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Diana Hassel

A MISSED OPPORTUNITY: THE FEDERAL TORT CLAIMS ACT AND CIVIL RIGHTS ACTIONS

DIANA HASSEL*

Introduction

The Federal Tort Claims Act (FTCA),[1] that venerable workhorse for imposition of tort liability against the United States, had the potential to become a significant tool for the effective redress of civil rights claims. This potential saw life for a brief period of time, but was quickly extinguished. Instead, the Supreme Court curtailed the scope of the FTCA, choosing rather to emphasize the benefits of judicially created civil rights actions against individual federal employees, such as that created in *Bivens v. Six Unnamed Agents*.[2] The interpretation of the FTCA that led to its elimination as a potential mechanism for the redress of civil rights claims was not inevitable. The text of the FTCA and the legislative history accompanying its amendments allow for a broad interpretation of the scope of claims that are cognizable under the FTCA. This article explores the reasons why the potential of the FTCA in the area of civil rights has never been realized and analyzes some of the consequences of this missed opportunity.

As a primary cause for the curtailment of the use of the FTCA, this article points to the Supreme Court's shortsighted view that a judicially created claim based directly on the federal Constitution against individual federal employees was a superior remedy. In order to emphasize the need for actions based directly on the federal Constitution, the Court denigrated existing statutory remedies, such as the FTCA. In the rush to embrace the judicially created civil rights claim, the benefits of an action against the United States under the FTCA were overlooked. Civil rights litigants were left with a mechanism that focuses on the individual liability of a federal employee rather than governmental liability under the FTCA. The rejection of the FTCA in order to further the expansion of claims against individual federal employees was particularly unproductive, given the limited effectiveness of those actions.

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* Associate Professor, Roger Williams University School of Law. B.A., 1979, Mount Holyoke College; J.D., 1985, Rutgers, The State University of New Jersey — Newark. Assistant United States Attorney, Southern District of New York, 1988-93. The author would like to thank her former colleagues at the Civil Division of the United States Attorney's Office in the Southern District of New York for their interest and support in this project, and in particular AUSA Kay K. Gardiner for her insight and encouragement. The author would also like to thank Jose L. Fernandez, Andrew Horwitz, Jonathan B. Mintz and Michael J. Yelnosky for their helpful comments on drafts of this article. Brandan S. Bell provided research assistance.

1. Federal Tort Claims Act, Pub. L. No. 79-601, §§ 401-424, 60 Stat. 812, 842-47 (1946) (codified as amended in scattered sections of 28 U.S.C.).

2. 403 U.S. 388 (1971).

In narrowly interpreting the language of the FTCA, the Supreme Court missed an opportunity to provide an effective remedy against the United States for violation of civil rights. The benefits of governmental liability for such claims has been widely discussed in the literature, but most scholars have emphasized the necessity of amending the FTCA to achieve this end.[3] While such amendment might now be the only realistic route to altering the scope of the FTCA, the federal courts had within their grasp a way to make use of the FTCA in the effective and fair resolution of civil rights claims. Failing to take this opportunity needlessly limited the range of remedies available to deter civil rights violations and to provide compensation for those whose rights are trampled upon.

I. Civil Rights Claims Against the Federal Government

A. The Provisions of the Federal Tort Claims Act

Since it took effect in 1948, the FTCA has provided a remedy against the United States for harm caused by the negligence of its employees. The Act provides that:

> [T]he district courts . . . shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages . . . for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.[4]

This general waiver of sovereign immunity is hedged by many exceptions to the government's liability and conditions which must be satisfied before a suit can be brought. For example, acts based on a "discretionary function" of a federal employee are not the basis for a claim.[5] Similarly, claims based on the delivery of the mail,[6] the assessment of taxes,[7] or arising out of combat,[8] are excluded. Sig-

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3. *See, e.g.*, PETER H SCHUCK, SUING GOVERNMENT: CITIZENS REMEDIES FOR OFFICIAL WRONGS 196-97 (1983); Thomas J. Madden et al., *Bedtime for* Bivens: *Substituting the United States as Defendant in Constitutional Tort Suits*, 20 HARV. J. ON LEGIS. 469, 472 (1983); H. Allen Black, *Balance, Band-Aid or Tourniquet: The Illusion of Qualified Immunity for Federal Officials*, 32 WM. & MARY L. REV. 733, 773-79 (1991).

4. 28 U.S.C. § 1346(b) (1994).

5. The FTCA shields the United States from liability for certain policy-driven decisions:

> The provisions of this chapter and section 1346(b) of this title shall not apply to —
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> (a) Any claim 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, based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.

Id. § 2680(a).

6. "The provisions of this chapter and section 1346(b) of this title shall not apply to . . . . (b) Any claim arising out of the loss, miscarriage, or negligent transmission of letters or postal matter." *Id.*

nificantly, prior to 1974, claims based on certain intentional torts — assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, and interference with contract rights — were also excluded as a basis for an action against the United States.[9]

The United States is also protected from unshielded exposure for the acts of its employees by procedural safeguards and limitations on the scope of remedies that are available. The United States cannot be liable for punitive damages.[10] Prior to bringing a suit in district court, a claimant must present his claim to the federal agency whose employee is alleged to have caused the injury.[11] The United States provided a significant protection for itself by denying a claimant under the FTCA the right to a jury trial.[12]

Apart from the exceptions and protections that are particular to the United States, the basis of liability under the FTCA has traditionally been state tort concepts.[13] Since the United States is liable as an individual would be "in accordance with the law of the place where the act or omission occurred,"[14] courts have generally looked to state law to provide the substance of "the law of the place."[15] Prior to the 1974 Amendments, the FTCA was viewed merely as a vehicle to bring common law tort claims against the United States, not as a potential mechanism for bringing tort claims based on the federal Constitution against the United States.[16] Accor-

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§ 2680(b).

7. Another significant limitation to FTCA liability shields the United States from claims based on collection of taxes:

> The provisions of this chapter and section 1346(b) of this title shall not apply to —
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> . . . .
>
> (c) Any claim arising in respect of the assessment or collection of any tax or customs duty, or the detention of any goods or merchandise by any officer of customs or excise or any other law-enforcement officer.

Id. § 2680(c).

8. "The provisions of this chapter and section 1346(b) of this title shall not apply to . . . . (j) Any claim arising out of the combatant activities of the military or naval forces, or the Coast Guard, during time of war." *Id.* § 2680(j).

9. The 1994 Amendments modified the exclusion for "acts or omissions of investigative or law enforcement officers of the United States Government." Act of Mar. 16, 1974, Pub. L. No. 93-253, § 2, 88 Stat. 50, 50 (codified at 28 U.S.C. § 2680(h) (1994)); *see infra* notes 42-45 and accompanying text.

10. *See* 28 U.S.C. § 2674 (1994).

11. *See id.* § 2675 (a), (b). A claimant must wait until the agency has denied his claim to bring his action in federal court. The claimant will be limited in his federal court action to the amount he sought in his administrative claim. *See id.*

12. *See id.* § 2402.

13. *See, e.g.*, Adams v. United States, 239 F. Supp. 503, 506 (E.D. Okla. 1965).

14. 28 U.S.C. § 1346(D) (1994).

15. *Adams*, 239 F. Supp. at 506.

16. Even before the 1974 Amendments, the FTCA could have been interpreted to allow for recovery for constitutional torts. The United States was to be held liable as an individual would be according to the law of the place where the act occurred. *See* 28 U.S.C. § 1346(b) (1970). This broad liability could be interpreted to include constitutional violations based on state or federal law. However, the exclusion of intentional torts from the ambit of the FTCA would make this a strained interpretation of the Act, since the exclusion seems to expressly relieve the government from liability for the types of behavior

dingly, in order to seek civil damages against the federal government for violations of civil rights, plaintiffs were forced to look beyond the FTCA to judicially created remedies.

B. Creation of a Civil Rights Claim Against the Federal Government

Unlike state and local officials, who can be liable in money damages for their acts that violate the federal Constitution under 42 U.S.C. § 1983,[17] there was no analogous basis for bringing a damages suit against a federal official for violation of a citizen's civil rights.[18] Against this backdrop, the Supreme Court was confronted, in *Bivens v. Six Unknown Agents*,[19] with the question of whether there was any federal cause of action for damages available against an individual federal employee who had violated the plaintiff's Fourth Amendment rights.[20] The Court answered in the affirmative, determining that a claim for damages based on a violation of the Fourth Amendment against a federal law enforcement official was appropriate even in the absence of congressional action authorizing such a claim.[21] The Court created a damages remedy against individual federal law enforcement officials for violation of the Fourth Amendment.[22] In doing so, the Court raised several issues that would become the focal point of the continuing debate concerning the parameters of the remedy.

In *Bivens*, the plaintiff's claim was based on his search and arrest by agents of the Federal Bureau of Narcotics. The agents entered the plaintiff's apartment, manacled him, searched the apartment, arrested him, and at the courthouse, interrogated and searched him.[23] The plaintiff claimed that the arrest was made without probable cause, that unreasonable force was used, and that as a result of the agents' behavior he experienced humiliation, embarrassment, and mental suffering.[24] The plaintiff's complaint was dismissed in the court below for failing to state a cause of action.[25]

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that are most commonly characterized as constitutional violations such as unlawful searches and detentions.

17. Section 1983 was derived from the Civil Rights Act of 1871, ch. 22, § 1, 17 Stat. 13, 13.

18. Section 1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . .

42 U.S.C. § 1983 (1994).

19. 403 U.S. 388 (1971).

20. *See id.* at 389.

21. *See id.* at 395-96.

22. *See id.* at 397.

23. *See id.* at 389.

24. *See id.* at 389-90.

25. *See id.* at 390.

Justice Brennan, writing the opinion of the Court, rejected the defendants' argument that the plaintiff had no remedy based on federal law for the alleged violation of Fourth Amendment rights.[26] The defendants contended that the plaintiff should seek redress based on state tort law, and if the government officials were not acting in a valid exercise of federal power, they would be subject to liability under state law tort principles.[27] Justice Brennan concluded that there was a federal basis for the plaintiff's claim regardless of state law: "the Fourth Amendment operates as a limitation upon the exercise of federal power regardless of whether the State in whose jurisdiction that power is exercised would prohibit or penalize the identical act if engaged in by a private citizen."[28]

The limitation imposed by the Fourth Amendment could properly be expressed in a claim for monetary damages against the individual federal officer.[29] Justice Brennan acknowledged that:

> [T]he Fourth Amendment does not in so many words provide for its enforcement by an award of money damages for the consequences of its violation. But "it is . . . well settled that where legal rights have been invaded, and a federal statute provides for a general right to sue for such invasion, federal courts may use any available remedy to make good the wrong done."[30]

The Court determined that it was free to act even in the absence of congressional mandate because the case presented "no special factors counselling hesitation in the absence of affirmative action by Congress"[31] and because "[the Court] ha[d] no explicit congressional declaration that persons injured by a federal officer's violation of the Fourth Amendment may not recover money damages from the agents, but must instead be remitted to another remedy, equally effective in the view of Congress."[32]

In his concurring opinion Justice Harlan expressed the belief that the protection of constitutional interests was a particular responsibility of the federal courts.[33] He

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26. *See id.* at 390-92.
27. *See id.* at 390-91.
28. *Id.* at 392.
29. *See id.* at 395-96.
30. *Id.* at 396 (quoting Bell v. Hood, 327 U.S. 678, 684 (1945)) (omission in original).
31. *Id.*
32. *Id.* at 397.
33. *See id.* at 407 (Harlan, J., concurring in the judgment). Justice Harlan much more explicitly set forth the basis of the Court's power to create a remedy based on the Fourth Amendment. Referring to the federal courts' power to award damages to effectuate federal statutory schemes, Justice Harlan rejected the contention that federal courts cannot award damages for violations of constitutional rights without prior action by Congress. Instead, he concluded that:

> it would be at least anomalous to conclude that the federal judiciary — while competent to choose among the range of traditional judicial remedies to implement statutory and common-law policies, and even to generate substantive rules governing primary behavior in furtherance of broadly formulated policies articulated by statute or Constitution — is powerless to accord a damages remedy to vindicate social policies, which by virtue of

further explained that compensatory damages are appropriate given the nature of the injury suffered when Fourth Amendment privacy interests are violated, even if the award of damages has little deterrent effect on future constitutional wrongdoing.[34] Justice Harlan also remarked that a claim of damages against an individual federal employee would in most cases be a plaintiff's only source of redress: "However desirable a direct remedy against the Government might be as a substitute for individual official liability, the sovereign still remains immune to suit."[35]

Justice Black in his dissent expressed doubt about the wisdom of creating such a remedy even if the Court had the power to do so.[36] His concerns focused on the fact that the courts are "choked with lawsuits" and that adding a new cause of action would only add to that problem.[37] In addition, Justice Black was concerned that the damages remedy "might deter officials from the *proper* and honest performance of their duties."[38]

The Court identified its reluctance to allow a remedy for a constitutional right to rest on state law and emphasized the desirability of having a uniform federal law

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> their inclusion in the Constitution, are aimed predominantly at restraining the Government as an instrument of popular will.

Id. at 403-04 (Harlan, J., concurring in the judgment) (citations omitted). Justice Harlan further pointed to the equitable remedial powers of the federal courts as an analogous broad source of authority to fashion relief whose validity does not depend on prior congressional action, stating that:

> if a general grant of jurisdiction to the federal courts by Congress is thought adequate to empower a federal court to grant equitable relief for all areas of subject-matter jurisdiction enumerated therein, see 28 U.S.C. § 1331(a), then it seems to me that the same statute is sufficient to empower a federal court to grant a traditional remedy at law.

Id. at 405 (Harlan, J., concurring in the judgment).

34. *See id.* at 408 (Harlan, J., concurring in the judgment).

35. *Id.* at 410 (Harlan, J., concurring in the judgment). Chief Justice Burger dissented from the Court's opinion writing that the creation of a damage remedy should properly be the work of Congress and not the Court. *See id.* at 411 (Burger, C.J., dissenting). He further opined that Congress should enact a damages remedy for Fourth Amendment violations as a substitute for the exclusionary rule. *See id.* at 421 (Burger, C.J., dissenting). Justice Burger viewed the suppression of evidence gathered in violation of the Fourth Amendment in a criminal trial as a remedy for unconstitutional behavior that exacts too high a societal cost. *See id.* at 416-20 (Burger, C.J., dissenting). Important evidence is suppressed in criminal trials allowing the guilty to go free. *See id.* at 416 (Burger, C.J., dissenting). Justice Burger's dissenting opinion is devoted almost entirely to his explanation of the "fundamental weakness" of the exclusionary rule and the benefits that would flow from congressional elimination of the rule and the creation of a substitute damages remedy. *See id.* at 411-27 (Burger, C.J., dissenting).

36. *See id.* at 427-30 (Black, J., dissenting).

37. *See id.* at 428 (Black, J., dissenting). In Justice Black's dissent, he concluded that creating a damages remedy for violations of constitutional violations was beyond the power of the federal courts. Pointing to 28 U.S.C. § 1983 as an example of the exercise of congressional will when it wanted to create a remedy against individuals for violations of civil rights, Justice Black expressed the belief that absent such action by Congress, the Court could not act. *See id.* at 427-28 (Black, J., dissenting).

Justice Blackmun, in his dissenting opinion also expressed concern at the potential "avalanche of new federal cases" and the possibility that the remedy "will tend to stultify proper law enforcement and to make the day's labor for the honest and conscientious officer even more onerous and more critical." *Id.* at 430 (Blackmun, J., dissenting). Justice Blackmun concluded that if additional remedies are needed "it is the Congress and not this Court that should act." *Id.* (Blackmun, J., dissenting).

38. *Id.* at 429 (Black, J., dissenting).

apply to civil rights claims against federal officials.[39] The dissenting opinions expressed reservations about the deterrence value of the remedy and also forecasted a negative effect on federal law enforcement.[40] In several of the opinions, the justices directly, or at least implicitly, expressed their desire that Congress address the issue and determine explicitly whether and what kind of remedy should be available to individuals whose civil rights are violated by federal officials.[41]

C. 1974 Amendments to the Federal Tort Claims Act

In the wake of the *Bivens* decision and in response to the perceived lack of remedy against the United States for particularly outrageous wrongful acts by law enforcement agents,[42] Congress amended the FTCA in 1974.[43] These amendments provided the basis for the FTCA to be used as a remedy for civil rights violations. The most significant change brought by the 1974 Amendments was an exception to the exclusion of the intentional torts listed in the FTCA.[44] The amended act included within its scope claims against the United States arising out of assault, battery, false imprisonment, false arrest, abuse of process, or malicious prosecution based on the "acts or omissions of investigative or law enforcement officers of the United States."[45]

The main impetus for these amendments was the desire to establish a remedy for citizens who had been the victims of unconstitutional raids by federal law enforcement agents.[46] In support of the amendment, Sen. Charles H. Percy (R.-Ill.) related the tale of a raid by federal agents at the home of the Giglottos in Collinsville, Illinois.[47] Federal agents broke into the Giglottos' home without warning. The house was ransacked, and the family was threatened with drawn weapons. During this raid the agents did not identify themselves. At some point during their search the agents discovered they had raided the wrong house and left the home without any apology or explanation.[48] Senator Percy related several similar stories outlining the kind of unconstitutional behavior in which federal drug enforcement agents were engaging around the country.[49]

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39. *See id.* at 408-09 (Harlan, J., concurring).

40. *See id.* at 421-22 (Burger, C.J., dissenting); *id.* at 430 (Blackmun, J., dissenting).

41. *See id.* at 397 (majority opinion); *id.* at 421 (Burger, C.J., dissenting); *id.* at 429 (Black, J., dissenting); *id.* at 430 (Blackmun, J., dissenting).

42. *See* S. REP. NO. 93-588 (1973), *reprinted in* 1973 U.S.C.C.A.N. 2789.

43. *See* Act of Mar. 16, 1974, Pub. L. No. 93-253, 88 Stat. 50.

44. Those torts are: assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, and interference with contract rights. *See* 28 U.S.C. § 2680(h) (1994).

45. *Id.*

46. *See* S. REP. NO. 93-588, at 1 (1974), *reprinted in* 1974 U.S.C.C.A.N. 2789, 2789.

47. *See* SENATE GOV'T OPERATIONS COMM., ESTABLISHING A DRUG ENFORCEMENT ADMINISTRATION IN THE DEPARTMENT OF JUSTICE, S. REP. NO. 93-469 (1973). The individual views of Senator Percy were included as part of the Committee Report. *See id.*

48. *See id.* at 30.

49. *See id.* at 30-32.

In Senator Percy's words, the FTCA was amended to permit victims such as the Giglottos "to bring actions directly against the Federal government to recover for the damage they sustained due to the intentional or willful misdeeds of Federal officers. This, it seems to me, is only right and fair under the circumstances."[50] Members of Congress were shocked that citizens were without an effective remedy against the United States for unlawful searches and raids such as that conducted against the Giglottos. Since the Giglottos were not prosecuted for any criminal violation and no evidence was seized, "the traditional remedy [for suppression of evidence gathered unconstitutionally] open to those who have had their Fourth Amendment rights violated by the police is meaningless."[51]

Congress was aware that while remedies are available against individual state agents under the Civil Rights Act of 1871[52] and against federal agents under *Bivens*,[53] "causes of action against officials as individuals will, on occasion, be virtually worthless since government employees may be so lacking in funds as to be judgment proof."[54] A remedy against the government was considered necessary because otherwise "[c]itizens seeking compensatory damages . . . are left with the often rather hollow right of bringing a civil action against the agents directly responsible for their losses."[55]

On November 30, 1973, the amendment was passed in the Senate. Portions of the Senate Report were read into the record, explaining that "the [amendment] would submit the Government to liability whenever its agents act under color of law so as to injure the public through search and seizures that are conducted without warrants or with warrants issued without probable cause."[56] However, the Report maintained that the actions covered by the amendment were not limited to constitutional torts.[57] The legislative record supports the conclusion that the liability established by the 1974 Amendments should be seen as a "counterpart to the *Bivens* case and its progeny in that it waives the defense of sovereign immunity so as to make the Government independently liable in damages for the same type of conduct that is alleged to have occurred in *Bivens*."[58]

Similarly, when the amendment was discussed in the House of Representatives, the purpose of the Bill was understood to provide a civil remedy against the United

50. *Id.* at 33. Along with amending the FTCA, Congress at the same time repealed the no-knock statute which allowed forcible entry by federal agents in certain circumstances. *See id.* at 33-35.

51. *Id.* at 35.

52. Codified at 42 U.S.C. § 1983 (1994).

53. *See Bivens*, 403 U.S. at 397.

54. S. REP. NO. 93-469, at 36 (1973). Concluding that the state of law that provided "no remedy against the Federal government if one of its agents intentionally violates an individual's constitutional rights" should be corrected, Senator Percy stated that the "Federal Treasury should be ultimately responsible" for compensating victims when federal agents intentionally violate constitutional rights. *Id.*

55. *Id.*

56. 119 Cong. Rec. S38,559, S38,969 (1973).

57. *See id.* "However, the Committee's amendment should not be viewed as limited to constitutional tort situations but would apply to any case in which a Federal law enforcement agent committed the tort while acting within the scope of his employment or under color of Federal law." *Id.*

58. *Id.*

States for "fourth amendment violations where a police officer may improperly enter the premises of a suspect."[59] However, the House was cognizant of the problems raised by the amendment in providing a remedy for federal constitutional violations through a remedial scheme that is tied to state law.[60] Nevertheless, the House passed the amendment on March 5, 1974, and it became effective on March 16, 1974.[61]

On the most simple level, Congress had altered the FTCA to allow for claims against the United States based on some intentional torts of federal law enforcement officers. These intentional torts — assault, battery, false imprisonment, false arrest, abuse of process, and malicious prosecution — roughly parallel the types of harms also caused by violations of the Fourth Amendment prohibition of unreasonable searches and seizures. However, the legislative history of the amendments suggests that Congress meant to do more than broaden the scope of state tort remedies available under the FTCA. Congress intended to provide a remedy for Fourth Amendment violations, and perhaps other constitutional claims generally, through the FTCA.

The implementation of the desire to expand the FTCA to include the Fourth Amendment as a basis for relief was complicated by the language of the FTCA, which provided that the United States was liable under the FTCA "in accordance with the law of the place where the act or omission occurred."[62] Prior to the amendments, that provision had been interpreted to mean state tort law. By not clarifying whether the amendments were meant to include constitutional law within the "law of the place," Congress left in the hands of the courts a somewhat ambiguous expression of its will on the issue of constitutional claims under the FTCA.

II. Judicial Interpretation of the FTCA

A. Interpretation of 1974 Amendments

Following the 1974 amendments to the FTCA, several courts took Congress at its word and began to apply the FTCA to constitutional claims against the United States.[63] Courts approached the expansion of the FTCA in different ways. Some interpreted the 1974 Amendments as a direct waiver of sovereign immunity for

59. 120 Cong. Rec. H5285, H5287 (1974). In discussing the amendment, the House was particularly concerned about the possible impact that a remedy for Fourth Amendment violations would have on the exclusionary rule. The House also questioned whether the FTCA should be the exclusive remedy and thus eliminate duplicative remedies against individual agents. *See id.* at H5288.

60. *See id.* at H5288.

61. *See* Act of Mar. 16, 1974, Pub. L. No. 93-253, § 2, 88 Stat. 50, 50 (codified at 28 U.S.C. § 2680(h) (1994)).

62. 28 U.S.C. § 1346(b) (1994).

63. *See, e.g.*, Van Schaick v. United States, 586 F. Supp. 1023 (D.S.C. 1983); Norton v. Turner, 427 F. Supp. 138 (E.D. Va. 1977), *rev'd sub nom.* Norton v. United States, 581 F.2d 390 (4th Cir. 1978); Avery v. United States, 434 F. Supp. 937 (D. Conn. 1977); Birnbaum v. United States, 436 F. Supp. 967 (E.D.N.Y. 1977), *aff'd in part, rev'd in part*, 588 F.2d 319 (2d Cir. 1978).

constitutional claims against the United States.[64] Others, influenced by the legislative history of the 1974 amendments to the FTCA, were inspired to take a new look at the language of the Act. These courts determined that even before the 1974 Amendments, the FTCA could be used to bring constitutional claims against the United States.[65] A new look was also given to the use of state law as a basis of constitutional claims. The FTCA could be used to vindicate federal constitutional interests if those interests were also protected by state law.[66] In all of these approaches, the courts were seeking, at least to some degree, to expand the reach of the FTCA to include within its ambit civil rights claims against the United States. The courts were attempting to reconcile the apparent goal of Congress in expanding the FTCA to cover constitutional claims and the language of the FTCA, which bound the remedy to the "law of the place."

1. 1974 Amendments As Waiver of Sovereign Immunity

The most direct response to the newly amended FTCA was the conclusion reached by some courts that the 1974 Amendments were a waiver of sovereign immunity that was coextensive with the liability of an individual under *Bivens*. Thus, just as an individual federal employee would be liable for violations of the Fourth Amendment under *Bivens*, so would the United States be directly liable for the same violation. Accordingly, those courts concluded that claims based directly on the Constitution could be made under the FTCA. For example, in *Norton v. Turner*,[67] the plaintiff was awarded summary judgment for a claim against the United States for Fourth Amendment violations arising out of the entry and search of her apartment.[68]

The Government's defense in *Norton* centered on the assertion that it was entitled to the defenses that individual employees would have under *Bivens*, such as qualified immunity. The court rejected this argument, finding that under the FTCA the United States could not assert defenses available to individual defendants.[69] In reaching this conclusion, the court looked to the legislative history of the 1974 Amendments and determined that Congress intended the FTCA to reach "the same kind of conduct that is alleged to have occurred in *Bivens*" but to withhold from the United States defenses such as good faith that would be available to an individual in a *Bivens* case.[70] The court concluded that the 1974 Amendments were meant to expand the recovery available to aggrieved citizens under *Bivens*.[71] Congress had

64. *See Norton*, 427 F. Supp. at 152; *cf. Van Schaik*, 586 F. Supp. at 1029 (recognizing that Congress may waive sovereign immunity).

65. *See Birnbaum*, 436 F. Supp. at 976; *Avery*, 434 F. Supp. at 945 n.11.

66. *See Birnbaum*, 436 F. Supp. at 976; *Van Schaik*, 586 F. Supp. at 1031-32; Myers & Myers, Inc. v. United States Postal Serv., 527 F.2d 1252, 1260 (2d Cir. 1975).

67. 427 F. Supp. 138 (E.D. Va. 1977).

68. *See id.* at 152. The plaintiff also brought actions against individuals under *Bivens* and 42 U.S.C. § 1983. *See id.*

69. *See id.* at 146.

70. *See id.* at 147-48.

71. *See id.* at 149.

concluded that *Bivens* was inadequate in part because of the ease with which an individual federal employee could establish a good faith defense.[72]

Interestingly, the Government did not raise the defense that the FTCA did not include Fourth Amendment violations within its scope, but instead was limited to state law as a basis for liability.[73] Since the court concluded that the Government's actions had violated the Fourth Amendment and that the United States was not entitled to assert immunity defenses available to federal employees, judgment was entered for the plaintiff.[74]

On appeal, the Fourth Circuit reversed the district court's decision on the issue of whether the United States could assert the good faith of the officials as a defense.[75] Again, the United States did not contest the applicability of the FTCA to a claim based on the Fourth Amendment. The court concurred in the district court's view that the Fourth Amendment claim could be brought under the FTCA, stating that the 1974 Amendments are "clearly intended to waive the federal government's sovereign-immunity defense in suits brought to redress violations of the fourth amendment committed by federal law enforcement officers."[76] The court acknowledged the ambiguity of the statutory language, stating that "[t]he statutory language . . . suggests that its applicability is limited to suits alleging certain state-created intentional torts. . . . [T]he legislative history, however, makes clear that the 1974 amendment was viewed by Congress as 'a counterpart to the *Bivens* case.'"[77] Based on its belief that Congress meant to create a counterpart to *Bivens*, the court concluded that the United States would be entitled to the same good faith defenses available to an individual defendant in a *Bivens* suit.[78]

Similarly, in *Van Schaick v. United States*,[79] the plaintiff brought an FTCA action, claiming that his arrest and confinement by the Drug Enforcement Agency violated the Fifth, Sixth, and Eighth Amendments. The court expressed doubt whether constitutional claims could be brought under the FTCA, but was bound to follow *Norton*'s dictate that such claims were cognizable under the 1974 Amendments. However, the court decided that even if such a claim could be brought, it could not succeed because of the good faith of the federal officials involved.[80]

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72. *See id.* at 148 (quoting S. REP. NO. 93-469, at 36 (1973) (individual views of Senator Percy)).
73. *See id.* at 146 n.7.
74. *See id.* at 152.
75. *See* Norton v. United States, 581 F.2d 390, 391 (4th Cir. 1978).
76. *Id.* at 392-93.
77. *Id.* at 395.
78. *See id.* at 397.
79. 586 F. Supp. 1023 (D.S.C. 1983).
80. *See id.* at 1031. *Norton* ruled that the good faith defenses available to individual agents under *Bivens* were also available to the United States under the FTCA. *See Norton*, 581 F.2d at 393-94; *see also* Cynthia R. Finn, Recent Decision, 47 GEO. WASH. L. REV. 651 (1979).

The district court in *Norton* also concluded that a constitutional claim could be brought if South Carolina recognized a private cause of action for constitutional deprivations. *See Norton*, 586 F. Supp. at 1031.

Taking a straightforward view of what the 1974 amendments to the FTCA accomplished, the decisions in *Norton* and *Van Schaick* were based on an interpretation of the amendment as a waiver of sovereign immunity for civil rights claims. Their support for this conclusion lies not in the language of the amended statute but in the legislative history which expressed Congress's intention to provide a broad remedy to aggrieved citizens.

2. 1974 Amendments As Expression of Policy

A few decisions, staking out the most radical perspective on the scope of the FTCA, determined that even before the 1974 Amendments, civil rights claims could be brought against the United States under the FTCA. In *Birnbaum v. United States*,[81] Judge Jack B. Weinstein found that a constitutional claim could be brought against the United States under the FTCA.[82] The claim was based on the interception and opening of the plaintiff's mail by the CIA. The court ruled that the opening of the plaintiff's mail violated the First and Fourth Amendments.[83] Turning to 28 U.S.C. § 2680(h), the court reviewed the 1974 Amendments and concluded that Congress meant to broaden the scope of the FTCA to cover Fourth Amendment violations.[84] The court stated that "Congress altered section 2680(h) so that, from the date of amendment forward . . . Fourth Amendment violations would be actionable against the government, providing aggrieved persons actual relief, rather than worthless awards against 'judgment-proof' individual agents."[85]

The *Birnbaum* decision, however, turned on the pre-1974 provisions of the FTCA. The *Birnbaum* court determined that even without the 1974 Amendments, constitutional claims could be brought against the United States under the FTCA.[86] This approach relied upon the reasoning that constitutional torts were not explicitly excluded under the FTCA and therefore fell within the general waiver of liability.[87] *Birnbaum* also relied on finding a basis for federal constitutional claims within state law. Thus, if the state law provided a remedy for a federal constitutional claim, then it was covered by the FTCA.[88] Accordingly, Judge Weinstein concluded that the FTCA provided for a claim against the United States based directly on the Constitution, and also for a claim based on New York tort law, which provided a remedy for violation of federal constitutional rights.[89]

The Second Circuit Court of Appeals affirmed Judge Weinstein's judgment, finding that a claim for surreptitiously opening mail could be brought against the

81. 436 F. Supp. 967 (E.D.N.Y. 1977), *aff'd in part, rev'd in part*, 588 F.2d 319 (2d Cir. 1978).

82. *See id.* at 972-76.

83. *See id.* at 972. The court also determined that the CIA's actions did not fall within the discretionary function or postal matter exceptions to the FTCA. *See id.* at 973-74.

84. *See id.* at 975.

85. *Id.*

86. *See id.* at 975-76.

87. *See id.*

88. *See id.* at 974-76

89. *See id.*

United States under the FTCA.[90] However, the FTCA claim could be based only on New York state law, which provided a common law tort remedy for intrusions upon privacy.[91] The Court of Appeals rejected the district court's conclusion that the FTCA could be used for redress based directly on the federal Constitution.[92] The court stated that because claims under the FTCA must be based on "the law of the place," the claims must be founded on state law principles, not federal law.[93]

Applying reasoning similar to that of the district court in *Birnbaum*, the court in *Avery v. United States*[94] concluded that a claim for a constitutional tort against the United States could lie under the FTCA.[95] In *Birnbaum*, the court did not rely on the 1974 Amendments and nonetheless concluded that a constitutional claim could be brought against the United States.[96] In *Avery*, the plaintiff claimed that his constitutional rights were violated by the Central Intelligence Agency when his mail was opened. The claim was brought under the FTCA, and the Government moved to dismiss the action for lack of subject-matter jurisdiction. The court denied the motion.[97] The plaintiff's claim was based on the "constitutional tort of invasion of privacy," and the court concluded that this tort was not one of the enumerated intentional torts that is excluded under section 2680(h); therefore, a claim against the United States was proper.[98] While not directly addressing the issue, the court apparently determined that federal constitutional law, not merely state tort law, could function as the source of substantive relief under the FTCA.[99]

3. State Law Basis for Constitutional Claim

In addition to their reliance on the expansion of the FTCA expressed in the 1974 Amendments, the courts in *Birnbaum* and *Van Schaick* also concluded that the FTCA could be used as a basis for federal constitutional claims if those claims were the basis for a remedy under state law. For example, the district court in *Birnbaum* found that "[v]iolation of plaintiffs' federal constitutional rights is . . . a . . . ground of liability under New York law. New York treats tortious conduct, in violation of the Constitution, by government agents as grounds for recovery of damages."[100] Because money damages were available under New York law for violations of the

90. *See* Birnbaum v. United States, 588 F.2d 319, 328-33 (2d Cir. 1978).
91. *See id.* at 326.
92. *See id.* at 327.
93. *See id.*
94. 434 F. Supp. 937 (D. Conn. 1977).
95. *See id.* at 939.
96. *Birnbaum*, 436 F. Supp. at 975-76.
97. *See Avery*, 434 F. Supp. at 939.
98. *See id.* at 945-46.
99. The court in *Avery* did not explicitly define the federal Constitution as the source of the "constitutional tort of invasion of privacy" that was the basis of the claim. However, the court expressed the belief that the interests protected by the action are those based on "principles of constitutional liberty," thus apparently concluding that the claim is based on more than state tort concepts. *See id.* at 946.
100. Birnbaum v. United States, 436 F. Supp. 967, 983 (E.D.N.Y. 1977), *aff'd in part, rev'd in part*, 588 F.2d 319 (2d Cir. 1978).

federal constitution,[101] such a claim was similarly cognizable against the United States under the FTCA.

In *Van Schaick v. United States*,[102] the court similarly concluded that claims based on federal constitutional rights could be brought against the United States under the FTCA if state law "recognize[s] a private cause of action for damages for constitutional deprivations."[103] In both *Birnbaum* and *Van Schaick* the FTCA was viewed as a mechanism to vindicate federal constitutional interests if those constitutional interests were also the basis for a damages claim under state law. This approach allows federal constitutional principles to function as a basis for claims under the FTCA but does not run afoul of the "law of the place" mandate since the source of the remedy is still state law.

Taking a seemingly similar but fundamentally different approach, the court in *Myers & Myers, Inc. v. United States Postal Service*[104] determined that a claim based on the failure to comply with constitutional standards of due process could be brought against the United States under the FTCA.[105] The plaintiff in *Myers* was denied a renewal of its trucking contract and barred from future contracts with the Postal Service without a hearing.[106] The court reasoned that the plaintiff's due process-like claim could be the basis of a state tort claim.[107] The court suggested that under some state tort law, the failure to comply with constitutional requirements could constitute interference with business opportunity or negligence.[108] Thus, the court endorsed the use of the FTCA to vindicate federal constitutional interests, when those interests could be translated into state tort law concepts.

The approach of the *Myers* court reflects a much more narrow use of the FTCA. Federal constitutional interests could be protected by the FTCA if those same interests are also protected by state tort law concepts. Unlike *Birnbaum* and *Van Schaick*, the source of the law in *Myers* must be the state tort concepts rather than the federal right itself. The conception of the scope of the FTCA expressed in *Myers* is the traditional one: a claim may be brought against the United States based on state tort law. The fact that a claim based on state tort concepts might also vindicate interests similar to those expressed in the federal Constitution is irrelevant.

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101. *See id.* at 985. Judge Weinstein relied on a series of New York cases awarding damages for violations of constitutional rights by law enforcement officials. *See* People v. Defore, 150 N.E. 585 (N.Y. 1926); Casler v. State, 307 N.Y.S.2d 695 (App. Div. 1970); Brenon v. State, 297 N.Y.S.2d 88 (App. Div. 1969); Frady v. State, 242 N.Y.S.2d 95 (App. Div. 1963); Nader v. General Motors Corp, 292 N.Y.S.2d 514 (Sup. Ct. 1968) *aff'd*, 298 N.Y.S.2d 137 (App. Div. 1969), *and aff'd*, 307 N.Y.S.2d 647 (N.Y. 1970); Herman v. State, 357 N.Y.S.2d 811 (Ct. Cl. 1974); Baisch v. State, 351 N.Y.S.2d 617 (Ct. Cl. 1974).

102. 586 F. Supp. 1023 (D.S.C. 1983).

103. *Id.* at 1031.

104. 527 F.2d 1252 (2d Cir. 1975).

105. *See id.* at 1256.

106. *See id.* at 1258-59.

107. *See id.* at 1260-61.

108. *See id.*

B. Impact of Carlson v. Green

Judicial interpretations of the FTCA as a remedy for constitutional torts were brought up short by the Supreme Court's decision in *Carlson v. Green*.[109] In *Carlson*, the Court was faced with the question of whether a *Bivens* claim against an individual federal employee was available to redress a constitutional claim even when there was another remedy, in this case the FTCA, for the wrong. Justice Brennan, writing the opinion of the Court, concluded that "[p]lainly FTCA is not a sufficient protector of citizens' constitutional rights."[110] Since the FTCA did not provide an adequate remedy for the wrongs alleged by the plaintiff, the Court, following *Bivens*, expanded the scope of constitutional claims that could be brought against individual federal employees. The Court concluded that the plaintiff had stated a claim against the individual federal employees based on the Fifth and Eighth Amendments.[111]

In the opinion of the Court, Justice Brennan reasoned that in *Bivens* the Court had determined that a claim against federal employees based directly on the Constitution was available absent "special factors counselling hesitation"[112] or a congressional declaration that "persons injured by federal officers' violations of the Eighth Amendment may not recover money damages . . . but [instead] must be remitted to another remedy, equally effective in the view of Congress."[113] Thus, the Court interpreted *Bivens* to require the creation of a cause of action based directly on the Constitution, unless Congress explicitly provided a remedy that insured the same procedural protections and damages as *Bivens*. Here, the Court determined that there were no "special factors counselling hesitation," nor had Congress provided an equally effective remedy for the plaintiff's injury.[114] The alternative remedy available to the plaintiff in *Carlson*, found to be inadequate and therefore not a substitute for a *Bivens* action, was a claim under the FTCA. In reaching the conclusion that the FTCA was an inadequate remedy for the claims of the plaintiff in *Carlson*, the Court delineated the ways in which the FTCA was a less effective remedy than a *Bivens* claim.

One of the Court's objections to the FTCA as an effective remedy focused on the assumption that constitutional claims under the FTCA would not be treated uniformly because of the FTCA requirement that the United States be liable "in accordance with the law of the place where the act or omission occurred."[115] The Court concluded that "[t]he question whether respondent's action for violations by federal officials of federal constitutional rights should be left to the vagaries of the laws of the several States admits of only a negative answer in the absence of a

109. 446 U.S. 14, 25 (1980).

110. *Id.* at 23. The claim in *Carlson* was brought on behalf of an inmate who allegedly received inadequate medical care at a federal correctional facility. *See id.* at 16 n.1.

111. *See id.* at 20.

112. *Id.* at 18 (quoting *Bivens*, 403 U.S. at 396).

113. *Id.* at 19.

114. *See id.*

115. *See id.* at 23 (citing 28 U.S.C. § 1346(b)).

contrary congressional resolution."[116] Thus, one limitation the Court identified with the FTCA was based on the Act's "law of the place" language. The Court interpreted "law of the place" to mean state law, not federal law.[117] Since "the law of the place" was determined to be state law, the law applied under the FTCA to determine whether a cause of action existed would not be uniform.[118]

Another basis articulated by the Court for the ineffectiveness of the FTCA was that the Act provided less deterrence to wrongdoing by federal employees than did a *Bivens* claim. Personal financial liability of an individual employee, rather than money damages against the government based on the FTCA, was perceived to be a stronger deterrent.[119] Similarly, the Court stated that another superiority of a *Bivens* claim was that punitive damages may be awarded under *Bivens*, while they were statutorily prohibited under the FTCA.[120] Another indication of the inferiority of the FTCA remedy was that it did not permit a jury trial, while such a trial was available under a *Bivens* claim.[121] The Court concluded that given the limitations it had delineated in the FTCA, the Act was not a remedy that was equally effective as *Bivens*; therefore, a claim against the individual federal employees should go forward.[122]

In his dissenting opinion in *Carlson*, Chief Justice Burger argued that the Court had gone too far in requiring that Congress explicitly create an alternative remedy before a *Bivens* claim was barred.[123] Instead, Justice Burger concluded: "The Federal Tort Claims Act provides an adequate remedy for prisoners' claims of medical mistreatment. For me, that is the end of the matter."[124] Similarly, Justice Rehnquist in a separate dissent also disagreed with the majority's conclusion that the FTCA was an inadequate remedy for the plaintiff's claims and that, therefore, a *Bivens* action was required.[125] Justice Rehnquist stated that the majority's conclusion "is all the more anomalous in that Congress in 1974 amended the FTCA to permit private damages recoveries for intentional torts committed by federal law enforcement officers, thereby enabling persons injured by such officers' violations of their federal constitutional rights in many cases to obtain redress on their injuries."[126]

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116. *Id.*
117. *See id.*
118. *See id.*
119. *See id.* at 21.
120. *See id.* at 21-22.
121. *See id.* at 22-23.
122. *See id.* at 18-23.
123. *See id.* at 30 (Burger, C.J., dissenting).
124. *Id.* (Burger, C.J., dissenting). Justice Rehnquist had even more fundamental problems with the majority's decision than did Justice Burger. Justice Rehnquist believed that "absent a clear indication from Congress, federal courts lack the authority to grant damages relief for constitutional violations." *Id.* at 41 (Rehnquist, J., dissenting). His dispute with the majority accordingly was not limited to his assessment of the availability of an alternative remedy such as the FTCA, but with the authority of the courts acting alone to create a *Bivens*-type remedy. *See id.* (Rehnquist, J., dissenting).
125. *See id.* at 32-33 (Rehnquist, J., dissenting).
126. *Id.* at 33 (Rehnquist, J., dissenting).

Justice Rehnquist went on to question the majority's conclusion that the FTCA provided a less effective remedy than did a *Bivens* claim because it allowed damages against an individual federal employee rather than against the United States.[127] This assessment, Justice Rehnquist asserted, failed to take into account other factors that enter into the effectiveness of a remedy, such as "the amount of damages necessary to offset the benefits of the objectionable conduct, the risk that the wrongdoer might escape liability, the clarity with which the objectionable conduct is defined, and the perceptions of the individual who is a potential wrongdoer."[128] In addition, Justice Rehnquist noted that the morale and effectiveness of government employees may suffer due to the possibility of a suit against them, therefore making a *Bivens* suit less desirable than a claim based on the FTCA.[129]

Justice Rehnquist doubted the necessity of uniform rules to govern liability for violations of federal rights.[130] He asserted that federal courts frequently refer to state law and defer to state procedure in implementing a federal remedial scheme:

> Once we get past the level of a high-school civics text, it is simply not self-evident to merely assert that here we have a federal cause of action for violations of federal rights by federal officials, and thus the question of whether reference to state procedure is appropriate "admits of only a negative answer in the absence of a contrary congressional resolution." The Court articulates no solid basis for concluding that there is any interest in uniformity that should generally be viewed as significant.[131]

Thus, Justice Rehnquist questioned whether uniformity — a major flaw in the FTCA according to the majority of the Court — was really a significant issue.

In reaching the conclusion that the FTCA could not be an effective remedy for injuries such as those suffered by the plaintiff in *Carlson*, the Court narrowly interpreted the scope of the FTCA. Most significantly, the Court concluded that the "law of the place" language of the FTCA limited the substantive law covered by the FTCA to state tort law.[132] In addition, the Court pointed to the individual liability provided by *Bivens*, but not by the FTCA, as a superior deterrent.[133] The Court also viewed the failure of the FTCA to provide for a jury trial or punitive damages

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127. *See id.* at 44-45 (Rehnquist, J., dissenting).

128. *Id.* at 45 (Rehnquist, J., dissenting).

129. *See id.* at 47 (Rehnquist, J., dissenting). Justice Rehnquist also questioned the majority's reliance on the fact that punitive damages were available under *Bivens* and not the FTCA, because the question of the availability of punitive damages under both *Bivens* and 42 U.S.C. § 1983 remained unsettled. *See id.* (Rehnquist, J., dissenting). Justice Rehnquist also questioned the majority's assertion that the availability of a jury under *Bivens* was more desirable than the bench trial provided for under the FTCA. *See id.* at 48 (Rehnquist, J., dissenting).

130. *See id.* (Rehnquist, J., dissenting).

131. *Id.* at 49 (Rehnquist, J., dissenting) (citations omitted).

132. *See id.* at 23.

133. *See id.* at 25.

as an indication of its inadequacy as a mechanism for redress of constitutional claims.[134]

After *Carlson*'s narrow interpretation of the provisions of the FTCA, broader interpretations, such as the Fourth Circuit's in *Norton v. United States*[135] that the 1974 amendments to the FTCA waived sovereign immunity with respect to constitutional claims,[136] were much less possible. *Carlson's* mandate that the FTCA did not provide an adequate remedy for civil rights claims inhibited broad interpretations of the impact of the 1974 Amendments. Those courts that had interpreted the FTCA expansively soon began to narrow the scope of the Act.[137] The Court's analysis of the FTCA would become the major stumbling block for future interpretation of the FTCA as a vehicle for the redress of constitutional claims.

Both avenues of using the FTCA as a remedy for constitutional claims that were explored by the lower courts were frustrated. The 1974 Amendments were not a general waiver of sovereign immunity with respect to constitutional claims.[138] The Court had interpreted "the law of the place" to limit the scope of the FTCA to claims based on state law.[139] The Court also emphasized the requirement of uniformity in a remedy for constitutional claims.[140] Therefore, using state law as a mechanism for vindicating federal constitutional rights was not an adequate basis for remedy. While not directly faced with the question of whether a constitutional claim could be brought under the FTCA, the Court in *Carlson* effectively limited that possibility.

The Court in *Carlson* was led to its narrow interpretation of the FTCA by the logic that *Bivens* allowed a claim based on the Constitution only when there was no other adequate remedy. Thus, in order to preserve and expand *Bivens*, other available remedies, such as the FTCA, had to be denigrated and characterized as inadequate to protect the constitutional interest of the plaintiff, making the need for a *Bivens* claim unarguably apparent.

C. Post-Carlson Decisions

Following *Carlson*, judicial interpretations of the FTCA reflected the Court's view of the narrowness of the remedy, and expansive views of the FTCA as a remedy for constitutional claims diminished. The limitations *Carlson* imposed on interpretation of the FTCA were explored in *Brown v. United States*.[141] In *Brown*, the plaintiff brought a claim under the FTCA for malicious prosecution and for violations of Fourth and Fifth Amendment rights.[142] The court, relying on the interpretation of

134. *See id.* at 21-22.

135. 581 F.2d 390 (4th Cir. 1978).

136. *See id.* at 392-93.

137. *See, e.g.*, Brown v. United States, 653 F.2d 196, 201-02 (5th Cir. 1981); Van Schaick v. United States, 586 F. Supp. 1023, 1031 (D.S.C. 1983).

138. *See Carlson*, 446 U.S. at 28-29 (Powell, J., concurring).

139. *See id.* at 23.

140. *Id.*

141. 653 F.2d 196 (5th Cir. 1981).

142. *See id.* at 197-98. The claims grew out of a prosecution for violations of federal banking laws.

the FTCA set forth in *Carlson*, held that the plaintiff's claims based on the Fourth and Fifth Amendments were not cognizable under the FTCA.[143] The court in *Brown* addressed the question of whether the plaintiff's constitutional claims were cognizable under the FTCA by seeking to determine whether Congress had waived sovereign immunity with respect to those claims in its 1974 amendments to the FTCA.[144] The *Brown* court determined that the broad language of the 1974 Amendments, which provided that the FTCA would be applicable to claims arising out of a series of intentional torts including malicious prosecution, could be read as a waiver of sovereign immunity that would extend to constitutional claims.[145] In reviewing the 1974 Amendments, the court also determined that "[t]he legislative history suggests that, at least under some circumstances, Congress intended to provide a new remedy for any violation of constitutional rights."[146]

The court in *Brown* concluded, however, that given the interpretation of 28 U.S.C. § 1346(b) by the Supreme Court in *Carlson*, a broad interpretation of the waiver of sovereign immunity in the 1974 Amendments would be inappropriate. Because "*Carlson* . . . instructs us that the liability of the United States under the Act arises only when the law of the state would impose it," the court concluded that a claim based directly on the Constitution could not be brought under the FTCA.[147] The court also opined that *Norton*'s determination that the 1974 amendments to the FTCA allowed *Bivens* actions against the United States was no longer "tenable" post-*Carlson*.[148]

The court in *Van Schaick v. United States*[149] also focused on the question of whether the 1974 Amendments were a waiver of sovereign immunity for constitutional claims. The court, citing *Carlson*, stated that it doubted it had jurisdiction over constitutional claims.[150] According to *Van Schaick*, *Carlson* might well preclude the use of the FTCA to bring constitutional claims because *Carlson* interpreted "the FTCA to mean that 'the liability of the United States under the Act arises only when the law of the state would impose it.'"[151]

As a result of the Court's limited view of the FTCA in *Carlson*, interpretation of the 1974 Amendments as a waiver of sovereign immunity with respect to constitutional torts was effectively cut short. The legitimacy of the tentative and hesitant expansion of the FTCA to incorporate federal constitutional claims was thrown into question. The Court's opinion in *Carlson* was based on an interpretation

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See id.

143. *See id.* at 201. The dismissal of the plaintiff's malicious prosecution claim was affirmed based on the trial court's factual finding that plaintiff had not proved the elements of malicious prosecution under Texas law. *See id.* at 199.

144. *See id.* at 200.

145. *See id.*

146. *Id.*

147. *Id.* at 201.

148. *Id.* at 201 n.4.

149. 586 F. Supp. 1023 (D.S.C. 1983).

150. *See id.* at 1029.

151. *Id.* at 1031 (quoting *Brown*, 653 F.2d at 201).

of the FTCA as based solely on state law, an insistence that the law applied to constitutional claims be consistent, and a conception of the FTCA as providing only limited relief. These conclusions left individuals whose constitutional rights were violated by the federal government with essentially only a *Bivens* claim. As the law developed with respect to *Bivens*, even that remedy became increasingly insubstantial.

III. The Consequences of the Rejection of the FTCA

A. The Inadequacy of Bivens

Justice Brennan's conclusion that *Bivens* was a superior remedy to that provided by the FTCA overlooked benefits a constitutional claim under the FTCA would provide a plaintiff and failed to take into account some significant limitations in the remedy provided by *Bivens*. Providing a remedy for violations of constitutional law under the FTCA would result in many advantages to the aggrieved citizen, the federal employees, and the federal agency involved in the claim. A remedy against the United States also serves the general interest of society in limiting unconstitutional behavior.

In comparing the contrasting benefits of *Bivens* claims and claims under the FTCA, several issues emerge. The first question is the kind of deterrence provided by each of the remedies; secondly, what does each of the remedies provide to the plaintiff in a satisfactory resolution? In addition, different attendant individual and governmental costs accompany each type of liability.

On the issue of deterrence, several commentators have concluded that individual liability under *Bivens* is not effective at getting to the causes of unconstitutional behavior. The superior deterrence value of governmental liability is emphasized by Professor Peter H. Schuck in his influential work *Suing Government*.[152] He argues that the governmental entity generally has more control over the circumstances that led to the constitutional violation than does an individual; therefore, focusing the financial incentives on the government rather than on the individual increases the likelihood that the agency involved will take steps to avoid liability.[153] Identifying the causes of misconduct as lack of comprehension, inability and lack of motivation to perform properly, and negligence, Professor Schuck suggests that these defects are better remedied at a system-wide level than through individual deterrence.[154]

Interestingly, in *Owen v. City of Independence*,[155] Justice Brennan outlined the benefits of governmental liability for civil rights violations, rather than emphasizing the benefits of individual liability as he did in *Carlson*.[156] Referring to the benefits of municipal liability for civil right violations, Justice Brennan stated:

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152. PETER H. SCHUCK, SUING GOVERNMENT: CITIZEN REMEDIES FOR OFFICIAL WRONGS 182-98 (1983).

153. *See id.* at 102-03.

154. *See id.* at 100.

155. 445 U.S. 622 (1980). In *Owen*, the Court determined that municipalities could not assert qualified or good faith immunity in 42 U.S.C. § 1983 actions. *See id.* at 650.

156. *See id.* at 651-52.

> [T]he threat that damages might be levied against the city may encourage those in a policymaking position to institute internal rules and programs designed to minimize the likelihood of unintentional infringements on constitutional rights. Such procedures are particularly beneficial in preventing those "systematic" injuries that result not so much from the conduct of any single individual, but from the interactive behavior of several government officials, each of whom may be acting in good faith.[157]

Justice Brennan also referred to the possibility that the threat of individual liability would result in "paralyzing the governing official's decisiveness and distorting his judgment on matters of public policy."[158]

On the issue of satisfactory compensation, commentators on *Bivens* jurisprudence have also emphasized the relative lack of meaningful financial judgments that have resulted from such claims.[159] The reluctance of juries and judges to award damages against individual employees prevents victims of constitutional wrongs from receiving a meaningful remedy.[160] Few claims survive to judgment, and the monetary awards are generally quite low.[161] One reason courts and jurors may be reluctant to subject an individual defendant to significant liability is the understanding that the individual is merely a stand-in for the larger governmental entity, and that to punish an individual for a systematic problem is unfair.[162]

Even if a large award is granted against an individual defendant, there is still the question of whether the defendant can satisfy such a judgment; clearly, there is no such limitation on a judgment against the United States.[163] Governmental liability, such as that under the FTCA, would maximize the plaintiff's chances of obtaining adequate compensation because of the vastly superior resources of the federal government as compared to an individual employee.[164]

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157. *Id.* at 652.

158. *Id.* at 655-56.

159. *See* SCHUCK, *supra* note 152, at 70 n.56; William P. Kratzke, *Some Recommendations Concerning Tort Liability of Government and Its Employees for Torts and Constitutional Torts*, 9 ADMIN. L.J. AM. U. 1105, 1143 (1996). As of 1982, of 10,000 *Bivens* claims, only 13 resulted in judgments. Kratzke, *supra*, at 1149-50.

160. *See* Christina Whitman, *Constitutional Torts*, 79 MICH L. REV. 5, 41-56 (1980). Professor Whitman extensively critiques the remedies provided by section 1983, which provides for individual liability against state officials for violations of constitutional rights. *See id.* at 7. One of Professor Whitman's suggestions is that equitable relief, rather than money damages would be a more effective way to prevent the occurrence of constitutional violations. *See id.* at 70.

161. *See* SCHUCK, *supra* note 152, at 70.

162. *See* Whitman, *supra* note 160, at 258-59.

163. *See* Thomas J. Madden et al., *Bedtime for* Bivens*: Substituting the United States as Defendant in Constitutional Tort Suits*, 20 HARV. J. ON LEGIS. 469, 473 (1983). Professors Madden, Alland, and Remes analyze legislation then pending in Congress to explicitly amend the FTCA to substitute the United States as a defendant for constitutional claims against individual federal employees. *See id.* at 476-97.

164. *See* SCHUCK, *supra* note 152, at 100-01.

Another barrier between a victim of constitutional wrong and a satisfactory resolution of his claim is the protection afforded individuals by qualified immunity. The qualified immunity defense protects a federal employee when his actions were not violations of clearly established law about which he reasonably should have known.[165] The judicial creation of qualified immunity may be yet another indication of the general reluctance to subject individual employees to liability for constitutional wrongs.[166] *Bivens* claims almost universally begin with the defendant's motion for summary judgment on the issue of qualified immunity. Litigation of the qualified immunity issue can consume a long period of time before the ultimate issue of whether the plaintiff's constitutional rights were violated is ever reached.[167] Often, the litigation never goes beyond the issue of immunity.

The qualified immunity defense also increases the amount of governmental resources that are expended in defending *Bivens* claims.[168] The defense of an FTCA claim is less costly because the qualified immunity defense and the attendant right to an interlocutory appeal is not available, and because the stakes are perceived to be less high when an individual's personal liability is not at issue.[169] Ironically, the qualified immunity defense which so limits a plaintiff's ability to recover is also of limited usefulness to a federal employee. The employee will still have to participate in and perhaps pay for several years of litigation while the qualified immunity issue is decided, even if the suit is ultimately dismissed.[170]

Several commentators have suggested that the threat of individual liability, rather than providing a deterrent to violations of civil rights, creates an atmosphere in which federal employee performance and decision making are adversely affected.[171] For example, Professor Schuck concludes that the possibility of individual liability has a negative effect on the performance of governmental officials by inhibiting vigorous decision making.[172] Risk avoidance behavior on the part of government officials leads to inaction, delay, formalism, and increased

165. *See* Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982).

166. *See* H. Allen Black, *Balance, Band-Aid, or Tourniquet: The Illusion of Qualified Immunity for Federal Officials*, 32 WM. & MARY L. REV. 733, 735 (1991). Professor Black argues that the FTCA should be amended to make it an explicit remedy for constitutional torts. *See id.*

167. Based on *Harlow*, defendants have the right to an immediate appeal of the qualified immunity issue, thus allowing the issue to considerably delay an adjudication of the merits of the constitutional claim. *See Harlow*, 457 U.S. at 813-14.

168. The United States Attorney's Office provides representation for federal employees in *Bivens* claims in most circumstances. *See* 28 C.F.R. § 50.15(a) (1990).

169. *See* Black, *supra* note 166, at 776-78. Professor Black focused on a problem intrinsic in the focus on qualified immunity. *See id.* at 773. The issue before the court is whether the individual employee reasonably should have known that his actions violated the constitution. *See id.* at 759. This misplaces the emphasis of the litigation which would more properly be on the issue of whether the plaintiff's rights were violated. *See id.* at 763-64. This misplaced emphasis also inhibits the development of clear guidance on what constitutes unconstitutional behavior. *See id.* at 765.

170. *See id.* at 752-53.

171. *See, e.g.*, SCHUCK, *supra* note 152, at 70-71; Madden et al., *supra* note 163, at 481-82.

172. *See* SCHUCK, *supra* note 152, at 55.

bureaucratism and to choosing the less controversial alternative when an official is faced with a decision.[173]

Of course there are some benefits provided by *Bivens* claims that are not presently available under the FTCA. A plaintiff does not have the option of a jury trial or punitive damages under the FTCA.[174] There are also procedural hurdles, such as the requirement of filing an administrative claim,[175] that are required under the FTCA but not in a *Bivens* claim. However, it is not at all clear that *Bivens* is a superior remedy to the FTCA. Indeed, in situations in which the source of the constitutional violation is based on an agency policy, *Bivens* might well provide no remedy against an individual official if he acted in good faith, while a claim under the FTCA could reach to the systemic source of the violation.[176]

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173. *See id.* at 59.

174. *See, e.g.*, 28 U.S.C. § 2674 (1994); Carlson v. Green, 446 U.S. 14, 22 (1980). At least one commentator has suggested that the FTCA's failure to provide for a jury trial would constitute a violation of the Seventh Amendment if the FTCA were the exclusive remedy for constitutional violations. *See* Roger W. Kirst, *Jury Trial and the Federal Tort Claims Act: Time to Recognize the Seventh Amendment Right*, 58 TEX. L. REV. 549, 550-51 (1980).

175. 28 U.S.C. § 2675(a), (b) (1994).

176. Since the 1974 amendments to the FTCA, there have been several attempts to again address the issue of federal governmental liability for constitutional wrongs through further amendment of the FTCA. *See* H.R. 700, 100th Cong. (1988); S. 829, 98th Cong. (1983); S. 775, 98th Cong. (1983); H.R. 595, 98th Cong. (1983); H.R. 7034, 97th Cong. (1982); H.R. 6359, 97th Cong. (1982); S. 1775, 97th Cong. (1981); H.R. 1696, 97th Cong. (1981); H.R. 24, 97th Cong. (1981); S. 695, 96th Cong. (1979); H.R. 2659, 96th Cong. (1979); H.R. 193, 96th Cong. (1979); S. 3314, 95th Cong. (1978); S. 2868, 95th Cong. (1978); S. 2117, 95th Cong. (1977); H.R. 12,715, 93d Cong. (1977); H.R. 9219, 95th Cong. (1977).

The most nearly successful attempt to address the dissatisfaction with the current scheme came in 1981, 1982 and 1983 when both the House and the Senate were considering proposed amendments to the FTCA. *See Title XIII of S. 829 — To Amend the Federal Tort Claims Act: Hearings Before the Subcomm. on Administrative Practice and Procedure of the Senate Comm. on the Judiciary*, 98th Cong. 136 (1983); *Hearings on H. R. 595, Before the Subcomm. on Admin. Law and Governmental Relations of the House Comm. on the Judiciary*, 98th Cong. 5 (1983); *Tort Claims: Hearings on H.R. 24, H.R. 3060 & H.R. 3795 Before the Subcomm. on Admin. Law and Governmental Relations of the House Comm. on the Judiciary*, 97th Cong., 1st & 2d Sess. 23 (1982); *Federal Tort Claims Act: Hearings on S. 1775 Before the Subcomm. on Agency Admin. of the Senate Comm. on the Judiciary, Part 1*, 97th Cong. (1981). Those proposed amendments would have made the United States the exclusive defendant for constitutional torts committed by federal employees within the scope of their employment. *See id.*; *see also* Madden et al., *supra* note 163, at 470. Government officials from the Justice Department, including the Director of the FBI, testified in favor of the amendments. *See, e.g.*, *Federal Tort Claims Act: Hearings on S. 1775 Before the Subcomm. on Agency Admin. of the Comm. on the Judiciary, Part* 2, 97th Cong. 2-3 (1982) (testimony of FBI director William Webster); *Tort Claims: Hearings on H.R. 24 Before the Subcomm. on Admin. Law & Governmental Relations of the House Comm. on the Judiciary*, 97th Cong. 22-23 (1982) (testimony of Deputy Attorney General Edward C. Schmults). Professor Peter H. Schuck also testified, expressing his belief that governmental liability would further the goals of compensation to the victims, encouragement of vigorous decision making by governmental officials, and improved deterrence. *See id.* at 13-14 (testimony of Peter H. Schuck).

Amendment of the FTCA to more explicitly allow for the bringing of constitutional torts would be an opportunity for Congress to not only allow plaintiffs to use the FTCA to redress civil rights claims, but could also be an opportunity to address additional issues raised by the use of the FTCA in civil rights litigation. Provisions for punitive damages, attorney's fees, and the right to a jury trial, might be included

B. The Stalled Expansion of Bivens

In deciding that *Bivens* was a superior remedy to the FTCA, the Court in *Carlson* apparently anticipated the continued expansion and strengthening of *Bivens* claims. However, rather than continuing to expand the *Bivens* remedy, in decisions following *Carlson* the Supreme Court has consistently declined to expand *Bivens* claims to other civil rights violations by federal officials.[177]

In *Chappell v. Wallace*,[178] *Bush v. Lucas*,[179] and *Schweiker v. Chilicky*,[180] respectively, the Court determined that *Bivens* would not be expanded to cover claims based on race discrimination in the military,[181] claims based on the exercise of First Amendment rights by a NASA employee,[182] or due process claims made by social security recipients.[183] The reasoning in these cases was starkly in contrast with the aggressive approach to the availability of *Bivens* claims set forth in *Carlson*.[184] Unlike in *Carlson*, the Court's decisions in *Chappell*, *Bush*, and

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in an amendment to provide a plaintiff with a civil rights claim against the United States rights and protections similar to those now afforded under 28 U.S.C. § 1983. *See* Madden et al., *supra* note 163, at 471-72; Black, *supra* note 166, at 777-78; *see also* Kirst, *supra* note 174, at 549. However, there seems little political will to pursue such a goal, and it seems unlikely that expansion of the scope of the FTCA will soon be accomplished through congressional action.

177. *See infra* notes 178-83 and accompanying text. Prior to *Carlson*, in Davis v. Passman, 442 U.S. 228 (1979), the Court allowed a *Bivens* claim for the violation of Fifth Amendment equal protection rights by a congressional employee who alleged she had been discriminated against on the basis of her gender. *See Davis*, 442 U.S. at 234.

178. 462 U.S. 296 (1983).

179. 462 U.S. 367 (1983).

180. 487 U.S. 412 (1988).

181. *See Chappell*, 462 U.S. at 304.

182. *See Bush*, 462 U.S at 390.

183. *See Schweiker*, 487 U.S. at 414; *see also* United States v. Stanley, 483 U.S. 669, 686 (1987) (holding that no *Bivens* claim available for solider injured in military service, even though no alternative remedy); Neely v. Blumenthal, 458 F. Supp. 945, 947 (D.D.C 1978) (refusing application of *Bivens* to a Title VII claim); Langster v. Schweiker, 565 F. Supp. 407, 419 (N.D. Ill. 1983) (denying application of *Bivens* to Social Security Administration civil rights claim); Gillam v. Roudebush, 547 F. Supp. 28, 33 (N.D. Ill. 1982) (holding that *Bivens* is inapplicable to First and Fourth Amendment Claims).

In *Chappell*, the Court determined that because the alleged constitutional violation arose in the context of the military, the "special factors" referred to in *Bivens*, counselled hesitation in the creation of a remedy. *See Chappell*, 462 U.S. at 298. The Court also pointed to the established system for discipline within the military as a mechanism already in place to deal with the problem. *See id.* at 302. In *Bush*, the Court similarly determined that a *Bivens* claim was not appropriate when a NASA employee claimed that he had been fired because of the exercise of First Amendment speech rights. *See Bush*, 462 U.S. at 390. The Court concluded that it should hesitate to create a remedy because Congress had unique expertise in dealing with federal personnel matters and Congress had created an elaborate system of civil service remedies to deal with federal employee grievances. *See id.* at 381-89. Again in *Schweiker*, the Court held that a due process claim based on the denial of social security benefits should not be the basis of a *Bivens* claim because deference to the remedial scheme created by Congress was appropriate. *See Schweiker*, 487 U.S. at 412. The Court reached this conclusion even though in the remedial scheme created by Congress for the denial of social security benefits, there was no damages remedy for this constitutional wrong. *See id.* at 449 (Brennan, J., dissenting).

184. In *Simpson v. McCarthy*, 741 F. Supp 95 (W.D. Pa. 1990), the court went so far to state that the part of *Carlson* "which urged the creation of constitutional torts unless Congress had provided a

Schweiker reflect little analysis of the adequacy of the alternative remedy provided by Congress.[185] Clearly, the kind of scrutiny the FTCA was given in *Carlson* to determine whether it provided an adequate remedy was no longer the standard.[186] Since *Carlson* there had clearly been a shift in the will of the Court to expand civil rights claims.[187]

The expansion of *Bivens* as a far-reaching remedy for constitutional claims has not occurred. Concurrently, the potential breadth of the FTCA as a mechanism for redress of constitutional claims has not been realized. Ironically, were *Carlson* decided today, the fate of the FTCA might well be quite different. Applying the standards developed in *Chappell*, *Bush*, and *Schweiker*, the FTCA could be perceived as an adequate remedy for improper medical treatment at a correctional facility, therefore obviating the need for a *Bivens* claim. Had that happened, the pressure to read the FTCA broadly would have continued rather than being constrained as dictated by *Carlson*. Having created a paradigm in *Bivens* that precluded two complementary civil rights remedies, the Court chose the extension of *Bivens* rather than the amplification of the FTCA. However, as the law stands today, neither *Bivens* nor the FTCA provides a satisfactory mechanism for redress of civil rights claims against the United States.

The limitations of the present interpretation of the two remedies is made clear, for example, in *Federal Deposit Insurance Corp. v. Meyer*.[188] In *Meyer*, the Supreme Court held that a constitutional claim against the federal government was not cognizable under the FTCA.[189] Justice Thomas, writing the opinion for a

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remedial scheme equivalent to *Bivens* and had expressly stated that the remedy was exclusive, is not good law." *Simpson*, 741 F. Supp. at 97.

185. And, in the case of *Schweiker*, the fact that Congress had decided not to create a remedy at all was not considered a basis for the Court to create a cause of action. *See Schweiker*, 487 U.S. at 415.

186. The reason for this shift in analysis cannot be explained solely by the different factual contexts in which the cases arose. While special deference may be more appropriate in the context of the military, there seems to be little principled reason why the federal prison system should be any less within the expertise of Congress than federal employees, or the social security system. *See* Gene R. Nichol, Bivens, Chilicky, *and Constitutional Damages Claims*, 75 VA. L. REV. 1117, 1126-27 (1989); Joan Steinman, *Backing Off* Bivens *and the Ramifications of this Retreat for the Vindication of First Amendment Rights*, 83 MICH. L. REV. 269, 294-95 (1984).

187. Rather than writing the opinion of the Court, Justice Brennan became the dissenter in *Schweiker*, and argued that the remedial mechanisms provided by Congress for those denied social security benefits did not preclude recognition of a *Bivens* claim. *See Schweiker*, 487 U.S. at 431 (Brennan, J., dissenting). Justice Brennan pointed to the inadequacies of the remedial scheme provided by Congress for denial of social security benefits: constitutional challenges cannot be raised during administrative review and no consequential damages can be awarded. *See id.* at 436 (Brennan, J., dissenting). Further, Justice Brennan stated that Congress, in creating a remedial mechanism for those denied social security benefits, did not mean to preclude a *Bivens* claim. *See id.* at 431 (Brennan, J., dissenting). Justice Brennan also concluded that unlike in *Chappell* (military discipline) and *Bush* (federal employment), Congress had no special expertise in the area of the social welfare system which made it appropriate for the courts to defer from creating remedies. *See id.* at 440-44 (Brennan, J., dissenting). By 1988, however, these arguments no longer won the day, and instead, the expansion of *Bivens* was further limited. *See id.* at 414.

188. 510 U.S. 471 (1994).

189. *See id.* at 477-78.

unanimous Court, based its conclusion that no constitutional claim could be brought on the language requiring that liability under the FTCA be based on the "law of the place" and on its determination that that requirement means "the law of the State."[190] Justice Thomas emphasized that "the United States has not rendered itself liable under § 1346(b) for constitutional tort claims."[191]

The Court declined to extend *Bivens* liability to federal agencies, determining that a constitutional claim could not be implied against the FDIC.[192] A *Bivens* claim the plaintiff had previously brought against an FDIC employee had been dismissed based on qualified immunity.[193] The Court cited *Carlson*, concluding that a *Bivens* claim directly against an individual employee should not be circumvented by allowing a similar claim directly against a federal agency: "[i]f we were to imply a damages action directly against federal agencies, thereby permitting claimants to bypass qualified immunity, there would be no reason for aggrieved parties to bring damages actions against individual officers. Under [that] regime, the deterrent effects of the *Bivens* remedy would be lost."[194] Thus, foreclosed from a claim based on the FTCA and prevented from an extension of *Bivens* liability, the plaintiff in *Meyers* was left without a remedy.

Conclusion

Neither *Bivens* nor the FTCA has become a vigorous mechanism for the redress of constitutional claims. The failure of the FTCA to be used as such a mechanism can largely be laid at the door of the *Carlson* decision, which interpreted the FTCA in such a narrow way that it precluded expansive use of the statute. Ironically, the *Carlson* decision seems intended to make a strong case for the necessity of *Bivens*. However, the expansive and aggressive approach to *Bivens* that the *Carlson* court sought to promote has also failed to survive.

If the opportunity presented by the 1974 amendments to the FTCA had been taken, the current landscape with respect to civil rights claims might be quite different. Instead of only an unreliable remedy against individual federal employees, victims of unconstitutional acts by the federal government might also be able to seek redress directly against the most responsible party, the United States.

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190. *Id.* Interestingly, none of the authority Justice Thomas cited for this proposition discuss the impact that the 1974 amendments to the FTCA had on 28 U.S.C. § 1346; indeed, most of the cases cites to illustrate the meaning of the "law of the place" are pre-1974. *See id.*

191. *Id.* at 478.

192. *See id.* at 484-85.

193. *See id.* at 485.

194. *Id.*