The Future of Damage Actions Against Government Officials

BY THOMAS J. MADDEN AND
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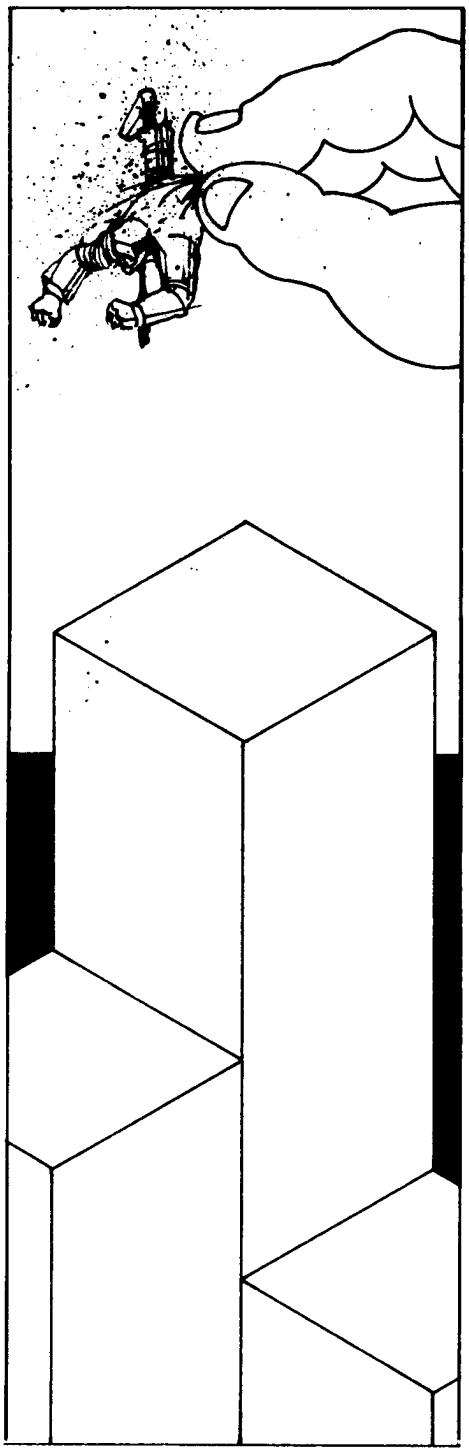

I. INTRODUCTION

Immunity of the sovereign from liability for money damages in civil actions is among the most deeply rooted doctrines of our legal order. Under the doctrine, victims of official misconduct may not sue the government for monetary redress. Mitigating this harsh consequence of the sovereign immunity doctrine, a body of law has arisen permitting damage actions against government officials, employees and other individuals where official misconduct is alleged. The sovereign immunity defense does not apply to municipalities charged with violations of federal constitutional, statutory, or administrative law. Even in those instances where sovereign immunity has been waived or does not apply, however, liability for official misconduct may extend not only to the government, but also to the errant government employee.

The existing system of civil sanctions for official misconduct thus relies heavily on the possibility of recovery from government employees to accomplish the goal of compensating the victims of such misconduct. The possibility of such recovery, in turn, is largely relied upon to deter further official misconduct and to assure the wrongdoer's accountability to the victim and to society at large.

Notwithstanding the apparent logic of the existing system, most observers today agree that the system fails to serve two of its primary goals — measured deterrence of official misconduct, and adequate compensation of the victims of such misconduct. On the one hand, the ever-present threat of damage suits is widely believed to deter not only improper conduct by government employees, but proper conduct as well. On the other hand, there is general recognition that private damage actions against individual government employees do not afford the victims of official misconduct financially responsible defendants. A further concern, at the local level, is the potentially crippling effect of large civil damage awards against municipalities in a period of recession and retrenchment.

In recent years, the impetus has grown for change of the civil sanction system applicable to government officials. This movement responds, in large part, to the increase in the number of allegations of government misconduct that has accompanied the expanding role of the modern state. At the federal level— under the Federal

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Tort Claims Act, 28 U.S.C. §§ 2671-2680, and under the *Bivens* doctrine — and at the state and local levels—under 42 U.S.C. §1983[1]—thousands of lawsuits are pending which raise issues of sovereign immunity and official liability.

The long running congressional controversy—now in its second decade—over the existing system of sovereign immunity and federal official liability finally appears to be approaching a crescendo. And at the state and local levels of government there are tremendously varied responses to increasingly acute problems of official liability.

Inevitably, however, the current debate over legislative alternatives to the existing system is again bedevilled by seemingly incompatible political considerations. Many government officials contend that the real problem to be addressed is not how to deter official misconduct or to compensate its victims, but rather how to free civil servants from the debilitating threat of civil damage actions, and municipal government from the crushing burden of civil liability. Civil liberties groups and others, by contrast, focus on the importance of deterrence and accountability, and on the need to assure adequate compensation for the victims of government misconduct. Reconciliation of the competing concerns has thus far proved a most formidable challenge.

These political disagreements are complicated by the perceived vastness and intricacy of the subject. The burgeoning literature devoted to the topic of sovereign immunity and official liability attests to the intense interest in the subject among scholars, while recent Supreme Court decisions have heightened uncertainties considerably. Moreover, fundamental questions such as the scope of government involvement in everyday life, and about the proper allocation of power between the federal government and the states, bear directly on proposed alternatives to the existing system of sovereign immunity and official liability and impede dispassionate analysis of the public policy choices involved.

II. RECENT DEVELOPMENTS

Legislative efforts underway in Congress would substitute the United States as the exclusive defendant in many civil actions that can now be brought only against government employees. At the state and local levels, executive branch officials are also reappraising the existing system, addressing the added factor — without real analogue at the federal level — of the crippling effect of civil damage awards against municipalities.

A. *The Federal Level*

Although the Federal Tort Claims Act, 28 U.S.C. §§ 2671-2680, permits suits against the United States for many wrongs cognizable under state common law, only individual federal employees may be sued for violations of rights secured by the Constitution as such. *See, e.g., Bivens v. Six Unknown Federal Narcotics Agents,* 403 U.S. 388 (1971) (Fourth Amendment rights); *Carlson v. Green,* 446 U.S. 14 (1980) (Eighth Amendment rights); *Davis v. Passman,* 442 U.S. 226 (1979) (Fifth Amendment rights).

With respect to a federal executive official's defense to suits for violations of such rights, the Supreme Court held in *Butz v. Economou,* 438 U.S. 478, 507 (1978), that, in a suit for damages arising from unconstitutional action, federal executive officials exercising discretion are entitled only to the qualified immunity specified in *Scheuer v. Rhodes,* 416 U.S. 232 (1974) — subject to those exceptional situations where it is demonstrated that absolute immunity is essential to the conduct of public business.[2] Previously, in *Barr v. Matteo,* 360 U.S. 564 (1959), a plurality of the Court had appeared to extend, *sub silentio,* absolute immunity to a federal executive officer with respect to state tort claims, as distinct from claims arising under the Constitution.

Legislation considered but not enacted in Congress would have substantially modified the existing system of civil sanctions for official misconduct. The House bill — H.R. 7034 — would have amended the Federal Tort Claims Act to provide that the United States would be exclusively liable with respect to a claim arising under the Constitution of the United States for torts committed by government employees acting within the scope of their office or employment.[3] Unlike legislation endorsed by the Carter Administration in the 96th Congress, the United States would be free under H.R.7034 to assert as a defense to a constitutional tort claim the absolute or qualified immunity of the employee whose act gave rise to the claim, or his reasonable good faith belief in the lawfulness of his conduct. In contrast to the elaborate administrative sanctions contemplated by the legislation endorsed by the previous Administration, H.R. 7034 provided simply that where a constitutional tort action results in a judgment against the United States or an award, compromise, or settlement paid by the United States, "the Attorney General shall forward the matter for such further administrative investigation or disciplinary action as may be appropriate to the head of the department or agency which employed the employee at the time of the employee's alleged act or omission giving rise to the claim." H.R. 7034 was drafted so as to preserve the right to a jury trial in constitutional tort cases.

S.1775—the Senate bill in the 97th Congress—was substantially similar to H.R.7034, with three significant exceptions. First, S.1775 did not provide "additional" damages for intentional or reckless conduct (although S.1775, like H.R. 7034, expressly precluded "punitive damages"). Second, there was no provision under S.1775 for any award to a prevailing plaintiff of reasonable attorney's fees or other litigation costs. And third, S.1775 did not provide for jury trial in constitutional tort cases, except with respect to cases either (1) pending on the date of the enactment of the bill, or (2) based on claims extant on that date.

Both H.R.7034 and S.1775 proposed substituting the United States as exclusive defendant not only in cases involving alleged constitutional torts, but in all other cases now cognizable under the Federal Tort Claims Act. Both bills encountered strong opposition during the 97th Congress from civil liberties groups and others who, together with a number of federal lawmakers, favor the "stronger" approach previously embodied in Carter Administration proposals. Both bills are expected to be reintroduced in essentially the same form early in the 98th Congress.

B. *The State and Local Level*

Recent Supreme Court decisions have expanded significantly the potential liability of state and local officials and municipalities under § 1983. The Supreme Court in *Scheuer* v. *Rhodes,*

416 U.S. 232, 246 (1963), had held that "higher officers of the executive branch" of state governments were not immune from liability under § 1983 for violations of constitutionally protected rights. In *Monell* v. *New York City Department of Social Services*, 436 U.S. 658 (1978), the Court for the first time held that municipalities are not immune to damage actions under § 1983, and in *Owen* v. *City of Independence*, 445 U.S. 622 (1980), the Court—partially overruling *Monroe* v. *Pape*, 365 U.S. 1 (1961)—held that the good faith defense in § 1983 suits is unavailable to local governments. Finally, in *Maine* v. *Thiboutot*, 448 U.S. 1 (1980), the Court held that § 1983 claims may encompass claims based on violations of rights secured by federal laws.

Many states have enacted legislation designed to protect government officials and employees from the increased spectre of liability under § 1983 suits. For municipalities, however, the problem of § 1983 liability remains acute. During the 97th Congress, the Senate considered legislation to amend § 1983 and thereby reduce some of the problems which critics attribute to *Monell, Owen,* and *Thiboutot*.[4] But because of the controversy engendered by any discussion to amend § 1983, and because no parallel action to amend § 1983 has yet been undertaken in the House, the prospects for passage of such measures in the present session of the 98th Congress is remote.

FOOTNOTES

[1]42 U.S.C. § 1983 provides: Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other persons within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in any action at law, suit in equity, or other proper proceeding for redress.

[2]In *Scheuer*, the Court held that, in varying scope, a qualified immunity is available to officers of the executive branch of government, the variation being dependent upon the scope of discretion and responsibilities of the office and all the circumstances that reasonably appeared at the time of the action on which liability is sought to be based. It is the existence of reasonable grounds for the belief formed at the time and in light of all the circumstances, coupled with good-faith belief, that affords a basis for qualified immunity of executive officers for acts performed in the course of official conduct. 416 U.S. 247-48.

[3]With respect to any such claim, the United States would be liable for the greater of either (1) actual damages or (2) liquidated damages in an amount which is the greater of either (A) $2,000 or (B) in the case of a continuing violation, $200 per day for each violation. If it is established that the defendant employee acted with malicious intent or reckless disregard for the plaintiff's constitutional rights, "additional" damages of up to $100,000 are authorized.

[4]One bill introduced by Senator Hatch (R.-Utah) would have effectively overruled the decision in *Thiboutot* by deleting from § 1983 the language "and laws." S. 584, 97th Cong. 1st Sess. (1981). Another overruled bill, also sponsored by Senator Hatch, would have restored the good faith defense to local governments in actions brought under § 1983, thereby overruling the decision in *Owen*. S. 585, 97th Cong., 1st Sess. (1981).

The Scope of the Bivens Remedy: Can Federal Employees Be Plaintiffs?

BY PHILIP E. CHARTRAND

SUMMARY

This article discusses an aspect of Bivens *cases of special interest to federal executives: suits brought by federal employees against their supervisors alleging that some employment action has deprived them of a constitutional right. The number of such cases is growing rapidly, and even where courts have not awarded damages to the plaintiffs to be paid individually by the defendants, such cases are especially time-consuming and threaten the orderly and efficient operation of government agencies. While the Supreme Court has considered several* Bivens*-type cases where suits seeking damages from federal personnel have been allowed, the kind of* Bivens *action where both parties are federal employees has only been considered by federal district courts and courts of appeal.*

In two current appellate cases where federal employees sued their supervisors, Bishop *v.* Tice, *622 F.2d 349 (8th Cir. 1980) and* Bush v. Lucas, *598 F.2d 958 (5th Cir. 1979),* aff'd, *647 F.2d 573 (1981)* cert. granted, *50 U.S.L.W. 3998-18 (June 28, 1982) the courts ruled that civil service plaintiffs do not have the right to bring* Bivens*-type actions in employment situations, citing language from the Supreme Court's opinion in a post-*Bivens *case entitled* Davis *v.* Passman, *442 U.S. 228 (1979). If these two judgments are not overturned by the Supreme Court, the consequence will be to remove one of the most troublesome areas of personal liability of the federal executive, although liability would still exist where the plaintiff was not a federal employee. In the alternative, only action by Congress to amend the Federal Tort Claims Act, 28 U.S.C. §§ 2671-2680, so as to provide an equally effective substitute remedy to* Bivens, *will insulate the federal executive from personal liability, and for both legal and political reasons this is unlikely to occur soon.*

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It is the author's contention that the appellate court opinions written in the Bishop *and* Bush *cases reached the proper conclusion but for the wrong reasons, because the appellate courts did not fully understand the most recent* Bivens *case decided by the Supreme Court in 1980,* Carlson *v.* Green, *446 U.S. 14. The Supreme Court's opinion in* Carlson *supports the argument made here that civil service grievance remedies presently available to those alleging improper employment practices by their federal superiors constitute an equally effective alternative remedy to a* Bivens *action, negating the need to extend the latter remedy to cases where federal employees are suing their superiors individually for money damages.*

DISCUSSION

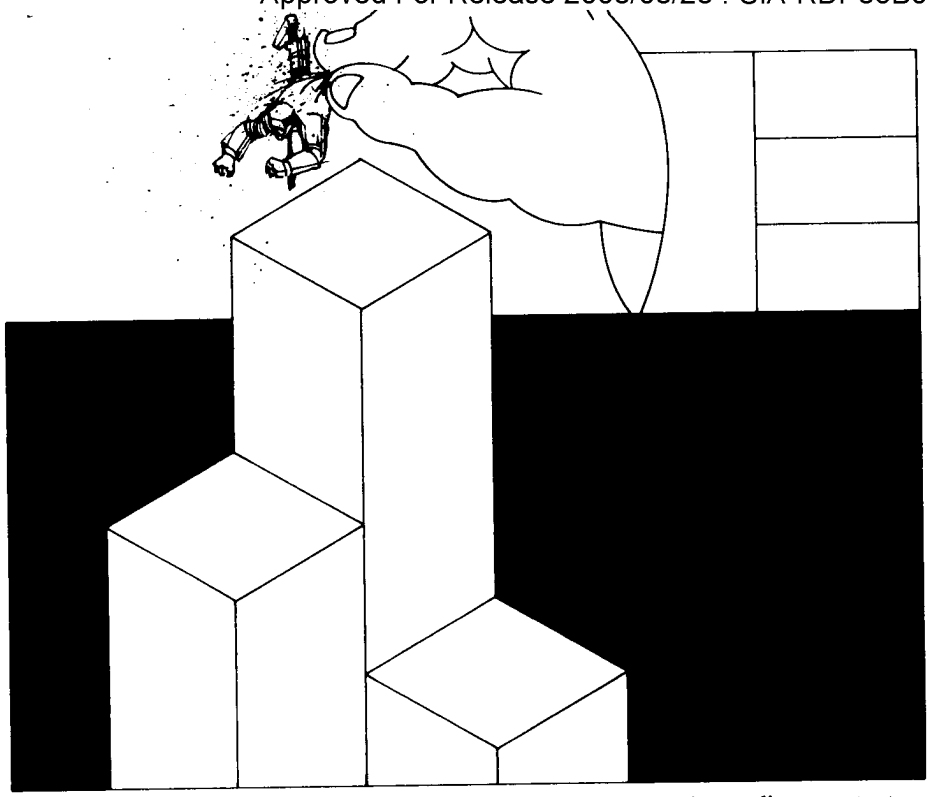
When the Supreme Court created or discovered a judicial remedy for Webster Bivens in *Bivens* v. *Six Unknown Named Federal Agents*, 403 U.S. 388 (1971),[1] the court left open the question of just what the scope of this remedy was to be; i.e., for how many plaintiffs and under what circumstances would the new remedy be applicable. A number of lower federal courts assumed that *Bivens* was to be applied narrowly, perhaps only where a Fourth Amendment violation was asserted and certainly only where the plaintiff could show that no other means of redress were available. *Torres* v. *Taylor*, 456 F. Supp. 951, 953 (S.D.N.Y. 1978); *Neely* v. *Blumenthal*, 458 F. Supp. 945, 959-60 (D.D.C. 1978); *contra, Thornwell* v. *U.S.*, 471 F. Supp. 344 (D.D.C. 1979). However, the "logic" of the *Bivens* decision encouraged some federal courts to begin to extend it to cases where other constitutional rights were alleged to have been invaded, and subsequent decisions of the Supreme Court certainly furthered this trend. Our particular interest here will be to see how this expansion of the *Bivens* doctrine has been utilized by federal employees to bring individual constitutional tort actions against their superiors, and to evaluate recent measures taken by lower federal courts and by Congress to limit this use of the *Bivens* remedy.

In *Davis* v. *Passman*, 442 U.S. 228 (1978),[2] Justice Brennan writing for the court held that there were three questions to be asked in deciding whether or not a *Bivens* remedy could be conferred on any particular plaintiff:

> [whether] petitioner asserts a constitutionally protected right; second, that petitioner has stated a cause of action which asserts this right; and third, that relief in damages constitutes an appropriate form of remedy.
>
> *Id.* at 234.

Brennan's answers to each of these questions, but particularly to the latter two, emphasized the discretionary nature of the *Bivens* remedy and the relative freedom of the federal courts to decide when it was appropriate and when not.

The Supreme Court like the Court of Appeals found that Davis did have a constitutionally protected right, arising out of the "Equal Protection Component of the Due Process Clause" of the Fifth Amendment—a right to be free from gender discrimination which cannot meet the requirements that such "classifications by gender (1) must serve important governmental objectives and (2) must be substan-



tially related to the achievement of those objectives." *Id.* at 234-235, citing *Craig* v. *Boren*, 429 U.S. 190, 197 (1976). The Supreme Court left to the lower court the determination of the fact situation regarding the allegation of discrimination here.

The opinion of the Court went on to obscure the distinction between the first and second questions posed by Brennan, by concluding that if the plaintiff had asserted a constitutionally protected right, he or she fairly automatically had stated a "cause of action". In reaching this conclusion, the Supreme Court firmly rejected the elaborate analytical approach adopted by the Court of Appeals based on the factors contained in *Cort* v. *Ash*, 422 U.S. 66 (1975), for assertaining whether a private right of action may be implied from "a statute not expressly providing one". The approach found in *Cort* was to be used, said Brennan, only to answer the question of who has a cause of action to enforce a *statutory* right, whereas in *Passman* the question concerned a constitutional right. 442 U.S. at 241.

To reach an answer to the appropriate question raised by the *Passman* case—has petitioner stated a cause of action—Brennan defined some simple but oft misunderstood legal terms to set the lower court straight. "Jurisdiction," said Brennan, "is a question of whether the federal court has the power, under the Constitution or laws of the United States, to hear a case." 442 U.S. at 239 n. 18. "Standing" on the other hand, is a question of "whether the plaintiff is sufficiently adversary to the defendant to create an Art. III case or controversy, or at least to overcome prudential limitations on federal court jurisdiction". 442 U.S. at 239 n. 18. Finally, "cause of action" is different from both of the above and

> depends not on the quality or extent of her injury, but on whether the class of litigants of which petitioner is a member may use the courts to enforce the right at issue. The focus must therefore be on the nature of the right petitioner asserts.
>
> 442 U.S. at 239 n. 18.

A plaintiff may have a cause of action, noted Brennan, "even though he be entitled to no relief at all" because he does not meet some preconditons set by the federal courts for granting various kinds of legal relief such as injunctions or damages.

Having set the definitional framework for an answer to his second question, Brennan went on to assume that the petitioner here, Davis, did state a cause of action because she had stated a deprivation of a constitutional right. Note that the last sentence of the lengthy quote above, defining "cause of action" brings the court back around to just this point: the nature of the right asserted is "the focus" of the inquiry as to the existence of a cause of action. This conclusion by the Supreme Court is then bolstered by two further statements made by Brennan. The first of these is that there is ample precedent for finding that a cause of action "may be implied directly under the Equal Protection Component of the Due Process Clause of the Fifth Amendment", because that was exactly the holding of the Supreme Court in the District of Columbia school desegregation case, *Bolling* v. *Sharpe*, 347 U.S. 497 (1954). The second was that one of the important objectives of the Constitution was the designation of rights, and the judiciary "is clearly discernible as the primary means through which these rights may be enforced." 442 U.S. at 241-42.

The assumption from the constitutional scheme of things, that all constitutional violations would naturally be decided by the courts, was significantly narrowed by two qualifications added by Brennan, the exact meaning of which in this context of *Bivens* remedies was not made clear. Restating the scope of this constitutionally-based cause of action doctrine in two succeeding sentences, *id.*, at 242, Brennan wrote: (1) "At least in the absence of 'a textually demonstrable constitutional commitment of [an] issue to a coordinate political department' . . . we presume that justiciable constitutional rights are to be enforced through the courts,"' (2) "unless such rights are to become merely precatory, the class of the litigants who allege that their own constitutional rights have been violated, and who at the same time *have no effective means other than the judiciary* to enforce these rights, must be able to invoke the existing jurisdiction of the courts". 442 U.S. at 242 (emphasis added).

Now in *Bivens* the Supreme Court found readily that the plaintiff had no other effective remedy for the wrong done him, unless the courts would grant him damages recovery against the federal agents who invaded his home. Similarly, the Supreme Court found that Davis had no effective remedy other than the judiciary to vindicate her rights, although the Court did not precisely say how it reached that conclusion other than to cite to the non-binding nature of House of Representative rules governing sex discrimination. 442 U.S. at 243 n. 21. Nonetheless, the Court concluded: "She has a cause of action under the Fifth Amendment." 442 U.S. at 244. Thus, neither in *Bivens* nor in *Passman* does the Supreme Court really indicate what would constitute other "effective means" for the vindication of deprived constitutional rights, and none of the dissents in either case really discusses the meaning of this phrase either.

Having decided in the affirmative the first two of the three questions set forth as "required" in his opinion in *Passman*, Justice Brennan went on to reiterate that even though the plaintiff might have a cause of action, the court still had to determine "whether a damages remedy is an appropriate form of relief", as otherwise the suit "might nevertheless be dismissed under rule 12(b)(6)." 442 U.S. at 244. In short, while an affirmative answer to question number one almost insured an affirmative answer to question two (in the absence of other effective means of enforcement of rights), the answer to question three was a separate and independent hurdle that the plaintiff must surmount if his case was even to be considered on its merits by a federal trial court. Of course, at this stage of the proceedings, where argument is centered on whether there is any justiciable matter validly before the court, the factual allegations of the plaintiff must be assumed to be true.

In seeking an answer to his third question, Brennan relied heavily on two quotes taken from the opinion he had written for the Court's majority in *Bivens*. "*Bivens*, *supra*, holds," said Brennan in *Passman*, "that in appropriate circumstances a federal district court may provide relief in damages for the violation of constitutional rights if there are 'no special factors counselling hesitation in the absence of affirmative action by Congress," and if there is "'no *explicit* congressional declaration that persons' in petitioner's position injured by unconstitutional federal employment discrimination 'may not recover money damages from' those responsible for the injury." 442 U.S. at 245-47 (citations omitted). To apply these criteria to the *Passman* case, Brennan broke down his remarks as if replying to three short questions:

(a) what are appropriate circumstances for the provision of relief in damages,

(b) what are "special factors counselling hesitation", and

(c) what is an "explicit congressional declaration"?

See 442 U.S. at 245-47.

In discussing the "appropriateness" of a damages remedy, Brennan offered very little guidance to lower courts as to when not to answer this question in the affirmative; i.e., his comments were so general as to suggest that such a remedy is almost always appropriate. "Historically, damages have been regarded as the ordinary remedy," he noted; relief in damages would be "judicially manageable" especially in discrimination cases because the federal courts have had "great experience evaluating claims for back pay due to illegal sex discrimination" 442 U.S. at 245. Furthermore, added Brennan, in this case, "there are available no other alternative forms of judicial relief. For Davis, as for Bivens, 'it is damages or nothing'." 442 U.S. at 245 (citations omitted).[4]

Brennan's conclusion in *Davis* v. *Passman* that one of the factors for determining the "appropriateness of a damages remedy" is the presence or absence of "other forms of judicial relief" can easily be confusing. In what appears to be a listing of separate questions each raising distinct issues through which a federal court must proceed in determining whether a plaintiff is entitled to a *Bivens* cause of action, the issue of alternative remedies has now appeared *twice*. The plaintiff can state a cause of action if he or she belongs to "the class of litigants who allege that their own constitutional rights have been violated, and who at the same time have no effective means other than the judiciary to enforce the rights." *Id.* at 242; and the plaintiff can state a cause of action "for money damages" if he or she can show that there are "no other alternative forms of judicial relief." 442 U.S. at 242. We shall see shortly that the absence of alternative remedies will be raised in yet a third form in *Passman* as justification for granting the plaintiff a *Bivens* remedy. It remains to be said here only what a recent law review comment has correctly noted of Brennan's "appropriateness test" in *Passman*: "[a]lthough the tenor of the Court's language indicates the use of an 'appropriateness' test, the facts of the case support an 'essentiality' test because of *Davis*' lack of an alternative remedy." Comment, 29 *Emory L.J.* 230, 266 (1980) (footnote omitted).

As for the phrase "special factors counselling hesitation", there was no guidance offered to its meaning by Brennan's opinion in *Bivens*, where he simply wrote that *Bivens* "involves no special factors counselling hesitation in the absence of affirmative action by Congress," 403 U.S. 388, at 396. Furthermore, in *Butz* v. *Economou*, 438 U.S. 478 (1978), where Justice White wrote the opinion of the Supreme Court reaffirming the holding in *Bivens*, only the most passing reference is made to the "special factors" phrase, *id.*, at 503; and White does not suggest it to be a part of the holding of the Court in *Bivens* which he reaffirmed twice. *Id.* at 485-86, 504. Certainly in the consideration in *Economou* of what immunity defenses are available to defendants in constitutional tort cases, Justice White made no reference identifying immunity doctrines as "special factors counselling hesitation." Yet this is precisely the approach taken by Brennan in his opinion in *Passman* a year after *Economou*, when he noted that the fact that Davis was suing a Congressman "does raise special concerns counselling hesitation," 442 U.S. at 246; and cited to *Bivens* for the proposition that inquiry into the presence of "special factors" was part of the *Bivens* holding. 442 U.S. at 246.

Having raised immunity as a "special factor counselling hesitation", Brennan proceeded in his *Passman* decision to conclude that only momentary hesitation was necessary here. The Court in *Passman* held that neither comity nor any other special defense due a coordinate branch of the federal government barred suits against a Member of Congress by a Congressional employee. Wrote Brennan: "The concerns [raised by defendant's status are] coextensive with the protections offered by the Speech or Debate Clause" found in Art. I, §6, cl. 1 of the Constitution. 442 U.S. at 246 (footnote omitted). And, he continued: "If respondent's actions are not shielded by the clause, we apply the principle that 'legislators ought . . . generally to be bound by [the law] as are ordinary persons.' *Gravel* v. *United States*, 408 U.S. 606, 615 . . . ." 442 U.S. at 246. It was with the reliance of the majority on the Speech or Debate Clause that the dissenters in *Passman* took exception, but none of the dissenting opinions considered the meaning of Brennan's "special factors" phrase.

The absolute immunity from suit created by the Speech or Debate Clause is considered in a somewhat puzzling manner by the Court in *Passman*, in that it is discussed in two places rather than one. Early on in the opinion by Brennan, when the issue is said to be one of "justiciability", the justice in a long footnote makes the point that action protected by the Speech or Debate Clause would be immune from review in a federal court, and that neither the Supreme Court nor the Court of Appeals in *Passman* has yet ruled on whether employment questions such as that involved in *Davis* v. *Passman* are constitutionally protected actions of a Congressman or not. But the entire tenor of that footnote certainly suggests that Brennan and his brethren are not terribly impressed by the absolute immunity concept as raised in this case. The dissent by Justices Stewart and Rehnquist argued that this question should be answered by the Court of Appeals *before* the Supreme Court touched any of the other issues raised by *Passman*, but Brennan for the majority rejected that argument because the other questions in this case are "properly before us and may be resolved without imposing on respondent additional litigative burdens." 442 U.S. at 236 n. 11. Then in a later portion of his opinion where Brennan considered "special factors counselling hestitation" the issue of Congressional immunity was raised once again as a possible "special factor." 442 U.S. at 245. Here Brennan says no more than that while suing a Congressman "does raise special concerns counselling hesitation, we hold that these concerns are coextensive with the protection afforded by the Speech or Debate Clause." 442 U.S. at 246. (footnote omitted). Once again, as with "alternative remedies", Brennan's opinion in *Passman* does not make entirely clear when and with regard to what question should a lower federal court consider immunity when deciding whether to confer a *Bivens*-style cause of action on a plaintiff.

Coming to the final qualification raised by Brennan for deciding if a damages remedy should lie, the justice's opinion in *Passman* deals with whether or not there was an "explicit congressional declaration" barring persons in petitioner's position from recovering money damages individually from those responsible for violating their constitutional rights. The respondents in *Passman* alleged that there was such a congressional declaration implicit in Section 717 of Title VII of the Civil Rights Act of 1964 as amended in 1972, 42 U.S.C. 2000e-16, where suits were permitted by federal employees against the United States for alleged discrimination in federal employment. The argument by Passman's attorneys was that because Congress intentionally chose not to extend the protection afforded federal employees by Section 717 to Congressional employees (who were specifically excluded from §717 coverage), this action reflected a congressional "declaration" that such employees have no judicial remedies for discriminatory employment practices of their congressional employers. This argument was accepted by the Court

of Appeals in *Davis* v. *Passman*, 571, F.2d 793, 800 (5th Cir. 1978) (*en banc*), but rejected by the Supreme Court which found, in Brennan's words:

> There is no evidence, however, that Congress meant §717 to foreclose alternative remedies available to those not covered by the statute. Such silence is far from 'the clearly discernible will of Congress' perceived by the Court of Appeals. 442 U.S. at 247 (citation omitted).

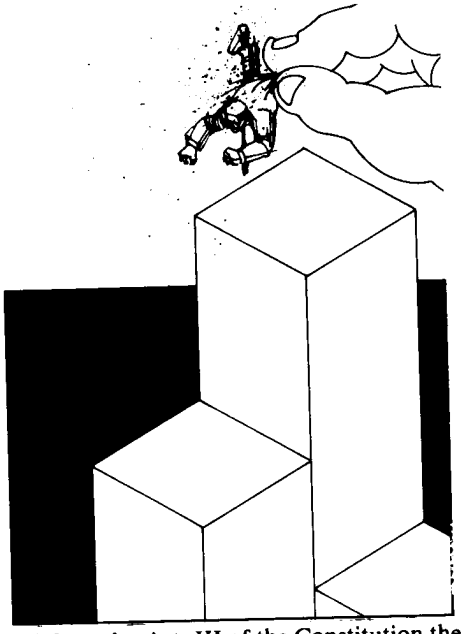
In marked contrast with the handling of the other questions posed by Brennan in *Passman*, this discussion of what constituted Congressional intent set down a fairly clear viewpoint for the Court. In short, the Court was not prepared to bar a plaintiff from recovering for damages caused by a violation of his constitutional rights unless such a bar was *clearly* declared to be the intent of Congress. Perhaps in consequence, this section of the *Passman* option would be reiterated in very similar terms in *Carlson* v. *Green*, 446 U.S. 14 (1980), where the term "explicit declaration", taken from *Bivens*, would become a central feature of the Court's opinion.

Brennan's discussion in *Passman* concerning "explicit congressional declarations" prohibiting petitioners like Davis from seeking money damages did not, however, clarify what interpretation he meant to give now to the larger statement in *Bivens* of which he had quoted only a portion. What the Supreme Court opinion in *Bivens* had said in full was:

> we have here no explicit congressional declaration that persons injured by a federal officer's violation of the Fourth Amendment may not recover money damages from the agents, *but must instead be remitted to another remedy, equally effective in the view of Congress.* 403 U.S. at 397. (emphasis added)

The final portion of this statement from *Bivens* was mentioned only as an aside by Brennan in *Passman*, and not in reference to the remainder of the sentence from *Bivens*. "And of course," said the Justice, "were Congress to create equally effective alternative remedies, the need for damages relief may be obviated." 442 U.S. at 248.

What was left unanswered in *Passman* by the casual treatment of the latter words in *Bivens* about "another remedy" is the question of whether Congress can simply "affirmatively declare" in an "explicit" manner that suits against federal officials in their individual capacities shall not be heard by federal courts. Or may Congress bar *Bivens*-type suits *only* by creating "equally effective alternative remedies"? Justice Powell writing in dissent in *Passman*, 442 U.S. at 255 n. 4, answered this question by saying that Congress could choose to respond to the Court's *Passman* decision by statutorily limiting the jurisdiction of the federal courts so that plaintiffs like Davis had no judicial remedy whatsoever. Certainly under Art. III of the Constitution the Congress has power to determine the scope of jurisdiction of the federal courts, a topic of considerable interest presently, as the Congress considers whether to take questions of school busing or abortion out of the jurisdiction of the federal courts. For the moment it is enough to note that the existence of "alternative remedies" once again becomes important in *Passman* to decide whether to find a *Bivens* remedy. But what would constitute such an "alternative remedy" is not stated.



Detailed consideration of that portion of the *Passman* opinion concerned with determining the appropriate scope of the *Bivens* damages remedy is essential, even though the Supreme Court has altered its position subsequently, in *Carlson* v. *Green*, 446 U.S. 14 (1980), because lower federal courts have tried to conform their holdings to the Supreme Court's prescription in *Passman* as if *Carlson* had wrought no changes. This is particularly true in the cases decided since *Passman* involving *Bivens* suits brought against federal executives by their subordinates, and we shall consider these cases after viewing how the *Carlson* opinion differs from that delivered in *Passman*.

In *Carlson*, respondent brought an action for damages against the Director of the Federal Bureau of Prisons and other federal prison officials in their individual capacities, on behalf of the estate of her deceased son, alleging that he suffered personal injuries and died because the petitioners failed to provide him with competent medical attention while he was an inmate in a federal penitentiary in Indiana, in violation of his due process, equal protection and eighth amendment rights. The federal district court held that while respondent had a *Bivens* remedy available, it was governed by Indiana's survivorship and wrongful death laws and as such failed to meet federal jurisdictional amount requirements. The Seventh Circuit Court of Appeals reversed on grounds that *Bivens* actions were governed by federal common law rather than state law. 581 F.2d 669 (1978). Two questions were presented for decision by the Supreme Court, the only one of which interests us here being the one presented for the first time in the petition for certiorari: is a *Bivens*-type remedy available in circumstances where the plaintiff could also sue the United States under the Federal Tort Claims Act?

Justice Brennan, once again writing for a majority of the Supreme Court, answered this question by invoking much of the same *Bivens* language he used to answer the third question he raised in *Passman*: is a remedy for damages appropriate? But what had seemed to be prefunctory language in *Bivens*—language ignored in *Passman*—suddenly emerged as the basis for the decision in *Carlson*. And what seemed to many to be a remedy judicially created for plaintiffs otherwise helpless to recover for violations of constitutional rights, in *Carlson* appeared dramatically increased in scope.

The holding in *Bivens*, said Brennan in *Carlson*, was that "victims of a constitutional violation by a federal agent have a right to recover damages against the official in federal court" unless one of two situations exists:

> The first is when defendants demonstrate 'special factors counselling hesitation in the absence of affirmative action by Congress'. . . .
> The second is when defendants show that Congress has provided an alternative remedy which is explicitly declared to be a *substitute* for recovery directly under the Constitution, and viewed as equally effective. 446 U.S. at 18-19.

Neither situation existed in the *Carlson* case, Brennan concluded. There were no special factors involved, and no explicit congressional declaration that plaintiffs could not recover from defendants but were remitted to another remedy. Congress had not stated that the Federal Tort Claims Act (FTCA) was intended to pre-empt a *Bivens*-type remedy, and the fact that the *Bivens* remedy was more effective for plaintiffs in four regards than the FTCA also supported the conclusion "that Congress did not intend to limit respondents to an FTCA claim." 446 U.S. at 20-21.

"Special factors counselling hesitation", the phrase defined in *Bivens* and *Economou* and discussed in terms of congressional immunity from suit in *Passman*, becomes in *Carlson* nothing more than a concern about immunity. Once again, in *Carlson*, a Court majority concludes there are no such special factors present, and in two sentences explains why:

> Petitioners do not enjoy such independent status in our constitutional scheme as to suggest that judicially created remedies against them might be inappropriate. *Davis* v. *Passman*, 442 U.S. at 246.

> Moreover, even if requiring them to defend respondent's suit might inhibit their efforts to perform their official duties, the qualified immunity accorded them under *Butz* v. *Economou*, 438 U.S. 478 (1978), provides adequate protection. See *Davis* v. *Passman*, *supra*, at 246.
> 446 U.S. at 19.

If "special factors" means no more than this, then as *Economou* and *Passman* demonstrated, momentary hesitation at best is all that will be counselled. What appeared to be grounds for denying the existence of a *Bivens* remedy in particular cases turned out to be nothing more than a recognition that some defendants to a *Bivens* suit may have an immunity defense available to them, which is not the same thing at all.

Justice Powell, writing for himself and for Justice Stewart, joined in the judgment of the Court in *Carlson* but disagreed vigorously as to the Court's reasoning. On Brennan's treatment of the "special factors" phrase, Powell commented that since no guidance was given on this point it appeared that it was unlikely to prove a factor in limiting court discretion in future in finding *Bivens* remedies available to plaintiffs. 446 U.S. at 27. The Chief Justice writing in dissent was even more critical in his comment on the *Carlson* court's treatment of "special factors," dismissing this criteria in a footnote as essentially meaningless.

> The Court pays lip service to the notion that there must be no "special factors counselling hesitation in the absence of affirmative action by Congress." Its one sentence discussion of the point, however, plainly shows it is unlikely to hesitate unless Congress says that it must. See opinion of Mr. Justice Powell, *ante*, at 27.
> 446 U.S. at 30.

As one law review has concluded, if "special factors" did not stop the Supreme Court in *Passman* it is difficult to imagine any case where this factor would do so. See 29 *Emory L.J.* 230, 266 (1980).

On the matter of "alternative remedies", Justice Brennan's opinion in *Carlson* is more informative than it was on "special factors." It now appeared that unless the Congress provides an alternative remedy that satisfies very specific prerequisites set down in *Carlson*, the federal courts *must* grant plaintiffs complaining of constitutional violations a *Bivens* remedy.[5] What had begun in *Bivens* as a judicious exercise of discretion available to the federal courts to fashion a remedy now appeared to assure the provision of *Bivens* remedies to plaintiffs in much more absolute terms. Far too absolute terms, said three members of the Supreme Court. The "principled discretion" that a federal court must exercise in deciding whether a *Bivens* remedy is appropriate according to *Davis* v. *Passman*, has by the Court's opinion in *Carlson* become highly restricted, they said. Justice Powell complained: "[T]oday we are told that a court must entertain a *Bivens* suit unless the action is 'defeated' in one of the two specified ways." 446 US. at 26. And since one of the two ways in which to defeat a *Bivens* remedy, the presence of "special factors counselling hesitation" has been left undefined by the Court's opinion, Justice Powell concluded that:

> [O]ne is left to wonder whether judicial discretion in this area will hereafter be confined to the question of alternative remedies, which is in turn reduced to the single determination that congressional action does or does not comport with the specifications prescribed by this Court.
> 446 U.S. at 27.

Reaching this conclusion, Powell made the following observations:

> Such a drastic curtailment of discretion would be inconsistent with the Court's longstanding recognition that Congress is ultimately the appropriate body to create federal remedies.
>
> ***
>
> The court does not explain why this discretion should be limited in the manner announced today.
> 446 U.S. at 27-28.

Chief Justice Burger acknowledged that while he was prepared "to join an opinion giving effect to *Bivens* v. *Six Unknown Named Federal Narcotics Agents*, 403 U.S. 388 (1971)—which I thought wrongly decided—I cannot join today's unwarranted expansion of that decision." 446 U.S. at 30. In his view the existence of the FTCA provided the plaintiff in *Carlson* with an "adequate remedy" and "that is the end of the matter." 446 U.S. at 30. "Until today, I had thought *Bivens* was limited," said the Chief Justice, "to those circumstances in which a civil rights plaintiff had no other effective remedy." 446 U.S. at 31.

What particularly irritated the dissenters in *Carlson* was the addition of the word "substitute" to the original *Bivens* statement about alternative remedies; i.e., the defendant must show that Congress "explicitly declared [its remedy] to be a *substitute* for recovery directly under the Constitution and viewed [it] as equally effective", 446 U.S. at 18-19; and even more, the transformation of what had been an observation by the Court in *Bivens* into a principal ground for deciding the case in *Carlson*. For those who thought the essential point in deciding *Bivens* had been the issue of the presence or absence of alternative remedies, it was something of a shock to hear the issue stated in terms of the quality of the alternative and the specificity of Congress' intent in making the alternative exclusive.

In a footnote, Brennan denied the allegation made by the Chief Justice that the test . . congressional intent in *Carlson* required the Congress to recite the specific "magic words". Burger, C.J., argued that a perfectly acceptable alternative remedy may have been created by Congress, but unless the Congress chose explicitly to *say* that it was meant to be an exclusive alternative, the Court might well decide that both remedies co-existed to the advantage of the plaintiff, as they did in *Carlson* where an FTCA remedy and a *Bivens* remedy were both found to be available to the plaintiff 446 U.S. at 31. According to Brennan, the question was not one requiring specific words from Congress, but rather language indicating a clear intent by Congress. 446 U.S. at 19 n. 5. Nevertheless, Brennan spent the major portion of the opinion for the Court discussing how the Federal Tort Claims Act was not an equivalent remedy to that created by the Supreme Court in *Bivens* in that in at least four regards it was a *less effective* remedy for the plaintiff. On the basis of this discussion he concluded that, where the alleged "alternative remedy" is "plainly . . . not a sufficient protector of the citizens' constitutional rights", then Congress will have to speak out very clearly indeed if its intent is to create an exclusive remedy by statute that would exclude the *Bivens* remedy. 446 U.S. at 23.

What divided the Supreme Court in *Carlson* was not the proper judicial response to a congressional declaration regarding jurisdiction or remedies, but how best to proceed in the absence of such a clear declaration. There is no doubt that the Court would affirm dismissal of a *Bivens* claim if the defendant could show that congress had explicitly declared an equally effective alternative remedy to be that exclusively available to persons with the plaintiff's complaint. It is also very likely that even in the absence of such a specific declaration by Congress, the Court would *infer* such a motive on the part of Congress in cases where the alternative remedy was found by the Court to offer plaintiffs substantially the same advantages as a *Bivens* suit. The problem case in this area will be the one where the congressional substitute remedy does not offer the plaintiff substantially the same advantages as a *Bivens* remedy but is nevertheless declared by the Congress to be "equally effective". Given Justice Brennan's reiteration in *Carlson* of the words he authored in *Bivens*, 403 U.S. at 397, "equally effective *in the view of Congress*" (emphasis added), it would seem to follow that the Supreme Court would give precedence to a congressional declaration over the substance of congressional action. Consonant with this view is the fact that when Brennan discussed the four advantages of a *Bivens* action over an FTCA claim—the right to jury trial and punitive damages, the application of federal rather than state law, and an individual deterrent purpose—it was not in the context of establishing characteristics

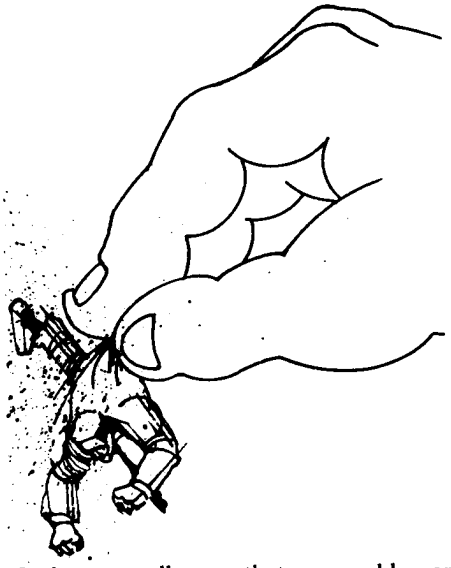
required of an alternative remedy so as to be "equally effective" to *Bivens*. Rather he used the absence of these advantages to buttress his argument that Congress did not implicitly intend the FTCA to be a substitute for a *Bivens* remedy. As Brennan stated in a footnote:

> The issue is not whether a *Bivens* cause of action or any of its particular features is essential. Rather the inquiry is whether Congress has created what it views as an *equally* effective remedial scheme.
> 446 U.S. at 22 n. 10

This question of how the court is likely to apply the "equally effective remedy" standard of *Carlson* is a pertinent one, in that the contemporary efforts in Congress to amend the Federal Tort Claims Act, so as to make it an acceptable substitute for *Bivens* actions against individual federal employees, do not (and practically-speaking cannot) endow the FTCA with the same advantages to plaintiffs as *Bivens*. In fact, none of the bills introduced in the 97th Congress provide three of the four "advantages" specifically mentioned in *Carlson*: individual deterrence, jury trials, or punitive damages. *E.g.*, H.R. 24, January 5, 1981. These bills and their predecessors did provide one ingredient to the FTCA deemed significant by the *Carlson* court: federal rather than state law would govern the outcome in FTCA cases where the allegation was that a "constitutional tort" had been committed.[6] And some of the earlier bills had proposed elaborate disciplinary schemes for federal official tortfeasors, to be invoked to a greater or lesser degree by the successful plaintiff following judgment against the United States in FTCA proceeding. These administrative procedures were so sharply citicized in the 96th Congress however, by both friends and foes of the bill, that they have been dropped from the most recent version introduced in the House of Representatives. *Compare* H.R. 2659 (March 26, 1979) with H.R. 24 (January 24, 1981).

While it is problemmatical whether any amendment to the FTCA can pass the Congress in the near future, given the current lack of enthusiasm there for the federal bureaucracy (and the fact that the thrust of such legislation could be characterized as insulating federal tortfeasors from personal liability for their wrongdoing),[7] it is certain that bills allowing jury trials or punitive damages in suits against the United States have no chance of being enacted. It is simply too easy to see how likely it would be that sympathy for a wronged plaintiff could lead to very large recoveries against the United States, especially by juries viewing the federal government as having unlimited funds at its disposal.

It is not just unlikely that the FTCA will be rewritten so as to offer plaintiffs the same advantage as *Bivens*, it is impossible; With the exception of the application of federal rather than state law, the advantages enumerated by the Supreme Court in



Carlson are all ones that reasonably can occur only where the cause of action is one against an individual or individuals. The FTCA is by its nature not so much a remedy, as a substitute form of action against the federal government as a whole. To the extent that it is an exclusive remedy or offers advantages to plaintiffs not found in *Bivens* actions (such as the assurance of collecting on judgments), its purpose has been to insulate federal officials from personal suits for torts committed in the course of their federal employment. And despite the absence of jury rights or punitive damages, FTCA actions can, after all, "make whole" the private citizen injured by the action of a federal employee. To compare an action brought under the FTCA and one brought under *Bivens* as if they should be identical is as ridiculous as asking the same question of an apple and an orange. If the FTCA were amended in line with Justice Brennan's opinion in *Carlson*, it would no longer be a Federal Tort Claims Act at all.

It is with this realization in mind that congressional drafters have recently sought to amend the FTCA by incorporating other advantages for plaintiffs than those listed in *Carlson* as adhering to a *Bivens* cause of action, as well as by including the "explicit declaration," that as amended, the FTCA will be "equally effective" as a remedy. Among the advantages of an FTCA claim are the traditional ones of assured recovery if judgment is favorable; guaranteed minimum liquidated damages as a partial substitute for punitive damages; government waiver of any immunity defense which would be available to the accused federal official;[8] and (in a few bills) some administrative disciplinary proceeding that could be triggered and participated in by a victorious plaintiff against the individual federal tortfeasor. While these "advantages" would not make the FTCA as amended identical to the *Bivens* remedy, it is obviously the hope of congressional drafters that these features would, coupled with the explicit wording regarding "intent" seemingly required by *Carlson*, convince the federal courts to accept an amended FTCA as the exclusive remedy in cases where federal officials committed constitutional torts.

In the absence of such amendments to the FTCA, there remains the problem whether other congressionally-created remedies, not explicitly stated to be substitutes for *Bivens* remedies, can nevertheless be found to serve as exclusive remedies. The question is particularly pressing in a class of constitutional tort cases yet to be considered by the Supreme Court: suits against federal officials by their subordinate employees alleging deprivation of constitutional rights through some employment practice. All of the *Bivens*-type cases to come before the Supreme Court to date have been brought by private citizens outside of federal employment against alleged federal tortfeasors, e.g., *Bivens, Economou, Green.* But there has been an increasing number of cases brought before lower federal courts since *Bivens*, in which both the plaintiffs and the defendants were in federal employment See, *e.g., Harper v. Blumenthal,* 478 F. Supp. 176 (D.D.C. 1979); *Neely v. Blumenthal,* 458 F. Supp. 945 (D.D.C. 1978). And while employees have won money damages from their supervisors individually in few of these cases, the number continues to rise.

The most interesting of these constitutional tort cases arising out of federal employment actions are *Bishop v. Tice,* 622 F.2d 349 (8th Cir. 1980), and *Bush v. Lucas,* 647 F.2d 573 (5th Cir. 1981), because in both of these opinions, *Bivens*-type suits were dismissed on the authority of *Carlson v. Green,* as "special factors counselling hesitation" were present. The thrust of both appeals court opinions would be to bar all *Bivens* actions by federal employees against their supervisors arising out of disciplinary actions, on grounds that adequate civil service procedures exist to protect federal employees in such circumstances. Given the difficulties of drawing such a conclusion based on the summary comments made by Justice Brennan in *Carlson,* it is not easy to perdict how these opinions will fare if the Supreme Court chooses to review them. But if *Bishop* and *Bush* are upheld, they would effectively end litigation among federal employees arising out of *Bivens*-type situations, further reducing pressures on Congress to amend the FTCA so as to achieve the same ends.

In *Bishop v. Tice,* 622 F.2d 349 (1980), the plaintiff brought a diversity action coupled with a *Bivens*-type claim against three employees of the Occupational Safety and Health Administration (OSHA), which charged that the defendants had coerced plaintiff into resigning his job as a federal safety engineer with OSHA by threatening to lodge false criminal charges against him unless he did so. The plaintiff sought compensatory and punitive damages under four theories of recovery: (1) defamation, (2) deprivation of liberty and property without

due process, (3) contractual interference, and (4) conspiracy to defraud and deceive. The Federal District Court for the Eastern District of Arkansas granted the defendants' motion to dismiss, and plaintiff appealed with regard to theories (2) through (4), only the first of which raises constitutional issues.[9]

The Eighth Circuit Court of Appeals used the approach set forth by Justice Brennan in *Davis v. Passman,* in order to decide whether Bishop's complaint stated an actionable claim for damages under the Constitution. 622 F.2d at 353. Although the appeals court noted that it had examined the Supreme Court's opinion in *Carlson v. Green* and found it "consistent with our result", *622 F.2d* at 357 n. 16, the reasoning in *Bishop* sought no support from the *Carlson* opinion, perhaps understandably since *Carlson* was announced barely a month prior to the decision in *Bishop v. Tice.* Instead, the Court of Appeals took the test for finding the existence of a *Bivens*-type remedy to be one determined solely by deciding whether or not there was an alternative "adequate federal remedy" available, 622 F.2d at 356, n. 12. And the Appeals Court sought support for its approach in citing the opinion of *lower* federal courts and especially its own decision in *Owen v. City of Independence,* 589 F.2d 335 (8th Cir. 1978), *rev'd on other grounds,* 445 U.S. 622 (1980). There are several reasons to suggest that the appeals court would have been better advised to stick closer to the Supreme Court's reasoning in *Carlson v. Green,* which as already noted was no restatement of *Bivens* and *Passman,* but went beyond both in making it substantially easier for a plaintiff to raise a cause of action directly under the Constitution.

In its opinion in *Bishop,* the Court of Appeals chose to argue that it accepted the view of *Bivens* and *Passman* expressed by several circuits — that it was inappropriate to expand the *Bivens* remedy into areas where Congress had created an alternative remedy. The question was not the adequacy of the alternative (nowhere does the appellate court undertake to compare the relative advantages of the congressionally mandated alternative to those of *Bivens* actions as the Supreme Court did in *Carlson*), but the *existence* of the alternative. But the court went even further in ignoring *Carlson:* it cited as support for its approach a lower federal decision whose future is very much in doubt given the Supreme Court opinion in *Carlson.* The Appeal Court said:

> courts have declined to infer *Bivens* style damage claims based on the torts of federal government employees where the plaintiff had an alternative federal remedy under the Federal Tort Claims Act (FTCA). E.g. *Torres v. Taylor,* 456 F. Supp. 951, 952-55 (S.D.N.Y. 1978). *Contra, Thornwell v. U.S.,* 471 F. Supp. 344, 354-55 (D.D.C. 1979).

622 F.2d at 356.

The other lower court cases from which the circuit court claimed support were those relating to suits brought against municipalities under 42 U.S.C. §1983.[10] Until the decision of the Supreme Court in *Monell v. Department of Social Services,* 436 U.S. 658 (1978), held that the words "every person" in the statute encompassed municipal corporations, some appeals courts had considered whether a cause of action for damages might lie directly against a municipality for the unconsitutional conduct of its officials utilizing the reasoning of *Bivens v. Six Unknown Federal Agents.* The Eighth Circuit cited with approval three decisions in other circuits where such arguments were rejected on grounds that Congress had authorized another form of relief, under 42 U.S.C. §1983 against officers of such a municipality:

> E.G., *Cale v. City of Covington,* 586 F.2d 311, 317 (4th Cir. 1978) (declining to infer *Bivens* style remedy in part because of congressionally-provided alternative of 42 U.S.C. §1983 suit against individual municipal officials); *Mahone v. Waddle,* 564 F.2d 1018, 1024-25 (3rd Cir. 1977) (plaintiffs have cause of action under 42 U.S.C. §1981 and *Bivens* teaches that the existence of an effective and substantial federal statutory remedy . . . obviates the need to imply a constitutional remedy"); *Kostka v. Hogg,* 560 F.2d 37, 42 (1st Cir. 1977) ("existence of a statutory remedy [42 U.S.C. §1983] which is designed to implement the constitutional guarantee may itself render the *Bivens* analysis inappropriate").

622 F.2d at 355-56.

The appeals court went on to note its own prior holding in *Owen v. City of Independence,* 560 F.2d 925, 931-34 (8th Cir. 1977), *vacated and remanded,* 438 U.S. 902 (1978), where it had decided that the employee plaintiff *did* have an implied cause of action under the 14th Amendment against the city for equitable relief including back pay. Forced to reconsider its opinion in *Owen* following remand by the Supreme Court after that court's decision in *Monell,* the Eighth Circuit agreed that since the remedy of 42 U.S.C. § 1983 was now made available to the plaintiff by the *Monell* decision, "no reason exists to imply a direct cause of action under the fourteenth amendment." 589 F.2d 335, 337 (8th Cir. 1978), *rev'd on other grounds,* 445 U.S. 622 (1980).[11] While agreeing that its own position in *Owen* had been contrary to the approach taken by other circuits, the Eighth Circuit argued in *Bishop* that they all agreed on how to interpret *Bivens:* "we adhere to the widely held view that a *Bivens* analysis is obviated once once an adequate federal remedy is shown to exist." 622 F.2d at 356, n. 12.

Having established the test as being "what alternative remedies were available". 622 F.2d at 356, the Eighth Circuit went on to examine civil service discharge procedures available to a dismissed federal employee such as Bishop, for both reinstatement and back pay. "It is our view," said the Court. "that the existence of these remedies obviates a *Bivens* style compensatory remedy inferred from the Constitution." 622 F.2d at 357. In a few brief sentences, the Court buttressed this conclusion by adding that allowing a *Bivens*-type action might encourage dismissed employees to bypass the civil service procedures available; although it went on immediately to say that a "widespread evasion of civil service discharge appeal procedures . . . is admittedly unlikely." 622 F.2d

Despite the contention of the circuit court in *Bishop* that its opinion was congruent with that of the Supreme Court in *Carlson v. Green,* 622 F.2d at 357 n. 16, the *Bishop* opinion reads to the contrary. It completely ignores the debate among Supreme Court justices as to how explicitly Congress must indicate that another remedy is exclusive in order to exclude the existence of a *Bivens*-type remedy; and it overlooks the lengthy discussion by Brennan, J., for the Court, concerning the relative advantages for the plaintiff of a *Bivens* type action relative to an action brought under the Federal Tort Claims Act as a way of inferring congressional intent. As a consequence of these two omissions, the *Bishop* opinion reads much more like the opinion of the lower federal court in *Carlson,* 581 F.2d 669 (7th Cir. 1978), an opinion *reversed* on appeal.

If the Supreme Court in *Carlson* is saying anything more than it had in *Bivens, Economou,* and *Passman,* certainly it is saying that the justices will look *very closely* at the legislative history of federal remedies purported to exclude the existence of a *Bivens*-type remedy. The majority of the Court implied that they would be inclined to give great weight to a specific congressional declaration that it had created an exclusive statutory remedy intended to foreclose a class of plaintiffs from availing themselves of a *Bivens* remedy. In the absence of such an explicit declaration, the Court would weigh the relative advantages to the plaintiff of a *Bivens*-type action in contrast to the purported substitute types of actions in order to decide whether the alternatives were "intended" to be exclusive ones. No such exploration of congressional intent, explicit or implicit, will be found in the Eighth Circuit's opinion in *Bishop v. Tice.*

After finding that the existence of civil service procedures for appealing from employment actions of superiors constitutes grounds for denying a *Bivens*-type remedy, the Eighth Circuit made the point,

albeit very briefly, that the plaintiff in *Bishop* had no right to a *Bivens*-type remedy because of the presence of "special factors counselling hesitation." *Id.* at 357. Citing in support the opinion of the Fifth Circuit in *Bush v. Lucas,* 598 F.2d 958, 961 (1979), the Eighth Circuit in one sentence concluded:

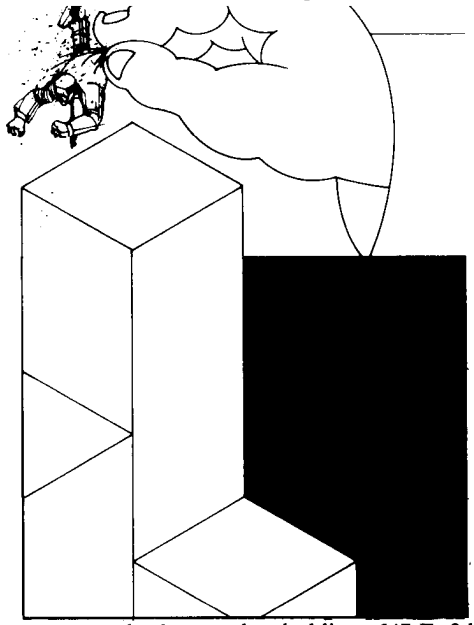
> [t]he existence of civil service remedies, coupled with the apparent anomaly of a parallel *Bivens* style remedy constitutes a "special factor counselling hesitation" in the creation of a constitutionally based remedy for a wrongful dismissal; we are persuaded it would be unwise therefore to infer a cause of action for damages directly from the Fifth Amendment.

622 F.2d at 357

This is the only reference made in *Bishop* to "special factors" analysis, and it completely neglects to indicate how the Court reached this particular conclusion except to indicate by its citation of *Bush v. Lucas* that the Eighth Circuit seems to have accepted the reasoning of the Fifth Circuit in that case. The citation is of dubious utility to the Court in *Bishop* since the Supreme Court vacated and remanded the Fifth Circuit's decision in *Bush,* 446 U.S. 914, and ordered it reconsidered in light of the Supreme Court's decision in *Carlson v. Green.*

We now need to turn to the two decisions of the Fifth Circuit in *Bush v. Lucas,* 598 F.2d 958 (1979), *vacated and remanded in light of Carlson v. Green,* 446 U.S. 914 (1980) *(Bush I),* and 647 F.2d 573 (1981) *(Bush II),* because here is to be found the only other appeals court discussion of civil service remedies as "special factors counselling hesitation" in the recognition of a *Bivens* remedy. It is also appropriate to turn to the *Bush* cases because in *Bush II* the Fifth Circuit Court of Appeals found comfort in citing the opinion of the Eighth Circuit in *Bishop v. Tice* — wherein the latter court supported its conclusion by citing the first *Bush* opinion! 647 F.2d at 577.

Bush, an aerospace engineer, originally brought an action against a federal space flight center director for damages (1) for defamation under state law, and (2) for allegedly retaliatory demotion (under a *Bivens* style remedy). The Federal District Court rendered summary judgment for the director, and the engineer appealed. The Fifth Circuit at first held in *Bush I* that the defamation claim was precluded by *Barr v. Matteo,* 360 U.S. 564 (1959), and the action for damages under the First Amendment for retaliatory demotion was precluded in view of the available remedies under Civil Service Commission regulations. 598 F.2d 958 (1979). When this judgment was remanded to the Court for reconsideration in light of *Carlson,* the Fifth Circuit *Bush II* affirmed its first holding on the defamation cause of action, since nothing in *Carlson*



cast any doubts on that holding. 647 F. 2d at 575. It then proceeded to reaffirm its prior holding on the *Bivens* remedy as well, distinguishing *Carlson* which dealt with "the role of government as sovereign over private citizens generally", whereas *Bush* dealt with "the role of government as an employer towards it employees". The one role, said the appeals court, was "fundamentally different" from the other role. 622 F.2d at 576.

Admitting that "[t]here is little guidance in the Supreme Court opinions as to what 'special factors' will justify withholding a *Bivens* remedy", the appeals court nevertheless concluded that:

> [d]efendant persuasively argues, however, that in this case, the unique relationship between the Federal Government and its civil service employees is a special consideration which counsels hesitation in inferring a *Bivens* remedy in the absence of affirmative congressional action.

622 F.2d at 576.

Besides finding support for this conclusion in the Eighth Circuit's opinion in *Bishop,* the Fifth Circuit argues that the Supreme Court has recognized the special nature of this employment relationship in more than one case, and that the Congress has through its extensive legislation in the federal employment area also recognized the special relationship. 622 F.2d at 576. Neither of these arguments, however, is more than tangentially relevant to the issue of concern in *Bush,* since they focus on very different definitions of "special factors" than that used by the Supreme Court in *Carlson v. Green.*[12]

To ground a judgment on the phrase "special factors counselling hesitation" is a risky endeavor for a federal appeals court, given the very limited content accorded that phrase by its originator, and the rejection of the phrase — as essentially meaningless — by its detractors on the Supreme Court. The risk of reversal on appeal is increased when the lower court uses the "special factors" phrase to *bar* a *Bivens* suit, something the Supreme Court has yet to do. Finally, it is very difficult to use the phrase to encompass a special employment relationship, such as that between the federal government and its employees, when the only "special factor" ever mentioned by the Supreme Court has been possible immunity defenses available to *Bivens* defendants.

In both *Bishop v. Tice,* and *Bush v. Lucas,* the appeals courts might have been better advised to rely on the argument that existing civil service remedies constituted a substitute to a *Bivens* remedy. But neither court took this approach. In *Bishop,* the court started to do so, by its examination of alternative remedies and its emphasis on lower federal courts' refusal to extend the *Bivens* remedy to plaintiffs who had other remedies available to them, 622 F.2d at 355-56. But the appeals court then throughly muddled the two separate grounds set down by the Supreme Court in *Carlson* for barring *Bivens* suits, when it concluded that "[t]he existence of civil service remedies, coupled with the anomaly of a parallel *Bivens* style remedy, constitutes a 'special factor counselling hesitation' in the creation of a constitutionally based remedy for a wrongful dismissal". 622 F.2d at 357. The *Bush* court did little better. It rested its judgment entirely on the "special factors" argument, and refused to reach the question of whether existing civil service remedies were intended by Congress to be an equally effective substitute for a *Bivens* remedy. The Fifth Circuit then concluded with a sentence that suggested a complete misunderstanding of the *Carlson* opinion. "We hold," it said, "only that absent more explicit direction from Congress, a *Bivens* remedy should not be inferred." 647 F.2d at 577. In fact, what the *Carlson* opinion had made abundantly clear was that a majority of the Supreme Court favored the opposite approach: it would infer a *Bivens* remedy unless there was an explicit direction from the Congress preventing it from doing so. See 446 U.S. at 19-20.

The "proper" interpretation of the Supreme Court's opinion in *Carlson,* as suggested here, was used by the Seventh Circuit in *Sonntag v. Dooley,* 650 F.2d 904 (1981), and it rests its reasoning directly on *Carlson* rather than its predecessors.

In *Sonntag* a former federal employee brought both a traditional tort and a constitutional tort action seeking damages from several former civil service supervisors for (1) making false and malicious statements about the plaintiff and (2) for bypassing administrative procedures and undertaking a systematic program to harass her into unwanted retirement. She further alleged that as her administrative complaints and protests were denied or ignored, she had no alternative but to bring this suit. The trial judge dismissed the constitutional tort count, relying on *Bishop v. Tice,* 622

F.2d 349, 357, for the proposition that the plaintiff could have resorted to civil service remedies created by Congress, so no *Bivens* remedy need be created for her. And he dismissed the common law tort claim of libel and slander since in the absence of the other count there was no independent jurisdiction to consider this pendant state claim. The Court of Appeals reversed on both counts and remanded the case for trial, rejecting implicitly both *Bishop v. Tice* and *Bush v. Lucas.*

The Seventh Circuit panel based its conclusion on the holding of *Carlson* that a plaintiff was entitled to a *Bivens* remedy unless there were "special factors counselling hesitation" demonstrated by defendants, or an explicitly declared substitute remedy for recovery created by the Congress. "Special factors" was interpreted to mean only what the Supreme Court explicitly said in *Carlson:* did the defendants "enjoy such an independent status in our constitutional scheme as to suggest that judicially created remedies against them might be inappropriate." *Carlson v. Green, supra* at 19. The Court of Appeals answered this question in the negative, concluding that qualified immunity provided adequate protection for these defendants. The court then moved to consider the existence of an alternative remedy. In other words, it implicitly rejected any interpretation of "special factors counselling hesitation" other than that relating to the question of *immunity.* The Seventh Circuit did not even mention the idea that had impressed the Fifth and Eighth Circuits, that federal employment somehow was a "special factor counselling hesitation".

As for the issue of alternative remedies, the court in *Sonntag* began by pouring cold water on the idea that civil service remedies would qualify, by saying that while *Bush v. Lucas (Bush I)* had so held, that opinion had been vacated and remanded by the Supreme Court in light of *Carlson.* 650 F.2d at 907 n.3. It continued, however, by saying that the Merit Systems Protection Board procedures were no alternative remedy for the plaintiff here. MSPB regulations did not cover coerced resignations. Moreover, even if the regulations had been applicable here, they would have provided only for reinstatement and back pay. But plaintiff, alleging that defendants' actions had destroyed her health, was unable to work and sought damages, not reinstatement.

It is likely that the Fifth and Eighth Circuit courts eschewed the "alternative remedies" basis for decision because Congress did not explicitly characterize civil service grievance procedures as substitute remedies to a *Bivens* action. Perhaps overly influenced by the attack of the dissenters in *Carlson* on the majority's use of the phrase "explicitly declared to be a substitute", these appeals courts overlooked Justice Brennan's rejoinder that the essential question was the traditional one of the intent of Congress, 446 U.S. at 19 n. 5. They may also have overlooked a second explanatory footnote in Brennan's opinion concerning the meaning of his requirement that alternative remedies had to be viewed by Congress as "equally effective" before the Court would type them as exclusive remedies. See 446 U.S. at 22 n. 10. The issue again, said Brennan, was not whether the alternative contained any essential features, but rather what had been the intent of Congress and "whether Congress has created what it views as an *equally* effective remedial scheme". On the basis of these two statements made in *Carlson,* coupled with the opinions of justices concurring and dissenting in *Carlson* to the effect that congressional intent was indeed the principal issue, there is a strong argument for the proposition that a majority of the justices would uphold existing civil service remedies as equally effective substitutes for a *Bivens* remedy in cases where federal employees sought tort damages from their supervisors in their individual capacities. Admittedly, such a majority might not contain all the members of the Court who joined in Brennan's *Carlson* opinion. But it would be necessary only to split away one of the *Carlson* majority to achieve such an outcome.

If the words in *Carlson* referring to an explicit declaration by Congress are to be taken literally, as Chief Justice Burger in his dissent and Justice Powell in his concurring opinion feared they were to be, 446 U.S. at 27, 30, then it is doubtful that any *existing* statutory remedial scheme can be found to be an equally effective substitute for a *Bivens* action, because *Bivens* has been developed and expanded too recently by the courts for Congress to undertake such explicit action yet. In that case, Brennan's words must be taken as advice to the Congress in terms of its future responses, if any, to the development of *Bivens* through *Carlson.* But there are too many recent cases where the Supreme Court has in other contexts assumed that Congress did or did not intend to create a judicial remedy, despite congressional silence on the subject, for that to be a viable interpretation of the *Carlson* opinion. The closest of these cases being on point with *Carlson* is *Brown v. General Services Administration,* 425 U.S. 820 (1976).

In *Brown,* the plaintiff brought suit against his employer for alleged job discrimination under §717 of the 1964 Civil Rights Act, as added by §11 of the 1972 Equal Employment Opportunity Act; and under 42 U.S.C. §1981. The Supreme Court affirmed the judgment of the trial court in granting defendants' motion to dismiss on grounds that Brown had not filed the complaint within the 30-day period specified by §717(c), and on grounds that §717 had been intended by the Congress to be the exclusive, pre-emptive administrative scheme for the redress of federal employment discrimination, 425 U.S. at 829. In reaching its conclusion, the Court's majority admitted that "Congress simply failed explicitly to describe §717's position in the constellation of antidiscrimination law." 425 U.S. at 825. But this did not stop the Court from inferring a particular intent to the Congress on the basis of what its majority saw as the purpose implicit in the legislative history of §717, 425 U.S. at 825-29. And while Burger, C.J., expressed the concern in *Carlson* that the opinion of the majority in that case cast into doubt the decision in *Brown* because "[i]n enacting §717 Congress did not say the magic words which the Court now seems to require", 446 U.S. at 31, no other member of the Court seemed to feel this concern.

In cases since *Brown,* the Supreme Court has applied an "intent of Congress test" in order to determine the existence of "private causes of action" in federal legislation that would presumably make the discovery of such rights much less likely. See *Middlesex County Sewerage Authority v. National Sea Clammers Association,* 453 U.S. 1, 25 (Stevens, J., disenting). The new criteria, first adopted in *Cort v. Ash,* 422 U.S. 66 (1975), focus heavily on Congressional reports, statements, and debates in order to determine intent. *Texas Industries Inc. v. Radcliffe Materials, Inc.,* 451 U.S. 630, 639 (1981). And while the Court has divided bitterly at times over precisely how to read the intent of Congress in the face of actual Congressional silence on the creation of private causes of action, this has not prevented a majority of the justices from occasionally finding a statutorily-created tort right implicit in Congressional action. See *Merrill Lynch v. Curran,* 50 U.S.L.W. 4457 (1982).

Two aspects of these recent decisions are especially relevant to the discussion here. First, when the Supreme Court has found a statutorily-created tort in the face of Congressional *silence,* it has done so on the basis that Congress knew of the decisions of lower federal courts recognizing such a tort and by not overturning those decisions through legislative amendments, Congress intended to validate the judicial action. *Merrill Lynch,* at 4464-65. Second, when a court majority has denied the existence of a statutorily-created tort, in the absence of an explicit Congressional declaration, it has also utilized the assumption that Congress knew the precise nature of the legal rights it was affecting. Hence, in *Sea Clammers,* 453 U.S. at 19-21, the Court ruled that by creating one or more statutory remedies for injuries, the Congress, albeit silently, intended these remedies to supplant other remedies which might otherwise have been implied by judicial decision. The judicial willingness to explore at considerable length the state of mind of Congress, reflected in *Sea Clammers* and *Merrill Lynch,* suggests that Justice Brennan correctly stated the views of his colleagues when he said in *Carlson* that no "magic words" by Congress are required before the Supreme Court can delve into assaying the Congressional intent

that may be concealed in Congressional silences.

If in discussing the advantages to the plaintiff of a *Bivens* action over an FTCA action, Brennan in *Carlson* meant that no substitute would be viewed as equally effective unless it contained the right to a jury trial, punitive damages, the application of federal law, and individual deterrent effect, then existing civil service remedies cannot be considered "equally effective substitutes". But if, as has been suggested here, the discussion in *Carlson* of relative advantages was only intended to justify the Court's inference of a particular intent to Congress, then neither a *Bivens* cause of action nor any one of its particular features is essential. See 446 U.S. at 22, n.10; and civil service remedies may be sufficient to satisfy the *Bivens* test as set forth in *Carlson*. Certainly it is arguable that under provisions of the Civil Service Reform Act of 1979, P.L. 95-454, 92 Stat. 1111, 5 U.S.C. §2302, the essential needs of the employee subjected to a "prohibited personnel practice" (which includes the deprivation of constitutional rights), both to reinstatement, back pay, and other relief necessary to remedy the injury suffered, may be satisfied. Further, under provisions therein pertaining to the authority of the Merit Systems Protection Board, 5 U.S.C. §1206, a special counsel is called for, empowered not only to present an employee's case to the Board but also to initiate disciplinary proceedings against a supervisor responsible for improper action. See Parnes and Trause, "Personal Liability for Managers: Exposure of Supervisors and Managers", *The Bureaucrat*, Spring 1981, 23, 25-26. In short, the wronged federal employee can receive meaningful "make-whole" relief under this legislation, without resort to an individual damages action; and even trigger a process that can pin responsibility personally on supervisors with consequent deterrent penalties. Coupled with the fact that federal courts would presumably apply federal common law in reviewing decisions of the Merit Systems Protection Board, these "advantages" to the plaintiff proceeding under the provisions of the Civil Service Reform Act would seem to satisfy the basic concerns raised by the Supreme Court's majority and concurring opinions in *Carlson* concerning the inadequacies of FTCA actions.

The Supreme Court has been inclined in its opinions on the *Bivens* remedy to be very much influenced by its decisions regarding the scope and meaning of similar actions brought against state officials under 42 U.S.C. §1983. For example in *Butz* v. *Economou*, 438 U.S. 478, 504 (1978), where the suit was based on *Bivens*, the Supreme Court adopted the same immunity standard for federal officials as had been set for state officials in §1983 cases. See *Scheuer* v. *Rhodes*, 416 U.S. 232 (1974), on grounds that logic dictated treating both kinds of officials identically in suits based

on allegations of similar violations of constitutional rights. With equal logic, the Supreme Court could analogize from its recent decision limiting §1983 suits, *Parratt* v. *Taylor*, 49 U.S.L.W. 4509 (May 18, 1981), that existence of a remedy adequate to satisfy the constitutional requirements of due process make the provisions of a *Bivens* remedy unnecessary.

In *Parratt*, despite some qualifying statements made in concurring opinions, six justices of the Supreme Court joined in an opinion written by Justice Rehnquist which concluded that a state prison inmate had not stated a claim for relief under 42 U.S.C. §1983 because the state tort claims act provided the respondent with the means to receive redress for the deprivation of his property. The negligent loss by prison officials of hobby materials ordered by the inmate did constitute a deprivation of property under color of state law, said Rehnquist, but such deprivation did not rise to the stature of a violation of the 14th Amendment's Due Process Clause because it was merely tortious negligence, and state law provided a remedy to persons suffering from such tortious loss. The inmate protested that the state remedy "does not adequately protect the respondent's interest because it provided only for an action against the State as opposed to its individual employees, it contains no provisions for punitive damages, and there is no right to trial by jury". *Parratt*, at 4513, raising precisely the same kind of objections as had been raised in *Carlson v. Green* to the adequacy of an FTCA remedy. But in *Parratt*, the Court's majority found that even though the state remedy did not provide "all the relief which may have been available if [the inmate] had proceeded under §1983, that does not mean the state remedies are not adequate to satisfy the requirements of due process". *Paratt*, at 4513. Concluded the Court: "[t]he remedies provided could have fully compensated the respondent for the property loss suffered, and we hold that they are sufficient to satisfy the requirements of due process." *Id.*

In focusing on the adequacy of compensation in terms of narrow "make-whole" relief, and in rejecting matters such as punitive damages and jury trials as not essential to constitutional due process, the Court in *Parratt* seems to be declaring what Brennan was intimating in *Carlson*. If an analogy were drawn from *Parratt*, a §1983 suit, to *Bivens* cases as the Supreme Court has done previously, it would suggest that the adequacy of alternative remedies may be determined in *Bivens* cases simply by whether or not they could have "fully compensated" the victim for his loss.[13] In cases where federal civil servants seek *Bivens* remedies against their superiors for constitutional tort injuries suffered, they could be remitted to remedies available under civil service procedures where full compensation is available.

A further analogy may also be drawn from *Parratt v. Taylor* to *Bivens* cases. Writing for the majority, Justice Rehnquist ignored all questions of legislative intent in his *Parratt* opinion. He did not reach his conclusion based on a finding, a la *Bivens*, that Congress intended persons situated like Parratt not to recover damages from state officials individually under §1983, but to be remitted to another remedy. The Court's majority in *Parratt* weighed *for itself* the constitutional adequacy of alternative remedies, concluding that the extension of §1983 to this case was unnecessary. Adopting a similar stance in federal employee-employer suits would also lead to a finding that other remedies preclude the need for extending *Bivens* remedies to this area.

In June 1982, the Supreme Court finally decided to grant a writ of certiorari in *Bush v. Lucas*, 50 U.S.L.W. 3998 (June 28, 1982), but only after the court had already heard the *Bush* argument made in another case and refused to consider it. Petitioner in *Harlow v. Fitzgerald*, 50 U.S.L.W. 4815 (June 24, 1982), had urged the court to consider respondent's *Bivens* claims under the First Amendment in light of the *Bush* argument that the "unique relationship between the Federal Government and its civil service employees is a special consideration which counsels hesitation in inferring a *Bivens* remedy." This the court declined to do, preferring to let the District Court consider the point first in light of its opinion in *Harlow*. All the Supreme Court would say was that "we do not view the petitioners' argument [on the *Bivens* question] as insubstantial." 50 U.S.L.W. at 4821. However, it is interesting to note that in both the *Harlow* case and its companion case, *Nixon v. Fitzgerald*, 50 U.S.L.W. 4797 (June 24, 1982), where the single issue litigated concerned the immunity of federal officials (both Presidents and their closest White House aides) in personal tort damages cases, the "special factors counselling hesitation" phrase never appeared. Although immunity had been seen in *Carlson* in 1980 as the *only* special factor counselling hesitation in the granting of a *Bivens* remedy, two years later the special factors

language had disappeared altogether from the Supreme Court's *Bivens* cases, majority and dissenting opinions alike.

CONLUSION

The Supreme Court has made it increasingly easy for plaintiffs contending deprivation of federal constitutional rights by reason of tortious conduct by federal employees under color of federal law, to bring a cause of action for damages against the alleged tortfeasor individually. From *Bivens* to *Carlson*, the Court has progressively narrowed the conditions under which such a cause of action should be denied by a federal court. But the Supreme Court has yet to speak out on the particular matter of *Bivens* suits where federal employees are the plaintiffs; their federal superiors are the defendants; and the cause of action arises out of allegations of tortious conduct committed within the context of federal employment.

Two courts of appeals have recently dismissed such complaints on grounds that existing civil service grievance remedies constitute "special factors counselling hesitation" in the recognition of a *Bivens* remedy in such cases. It is the argument of this paper that these two appellate cases reached the right decision but for the wrong reasons, because the judges misunderstood the reasoning of the Supreme Court in the most recent *Bivens* case, *Carlson v. Green* (1980). The better argument for rejecting *Bivens* suits by federal employees against their supervisors would be that they are unnecessary because equally effective alternative remedies exist to "make-whole" injured plaintiffs, and these alternative remedies, created by the 1978 Civil Service Reform Act, were intended by Congress to be the exclusive remedy in such employment cases.

FOOTNOTES

[1]Bivens complained that unknown federal agents acting under color of federal authority had made a warrantless entry of his apartment, searched it and arrested him without probable cause, consequently depriving him of constitutional rights guaranteed by the Fourth Amendment. His action to recover damages for this "constitutional tort" from the agents was dismissed by the federal district court for failure to state a claim, but reversed by the Supreme Court on grounds that he had a judicially recognized cause of action arising directly under the Constitution.

[2]Petitioner sought damages from respondent, who was a U.S. Congressman at the time this case commenced, alleging that she had been discriminated against by reason of her sex, in violation of her Fifth Amendment right to equal protection, by terminating her employment. Petitioner's suit for damages in the form of back pay was dismissed by the district court on grounds that no such private cause of action existed. The Supreme Court reversed, citing *Bivens*.

[3]This is a minor qualification in that it apparently refers to limitations inherent in the Constitutional principle of separation of powers, and as shown in the case of *Powell* v. *McCormack*, 395 U.S. 486 (1969), the Supreme Court found that not even the question of disqualifying members from the House of Representatives was a matter "textually demonstrable" from the Constitution to be exclusively left to "a coordinate political department."

[4]In a footnote to his argument, Brennan points out that state judicial remedies, even if available, would not qualify as "alternatives" under his analysis since at issue here is a federal constitutional violation by "a federal officer in the course of his federal duties. It is therefore particularly appropriate that a federal court be the forum in which a damages remedy be awarded." *Id.*, at 245-46, n. 23.

[5]Writing in dissent in *Carlson*, Rehnquist, J., made the same observation that Powell had earlier in *Passman*, see *supra*, p. 11. to the effect that another option was available to Congress than that of creating a substitute remedy requirement to *Bivens*. "Congress has broad authority," wrote Rehnquist, "to establish priorities for the allocation of judicial resources in defining the jurisdiction of the federal courts. *Ex Part McCardle*, 7 Wall. 506 (1869)", and hence could choose simply to prevent federal courts from deciding *Bivens* actions by appropriate legislation, 446 U.S., at 36.

[6]Concurring in the judgement in *Carlson*, Powell, J., emphasized that the principle reason why he concluded that the FTCA "simply is not an adequate remedy" was that it "is not a federal remedial scheme at all, but a waiver of sovereign immunity that permits an injured claimant to recover damages against the United States" as if it were a private person subject to the laws of the state where the injury occurred. 446 U.S. at 28 & n. 1.

[7]Dr. Donald Devine, Director of the U.S. Office of Personnel Management, has indicated however that the present Administration would favor at least amending the FTCA so as to substitute the United States as defendant in personal law suits brought against federal supervisors or managers by their subordinates; see Testimony before the Committee on Governmental Affairs, U.S. Senate, March 6, 1981.

[8]In *Norton v. U.S.*, 581 F.2d 390 (1978), *cert. denied*, 439 U.S. 1003 (1978), the court of appeals ruled that under the present provisions of the FTCA, any immunity defenses available to federal officials if sued individually, were also available to the United States as defendant in FTCA cases. *See also 47 Geo. Wash. L. Rev.* 651 (1979).

[9]The trial court's dismissal of the case was reversed on grounds that the plaintiff had stated a cause of action under two state law theories, contractual interference, and fraud and deceit; and under one constitutional theory, deprivation of procedural due process. The final theory, if proven at trial, could result in recovery of damages from the defendants even though, strictly speaking, the appeals court denied Bishop a *Bivens* remedy. 622 F.2d at 357, 360. Only the appellate court's reasoning on *Bivens* is of relevance here.

[10]Section 1983 provides: "Every person who, under color of any statute, ordinance, regulation, custom, or usage of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

[11]The Second Circuit like the Eighth Circuit had also extended *Bivens* to imply a direct cause of action against a municipality arising out of an alleged constitutional violation committed by its officials, and also reconsidered its holding in light of *Monell* with the same result: the plaintiff was allowed to proceed against the municipality under 42 U.S.C. §1983 rather than under *Bivens*. See *Turpin v. Mailet*, 591 F.2d 426 (2nd Cir. 1979) (en banc).

[12]The court cited from *Sampson v. Murray*, 415 U.S. 61, 83 (1974), the statement that the Government has traditionally been granted "the widest latitude in the 'dispatch of its own internal affairs' "; and from *Arnett v. Kennedy*, 416 U.S. 134, 168 (1974), that the Government "must have wide discretion and control over the management of its personnel and internal affairs". But both *Sampson* and *Arnett* are very different from *Bivens* type cases like *Bush*. *Sampson* was narrowly concerned with the appropriateness of a temporary injunction issued by a federal district court against the federal government in an employment dispute. And *Arnett* badly divided the Supreme Court on what constituted the due process rights of federal employees. Neither case, nor *Pickering v. Board Education*, 391 U.S. 563 (1968) also cited by the *Bush* court for support, considered whether or under what circumstances federal employees could sue their employers individually.

[13]In October 1981, the Court required that such an analogy at least be considered by lower federal courts in *Bivens* cases, when it vacated and remanded the decision of the Ninth Circuit Court of Appeals in *Lehman v. Weiss*, 642 F.2d 265 (1978), in light of *Parratt v. Taylor*, at 50 U.S.LW 3244.