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FOREWORD

OFFICIAL WRONGDOING AND THE CIVIL LIABILITY OF THE FEDERAL GOVERNMENT AND OFFICERS

GREGORY C. SISK*

During the past several decades, Congress has progressively relaxed the protection of sovereign immunity for the federal government and has granted consent for individuals to seek relief in a judicial forum for most categories of claims against the federal government.[1] As I have described it previously, congressional enactments "have woven a broad tapestry of authorized judicial actions against the federal government."[2] The statutory regime expresses a general legislative intent that the federal government should be held responsible for its obligations and accountable for its misdeeds. Furthermore, Congress generally has directed that judicial review should be available to ensure that government obligations are legally satisfied and that compensation is provided to those who are harmed by governmental misconduct.

At the same time, as the Supreme Court said more than half a century ago, "[i]t is too late in the day to urge that the Government is just another private litigant, for purposes of charging it with liability."[3] Nearly everyone agrees that, because the federal government represents the whole community and thus often must act in ways that a private party cannot or should not, the government's exposure to liability must be controlled. A solitary objector cannot be permitted in every instance to obtain a judicial ruling that contravenes or penalizes the decisions of the community duly made

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1. On the history of statutory waivers of sovereign immunity over the last 150 years, see generally Gregory C. Sisk, *The Continuing Drift of Federal Sovereign Immunity Jurisprudence*, 50 WM. & MARY L. REV. 517, 529–43 (2008).

2. Gregory C. Sisk, *The Tapestry Unravels: Statutory Waivers of Sovereign Immunity and Money Claims Against the United States*, 71 GEO. WASH. L. REV. 602, 603 (2003).

3. Federal Crop Ins. Corp. v. Merrill, 332 U.S. 380, 383 (1947).

through the ordinary processes of government. The hard question is how and where to draw the line between those kinds of harm caused by government that are properly the subject for a judicial remedy by a damages judgment against the United States or its officers and those collateral, but sometimes substantial, consequences of vital or policy-oriented government operations that should be shielded from judicial review.

On the one hand, no less eminent a figure than President Abraham Lincoln argued that "[i]t is as much the duty of Government to render prompt justice against itself, in favor of its citizens, as it is to administer the same between private individuals."[4] On the other hand, administrative law scholar Richard Pierce reminds us that "[t]he process of governing almost always helps some and hurts others, but those who are hurt should not necessarily be entitled to damages from the government."[5]

If a private-sector employer deliberately sends an employee into harm's way knowing that he is likely to be killed or injured, the employee or his survivors may be able to recover against the employer under an intentional tort theory, notwithstanding the otherwise available immunity to employers under workers' compensation law.[6] But a soldier employed in the armed services who is ordered to lead the charge into battle, despite the grave prospect of death or injury, may not invoke the law of torts to obtain recovery by alleging dereliction in the chain of military command.[7]

If a private manufacturer provides or transports a dangerous product, while bypassing measures that could have made the product safer to avoid additional expense or delay in production, the manufacturer may be liable for injuries. The courts will not hesitate to question the economic efficiency choices made by the manufacturer and to instead elevate human safety. But if the federal government specifies how a product is to be manufactured, making production choices that are susceptible to analysis as policy decisions under exigent circumstances, the courts are not empowered to evaluate the wisdom of the judgments made by the government.[8]

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4. CONG. GLOBE, 37TH CONG., 2D SESS. app. at 2 (1862) (asking Congress to give the then-Court of Claims the power to enter a final judgment on contract claims against the United States).

5. 3 RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE § 19.4, at 1435 (4th ed. 2002).

6. *See* ARTHUR LARSON, LARSON'S WORKERS' COMPENSATION LAW §§ 103.02–.03 (2007) (describing the intentional acts or injury exception to workers' compensation immunity for the employer as adopted in many states).

7. *See* 28 U.S.C. § 2680(j) (2010) (excluding from the Federal Tort Claims Act "[a]ny claim arising out of the combatant activities of the military or naval forces, or the Coast Guard, during time of war"); *see also* Feres v. United States, 340 U.S. 135, 141–46 (1950) (holding that claims by military personnel for injuries sustained incident to service should be excluded from the Federal Tort Claims Act). For a general discussion of the *Feres* doctrine, see SISK, LITIGATION, *supra* note *, § 3.08(c), at 177–87. For a defense of the *Feres* doctrine, see Paul Figley, *In Defense of* Feres*: An Unfairly Maligned Opinion*, 60 AM. U. L. REV. 393 (2010).

8. *See* Dalehite v. United States, 346 U.S. 15, 41 (1953) (holding that the government was immune from liability under the Federal Tort Claims Act for death and injury resulting from explosion of fertilizer produced by government specification for shipment to war-torn regions, saying that the policy choices on methods of manufacture were not the kind of decision "which

The stream of legal history is flowing ever more forcefully in the direction of affording recovery in court against the United States government for tort and tort-like injuries. But, here and there, levies, dikes, and overflow channels still control or divert the course of the stream, protecting against excessive public liability or interference by the judicial branch with the political choices made by democratically elected officials or their appointees in the legislative and executive branches. Thus, when we study the federal government's liability for damages in court for common-law or constitutional torts, we also explore the proper limits on the courts in second-guessing the actions of the political branches.

In the end, we may all agree with the broad propositions that the government should be responsive to claims by injured persons alleging negligence by government actors, while subjecting court access to prudential constraints to protect public policy. "What is needed," argued the late administrative law scholar Kenneth Culp Davis, "is a much better balance between the public interest in the effectiveness of governmental programs and private interests."[9]

This symposium asked the participants to take on those hard questions, offer insight into the responses of the federal government to accusations in court of official wrongdoing, and help us to better understand the judicial holdings, statutes, and legal doctrine governing common-law and constitutional tort liability for the federal government itself or individual federal government officials. The "better balance" asked for by Professor Davis may still elude us, but our understanding will be enhanced by the quality of the dialogue inspired by the symposium participants.

I. Common-Law Torts: The Federal Tort Claims Act

A. The Origins, Purpose, and Scope of the Federal Tort Claims Act

Before 1946, the only means of recovery from the government for injury in tort was a private bill enacted by Congress through the ordinary legislative process. As a matter both of equity to citizens suffering personal injury through government operations and to relieve itself of the burden of considering a multitude of private bills,[10] Congress finally passed the Fed-

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the courts, under the Act, are empowered to cite as 'negligence' "); *In re* Joint E. & S. Dist. Asbestos Litig., 891 F.2d 31, 33–38 (2d Cir. 1989) (holding that the United States was immune from liability under the Suits in Admiralty Act for using existing standards for shipbuilding that included asbestos insulation as part of an emergency merchant shipbuilding program during World War II). On the *Dalehite* case generally, see Gregory C. Sisk, *The Inevitability of Federal Sovereign Immunity*, 55 Vill. L. Rev. 899, 908–22 (2010).

9. Kenneth Culp Davis, *Sovereign Immunity Must Go*, 22 Admin. L. Rev. 383, 395 (1970).

10. For a succinct history of the Federal Tort Claims Act legislation and congressional purpose, see Professor Paul Figley's contribution to this symposium, *Ethical Intersections & the Federal Tort Claims Act: An Approach for Government Attorneys*, 8 U. St. Thomas L.J. 347, 347–74 (2001).

eral Tort Claims Act (FTCA) in 1946.[11] As the Supreme Court later explained:

> [The FTCA] was the offspring of a feeling that the Government should assume the obligation to pay damages for the misfeasance of employees in carrying out its work. And the private bill device was notoriously clumsy. Some simplified recovery procedure for the mass of claims was imperative. This Act was Congress' solution, affording instead easy and simple access to the federal courts for torts within its scope.[12]

At the time of its enactment, Congress contemplated compensation under the FTCA to those injured by the government through "ordinary common-law torts."[13] The most often-cited example for appropriate governmental liability in the legislative history was that of "negligence in the operation of vehicles."[14] While injuries resulting from car accidents remain a common basis for resort to this statutory waiver of sovereign immunity, controversies arising under the FTCA today frequently involve governmental conduct rather different than mundane operation of a motor vehicle and invoke theories of tort liability that have substantially evolved and expanded since 1946.

Lawsuits under the FTCA have challenged the regulatory approval of the polio vaccine by the Food and Drug Administration,[15] the alleged negligence of federal mine inspectors in failing to discover non-compliance with regulatory safety requirements before a mine accident,[16] and a multi-billion-dollar lawsuit alleging that the negligence of the Army Corps of Engineers in failing to seek congressional appropriations to upgrade a navigation channel adjacent to New Orleans was responsible for exacerbating the damage caused by Hurricane Katrina.[17]

Because the FTCA is simultaneously expansive in scope and subject to significant procedural and substantive limitations, the role of the government lawyer in defending against FTCA claims becomes one of wise and

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11. Federal Tort Claims Act (FTCA) of 1946, ch. 753, 60 Stat. 842.

12. *Dalehite*, 346 U.S. at 24–25.

13. *Id.* at 28.

14. H.R. REP. NO. 76-2428, at 3 (1940); *see Tort Claims: Hearings on H.R. 5373 and H.R. 6463 Before the H. Comm. on the Judiciary*, 77th Cong. 66 (1942); *Tort Claims Against the United States: Hearings on H.R. 7236 Before the Subcomm. No. 1 of the H. Comm. on the Judiciary*, 76th Cong. 7, 16, 17 (1940); *Tort Claims Against the United States: Hearings on S. 2690 Before the Subcomm. of the S. Comm. on the Judiciary*, 76th Cong. 9 (1940); 86 CONG. REC. 12,024 (1940); 69 CONG. REC. 2192, 2193, 3118 (1928); *see also Dalehite*, 346 U.S. at 28 (citing the legislative reports and noting that car accident cases were the kind of ordinary tort "[u]ppermost in the collective mind of Congress").

15. *See* Berkovitz v. United States, 486 U.S. 531 (1988).

16. *See* United States v. Olson, 546 U.S. 43 (2005).

17. *See In re* Katrina Canal Breaches Consol. Litig., 647 F.Supp.2d 644 (E.D. La. 2009), appeal docketed, No. 10-30249 (5th Cir.); *see also* Robert C. Longstreth, *Longstreth Reflects on Two Years of Hurricane Katrina Litigation Against the US*, 2008 Emerging Issues 1487 (Dec. 13, 2007).

ethical public administration. As Professor **Paul Figley** observes in his contribution to this symposium, "[a] swirl of competing interests results from the structure of the FTCA, the deep pocket it grants successful claimants, the complete immunity it provides some tortfeasors, and the methods Congress chose for paying settlements and judgments awarded under its auspices."[18] In ***Ethical Intersections & the Federal Tort Claims Act: An Approach for Government Attorneys***, Figley suggests that the government lawyer's ethical responsibilities should be informed by the underlying congressional purposes in enacting the FTCA: "to end the inefficient, burdensome, and unjust system of resolving tort claims through legislative private relief bills, and to create a system that provided compensation to individuals injured by government negligence without damaging the efficient operation of government or unduly taxing the public treasury."[19] Thus, to uphold Congress's desire that tort claims against the government be resolved under the FTCA, the government lawyer should advise claimants of procedural requirements and approaching deadlines to enable them to bring timely claims, even though the result of such warnings may be to subject the government to compensatory liability under the FTCA.[20] With respect to the substantive limits of the FTCA, however, to ensure equal treatment of all claimants, Figley contends that the government lawyer "in every case [should] vigorously raise each defense that is reasonably supported by the facts and the law."[21]

B. Standards for Imposing Liability Under the Federal Tort Claims Act

Sections 1346(b) and 2674 of Title 28 of the United States Code set out the basic parameters of the statutory waiver of federal sovereign immunity for tort liability under the FTCA: The United States is liable in tort—

1) for personal injury, death, or property damage,
2) caused by negligent or wrongful acts or omissions,
3) by a government employee acting within the scope of his office or employment,
4) in the same manner and to the same extent as a private person under like circumstances,
5) in accordance with the law of the place (state) where the act or omission occurred, and
6) for money damages, but not for interest before judgment or for punitive damages.[22]

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18. Figley, *supra* note 10, at 348.
19. *Id.* at 371.
20. *Id.*
21. *Id.*
22. *See* 28 U.S.C. §§ 1346(b), 2674 (2010). On these standards for FTCA liability, see generally SISK, LITIGATION, *supra* note *, § 3.05, at 124–40.

The FTCA does not create any new causes of action nor does it formulate federal rules of substantive tort law. Instead, as the Supreme Court explained in *Richards v. United States*,[23] Congress chose "to build upon the legal relationships formulated and characterized by the States" with respect to principles of tort law.[24] Accordingly, under § 1346(b)(1), the United States is liable under the FTCA when "a private person[ ] would be liable to the claimant in accordance with the law of the place where the act or omission occurred."[25] The fundamental principle, then, is that the tort claim alleged must be one that the law of the pertinent state recognizes.[26]

Exclusive jurisdiction over suits brought under the FTCA is given to the United States District Courts.[27] The "United States" is the proper and sole defendant to a suit under the FTCA, not a federal agency or officer.[28] As with most other actions authorized against the federal government, FTCA claims are tried to the court without a jury.[29]

C. The Discretionary Function Exception

While the FTCA does waive federal sovereign immunity for tort claims generally, the United States remains the beneficiary of several special rules and protections, notably: restrictions on the standards of liability (such as the exclusion of strict liability);[30] numerous defined exceptions to liability that bar certain types of claims (such as claims for assault, libel, misrepresentation, and interference with contract)[31] or preclude liability arising out of certain governmental activities (including discretionary or policymaking functions,[32] transmission of mail,[33] and military combat[34]); restrictions on damages available (precluding prejudgment interest and punitive damages);[35] and the exclusion of certain categories of people from eligibility to seek a damages remedy under the FTCA (federal civilian employees covered by the Federal Employees Compensation Act[36] and military servicemembers injured incident to service[37]).[38]

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23. 369 U.S. 1 (1962).
24. *Id.* at 7.
25. 28 U.S.C. § 1346(b)(1).
26. *See* Carlson v. Green, 446 U.S. 14, 23 (1980).
27. 28 U.S.C. § 1346(b)(1).
28. *See id.* §§ 1346(b)(1), 2674.
29. *Id.* § 2402.
30. *See* Laird v. Nelms, 406 U.S. 797, 797–803 (1972) (construing 28 U.S.C. § 1346(b)(1), making the government liable for the "negligent or wrongful act or omission" of any government employee, as encompassing only fault-based causes of action, such as negligence or intentional wrongdoing).
31. 28 U.S.C. § 2680(h).
32. *Id.* § 2680(a).
33. *Id.* § 2680(b).
34. *Id.* § 2680(j).
35. *Id*. § 2674.
36. Federal Employees Compensation Act, 5 U.S.C. § 8116(c) (2010).
37. *See* Feres v. United States, 340 U.S. 135, 141–46 (1950).

In sum, the bar of sovereign immunity is preserved under these specified circumstances. Not surprisingly, the applicability of an exception often is the centerpoint of contention in FTCA litigation, and more than one of our symposium participants addressed these exceptions.

The first exception listed in § 2680(a),[39] and the most important (in terms of frequency of assertion by the government, successfully more often than not) is the discretionary function exception. Subsection 2680(a) has two parts or exceptions. First, the subsection excludes liability based upon "an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid."[40] Claims of injury arising out of an allegedly invalid statute or regulation do not give rise to tort liability for the government; the enactment of a statute or promulgation of a regulation cannot be characterized as a negligent act of governance. Challenges to a statute or regulation must be made through the political process or through a court petition to strike down the statute or regulation by a constitutional attack or judicial review of administrative action. A challenge to the validity of a statute or regulation may not be made through the vehicle of a tort action. This first phrase of § 2680(a) has not presented difficult issues of interpretation or application.

The second part of § 2680(a) immunizes the government from liability based upon an employee's exercise or failure to exercise a "discretionary function or duty . . . whether or not the discretion involved be abused."[41] This second phrase, commonly cited as the "discretionary function exception," is the subject of ongoing debate as to what falls within its scope.

As one of the more recent in a long series of decisions that began in 1953, the Supreme Court's 1988 decision in *Berkovitz v. United States*[42] articulated a two-pronged test for the discretionary function exception: First, the discretionary function exception is not implicated at all unless there is room for discretion by government employees.[43] If a statute, regulation, or (uncodified) policy specifically prescribes a particular course of action, then no discretion exists, and consequently, the exception has no application.[44] Second, when there is room for discretion, the question remains whether the discretion exercised was that type intended to be protected by the exception—that is, involves the permissible exercise of policy judgment.[45]

38. For a general discussion of each of these limitations and exceptions, see generally SISK, LITIGATION, *supra* note *, §§ 3.05–.08, at 124–86.

39. 28 U.S.C. § 2680(a).

40. *Id.*

41. *Id.*

42. 486 U.S. 531 (1988).

43. *Id.* at 536, 546–47.

44. *See id.* at 536.

45. *See id.*

In arguing for something like the discretionary function exception, the eminent scholar of administrative law, Louis Jaffe, wrote that "a court cannot undertake to determine whether complex governmental decisions are 'reasonable.'"[46] "An attempt to transmute in the alembic of negligence these competing considerations [of costs, alternatives, risks, and public interest] into a judgment of 'reasonableness'" Jaffe argued, would only confirm the unsuitability of the judicial process for such matters.[47] In other words, if the courts were to accept common-law review on the merits of an allegedly negligent or otherwise wrongful governmental action that hinges on disputed questions of policy, the traditional legal standard of reasonableness could too easily shade into an evaluation of political wisdom.

The discretionary function exception may also be the most controversial of the exceptions. As our symposium plenary keynote speaker, Professor **Peter Schuck**, has written previously in an article co-authored by Professor James Park, "even the most routine ministerial action by the lowest-level employee can be said to involve some judgment or choice," and if the exception encompasses "all actions as to which the actor had such choices, it would literally swallow the FTCA's general waiver of immunity."[48] Thus, they argue, because "even the most routine agency action can always be linked to some general policy concern," broad justifications offered by the government for decisions, such as limited financial resources, are "too universal to constitute a policy judgment that triggers the" exception.[49]

Still, the Supreme Court outlined a very broad scope for the discretionary function exception in *United States v. Gaubert*,[50] instructing that the analysis is to be focused on "the nature of the actions taken and on whether they are susceptible to policy analysis."[51] Thus, under the Court's FTCA doctrine, the government need not show that government officials consciously balanced policy considerations but only that the type of decision is "susceptible to policy analysis" for the exception to apply and immunity from tort liability to attach. If the government offers a purported policy justification, even post hoc, may the court re-characterize the government action as mundane conduct subject to liability without usurping the government's policy-making role? And, yet, if the government too readily asserts budgetary costs or aesthetic concerns to cast the cloak of immunity over garden-variety government conduct, wouldn't nearly every governmental choice be covered with immunity?

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46. Louis L. Jaffe, *Suits Against Governments and Officers: Damage Actions*, 77 HARV. L. REV. 209, 236 (1963).

47. *Id.*

48. Peter H. Schuck & James J. Park, *The Discretionary Function Exception in the Second Circuit*, 20 QUINNIPIAC L. REV. 55, 65 (2000).

49. *Id.* at 65–66.

50. 499 U.S. 315 (1991).

51. *Id.* at 325.

In his contribution to this symposium, Judge **Robert Longstreth**, who is also the author of a multi-volume treatise on the FTCA, asks whether the judicial decision on application of the discretionary function exception may be influenced by the judge's policy preferences regarding the government's immunity from suit.[52] In ***Does the Two-Prong Test for Determining Applicability of the Discretionary Function Exception Provide Guidance to Lower Courts Sufficient to Avoid Judicial Partisanship***, Longstreth uses the political party of the nominating president as a proxy for a judge's attitude, postulating that Republican-nominated judges may be more likely to defer to the actions of government and thus approve immunity, while Democratic-nominated judges may be more likely to approve compensation for injured parties and thus decline to find immunity.[53] Examining 245 judicial rulings in cases between January 1, 2009, and February 18, 2011, Longstreth found that Republican-nominated judges were more likely than Democratic-nominated judges by a margin of 12.6 percent to hold that the discretionary function exception barred a claim, with nearly all of that difference attributable to application of the second susceptible-to-policy-analysis prong.[54] Still, because "in the overwhelming majority of cases reviewed, the partisan affiliation of the decision maker did not affect the outcome of the case," Longstreth concludes that present and proposed alternative tests for the application of the discretionary function exception should be "considered on their own merits, rather than as tools necessary to achieve greater consistency."[55]

D. The Intentional Tort Exception

Among the other various exceptions to FTCA liability, § 2680(h) of Title 28 of the United States Code excludes "[a]ny claim arising out of

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52. Robert C. Longstreth, *Does the Two-Prong Test for Determining Applicability of the Discretionary Function Exception Provide Guidance to Lower Courts Sufficient to Avoid Judicial Partisanship?*, 8 U. ST. THOMAS L.J. 398, 398–416 (2011).

53. *Id.* at 399.

54. *Id.* at 405–06. Judge Longstreth's finding of a frequency margin of 12.6 percent between judges nominated by presidents of the opposing parties appears comparable to those in empirical studies of the federal courts. In reporting a recent study on judicial decision-making, my co-author and I referred to "the typical 10 percent (or less) margin in outcomes reached by Republican-appointed compared to Democratic-appointed judges found in empirical studies of the federal courts that include a variety of case types, even when those cases are likely to have an ideological flavor and only published opinions are examined." Gregory C. Sisk & Michael Heise, *Ideology "All the Way Down"? An Empirical Study of Establishment Clause Decisions in the Federal Courts*, MICH. L. REV. (forthcoming 2012); *see also* CASS R. SUNSTEIN, DAVID SCHKADE, LISA M. ELLMAN & ANDRES SAWICKI, ARE JUDGES POLITICAL? 8–10, 12–13 (2006) (finding that Democratic-appointed federal appellate judges cast "stereotypically liberal" votes about twelve percent more of the time than Republican-appointed judges, on "a number of controversial issues that seem especially likely to reveal divisions"); C.K. ROWLAND & ROBERT A. CARP, POLITICS AND JUDGMENT IN FEDERAL DISTRICT COURTS 34 (1996) (finding a difference of 10 to 13 percent between Democratic and Republican cases for all types of cases).

55. Longstreth, *supra* note 52, at 408.

assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights."[56] This exception, which includes most intentional torts (but perhaps not all, as trespass, conversion, invasion of privacy, and intentional infliction of emotional distress are not listed), demonstrates that the FTCA falls far short of a complete waiver of the federal government's sovereign immunity in tort. As Judge **Robert Longstreth** has written in his treatise on the FTCA, through this exception, "eleven familiar torts"—"a very considerable portion of the law of torts"—have been removed altogether from the government's consent to suit.[57]

Among these intentional torts, the assault and battery exception has drawn the most attention from the courts.[58] In *Sheridan v. United States*,[59] a majority of the Supreme Court ruled that certain independent claims of negligence may be maintained notwithstanding an underlying assault or battery. In *Sheridan*, after his shift as a naval medical aide at the Bethesda Naval Hospital, an intoxicated off-duty serviceman fired rifle shots into a public street, striking the plaintiffs' car and injuring them.[60] The Court held that, at least in some circumstances, "the negligence of other Government employees who allowed a foreseeable assault and battery to occur may furnish a basis for Government liability that is entirely independent" of the assaulting person's employment status and thus is not simply imposition of vicarious liability against the government for assault and battery by that employee.[61] In the *Sheridan* case, the plaintiff's state-law cause of action against the United States was grounded on the Good Samaritan doctrine, under which the government allegedly had undertaken to protect the public and then negligently failed to uphold that duty.[62] Because the rifle-firing serviceman in *Sheridan* was off-duty—that is, was not acting within the scope of employment—at the time of the episode, the Court held that the government was no more protected from liability for its negligent failure to protect the public than if the assailant "had been an unemployed civilian patient or visitor in the hospital."[63]

In the aftermath of *Sheridan*, uncertainty lingers as to whether a claim against the federal government for negligent hiring, training, or supervision of an employee who commits an intentional tort, such as an assault and battery, falls within the exception. Justice Kennedy, in a separate concurrence in *Sheridan*, specifically carved out such negligent employment

56. 28 U.S.C. § 2680(h) (2010).

57. 2 LESTER S. JAYSON & ROBERT C. LONGSTRETH, HANDLING FEDERAL TORT CLAIMS §§ 13.06[1][a], [b] (2010).

58. *See* SISK, LITIGATION, *supra* note *, § 3.06(d), at 156–62.

59. 487 U.S. 392 (1988).

60. *Id.* at 393–95.

61. *Id.* at 401.

62. *Id.*

63. *Id.* at 402.

claims as barred.[64] The three dissenting justices in *Sheridan* expressed the hope that "the courts will preserve at least this core of the assault and battery exception."[65] By contrast, the *Sheridan* majority expressly declined to decide "whether negligent hiring, negligent supervision, or negligent training may ever provide the basis for liability under the FTCA for a foreseeable assault or battery by a Government employee."[66]

The lower courts are divided on this issue.[67] In *Bennett v. United States*,[68] the United States Court of Appeals for the Ninth Circuit found the intentional tort exception inapplicable to the case of sexual abuse of children by a federal employee at a federally-run day care center. In a subsequent decision, the Ninth Circuit explained that this ruling meant that "the assault and battery exception does not immunize the Government from liability for negligently hiring and supervising an employee."[69] In approval of the Ninth Circuit approach, one commentator argues that "[r]espondeat superior claims, which are based on vicarious liability and are barred by the assault and battery exception, are readily distinguishable from claims based on negligent hiring, retention and supervision," as the latter require proof of the employer's independent negligence.[70]

By contrast, most courts that have addressed the question post-*Sheridan* have barred claims that are based on the employment relationship, such as negligent hiring or supervision.[71] One district court explained the line between exclusion under the intentional tort exception and viability as a claim under the FTCA as reflecting "the distinction between tort theories of liability that depend upon an employment relationship (*e.g.*, negligent hiring or supervision) and those that do not (*e.g.*, premises liability)."[72] Thus, if the plaintiff seeks to hold the United States liable on theories independent of the employment relationship, such as the duty to maintain safe premises and guard persons entering a government facility from being attacked by others, then FTCA liability is not precluded by the exception. But, of course, claims may arise at a place other than a government facility or the

64. *Id.* at 406–08 (1988) (Kennedy, J., concurring in the judgment).

65. *Id.* at 411 (O'Connor, J., dissenting).

66. *Id.* at 403 n.8.

67. *See generally* SISK, LITIGATION, *supra* note *, § 3.06(d)(3), at 161–62.

68. 803 F.2d 1502, 1502–05 (9th Cir. 1986).

69. Brock v. United States, 64 F.3d 1421, 1425 (9th Cir. 1995); *see also* Senger v. United States, 103 F.3d 1437, 1442 (9th Cir. 1996).

70. Rebecca L. Andrews, Comment, *So the Army Hired an Ax-Murderer: The Assault and Battery Exception to the Federal Tort Claims Act Does Not Bar Suits for Negligent Hiring, Retention and Supervision*, 78 WASH. L. REV. 161, 192–93 (2003).

71. *See, e.g.*, Billingsley v. United States, 251 F.3d 696, 698 (8th Cir. 2001); Leleux v. United States, 178 F.3d 750, 756–58 & n.5 (5th Cir. 1999); Martinez v. United States, 311 F. Supp. 2d 1274, 1279 (D. N.M. 2004); Ryan v. United States, 156 F. Supp. 2d 900, 906–07 (N.D. Ill. 2001); Lilly v. United States, 141 F. Supp. 2d 626, 628–29 (S.D. W. Va. 2001), *aff'd*, 22 Fed. Appx. 293 (4th Cir. 2001); Pottle v. United States, 918 F. Supp. 843, 847–48 (D. N.J. 1996).

72. Verran v. United States, 305 F. Supp. 2d 765, 776 (E.D. Mich. 2004).

common-law tort rules that specify when a property owner has a special duty to protect people against intentional wrongdoing may not apply in a case. Under the majority approach in the federal courts, in such a case where a premises liability or similar general duty theory is unavailable, the plaintiff cannot alternatively assert that the government had a duty as an employer to control the conduct of the employee, because this latter theory runs afoul of the assault and battery exception.

In ***Intentional Torts and Other Exceptions to the Federal Tort Claims Act***,[73] Assistant United States Attorney **David Fuller** examines the various exceptions and limitations to the FTCA, with a special focus on the tort of intentional infliction of emotional distress (IIED), which is not among those listed in the Intentional Tort Exception of § 2680(h). Although one federal court of appeals in a footnote summarily rejected this tort as not actionable under the FTCA,[74] and the Supreme Court also in a footnote termed such a claim to be questionable in light of the general exclusion of intentional torts from the FTCA,[75] the majority of courts of appeals have viewed the IIED claim as falling outside of the statutory exception, at least under some circumstances.[76] As Fuller explains, the rule widely recognized and applied by courts in considering IIED claims brought pursuant to the FTCA[77] is that (1) conduct that would constitute another excluded tort, such as assault or battery, is barred, even if it could alternatively be framed as constituting a non-excluded tort, such as IIED, but (2) any other aspect of that conduct that would not in itself constitute an excluded tort is not barred.[78] Thus, for example, sexual battery and molestation of an FTCA plaintiff by a government employee would be barred by the battery exception in the FTCA (even though the plaintiff undoubtedly suffered emotional distress as a result), but the employee's demands for sexual favors, which did not involve touching and thus were not a battery, could be the basis for a claim of IIED and not be barred by any FTCA exception.[79] Because drawing these lines can be difficult, Fuller observes that "courts have seemingly reached widely divergent conclusions on whether IIED claims fall within one of the many FTCA exclusions."[80]

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73. David W. Fuller, *Intentional Torts and Other Exceptions to the Federal Tort Claims Act*, 8 U. ST. THOMAS L.J. 375, 375–97 (2011).

74. Denson v. United States, 574 F.3d 1318, 1345 & n.67 (11th Cir. 2009).

75. Christopher v. Harbury, 536 U.S. 403, 420–22 n.19 (2002).

76. *See, e.g.*, Limone v. United States, 579 F.3d 79, 92–93 (1st Cir. 2009); Estate of Trentadue *ex rel.* Aguilar v. United States, 397 F.3d 840, 858–59 (10th Cir. 2005); Raz v. United States, 343 F.3d 945 (8th Cir. 2003); Truman v. United States, 26 F.3d 592, 596–97 (5th Cir. 1994); Kohn v. United States, 680 F.2d 922, 924 (2d Cir. 1982).

77. Fuller, *supra* note 73, at 392.

78. *See* Sheehan v. United States, 896 F.2d 1168, 1171 (9th Cir. 1990).

79. *See* Xue Lu v. Powell, 621 F.3d 944, 950 (9th Cir. 2010).

80. Fuller, *supra* note 73, at 393.

E. Personal Liability Suits Against Federal Employees, the Westfall Act, the Federal Tort Claims Act, and Constitutional Tort Claims

Under § 1346(b)(1) of Title 28 of the United States Code, the government is liable for tortious acts committed by "any employee of the Government while acting within the scope of his office or employment."[81] If a federal employee commits a tort in his or her personal capacity, then he or she is responsible individually and subject to personal liability.[82] But when a government employee was acting within the scope of employment at the time of an allegedly tortious incident, then by statute the United States is to be substituted as the sole defendant to an FTCA suit, and the suit may no longer proceed against the government employee individually.

Under the Federal Employees Liability Reform and Tort Compensation Act (commonly known as the Westfall Act), the remedy against the United States under the FTCA "is exclusive of any other civil action or proceeding for money damages by reason of the same subject matter against the employee whose act or omission gave rise to the claim . . . ."[83] Thus, the Westfall Act grants personal immunity from tort liability to government employees when acting within the scope of employment. Moreover, the Westfall Act converts a lawsuit for money damages against a federal employee acting within the scope of employment into a suit under the FTCA against the United States. If such a suit is filed in state court, it will be removed to federal district court.[84]

In sum, the Westfall Act eliminates ordinary common-law suits against federal employees when acting within the scope of employment but does provide the plaintiff with a substitute defendant (the United States) against which to maintain the tort action.

However, as Professors Kenneth Culp Davis and Richard Pierce pointed out many years ago, the Westfall Act's transfer of liability from the individual government employee to the government "is seriously incomplete because federal employees remain potentially liable for constitutional torts, and victims of some intentional torts continue to have no remedy against the government."[85]

First, as discussed below in Part II of this *Foreword*, the Supreme Court under certain circumstances has implied private actions against federal employees for money damages premised on violations of constitutional rights. In terms of whether to substitute the United States as the defendant

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81. 28 U.S.C. § 1346(b)(1) (2006); *see also id.* § 2675 (using same language in context of FTCA administrative claim).

82. SISK, LITIGATION, *supra* note *, § 5.06(a), at 359.

83. 28 U.S.C. § 2679(b)(1) (2006). For more on the scope of this Judgment Bar and its application to constitutional as well as common-law tort claims, see *infra* Part III.

84. 28 U.S.C. § 2679(d)(2).

85. KENNETH C. DAVIS & RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE § 19.3, at 227 (3d ed. 1994).

and confer personal immunity on the government employee in such suits, the Westfall Act expressly excepts civil actions against government employees "brought for a violation of the Constitution of the United States . . . ."[86] Thus, the so-called *Bivens* suit is not preempted by the Westfall Act in the same way that a common-law tort suit against an employee acting within the scope of employment is superseded by a suit against the United States.

Second, as the Supreme Court held in *Gutierrez de Martinez v. Lamagno*,[87] although the Westfall Act substitutes the United States as the defendant, "[i]f . . . an exception to the FTCA shields the United States from suit, the plaintiff may be left without a tort action against any party."[88] Accordingly, a party seeking recovery for wrongful death, injury, or property damage based on an employee's tortious action while acting in the scope of employment is limited to a suit against the United States. The party may not recover from the individual employee, even if the FTCA suit fails because of special defenses available only to the federal government.[89]

If the plaintiff finds that the United States is not amenable to liability due to an exception in the FTCA, that plaintiff understandably would wish to challenge the Attorney General's certification and seek to have the individual employee reinstated as the defendant. In *Gutierrez de Martinez*, the Court understood Congress's purpose in the Westfall Act as merely to restore immunity from common-law torts to federal employees, not to make the Attorney General "the final arbiter" of the scope-of-employment issue.[90] Under *Gutierrez de Martinez*, the Attorney General's certification of the scope of employment, for the purposes of extending immunity to the employee and substituting the United States as the sole defendant, is reviewable in federal court.[91]

As with the determination of scope of employment under the FTCA for purposes of alleging respondeat superior liability on the part of the United States, state law provides the general principles for determining whether the employee acted within the scope of the federal office or position for purposes of the Westfall Act. The United States Court of Appeals for the First Circuit has explained: "Federal law determines whether a person is a federal employee and defines the nature and contours of his official responsibilities; but the law of the state in which the tortious act allegedly

86. 28 U.S.C. § 2679(b)(2)(A).

87. 515 U.S. 417 (1995).

88. *Id.* at 420.

89. United States v. Smith, 499 U.S. 160, 166–67 (1991).

90. 515 U.S. at 425–26.

91. *Id.* at 434.

occurred determines whether the employee was acting within the scope of those responsibilities."[92]

State legal standards regarding the scope of employment have evolved in the course of determining when the employer is appropriately held responsible under the respondeat superior doctrine for the wrongdoing of an employee. As I have written previously:

> [O]ver time, state law rules have tended to broaden the scope of employment concept so as to expand employer accountability to others for the misdeeds of employees. Ironically—or some might say, perversely—application of these state law expectations to the peculiar Westfall Act context occasionally may have precisely the opposite effect. If the federal employee is found to have acted within the scope of employment, he or she individually will be immune from liability. And if the federal government, as the substituted sole defendant, successfully invokes an exception to FTCA liability, it too will enjoy immunity from liability. Thus, rather than expanding tort liability and enhancing the opportunity for plaintiffs to sue a financially-responsible defendant—as generally was the intent behind state court decisions broadening the reach of respondeat superior in recent decades—application of liberal state scope-of-employment rules sometimes may operate to narrow tort liability in the federal employee/federal government context. Of course, in the typical case involving garden-variety negligence occurring inside the nation's borders, substituting the United States as the defendant under the FTCA leaves the plaintiff with a legally-amenable and financially-responsible defendant comfortably in place.[93]

"Every year," Senior Department of Justice Counsel **Paul Michael Brown** writes, "plaintiffs name thousands of current or former federal employees as defendants in civil suits, asserting claims against them in their individual capacity and seeking to recover money damages from their personal assets."[94] In ***Personal Liability Tort Litigation Against Federal Employees—A Primer***, Brown explains that the Department of Justice has long taken the position that "personal liability tort claims against federal employees implicate the interests of the United States," and, accordingly, Department of Justice attorneys are assigned to defend these claims.[95] Under Department of Justice guidelines, "individual capacity representation" is provided if (1) the conduct giving rise to the claim occurred within the

92. Lyons v. Brown, 158 F.3d 605, 609 (1st Cir. 1998); *see also* Gutierrez de Martinez v. Drug Enforcement Admin., 111 F.3d 1148, 1156 (4th Cir. 1997) (on remand from Supreme Court); RMI Titanium Co. v. Westinghouse Elec. Co., 78 F.3d 1125, 1143 (6th Cir. 1996).

93. SISK, LITIGATION, *supra* note *, § 5.06(c)(4), at 369.

94. Paul Michael Brown, *Personal Liability Tort Litigation Against Federal Employees—A Primer*, 8 U. ST. THOMAS L.J. 329, 329 (2011).

95. *Id.*

scope of employment, and (2) it is in the interests of the United States to assign a Department of Justice lawyer to defend the claim.[96]

If individual capacity representation is approved, as Brown reports, then a "full and traditional attorney client relationship" is created, including protection of privileged communications between the Department of Justice lawyer and the individual officer.[97] Brown advises that "many civil actions asserting these claims become extremely complex procedurally" because some of these claims against individual officers may eventually be transformed into suits against the sovereign, because some raise special questions of constitutional scope and immunity from suit, and because a variety of defenses are typically available.[98]

II. Constitutional Torts: *Bivens* Suits

Before Congress began enacting statutory waivers of the federal government's sovereign immunity in the latter part of the nineteenth and into the twentieth centuries, a lawsuit framed against the individual government officer or employee—based upon a common-law cause of action in tort or contract—was the primary means by which to obtain redress against the government in court.[99] During this period, the Supreme Court indulged the fiction that a suit targeted at actions by the government collectively nonetheless could avoid the bar of sovereign immunity by being plead against an individual government officer.[100] Eventually, as the doctrine of federal sovereign immunity matured into its present form, the Supreme Court dispensed with this fiction and recognized a suit against a federal officer acting within the scope of his or her statutory authority as effectively running against the sovereign United States itself.[101] Moreover, with the advent of the era of statutory waivers of federal sovereign immunity, governmental amenability to suit expanded and the need for alternative avenues against governmental agents subsided.

Accordingly, in the modern era, with respect to non-constitutional claims, suits framed against individual officers or employees play a much reduced role. When a plaintiff seeks specific or equitable-type relief against the federal government, the Administrative Procedure Act[102] allows the suit to go forward either against the federal officer in his or her official capacity or against the United States directly. When a plaintiff seeks recovery of money damages for common-law torts, Congress has granted statutory im-

96. *Id.* at 330.
97. *Id.* (quoting 28 C.F.R. § 50.15(a)(3) (2011)).
98. *Id.* at 346.
99. *See generally* Gregory C. Sisk, *A Primer on the Doctrine of Federal Sovereign Immunity*, 58 Okla. L. Rev. 439, 446–51 (2005).
100. United States v. Lee, 106 U.S. 196 (1882).
101. Larson v. Domestic & Foreign Commerce Corp., 337 U.S. 682 (1949).
102. 5 U.S.C. § 702 (2006).

munity to federal employees acting within the scope of employment. Such a tort suit instead must proceed with the United States substituted as the sole defendant to a suit under the FTCA.[103]

Still, even today, an injured party seeking certain types of relief for certain kinds of harms may be restricted to a remedy against a government officer. Importantly, a plaintiff suing for money damages against an individual federal officer for violation of constitutionally-protected rights has a potential cause of action directly under the Constitution as implied by the Supreme Court in *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*.[104]

However, even in this context, the conventional wisdom today is that the remedy against an individual government officer often is more theoretical than real. The Supreme Court increasingly is reluctant to extend a judicially-implied cause of action for damages based on constitutional violations into new contexts. The Court frequently has found that the *Bivens* remedy has been displaced by alternative statutory schemes. Together with the Court's invigoration of the defense of qualified immunity for government officers, these judicial developments have been understood to make successful *Bivens* suits rather few in number. But, as recent scholarship reveals, *Bivens* claims focused on traditional abuses of constitutional authority by law enforcement—typically claims of unlawful searches and seizures or cruel and unusual prison conditions—meet with greater success.

A. The Origins of the Bivens Claim

That individuals would bring common-law suits for ordinary torts against individuals who happened to be government employees, even when those employees were acting within the scope of their government duties, was inevitable and unremarkable. With respect to ordinary tort suits, the common law already supplied the cause of action; the only issues have been whether a suit brought against a federal employee was effectively one against the United States itself (and thus covered by sovereign immunity) and whether the defendant's status as a federal employee afforded a degree of immunity from suit and liability.

However, it was *not* inevitable that a federal government employee's violation of a constitutional provision would be recognized as the equivalent of a tort that gives rise to a private remedy in court for money damages against the individual employee. Indeed, the Constitution does not expressly speak to the availability of a private cause of action for those suffering an infringement of constitutional rights, and further does not indicate that individual officers, rather than the government itself, should bear personal responsibility for upholding constitutional standards at the risk of

103. 28 U.S.C. § 2679 (2006).
104. 403 U.S. 388 (1971).

private liability. Not until some 180 years after ratification of the United States Constitution did the Supreme Court first recognize a private judicial action for personal liability against a federal government employee premised upon a constitutional transgression.

As the factual background to the Supreme Court's landmark 1971 decision in *Bivens*,[105] agents of the Federal Bureau of Narcotics had entered the plaintiff's apartment, arrested him for narcotics violations, and searched his apartment. The plaintiff brought suit in federal district court for damages against the agents, contending that the arrest and search were without probable cause and without a warrant, in violation of the Fourth Amendment of the Constitution.[106] Justice Brennan, writing for a five-Justice majority of the Supreme Court, upheld a cause of action against the federal agents, acting under color of federal authority, for their alleged violation of the plaintiff's constitutional rights under the Fourth Amendment.[107] Justice Brennan's analysis essentially boils down to the principle that a legal remedy should be available for a legal wrong.[108] Although, Justice Brennan admitted, the Fourth Amendment does not "in so many words" provide for its enforcement by an award of damages, he insisted that the ordinary remedy for invasion of personal liberty interests was damages.[109] Three Justices dissented in *Bivens*, arguing that the creation of the *Bivens* remedy was "judicial legislation," contending that the subject should have been left to Congress, and predicting that the Court's action would choke the courts with lawsuits.[110]

After *Bivens*, the Supreme Court recognized the implied constitutional remedies in additional contexts and based upon constitutional provisions beyond the Fourth Amendment. The Court found a right to damages for employment discrimination in violation of the Fifth Amendment[111] and for injuries to a prisoner under the Eighth Amendment.[112] However, these rulings proved to be the high water mark for the *Bivens* doctrine.

105. 403 U.S. at 389–90. For the "*Story of* Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics," see symposium participant James E. Pfander's chapter by that name in FEDERAL COURTS STORIES (Vicki C. Jackson & Judith Resnik, eds. 2009).

106. *Bivens*, 403 U.S. at 398–90.

107. *See id.* at 390–97.

108. *Id.* at 395–97.

109. *Id.* at 396.

110. *Id.* at 411–27 (Burger, C.J., dissenting); *id*. at 427–30 (Black, J., dissenting); *id*. at 430 (Blackmun, J., dissenting).

111. Davis v. Passman, 442 U.S. 228, 229–49 (1979).

112. Carlson v. Green, 446 U.S. 14, 18–25 (1980).

B. *Limitations on Implying a Cause of Action for Constitutional Violations*

In 1983, Professor **Peter Schuck** described the *Bivens* remedy as "a powerful new string to a victim's bow."[113] But by 1995, Professor Susan Bandes was lamenting that the promise of remediation for constitutional violations had been eroded and that "there is little left of the *Bivens* principle."[114] What happened in the interim? Since the mid-1980s, as Professor Richard Pierce explains, the Supreme Court's opinions "seem to reflect waning enthusiasm for the *Bivens* doctrine and increasing willingness to conclude that available alternative remedies displace the *Bivens* remedy in specific contexts."[115]

After the initial wave of decisions extending the *Bivens* remedy, the Court trimmed the sails of *Bivens* plaintiffs by finding reasons not to imply a cause of action for constitutional infractions in other contexts and to defer to Congress in determining what remedies to make available, if any. Thus, in *Bush v. Lucas*,[116] the Supreme Court unanimously declined to extend *Bivens* to a federal employee's claim that his superior had violated his First Amendment free speech rights. The Court found "special factors counselling hesitation" that militated against creating a new judicial remedy.[117] In essence, the *Bush* Court regarded the case as a federal personnel matter. The Court was unwilling to expand upon existing civil service remedies without some overture from Congress.[118]

Following *Bush*, the Supreme Court has been ever more likely to find "special factors" that militate against extension of this remedy. The Court has refused to authorize a *Bivens* action for Social Security beneficiaries alleging a violation of the Due Process Clause of the Fifth Amendment in processing disability benefit claims,[119] for military service personnel alleging injury due to unconstitutional actions of superior officers,[120] and, most recently, for a property owner alleging extortionate tactics by government employees to coerce the granting of an easement to the government as violating property rights under the Fifth Amendment.[121] In that 2007 decision, *Wilkie v. Robbins*, Justices Thomas and Scalia wrote a separate concurrence, characterizing "'*Bivens* [as] a relic of the heady days in which this

113. PETER H. SCHUCK, SUING GOVERNMENT: CITIZEN REMEDIES FOR OFFICIAL WRONGS 42 (1983).

114. Susan Bandes, *Reinventing* Bivens*: The Self-Executing Constitution,* 68 S. CAL. L. REV. 289, 293–94 (1995).

115. PIERCE, *supra* note 5, § 19.5, at 1855.

116. 462 U.S. 367, 368–80 (1983).

117. *Id.* at 378.

118. *See id.* at 380–90.

119. Schweiker v. Chilicky, 487 U.S. 412, 414–29 (1988).

120. United States v. Stanley, 483 U.S. 669, 684 (1987); Chappell v. Wallace, 462 U.S. 296, 304 (1983).

121. Wilkie v. Robbins, 551 U.S. 537 (2007).

Court assumed common-law powers to create causes of action,'" and thus should be confined to its precise circumstances.[122]

In his contribution to the symposium, Professor **Stephen Vladeck** disputes the characterization of *Bivens* as "a relic of the heady days" in which a supposedly activist Supreme Court profligately created private causes of action for statutory and constitutional wrongs while arrogantly neglecting legislative intent.[123] In **Bivens *Remedies and the Myth of the "Heady Days*,"**[124] Vladeck distinguishes between judicial inference of a private cause of action into a statutory scheme, a question which turns directly on legislative intent, and judicial implication of an effective remedy for a constitutional wrong, the existence of which "in no way *required* indicia of legislative intent."[125] As Vladeck writes, "congressional intent has always been a linchpin of the Supreme Court's jurisprudence concerning implied statutory remedies," given that "Congress's control over statutory rights is virtually plenary."[126] At present, the Supreme Court ordinarily demands an express textual provision for a cause of action for statutory rights.[127] By contrast, in several areas, such as habeas corpus challenges to criminal convictions by prisoners, suits to recover state taxes that allegedly were unconstitutionally exacted, or injunctive relief against government officers allegedly acting in violation of constitutional constraints, the Constitution does require some type of remedy, including judicial implication of one if Congress fails to provide it.[128] Along the same lines, while the Supreme Court may conclude that Congress has displaced a *Bivens* remedy by legislatively fashioning an alternative remedial approach, Vladeck observes that "the Supreme Court has *never* declined to recognize a *Bivens* remedy in a case where the absence of such relief left the plaintiff with no legal remedy whatsoever."[129]

In any event, the Supreme Court, while not overturning *Bivens*, is now more likely to defer to legislative action on whether a private damages remedy should be created for recompense against alleged official wrongdoing. The Court appears to be presumptively receptive to arguments that alternative statutory remedies—even if incomplete in relief afforded and although designed very differently from a tort action for money damages—displace any *Bivens* constitutional tort cause of action. As **Paul Michael Brown**

122. *Id.* at 568 (Thomas, J., concurring) (quoting Correctional Services Corp. v. Malesko, 534 U.S. 61, 75 (2001)).

123. Stephen I. Vladeck, Bivens *Remedies and the Myth of the "Heady Days*," 8 U. ST. THOMAS L.J. 513, 513 (2011).

124. *Id.*

125. *Id.* at 519.

126. *Id.* at 520.

127. *See* Alexander v. Sandoval, 532 U.S. 275, 288 (2001).

128. Vladeck, *supra* note 123, at 524.

129. *Id.* at 523 (emphasis added).

reports in his contribution to this symposium, "[t]he courts of appeal have been similarly disinclined to infer a *Bivens* remedy" in recent years.[130]

C. Qualified Immunity of Federal Officers

When dissenting from the judicial implication of a private right of action for damages for constitutional violations against federal officers in *Bivens* in 1971, Justice Black expressed the fear that the *Bivens*-type suit "might deter officials from the proper and honest performance of their duties."[131] A decade later, the Supreme Court agreed unanimously in *Harlow v. Fitzgerald*[132] that some level of immunity should be available to defendants in *Bivens* actions because litigation against federal officers diverts officials from their public responsibilities and may discourage them from acceptance of office or faithful discharge of their duties. The Court concluded that the proper "balance between the evils" of abuse of office by government officials and the social costs of litigation (which run against the innocent as well as the guilty) was best measured by affording *qualified*, but not *absolute*, immunity to executive officials other than the President.[133]

In his plenary keynote address at the symposium, Professor **Peter Schuck** highlights "the important relationship of a governmental entity and an individual officer's liability to deterrence—and, equally or more important but much less visible, to the risk of over-deterrence."[134] Titling his contribution, ***Suing Government Lawyers for Giving Dubious Legal Advice in a National Security Crisis: Notes on How (Not) to Become a Banana Republic***, Schuck illustrates the main themes of his argument with references to still-pending *Bivens* litigation against former Department of Justice legal advisor John Yoo, who had authored a controversial legal memorandum requested by the Central Intelligence Agency on the legal permissibility of certain harsh interrogation methods proposed to be used against "enemy combatants" captured overseas, a document that critics later characterized as authorizing the use of torture. Schuck characterizes the litigation as "ill-conceived for at least three distinct reasons: legal principles, public policy, and professional ethics."[135] He reminds us that the security of our society, especially in dangerous times, depends on the willingness of government legal counselors to offer "their best judgment on difficult issues without having to worry about being dragged into court or disbarred if they turn out to be wrong or (in the case of criminal prosecution) when a new

130. Brown, *supra* note 94, at 333.

131. Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics, 403 U.S. 388, 429 (1971) (Black, J., dissenting).

132. 457 U.S. 800, 806–14 (1982).

133. *Id.* at 813–14.

134. Peter H. Schuck, *Suing Government Lawyers for Giving Dubious Legal Advice in a National Security Crisis: Notes on How (Not) to Become a Banana Republic*, 8 U. ST. THOMAS L.J. 496, 496 (2011).

135. *Id.* at 503.

administration arrives in Washington."[136] Qualified immunity from civil liability for official actors, by promoting "vigorous decision-making and appropriate risk-taking" or putting it another way, by discouraging undue timidity,[137] thus benefits us all, and if it also benefits the individual official, "that is incidental."[138]

Under the Supreme Court's decision in *Harlow*, the question of whether qualified immunity covers the defendant official's conduct turns on the objective reasonableness of the official's conduct.[139] In his contribution to this symposium, also discussed earlier in Part I.E of this *Foreword*, **Paul Michael Brown** emphasizes that the test "is whether reasonable officials, not judges or constitutional scholars, could have thought the defendant's conduct was permissible under the Constitution."[140] The crucial inquiry is whether the official violated "clearly established statutory or constitutional rights of which a reasonable person would have known."[141] Reaffirming the objective reasonableness test, the Supreme Court said:

> Qualified immunity shields an officer from suit when she makes a decision that, even if constitutionally deficient, reasonably misapprehends the law governing the circumstances she confronted. Because the focus is on whether the officer had fair notice that her conduct was unlawful, reasonableness is judged against the backdrop of the law at the time of the conduct. If the law at that time did not clearly establish that the officer's conduct would violate the Constitution, the officer should not be subject to liability or, indeed, even the burdens of litigation.[142]

As Professor **Peter Schuck** suggests, the "clearly established" standard for qualified immunity "may sometimes be difficult to apply—in hard cases, clarity is in the eye of the beholder—but it does strike roughly the correct balance between the competing public and private interests."[143]

D. The Prospect for Success in Bivens Claims

The conventional wisdom, echoed by many scholars, has been that, under the Supreme Court's increasingly skeptical jurisprudence, *Bivens* claims are seldom available and are rarely successful. Joining the scholars quoted previously who fear that the *Bivens* principle has eroded over the

136. *Id.* at 508–09.

137. *Id.* at 510.

138. *Id.* at 509.

139. Harlow v. Fitzgerald, 457 U.S. 800, 818–19 (1982).

140. Brown, *supra* note 94, at 336.

141. *Harlow*, 457 U.S. at 818.

142. Brosseau v. Haugen, 543 U.S. 194, 198 (2004).

143. Schuck, *supra* note 134, at 503.

past couple of decades,[144] Professor Laurence Tribe says that "the *Bivens* doctrine . . . is on life support with little prospect of recovery."[145]

However, an earlier empirical study conducted by another of our symposium participants, Professor **Alexander Reinert**, found that "*Bivens* cases are much more successful than has been assumed by the legal community, and that in some respects they are nearly as successful as other kinds of challenges to governmental misconduct."[146] Based on this study of the outcomes in *Bivens* cases in five district courts over four years, Reinert found that classic *Bivens*-type claims, such as prison condition suits and suits alleging an unlawful search and seizure in violation of the Fourth Amendment, prevailed 26 and 34 percent of the time in cases in which the issue was joined by the filing of an answer to the complaint.[147] When the *Bivens* claimant is represented by counsel, the rate of success climbs significantly, to nearly 40 percent overall.[148]

Thus, while the scope of the *Bivens* universe of claims may be circumscribed, in the wake of such Supreme Court decisions as *Bush* and *Wilkie*,[149] lawsuits challenging egregious misconduct by federal prison officials and law enforcement and alleging physical harm or direct damage to property appear to have moderate success. In sum, the *Bivens* remedy is more robust in the context of typical constitutional torts alleging physical abuse by federal law enforcement or prison guards.

In his contribution to this symposium, Reinert sets the stage for further research on the availability of the *Bivens* remedy to a larger universe of potential claimants by asking whether qualified immunity as a defense for federal officers plays a major role at the screening stage for lawyers who are considering whether to file suit.[150] In ***Does Qualified Immunity Matter***, Reinert reports preliminary results from a qualitative survey of experienced attorneys who had handled multiple *Bivens* or related suits.[151] In summarizing his results, Reinert emphasizes that the surveyed lawyers may not be representative of all *Bivens* litigators, the data was not collected in a systematic manner, and the data are "soft by nature" as based on anecdotal reports by lawyers.[152] Nonetheless, certain clear patterns at least suggest wider ramifications.

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144. *See supra* notes 114–16 and accompanying text.

145. Laurence H. Tribe, *Death By a Thousand Cuts: Constitutional Wrongs Without a Remedy After* Wilkie v. Robbins, CATO SUP. CT. REV., 2006-07, at 23, 26.

146. Alexander A. Reinert, *Measuring the Success of Bivens Litigation and Its Consequences for the Individual Liability Model*, 62 STAN. L. REV. 809, 813 (2010).

147. *Id.* at 841 n.154.

148. *Id.* at 839.

149. *See supra* notes 117–23 and accompanying text.

150. Alexander A. Reinert, *Does Qualified Immunity Matter?*, 8 U. ST. THOMAS L.J. 477, 477–496 (2011).

151. *Id.*

152. *Id.* at 491.

Nearly every lawyer surveyed agreed that "qualified immunity plays a large role in case selection. Most attorneys seem to select cases to avoid any possible qualified immunity issues arising in the litigation."[153] Moreover, the impact of qualified immunity at the screening stage flows not only from its substantive effect but also from its procedural obstacles, such as the availability of interlocutory appeal to government officers, which delays adjudication and thus discourages clients. Because there is "nearly overwhelming support for the proposition that qualified immunity considerations matter at the screening stage, and some attorneys consider them dispositive,"[154] Reinert's results, preliminary though they may be, are worthy of attention and justify continued investigation in future studies.

III. Whether to Impose Liability on the Government or the Individual Officer

In *FDIC v. Meyer*,[155] the Supreme Court unanimously identified "the logic of *Bivens*" as grounded in the responsibility and liability of the individual government employee for his or her own constitutional misconduct. The premise of *Bivens*, in the Court's mind at least, is that the individual agents of the government, rather than the government as an entity, would have committed the constitutional wrong to the detriment of the plaintiff's constitutional right. But isn't that simply a resurrection of the fictional dichotomy between government officers and the government they serve? The government officer acts as an agent of the government, and the government can only act through its agents. Why should they not be seen as one and the same, at least as to those outside the government who suffer constitutional injury at the hands of a government agent? What are the costs and benefits of preserving the *Bivens* remedy as one against the government employee personally rather than adding or substituting the government as the defendant?[156]

A number of commentators have argued that there would be great advantages in shifting liability for both ordinary and constitutional torts from public employees to the government itself. Professor **Peter Schuck** lists a variety of defects that he sees as flowing from imposition of liability directly upon officials rather than upon the government: "its propensity to chill vigorous decisionmaking; to leave deserving victims uncompensated and losses concentrated; to weaken deterrence; to obscure the morality of the law; and to generate high system costs."[157] Professor Richard Pierce contends that "[e]xposing individual government employees to potential tort liability is particularly likely to produce socially undesirable decision-

153. *Id.* at 494.
154. *Id.* at 493.
155. 510 U.S. 471, 484–85 (1994).
156. Sisk, Litigation, *supra* note *, § 5.07(g), at 394–97.
157. Schuck, *supra* note 113, at 100.

making incentives."[158] Because individuals are most likely to fear substantial personal liability (even though most federal employees held liable for actions within the scope of employment are indemnified), holding government employees personally liable for ordinary or constitutional torts may discourage them from undertaking new initiatives or reforms.

In addition, focusing liability upon government officials, rather than the government, weakens the claims of those who have been wronged by government agents. Pierce notes that "sympathy for the plight of the public employee induces courts to adopt unduly narrow interpretations of constitutional and statutory rights" and "induces juries to resolve close factual disputes in favor of the defendant and to award lower damages."[159] By contrast, Schuck contends, a governmental liability scheme would ensure adequate compensation to victims of government misconduct and the elimination of even the possibility of personal exposure to liability would dissipate some of the chill on vigorous decision-making by government officials.[160] He concludes that "[e]nterprise liability . . . would reduce the randomness with which particular officials are now sued and held liable," which makes actually being held liable for official wrongdoing "seem morally irrelevant and arbitrary when it does occur."[161]

Professor Barbara Armacost has taken the contrary view and generally has defended the Supreme Court's resistance to respondeat superior liability by governmental entities for constitutional violations and its focus upon the individual conduct of government officials.[162] Armacost has contended that "fault-based, individual liability—in which a particular official is identified as a 'constitutional wrongdoer'—serves a moral blaming function that has independent value regardless of who ultimately bears the financial cost of liability."[163] Thus, she has concluded, "important moral and societal interests are vindicated by a regime that makes blameworthy officials personally liable for their unconstitutional behavior, even if they do not ultimately pay the judgment."[164]

Professor **Alexander Reinert** strikes something of a middle position. He suggests a "hybrid form of liability," in which individual federal employees would remain the primary defendants but would be allowed "to join the federal government as a necessary third party defendant where the individual defendant can show that the conduct in which she engaged was consistent with and in furtherance of government policy."[165] Thus, court-

158. 3 PIERCE, *supra* note 5, § 19.2, at 1390.
159. *Id.* § 19.2, at 1391–92.
160. SCHUCK, *supra* note 113, at 101–02.
161. *Id.* at 102.
162. Barbara E. Armacost, *Qualified Immunity: Ignorance Excused*, 51 VAND. L. REV. 581, 591–92, 663–76 (1998).
163. *Id.* at 592.
164. *Id*. at 670.
165. Reinert, *supra* note 146, at 849.

ordered governmental indemnity would shield individual officers in circumstances where, in Schuck's words, they were "little more than an instrument of impersonal bureaucratic, political, and social processes over which they have little or no effective control."[166]

Under current doctrine, which weaves together judicial implications and statutory directions, individual government officers are potentially liable for constitutional torts but are generally immune from common-law torts committed in the scope of government employment, while the federal government itself may be sued for common-law torts but enjoys sovereign immunity from constitutional tort claims for money damages.[167] The uneasy relationship and sometimes peculiar contrast between officer and governmental entity liability and immunity are further revealed in the increasingly expansive interpretation by the lower federal courts of the reach of the so-called Judgment Bar.

As a general rule, a statutory provision within the FTCA states that if a judgment is obtained against the United States, then that judgment operates as a "complete bar" to a suit "by reason of the same subject matter" against the individual government employee.[168] If an injured plaintiff pursues a claim to judgment against the United States as a governmental entity by pressing a common-law tort theory under the FTCA, even if the judgment is adverse to the plaintiff, then every remedy against the individual employee is precluded, even if framed alternatively as a constitutional tort against the employee under *Bivens*. When a case is litigated to a judgment in an FTCA suit, even if the ruling is that the claim falls outside the scope of the FTCA or comes within an exception to the FTCA, most (but not all) courts of appeals[169] have held that a *Bivens* constitutional tort claim against an individual federal officer and arising from the same event is barred.

Professor **James Pfander and Neil Aggarwal** argue that such interpretations of the Judgment Bar have "gone terribly wrong."[170] In **Bivens**, ***the Judgment Bar, and the Perils of Dynamic Textualism***, they carefully trace the original purpose of the Judgment Bar back to Congress's intent "to

166. SCHUCK, *supra* note 113, at 101.

167. *See supra* Part I.E.

168. 28 U.S.C. § 2676 (2006). *See* Estate of Trentadue *ex rel.* Aguilar v. United States, 397 F.3d 840, 858–59 (10th Cir. 2005).

169. *See, e.g.*, Unus v. Kane, 565 F.3d 103, 121–22 (4th Cir. 2009); Manning v. United States, 546 F.3d 430, 432–37 (7th Cir. 2008); Harris v. United States, 422 F.3d 322, 333–37 (6th Cir. 2005); Farmer v. Perrill, 275 F.3d 958, 963 & n.7 (10th Cir. 2001); Hoosier Bancorp of Indiana, Inc. v. Rasmussen, 90 F.3d 180 (7th Cir. 1996); Gasho v. United States, 39 F.3d 1420, 1436–38 (9th Cir. 1994). *But see* Hallock v. Bonner, 387 F.3d 147, 154–55 (2d Cir. 2004) (holding judgment bar does not apply to FTCA suits dismissed on jurisdictional grounds, which the court held included dismissals based on FTCA exceptions), *vacated on other grounds*, 546 U.S. 345 (2006); Kreines v. United States, 959 F.2d 834, 838 (9th Cir. 1992) (holding that judgment bar statute does not preclude a *Bivens* claim when the FTCA suit was filed "contemporaneously").

170. James E. Pfander & Neil Aggarwal, Bivens*, the Judgment Bar, and the Perils of Dynamic Textualism*, 8 U. ST. THOMAS L.J. 417, 418 (2011).

block a specific kind of duplicative litigation that could result from the government's acceptance of *respondeat superior* liability in suits for ordinary negligence."[171] As Pfander and Aggarwal explain, when the Judgment Bar was enacted in 1946, under then-existing preclusion rules and the master-servant doctrine of the period, while a judgment in favor of an employee by finding non-negligence would operate to preclude later suit against the employer who had only derivative responsibility, the opposite was not true.[172] That is, a judgment in favor of the employer would not extend to preclude renewed litigation against the individual employee whose acts were alleged to have been negligent.[173] Congress enacted the Judgment Bar, then, to "block negligence suits against the driver of a federal postal truck whose act or omission had given rise to an earlier negligence suit [under the FTCA] against the federal government."[174] To address this particular derivative liability and common liability theory scenario, Congress adopted the term "same subject matter" from the 1942 *Restatement of Judgments* to "describe a narrow subset of claims that rested on the same theory of liability" and thus to bar subsequent suits against a government employee that had been negated by a finding of non-negligence in a prior suit against the government.[175]

Neglecting the history, purpose, and early operation of the Judgment Bar, courts of appeals have construed the statutory text out of context and, in Pfander and Aggarwal's words, engaged in a "breathtakingly dynamic statutory interpretation" to extend the Judgment Bar beyond the context of liability under the same common-law tort theory to encompass all claims that arose out of the same factual transaction.[176] Displaying what Pfander and Aggarwal fear is "a degree of hostility towards *Bivens* claimants," these courts mistakenly have applied the Judgment Bar to preclude constitutional claims brought against individual government officers under *Bivens*, even when the prior judgment in favor of the government merely concluded that the claim did not fall within the scope of the FTCA.[177]

In any event, the Supreme Court plainly has taken the individual-officer liability side in this debate about accountability in damages for constitutional infractions. Thus, whatever may be the public policy arguments for holding the government liable directly for the constitutional infringements of its agents, the judicially-implied *Bivens* action is one against the individual government employee and no other.

171. *Id.* at 418.
172. *Id.* at 424–425.
173. *Id.* at 429.
174. *Id.* at 418.
175. *Id.* at 421.
176. *Id.* at 418.
177. *Id.* at 423.

Congress, of course, would be free to adopt a legislative alternative and authorize constitutional tort suits against the federal government, while simultaneously eliminating individual officer liability under *Bivens*. But, unless and until it does, the *Bivens* remedy, limited though it may be in scope to certain circumstances and qualified as it is by immunity for defendants acting with objective reasonableness, remains a prominent landmark of the jurisprudential landscape.

Conclusion

As long as the Republic endures, the federal courts will encounter claims against the national government for the injuries regrettably but inevitably visited on persons, entities, and property through the far-flung and multifarious operations of the United States government. The claim for individual justice in court to an aggrieved person or entity must be balanced against the common good advanced by effective collective measures of government and the preservation of democratic rule. Questions will persist about the competence of the courts as compared to other institutions of government when politically-controversial or policy-oriented subjects arise in such litigation. Accordingly, legislative and judicial decision-makers will continue to struggle with the appropriate nature and scope of prudential constraints on adjudication of common-law and constitutional torts against the federal government to prevent undue intervention by the courts into political choices and policy-making.

No perfect adjudication process or ideal set of substantive liability standards is likely to be identified for resolving all claims of harm presented against the federal government. Nonetheless, with the enactment of the Federal Tort Claims Act and the articulation of *Bivens* constitutional tort doctrine, the history of the past sixty-five years confirms the possibility of legislative and judicial progress in crafting judicial remedies for most of the tortious harms caused by the wrongful conduct of government agencies and officials. In this symposium, the contributors report on and question the progress made, identify and contest the problems remaining, and chart various paths toward further progress in this vital area of public law.

Through the contributions made to this volume of the *University of St. Thomas Law Journal*, our remarkable group of symposium contributors have produced a substantial resource that should be of practical value to those litigating common-law and constitutional tort claims against the federal government, those defending the government against such claims, and decision-makers in the legislative and judicial branches. The complex and often knotty legal issues raised by common-law and constitutional tort claims against the federal government are of practical concern to real people suffering concrete injuries through the actions of the government and of government officials, while also implicating fundamental questions of legal

theory about the proper role of the judiciary, just governance, governmental accountability, and democratic rule. These issues rarely are addressed in the legal literature in such a comprehensive and integrated manner as reflected in the series of articles in this symposium volume.

At this conference on "Official Wrongdoing and the Civil Liability of the Federal Government and Officers," we succeeded in bringing together prominent legal scholars and leading practicing lawyers from both sides of the plaintiff-defendant divide in government litigation. On a brisk March day in Minneapolis, experienced advocates in lawsuits against the federal government came face-to-face—outside of the courtroom—with senior counsel for the government who have defended against such claims. They were joined by prominent scholars in the field (most of whom had previously toiled in the trenches and often continue to be involved in civil litigation with the federal government). Together with the student editors and members of the *University of St. Thomas Law Journal*, I am deeply thankful for the generosity of our symposium participants in joining with us at this timely conference and for contributing the well-informed, carefully-considered, and thought-provoking articles that follow.