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THE *BIVENS* REMEDY IN PRISONERS' RIGHTS LITIGATION

Federal and state prisoners often seek to challenge the constitutionality of the conditions of prison life.[1] Section 1983 of Title 42 of the United States Code (section 1983)[2] provides a statutory remedy for damages actions brought against state and local officials to redress deprivations of civil rights.[3] Under the authority of section 1983, prisoners may bring civil rights suits in federal courts against state prison officials.[4] Section 1983, however, does not authorize prisoners to sue federal prison officials.[5] In *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*,[6] the United States Supreme Court established a private right of action implied directly from the United States Constitution under which persons may sue federal officials to redress deprivations of federal constitutional rights.[7] The *Bivens*

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[1] *See* PRISONER CIVIL RIGHTS COMMITTEE, FEDERAL JUDICIAL CENTER, RECOMMENDED PROCEDURES FOR HANDLING PRISONER CIVIL RIGHTS CASES IN FEDERAL COURTS, 8-9 (1980) [hereinafter cited as ALDERSERT REPORT] (describing significant volume of prisoner rights cases and citing Annual Report of the Director of the Administrative Office of the United States Courts 1979 and Report of the Study Group on the Caseload of the Supreme Court, 57 F.R.D. 573 (1972)).

[2] 42 U.S.C. § 1983 (1976 & Supp. IV 1980).

[3] *Id.* Section 1983 is a derivative of § 1 of the Civil Rights Act of 1871. Act of April 20, 1871, ch. 22, § 1, 17 Stat. 13 (1871) (current version at 42 U.S.C. § 1983 (1976 & Supp. IV 1980)). Congress enacted the 1871 Civil Rights Act during the Reconstruction Period primarily to provide civil rights protection against state government toleration of widespread violence inflicted upon Blacks. *See* Monroe v. Pape, 365 U.S. 167, 174-80 (1961), *overruled*, 436 U.S. 658 (1978); CONG. GLOBE, 42nd Cong., 1st Sess. 315, 334, 374, 428, 505, 653 (1871) (comments of Reps. Burchard, Hoar, Lowe, and Beatty, and Sens. Pratt and Osborn, respectively). Until the 1960s, however, judicially afforded relief under § 1983 was rare and often ineffective. Comment, *The Civil Rights Act: Emergence of an Adequate Federal Civil Remedy?*, 26 IND. L. J. 361 (1951); *See Developments in the Law: Section 1983 and Federalism*, 90 HARV. L. REV. 1133, 1167-79 (1977) [hereinafter cited as *Section 1983 and Federalism*]. In *Monroe v. Pape*, the Supreme Court resurrected the § 1983 cause of action by recognizing a civil damages remedy for persons injured by the constitutional violations of state officials. 365 U.S. 167, 171-87 (1961). After the *Monroe* decision, the volume of civil rights cases brought under § 1983 increased dramatically. *See Section 1983 and Federalism*, *supra*, at 1136.

[4] *See generally* Turner, *When Prisoners Sue: A Study of Prisoner Section 1983 Suits in the Federal Courts*, 92 HARV. L. REV. 610 (1979) (analysis of prisoner § 1983 suits brought against state prison officials).

[5] 42 U.S.C. § 1983 (1976 & Supp. IV 1980). The statutory remedy most analogous to the § 1983 cause of action is the Federal Torts Claim Act (FTCA). Ch. 753, § 410(a), 60 Stat. 843 (1946) (current version at 28 U.S.C. §§ 1346, 1402, 1504, 2110, 2401-2402, 2411-2412, 2671-2680 (1976 & Supp. V 1981)) (allowing parties to sue United States government for tortious conduct of federal officials); *see infra* notes 119-124 and accompanying text (describing FTCA).

[6] 403 U.S. 388 (1971).

[7] *Id.* at 390-97. The remedy the *Bivens* decision created generally is available only to

remedy, therefore, provides a method by which prisoners may sue

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plaintiffs suing federal, as opposed to state, defendants. *See infra* notes 19-25 and accompanying text (describing *Bivens* remedy). A number of lower federal courts, however, chose to extend the *Bivens* theory to the fourteenth amendment and found municipalities liable for civil rights violations after the Supreme Court limited the scope of § 1983 actions to exclude municipalites from the statute's coverage. *See* Monroe v. Pape, 365 U.S. 167, 191-92 (1961) (excluding municipalities from liability under § 1983); 42 U.S.C. § 1983 (Supp. IV 1980); *see, e.g.*, Sanabria v. Village of Monticello, 424 F. Supp. 402, 410-11 (S.D.N.Y. 1976) (cause of action allowed under fourteenth amendment in action against municipality when plaintiff alleged physical abuse by city police officers); Shifrin v. Wilson, 412 F. Supp. 1282, 1288, 1305-06 (D. D.C. 1976) (supplemental opinion) (cause of action granted under fourteenth amendment in action against District of Columbia when plaintiff alleged unlawful arrest while making public speech); Collum v. Yurkovich, 409 F. Supp. 557, 559 (N.D. Ill. 1975) (cause of action under fourteenth amendment in action against city when plaintiff alleged beating inflicted by police officers); Williams v. Brown, 398 F. Supp. 155, 156 (N.D. Ill. 1975) (cause of action under fourteenth amendment in action against city when plaintiff alleged unlawful arrest); Maybanks v. Ingraham, 378 F. Supp. 913, 914-16 (E.D. Pa. 1974) (cause of action under fourteenth amendment in action against city when former city employee alleged racial discrimination in employment dismissal). *But see* Mitchell v. Chester County Farms Prison, 426 F. Supp. 271, 274 n.5 (E.D. Pa. 1976) (no cause of action under fourteenth amendment in action against county prison).

The Supreme Court recognized that some lower courts were implying causes of action directly from the fourteenth amendment, but the Court chose to defer a decision upon whether the lower courts' actions were proper. *See* Mt. Healthy City School Dist. Bd. of Educ. v. Doyle, 429 U.S. 274, 278 (1977). The Court later eliminated the obstacle to municipal liability that initially encouraged the lower courts to extend the *Bivens* theory to the fourteenth amendment, by establishing that municipalities are liable under § 1983. *See* Monell v. Dep't of Social Servs., 436 U.S. 658, 690 (1978); *see also* Owen v. City of Independence, 445 U.S. 622, 650 (1980) (good faith defense unavailable to municipalities under § 1983). Nevertheless, in certain situations § 1983 may not be as effective a remedy as the remedy provided by the *Bivens* cause of action. *See, e.g.*, Parratt v. Taylor, 451 U.S. 527, 543-44 (1981) (§ 1983 relief unavailable when deprivation of property resulted not from established state procedure but from negligence of state agents and when state provided adequate remedy); Crocker, *When Cops are Robbers—Municipal Liability for Police Misconduct Under Section 1983 and* Bivens, 15 U. RICH. L. REV. 295, 305-16 (1981) (§ 1983 less effective remedy than *Bivens* remedy in cases involving municipal inaction causing injury); Note, *Vicarious Municipal Liability: Creating a Consistent Remedial Policy for Local Government Violations of Civil Rights*, 16 CAL. W.L. REV. 58, 65-69 (1980) (§ 1983 not equally effective alternative remedy to *Bivens* actions because municipalities not completely liable under vicarious liability).

A commentator has argued that the Supreme Court's decision in *Carlson v. Green*, 446 U.S. 14 (1980), does not establish that the availability of § 1983 necessarily precludes *Bivens* claims against unconstitutional state action. *See* Wolcher, *Soverign Immunity and the Supremacy Clause: Damages Against States in Their Own Courts for Constitutional Violations*, 69 CALIF. L. REV. 189, 293 (1981). The argument's foundation is the *Green* Court's statement that a parallel statutory remedy will not preclude a judicially implied remedy unless Congress explicitly declares that the statute provides an exclusive remedy. *See* Carlson v. Green, 446 U.S. 14, 18-19 (1980); *infra* notes 43-47 and accompanying text (holding in *Carlson v. Green*). Thus, the narrow legislative intent limitation established in *Green* appears to permit *Bivens* actions against state officials and local governments because nothing in the language or legislative history of § 1983 declares the statute to be a substitute for a judicially implied remedy. *See* 446 U.S. at 30 (Burger, C.J., dissenting).

In most recent decisions, however, courts have been unwilling to imply a *Bivens* cause of action when § 1983 was available. *See, e.g.*, Ward v. Caulk, 650 F.2d 1144, 1147-48 (9th

federal officials for violations of the prisoners' constitutional rights.[8]

The nature of prison life breeds prisoners' complaints,[9] the majority of which are frivolous.[10] Among the many frivolous prisoner rights cases, however, a significant number of meritorious complaints exist which raise important constitutional questions.[11] The excessive number of section 1983 suits brought by state prisoners in recent years has overburdened federal courts and created serious problems in identifying meritorious prisoners' claims.[12] In contrast to the proliferation of state

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Cir. 1981) (construing *Carlson v. Green*) (no basis for constitutionally implied action when statutory remedy available under § 1983); Rogin v. Bensalem Township, 616 F.2d 680, 685-86 (3d Cir. 1980) (cause of action implied from fourteenth amendment unnecessary when § 1983 available), *cert. denied*, 450 U.S. 1029 (1981); City of West Haven v. Turpin, 591 F.2d 426, 427 (2d Cir. 1979) (per curiam) *on remand from* 439 U.S. 974, *cert. denied*, 439 U.S. at 988 (1978) (vacating 579 F.2d 152 (2d Cir. 1978) (en banc)) (*Monell* decision eliminates need to imply cause of action against municipality under fourteenth amendment); Cale v. City of Covington, 586 F.2d 311, 318 (4th Cir. 1978) (vacating decision implying cause of action under the fourteenth amendment); Kostka v. Hogg, 560 F.2d 37, 44 (1st Cir. 1977) (no basis for constitutionally implied remedy when statutory remedy available under § 1983); Pagano v. Hadley, 535 F. Supp. 92, 100 (D. Del. 1982) (direct damages action not implicit in fourteenth amendment); Strong v. Demopolis City Bd. of Educ., 515 F. Supp. 730, 732 n.1 (S.D. Ala. 1981) (fourteenth amendment does not afford implied cause of action); Harris v. Arizona Bd. of Regents, 528 F. Supp. 987, 993 (D. Ariz. 1981) (no constitutionally based cause of action inferred when statutory remedy under § 1983 available); Bell v. City of Philadelphia, 511 F. Supp. 1156, 1160 (E.D. Pa. 1981) (declining to imply cause of action from fourteenth amendment when § 1983 remedy available); Highfield Water Co. v. Public Serv. Comm'n, 488 F. Supp. 1176, 1193 (D. Md. 1980) (remedy not implied from constitution when § 1983 cause of action existed); Ohland v. City of Montpelier, 467 F. Supp. 324, 348 (D. Vt. 1979) (declining to imply cause of action directly from constitution when § 1983 claim stated). *But see* Jones v. City of Memphis, 586 F.2d 622, 624 (6th Cir. 1978) (plaintiff has direct cause of action against municipality for violation of constitutional rights), *cert. denied*, 440 U.S. 914 (1974); Rhodes v. City of Wichita, 516 F. Supp. 501, 502 (D. Ka. 1981) (*Bivens* action allowed against city under fourteenth amendment); *cf.* Goss v. San Jacinto Junior College, 588 F.2d 96, 98 n.2 (5th Cir. 1979) (dictum) (Fifth Circuit has implied causes of action from fourteenth amendment); Smith v. Jordan, 527 F. Supp. 167, 172-73 (S.D. Ohio 1981) (dictum) (*Bivens* claim under fourth amendment would be permitted against state officials).

[8] *See* Carlson v. Green, 446 U.S. 14, 18-23 (1980) (allowing *Bivens* action against federal prison official); *infra* text accompanying notes 38-42 (discussing *Carlson v. Green*). Federal prisoners file the overwhelming majority of *Bivens* suits brought in the litigation of prisoners' rights, although state prisoners have brought *Bivens* actions against federal officials on rare occasions. *See, e.g.*, Nees v. Bishop, 524 F. Supp. 1310, 1312-13 (D. Colo. 1981) (*Bivens* cause of action established when federal agent allegedly deprived state prisoner of sixth amendment right to counsel).

[9] *See* Preiser v. Rodriguez, 411 U.S. 475, 492 (1973) (potential for prisoners' disputes).

[10] *See* ALDERSERT REPORT, *supra* note 1, at 9-10 (citing Annual Report of the Director of the Administrative Office of the United States Court, 57 F.R.D. 573 (1972)).

[11] *See id.* at 7, 11 (significant number of prisoners' complaints raise important constitutional questions).

[12] *See id.* at 11. *See generally* Turner, *supra* note 4 (overburdening of federal judicial system resulted from growth in number of prisoner § 1983 suits); Note, *Limitation of State Prisoners' Civil Rights Suits in Federal Courts*, 27 CATH. U. L. REV. 115 (1977) [hereinafter cited as *Limitation of State Prisoners' Suits*] (increasing prisoner § 1983 suits creating strain on federal judicial system).

prisoners' section 1983 suits, the number of federal prisoners' petitions has declined, presumably due to the effectiveness of federal inmate greivance procedures.[13] Federal prisoners' complaints are subject, nevertheless, to the rigorous screening processes that courts have created to limit the growing number of state prisoners' section 1983 suits.[14] An additional problem federal prisoners encounter is the lack of an effective statutory remedy in suits against federal officials.[15] The only legal recourses available to federal prisoners suing federal officials for deprivations of the prisoners' constitutional rights are the remedies that the *Bivens* cause of action, the Federal Tort Claims Act,[16] and the federal statutes of habeas corpus[17] and mandamus[18] provide.

The Supreme Court initiated the development of the constitutionally implied cause of action[19] in 1971 with the *Bivens* deci-

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[13] *See* ALDERSERT REPORT, *supra* note 1, at 2 n.9 (decline in federal prisoner cases possibly result of federal inmate grievance procedures); 28 C.F.R. § 542.10 (1981) (administrative remedy procedure for inmates confined in Bureau of Prisons institutions). Established by the Bureau of Prisons, the administrative remedy procedure enables inmates to seek formal review of complaints relating to imprisonment. *Id.* The procedure initially requires inmates to attempt to resolve their complaints informally with Bureau of Prisons staff members. *Id.* § 542.13(a). If informal resolution is unsuccessful, inmates may file a formal written complaint. *Id.* § 542.13(b). Once an inmate files a formal complaint, the Warden of the federal prison normally must respond within thirty days. *Id.* § 542.14. If an inmate is not satisfied with the Warden's response, the inmate may appeal the response to the Regional Director and finally, if necessary to the Bureau of Prisons' Office of General Counsel. *Id.* § 542.15.

[14] *See Limitation of State Prisoners' Suits*, *supra* note 12, at 119-22 (courts have broad discretion to dismiss in forma pauperis prisoners' suits that courts deem frivolous or malicious). The discretionary judicial practice of dismissing in forma pauperis petitions greatly restricts prisoners' rights actions because most prisoners file in forma pauperis petitions to bring court actions without paying filing fees. *See* 28 U.S.C. § 1915(a) (1976) (authorizing federal courts to commence actions brought by persons unable to pay court fees); *Limitation of State Prisoners' Suits*, *supra* note 12, at 119 n.6. Courts also dismiss most suits in which prisoners fail to exhaust administrative remedies properly before the prisoners file court actions. *See infra* note 75 (exhaustion requirement in prisoners' suits).

[15] *See infra* text accompanying notes 119-35 (describing FTCA as a remedy for prisoners' suits against federal officials). The FTCA allows direct recovery against the federal government for certain intentional torts committed by federal officials. 28 U.S.C. § 2680(h) (1976). In *Carlson v. Green*, however, the Supreme Court held that the availability of damages under the FTCA does not preclude a *Bivens* claim because the remedy provided by the FTCA is less effective than the *Bivens* remedy. 446 U.S. at 19-23 (1980).

[16] Federal Tort Claims Act, ch. 753, § 410(a), 60 Stat. 843 (1946) (current version at 28 U.S.C. §§ 1346, 1402, 1504, 2110, 2401-2402, 2411-2412, 2671-2680 (1976 & Supp. V 1981).

[17] 28 U.S.C. § 2241 (1976).

[18] *Id.* § 1361.

[19] *See* Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388 (1971). A private cause of action exists when the plaintiff is a member of a class that may invoke the court's power to decide a controversy on the legal merits. *See* Davis v. Passman, 442 U.S. 228, 239-40 n.18 (1979). Before the court determines whether a cause of action is present, the plaintiff's complaint must demonstrate that the court has jurisdiction to hear the case. *Id.* In cases in which the complaint asserts a constitutionally implied cause of action, a substantial claim that the Court may imply a remedy from the Constitution will

sion.[20] In *Bivens*, the plaintiff sought damages from federal officials who allegedly performed an illegal search and seizure.[21] The *Bivens* Court

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support federal subject matter jurisdiction. *See* 13 C. WRIGHT, A. MILLER & E. COOPER, FEDERAL PRACTICE & PROCEDURE § 3562 (1975). If the court finds that the plaintiff's complaint presents a substantial claim that an implied constitutional remedy exists, then the court should evaluate the substantive legal issues involved to determine whether the allegations in the complaint state a cause of action upon which the court can grant relief. *See* Bell v. Hood, 327 U.S. 678, 682 (1946).

In addition to establishing an implied constitutional remedy, the Supreme Court has implied causes of action from rights created by particular federal statutes that do not expressly provide a private remedy. *See, e.g.*, Merrill Lynch, Pierce, Fenner & Smith v. Curran, 102 S. Ct. 1825, 1839-41 (1982) (private cause of action implicit in Commodities Exchange Act); Transamerica Mortgage Advisors, Inc. v. Lewis, 444 U.S. 11, 18-19 (1979) (implied private remedies exist under § 215 but not under § 206 of the Investment Advisors Act of 1940); J.I. Case Co. v. Borak, 377 U.S. 426, 431-34 (1964) (implied cause of action provided under § 14(a) of the Securities Exchange Act of 1934); Texas & Pac. Ry. Co. v. Rigsby, 241 U.S. 33, 39-42 (1916) (Court implied railroad employee's personal injury action from federal statute prescribing railroad equipment standards). The Supreme Court has restricted substantially the statutory implication doctrine in recent years. *See generally* Comment, *A New Direction for Implied Causes of Action*, 48 FORDHAM L. REV. 505 (1980); Note, *The Implication Doctrine After* Touche Ross *and* Transamerica: *The State of Implied Causes of Action in Federal Regulatory Statutes*, 26 VILL. L. REV. 433 (1980-81).

Statutorily implied remedies do not provide an important legal device in the litigation of prisoners' rights. In the few prisoners' suits that have asserted statutorily implied remedies, courts generally have refused to imply causes of action. *See, e.g.*, Micklus v. Carlson, 632 F.2d 227, 233-39 (3d Cir. 1980) (when young adult offender alleged injury due to governmental noncompliance with Federal Youth Corrections Act (YCA) cause of action implied from due process clause of fifth amendment rather than directly from YCA); Owens v. Haas, 601 F.2d 1242, 1247-48 (2d Cir.) (no cause of action implied from statute authorizing United States to contract with local authorities for imprisonment of federal prisoners when federal prisoners sued for injuries allegedly incurred while housed in county jail pursuant to contract), *cert. denied*, 444 U.S. 980 (1979); Wentworth v. Solem, 548 F.2d 773, 775 (8th Cir. 1977) (no cause of action implied from federal statutes regulating transportation and labeling of goods made by prisoners when state prisoner alleged illegal operation of prison industries).

[20] 403 U.S. 388, 390-97 (1971). The Supreme Court established the base for the *Bivens* decision twenty-five years earlier in *Bell v. Hood*. *See* 327 U.S. 678 (1946), *noted in* 403 U.S. at 389, 392. In *Bell*, the Court held that federal district courts have federal question jurisdiction over claims for damages against federal officials who allegedly violated the fourth amendment rights of individuals. 327 U.S. at 684-85; *see* 28 U.S.C. § 1331 (1976 & Supp. V 1981) (providing federal question jurisdiction). The *Bell* Court reserved judgment, however, on the issue of whether courts properly may imply such claims directly from the Constitution. *See* 327 U.S. at 694-95 (recognizing *Bell* as case of first impression). Commentators have followed closely the development of the *Bivens* remedy. *See generally* Note, *"Damages or Nothing"—The Efficacy of the* Bivens*-Type Remedy*, 64 CORNELL L. REV. 667 (1979); Note, Bivens *and the Creation of a Cause of Action for Money Damages Arising Directly from the Due Process Clause*, 29 EMORY L. J. 231 (1980); Note, *Remedies for Constitutional Torts: "Special Factors Counseling Hesitation,"* 9 IND. L. REV. 441 (1976) [hereinafter cited as *Remedies*]; Note, *The Limits of Implied Constitutional Damage Actions: New Boundaries for* Bivens, 55 N.Y.U. L. REV. 1238 (1980) [hereinafter cited as *Limits of Implied Actions*].

[21] 403 U.S. at 389-90. The plaintiff's complaint in *Bivens* asserted that agents of the Federal Bureau of Narcotics, acting without a warrant or probable cause and using

concluded that the allegations in the plaintiff's complaint sufficiently stated a cause of action under the fourth amendment.[22] Although the Court recognized that the explicit language of the fourth amendment does not provide a mechanism for the fourth amendment's enforcement, the Court held that, based upon the general remedial powers of the federal courts, an action for damages was implicit within the scope of the protection the fourth amendment affords.[23] The Court concluded, therefore, that the *Bivens* plaintiff was entitled to receive a monetary award to redress any injuries he suffered as a result of the agents' violation of his fourth amendment rights.[24] The *Bivens* Court suggested, however, that the Court might not have implied a remedy for damages from the Constitution if special factors had been present to discourage the Court from considering issues Congress had not taken affirmative action on.[25]

Ten years after the *Bivens* decision the Supreme Court decided two cases in successive terms that clarified and expanded the constitutionally implied damages remedy. In *Davis v. Passman*,[26] the plaintiff, a congressional staffperson dismissed from work because of her sex, brought an action for damages against the congressman who fired her.[27] The Court

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unreasonable force, arrested and shackled Bivens, the plaintiff, in the view of his family. *Id.* at 389. Although the complaint did not state explictly that the agents performed the search and seizure without probable cause, the Court implied this allegation from other language within the complaint. *See id.* at 389 n. 1. The agents allegedly proceeded to search Bivens' residence thoroughly. *Id.* at 389. The complaint further asserted that the officers interrogated Bivens and subjected him to a visual strip search at a federal courthouse. *Id.*

[22] *Id.* at 390-95, 97.

[23] *Id.* at 395-97.

[24] *Id.* at 397. The *Bivens* concurrence stated that a damage remedy was necessary to redress Bivens' injuries because other alternative remedies either was inadequate or inapplicable. *Id.* at 409-10 (Harlan, J., concurring). Injunctive relief would have been useless to Bivens since an injunction could not rectify the past harm. *Id.* Also, assuming that prosecutors had not brought any criminal charges against Bivens, the exclusionary rule was not an applicable remedy. *Id.* Further, state remedies were inadequate since the fourth amendment's protection of privacy interests usually is more extensive than the protection afforded by state trespass laws. *Id.* at 394-95; *Id.* at 409 (Harlan, J., concurring).

[25] 403 U.S. at 396. The *Bivens* Court cited two examples of situations in which special factors might be present that would limit the Court's willingness to find a constitutionally implied cause of action. *Id.* at 396-97. In the first example, the Court suggested that federal fiscal policy matters could act as special factors. *Id.* (citing United States v. Standard Oil Co., 332 U.S. 301, 311 (1974) (implied cause of action unavailable for government to recover expenses incurred after solider tortiously injured since Congressional policy to authorize expenditures rather than receive payments). In another example, the Court stated that a special factor existed when a congressional employee's conduct exceeded his authority but did not constitute an unconstitutional act. *Id.* at 396-97 (citing Wheeldin v. Wheeler, 373 U.S. 647, 652 (1963) (implied cause of action denied to plaintiff seeking damages for congressional employee's illegal but not unconstitutional conduct). The Supreme Court developed the special factors limitation to the implication doctrine in the later cases. *See infra* note 45.

[26] 442 U.S. 228 (1979).

[27] 442 U.S. at 230-31. The defendant in *Davis* was a United States Congressman from Louisiana when the case began. *Id.* The Congressman hired the plaintiff, Davis, as an administrative assistant, and then fired her six months later. *Id.* After terminating Davis's em-

held that the equal protection component of the due process clause of the fifth amendment provides a right to be free from gender discrimination.[28] Therefore, because the plaintiff, Davis, asserted a violation of her fifth amendment right to due process and the only method available to vindicate her rights was the power of the judiciary, the Court held that Davis had a cause of action under the Constitution.[29] In determining whether a damages remedy was available to redress the injuries resulting from violations of the due process clause of the fifth amendment, the Court considered several factors. First, the Court established that federal courts were capable of deciding the allocation of monetary relief in decisions like *Davis* since that case did not present complex questions of valuation or causation.[30] Next, the Court stated that alternative forms of relief were not available to Davis.[31] Additionally, the Court held that Congress had not expressly preempted the judiciary from implying a constitutional remedy in the *Davis* case.[32] Finally, the *Davis* Court held that the creation of an implied constitutional remedy for violations of the fifth amendment due process clause would not flood the federal courts with similar cases.[33] The Court stated that, in any case, the limits imposed on judicial resources should not affect the protection of constitutional principles.[34] The Court also suggested but did not decide that a suit brought against a congressman for actions within his official capacity could present special concerns that, as the Court had pronounced in *Bivens*, might limit the implication of constitutional remedies.[35] The Court concluded that the plaintiff in *Davis* was entitled

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ployment, the Congressman wrote a letter to Davis in which he explicitly stated that she had been a capable worker but that a man should occupy the position. *Id.* at 230 n.3.

[28] *Id.* at 235.

[29] *Id.* at 243-44. A statute providing a means to enforce nondiscriminatory employment actions for congressional staffpersons was not available to Davis. *See id.* at 243-44 n. 21.

[30] *Id.* at 245. The *Davis* Court stated that federal courts were familiar with evaluating sex discrimination claims in which backpay remedies were sought, because of the courts' experience with suits brought under Title VII of the Civil Rights Act of 1964. *Id.*; *see* 42 U.S.C. § 2000e-5(g) (1976 & Supp. IV 1980).

[31] 442 U.S. at 245. The *Davis* Court observed that equitable relief in the form of job reinstatement was inappropriate because the defendant was no longer a congressman and thus incapable of rehiring Davis. *Id.*

[32] *Id.* at 246-47. The *Davis* Court found that Title VII of the Civil Rights Act of 1964 did not establish an explicit congressional declaration that would foreclose the implication of judicial remedies for persons whom the Act does not protect. 442 U.S. at 247.

[33] *Id.* at 248.

[34] *Id.*

[35] *Id.* at 246; *see* 403 U.S. at 396; *supra* note 25 and accompanying text (special factor limitation in *Bivens* decision). The *Davis* Court suggested that under the speech or debate clause of the Constitution, art. I, § 6, cl. 1, a Congressman might be immune from suits for actions the Congressman performs within the scope of his official conduct. *See* 446 U.S. at 235 n.11, 246. The Court chose to remand the issue of whether the speech and debate clause shielded Passman from liability. *See id.* at 236 n. 11. The Court clearly stated, however, that absent a lower court's finding of Passman's immunity under the speech and debate clause, Passman could be held personally liable for any violations of Davis' fifth amendment due process rights. *Id.* at 246.

to a cause of action for damages to vindicate any violation of her fifth amendment right to due process.[36]

In *Carlson v. Green*,[37] the Supreme Court extended the scope of the *Bivens* cause of action to include suits brought to redress injuries caused by federal officials' violations of the eighth amendment.[38] In *Green*, plaintiff's decedent, while incarcerated in federal prison, died allegedly as a result of inadequate medical attention.[39] The plaintiff in *Green* could have presented the allegations in the complaint as a claim against the United States under the Federal Tort Claims Act (FTCA).[40] The *Green* Court established, however, that a *Bivens* claim for damages against the individual federal officers was an appropriate remedy to redress the injuries caused by the officers' alleged violation of the eighth amendment.[41] By reasoning that the *Bivens* remedy was more effective than the available FTCA remedy, the Court justified granting the plaintiff's *Bivens* claim.[42]

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[36] *Id.* at 248.

[37] 446 U.S. 14 (1980).

[38] *Id.* at 16, 18-23. The eighth amendment of the Constitution provides the right to be free from cruel and unusual punishment. U.S. CONST. amend. VIII. The *Green* Court did not explain the extension of the *Bivens* remedy to eighth amendment violations. Instead, the Court primarily addressed the issue of whether Congress intended to limit the plaintiff's suit to an action under the FTCA. 446 U.S. at 18-23; *see infra* text accompanying notes 40-42. In fact, the language of the *Green* opinion suggests that the *Bivens* decision created a remedy for victims of constitutional violations in general. *See* 446 U.S. at 18.

[39] 446 U.S. at 16 n. 1. The plaintiff in *Green* sued on behalf of the estate of her deceased son, a federal prisoner at the time of his death. *Id.* at 16. In the complaint, the plaintiff alleged that her son, who was afflicted with a serious asthmatic condition, died as a result of the defendants' incompetent medical attention. *Id.* at 16 n. 1. The plaintiff asserted that the defendants kept the prisoner in a medical facility which the defendants knew was grossly inadequate, against the advice of doctors. *Id.* When the prisoner had the asthmatic attack which eventually led to his death, the defendants allegedly did not provide the prisoner with competent medical attention for eight hours and they allegedly delayed excessively in transferring the prisoner to an outside hospital. *Id.* The plaintiff asserted that the prisoner's attack was made more severe because the defendants administered contra-indicated drugs to the prisoner and impeded the prisoner's breathing by using a respirator the defendants knew was inoperative. *Id.*

[40] 446 U.S. 14, 20 (1980); *see* 28 U.S.C. § 2680(h) (1976) (allowing direct recovery against the United States for certain intentional torts committed by federal officials); *infra* text accompanying notes 116-24 (describing Federal Tort Claims Act).

[41] 446 U.S. 14, 18-23 (1980).

[42] *Id.* at 20-23. The Court provided four reasons to support the decision in *Green* that the *Bivens* remedy was more effective than the FTCA remedy. First, the Court stated that the *Bivens* remedy served as a more effective deterrent to unconstitutional actions by federal officials because the remedy is directly recoverable against individual tortfeasors whereas the United States pays the judgments that courts award to successful FTCA plaintiffs. *Id.* at 21. Second, the FTCA prohibits punitive damages awards, but punitive damages are available in *Bivens* actions. 446 U.S. at 22; *see* 28 U.S.C. § 2674 (1976). Third, a jury is an available option in a *Bivens* action, but not in a FTCA suit. 446 U.S. at 22; *see* 28 U.S.C. § 2402 (1976). Fourth, under the FTCA the liability of the United States is determined according to the laws of the state in which the alleged tortious conduct occurred and, thus, the suc-

The *Green* Court clearly stated that federal courts should not restrict *Bivens* actions brought to redress constitutional injuries caused by federal officials unless defendants can demonstrate that one of two limitations apply.[43] One limitation may arise from special factors that advise against judicial involvement in the absence of affirmative action by Congress.[44] The Court, however, has not provided clear guidance as to what constitutes a special factor.[45] Situations in which an equally effective statutory alternative is available also preclude *Bivens* claims, but only if Congress explicitly has declared that the statute is a substitute to a judicially implied remedy under the Constitution.[46] By requiring defendants in *Bivens* suits to demonstrate one of the two specified limitations to obtain a dismissal of the cause of action, the *Green* Court established a presumption favoring judicial implication of *Bivens* remedies.[47]

The federal judiciary has responded affirmatively to the *Bivens* doctrine and consequently, the *Bivens* cause of action has become an established mechanism in the litigation of civil rights disputes. Lower courts began to extend the constitutionally implied damages remedy to amendments other than the fourth even before the Supreme Court's decisions in *Davis* and *Green*.[48] The potential application of the *Bivens*

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cess of FTCA claims may vary depending upon where the misconduct allegedly took place. 446 U.S. at 23. In contrast, uniform federal laws govern *Bivens* claims. 446 U.S. at 23.

[43] 446 U.S. at 18-19.

[44] *Id.* at 18; *see* Davis v. Passman, 442 U.S. 228, 246 (1976); Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388, 396 (1971).

[45] *See* 446 U.S. at 27 (Powell, J., concurring). The Supreme Court has not defined clearly what constitutes a special factor limiting a constitutionally implied cause of action, although the Court has suggested examples. In *Bivens*, the Court suggested that considerations of federal fiscal policy or unlawful, but not unconstitutional, conduct were special factors courts must consider. 403 U.S. at 396-97; *see supra* note 25. The *Davis* Court added that political questions and the speech and debate clause of the Constitution were also special factors. 442 U.S. at 242, 246; *see supra* notes 35-36 and accompanying text. In *Green*, the Court suggested that a special factor also might exist when fear of personal liability might deter government officials from effectively exercising their authority. 446 U.S. at 19 (1980); *see supra* note 25. *See generally* Note, *Remedies*, *supra* note 20, at 453-67 (special factors limitation in *Bivens* suits); *Limits of Implied Actions*, *supra* note 20, at 1251-65 (survey of special factors in *Bivens* actions).

[46] 446 U.S. at 18-19; *see infra* note 124 (proposed legislation to amend FTCA to expressly provide adequate substitute for *Bivens* actions). *See generally Limits of Implied Actions*, supra note 20, at 1248-51 (congressional intent limitation in *Bivens* actions).

[47] *See* 446 U.S. at 26 (Powell, J., concurring).

[48] *See, e.g.*, Jacobson v. Tahoe Regional Planning Agency, 556 F.2d 1353, 1358 (9th Cir. 1977) (fifth amendment) (cause of action allowed when plaintiffs alleged rezoning land deprived them of property without due process), *rev'd in part, aff'd in part on other grounds sub. nom.* Lake Country Estates, Inc. v. Tahoe Regional Planning Agency, 440 U.S. 391 (1979); Dellums v. Powell, 566 F.2d 167, 174, 195 (D.C. Cir. 1977) (first amendment) (cause of action established when District of Columbia police officials ordered arrests of lawfully gathered persons), *cert. denied*, 435 U.S. 916, (1978); Cox v. Stanton, 529 F.2d 47, 50 (4th Cir. 1975) (thirteenth amendment) (cause of action established when black woman sued county for her involuntary permanent sterilization); Berlin Democratic Club v. Rusfeld, 410 F.

remedy expanded even further when, in 1976, Congress passed an amendment to the general federal question jurisdiction statute, section 1331(a) of Title 28 of the United States Code (section 1331(a)),[49] eliminating the $10,000 amount in controversy requirement for actions brought against federal officials.[50] Because section 1331(a) is the jurisdictional predicate for *Bivens* causes of action,[51] Congress' removal of the historical amount in controversy requirement lightened the burden on plaintiffs seeking *Bivens* remedies. Although plaintiffs apparently utilize the *Bivens* action predominately to seek relief in the form of damages, *Bivens* plaintiffs pursuing injunctive relief especially benefit by not having to allege a minimum amount in controversy.[52]

Supp. 144, 160-61 (D. D.C. 1976) (sixth amendment) (cause of action established when United States Army allegedly intercepted communications between plaintiff's attorney and consultant on plaintiff's criminal case); Patmore v. Carlson, 392 F. Supp. 737, 740 (E.D. Ill. 1975) (eighth amendment) (cause of action established when prison officials allegedly brutally asaulted prisoner); Dahl v. City of Palo Alto, 372 F. Supp. 647, 650-51 (N.D. Cal. 1974) (fourteenth amendment) (cause of action for deprivation of property without due process when city rezoned plaintiff's land). *See generally* Lehmann, Bivens *and its Progeny: The Scope of a Constitutional Cause of Action for Torts Committed by Government Officials*, 4 HASTINGS CONST. L.Q. 531 (1977) (exhaustive survey of lower federal court extensions of *Bivens* remedy to amendments).

[49] 28 U.S.C. § 1331(a) (1976 & Supp. V 1981) (federal district courts have original jurisdiction over civil actions arising under federal Constitution, laws, or treaties).

[50] Act of October 21, 1976, Pub. L. No. 94-574, § 1, 90 Stat. 2721 (codified as amended at 28 U.S.C. § 1331(a) (Supp. V 1981)) (removing historical $10,000 amount in controversy requirement in actions under federal law against United States, federal agencies, or federal employees in official capacity). Congress completely eliminated the amount in controversy requirement for general federal question cases with the enactment of the Federal Question Jurisdictional Amendments Act of 1980. Pub. L. No. 96-486, § 2(a), 94 Stat. 2369 (codified at 28 U.S.C. § 1331(a) (Supp. V 1981)). The 1976 amendment, however, was the significant enactment from the perspective of *Bivens* plaintiffs since plaintiffs generally bring *Bivens* claims against federal officials. *See supra* note 8 (federal prisoners file overwhelming majority of prisoners' *Bivens* suits).

[51] *See* Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388, 398 (1971) (Harlan, J., concurring). The *Bivens* majority opinion did not establish clearly the jurisdictional predicate for *Bivens* claims. The concurring opinion, however, suggested that section 1331(a), not §§ 1343(a)(3)-(4) of Title 28 of the United States Code, was the jurisdictional base for the plaintiff's claims in *Bivens*. 403 U.S. at 398 n. 1; *see* 28 U.S.C. §§ 1343(a)(3), (4) (1976 & Supp. V 1981) (federal district courts have original jurisdiction over actions challenging deprivations, under color of state law, of federal civil rights). In subsequent decisions, the Court has established that § 1331 is the proper jurisdictional predicate for constitutionally implied causes of action. *See* Carlson v. Green, 446 U.S. 14, 16 (1980); Davis v. Passman, 442 U.S. 228, 231 (1979).

[52] *See supra* note 50 (lack of amount in controversy requirement in federal question suits). Although the *Bivens*, *Davis*, and *Green* plaintiffs all sought damages, lower federal courts generally have held that injunctive relief also is available as a remedy in claims brought under the *Bivens* cause of action. *See* 403 U.S. at 390-91; 442 U.S. at 231; 446 U.S. at 16; *see, e.g.*, Micklus v. Carlson, 632 F.2d 227, 241 (3rd Cir. 1980) (prisoner bringing *Bivens* cause of action for violation of due process clause of fifth amendment entitled to injunctive relief upon proving constitutional violation); Lewis v. S.S. Baune, 534 F.2d 1115, 1122 (5th Cir. 1976) (dictum) (citing *Bivens* as authority for proposition that courts have power to enjoin harassment or repeated invasions of privacy); Wounded Knee Legal Defense/Offense

In contrast to the beneficial absence of an amount in controversy requirement, the sovereign immunity[53] of the United States government operates as a critical obstacle to plaintiffs bringing *Bivens* suits. The United States is not subject to direct lawsuits unless the federal government has waived sovereign immunity.[54] The federal government has not waived immunity for general constitutional torts committed by federal officials.[55] Therefore, *Bivens* claimants must sue individual federal officials directly. Also, because the doctrine of respondeat superior is not available in suits brought directly under the Constitution,[56] *Bivens* plain-

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Comm. v. F.B.I., 507 F.2d 1281, 1284 (8th Cir. 1974) (federal courts have power to grant injunctive relief in *Bivens* claim asserting that federal agents deprived plaintiffs of constitutional rights); United States v. Various Articles of Obscene Merchandise, 514 F. Supp. 463, 469 (S.D.N.Y. 1981) (federal court has power to award injunctive relief in *Bivens* action alleging infringement of fifth amendment right to due process); Doe v. United States Civil Serv. Comm'n, 483 F. Supp. 539, 564 n. 22 (S.D.N.Y. 1980) (courts may award injunctive relief in *Bivens* action even though *Bivens* and *Davis* involved claims for money damages); Wetmore v. Fields, 458 F. Supp. 1131, 1147 (W.D. Wis. 1978) (preliminary injunction granted in inmates' action claiming federal officials' interference with constitutional right of access to courts). *But see* Wheeler v. United States, 640 F.2d 1116, 1120 n. 8 (9th Cir. 1981) (dictum) (*Bivens* action traditionally has provided means of obtaining damages, not injunctions); *Lehmann, supra* note 48, at 561-62 (*Bivens* cause of action should not provide basis for injunctive relief). The commentator viewed the *Bivens* holding narrowly and hypothesized problems in applying a limited legal damages remedy in conjunction with the broad scope of equitable remedies previously available in federal courts. *Lehmann, supra* note 48, at 561-62. The commentator's argument probably is not valid any longer in view of the Supreme Court's subsequent expansion of the *Bivens* doctrine in *Green*, 446 U.S. 14, and *Davis*, 442 U.S. 28. *See supra* text accompanying notes 26-47. Moreover, the *Davis* Court stated that the issuance of injunctions is an established practice to protect constitutional rights. 442 U.S. at 242 (dictum) (quoting Bell v. Hood, 327 U.S. 678, 684 (1946), and citing *Bivens*, 403 U.S. at 400 (Harlan, J., concurring)).

[53] *See* BLACK'S LAW DICTIONARY 1252 (5th ed. 1979) (sovereign immunity doctrine precludes litigants from suing sovereign unless sovereign consents to suit).

[54] *See* United States v. Mitchell, 445 U.S. 535, 538 (1980) (United States immune from suit except when immunity waived), *reh'g denied*, 446 U.S. 992 (1980); United States v. Sherwood, 312 U.S. 584, 586 (1941) (United States immune from suit except when immunity waived).

[55] *See* Butz v. Economou, 438 U.S. 478, 504 (1978) (dictum) (barrier of sovereign immunity frequently impenetrable in *Bivens* suits); Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388, 410 (1971) (Harlan, J., concurring) (plaintiff limited to action against individual officials since federal government immune from suit); Laswell v. Brown, 683 F.2d 261, 268 (8th Cir. 1982) (sovereign immunity bars *Bivens* suits against United States). *But see infra* note 124 (legislative proposal to make United States government liable for constitutional torts committed by federal officials).

[56] *See*, e.g., Laswell v. Brown, 683 F.2d 261, 268 (8th Cir. 1982) (doctrine of respondeat superior not applicable in *Bivens* suits); Jones v. City of Memphis, 586 F.2d 622, 623 (6th Cir. 1978) (doctrine of respondeat superior inapplicable in action brought directly under fourteenth amendment), *cert. denied*, 440 U.S. 914 (1979); Kite v. Kelley, 546 F.2d 334, 337-38 (10th Cir. 1976) (respondeat superior inapplicable in action brought under the Constitution); Black v. United States, 534 F.2d 524, 527-28 (2d Cir. 1976) (respondeat superior inapplicable in actions against federal officials). The common-law doctrine of respondeat superior holds an employer legally responsible for the conduct of the employer's agents or employees who act within the scope of legitimate authority. BLACK'S LAW DICTIONARY 1179 (5th ed. 1979).

tiffs must identify the federal officials directly responsible for the alleged violation.[57] Supervisory officials of federal agencies are proper defendants only if they participated in or knew of the alleged misconduct.[58] The unavailability of the doctrine of respondeat superior also restricts the amount that *Bivens* claimants may recover to the assets of the federal officials against whom the claim is brought.[59] The relatively low incomes of federal civil servants often preclude the recovery of substantial monetary awards against federal officials.[60] Moreover, most *Bivens* plaintiffs seeking to recover court-awarded judgments will be unable to garnish the wages of federal officials.[61] Thus, even if plaintiffs in *Bivens* suits are able to identify the proper federal defendants, and are successful in the lawsuit, *Bivens* plaintiffs may have difficulty obtaining the full amount of damages awarded.

Bivens claimants may not bring actions against government officials in every case, however, since federal officials sometimes may assert the affirmative defense of immunity from suit.[62] In *Butz v. Econo-*

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[57] *See* Laswell v. Brown, 683 F.2d 261, 268 (8th Cir. 1982) (*Bivens* defendants must have been involved actively in alleged constitutional violation); Black v. United States, 534 F.2d 524, 527-28 (2d Cir. 1976) (in actions against federal officials plaintiff must allege defendant's direct responsibility).

[58] *See supra* note 56. Since the specific federal officials committing tortious acts may be difficult to identify, many plainiffs file complaints naming "unknown" officials as defendants and courts may allow the plaintiff an opportunity to identify the defendants through discovery. *See, e.g.*, Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388, 390 n. 2 (1971) (district court ordered complaint naming unknown federal agents served upon agents that government records indicated participated in alleged misconduct); Jaffee v. United States, 663 F.2d 1226, 1226 (3d Cir. 1981) (en banc) (complaint named unknown defendants whose names would be inserted when discovered), *cert. denied*, 102 S. Ct. 2234 (1982); Gillespie v. Civiletti, 629 F.2d 637, 642-43 (9th Cir. 1980) (plaintiff entitled to discover identity of "John Doe" defendants); Spock v. United States, 464 F. Supp. 510, 518 (S.D.N.Y.1978) ("unknown agents" appropriate designation for existing persons whose names plaintiff did not know yet). *But see* Black v. United States, 534 F.2d 524, 528 (2d Cir. 1976) (dismissing complaint brought against unknown officials when plaintiff made suspect inquiries about officials' names).

[59] *See supra* notes 54-55 (United States government not liable for constitutional torts committed by federal employees).

[60] *See* S. REP. No. 588, 93rd Cong., 2nd Sess. 1, *reprinted in* 1974 U.S. CODE CONG. & AD. NEWS 2789, 2790.

[61] *See* Buchanan v. Alexander, 45 U.S. (4 How.) 10, 11 (1845); May Dept. Stores Co. v. Smith, 572 F.2d 1275, 1276 (8th Cir.), *cert. denied*, 439 U.S. 837 (1978); Overmann v. United States, 563 F.2d 1287, 1291 (8th Cir. 1977). Garnishment is an ancilliary statutory proceeding whereby a party's tangible assets, such as wages, which are under control of a third party, are applied directly to payment of a judgment in favor of the opposing party in the original action. BLACK'S LAW DICTIONARY 612 (5th ed. 1979).

[62] *See* Harlow v. Fitzgerald, 102 S. Ct. 2727, 2732-38 (1982). The Supreme Court has established two types of immunity defenses to protect government officials from undue interference with the performance of their duties. Legislators and judges, acting in their official capacity, are completely protected from suit under the defense of absolute immunity. *Id.* at 2732-33 (citing Eastland v. United States Servicemen's Fund, 421 U.S. 491 (1975) and Stump v. Sparkman, 435 U.S. 349 (1978)). Absolute immunity also extends to prosecutors,

mou,[63] the Supreme Court established that a *Bivens* claim would subject most federal officials to liability unless the defendant official could successfully assert a qualified immunity defense.[64] The qualified immunity defense traditionally allowed federal officials to escape liability if the defendant officials satisfied objective and subjective elements of the defense.[65] The objective element of the defense required officials to demonstrate that they reasonably should not have known, or did not know, that the action would cause the deprivation of another's constitutional rights.[66] The subjective element of the defense required officials to have acted without an intent to maliciously violate the constitutional rights of others.[67] The Supreme Court recently found that the amorphous nature of the subjective element of the qualified immunity defense prolonged the litigation of insubstantial claims, thereby diminishing federal productivity and creating excessive government litigation costs.[68] The Court, therefore, eliminated the subjective element of the qualified immunity defense.[69] In the future, the qualified immunity defense generally will protect government officials from liability unless officials acting within the scope of official responsibility violate clearly established constitutional or federal statutory rights of which a reasonable person should have had knowledge.[70]

Despite the limitations of the *Bivens* cause of action,[71] many plaintiffs sue federal officials under the *Bivens* theory.[72] The *Bivens* remedy is crucial in federal prisoner litigation since prisoners suing federal officials have limited effective means to redress violations of the prisoners' constitutional rights.[73] To litigate a *Bivens* claim, however, federal prisoners must overcome procedural hurdles.[74] Moreover, many

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executive officers engaged in adjudicative functions and to the President of the United States. *See* Butz v. Economou, 438 U.S. 478, 508-17 (1978); Nixon v. Fitzgerald, 102 S. Ct. 2690, 2700-701 (1982). Most other federal officials have the defense of qualified immunity. *Harlow*, 102 S. Ct. at 2737-38.

[63] 438 U.S. 478 (1978).

[64] *Id.* at 504-08.

[65] Wood v. Strickland, 420 U.S. 308, 321-22 (1975), *reh'g denied*, 421 U.S. 921 (1975).

[66] *Id.* at 321.

[67] *Id.*

[68] *See* Harlow v. Fitzgerald, 102 S. Ct. 2727, 2737-38 (1982).

[69] *Id.* at 2737-38.

[70] *Id.*

[71] *See supra* notes 53-70 and accompanying text (limitations of *Bivens* remedy).

[72] *See Hearings on S. 1775 Before the Subcomm. on Agency Admin. of the Comm. on the Judiciary*, 97th Cong., 1st Sess. 12 (1979) (prepared statement of Deputy Attorney General Schmults) (Department of Justice estimates over 2,000 constitutional tort claims pending against federal officials).

[73] *See infra* notes 113-55 and accompanying text (effectivenss and availability of FTCA, habeas corpus and mandamus remedies to prisoners).

[74] *See* Note, *"Damages or Nothing"—The Efficacy of the* Bivens*-Type Remedy*, 64 CORNELL L. REV. 667, 674-82 (1979) (discussion of statute of limitations and personal jurisdiction obstacles confronting *Bivens* plaintiffs).

courts require federal prisoners to exhaust all remedies available under the Federal Bureau of Prisons grievance procedures.[75] The policy reasons for imposing an exhaustion requirement on plaintiffs include using agency expertise to develop a factual record, reinforcing the integrity of the administrative process, and restricting the caseloads of already overburdened courts.[76] The exhaustion requirement may impose a substantial hardship on prisoners, however, by effectively denying prisoners' claims, significantly delaying the redress of injuries, or causing prisoners to incur further injury by not allowing expedient recovery.[77] To obviate the hardship caused by the exhaustion requirement, some courts have not required exhaustion when the administrative remedies available to plaintiffs are inadequate.[78] Thus, because the Bureau of Prisons' administrative provisions do not authorize prison officials to resolve damage claims,[79] the Fourth Circuit has held that prisoners' *Bivens* claims for damages may proceed directly to court.[80] In any case,

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[75] *See* Brice v. Day, 604 F.2d 664, 666-68 (10th Cir.) (*Bivens* claim brought by federal prisoners dismissed for failure to exhaust administrative remedies), *cert. denied*, 444 U.S. 1086 (1979); Jones v. Carlson, 495 F.2d 209, 210 (5th Cir. 1974) (per curiam) (federal prisoners could not maintain action for injunctive relief absent exhaustion of administrative remedies in accordance with Bureau of Prisons policy statement); Soyka v. Alldredge, 481 F.2d 303, 306 (3rd Cir. 1973) (federal prisoner failing to exhaust administrative remedies could not maintain habeas corpus proceeding); Waddell v. Alldredge, 480 F.2d 1078, 1079-80 (3d Cir. 1973) (mandamus action dismissed when federal inmates failed to exhaust administrative remedies); Paden v. United States, 430 F.2d 882, 883 (5th Cir. 1970) (per curiam) (federal prisoners' petition for court order denied for failure to exhaust Bureau of Prisons administrative remedies); *supra* note 13 (describing Federal Bureau of Prisons grievance procedures).

[76] *See* Zacharias, *Exhaustion of Administrative Remedies—A Synthesis of the Law and a Proposed Statute for Federal Prison Cases*, 4 NEW ENG. J. OF PRISON LAW 5, 9-14 (1977).

[77] *See id.* at 16-21.

[78] *See, e.g.*, United States *ex rel.* Marrero v. Warden, 483 F.2d 656 (3rd Cir. 1973) (requirement of exhaustion of remedies waived when administrative remedies would be futile in habeas corpus action on parole status), *rev'd on other grounds*, 417 U.S. 653, *reh'g denied*, 419 U.S. 1014 (1974); Green v. Nelson, 442 F. Supp. 1047, 1052 (D. Conn. 1977) (federal prisoner not required to exhaust administrative remedies when correction officials not competent to decide constitutional question involved in prisoner's denial of parole); Brown v. Carlson, 431 F. Supp. 755, 762-63 (W.D. Wis. 1977) (exhaustion of administrative remedies not required in habeas corpus petition by federal prisoners seeking transfer); Cravatt v. Thomas, 399 F. Supp. 956, 970 (W.D. Wis. 1975) (federal prisoner bringing habeas corpus petition not required to exhaust administrative remedies when sole claim involved constitutional question); *c.f.* Miller v. Stanmore, 636 F.2d 986, 991 n. 8 (5th Cir. 1981) (suggesting exhaustion not required if Bureau of Prisons administrative procedure itself violates due process rights).

[79] *See* 28 C.F.R. §§ 542.10-.16 (1981).

[80] *See* Bey v. United States, No. 79-6828, slip. op. at 3, 4 (4th Cir. April 28, 1981) (per curiam) (federal prisoners bringing *Bivens* actions for damages under first amendment not required to exhaust Bureau of Prisons administrative remedies); Abdul-Khabir v. Lichtenberger, 518 F. Supp. 673, 675 (E.D. Va. 1981) (federal prisoner not required to exhaust administrative remedies before suing to recover damages for alleged constitutional

as the Fifth Circuit has stated, courts should not dismiss prisoners' complaints for failure to exhaust administrative remedies before allowing prisoner plaintiffs an opportunity to demonstrate that the prisoners have exhausted all available administrative remedies, or that the exhaustion requirement should not apply because administrative remedies are inadequate.[81]

Even if federal prisoners have fulfilled the exhaustion requirement, the prisoners' *Bivens* suits may be unsuccessful since federal officials are entitled to a defense of qualified immunity for actions taken within the scope of their official duties.[82] Although the Supreme Court has not ruled upon the degree of immunity available to federal prison officials,[83] the Court considered the immunity of state prison officials in *Procunier v. Navarette*.[84] In *Procunier*, a state prisoner brought an action under section 1983.[85] The complaint alleged that prison officials had violated the prisoner's constitutional rights by interfering with the prisoner's mail.[86] The Court found that the first amendment did not protect the mailing privileges of state prisoners at the time of the prison officials' alleged misconduct.[87] Ruling upon the defendants' defense of qualified immunity, the *Procunier* Court held that the prison officials were immune from any liability resulting from the violation of an undeclared constitutional prescription.[88]

The qualified immunity defense also protected a federal prison official from liability in a *Bivens* suit brought in the Sixth Circuit.[89] In *Jihaad v. O'Brien*,[90] a federal prisoner alleged that federal prison officials had deprived the prisoner of his constitutional rights by disciplining the prisoner for refusing to obey an order to shave.[91] The *Jihaad* court found

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violations). *But c.f.* Brice v. Day, 604 F.2d 664 (10th Cir. 1979) (per curiam) (federal prisoner bringing *Bivens* action under eighth amendment required to exhaust administrative remedies), *cert. denied*, 444 U.S. 1086 (1980).

[81] *See* Miller v. Stanmore, 636 F.2d 986, 991 (5th Cir. 1981) (prisoners' *Bivens* claim alleging constitutional violations stated cause of action).

[82] *See supra* notes 63-70 and accompanying text (qualified immunity defense).

[83] *But c.f.* Carlson v. Green, 446 U.S. 14, 19 (1980) (dictum) (doctrine of qualified immunity sufficient to protect federal prison officials from excessive personal liability).

[84] 434 U.S. 555 (1978).

[85] *Id.* at 556; *see supra* note 3 and accompanying text (§ 1983 cause of action).

[86] 434 U.S. at 557.

[87] *Id.* at 562-63.

[88] *Id.* at 562-65.

[89] *See* Jihaad v. O'Brien, 645 F.2d 556, 561 (6th Cir. 1981) (citing Procunier v. Navarett, 434 U.S. 555 (1978)).

[90] 645 F.2d 556.

[91] *Id.* at 588. In *Jihaad*, the plaintiff wore a beard when he first arrived in prison. *Id.* When prison officials ordered the plaintiff, Jihaad, to shave his beard, the prisoner did so willingly. *Id.* Purportedly for religious reasons, the plaintiff grew another beard shortly thereafter. *Id.* After Jihaad refused an order by a staff officer to shave, O'Brien, the defendant and the Chairman of the Institution Discipline Committee, held a disciplinary hearing. *Id.* O'Brien found Jihaad guilty of violating prison regulations, ordered Jihaad to shave his

that because a clearly established constitutional right of prisoners to exercise religious freedom by wearing beards did not exist, the federal prison official was immune from suit.[92] The Eighth Circuit provided another federal prison official with qualified immunity in a *Bivens* action.[93] In *Ervin v. Ciccone*,[94] a former federal prisoner brought an action for damages alleging that federal prison officials placed the prisoner in punitive solitary confinement in violation of the prisoner's fifth amendment right of due process.[95] The *Ervin* court held that a clearly established constitutional right of prisoners to notice and hearing prior to the imposition of disciplinary actions was not in effect at the time the alleged injustice occurred.[96] The Eighth Circuit found, therefore, that the federal officials were entitled to qualified immunity from monetary liability for the alleged denial of the prisoner's due process rights.[97] In *Nees v. Bishop*,[98] however, a district court held that a Federal Bureau of Investigation (FBI) agent was not entitled to qualified immunity from damages liability in a *Bivens* suit.[99] In *Bishop*, an FBI agent asserted the qualified immunity defense in an action brought by a state prisoner alleging the denial of the plaintiff's sixth amendment right to counsel in a criminal proceeding.[100] The court ruled that, although the FBI agent had acted in good faith the unreasonableness of the agent's action barred the agent from asserting the qualified immunity defense.[101]

Courts addressing the immunity of federal officials from liability in prisoners' suits have considered primarily whether the officials reasonably should have recognized that the officials' actions would con-

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beard, and placed the prisoner in disciplinary segregation for seven days. *Id.* The plaintiff claimed that O'Brien had deprived Jihaad of his first amendment right to exercise religious freedom. *Id.*

[92] *Id.* at 561.

[93] *See* Ervin v. Ciccone, 557 F.2d 1260 (8th Cir. 1977).

[94] *Id.*

[95] *Id.* at 1261-62. In *Ervin*, the plaintiff also alleged that the condition of his solitary confinement violated the eighth amendment's proscription against cruel and unusual punishment. *Id.* at 1262. The *Ervin* court ruled that punitive solitary confinement in itself does not constitute cruel and unusual punishment. *Id.* The plaintiff further asserted that the defendant prison officials had taken retaliatory action against him because he was involved in preparing legal material for other inmates. *Id.* The court held that prison officials constitutionally could prohibit a prisoner from giving legal assistance to other inmates as long as the officials provided legal assistance from persons trained in the law. *Id.*

[96] *Id.* at 1262.

[97] *Id.*

[98] 524 F. Supp. 1310 (D. Colo. 1981).

[99] *Id.* at 1313.

[100] *Id.* at 1311. The *Bishop* plaintiff alleged that after he was arrested on a federal charge, jailed, and was awaiting trail he was denied the right to speak with an attorney. *Id.* Police refused to permit a state public defender to see the plaintiff. *Id.* At trial, the district court found a constitutional violation and assessed damages against the defendant officials. *Id.* Following the conclusion of the trial, the defendant requested an appeal on the issue of immunity. *Id.*

[101] *Id.* at 1313.

stitute a constitutional violation.[102] By not deliberating upon whether the federal officials maliciously intended to violate the prisoners' constitutional rights, courts evaluating the immunity of federal officials from prisoners' suits seem to have disregarded the subjective element of the qualified immunity defense.[103] Thus, the Supreme Court's recent elimination of the subjective element of the qualified immunity defense[104] probably will not affect the application of the defense in future prisoners' suits brought against federal officials.

In furtherance of the limitations confronting prisoners bringing *Bivens* suits, prisoners' *Bivens* claims are subject to motions to dismiss if claimants fail to present facts that demonstrate constitutional violations. For example, *Bivens* claims have been dismissed for failing to state constitutional claims when a probation officer refused to assume discretionary supervision of a prisoner,[105] and also when prison officials removed a fellow inmate from plaintiff's official visiting list without a prior hearing.[106] Courts however, should liberally interpret prisoners' pro se complaints since pro se claimants draft pleadings without receiving legal assistance.[107] Circuit courts, therefore, have overturned some lower court decisions dismissing prisoners' *Bivens* claims for failure to state a constitutional claim by holding the prisoners' pro se complaints

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[102] *See supra* notes 89-101 and accompanying text (cases addressing qualified immunity of federal officials in prisoners' suits).

[103] *See id.*

[104] *See* Harlow v. Fitzgerald, 102 S. Ct. 2727, 2737-38 (1982); *supra* text accompanying notes 68-70.

[105] *See* DeCosta v. United States Dist. Ct., 445 F. Supp. 989, 990-91 (D. Minn. 1978). In *DeCosta*, the plaintiff sought to continue his college education in Minnesota when he was released on parole from a federal prison in Minnesota. *Id.* at 990. The Minnesota probation officer refused to accept supervision of the plaintiff because the plaintiff was not a Minnesota resident and the plaintiff had a lengthy criminal record. *Id.* The Court ruled that the federal probation officer had discretionary authority to refuse to assume parole supervision over the plaintiff. *Id.* at 991. Consequently, the court found that the plaintiff had not alleged a constitutional violation and the court granted defendants' motion to dismiss. *Id.*

[106] *See* Fennell v. Carlson, 466 F. Supp. 56, 59 (W.D. Okla. 1978). In *Fennell*, a federal prisoner alleged that prison officials violated the prisoner's fifth amendment right to due process when the officials removed another inmate from the prisoner's visiting list. *Id.* at 58. The court held that a prisoner has no constitutional right to prison visitation and, therefore, the prisoner's claim failed to state a constitutional cause of action. *Id.* at 59. The court also found that the prison officials' limiting of the plaintiff's visiting privileges furthered a legitimate governmental interest. *Id.* at 60 n. 1.

[107] *See* Haines v. Kerner, 404 U.S. 519, 520-21 (per curiam) (holding state prisoner's pro se complaint to less stringent standards than attorney-drafted formal pleadings), *reh'g denied*, 405 U.S. 948 (1972). The overwhelming majority of prisoners filing judicial actions are pro se cliamants. *See* ALDERSERT REPORT, *supra* note 1, at 2, 3. In liberally interpreting a prisoner's pro se *Bivens* complaint, the Fifth Circuit recently held that courts should not dismiss prisoners' complaints unless the complaint clearly contains no facts that would entitle a prisoner to relief. Miller v. Stanmore, 636 F.2d 986, 992 (5th Cir. 1981) (citing Conley v. Gibson, 355 U.S. 41, 45-46 (1957)) (prisoners' *Bivens* claim alleging constitutional violations stated cause of action).

to less stringent standards than pleadings attorneys have drafted.[108]

Despite the obstacles, some federal prisoners have successfully presented constitutional causes of action in *Bivens* suits. Courts have found violations of prisoners' first amendment rights when prison officials unreasonably restricted mailing privileges[109] and when officials disregarded a name change a prisoner made for religious reasons.[110] Federal prisoners have also presented valid *Bivens* claims by alleging violations of the fifth amendment right to procedural due process when federal officials deprived prisoners of protected liberty interests.[111] Moreover, some courts have found violations of the eighth amendment's proscription against cruel and unusual punishment when prisoners'

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[108] *See, e.g.*, Milhouse v. Carlson, 652 F.2d 371, 373-74 (3d Cir. 1981) (federal prisoner's allegations of conspiratorily planned, retaliatory disciplinary actions by prison officials stated cause of action); Miller v. Stanmore, 636 F.2d 986, 992 (5th Cir. 1981) (federal prisoner and wife stated constitutional claim alleging wife's visiting privileges suspended and prisoner's good time credits withdrawn without due process under fifth amendment).

[109] *See* Intersimone v. Carlson, 512 F. Supp. 526, 530-31 (M.D. Pa. 1980) (federal prison officials' overbroad correspondence restrictions infringed prisoner's first amendment rights).

[110] *See* Salahuddin v. Carlson, 523 F. Supp. 314, 316 (E.D. Va. 1981) (cause of action stated in complaint alleging federal prison officials failed to give proper effect to court order legally changing prisoner's name).

[111] *See* Evans v. Dillahunty, 662 F.2d 522, 527 (8th Cir. 1981); Micklus v. Carlson, 632 F.2d 227, 239 (3d Cir. 1980); Walker v. Hughes, 558 F.2d 1247, 1255-56 (6th Cir. 1977); Bono v. Saxbe, 450 F. Supp. 934, 941 (E.D. Ill. 1978); Murphy v. Fenton, 464 F. Supp. 53, 57 (M.D. Pa. 1978). Prison officials may not deprive prisoners of protected liberty interests without providing prisoners with procedural due process protections. *See* Vitek v. Jones, 445 U.S. 480, 488-89 (1980) (prisoner liberty interests protected by fourteenth amendment due process rights). Constitutionally sufficient prison disciplinary proceedings may furnish procedural due process protection of liberty interests. *See generally* Babcock, *Due Process in Prison Disciplinary Proceedings*, 22 B.C. L. REV. 1009 (1981) (concluding prison disciplinary proceedings generally afford prisoners minimal due process protection). In certain prisoners' *Bivens* actions, the Constitution provides liberty interests entitling prisoners to fifth amendment due process protection. *See, e.g.*, Murphy v. Fenton, 464 F. Supp. 53, 57 (M.D. Pa. 1978) (conditions in administrative segregation unit created liberty interest protected by procedural due process).

Courts also have implied prisoners' liberty interests from federal statutes and regulations in *Bivens* suits. *See* Evans v. Dillahunty, 662 F.2d 522, 526 (8th Cir. 1981) (federal parole statute creates constitutionally protected expectation of liberty); Micklus v. Carlson, 632 F.2 227, 237-39 (3d Cir. 1980) (Youth Correction Act's mandate of segregation and special treatment of youth offenders created liberty interest protecting youth offender's fifth amendment due process rights). Federal prison policy statements also may create expectations of liberty. *See* Walker v. Hughes, 558 F.2d 1247, 1255-56 (6th Cir. 1977) (Bureau of Prisons policy statement created liberty interest by leading inmates to expect imposition of disciplinary sanctions only on finding of major misconduct); Bono v. Saxbe, 450 F. Supp. 934, 941 (E.D. Ill. 1978) (federal prison's policy statements created protected liberty interest by encouraging inmates to believe behavior conforming to norm will not result in segregation). When minor privileges are taken away in accordance with reasonable administrative policies, however, the procedural protections afforded prisoners are less extensive. *See* O'Callaghan v. Anderson, 514 F. Supp. 765, 768-69 (M.D. Pa. 1981) (due process liberty interest not involved in transfer of prisoner within penetentiary).

Bivens complaints presented allegations that suggested inhumane treatment of prisoners.[112]

In addition to the *Bivens* action, remedies under the Federal Tort Claim Act (FTCA),[113] and the federal statutes of habeas corpus[114] and mandamus,[115] may provide a means of redress for prisoners suing federal officials for violations of the prisoners' constitutional rights. The FTCA requires the United States to pay damages for certain tortious acts committed by federal officials.[116] The federal habeas corpus statute provides a means by which some federal courts rule on federal prisoners' conditions of confinement cases, and occasionally enjoin the actions of federal officials.[117] Finally, the federal mandamus statute authorizes federal courts to compel federal officials to perform a duty owed to the plaintiff prisoner.[118]

Prisoners occasionally are able to bring suits against federal officials under the FTCA.[119] The FTCA allows federal courts to hear suits against the United States in which plaintiffs seek to recover damages for the tortious conduct of federal officials acting within the scope of the officials' employment.[120] The FTCA, therefore, waives the government's sovereign immunity for officials' actions that satisfy the Act's provisions.[121] Congress amended the FTCA in 1974 to expand the Act's coverage beyond recovery for the negligent acts of federal officials.[122] The 1974 amendment removed the government's sovereign immunity for specific intentional torts committed by investigative or law enforcement officers.[123] Even as the amendment passed Congress, however, pro-

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[112] *See* Carlson v. Green, 446 U.S. 14, 25 (1980) (damage remedy available for federal officials' medical mistreatment of prisoner); Botway v. Carlson, 474 F. Supp. 836, 839 (E.D. Va. 1979) (damage remedy available when prison conditions substandard); *supra* notes 38-42 and accompanying text (discussing *Green* decision).

[113] 28 U.S.C. §§ 1346, 1402, 1504, 2110, 2401-2402, 2411-2412, 2671-2680 (1976 & Supp. V. 1981).

[114] *Id.* § 2241 (1976).

[115] *Id.* § 1361.

[116] *Id.* § 1346(b), *see infra* notes 125-35 and accompanying text (FTCA remedy in federal prisoners' actions).

[117] 28 U.S.C. § 2241 (1976); *see infra* notes 136-46 and accompanying text (habeas corpus remedy for prisoners challenging conditions of confinement).

[118] 28 U.S.C. § 1361 (1976); *see infra* notes 147-55 and accompanying text (mandamus remedy in federal prisoners' actions).

[119] *See infra* notes 125-35 and accompanying text (describing federal prisoners' FTCA actions).

[120] 28 U.S.C. § 1346(b) (1976).

[121] *Id.*; *see supra* notes 53-55 and accompanying text (sovereign immunity of United States government in *Bivens* actions).

[122] Act of March 16, 1974, Pub. L. No. 93-253, 88 Stat. 50 (amending 28 U.S.C. § 2680(h) (1970)); *see* S. REP. NO. 588, 93rd Cong., 1st Sess. 2-3, *reprinted in* 1974 U.S. CONG. & AD. NEWS 2789, 2790-92. *See generally* Boger, Gitenstein, and Verkuil, *The Federal Tort Claims Act Intentional Torts Amendment: An Interpretative Analysis*, 54 N.C. L. REV. 497 (1976) (thorough analysis of 1974 FTCA amendment).

[123] 28 U.S.C. § 2680(h) (1976). The 1974 FTCA amendment specifically established federal

ponents of the legislation and the Department of Justice both recognized that the amendment did not make the FTCA a completely effective remedy for torts committed by federal officials.[124]

The FTCA applies in some federal prisoners' suits against government officials.[125] In *Carlson v. Green*, however, the Supreme Court held

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government liability for intentional torts of federal officials arising from assault, battery, false imprisonment, false arrest, malicious prosecution and abuse of process. *Id.*

[124] *See* S. REP. No. 588, 93rd Cong., 1st Sess. 4, *reprinted in* 1974 U.S. CODE CONG. & AD. NEWS 2789, 2792 (statement of Sen. Ervin, the 1974 FTCA amendment's chief proponent); *Hearings on H.R. 10439 Before the Subcomm. on Claims and Governmental Relations of the House Comm. on the Judiciary*, 93rd Cong., 2d Sess. § 33 at 15 (1974) (testimony of Assistant Attorney General Jaffe) (criticizing amendment's silence regarding constitutional tort claims). After the passage of the 1974 amendment to the FTCA, the Department of Justice introduced several unsuccessful bills in an attempt to amend the FTCA further. *See* Dolan, *Constitutional Torts and the Federal Tort Claims Act*, 14 U. RICH. L. REV. 281, 300-02 (1980) (describing Department of Justice legislative proposals to increase the effectiveness of the FTCA). The ninety-sixth Congress also considered a proposal to amend the FTCA. H.R. 2659, 96th Cong., 1st Sess., 125 CONG. REC. 3990 (1979) (introduced by Congressmen Danielson and Rodino). The companion bill in the Senate was S. 695, 96th Cong., 1st Sess., 125 CONG. REC. 5225, 5274-75 (1979) (introduced by Sen. Kennedy). The bill expired, however, because Congress did not act upon the legislation before the ninety-sixth session ended.

Senator Grassly of Iowa introduced yet another bill in the ninety-seventh Congress to amend the FTCA. *See* S. 1775, 97th Cong., 1st Sess., 127 CONG. REC. 12147, 12152-54 (1981). If enacted, the amendment would provide federal courts with jurisdiction over damages claims against the United States to redress the constitutional torts of federal employees acting within the scope of their employment. S. 1775, § 1 (amending 28 U.S.C. § 1346(b) (1976)). The enactment of the bill would constitute an explicit congressional declaration that the FTCA remedy is a replacement for the *Bivens* remedy. *See* S. 1775, § 1 (amending 28 U.S.C. § 2679(b) (1976 & Supp. V. 1981) to provide "an equally effective substitute for any recovery against the [federal] employee [whose act gave rise to the claim] in his individual capacity directly under the Constitution"). Under the Supreme Court's ruling in *Carlson v. Green*, however, the FTCA remedy will not preclude *Bivens* claims unless, in addition to being an express Congressional mandate of the remedy's exclusiveness, the amendment also transforms the FTCA remedy into an equally effective statutory alternative to the *Bivens* remedy. 446 U.S. 14, 18-19 (1980); *see supra* text accompanying note 46. The proposed amendment probably would not provide an equally effective alternative to the *Bivens* remedy, however, because the resultant FTCA remedy would not allow the recovery of punitive damages, would bar plaintiffs access to a jury, and would not deter official misconduct since no threat of personal liability would exist. *See Hearings on S. 1775 Before the Subcomm. on Agency Admin. of the Senate Comm. on the Judiciary*, 97 Cong., 1st Sess. 27-28 (1979) (prepared statement of Prof. Neuborne presenting views of American Civil Liberties Union). One of the purposes of broadening the coverage of the FTCA to provide an exclusive remedy for constitutional violations is to establish a more effective remedy than the relief the *Bivens* action currently provides. *See id.* at 1 (opening statement of Sen. Grassly) (commenting on expense and unlikelihood of collectible judgment confronting constitutional tort plaintiffs). The proponents of the legislation, however, probably are concerned more about reducing the government's costs in defending suits brought against government officials and dispelling the threat of personal liability which presently diminishes the productivity of federal employees. *See id.* at 13-15 (prepared statement of Deputy Attorney General Schmults).

[125] *See* United States v. Muniz, 374 U.S. 150 (1963) (federal prisoner may bring FTCA action for damages against United States for negligence of government employees).

that the availability of an FTCA remedy does not preempt a *Bivens* action against federal officials.[126] The *Green* Court suggested that the *Bivens* remedy is more effective than the FTCA remedy in four ways.[127] First, the *Bivens* remedy deters official misconduct by threatening officials with personal financial liability.[128] Second, punitive damages are available to successful *Bivens* plaintiffs whereas only compensatory damages are available in an FTCA action.[129] Third, jury trials are not available in FTCA actions as they are in *Bivens* suits.[130] Fourth, the law of the individual state in which the violation occurred governs FTCA actions, making the outcome unpredictable, while the uniform federal common law for constitutional torts applies in *Bivens* actions.[131] In addition to the disadvantages recognized in *Green*, the FTCA is deficient as a means to recompense prisoners harmed by the tortious actions of federal officials for other reasons. For example, the FTCA does not apply to the discretionary actions of federal officials, even when the discretionary actions cause injury.[132] Thus, when a prison inmate's widow brought an FTCA action alleging that prison authorities failed to prevent an inmate's murder, the court dismissed the action stating that the decision to provide better protection by stationing more correctional officers involved an exercise of discretion.[133] A further disadvantage is that plaintiffs are subject to a two year statute of limitations during which time they must exhaust administrative remedies.[134] Finally, prisoners may not

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[126] 446 U.S. 14, 18-23 (1980).

[127] *Id.* at 20-23; *see supra* note 42 (*Green* Court's discussion of superiority of *Bivens* claims).

[128] 446 U.S. at 21.

[129] *Id.* at 22 (referring to 28 U.S.C. § 2674 (1976)); *see* Brady v. Smith, 656 F.2d 466, 468 (9th Cir. 1981) (barring federal prisoners' FTCA complaint seeking punitive damages).

[130] 446 U.S. at 22. Commentators have suggested that a jury trial actually may be an obstacle in an action against federal officials since jurors frequently are biased against plaintiffs in constitutional torts suits. *See* Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388, 421-22 (1971) (Burger, C.J., dissenting); Dellinger, *Of Rights and Remedies: The Constitution as a Sword*, 85 HARV. L. REV. 1532, 1553 (1972); Note, *"Damages or Nothing"—The Efficacy of the* Bivens*-Type Remedy*, 64 CORNELL L. REV. 667, 692 (1979). The *Bivens* concurrence, however, noted that the phenomenon of jury hostility, if it exists, will only serve the beneficial purpose of reducing the number of frivolous claims. 403 U.S. 388, 410 (1971) (Harlan, J., concurring) (suggesting that plaintiffs will not choose to expend resources on *Bivens* claims if chance of success is slight).

[131] 446 U.S. at 23.

[132] 28 U.S.C. § 2680(a) (1976) (FTCA inapplicable to federal officials' discretionary actions). Federal officials also must have acted within the scope of their employment when committing allegedly tortious conduct for the FTCA to apply. 28 U.S.C. § 1346(b) (1976). A circuit court recently found that a complaint literally alleging that a prisoner's death resulted from injuries inflicted by United States Marshalls acting in excess of and outside the scope of their authority was sufficient to satisfy the FTCA requirement that federal officials have acted within the scope of their employment. *See* Hoston v. Silbert, 681 F.2d 876, 879-80 (D.C. Cir. 1982).

[133] *See* Garza v. United States, 413 F. Supp. 23, 27 (W.D. Okla. 1975).

[134] 28 U.S.C. § 2675 (1976). Plaintiffs may bring FTCA lawsuits if they have filed a damage claim with the administrative agency that employs the tortfeasor within two years

bring FTCA actions if relief is available under the Federal Prison Industries Fund to compensate prisoners injured in federal prison employment.[135]

The FTCA remedy is not appropriate in all federal prisoners' suits, however, since in some instances prisoners only seek to rectify the conditions of confinement in federal prison. Some courts have utilized the writ of habeas corpus, which unquestionably provides a means by which prisoners may challenge the fact or length of incarceration,[136] to allow federal prisoners to dispute the constitutionality of the conditions of confinement in prison.[137] Because the traditional habeas corpus remedy is release from prison, however, other courts have held that habeas corpus is not the proper means for challenging conditions of confinement.[138] Although the Supreme Court has recognized the controversy involving the appropriateness of habeas corpus as a remedy for prisoners' challenges to conditions of confinement, the Court has chosen to postpone resolution of that dispute.[139]

As a threshold requirement in bringing a federal habeas corpus petition a prisoner must be in custody.[140] Although courts interpret the custody requirement liberally,[141] former prisoners whose sentences have

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of the injurious conduct and the administrative agency does not grant relief within six months. *Id.* § 2675(a). Plaintiffs may only recover the damage amount claimed in the administrative request. *Id.* § 2675(b).

[135] *See* 18 U.S.C. § 4126 (1976); United States v. Demko, 385 U.S. 149, 151-54 (1966) (compensation system established by 18 U.S.C. § 4126 reasonably covers federal prisoners injured in prison employment and therefore is exclusive remedy).

[136] *See* 28 U.S.C. § 2255 (1976 & Supp. V 1981) (provides jurisdictional basis for federal prisoners attacking process of conviction or manner sentence imposed).

[137] *See* Albers v. Ralston, 665 F.2d 812, 815 (8th Cir. 1981) (habeas corpus available to challenge conditions of confinement when substantial infringement of constitutional rights alleged); Williams v. Richardson, 481 F.2d 358, 360 (8th Cir. 1973) (challenges to conditions of confinement cognizable in habeas corpus); Cravatt v. Thomas, 399 F. Supp. 956, 963 (W.D. Wis. 1975) (habeas corpus available in attack on conditions of confinement). Courts that hear federal habeas corpus petitions challenging conditions of confinement in federal prison utilize § 2241 of Title 28 of the United States Code to provide a jurisdictional predicate for the habeas corpus petitions. *See* 28 U.S.C. § 2241 (1976). Section 2255 of Title 28 of the United States Code, the general habeas statute for federal prisoners, is not the proper means of bringing conditions of confinement cases. *Id.* § 2255; see ALDERSERT REPORT, *supra* note 1, at 1 n.8; *supra* note 136 and accompanying text (proper function of § 2255).

[138] *See* Cook v. Hanberry, 592 F.2d 248, 249 (5th Cir. 1979) (habeas corpus unavailable to prisoner complaining of mistreatment since proper form of relief is equitable restraint not release); Crawford v. Bell, 599 F.2d 890, 891 (9th Cir. 1979) (habeas corpus unavailable for challenges to terms and conditions of incarceration since release inappropriate remedy); *see also Developments in the Law—Federal Habeas Corpus*, 83 HARV. L. REV. 1038, 1079-87 (1970) (controversy over usage of habeas corpus as remedy in conditions of confinement cases).

[139] *See* Bell v. Wolfish, 441 U.S. 520, 526 n.6 (1979).

[140] 28 U.S.C. § 2241(c) (1976). Habeas corpus petitioners must have exhausted administrative remedies. *See supra* note 75 (federal prisoners' claims dismissed for failure to exhaust administrative remedies).

[141] *See* Hensley v. Municipal Court, 411 U.S. 345, 348-53 (1973) (restraints imposed on

expired or been vacated will lack standing to bring federal habeas actions. Persons on parole or probation, however, satisfy the custody requirement and may bring habeas petitions.[142] Damages are unavailable as a remedy in habeas corpus actions.[143] Courts that adjudicate habeas corpus petitions challenging the conditions of confinement generally limit the relief granted for successful petitions to conditional writs.[144] Conditional writs direct prison officials to either remedy the contested condition of confinement or release the prisoner.[145] Court orders granting conditional writs, therefore, serve as injunctions forcing prison officials to improve unconstitutional conditions of confinement.[146]

In addition to federal habeas corpus, the federal writ of mandamus may provide a means to remedy the conditions of prisoners' confinement.[147] Under the authority of the general mandamus statute,[148] federal courts may compel federal officials to perform a duty the official owes to the plaintiff.[149] To obtain a writ of mandamus, however, plaintiffs must demonstrate that the defendant federal officials have failed to perform a nondiscretionary duty.[150] Additionally, the writ of mandamus is available only when prisoners have exhausted administrative remedies[151] and an alternative adequate judicial remedy does not exist.[152]

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petitioner released on own recognizance pending execution of sentence constitute custody within meaning of habeas corpus). The Supreme Court has stated factors courts should consider in determining whether a habeas petitioner is in custody. *Id.* at 351-52. The factors include whether petitioner is subject to restraints not shared by the general public or is not free to leave a particular jurisdiction, whether the petitioner's defiance of the restraints placed on him would be illegal, or whether the petitioner's freedom is entirely dependent on the discretion of the state. *Id.*

[142] *See* Jones v. Cunningham, 371 U.S. 236, 243 (1963) (parole constitutes custody for purposes of habeas corpus); United States v. Condit, 621 F.2d 1096, 1098 (10th Cir. 1980) (probation constitutes custody for purposes of federal habeas corpus).

[143] *See* J. RESNICK, *Federal Prisoners' Access to Federal Courts: Jurisdiction and Related Procedural Matters*, in 1 PRISONERS' RIGHTS 1979 85, 124 (Practising Law Inst. 1979) (discussing unavailability of damages in habeas corpus proceedings).

[144] *See id.* at 122-23 (describing judicial grants of conditional writs in habeas corpus proceedings).

[145] *See id.*

[146] *See id.*

[147] *See* 28 U.S.C. § 1361 (1976).

[148] Act of Oct. 5, 1962, Pub. L. No. 87-748, § 1(a), 76 Stat. 744 *codified at* 28 U.S.C. § 1361 (1976).

[149] 28 U.S.C. § 1361 (1976).

[150] *See* Anderson v. Luther, 521 F. Supp. 91, 96 (N.D. Ill. 1981) (mandamus not available against Parole Commission to challenge discretionary determination of release on parole); Fennell v. Carlson, 466 F. Supp. 56, 60 (W.D. Okla. 1978) (dismissing federal prisoner's mandamus claims challenging prison officials' discretionary authority to transfer prisoners).

[151] *See* Johnson v. Luther, 516 F. Supp. 423, 429 (N.D. Ill. 1981) (dismissing mandamus action to compel federal prison official to grant furlough when prisoner failed to exhaust Bureau of Prisons administrative remedies).

[152] *See* Kerr v. United States Dist. Court, 426 U.S. 394, 403 (1976) (issuance of mandamus inappropriate in state prisoners' class action when other adequate judicial means to

The majority of federal prisoners' mandamus actions unsuccessfully have challenged prison administrative decisions affecting parole classification of prisoners.[153] In isolated actions, however, federal prisoners have successfully obtained writs of mandamus to correct unconstitutional conditions[154] or to force compliance with Bureau of Prisons policy.[155]

The judicial remedies, other than the *Bivens* action, by which prisoners may sue for federal officials' violations of prisoners' constitutional rights are therefore remarkably inadequate in most cases. The FTCA remedy, which is the only means other than the *Bivens* remedy by which prisoners may seek damages for the tortious conduct of federal officials, does not prescribe a means of redress for official misconduct that violates the Constitution.[156] In addition to providing relief for a few specified intentional torts,[157] the FTCA redresses only the negligent misconduct of federal officials.[158] Furthermore, the FTCA requirement that allows plaintiffs to sue only for injuries resulting from the nondiscretionary actions of federal officials[159] critically restricts the recovery of prisoners pursuing FTCA relief since many injuries for which prisoners seek damages result from discretionary actions of government officials.[160] Although the deep pocket of the federal govern-

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attain relief available); Billiteri v. United States Bd. of Parole, 541 F.2d 938, 946 (2d Cir. 1976) (mandamus unavailable when relief requested by federal prisoner available through habeas corpus).

[153] *See* McClanahan v. Mulcrome, 636 F.2d 1190, 1191 (10th Cir. 1980) (dismissing mandamus action brought by federal prisoner to compel reinstatement of presumptive parole date); Goode v. Markley, 603 F.2d 973, 975-77 (D.C. Cir. 1979) (dismissing federal prisoner's mandamus action alleging unlawful denial of parole hearing); Butson v. Chairman, United States Parole Comm'n, 457 F. Supp. 841, 845 (D. Colo. 1978) (dismissing federal prisoner's mandamus action challenging decision of parole commission for denying request for parole). *But c.f.* Holmes v. United States Bd. of Parole, 541 F.2d 1243, 1249 (7th Cir. 1976) (jurisdiction established under federal mandamus statute when prisoner alleged prison officials' arbitrary classification of prisoner as special offender affected parole determination), *overruled on other grounds*, Solomon v. Benson, 563 F.2d 339 (7th Cir. 1977).

[154] *See* Kahane v. Carlson, 527 F.2d 492, 495-96 (2d Cir. 1975) (issuing mandamus writ requiring provision of food in accordance with Jewish dietary laws); Workman v. Mitchell, 502 F.2d 1201, 1206 (9th Cir. 1974) (jurisdiction provided under mandamus statute to order federal prison officials' compliance with due process requirements in prison disciplinary proceedings); Mead v. Parker, 464 F.2d 1108, 1112 (9th Cir. 1972) (mandamus granted to provide federal prisoners access to adequate legal materials).

[155] *See* Stover v. Carlson, 413 F. Supp. 718, 721 (D. Conn. 1976) (mandamus issued to compel federal prison officials to comply with Bureau of Prisons policy statement regulating surveillance of attorney-client mail).

[156] *See supra* note 124 (proposed amendment to expand FTCA coverage to include damages claims for constitutional torts of federal employees).

[157] 28 U.S.C. § 2680(h) (1976); *see supra* note 123 (specified intentional torts under FTCA).

[158] 28 U.S.C. § 1346(b) (1976).

[159] *Id.* § 2680(a).

[160] *See supra* note 133 and accompanying text.

ment is available for the recovery of damages in FTCA suits,[161] the amount awarded to prisoners in successful FTCA actions may be deficient since punitive damages are unavailable[162] and compensatory damages are not likely to be significant in many cases.

Habeas corpus and madamus also are inadequate remedies for federal prisoners seeking injunctive relief in suits challenging the constitutionality of the conditions of incarceration. Perhaps demonstrating the habeas corpus remedy's ineffectiveness in conditions of confinement cases, prisoners' use of the habeas remedy to challenge conditions of confinement is declining.[163] Moreover, in some courts habeas corpus is unavailable to challenge prison conditions.[164] Prisoners also rarely use the mandamus remedy which generally has been ineffective in prisoners' suits.[165] The limited application of the writ of mandamus in prisoners' cases probably is due primarily to the policy of courts not to grant mandamus relief if another adequate judicial remedy is available.[166]

In comparison to the FTCA, habeas corpus, and mandamus remedies, the *Bivens* remedy is a superior means of redress for prisoners alleging that federal officials have violated the prisoners' constitutional rights. The *Bivens* remedy is oriented towards redressing constitutional right deprivations since courts imply the *Bivens* cause of action directly from the Constitution.[167] Additionally, the *Bivens* action is a well recognized remedy that litigants frequently utilize for constitutional right violations.[168] Finally, the *Bivens* proceeding allows courts to be flexible in awarding appropriate relief to successful plaintiffs since both damages and injunctive relief are available as remedial measures.[169]

The *Bivens* action is insufficient in many respects, however. *Bivens* plaintiffs must identify specifically the individual defendants allegedly causing the constitutional deprivation, a difficult task for prisoners in some cases.[170] Furthermore, the qualified immunity defense that federal

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[161] 28 U.S.C. § 1346(b) (1976); *see supra* text accompanying notes 120-21.

[162] 28 U.S.C. § 2674 (1976).

[163] *See* ALDERSERT REPORT, *supra* note 1, at 9 n.14 (citing Annual Report of the Director of the Administrative Office of the United States Courts 1979).

[164] *See supra* note 138 (cases in which habeas corpus unavailable to challenge conditions of confinement). In courts that hear federal habeas corpus petitions challenging conditions of confinement, the habeas remedy has the advantage of a nominal filing fee of five dollars. 28 U.S.C. § 1914(a) (Supp. V. 1981). Other civil actions require a filing fee of sixty dollars, a significant sum to some prisoners. *Id.*

[165] *See supra* notes 147-52 and accompanying test (federal mandamus remedy in prisoners' suits).

[166] *See supra* note 152 (mandamus unavailable when adequate alternative remedy available).

[167] *See supra* notes 19-47 and accompanying text (development of constitutionally implied cause of action).

[168] *See supra* note 72 (estimated number of pending constitutional tort claims).

[169] *See supra* note 52 (injunctive relief available in *Bivens* action).

[170] *See supra* notes 56-57 and accompanying text (*Bivens* plaintiffs must identify specific defendants).

officials may assert in response to *Bivens* actions presents a formidable obstacle to *Bivens* plaintiffs.[171] Partially as a result of these limitations, the *Bivens* remedy has been glaringly unsuccessful in obtaining monetary judgments.[172] Moreover, even when courts award damages in *Bivens* suits, the plaintiffs may not recover since many federal officials are virtually judgment-proof.[173]

No federal statutory remedy exists prescribing a legal means of redress for instances in which federal officials violate the constitutional rights of others.[174] In the *Bivens* decision,[175] however, the Supreme Court established a constitutionally implied cause of action by which federal courts may grant relief to plaintiffs suing federal officials for violations of the plaintiffs' constitutional rights.[176] The *Bivens* remedy, along with the FTCA, federal habeas corpus, and federal mandamus remedies, provide the only legal recourses available to prisoners alleging that federal officials have violated the prisoners' constitutional rights. In *Bivens* actions, prisoners may sue individual federal officials for damages or injunctive relief by demonstrating that the federal officials violated the constitutional rights of the prisoners.[177] Under the FTCA, prisoners may recover damages from the federal government for certain tortious acts committed by federal officials.[178] In federal habeas corpus proceedings, some federal courts may issue injunctions against federal officials in prisoners' conditions of confinement cases.[179] Finally, under the federal mandamus statute, federal courts may compel federal officials to perform a duty the official owes to the prisoner.[180] In comparison to the other available remedies, the *Bivens* remedy is a superior means to redress federal officials' violations of prisoners' constitutional rights because the *Bivens* action is a well recognized remedy, was created to redress constitutional deprivations, and grants courts flexibility to

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[171] *See supra* notes 82-104 and accompanying text (qualified immunity defense in prisoners' suits against federal officials).

[172] *See Hearings on S. 1775 Before the Subcomm. on Agency Admin. of the Comm. on the Judiciary*, 97th Cong., 1st Sess. 13 n.11 (1979) (prepared statement of Attorney General Schmults) (nine of several thousand filed constitutional tort actions have resulted in money judgments).

[173] *See supra* note 59 and accompanying text (low incomes of federal officials preclude substantial recovery).

[174] *See supra* note 124 (proposed amendment to expand FTCA coverage to include damages claims for constitutional torts of federal employees).

[175] Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388 (1971).

[176] *See supra* notes 19-25 and accompanying text (discussion of *Bivens* decision).

[177] *See supra* notes 71-112 and accompanying text (prisoners' *Bivens* claims).

[178] *See supra* notes 125-35 and accompanying text (prisoners' FTCA claims).

[179] *See supra* notes 136-46 and accompanying text (habeas corpus petitioners challenging conditions of confinement).

[180] *See supra* notes 147-55 and accompanying text (prisoners' mandamus petitions).

award appropriate relief.[181] The *Bivens* action, however, is both ineffective and inadequate in compensating plaintiffs deprived of constitutional rights because the success of *Bivens* suits is dependent upon the personal liability of individual federal officials who may have qualified immunity from suit[182] and assets too dimunitive to pay substantial judgments.[183] Until Congress passes a more effective remedy,[184] however, the *Bivens* remedy is the best overall means by which prisoners may sue federal officials for constitutional deprivations.

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[181] *See supra* notes 167-69 and accompanying text (advantages of *Bivens* remedy in prisoners' rights suits).

[182] *See supra* notes 62-70 and accompanying text (qualified immunity defense in suits against federal officials).

[183] *See supra* note 59 and accompanying text (low incomes of federal officials precludes substantial recovery).

[184] *See supra* note 124 (proposed amendment to expand FTCA coverage to include damages claims for constitutional torts of federal employees).