Tort Claims against the Federal Government
Administrative Law (5402) Summer 2023 - Edward P. Richards

Where do Private Tort Claims fit into Administrative Law?

The tension between agency power and accountability runs through administrative law. We see it in the non-delegation doctrine, the major questions doctrine, and the fights between Congress and the executive branch over access to information to conduct Congressional oversight. We have looked at judicial review of agency actions under Constitutional due process standards and APA standards. We have seen the recurring question of how much Courts should defer to agency expertise and process, which has become more weighted toward the courts with decisions such as West Virginia v. EPA 597 U.S. ___ (2022).

The United States has a private, entrepreneurial torts litigation system to collect money damages for injuries caused by negligent and intentional behavior. The torts system is also used to punish – in the monetary loss sense, not the criminal sense – and deter. While historically intended only for private parties, tort remedies have been available against state actors for Constitutional torts since 42 USC 1983 was passed post-Civil war, against federal agencies since the Federal Tort Claims Act was passed in 1946, and against federal employees for Constitutional Torts since the *Bivens* case in 1971. Tort actions under these statutes and rulings can be an important means of agency accountability. They can also cause agencies to avoid hard choices and stop providing important services if the tort actions are not properly limited. We are going to learn how these tort systems work and their limitations as a final example of judicial controls over agency actions.

The vast majority of FTCA cases result from ordinary personal injuries and property torts. These include automobile accidents, medical malpractice cases at government hospitals, and the routine torts that arise from the day-to-day actions of a well over a million government employees. For an excellent guide to these torts, see: CRS - The Federal Tort Claims Act (FTCA): A Legal Overview (2019 November) These are important for compensating individuals who are injured by government employees, but these do not raise administrative law policy questions. We are going to review the basics of suing government officials and then focus on the cases that question government policy though mass torts.

Sovereign Immunity

Sovereign immunity refers to a government's immunity from being sued in its own courts without its consent. This doctrine dates as far back into the English common law as the thirteenth century. The premise of sovereign immunity was that "the king can do no wrong," because his will was the law. If the king acted, it was inherently lawful. Furthermore, there was no court high enough to try a king. The doctrine made its way into American law when the states adopted the common law of England.

Sovereign immunity was embodied in the United States Constitution through the Appropriations Clause: "No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law." U.S. Const. art. I, § 9. While the Takings Clause of the Fifth Amendment required just compensation to be paid when the Federal government takes private property for public use, it did not provide a way to collect the money. The only way to collect a judgment against the federal government was by petitioning Congress to pass a private appropriations bill to pay the judgment. Congress created the Court of Claims to regularize the process of paying claims against the government.

The Court of Claims

Congress conferred jurisdiction upon the Court of Claims – now the Court of Federal Claims - for "all claims founded upon any law of Congress, or upon any regulation of an executive department, or upon any contract, express or implied, with the government of the United States." Court of Claims Act of 1855, ch. 122, § 1, 10 Stat. 612. See: History of the United States Court of Federal Claims. This Court of Claims was an advisory tribunal which would investigate claims made against the government and recommend appropriate action to Congress, which would then appropriate money by private bill.

In his State of the Union Message of 1861, President Lincoln recommended that the court be authorized to render final judgments. He declared that it is "as much the duty of Government to render prompt justice against itself, in favor of citizens, as it is to administer the same between private individuals." Cong. Globe, 37th Cong., 2d Sess., app. 2 (1862). In 1863 Congress adopted Lincoln's recommendation and the decisions of the court became binding, meaning Congress was no longer required to approve the judgments. Act of March 3, 1863, ch. 92, 12 Stat. 765. Congress granted appellate jurisdiction to the Supreme Court over Court of Claims judgments in 1866. Act of March 17, 1866, *c.* 19, (14 St. 9).

Once the Court of Claims was granted power to render final judgments, its status as an Article I court was unsure. The Supreme Court decided in Williams v. United States, 289 U.S. 553 (1933), that the Court of Claims was an Article I court and Congress could therefore reduce the salaries of the judges on that court, which would be constitutionally forbidden for Article III courts.

In the Federal Courts Administration Act of 1992 (P.L. 102-572 § 902), the Court of Claims was renamed the Court of Federal Claims. It has jurisdiction to "render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort." 28 U.S.C. § 1491.

As such, the Court of Federal Claims hears three main types of suits against the government: government contract disputes; Fifth Amendment takings claims; and claims for tax refunds. The Tucker Act waives sovereign immunity for such claims against the federal government. United States v. Mitchell, 463 U.S. 206 (1983). Generally, only

money damages are available in a Tucker Act claim. United States v. King, 395 U.S. 1 (1969). The Court of Federal Claims lacks jurisdiction under the Tucker Act to hear tort claims against the federal government. Until the passage of the FTCA, private bills continued to be the only method for collecting for tort damages against the federal government.

Federal Tort Claims Acts (FTCA)

States and the federal government are immune from tort claims unless they waive sovereign immunity through the statutes or through their state constitution. (Louisiana abolished state sovereign immunity when it revised its constitution in 1974.) These laws are usually called Tort Claims Acts and allow claims for the torts that are listed in the statute, subject to other limitations in the statute.

The FTCA was passed in 1946. The FTCA allows recovery "for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred." The agency and the federal courts will borrow the tort law of the state where the case occurred as the substantive law of the case. The plaintiff will need to plead the state law in the complaint to the court. The plaintiff will also have to comply with any special pleading requirements imposed by state law. The most common of these is requiring an affidavit from a medical expert supporting claims of medical malpractice.

Since the FTCA is passed in derogation of sovereign immunity – it provides a limited waiver of the federal government's immunity - the courts strictly construe claims of waiver of immunity in favor of the government. If a claim is not clearly authorized by the FTCA, or if the claimant has not followed the statutory procedure, the claim will be dismissed. (The results are different under the Louisiana Tort Claims Act, as discussed later.)

The FTCA operates under a vicarious liability theory. If a suit is brought against a federal official for a common law tort, the federal government becomes the defendant. The federal official would be dismissed from the suit, and the federal government would be the defendant. Any damages awarded to the plaintiff would be paid by the federal government, not by the federal official. Therefore, the official will not be held accountable personally for damages awarded to the plaintiff, as long as the official was working within his scope of employment. Whether an official was working within the scope of his employment is determined on a case-by- case basis but will include any normal and routine activities associated with the position he holds.

The Westfall Act was passed in 1988 to clarify the procedure for substituting the government as defendant in FTCA claims filed against individual government employees and officers. (This section quotes and adapts language from *Osborn v. Haley*, 549 U.S. 225 (2007)). The Federal Employees Liability Reform and Tort Compensation Act of 1988, commonly known as the Westfall Act, accords federal employees absolute

immunity from common-law tort claims arising out of acts they undertake in the course of their official duties. See 28 U. S. C. §2679(b)(1). When a federal employee is sued for wrongful or negligent conduct, the Act empowers the Attorney General to certify that the employee "was acting within the scope of his office or employment at the time of the incident out of which the claim arose." §2679(d)(1), (2). Upon the Attorney General's certification, the employee is dismissed from the action, and the United States is substituted as defendant in place of the employee. The litigation is thereafter governed by the Federal Tort Claims Act (FTCA), 60 Stat. 842. If the action commenced in state court, the case is to be removed to a federal district court, and the certification remains "conclusiv[e] ... for purposes of removal." §2679(d)(2).

In *Gutierrez de Martinez v. Lamagno*, 515 U. S. 417, 420 (1995), [the court] held that the Attorney General's Westfall Act scope-of-employment certification is subject to judicial review. Substitution of the United States is not improper simply because the Attorney General's certification rests on an understanding of the facts that differs from the plaintiff's allegations. The United States must remain the federal defendant in the action unless and until the District Court determines that the employee, in fact, and not simply as alleged by the plaintiff, engaged in conduct beyond the scope of his employment. On the jurisdictional issues, the Attorney General's certification is conclusive for purposes of removal, i.e., once certification and removal are effected, exclusive competence to adjudicate the case resides in the federal court, and that court may not remand the suit to the state court. §1447(d)'s bar on appellate review of remand orders does not displace §2679(d)(2), which shields from remand an action removed pursuant to the Attorney General's certification.

The Administrative Claims Process

There is no right to a jury trial in actions brought under the federal statute, even if one would have existed in a suit against the employee. 28 U.S.C. § 2402. Also, by forcing the injured party to bring the action against the federal government instead of the individual federal employee, the two-year statute of limitations governing FTCA cases applies regardless of state law. Therefore, the suit may be barred under the FTCA even if the action would have been timely under the state law. This result works an injustice when the plaintiff had no reason to believe that the federal government was involved in the dispute. However, the FTCA's two- year statute of limitations will also apply to allow a claim which would be time- barred under state law. For example, a claim was allowed against the federal government even though the claim had expired under Maryland's one-year statute of limitations. Maryland v. United States, 165 F.2d 869 (4th Cir. 1947).

The FTCA sets up an administrative compensation system with an appeal to the federal courts. The claim must give the governmental agency enough notice of its nature and basis so that it can begin its own investigation and evaluation, and it must demand payment for a "sum certain." Since the appeal to courts is to evaluate the claim as ruled on by the agency, issues that are not raised in the filing with the agency cannot raised later in the court filings. The factual basis of the claim is the most important for the agency. While the FTCA does not provide for discovery, the claimant can get records through FOIA and the Privacy Act, as well as any agency specific avenues.

The administrative claim must be filed within two years of the injury. 28 U.S.C. § 2401(b). A plaintiff's failure to first file an administrative claim will result in the claim being dismissed from the court for lack of subject matter jurisdiction. (No exhaustion of remedies.) Because subject matter jurisdiction cannot be waived, the requirement to first file with the appropriate agency cannot be waived, *Richman v. U.S.*, 709 F.2d 122 (1st Cir. 1983); nor can jurisdiction be stipulated. *Bush v. U.S.*, 703 F.2d 491 (11th Cir. 1983).

After the administrative claim is filed, the agency must deny it in writing before a suit against the United States can be filed in district court. If the agency does not act upon the claim within six months, the claim is deemed denied and the plaintiff can then file in federal district court. 28 U.S.C. § 2675(a). If the administrative claim is denied outright by the agency or denial is presumed because of agency inaction for six months, the litigant has six months to file a tort claim in federal district court. 28 U.S.C. § 2401(b). Thus, if a claimant files on the last day of the two-year period and the agency ignores the claim, the claimant cannot go to court until the end of the six months. There is nothing in the statute that sets a limit for how long you can wait to file after the 6 months. Since this is a judicial review of any agency action, and not a *de novo* tort case, there is no right to a jury trial under the FTCA. 28 U.S.C. § 2402.

Recoverable Damages

Compensatory damages are the only remedy recoverable under the FTCA. *Fitch v. U.S.*, 513 F.2d 1013 (6th Cir. 1975). The FTCA does not allow courts to issue injunctions against the federal government. *Moon v. Takisaki*, 501 F.2d 389 (9th Cir. 1974). Punitive damages are expressly forbidden, even if they are allowed under state law. 28 U.S.C. § 2674.

Sovereign immunity bars an award of attorney fees against the federal government unless expressly authorized by statute. Since the FTCA does not expressly authorize attorney fees, they are not recoverable against the federal government under the FTCA. *Joe v. U.S.*, 772 F.2d 1535 (11th Cir. 1985). The FTCA limits the amount which may be claimed by counsel from the compensatory damages award. No attorney may receive more than 25% of any compensatory damages or settlement. 28 U.S.C. § 2678.

The FTCA itself does not place a cap on the amount of damages recoverable against the federal government. However, the government's liability is limited in the same way that a private party would be limited under the relevant state law. Therefore, the United States is able to take advantage of any state damage caps on awards for medical malpractice. *Carter v. U.S.*, 982 F.2d 1141 (7th Cir. 1992).

Exceptions to the FTCA

The FTCA does not waive immunity for all torts: major exceptions are carved out in 28 U.S.C. § 2680. These exceptions stipulate that the federal government will not be held liable for the claims against its employees arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights. Also not allowed are

damages from a quarantine imposed by the federal government. Claims based on intentional actions that are excluded from the FTCA may be brought as *Bivens* actions, if they rise to the level of constitutional violations (constitutional torts).

Perhaps most significantly, § 2680(a) precludes recovery from the government for:

> "[A]ny claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused."

This is the discretionary-function exception, and is discussed more fully below.

Discretionary Function Defense

The FTCA (and most state tort claims acts) preserve immunity from tort liability for the discretionary acts of government employees. This discretionary function exception is perhaps the most notable and complex exception to FTCA liability.

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A discretionary function is an act involving an exercise of personal judgment. The basis for the discretionary function exception to the FTCA is the legislative branch's desire to prevent judicial second-guessing through tort actions of legislative and administrative decisions grounded in social, economic, and political policy. The federal government retains immunity from tort liability for itself and its employees for the performance or nonperformance of discretionary functions. This immunity is granted when the act in question requires the exercise of judgment in carrying out official duties. Discretionary immunity applies unless a plaintiff can show that a reasonable person in the official's position would have known that the action was illegal or beyond the scope of that official's legal authority. *Harlow v. Fitzgerald*, 457 U.S. 800 (1982). We will take a more in depth look at the discretionary function immunity test when we look at the FTCA cases.

There is no discretion for ministerial tasks – actions mandated by law or regulation. These acts are not discretionary in nature, but ministerial. Ministerial tasks are those that do not require an official's discretion because they either follow a predetermined plan and cannot be changed, such as following a health department checklist regulation, or they do not involve any special expertise, such as driving a car. If a law or a regulation dictates a

government employee’s course of action, that employee will be subject to liability for failure to comply.

Intentional Torts under FTCA

The FTCA does only allows limited recovery for intentional torts. It does not allow recovery for:

> Any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights: Provided, That, with regard to acts or omissions of investigative or law enforcement officers of the United States Government, the provisions of this chapter and section 1346(b) of this title shall apply to any claim arising, on or after the date of the enactment of this proviso, out of assault, battery, false imprisonment, false arrest, abuse of process, or malicious prosecution. For the purpose of this subsection, “investigative or law enforcement officer” means any officer of the United States who is empowered by law to execute searches, to seize evidence, or to make arrests for violations of Federal law. 28 U.S.C. § 2680(h).

The section allowing certain intentional torts against federal law enforcement officers was passed after the *Bivens* case in 1971 created a constitutional tort action against federal officers. The court treat it as the exclusive remedy, so that if the claim is covered by the FTCA, you cannot file it as a *Bivens* action. (Nor would you want to, the defenses are much stronger for *Bivens* actions.)

Assault and Battery

This exception to the FTCA was applied in a case where the plaintiff alleged deviant sexual conduct by an Air Force clinical social worker who was treating the plaintiff for "blackouts". The court dismissed the claim by determining that the sexual misconduct constituted assault and sovereign immunity was therefore not waived. *Doe v. U.S.*, 769 F.2d 174 (4th Cir. 1985).

In a Fifth Circuit case, a Naval recruit who alleged that she had contracted a venereal disease from consensual intercourse with an enlisted Naval petty officer sued under the FTCA, alleging fraudulent concealment of the infection by the officer and negligence on the part of the Navy. The court held that the fraudulent concealment of infection claim made the officer’s actions a battery, and therefore fell within the intentional tort exception to the FTCA's waiver of sovereign immunity. Additionally, the claims of the Navy’s negligence were not sufficiently distinct from the battery claim against the officer, and therefore were also not admissible under the FTCA.[*Leleux v. United States*, 178 F.3d 750 (5th Cir. 1999)]

In contrast, the assault and battery exception did not apply when there was no intentional wrongful act on the part of a government surgeon in cutting into the plaintiff's right knee when the left knee was supposed to be the one operated on. The court in *Lane v. United States*, 225 F. Supp. 850 (D.C. Va. 1964) concluded that § 2680(h) was inapplicable

because under general tort law, assault must contain an element of intent. Furthermore, the surgeon was negligent, and this negligence should not lose its identity simply because the ultimate injury was the combined result of the negligence and the assault. The plaintiff was allowed to recover damages from the government.

Importantly, the assault or battery must have been committed by the government employee, not by a third party. For example, where an Air Force psychiatrist negligently failed to transmit to a second psychiatrist the history of a mentally ill airman who, as a result, was released and killed his wife, the court said the assault and battery exception was not applicable. The court noted that the assault and battery exception applied only to assault by government agents, not to assault by third parties which the government negligently failed to prevent. *Underwood v. U.S.*, 356 F.2d 92 (5th Cir. 1966).

Defamation

There is an express exception in the FTCA for libel and slander. Congress thus intended to retain sovereign immunity with respect to defamation allegations against federal employees. Government officials, including public health officials, often use publicity, which might include defamation, to change or influence policy. For example, if a health inspector informs the press about a restaurant's violations, the bad publicity generated might have more impact than any other enforcement measure. The health inspector will generally not be held liable to the restaurant for damages, even if the statements are false.

Quarantine

Quarantine is the isolation of a person or animal afflicted with a communicable disease or the prevention of such a person or animal from coming into a particular area, the purpose being to prevent the spread of disease. The power of governments to quarantine is an essential aspect of maintaining the public health, and dates back to 1377, when Venice required Crusader ships to wait forty days in port after returning from Arabia.

In modern American law, the authority to quarantine is a basic power of a health authority and a proper exercise of the police power. Federal law even acknowledges the power to quarantine and provides for the cooperation between federal and state or local health authorities in implementing quarantine laws. 42 U.S.C. § 243(a).

The quarantine exception to liability applies to the liability of public health officers under the tort claims acts. The FTCA states that the federal government will not be held liable for "[a]ny claim for damages caused by the imposition or establishment of a quarantine by the United States." 28 U.S.C.§ 2680(f). Federal liability is precluded even if the quarantine is shown to have been unnecessary and costly. For instance, a federal court held that the government's withholding of test samples and negligent informing of plaintiff that diseased livestock was free of hoof and mouth disease was covered by the quarantine exemption. Saxton v. United States, 456 F.2d 1105, 1106 (8th Cir. 1972).

In another case, a USDA doctor imposed quarantine on hogs, and injected them with hog cholera vaccine after erroneously diagnosing them with hog cholera. Many died as a result of the hazardous vaccine. The federal appeals court held that the FTCA quarantine

exemption barred any claim against the government or the doctor. The court also stated that any negligence in procedures, either through diagnosis or testing, by which the government doctor arrived at the decision to impose quarantine, would also be barred. Rey v. U.S., 484 F.2d 45 (5th Cir. 1973).

Torts Claims by Military Personnel

In a military context, the federal government still retains immunity from liability from suits by servicemen. The lead case is *Feres v. U.S.,* 340 U.S. 135 (1950), in which the Supreme Court held that the United States was not liable in tort for the death of a serviceman by fire in the barracks while on active duty, or for the injury or death of servicemen resulting from negligence in medical treatment by Army surgeons. This case established that the FTCA does not waive immunity for injuries to servicemen arising out of, or in the course of, activity incident to military service. Significantly, the *Feres* bar on recovery does not hinge on the military status of the tortfeasor. Rather, the *Feres* doctrine bars all suits on behalf of service members against the federal government based upon service- related injuries. *U.S. v. Johnson*, 481 U.S. 681 (1987).

The government can be liable under the FTCA when the injury does not arise out of conduct incident to military service. This "incident to service requirement" is examined on a factual, case-by-case basis and will not be reduced to a bright-line test. *U.S. v. Shearer*, 473 U.S. 52 (1985). Still, it is applied broadly by the courts to bar government tort liability. For example, the *Feres* doctrine barred an active duty serviceman's claim for an injury incurred despite that the serviceman was off duty playing basketball, some of those who treated his injury were civilians, and his alternative legal remedies may have been inadequate. *Borden v. Veterans Admin*., 41 F.3d 763 (1st Cir. 1994).

Importantly, the *Feres* doctrine only applies to active military personnel. Therefore, claims brought by civilians or civilian dependents of service members are not barred by *Feres*. *Mossow By Mossow v. U.S.*, 987 F.2d 1365 (8th Cir. 1993). Retired military personnel are also not barred from bringing an FTCA claim by *Feres. McGowan v. Scoggins*, 881 F.2d 615 (9th Cir. 1989). This case presented an FTCA claim brought by a retired Army officer, seeking damages for harm suffered while entering an Air Force Base. The court held that the *Feres* doctrine is inapplicable to a claim filed by someone who is not a member of the armed forces for an injury that was not incident to current military service, or who is not subject to supervision of military personnel.

Members of state National Guard units not in the active federal service are considered employees of the individual state, not of the Federal Government. Therefore, the United States is not held liable under the FTCA for the negligence of nonactivated members of the guard. *Williams v. United States*, 189 F.2d 607 (10th Cir. 1951).

The Government Contractor Defense

State tort claims are pre-empted where the plaintiff's injury is caused by the allegedly defective design of military equipment manufactured by the defendant pursuant to a contract with the federal government. Boyle v United Technologies Corp., 487 U.S. 500

(1988). This case established the government contractor defense to tort liability. The Court reasoned that although state tort law may allow products liability claims against military manufacturers, this is an area of uniquely federal concern, regardless of the lack of federal legislation specifically claiming the immunity the absence. In an effort to determine the scope of this defense, the Court stated that this pre- emption is limited to areas of "significant conflict" between federal policy and state law. For guidance on the extent of "significant conflict", the court applied the discretionary function exception of the FTCA, which is to say that state law will be pre-empted wherever it threatens a discretionary function of the federal government. Here, the design of the allegedly defective product was a military discretionary decision.

In sum, *Boyle* established that state law which imposes liability on a military manufacturer is pre-empted when (1) the US approved reasonable precise product specifications, (2) the equipment conformed to those specifications, and (3) the supplier warned the US of the known dangers of using the equipment.

An important issue is whether the defense applies only to contracts with the military, or whether it can be used by other government contractors. The Supreme Court has employed language hinting that it may apply to all contractors, but has never spoke directly on the issue. *See* Hercules, Inc. v. U.S., 516 U.S. 417, 421 (1996) ("The Government contractor defense . . . shields contractors from tort liability for products manufactured for the Government in accordance with Government specifications, if the contractor warned the United States about any hazards known to the contractor but not to the Government"). The lower federal courts are split on the issue.

Liability for Constitutional Torts by Federal Officials- Bivens Actions

The Supreme Court created a private damages action against federal officials for constitutional torts (civil rights violations), which were not covered by the FTCA as originally passed. In Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388 (1971), the Court held that the Fourth Amendment gives rise to a right of action against federal law enforcement officials for damages from an unlawful search and seizure. Since a *Bivens* action is brought against a federal official in the official’s personal capacity, it is not considered to be an action against the United States and therefore is not barred by sovereign immunity. *Bivens* is not a general tort law. The plaintiff seeking a damages remedy under *Bivens* must first demonstrate that constitutional rights have been violated.[Davis v. Passman, 442 U.S. 228 (1979)]

Bivens suits have been acknowledged by the Court as having more of a deterrence effect against federal officials committing constitutional torts than does the FTCA. A *Bivens* suit is a personal suit against the official, and punitive damages are recoverable. The government is substituted for the defendant in FTCA cases, and the FTCA does not allow punitive damages. In theory, a *Bivens* defendant is at risk of personal liability, including punitive damages, while the government pays all damages in FTCA cases. In reality, the individual defendants and their private insurers almost never pay anything – the government picks up the costs of litigation and judgments, removing the threat of personal liability. [Pfander, James E. and Reinert, Alexander A. and Schwartz, Joanna C.,

The Myth of Personal Liability: Who Pays When Bivens Claims Succeed (February 27, 2019). 72 Stanford Law Review 561 (2020)] Procedurally, a plaintiff is entitled to a jury trial in a *Bivens* action, but not in a FTCA case.[Carlson v. Green, 446 U.S. 14 (1980)]

The main defense for a federal official in a *Bivens* action is official immunity from actions for damages. There are two types of official immunity available as affirmative defenses: absolute and qualified.[Butz v. Economou, 438 U.S. 478 (1978)] Absolute immunity is granted to judges, prosecutors, legislators, and the President, so long as they are acting within the scope of their duties. Qualified immunity applies to federal officials and agents who perform discretionary functions, but may be overcome by a showing that their conduct violated a constitutional right.[Harlow v. Fitzgerald, 457 U.S. 800 (1982)] Absolute and qualified immunity are discussed more fully below.

Allowing liability claims against state and federal employees may be necessary to protect against arbitrary actions against individuals, but they can paralyze government action if they make governmental employees fearful of acting. To limit this threat, state and federal law recognizes two immunity-based defenses to *Bivens* and §1983 claims.

Absolute Immunity

Absolute immunity is not available to most officials. Unlike qualified immunity, the nature of the act is not as important as the position of the official. Generally, only judges, prosecutors, legislators, and the highest executive officials of all governments are absolutely immune from liability when acting within their authority. Medical peer review participants may also receive absolute immunity. Ostrzenski v. Seigel, 177 F.3d 245 (4th Cir. 1999).

Absolute immunity only applies to acts committed within the scope of the official's duties. Usually, this will not include acts that are committed by the official with malice or corrupt motives.

Absolute immunity is freedom from suit and can be invoked on a pretrial motion. Judges and judicial officers, for example, enjoy a broad absolute immunity which is not abrogated even by a state's tort claims act. Fisher v. Pickens, 225 Cal. App. 3d 708 (Cal. App. 4th Dist. 1990). The immunity bars all civil suits for money damages against judicial officers such as judges and prosecutors.

Michigan's statute preserving absolute immunity for certain officials provides: "A judge, a legislator, and the elective or highest appointive executive official of all levels of government are immune from tort liability for injuries to persons or damages to property if he or she is acting within the scope of his or her judicial, legislative, or executive authority." Mich. Comp. Laws § 691.1407(5) (1965). Thus, these officials may not be sued in tort so long as the act occurred within the scope of that official's duty.

Qualified Immunity

The doctrine of qualified immunity is a judicially created affirmative defense which protects public officials from being tried for violations of constitutional rights. This

defense to liability for constitutional claims operates in a similar manner as the discretionary function exception to tort liability. Qualified immunity applies to federal, state, and local officials equally. Butz v. Economou, 438 U.S. 478 (1978). This immunity is designed to be immunity from suit, not merely from a finding of liability. Mitchell v. Forsyth, 472 U.S. 511 (1985). The distinction is important because qualified immunity can be invoked and the lawsuit dismissed on summary judgment without the suit going through pretrial procedure and discovery. A pretrial motion is the vehicle for invoking qualified immunity. If the lower court denies qualified immunity, a defendant may appeal that ruling before litigation on the merits proceeds. This allowance for interlocutory appeal may significantly delay the litigation.

The Policy Rationale for Qualified Immunity

The rationale for granting qualified immunity to public officials is the recognition that constitutional law is constantly evolving, and public officials cannot be "expected to predict the future course of constitutional law." Procunier v. Navarette, 434 U.S. 555 (1978). The policy reasons for protecting officials from liability from suit for all conceivable constitutional claims include the need for officials to make decisions without fear of lawsuits, the reluctance to distract officials from their public duties, and the potential that without immunity, people would be deterred from participating in public service. See Scheuer v. Rhodes, 416 U.S. 232 (1974) (explaining that qualified immunity aims to alleviate "the injustice, particularly in the absence of bad faith, of subjecting to liability an officer who is required, by the legal obligations of his position, to exercise discretion," and "the danger that the threat of liability would deter his willingness to execute his office with the decisiveness and the judgment required by the public good").

The Clearly Established Rights Test

The Supreme Court set the modern standards for qualified immunity in Harlow v. Fitzgerald, 457 U.S. 800 (1982). The Court ruled that government officials performing discretionary functions should be protected from liability for civil damages if their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would be aware. Id. at 819. Those who are plainly incompetent or who knowingly violate the law cannot invoke qualified immunity. Malley v. Briggs, 475 U.S. 335 (1986). Therefore, the official will be protected from Bivens or § 1983 liability for a discretionary act unless the violated constitutional right is of such a basic nature that a reasonable person would have known it, or if the official breaks a law. This analysis requires a case-by-case analysis that is often unpredictable and difficult to determine. Additionally, qualified immunity might be defeated by showing that the official acted with malice or corrupt motives.

To defeat a defendant's claim of immunity, plaintiffs must show a violation of a constitutional right that the defendant knew or should have known, or a violation of law. To illustrate, a Michigan appeals court ruled that qualified immunity did not shield the superintendent of a state psychiatric hospital from liability under § 1983 for the violation of a deceased patient's constitutional rights where facts indicated in the plaintiff's pleadings alleged that the superintendent's conduct in failing to attend the medical needs

of the patient violated a clearly established constitutional right of which reasonable person should have known. Gordon v. Sadasivan, 373 N.W. 2d 258 (Mich. App. 1985).

The Role of Precedent in Establishing Qualified Immunity

In contrast, the Fourth Circuit granted qualified immunity to a defendant based on a lack of sufficiently analogous precedent in Rish v. Johnson 131 F.3d 1092 (4th Cir. 1997). Federal prison inmates claimed that the prison's failure to provide them with protective equipment to safeguard them against infectious diseases while they cleaned blood, feces, and urine from prison housing and medical areas violated their clearly established Eighth Amendment rights. The plaintiffs alleged that other prisoners were infected with HIV and Hepatitis B, and that their work involved risk of contact between those inmates' bodily fluids and the plaintiffs' unprotected skin. The plaintiffs also cleaned areas which housed patients in mental seclusion who sometimes threw hazardous bodily fluids. The court held that the alleged conduct failed to defeat qualified immunity because there existed no case law clearly establishing a constitutional right in this type of situation. This is a rather surprising outcome because the Supreme Court at the time of the alleged violations had already established that a prisoner's Eighth Amendment rights are violated when a prison official acts with deliberate indifference to known, substantial risks of serious bodily harm. *See* Estelle v. Gamble, 429 U.S. 97 (1976) (ruling that a deliberate indifference to the serious medical needs of prisoners is cruel and unusual punishment).

When determining whether a defendant violated a clearly established law or right, case law must also be analyzed. Hope v. Pelzer, 536 U.S. 730 (2002). In that case, a prisoner was handcuffed to a hitching post for seven hours, shirtless, in the Alabama sun, and not given water or bathroom breaks. He brought a § 1983 action against the guards for a violation of the Eighth Amendment's prohibition against cruel and unusual punishment, and they claimed qualified immunity. The federal district court and the Eleventh Circuit Court of Appeals granted the guards immunity, holding the guards could not have reasonable known that what they were doing was a violation of the prisoner's rights. The Supreme Court reversed, denying immunity protection. The Court examined the Eleventh Circuit's own case law where it established a standard for determining what constitutes an Eighth Amendment violation. Thus, the appropriate way to analyze a unique fact pattern is to apply case law. Here, case law implied that using a hitching post in such a way was a constitutional violation and although the issue had never arisen, the guards could not successfully claim they did not know their actions violated the prisoner's constitutional rights.

Examples of case decisions that have found qualified immunity: The Supreme Court acknowledged qualified immunity for state hospital administrators in O'Connor v. Donaldson, 422 U.S. 563 (1975). In another case, a Kansas federal court granted summary judgment on qualified immunity grounds to two staff members of a state mental health hospital. The court found the staff members were entitled to qualified immunity in a § 1983 action filed on behalf of a patient who was involuntarily committed and died as a result of suffocation from being restrained. The officials were exercising a discretionary duty and were doing what they believed to be reasonable at the time. As a result, damages were denied. Unzueta v. Steele, 291 F. Supp. 2d 1230 (D. Kan. 2003).

Has Qualified Immunity been Extended too Far?

The qualified immunity defense that is used in Bivens cases is also used in the much more numerous Civil Rights Act cases (42 USC 1983, et. seq.) against state actors, in particular police officers involved in assaults and shootings with civilians. The liberal justices and Justice Thomas have questioned how the court has made it almost impossible to overcome qualified immunity by requiring the plaintiffs to show that the defendants had a very high degree of specific knowledge about the constitutionality of their acts.

> In further elaborating the doctrine of qualified immunity for executive officials, however, we have diverged from the historical inquiry mandated by the statute. In the decisions following Pierson, we have "completely reformulated qualified immunity along principles not at all embodied in the common law." Instead of asking whether the common law in 1871 would have accorded immunity to an officer for a tort analogous to the plaintiff 's claim under §1983, we instead grant immunity to any officer whose conduct "does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." We apply this "clearly established" standard "across the board" and without regard to "the precise nature of the various officials' duties or the precise character of the particular rights alleged to have been violated." [Justice Thomas concurring in part in Ziglar v. Abbasi, 137 S. Ct. 1843, 1871 (2017)]

Bivens and Alternative Remedies

Bivens actions have been restricted by the Supreme Court when Congress has created other avenues for review and compensation. For example, the Court denied a *Bivens* action for procedural due process violations under the Social Security Act disability provisions because Congress had created an independent remedial scheme to restore benefits. [Schweiker v. Chilicky, 487 U.S. 412, 423 (1988)] In *Castanda*, the lower courts found United States Public Health Service employees liable under *Bivens* for the conscious disregard of the medical needs of an INS detainee, who died of cancer after being repeatedly denied medical care.[Castaneda v. United States, 546 F.3d 682 (9th Cir. 2008)] The court rejected claims by the defendants that the case should have been brought as a negligence action under the Federal Tort Claims Act. It held that their intentional actions went beyond negligent care and that Congress did not intend to make the FTCA the sole remedy against PHS employees. The Supreme Court rejected these claims based on 42 U. S. C. § 233(a). which gives the government immunity for all services provided through the Public Health Service. The court found that after the passage of the Westfall Act, which clearly substituted the government for the individual as a defendant in an FTCA claim, the governmental immunity in 42 U. S. C. § 233(a) then applied to the case. [Hui v. Castaneda, 559 U.S. 799 (2010)]

In the *Hernandez* case, which was a *Biven* action against a border patrol agent for shooting across the US Mexico border and killing a teenager who was throwing stones, the rejected a *Bivens* action. (The FTCA was not applicable because it excludes foreign

claims.) The Court firmly rejected any future expansions of *Bivens*, limiting it to the facts of previously decided favorable case. The Court recognized that this would exclude many actions that fell in the crack between the FTCA and *Bivens*. The Court stated that Congress could further amend the FTCA if it wanted to provide a remedy for these claims. [Hernandez v. Mesa, 140 S. Ct. 735 (2020)]