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## Is the Doctor In? The Contemptible Condition of Immigrant Detainee Healthcare in the U.S. and the Need for a Constitutional Remedy

Kate Bowles

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# **Is the Doctor In? The Contemptible Condition of Immigrant Detainee Healthcare in the U.S. and the Need for a Constitutional Remedy**

**By Kate Bowles\***

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*“[W]e are a country of immigrants. We are a country that has been tremendously benefited by bringing the people to the United States who want to work hard, people to the United States who believe in the kind of free environment that we have here.” ~Condoleezza Rice<sup>1</sup>*

## I. INTRODUCTION

Division of Immigration Health Services (“DIHS”) policy restricts immigrant detainee medical care to emergency care and conditions that would cause deterioration of detainee’s health or uncontrolled suffering affecting his or her deportation status.<sup>2</sup> As a result of this policy, the medical staffs of private detention centers throughout the United States are providing sub-standard and in some cases reckless medical care, and often push off paying for any medical care until it is either too late for immigrant detainees to seek care or it results in lifelong physical deformities.<sup>3</sup> The unfortunate story of Francisco Castaneda is just one of many examples.

Starting in March of 2006, immigrant detainee Francisco Castaneda persistently sought treatment for a bleeding, suppurating penile lesion and physician's assistants and three outside specialists repeatedly advised that he urgently needed a biopsy.<sup>4</sup> In April, Immigrations and Customs Enforcement (“ICE”) physicians

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\* Kate Bowles is a second year student at Pepperdine University School of Law and she is next year's Editor-in-Chief of NAALJ. Kate graduated from the University of Pennsylvania with a Bachelor of Science in Nursing, and she decided to pursue a law degree in order to have a broader impact in the healthcare field.

“I am grateful to my husband Eric for pushing me to be a better person – we make a great team! I thank my parents Mike and Maribeth for supporting my ambitions, and my parents-in-law Dave and Kathy for their kindness.”

1. Condoleezza Rice, Former Secretary of State (2005-2009), Interview with Maria Bartiromo of CNBC Television (May 22, 2008), <http://2001-2009.state.gov/secretary/rm/2008/05/105184.htm>.

2. Brief of the American Civil Liberties Union as Amicus Curiae in Support of Respondents at 26, *Hui v. Castaneda*, 130 Sup. Ct. 1845 (2010) (No. 08-1529) [hereinafter ACLU Brief].

3. *Id.* at 21-24, 26 (describing several examples of utter failure to provide detainees with constitutionally adequate healthcare). See *infra* Section V-B.

4. *Hui v. Castaneda*, \_\_\_ U.S. \_\_\_, 130 Sup. Ct. 1845, 1849 (2010); *Castaneda v. United States*, 538 F.Supp.2d 1279, 1281 (C.D. Cal. 2008) (citing Amended Compl. ¶ 372; Doyle Decl. Ex. 1).

assistants at the San Diego Correctional Facility (“SDCF”) noted that penile cancer should be ruled out, so a Treatment Authorization Request (“TAR”) was filed with the DIHS, requesting approval for biopsy and circumcision.<sup>5</sup> DIHS determined that certain possible infections were not causing the lesions and approved biopsy, urology consult, and pertinent surgical follow-up.<sup>6</sup>

Pursuant to the TAR, in June ICE sent Castaneda for an oncology consult, whereby an oncologist John Wilkinson, M.D. (“Dr. Wilkinson”) agreed that Castaneda had either penile cancer or a progressive viral based lesion, and Dr. Wilkinson strongly recommended urgent urologic assessment of biopsy and definitive treatment.<sup>7</sup> He offered inpatient consultation and biopsy, but instead Castaneda’s physicians decided to pursue outpatient biopsy, which is more cost effective.<sup>8</sup> That same day Dr. Wilkinson spoke with Public Health Service (“PHS”) employee Esther Hui, M.D. (“Dr. Hui”) who verbalized understanding of the need for a biopsy and who explained to Dr. Wilkinson that DIHS would not admit Castaneda to a hospital because it considered biopsy to be an elective outpatient procedure, so Dr. Hui never made arrangements for the biopsy.<sup>9</sup>

A few days later, Castaneda filed a grievance asking for the surgery recommended by Dr. Wilkinson, claiming he had a considerable amount of pain and was in desperate need of medical attention.<sup>10</sup> This grievance was denied, and by the end of the month, there was still no biopsy, despite DIHS records indicating that the lesion was getting worse with more swelling, foul odor, difficulty urinating, and bleeding from the foreskin.<sup>11</sup> The agency claimed he

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5. Castaneda v. United States, 538 F.Supp.2d at 1281. Castaneda was detained at the SDCF and therefore could not seek outside medical care. Hui v. Castaneda, 130 Sup. Ct. at 1848. The TAR noted that the lesion had grown and had a foul odor and Castaneda had rated his pain an 8 out of 10. Castaneda v. United States, 538 F.Supp.2d at 1281.

6. *Id.*

7. *Id.* at 1281-82.

8. *Id.* at 1282. Dr. Esther Hui, a PHS employee, was the physician responsible for Castaneda’s medical care during his detention at SDCF. Hui v. Castaneda, 130 Sup. Ct. at 1849.

9. Castaneda v. United States, 538 F.Supp.2d at 1282.

10. *Id.*

11. *Id.*

did not have cancer at this time and he needed to be patient and wait.<sup>12</sup>

Dr. Hui continued to deny the request for a total of eleven months.<sup>13</sup> During this time, ICE told Castaneda that while a surgical procedure might be recommended long-term, that does not imply that the Federal Government is obligated to provide surgery if the condition is not threatening to life, limb or eyesight.<sup>14</sup> Every few days from August to February of the next year, ICE continued to claim that surgery would be elective despite a continued worsening of symptoms and the appearance of another lesion.<sup>15</sup>

After the American Civil Liberties Union (“ACLU”) began advocating for Castaneda, a TAR was approved and there was a fourth urology consult with Asghar Askari, M.D. who recommended biopsy for a penile lesion that was most likely cancer, but just a few days prior to Castaneda’s scheduled biopsy, he was abruptly released.<sup>16</sup> He then went to the emergency room of Harbor-UCLA in Los Angeles, where he was diagnosed with squamous cell carcinoma and his penis was amputated, with the record confirming that he had metastatic cancer.<sup>17</sup> He underwent chemotherapy treatment, which was unsuccessful and in February of 2008 he died.<sup>18</sup>

After Castaneda passed away, his sister Yanira and his minor daughter Vanessa were substituted as plaintiffs in his pending lawsuit.<sup>19</sup> Castaneda had asserted claims against (1) the United States under the Federal Tort Claims Act (“FTCA”), (2) *Bivens* claims against federal officials alleging Fifth and Eighth Amendment violations for deliberate indifference to his serious health needs, (3) 42 U.S.C. § 1983 and common-law malpractice claims against state

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12. *Id.*

13. *Hui v. Castaneda*, 130 Sup. Ct. at 1849.

14. *Castaneda v. United States*, 538 F.Supp.2d at 1283.

15. *Id.* at 1284. These statements were made despite the fact that two more outside physicians had recommended biopsy of Castaneda’s lesion. *Id.*

16. *Id.*

17. *Id.* at 1285.

18. *Id.*

19. *Hui v. Castaneda*, 130 Sup. Ct. at 1849.

officials and (4) a malpractice claim against Dr. Hui who was responsible for Castaneda while in ICE custody.<sup>20</sup>

Dr. Hui crossed an ethical line by failing to put her patient's serious medical needs before policy considerations.<sup>21</sup> However, even if Dr. Hui is reprimanded, punished or replaced, there will still be instances of patient neglect by immigrant detainee healthcare providers.<sup>22</sup> The problem is not with Dr. Hui in particular, but rather with the immigrant detention system policies and practices. The DIHS policy in question restricts medical care to emergency care and conditions that would cause deterioration of detainee's health or uncontrolled suffering affecting his or her deportation status.<sup>23</sup> Thus, detainees should be kept minimally healthy, but only enough to be deported or otherwise released.<sup>24</sup> This DIHS policy arguably restricts medical diagnosis and treatment in a way that is unconstitutional on its face.<sup>25</sup> Furthermore, PHS employees that run the immigrant detainee system now have all of the benefits of sovereign immunity with none of the accountability required of other similarly situated employees serving in state prison systems, the Bureau of Prisons, and

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20. Brief for Respondents at 14, *Hui v. Castaneda*, 130 Sup. Ct. 1845 (2010) (No. 08-1529). The Fifth Amendment states "No person shall be...deprived of life, liberty, or property, without due process of law..." U.S. CONST. amend. V. The Eighth Amendment asserts "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted. U.S. CONST. amend. VIII.

21. ACLU Brief, *supra* note 2, at 25. Dr. Hui and others repeatedly blamed their failure to properly treat Castaneda on a DIHS policy against paying for "elective" care, even though the Supreme Court has held that *Bivens* constitutional claims are intended to deter Government officers from violating the Constitution 'no matter that they...are acting pursuant to an entity's policy.'" *Id.* (citing *Correctional Servs. Corp. v. Malesko*, 534 U.S. 61 (2001)). "[T]o the extent that DIHS policy encourages constitutional violations, the threat of *Bivens* lawsuits against individual officials is necessary to create pressure for reform from within DIHS, as well as to spur appropriate Government officials to address the matter." *Id.*

22. *See infra* Section V.

23. ACLU Brief, *supra* note 2, at 26.

24. *Id.*

25. *Id.* *See Farmer v. Brennan*, 511 U.S. 825, 837 (1994) (finding that prison officials may be held liable under Eighth Amendment for denying an inmate humane conditions of confinement if the official knows of and disregards an excess risk to inmate health or safety).

the DIHS.<sup>26</sup> This structure encourages systematic recklessness and negligence,<sup>27</sup> which is especially disheartening in the medical profession where people's lives are at stake.

Spurred by troubling media reports on immigrant detainee deaths, in 2009 Congress held hearings on the treatment of detainees and the healthcare services provided to individuals held in its custody at detention centers around the country, and U.S. Government Accountability Office ("GAO") reports were requested concerning compliance with ICE's Medical Care Standards.<sup>28</sup> The hearings detail shortcomings such as the failure to provide medication for mental illness and other serious medical conditions, dispensing of improper drugs that triggered severe adverse reactions, and inadequate screenings that failed to detect advanced stages of pregnancy, kidney stones, suicidal tendencies, and infectious diseases.<sup>29</sup> Legislation has been introduced in the House and Senate to reform the laws governing immigration detention and increase oversight and enforceability of detention standards.<sup>30</sup> Last year, physician advocates suggested that Congress adopt the Refugee Protections Act, which would reduce the number of needlessly

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26. Brief of National Experts on Health Services for Detained Persons as Amicus Curiae in Support of Respondents at 18, *Hui v. Castaneda*, 130 Sup. Ct. 1845 (2010) (No. 08-1529) [hereinafter National Health Experts Brief]. Doctors serving state prison systems, the Bureau of Prisons, and DIHS are still subject to *Bivens* claims for violations of the Constitution, even though they provide indistinguishable services from PHS physicians like Dr. Hui. *Id.*

27. See generally ACLU Brief, *supra* note 2.

28. Brief of National Immigrant Justice Center as Amicus Curiae in Support of Respondents at 18, No. 08-1529 (January 22, 2010).

29. *Id.* at 18-19. See U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-09-401T, *Organizational Structure, Spending, and Staffing for the Health Care Provided to Immigration Detainees, Before H. Subcomm. on Homeland Security 1* (Mar. 3, 2009) (Statement of Alicia P. Cackley, Dir. of Health Care), <http://www.gao.gov/new.items/d09401t.pdf>; U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-08-869T, *Alien Detention Standards: Observations on the Adherence of ICE's Medical Standards in Detention Facilities, Subcomm. on Immigration, Citizenship, Refugees, Border Security and International Law, H. Comm. on the Judiciary 1*, 83-99, 143-46, 161-204 (June 4, 2008) (Statement of Richard M. Stana, Dir. of Homeland Security and Justice Issues), <http://www.gao.gov/new.items/d08869t.pdf> [hereinafter June 4, 2008 Hearing].

30. William Fisher, *ICE Ignores Health of Immigration Detainees*, THE PUBLIC RECORD (Dec. 21, 2010), <http://pubrecord.org/nation/8671/ignores-health-immigration-detainees/> [hereinafter The Public Record Report].

detained immigrations, legally entitle detainees to have their basic health needs met, and strictly limit coercive measures such as forced psychotropic medication and use of shackles and restraints to cases of necessity.<sup>31</sup> However, the bill has been in committee since May 2010.<sup>32</sup>

Current news reports continue to expose the derisory state of immigrant detainee medical care.<sup>33</sup> At the SDCF, where Castaneda was placed, the Public Record reports that there are detainees with untreated clinical depression, bipolar disorder, type two diabetes, hypertension, abscessed and broken teeth, severe chest pain and cancer like-pain.<sup>34</sup> A recently settled ACLU lawsuit stated in its Complaint that detainees at the SDCF were routinely subjected to long delays before treatment, denied necessary medication for chronic illness, and refused essential referrals by medical staff, leading to unnecessary suffering and death.<sup>35</sup> Care was described as grossly deficient, causing detainees great physical pain and mental anguish and amounting to punishment in violation of the ban on cruel and unusual punishment in the Eighth Amendment.<sup>36</sup>

One possible solution would be to allow a constitutional (“Bivens”) action against federally employed personnel, including the PHS, for deliberate indifference to the serious medical needs of detained persons, as a violation of the Eighth Amendment ban on

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31. Erin Hustings and David Reid, MD, *For the Health of Immigrants: Pass the Refugee Protection Act* (April 2, 2010), <http://phrblog.org/blog/2010/04/02/for-the-health-of-immigrants-pass-the-refugee-protection-act/>.

32. S. 3113: REFUGEE PROTECTION ACT OF 2010, 111th Congress 2009-10, Introduced and Referred to S. Comm. on the Judiciary Mar. 19, 2010, <http://www.govtrack.us/congress/bill.xpd?bill=s111-3113> (last visited February 22, 2011). Although hearings were held in the S. Comm. on the Judiciary May 19, 2010, no action was taken afterwards. *Id.*

33. *See infra* Section V-B.

34. The Public Record Report, *supra* note 30.

35. *Id.* After two years fighting an ACLU lawsuit (filed June 2007) challenging medical care policies at the SDCF and ICE’s denial of needed treatment, which has led to severe suffering and death among detainees, ICE has settled with the ACLU by agreeing to change its policy on medical care that led to the denial of “non-emergency” care including heart surgeries and cancer biopsies and ICE promises to provide detainees with constitutionally adequate levels of medical and mental health care. *Id.*

36. *Id.*



cruel and unusual punishment.<sup>37</sup> Considering that adequate medical treatment was readily available, forcing Castaneda to suffer for a year with untreated metastatic penile cancer likely met that standard and thus constituted cruel and unusual punishment. However, a *Bivens* action would not undermine PHS's ability to execute its mission and would not place even a minor hardship on PHS personnel.<sup>38</sup> *Amici* insist that the small risk of constitutional lawsuits does not materially affect the willingness of medical personnel to provide such services, as tens of thousands of other dedicated medical personnel have provided high quality care to detainees for decades while being employed by federal, state and local agencies that do not enjoy the special immunity being sought by Dr. Hui.<sup>39</sup> The vast majority of PHS employees are dedicated public servants who have nothing to fear from the stringent requirements of proving *Bivens* actions.<sup>40</sup>

Despite this enthusiastic support for *Bivens* actions, the United States Supreme Court ("Supreme Court") overruled Castaneda's *Bivens* claims against Dr. Hui, holding that the Public Health Service Act 42 USC § 233(a) ("PHSA") precludes *Bivens* actions against PHS personnel for constitutional violations arising out of their official duties.<sup>41</sup> In order to understand how the Supreme Court unanimously arrived at such a decision, Part II of this Comment will discuss the background and interplay of the FTCA, the Westfall Act, and the PHSA, and Part III will explore the reasoning behind Castaneda's claims with reference to the history and development of the *Bivens* cause of action. Parts IV and V will focus on the Legal and Societal Implications of the Supreme Court's decision, and Part VI concludes by suggesting another possible solution for immigrant detainee system reform.

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37. *Estelle v. Gamble*, 429 U.S. 97 (1976) (establishing deliberate indifference to the serious medical needs of those detained as the standard for constitutional violations); *Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971) (establishing the *Bivens* constitutional claim against individual government employees).

38. National Health Experts Brief, *supra* note 26, at 18.

39. *Id.* at 18-19.

40. Brief of Rep. John Conyers, Jr., Rep. Zoe Lofgren, and Rep. Jerrold Nadler as Amicus Curiae in Support of Respondents at 31, *Hui v. Castaneda*, 130 Sup. Ct. 1845 (2010) (No. 08-1529) [hereinafter Representatives Brief].

41. Brief for Respondents, *Hui v. Castaneda*, 130 Sup. Ct. 1845 (2010) (No. 08-1529).

## II. STATUTORY BACKGROUND AND INTERPLAY

### A. Federal Tort Claims Act

The FTCA (28 U.S.C. § 1346) was enacted in 1946 in order to provide a remedy for persons injured by wrongful acts or omissions of the federal government, but it contains numerous exceptions, exclusions, and pre-filing requirements that frequently bar such claims.<sup>42</sup> Furthermore, it creates an administrative procedure, which resolves without litigation, the vast majority of tort claims against the federal government.<sup>43</sup> Judge Rosenn of the Third Circuit described it as “a traversable bridge across the moat of sovereign immunity,” as the FTCA is the exclusive vehicle for tort suits against the United States, its agencies, and for common law torts of federal employees acting within the scope of their employment.<sup>44</sup>

In *Federal Deposit Insurance Corp. v. Meyer*, the Supreme Court decided that § 1346(b) grants federal district courts jurisdiction over a certain category of claims that are (1) against the United States, (2) for money damages, (3) for injury or loss of property, personal injury or death, (4) caused by negligent or wrongful act or omission of any employee of the government, (5) while acting within the scope of his employment, (6) 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.<sup>45</sup>

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42. Paul F. Figley, *Understanding the Federal Tort Claims Act: A Different Metaphor*, 44 *TORT TRIAL & INS. PRACT. L.J.* 1105, 1105, 1109 (2009). Its primary purpose was to abolish the common law doctrine of sovereign immunity and to end the outdated principle that “the king can do no wrong.” Statement by Rep. Way Owens Before the Subcomm. On Admin. Law and Governmental Relations of the H. Comm. on the Judiciary, at 24 (April 14, 1988).

43. *Id.* At 1106-07.

44. *Jaffee v. United States*, 592 F.2d 712, 717 (3d Cir. 1979). The doctrine of sovereign immunity provides that a sovereign state may only be sued to the extent that it has consented to be sued, and that such consent may only be given by the legislative branch. Figley, *supra* note 42, at 1107. Since the Supreme Court held that Dr. Hui is protected by the sovereign immunity of the FTCA, the only redress Castaneda’s family could now receive would be Congressional action.

45. *Federal Deposit Insurance Corp. v. Meyer*, 510 U.S. 471, 477 (1994). Claims not included under § 1346(b) are excluded from the FTCA’s waiver of sovereign immunity. Figley, *supra* note 42, at 1110.

*B. Westfall Act – Congress Amends the FTCA in 1988*

Westfall v. Erwin involved a negligence suit brought by Erwin who received chemical burns while working as a civilian employee at an Army depot.<sup>46</sup> Erwin claimed that his supervisors, including Westfall, had improperly and negligently stored toxic soda ash at a warehouse and failed to warn Erwin, which resulted in him being injured.<sup>47</sup> Although Erwin filed the case in Alabama state court, Westfall removed to federal district court and moved for summary judgment based on absolute immunity, and since the acts were within the scope of Westfall's official duties, the district court granted the motion.<sup>48</sup> However, the appeals court reversed because Westfall failed to show that the negligent act was discretionary in addition to being within the scope of employment.<sup>49</sup> The Supreme Court affirmed unanimously, and Justice Marshall wrote that granting absolute immunity was proper only where government employees were exercising more than a minimal amount of discretion.<sup>50</sup> The Supreme Court also called for Congress "to provide guidance for the complex and often highly empirical inquiry into whether absolute immunity is warranted in a particular context."<sup>51</sup>

In response to this request, Congress passed 28 U.S.C. § 2679 ("Westfall Act") in 1988, amending the FTCA to cover all federal employees and providing under subsection (b)(1) that remedy against the United States under 1346(b) and 2672 of this title is exclusive of any other civil action or proceeding for money damages by reason of the same subject matter against the employee whose act or omission gave rise to the claim, regardless of when the act or omission occurred.<sup>52</sup> According to subsection (b)(2), subsection (b)(1) does not apply to a civil action against an employee of the government (A)

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46. Westfall v. Erwin, 484 U.S. 292, 293 (1988).

47. *Id.* at 294.

48. *Id.*

49. *Id.*

50. *Id.* at 298.

51. *Id.* at 300.

52. Derrick R. Franck & Charles D. Beckenhauer, *Personal Liability of Federal Managers for Common Law and Constitutional Torts*, 35 Air Force L. Rev. 375, 376 (1991). See 28 U.S.C.A § 2679 ("Westfall Act" or "Federal Employee Liability Reform and Tort Compensation Act") (West 2006).

which is brought for a violation of the Constitution of the United States or (B) which is brought for a violation of a statute of the United States under which such action is otherwise authorized.<sup>53</sup> Thus, the FTCA is the exclusive remedy for common law tort claims against any employee of the government unless one of the two exceptions applies.<sup>54</sup>

*C. Public Health Service Act – Congress Extends the FTCA to PHS Employees in 1970*

The PHS Act 42 U.S.C. § 233(a) was a 1970 amendment to the PHS Act (originally enacted in 1944) and it provides that a suit against the United States is the exclusive civil remedy for negligent acts or omissions of certain federally supported healthcare entities and their officers, governing board members, employees and contractors in performing activities related to medical, surgical, and dental care or

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53. *Id.* The exception for constitutional claims is for *Bivens* suits discussed in Section III. The statutory language of the Westfall Act § 2679(b) states:

(b)(1) The remedy against the United States provided by sections 1346(b) and 2672 of this title for injury or loss of property, or personal injury or death arising or resulting from the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment is exclusive of any other civil action or proceeding for money damages by reason of the same subject matter against the employee whose act or omission gave rise to the claim or against the estate of such employee. Any other civil action or proceeding for money damages arising out of or relating to the same subject matter against the employee or the employee's estate is precluded without regard to when the act or omission occurred.

(2) Paragraph (1) does not extend or apply to a civil action against an employee of the Government--

(A) which is brought for a violation of the Constitution of the United States, or

(B) which is brought for a violation of a statute of the United States under which such action against an individual is otherwise authorized. Westfall Act 28 U.S.C.A. § 2679(b) (West 2006).

54. *Id.*

other related functions.<sup>55</sup> Covered entities and individuals are considered employees of the federal government PHS and are provided tort immunity from malpractice claims of negligence while acting within the scope of their office or employment under § 233(a).<sup>56</sup> While those covered are immune from suit for medical negligence, the United States assumes liability to the extent set forth by the provisions of the PHSA and the FTCA.<sup>57</sup>

At the time the PHSA was enacted, the payment of medical malpractice insurance costs far exceeded the amount of claims paid by federally funded migrant health centers, community health centers, and health centers serving homeless individuals.<sup>58</sup> Congress in passing the PHSA hoped to free up resources for the provision additional healthcare services.<sup>59</sup> Congress also sought to strengthen the accountability of these centers by encouraging them to check staff credentials by reviewing claims history and license status of their physicians and other licensed healthcare practitioners.<sup>60</sup>

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55. Public Health Service Act (“PHSA” or “Defense of Certain Malpractice and Negligence Suits”) 42 U.S.C.A § 233(a) (West 2003 & Supp. 2010). The statutory language claims:

The remedy against the United States provided by section 1346(b) and 2672 of Title 28, or by alternative benefits provided by the United States where the availability of such benefits precludes a remedy under section 1346(b) of Title 28, for damage for personal injury, including death, resulting from the performance of medical, surgical, dental, or related functions, including the conduct of clinical studies or investigation, by any commissioned officer or employee of the Public Health Service while acting within the scope of his office or employment, shall be exclusive of any other civil action or proceeding by reason of the same subject-matter against the officer or employee (or his estate) whose act or omission gave rise to the claim. *Id.*

56. *Id.*

57. *Id.* PHSA § 233(a) contains explicit incorporation of the FTCA. *Id.*

58. Joseph P. Griffith, Jr., *Medical Malpractice Litigation and Federally Funded Health Centers: A Primer on the Federally Supported Health Centers Assistance Act*, 14-JAN S.C. LAW 32, 34 (2003).

59. *Id.*

60. *Id.*

### D. Statutory Interplay

Castaneda's claims were against the United States as well as Dr. Hui, a private employee of the SDCF who was acting within the scope of her employment by providing medical care to immigrant detainees.<sup>61</sup> Sovereign immunity was extended to Dr. Hui by the PHSa, as the SDCF is a federally supported healthcare entity, and thus she was considered an employee of the PHS.<sup>62</sup> While Dr. Hui clearly is protected by the FTCA § 1346(b) for any tort caused by medical negligence, the statutory law governing Castaneda's *Bivens* constitutional claim against Dr. Hui is not as elucidating.<sup>63</sup> Although the PHSa § 233(a), incorporates the FTCA, it does not mention the Westfall Act § 2679(1)(b), and it also does not expressly exclude constitutional claims, despite the numerous amendments that have been made to it, since the Westfall Act was passed.<sup>64</sup> In fact, all of the amendments to § 233(a) occurred after the Supreme Court upheld *Bivens* claims in three cases and after the enactment of the Westfall Act, meaning that if Congress' intent was to preclude *Bivens* claims with the PHSa, it certainly had ample opportunities to do so.<sup>65</sup>

Section 233(a) does mention that it is "exclusive of any other civil action," which according to the Supreme Court is broad enough to accommodate both known and unknown causes action, and is not undermined by the fact that the § 233(a) preceded the *Bivens* cause of

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61. See *Hui v. Castaneda*, 120 Sup. Ct. at 1849 (for the premise that Hui is the PHS employee who was responsible for providing care to immigrant detainees, including Castaneda).

62. See *supra* Section II-C.

63. Brief for Respondants at 16, *Hui v. Castaneda*, 130 Sup. Ct. 1845 (2010) (No. 08-1529). See *infra* Section III for a more comprehensive discussion on the viability of the *Bivens* constitutional claim.

64. PHSa § 233(a).

65. *Id.* The cases span from 1971 to 1980 and the *Bivens* cause of action was explicitly preserved by Congress in 1988. See *Bivens*, 403 U.S. 388 (1971); *Davis v. Passman*, 442 U.S. 228 (1979); *Carlson v. Green*, 446 U.S. 14 (1980); Westfall Act § 2679(b)(1) – (2) (enacted in 1988). Meanwhile, the PHSa has been amended 11 times, between 1992 and 2010, but none of these changes involve preclusion or even limitation of the right to sue individual federal employees for constitutional violations. PHSa 42 U.S.C.A. § 233(a) (West 2003 & Supp. 2010) (amendments listed in Statutory Notes section).

action.<sup>66</sup> The Supreme Court pointed out that the most recently enacted of the FTCA (1946), PHSA (1944 with §233(a) added in 1970), and Westfall Act (1988) is the latter, and it essentially copied § 233(a)'s exclusivity language.<sup>67</sup> The Supreme Court also acknowledged that the Westfall Act has an explicit exception for constitutional violations, which according to the Supreme Court is "powerful evidence that Congress did not understand the exclusivity provided by § 2679(1)(b) or the substantially similar § 233(a)."<sup>68</sup>

One would think that prior to claiming Congress "did not understand" the exclusivity of the PHSA when it passed the Westfall Act § 2679(1)(b), the Supreme Court would at least look to Congress' intent in passing an Act plainly supporting the preservation of *Bivens* claims. The timing of the statutes alone indicates a need to carefully consider whether one statute truly precludes another. Based on the fact that the FTCA was passed in 1946 and § 233(a) was created as an amendment in 1970, whereas the Westfall Act was enacted in 1988, perhaps the intent of a more modern Congress was to allow an individual cause of action against federal employees who violate the Constitution. The Westfall Act may have been a reaction to the increasing breadth of constitutional rights granted to detainees and prisoners by the Supreme Court in the 1970s and 1980s,<sup>69</sup> or it may have been Congress' explicit intent to broaden the FTCA, in line with the prisoners' reform movement, which started in the 1960s.<sup>70</sup> Either way, claiming Congress was

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66. *Hui v. Castaneda*, 120 Sup. Ct. at 1851. The Supreme Court is likely referring to both past and future causes of action not yet realized, such as a the *Bivens* claim, which was upheld by the Supreme Court in case law and preserved by Congress in the Westfall Act after the PHSA was enacted.

67. *Hui v. Castaneda*, 120 Sup. Ct. at 1851.

68. *Id.*

69. *See infra* Section III.

70. James B. Jacobs, *The Prisoners' Rights Movement and Its Impacts, 1960-80*, 2 CRIME & JUST. 429, 433 (1980) asserts:

Until the 1960s, the federal judiciary adhered to a 'hands off' attitude toward prison cases...A prisoner who complained about arbitrary, corrupt, brutal, or illegal treatment did so at his peril...The precondition for the emergence of a prisoners' rights movement in the United States was the recognition by the federal courts that prisoners are *persons* with cognizable constitutional rights. Just by opening a forum in which

simply confused when it expressly preserved a constitutional cause of action, as well as other causes of action under federal statutes, is disconcerting.

The duty of the courts when interpreting a statute is to look first to the plain language of the statute, construing the provision of the entire law, including its object and policy, and not to be guided by a single sentence or member of a sentence in ascertaining Congress' intent, and if the language of the statute is unclear the courts look to its legislative history.<sup>71</sup> Therefore, the Supreme Court should not have based its analysis of § 233(a) solely on the fact that it is "exclusive of any other civil action."<sup>72</sup> Courts may also find it necessary to trace a statute back to other statutes it references, to see if those statutes have been amended, as is the case here, where the Ninth Circuit traced the reference in § 233(a) "subject to the provisions of chapter 171 of this title" back to the FTCA, which incorporates by reference 28 U.S.C. § 2679 (the Westfall Act).<sup>73</sup> Furthermore, courts have recognized exceptions to clearly delineated statutes are implied when essential to prevent absurd results or consequences obviously at variance with the policy of enactment as a whole.<sup>74</sup> As a result, courts may look to the legislative history to ensure that the result was the one intended by Congress.<sup>75</sup>

Both the plain meaning and the legislative history of the Westfall Act reveal that *Bivens* constitutional actions against federal employees should survive as a separate cause of action.<sup>76</sup> On its face the statute says the exclusiveness of the FTCA does not apply to

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prisoners' grievances could be heard, the federal courts destroyed the custodians' absolute power and the prisoners' isolation from the larger society. *Id.*

71. *Nw. Res. Def. Council v. Glickman*, 82 F.3d 825, 830-31 (9th Cir. 1996) (tracing back to *U.S. v. Boisdore's Heirs*, 49 U.S. 113, 122 (1850)).

72. *Hui v. Castaneda*, 120 Sup. Ct. at 1851.

73. *Castaneda v. United States*, 538 F.Supp.2d at 1288-89.

74. *United States ex rel. Lujan v. Hughes Aircraft Co.*, 243 F.3d 1181, 1187 (9th Cir. 2001) (citing *United States v. Rutherford*, 442 U.S. 544, 551-52 (1979)).

75. *See Hughes Aircraft Co.*, 243 F.3d at 1189.

76. Westfall Act § 2679(b)(2)(A)-(B); Hearing Before the Subcomm. on Admin. Law and Governmental Relations of the H. Comm. on the Judiciary on H.R. 4358, H.R. 3872, and H.R. 3083 Legislation to Amend the Federal Tort Claim Act, Serial No. 55, at 3-6 (April 14, 1988).



either constitutional torts or separate causes of action against the United States that are authorized by federal statute.<sup>77</sup> The legislative history reveals that the purpose of the Westfall Act was to extend the provisions of the FTCA to all federal employees, not just PHS employees or other groups with specific statutory protections, as common law tort immunity was eroding.<sup>78</sup> Congress made it clear that this immunity was intended only to cover routine torts and that a plaintiff whose constitutional rights had been violated remained free to pursue a *Bivens* claim against the individual federal employee in question.<sup>79</sup> In fact, Congress upheld the exception for constitutional claims in the face of opposition by both the Department of Justice and the American Federation of Government Employees (AFL-CIO) who argued that the phrase “including constitutional claims” should be inserted in subsection (b)(1).<sup>80</sup>

Furthermore, a House Committee Report states that the second major feature of Section 5 (codified at 28 U.S.C. 2679(b)(2)(A)) is that the exclusiveness of an FTCA remedy does not apply to constitutional torts, since courts have drawn a sharp distinction between common law torts and constitutional torts.<sup>81</sup> While common law torts are routine acts or omissions occurring in the usual course of business, a constitutional tort is a vehicle to redress violations of one or more fundamental rights embraced in the Constitution, which is a more serious intrusion on the rights of an individual and merits special attention.<sup>82</sup>

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77. Westfall Act § 2679(b)(2)(A)-(B).

78. Hearing Before the Subcomm. on Admin. Law and Governmental Relations of the H. Comm. on the Judiciary on H.R. 4358, H.R. 3872, and H.R. 3083 Legislation to Amend the Federal Tort Claim Act, Serial No. 55, at 3-6, (April 14, 1988) (setting forth the statutory language of H.R. 4358 Federal Employees Liability and Tort Compensation Act of 1988).

79. *Id.* at 78 (Statement of Robert L. Willmore, Deputy Assistant Attorney General, Department of Justice Civil Division).

80. *Id.* at 78-79, 173 (Statement of Robert L. Willmore and Statement of Mark D. Roth, General Counsel of the American Federation of Government Employees (AFL-CIO)).

81. Report to Accompany H.R. 4612, Federal Employees Liability Reform and Tort Compensation Act of 1988, H. Comm. on the Judiciary H.R. Rep. 100-700, at 6 (June 14, 1988). *See also* 1988 U.S.C.C.A.N. at 5947.

82. *Id.*

Even the legislative history of § 233(a) reveals that Congress intended to immunize PHS employees from garden-variety malpractice claims, but not from constitutional violations.<sup>83</sup> Section 233(a) was not part of the original PHSA, but was introduced during congressional debate in the House on December 18, 1970 by Representative Staggers, who claimed that this provision was needed to protect PHS doctors, with their low salaries, from the burden of taking out malpractice insurance to cover them from mistakes made in the ordinary course of business.<sup>84</sup> Thus, the concern was over affordability of insurance for unintentional malpractice, which in no way indicates an attempt to preclude intentional torts rising to the level of a constitutional violation.<sup>85</sup> After being approved, the only mention of this amendment in the Senate occurred three days later, when Senator Javitz expressed his support for the provision for defense of certain malpractice and negligence suits against PHS doctors.<sup>86</sup> In addition, the title “Defense of Certain Malpractice and Negligence Suits” further indicates that Congress did not mean to apply this section to any and all claims arising against PHS employees in the past or the future.<sup>87</sup> Therefore, Castaneda’s *Bivens* claims should not have been precluded by § 233(a), and in the next Section, these issues are examined in the context of developing case law.

### III. OVERVIEW AND ANALYSIS OF CONSTITUTIONAL CLAIMS

#### A. Common Law Development of *Bivens* Claims

The case law demonstrates an expansion and then retraction of the right to seek justice against an individual government official for violations of the Constitution. In *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics* (1971), agency officials

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83. *Castaneda v. United States*, 538 F.Supp.2d at 1293.

84. 91 CONG. REC. 42,542-43 (1970).

85. *Castaneda v. United States*, 538 F.Supp.2d at 1293.

86. 91 CONG. REC. 42,977 (1970).

87. 91 CONG. REC. 42,542 (1970); *Castaneda v. United States*, 538 F.Supp.2d at 1293. See *Bhd. of R.R. Trainmen v. Baltimore & Ohio R.R.*, 331 U.S. 519, 528-29 (1947) (for the premise that the title of a statute and the hearing of a section may be used for interpretative purposes to shed light on an ambiguous word or phrase).

unlawfully entered and searched Bivens' apartment and arrested him for alleged narcotic violations, despite a lack of warrant or probable cause.<sup>88</sup> Bivens' complaint claimed that humiliation, embarrassment, and mental suffering was caused by the agents' unlawful conduct in violation of the Fourth Amendment, and Bivens sought relief in the form of \$15,000 in damages from each individual agent.<sup>89</sup> Although the district court dismissed the complaint for failure to state a claim upon which relief can be granted and the appeals court affirmed, the Supreme Court reversed, indicating that courts should adjust remedies as necessary to afford plaintiffs relief for invasions of a federally protected right.<sup>90</sup> The Supreme Court argued that its cases have long since rejected the notion that the Fourth Amendment applies only to private persons' conduct that would be condemned under state law, and therefore, the government officials' argument that the Constitution is not an independent limitation upon the exercise of federal power must be rejected.<sup>91</sup> Furthermore, the interests protected by state laws regulating trespass and the invasion of privacy could be inconsistent or even hostile when compared to the Fourth Amendment's guarantee against unreasonable searches and seizures.<sup>92</sup> In such cases there is no safety for the citizen, except for the protection of the judiciary, for rights which have been invaded by officers of the government who are professing to act in its name.<sup>93</sup> Since historically damages have been regarded as the proper remedy for invasion of personal liberty interests and there are no special factors counseling hesitation or affirmative action by Congress, the

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88. *Bivens*, 403 U.S. at 389. See Derrick R. Franck & Charles D. Beckenhauer, *supra* note 52, at 381; William P. Kratzke, *Some Recommendations Concerning Tort Liability of Government and its Employees for Torts and Constitutional Torts*, ADMIN. L.J. AM. UNIV. 1105, 1129 (1996).

89. Derrick R. Franck & Charles D. Beckenhauer, *supra* note 52, at 390. In *Bell v. Hood*, 327 U.S. 678 (1946), the Supreme Court reserved the question of whether a constitutional violation by a federal agent acting under the color of his authority gives rise to a cause of action for damages, but in *Bivens*, they held that it does. *Bivens*, 403 U.S. at 389.

90. *Id.* at 392 (citing *Bell*, 327 U.S. at 684; *Bemis Bros. Bag Co. v. United States*, 289 U.S. 28, 36 (1933) (Cardozo, J.); *The Western Maid*, 257 U.S. 419, 433 (1922) (Holmes, J.)).

91. *Id.* at 392-94.

92. *Id.* at 394.

93. *Id.* at 394-95.

Supreme Court held that Bivens was entitled to recover money damages for injuries he suffered as a result of the agents' violation of the Fourth Amendment.<sup>94</sup> The Supreme Court refused to address the agents' argument that they were immune from liability because of their official position.<sup>95</sup>

Justice Harlan's concurrence in the judgment described how he initially believed the Court of Appeals was correct in dismissing the complaint, but he then found that the federal courts do have the power to award damages for violation of a constitutionally protected right, even though the law is "not entirely free of ambiguity."<sup>96</sup> In response to the contention that the federal courts do not have the power to accord damages for a constitutional violation absent Congressional action, he did not understand why the Government and the dissenting Justices maintained that recovery depends on whether there exists such a remedy in the state in which the claimant resides.<sup>97</sup> According to Justice Harlan, "[s]uch a position would be incompatible with the presumed availability of federal equitable relief."<sup>98</sup> *Erie Railroad v. Tompkins* made clear that in a non-diversity suit a federal court's power to grant equitable relief depends on the presence of a substantive right derived from federal law, and in this case the Fourth Amendment is a federally protected interest.<sup>99</sup>

In *Davis v. Passman* (1979), the Supreme Court established the concept that the constitutional rights of a citizen presumptively prevail over competing interests in the context of private damage claims brought against public officials in their individual capacities.<sup>100</sup> In this case, Davis alleged that her employer Passman,

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94. *Id.* at 395-97.

95. *Id.* at 397-98.

96. *Id.* at 399-400.

97. *Id.* at 399-400.

98. *Id.* at 400. A proper showing must be made in terms of the ordinary principles governing equitable remedies. *Id.* See *Bell*, 327 U.S. at 684.

99. *Id.* (citing *Erie R.R. v. Tompkins* 304 U.S. 64 (1938)). See Al Katz, *The Jurisprudence of Remedies: Constitutional Legality and the Law of Torts in Bell v. Hood*, 117 U. PA. L. REV. 1, 33-34 (1968).

100. *Davis*, 442 U.S. at 241-46. "No man in this country is so high that he is above the law. No officer of the law may set that law at defiance with impunity. All officers of the government, from the highest to the lowest, are creatures of the law, and are bound to obey it." *Id.* at 246 (citing *United States v. Lee*, 106 U.S. 196, 220 (1882)).

a former United States Congressman, had discriminated against her on the basis of sex in violation of her due process rights guaranteed under the Fifth Amendment, and the Supreme Court held that an injured party could bring a *Bivens* claim for damages, as justifiable constitutional rights shall be enforced through the courts.<sup>101</sup>

Then, Marie Green brought an action (in *Carlson v. Green* (1980)) on behalf of her deceased son who she claimed died as a result of personal injuries sustained by federal prison officials, in violation of her son's due process, equal protection, and Eighth Amendment rights.<sup>102</sup> Despite the fact that Green's allegations could also have supported a FTCA suit against the United States, the Supreme Court extended *Bivens* to violations of an individual's right to freedom from infliction of cruel and unusual punishment and created a federal rule of survivorship for a *Bivens*-type claim.<sup>103</sup> The Supreme Court did not rely on the express FTCA language preserving *Bivens* remedies, because that language was not added to the FTCA until the Westfall Act of 1988, a full eight years after *Carlson*, which indicates Congress' express codification of its holding.<sup>104</sup>

The Supreme Court in *Carlson* noted that a *Bivens* action may be defeated in two situations: (1) when defendants demonstrate special factors counseling hesitation in the absence of affirmative action by Congress, or (2) when defendants show that Congress has provided an alternative remedy which it explicitly declared to be a substitute for recovery directly under the Constitution and viewed as equally

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101. *Id.* at 231, 234, 241-42.

If [these rights] are incorporated into the Constitution, independent tribunals of justice will consider themselves in a peculiar manner the guardians of those rights; they will be an impenetrable bulwark against every assumption of power in the Legislative or Executive; they will be naturally led to resist every encroachment upon rights expressly stipulated for in the Constitution by the declaration of rights. *Id.* at 241-42 (citing 1 *Annals of Cong.* 439 (1789)).

102. *Carlson*, 446 U.S. at 16.

103. *Id.* at 17-25.

104. Kratzke, *supra* note 88, at 1131-32.

effective, noting that neither situation existed in this case.<sup>105</sup> There were no special factors counseling hesitation, as federal prison officials do not enjoy such independent status in the constitutional scheme to suggest that judicially created remedies against them might be inappropriate.<sup>106</sup> With regard to an alternative remedy, not only is there no explicit congressional declaration that persons injured by federal officers' constitutional violations may not recover damages, but several factors suggest that a *Bivens* remedy is more effective than an FTCA remedy.<sup>107</sup> First of all, the *Bivens* remedy in addition to compensating victims, serves a deterrent purpose, since responsible superiors are motivated not only by concern for the public finances but also for the Government's integrity.<sup>108</sup> Second, Supreme Court decisions indicate that punitive damages may be awarded in a *Bivens* suit, especially since "the 'constitutional design' would be stood on its head if federal officials did not face at least the same liability as state officials guilty of the same constitutional transgression."<sup>109</sup> Third, a plaintiff cannot opt for trial by jury in an FTCA action, but may do so in a *Bivens* suit, and last, an action under FTCA exists only if the State in which the alleged misconduct occurred would permit such a cause of action to go forward.<sup>110</sup> Thus, the FTCA is not an adequate protector of a citizen's constitutional rights.<sup>111</sup>

More recently, the Second Circuit ruled in *Cuoco v. Moritsugu* (2000) (directly on point to *Castaneda*, though not mandatory authority) that a pretrial detainee *Cuoco*, while she might have a claim against the United States under the FTCA, could not bring a claim against Federal Corrections Institution officials for an Eighth Amendment violation by way of deliberate indifference to her serious medical needs.<sup>112</sup> As members of the PHS acting within the scope of their employment, these employees enjoy the privilege of absolute

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105. *Carlson*, 446 U.S. at 18-19. These two factors will be referred to as the *Carlson* two part test.

106. *Id.* at 19.

107. *Id.* at 19-21.

108. *Id.* at 21.

109. *Id.* at 21-22 (citing *Butz v. Economou*, 438 U.S. 478, 504 (1978)).

110. *Id.* at 22-23.

111. *Id.* at 23.

112. *Cuoco v. Moritsugu*, 222 F.3d 99, 108 (2000).

immunity to suits under the terms of the PHS Act § 233(a), and this Act is not limited to medical malpractice claims as when Congress has sought to limit the immunity of these claims it typically provides an express preservation.<sup>113</sup> This opinion stopped its analysis at the FTCA and did not make an attempt to trace the statute back to its amendments.<sup>114</sup>

### B. Section 1983 Claims

Even though the Supreme Court in *Castaneda* has foreclosed upon a federal remedy for violations of the Constitution, there exists a remedy against state government officials under 42 U.S.C. § 1983, which applied in *Estelle v. Gamble*, a case strikingly similar to *Castaneda*, where a prisoner was ordered by the prison doctor to return to work despite persistent back pain and inadequate medical treatment.<sup>115</sup> The Supreme Court in *Estelle* held an Eighth Amendment violation for inadequate medical care requires deliberate indifference to a detainee's serious medical needs, which may manifest itself through intentional denial or delay of medical care or an intentional interference with the treatment once prescribed.<sup>116</sup> Neither an accident, inadvertent failure to provide adequate medical care, or negligence in diagnosing or treating a medical condition is cognizable as a violation of the Eighth Amendment, though each may constitute medical malpractice.<sup>117</sup> The Supreme Court reasoned that the government has an obligation to provide medical care for those

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113. *Id.* at 106-09. The Second Circuit gives only one example of a statute with limiting language, which is 38 U.S.C. § 7316(a)(1) providing an exclusive remedy for damages for personal injury... arising from malpractice or negligence of a medical care employee of the Veterans Health Administration. *Id.* at 108. However, the language of the statute contains no express preservation of the FTCA § 2680 exceptions or express preservation of any other FTCA exception like the Westfall Act, it merely says that the exception under FTCA § 2680(h) does not apply. 38 U.S.C.A. § 7316(a)(1) (West 2010).

114. *Cuoco*, 222 F.3d at 107 (Statutory Discussion is Section (C)(1) of the opinion).

115. *Estelle*, 429 U.S. at 99-101, 105-06; 42 U.S.C.A. § 1983 (West 2003 & Supp. 2010) (Providing a remedy against state employees who subject any citizen to a "deprivation of any rights, privileges, or immunities secured by the Constitution and laws...") [hereinafter § 1983].

116. *Estelle*, 429 U.S. at 104-05.

117. *Id.*

whom it is punishing by incarceration, as an inmate is relying on prison authorities for treatment of his medical needs.<sup>118</sup> If the authorities fail to provide for these needs, they will not be met, and in the worst cases, such a failure may actually produce physical torture or a lingering death.<sup>119</sup>

Meanwhile, more modern cases like *DeShaney v. Winnebago County Department of Social Services* (“DSS”) (1989) illustrate the Supreme Court’s intent to reduce the scope of the constitutional violations cause of action. In this case, Joshua DeShaney and his mother claimed under § 1983 that Child Protective Services violated the Due Process Clause by failing to remove Joshua from his physically abusive father, which occurred over a two year span and resulted to beatings so severe that four-year-old Joshua fell into a life-threatening coma and would have to spend the rest of his life confined to an institution for the profoundly disabled.<sup>120</sup> The Supreme Court held that while the Due Process Clause guarantees that no State shall deprive any person of life, liberty, or property, without due process of law, this protection extends only to unwarranted government interference.<sup>121</sup> Even though the DSS was involved with Joshua’s case for over two years, he had no right to protection from private violence and an affirmative duty to protect him from child abuse did not arise and could not be enforced as a violation of the Constitution.<sup>122</sup>

### *C. Discussion of Constitutional Claims*

Section 1983 was enacted to ensure that State employees would uphold the Constitution, and the Supreme Court has said that *Estelle* and *Youngberg* stand for the proposition that “when the State takes a person into its custody and holds him there against his will, the Constitution imposes upon it a corresponding duty to assume some

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118. *Id.* at 103.

119. *Id.* (internal citation omitted).

120. *DeShaney v. Winnebago Co. Dep’t of Soc. Servs.*, 489 U.S. 189, 191-93 (1989).

121. *Id.* at 196.

122. *Id.* at 194-97.



responsibility for his safety and general well-being.”<sup>123</sup> In addition, the Supreme Court has stated that the Fourteenth Amendment was intended to prevent the *government* from abusing its power or employing it as an instrument of oppression, so even if § 1983 did not exist the Eighth Amendment’s prohibition against cruel and unusual punishment would still be applicable to the States through the Due Process Clause.<sup>124</sup>

In its discussion of the Fourteenth Amendment, the Supreme Court does not mention a State Government specifically, but rather uses the term in general way, and one would think that this constitutional protection should apply to all people detained by *any government*, whether federal, state, or local. Given that the Fourteenth Amendment provides for equal protection under the laws, it would make sense for federal employees to be subject to the same standards as their State counterparts. Traditionally, the Federal Constitution has provided a minimum standard, meaning that State Governments do not have the power to reduce a person’s constitutional rights below this threshold. Should not the Federal Government be held to its own minimum threshold? Should not this duty to uphold the Constitution also be enforceable against federal employees, even in the absence of an express statutory provision? Arguably, the Supreme Court does not need one, as its own precedent throughout the 1970s and 1980s in *Bivens*, *Davis*, and *Carlson* established that there is a cause of action against individual federal employees for constitutional violations.

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123. *Id.* at 199-200. The rationale for this principle is simple enough:

[W]hen the State by the affirmative exercise of its power so restrains an individual’s liberty that it renders him unable to care for himself, and at the same time fails to provide for his basic human needs – e.g., food, clothing, shelter, medical care, and reasonable safety – it transgresses the substantive limits on state action set by the Eighth Amendment and the Due Process Clause. *Id.* at 200.

*See Youngberg v. Romero*, 457, U.S. 307, 317, 324 (1982) (holding that constitutional protections extend to those institutionalized for a mental disorder as they are wholly dependent on the State for certain services such as food, clothing, shelter and medical care).

124. *Id.* at 196-99.

In raising such questions, one might wonder where the line should be drawn if the Supreme Court is to allow *Bivens* actions. I argue that instead of precluding *Bivens* actions, the Supreme Court should have drawn the line at *DeShaney*, where the person perpetrating the violence is in no way affiliated with the Local, State, or Federal Government. Although the Supreme Court's claim in *DeShaney* that the government has no constitutional duty to protect citizens' life, liberty and property from private violence<sup>125</sup> is disturbing on the basis that criminal laws were created to protect citizens from such violence, it is clear that such violence was not perpetuated by the government, and therefore was not actionable against it.

One might also retort with an argument that the FTCA or some other provision often provides an alternative remedy, which substitutes the Federal Government as a defendant in actions where federal employees have committed constitutional violations. But, as the Supreme Court argued in *Carlson*, this remedy was not intended by Congress to be an adequate substitute, as nothing in the FTCA or its legislative history shows that Congress meant to preempt *Bivens* claims or to create an equally effective remedy, and therefore it fails to satisfy the minimum threshold set forth in the Constitution.<sup>126</sup>

#### *D. Analysis of Bivens in the Context of Castaneda*

The Ninth Circuit found that the plain language of § 233(a) allowed *Castaneda* to assert *Bivens* claims against individual PHS Defendants, because Congress has not provided an alternative remedy which it explicitly declared to be a substitute for recovery directly under the Constitution and which could be viewed as equally effective (*Carlson* two part test).<sup>127</sup> According to Respondent's Brief, far from evincing the explicit intent required by *Carlson* to preclude *Bivens* claims, § 233(a) unambiguously states the opposite based on its reference to chapter 171 of the FTCA, which incorporates the Westfall Act.<sup>128</sup>

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125. *Id.* at 196.

126. *See Carlson*, 446 U.S. at 18-23.

127. *Castaneda v. United States*, 538 F.Supp.2d at 1286.

128. *Id.* at 1289-90.

Yet the Supreme Court dismissed Dr. Hui from the case after she brought a motion for lack of subject matter jurisdiction, which argued that she was absolutely immune from suit as a PHS employee acting within the scope of her employment and that Castaneda must bring his claim as an FTCA action against the United States only.<sup>129</sup> Although the Supreme Court's brief opinion (8 pages) was based solely on a short phrase from § 233(a),<sup>130</sup> a more comprehensive opinion discussing the common law *Bivens* claims was likely in order, especially considering the common law context in which *Bivens* claims arose.<sup>131</sup>

With regard to Castaneda's case, the FTCA would clearly be an inadequate remedy, since the Defendants' own record presented a strong case for punitive damages, especially considering that Dr. Hui refused Castaneda's request for a biopsy despite her knowledge that several medical specialists suspected he had cancer and strongly recommended it.<sup>132</sup> Dr. Hui may even have lied about the medical advice, as she indicated in an official report that Dr. Wilkinson considered biopsy and circumcision to be elective, based on the fact that he referred to it as "an elective outpatient procedure" when he called Dr. Hui to advise immediate diagnosis and treatment.<sup>133</sup> The evidence suggested that the federal government would not provide for elective surgery, so Dr. Hui may have purposefully mischaracterized the surgery in order to refuse him care, using such circular logic that because he does not need a biopsy, he does not have cancer at this time, and because he does not have cancer he does not need a biopsy.<sup>134</sup> Arguably such conduct was cruel and unusual and may by itself be enough of a factual basis to indicate reckless

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129. *Id.*

130. *See Hui v. Castaneda*, 120 Sup. Ct. at 1851 (for the phrase from § 233(a) claiming it is "exclusive of any other civil action").

131. *Bivens* claims were created by the Supreme Court itself and *Carlson* upheld a *Bivens* claim against a PHS employee after § 233(a) was enacted.

132. *Castaneda v. United States*, 538 F.Supp.2d at 1296.

133. *Id.* at 1297. While on the phone, Dr. Wilkinson was worried that the lesion "may represent a penile cancer" and "required urgent urologic assessment of biopsy" because "even benign lesions" in that area may be deadly. *Id.* Dr. Hui changed Dr. Wilkinson's use of elective to describe the location of procedure into her version, which was that diagnosis and treatment were altogether optional.

134. *Id.* at 1297-98 (citing Plaintiffs Ex. 8).

disregard of Castaneda's serious medical needs in accordance with the standard set forth in *Estelle*.<sup>135</sup>

Furthermore, the Central District of California explained that the FTCA fails to satisfy the *Carlson* test of providing an equally effective alternative remedy, because it allows a lawsuit only if the state in which the alleged misconduct occurred would permit a cause of action for the same claim.<sup>136</sup> Given that California caps non-economic damages in medical malpractice actions at \$250,000 and *Bivens* actions have no cap, Castaneda would have a strong argument that this amount is inadequate to compensate for his ten months of pain, bleeding, anxiety, loss of sleep, and humiliation while in ICE's custody, in addition to the subsequent amputation of his penis, almost a year of grueling chemotherapy, and his eventual death.<sup>137</sup>

#### IV. LEGAL IMPLICATIONS

Under *Erie Railroad v. Tompkins*, the lack of federal common law requires any right of action in federal court be granted either by the Constitution or by federal statute,<sup>138</sup> and arguably, here, there is both a constitutional cause of action under the Eighth Amendment, as well as a Congressional mandate to allow *Bivens* claims in accordance with the Westfall Act.

In effectively eliminating the availability of *Bivens* claims against PHS officers, the Supreme Court has resolved a Circuit Split regarding the preclusionary impact of § 233(a). Dr. Hui's case relied heavily on *Cuoco*, which held that the plain language of § 233(a) precluded *Bivens* actions.<sup>139</sup> However, in the Ninth Circuit's opinion, the Second Circuit must have failed to follow the statutory trail back to the Westfall Act; otherwise *Cuoco* would have adhered to the statutory mandate preserving *Bivens* claims.<sup>140</sup> When reviewing the present case, the Ninth Circuit respectfully requested that the Second Circuit and other Circuits following *Cuoco* reconsider their

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135. *Id.* at 1298.

136. *Id.* at 1287.

137. *Id.* at 1296-97.

138. *Erie RR. v. Tompkins*, 304 U.S. 64, 78 (1938).

139. *Cuoco*, 222 F.3d at 108.

140. *Castaneda v. United States*, 538 F.Supp.2d at 1290-91.

holdings.<sup>141</sup> Unfortunately, in its opinion the Supreme Court did not acknowledge the Westfall Act's incorporation by reference in § 233(a), and it is unclear why it found such an analysis unnecessary.<sup>142</sup>

The *Bivens* claim was supported by Supreme Court as recently as 1991 in *United States v. Smith*, 499 U.S. 160 (1991), which is directly contradictory to the holding here.<sup>143</sup> *Smith* dealt with the Gonzales Act § 1089(a) defense of certain suits arising out of medical malpractice, and this Act has a medical malpractice provision worded almost identically to § 233(a).<sup>144</sup> Both statutes

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141. *Id.* at 1291. The Ninth Circuit also upheld *Bivens* claims against federal secret service agents in *Billings v. United States*, 57 F.3d 797, 800 (9th Cir. 1995) (basing its decision on the Westfall Act exception to the FTCA). *Id.* at 1289. About twenty published and unpublished cases are listed in the Central District of California Court's opinion as holdings that should be reconsidered, and these cases appear to be from the 1st, 2d, 3d, or 7th Circuits. *Id.* at 1291.

142. *See Hui v. Castaneda*, 130 S. Ct. 1845 (2010) (per curiam opinion written by Sotomayor, J.)

143. *Castaneda v. United States*, 538 F.Supp.2d at 1290.

144. The Gonzales Act 10 U.S.C. § 1089(a) reads as follows:

The remedy against the United States provided by sections 1346(b) and 2672 of title 28 for damages for personal injury, including death, caused by the negligent or wrongful act or omission of any physician, dentist, nurse, pharmacist, or paramedical or other supporting personnel (including medical and dental technicians, nursing assistants, and therapists) of the armed forces, the National Guard while engaged in training or duty... the Department of Defense, the Armed Forces Retirement Home, or the Central Intelligence Agency in the performance of medical, dental, or related health care functions (including clinical studies and investigations) while acting within the scope of his duties or employment therein or therefore shall hereafter be exclusive of any other civil action or proceeding by reason of the same subject matter against such physician, dentist, nurse, pharmacist, or paramedical or other supporting personnel (or the estate of such person) whose act or omission gave rise to such action or proceeding. This subsection shall also apply if the physician, dentist, nurse, pharmacist, or paramedical or other supporting personnel (or the estate of such person) involved is serving under a personal services contract entered into under section 1091 of this title. 10 U.S.C.A. § 1089(a) (West 2010).

address damages claims for personal injury from certain federal officials involved in medical, dental or related health functions, both provide for exclusive civil actions and both incorporate by reference 28 U.S.C. §§ 1346 and 2671.<sup>145</sup> Thus, the only notable difference is that *Smith* held in favor of preserving *Bivens* claims.

*Amici* by the National Experts on Health Services for Detained Persons claimed that the legal impact of allowing a *Bivens* claim would have been minimal, as it would not have required the Supreme Court to recognize any new constitutional right, merely to uphold the standard set forth in *Carlson*.<sup>146</sup> Dr. Hui argued that the facts here arose in a different context because they dealt with immigration detention and not prison as in *Estelle*, but *Carlson* itself involved an action against a PHS defendant and the Supreme Court still upheld a *Bivens* action against any federal employee who was responsible for the medical care of detained persons.<sup>147</sup> The location of detention is irrelevant, as neither a prisoner nor an immigrant detainee is free to leave and pursue medical attention.<sup>148</sup> Castaneda was completely reliant on authorities at the detention center for almost a year, yet he did not receive proper medical care until he was released, when it was too late.<sup>149</sup>

In the United States penal system, the prisoners' reform movement involved ever increasing prisoner challenges to prison administrators by way of litigation starting in the 1960s with *Cooper v. Pate*, 378 U.S. 546 (1964) and culminating in *Wolf v. McDonnell*, 418 U.S. 549 (1974), where the Supreme Court held that prisoners have firmly established constitutional rights.<sup>150</sup> Shortly thereafter

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145. *Id.*

146. National Health Experts Brief, *supra* note 26, at 15.

147. *Carlson* 446 U.S. at 25.

148. National Health Experts Brief, *supra* note 26, at 16.

149. *Id.*

150. James B. Jacobs, *supra* note 73, at 440-41. Justice White wrote the Supreme Court's opinion, stating:

Lawful imprisonment necessarily makes unavailable many rights and privileges of the ordinary citizen...[b]ut though his rights may be diminished by the needs and exigencies of the institutional environment, a prisoner is not wholly stripped of constitutional protections when he is imprisoned for a crime.

*Estelle* (1976) provided that the deliberate indifference to serious medical needs constitutes cruel and unusual punishment.<sup>151</sup> This standard was extended by *Farmer v. Brennan*, 511 U.S. 825 (1994) to prison officials' acts or failures to act with deliberate indifference of substantial risk of serious harm to an inmate.<sup>152</sup> Under *Farmer*, the individual "would not escape liability if evidence showed that he merely refused to verify underlying facts that he strongly suspected to be true, or declined to confirm inferences of risk that he strongly suspected to exist."<sup>153</sup> This statement sounds eerily similar to Dr. Hui's acts in response to several doctors' recommendations that Castaneda be immediately treated for cancer.

It would be unreasonable to say that because immigrant detainees are not United States citizens, they should not be privy to the same Constitutional rights as prisoners. This distinction would serve as an injustice to the many refugees who eventually receive amnesty and also to the legal immigrants who are detained erroneously.<sup>154</sup> In fact, immigrant detainees do have some constitutional rights, such as due process rights under the Fifth Amendment and the right to be free from cruel and unusual punishment under the Eighth Amendment.<sup>155</sup>

Furthermore, the Supreme Court has explained that when the State takes a person into custody and holds him against his will, the Constitution imposes a corresponding duty upon that State to assume some responsibility for his safety and general well-being, since he is not free to act on his own behalf.<sup>156</sup> The Constitution is violated when officials manifest "deliberate indifference to serious medical

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There is no iron curtain drawn between the constitution and the prisons of this country. *Wolff*, 418 U.S. at 555.

151. *Estelle*, 429 U.S. at 104.

153. *Farmer*, 511 U.S. at 836, 839.

153. *Id.* at 843.

154. Representatives Brief, *supra* note 40, at 26. "Some are legal United States residents accused of offenses including misdemeanors. Others are lawful immigrants seeking political asylum from danger in their own countries. Still others are United States citizens who have been detained mistakenly." *Id.*

155. Brianna M. Mooty, *Solving the Medical Crisis for Immigration Detainees: Is the Proposed Detainee Basic Medical Care Act of 2008 the Answer?*, 28 L. & INEQUALITY 223, 228-29 (2010).

156. ACLU Brief, *supra* note 2, at 24 (citing *DeShaney*, 489 U.S. at 199-200).

needs.”<sup>157</sup> However, under DIHS policy detainees should be kept minimally healthy, enough to be deported or otherwise released.<sup>158</sup> This policy is likely unconstitutional as it restricts medical care to conditions that would cause deterioration of detainee’s health or uncontrolled suffering affecting his or her deportation status. It is simply impossible to reconcile this policy with the Supreme Court’s holding that the Eighth Amendment requires treatment of immediate health problems and prevention of future harms the detainee may suffer from his condition.<sup>159</sup> A reasonable policy would, at the very least, be designed to prevent a reduction in the immigrant detainee’s life expectancy while detained, so that the detainee is released in the same state of health as beforehand.

In *Castaneda*, the Supreme Court understated or ignored the deterrent impact of *Bivens* liability on government agencies, which it stated in *Carlson* would deter the grave mistreatment of individuals, by exposing and labeling an agency’s actions as constitutional violations.<sup>160</sup> Since PHS personnel are typically indemnified by the Government when sued in their individual capacities under *Bivens* and damage awards in these cases can be substantially larger than the awards under the FTCA, the pressure of increased monetary judgments and adverse publicity would have highlighted the need for reform in a system plagued by flawed medical judgments, faulty administrative practice, neglectful guards, ill-trained technicians, sloppy record-keeping, lost medical files, and dangerous staff shortages.<sup>161</sup>

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157. *Estelle*, 429 U.S. at 103 (establishing the standard for violations of the Eighth Amendment and holding a constitutional violation actionable against state employees under 42 U.S.C. § 1983).

158. ACLU Brief, *supra* note 2, at 26.

159. *Estelle*, 429 U.S. at 103; *Helling v. McKinney*, 509 U.S. 25, 33 (1993) (for the premise that a prisoner’s claim under the Eighth Amendment could be based on possible future harm to health as well as past harm). See *McKenna v. Wright*, 386 F.3d 432, 437 (2d Cir. 2004) (offering no qualified immunity from prisoner’s claim of Eighth Amendment violation for prison officials who allegedly denied treatment for Hepatitis C, based on the fact that the prisoner might be released within a year); *Jones v. Johnson*, 781 F.2d 769, 771 (9th Cir. 1986) (stating that a desire to limit the cost of medical care may not justify failure to address a serious medical need).

160. *Carlson*, 446 U.S. at 25.

161. See Dana Priest & Amy Goldstein, *System of Neglect: As Tighter Immigration Policies Strain Federal Agencies, the Detainees in Their Care Often*



Although as *amici* for Dr. Hui, the Commissioned Officers Association of the United States PHS (“Association”) stated that allowing *Bivens* actions would impede PHS’s ability to recruit and retain personnel and would destroy its ability to quickly respond to medical emergencies, this premise is simply not true.<sup>162</sup> Dr. Hui and the Association failed to identify any PHS doctors who claim they would not have joined PHS if they had known they would be subject to the same *Bivens* liability as doctors employed by other agencies.<sup>163</sup> The Association’s claim that there is a 13.5% pay differential between PHS and private sector employees is speculative at best, but even if there is a gap, PHS doctors often receive non-fiscal benefits in addition to compensation that exceed those in the private sector.<sup>164</sup> For example, PHS personnel are eligible for retirement benefits after 20 years of service, and they are entitled to free medical and dental care, low cost healthcare for their families, shopping privileges at lower-cost stores on military bases, Veterans Affairs benefits, and a host of other valuable remunerations.<sup>165</sup> More importantly, any gap in compensation between public and private employment would exist not just in PHS but in the dozens of other federal, state, and local agencies that provide medical care to prisoners or other detainees.<sup>166</sup>

There is simply no basis for the Association’s claim that lack of *Bivens* immunity will subject the PHS to additional, intolerable litigation burdens.<sup>167</sup> Since the victim will also have a right to sue the United States for medical malpractice under the FTCA, the litigation burdens will be substantially the same when *Bivens* claims are allowed to proceed.<sup>168</sup> The parties will engage in virtually the same discovery and they do not need counsel, as the Department of Justice will represent their interests or pay for separate counsel in the event of a conflict.<sup>169</sup> Even if the government were to decide not to

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*Pay a Heavy Cost*, Wash. Post, May 11, 2008, at A1 [hereinafter Priest & Goldstein Report].

162. National Health Experts Brief, *supra* note 26, at 17-18 (citing Association Br. 5-10).

163. *Id.* at 19.

164. *Id.* at 20 (citing Association Br. 6).

165. *Id.*

166. *Id.* at 20-21.

167. *Id.*

168. *Id.* at 21.

169. *Id.*

represent PHS doctors, \$1 million of personal liability insurance coverage for *Bivens* claims costs only \$270 per year, which is a reflection of how difficult it is to assert such claims successfully.<sup>170</sup> Meanwhile, private premiums for physicians range from \$10,000 to \$173,000 per year depending on specialty and location.<sup>171</sup>

The only relevant difference is that *Bivens* claims are substantially harder to bring than ordinary malpractice claims, as the standard of “deliberate indifference to serious medical needs” requires proof that Dr. Hui’s care “constituted unnecessary and wanton infliction of pain” or was “repugnant to the conscience of mankind.”<sup>172</sup> However, it would demean the medical profession to suggest that the average doctor would be willing to shirk his or her duties in a way that violates the most basic principles guiding every physician, which is the standard for a *Bivens* violation.<sup>173</sup> Indeed, this standard requires a failure of medical care so fundamental that PHS would do better to avoid employing anyone providing that type of care.<sup>174</sup> Exposing PHS employees to *Bivens* liability would place them in the same position as other federal employees “who perform identical functions and are similarly subject to *Bivens* liability.”<sup>175</sup> Thus, it provides a manageable remedy that poses no danger to federal programs and helps ensure proper administration of government.<sup>176</sup> Furthermore, “[t]here is no reason to assume that Congress intended to provide PHS with extraordinary immunity from constitutional violations that is not enjoyed by other government employees doing the same work.”<sup>177</sup>

## V. SOCIETAL IMPLICATIONS

In Justice Harlan’s concurrence in *Bivens*, he wrote that “the Bill of Rights is particularly intended to vindicate the interests of the individual in the face of the popular will as expressed in legislative

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170. *Id.* at 22 (citing Association Br. 6).

171. *Id.* at 22-23.

172. *Estelle*, 429 U.S. at 104-06 (internal citations omitted).

173. National Health Experts Brief, *supra* note 26, at 18.

174. *Id.*

175. Representatives Brief, *supra* note 40, at 31.

176. *Id.*

177. National Health Experts Brief, *supra* note 26, at 24.

majorities...”<sup>178</sup> Thus, the problems with medical treatment of immigrant detainees are unlikely to be resolved by the political branches, precisely because of the unpopular nature of immigrants, particularly those that are perceived as unlawful immigrants or criminal aliens, like those in ICE detention facilities.<sup>179</sup> Although Congress has requested information pertaining to these issues, thus far, there have not been significant changes for immigrant detainees, and in the absence of continued attention to these issues, improvements are unlikely.<sup>180</sup> In an attempt to understand the societal impact of the current immigrant detainee system, this Section is divided into a discussion of how this system functions and a portrayal of other immigrant detainees’ experiences within this system.

#### A. Immigrant Detainee Statistics

The SDCF is run by the Corrections Corporation of America, Inc. (“CCA”), which is the United States’ largest for-profit correctional services provider and overall fifth largest corrections system in the nation, even though it was founded just over twenty-five years ago.<sup>181</sup> CCA houses approximately 75,000 detainees and prisoners in more than 60 facilities, 44 of which are company owned, with a total bed capacity of more than 80,000.<sup>182</sup> Recently, the Wall Street Journal reported that private for-profit prison companies are preparing for a wave of new business as the economic downturn makes it

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178. *Bivens*, 403 U.S. at 407.

179. *Id.* at 17-18.

180. *Id.* at 17-18, 20. See AMERICAN BAR ASSOCIATION, *Ensuring Fairness and Due Process in Immigration Proceedings* 1, [http://www.abanet.org/polady/transition/2008dec\\_immigration.pdf](http://www.abanet.org/polady/transition/2008dec_immigration.pdf) (last visited Feb. 18, 2011).

181. The Public Record Report, *supra* note 30; CORRECTIONS CORPORATION OF AMERICA, *About CCA*, <http://www.correctionscorp.com/about/> (last visited Feb. 18, 2011).

182. CORRECTIONS CORPORATION OF AMERICA, *About CCA*, <http://www.correctionscorp.com/about/> (last visited Feb. 18, 2011). CCA employs 17,000 people and partners with all three federal corrections agencies (The federal Bureau of Prisons, the U.S. Marshals Service and ICE, nearly half of all states, and more than a dozen local municipalities. *Id.*

increasingly difficult for federal and state governments to build and operate their own detention centers.<sup>183</sup>

Prior to 1996, the United States generally used detention systems only for persons considered to be security threats or flight risks.<sup>184</sup> However, after several 1996 statutes addressing immigration were enacted, the number of noncitizens being detained increased rapidly, and policy changes since 9/11 resulted in further increases.<sup>185</sup> According to the GAO, in 2006 nearly 300,000 men, women and children were detained by U.S. Immigration and Customs Enforcement, tripling the number since 2001, and a significant number of these detainees spent more than 200 days in confinement.<sup>186</sup> A Congressional Research Service Report indicates that in October 2007, 65% of detainees were housed at state and local prisons, 19% at contract facilities, 14% at ICE's own facilities, and 2% at Bureau of Prisons facilities.<sup>187</sup>

ICE claims that approximately twenty-five percent of immigrant detainees have chronic illnesses including hypertension, diabetes, HIV/AIDS and other illnesses requiring ongoing treatment.<sup>188</sup> Current issues include medical staff giving inconsistent and inadequate treatment by failing to provide medical check-ups on arrival or within 14 days in accordance with ICE standards.<sup>189</sup> Care is often limited to urgent medical needs and translation services are often not available, which likely prevents staff from administering correct treatment.<sup>190</sup> The quality of personnel is questionable as there

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183. *Id.*

184. Mooty, *supra* note 155, at 228.

185. *Id.* at 230. The statutes referred to are the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) amending existing immigration laws to address heightened concerns of terrorism, the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA) amending the AEDPA and adding a provision to the Immigration and Nationality Act (INA) requiring automatic mandatory detention without bail for any alien convicted of an "aggravated felony." *Id.* at 228-29.

186. Representatives Brief, *supra* note 40, at 25.

187. Congressional Research Service Report for Congress, Healthcare for Noncitizens in Immigration Detention 1, 3 (June 27, 2008), [http://assets.opencrs.com/rpts/RL34556\\_20080627.pdf](http://assets.opencrs.com/rpts/RL34556_20080627.pdf) (Francisco Castaneda is mentioned on page 2).

188. Mooty, *supra* note 155, at 231-32.

189. *Id.* at 232-33.

190. *Id.* at 233.

are documented instances of doctors and nurses laughing at detainees for “faking” illnesses later proven to be legitimate and life-threatening, meanwhile ICE’s medical care standards are non-binding and routinely ignored.<sup>191</sup>

Since all those in custody are completely dependent on governmental officers for access to necessary medical care, those with serious medical needs are at grave risk should ICE employees fail to provide appropriate treatment.<sup>192</sup> Shortly before his death, Castaneda himself testified in front of the House of Representatives Subcommittee on Immigration, Citizenship, Refugees, Border Security, and International Law about being denied adequate medical care, despite the fact that it was needed to save his life.<sup>193</sup>

Other issues with the administration of the immigration detention system include a lack of transparency and oversight.<sup>194</sup> In particular, medical records are often inaccessible to the detainee and gaining access may require detainees or their families to hire an attorney.<sup>195</sup> One family waited many months to receive the medical records of a relative who had died under questionable circumstances while in immigration detention, and the report ended up containing thirty-one pages of redacted information for “privacy.”<sup>196</sup> With regard to oversight, a GAO report revealed that ICE’s current inspection system is deeply flawed, as ICE often fails to meet even the low standard of facility inspection once per year.<sup>197</sup> External actors, such

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191. *Id.*

192. Representatives Brief, *supra* note 40, at 26. See *Problems with ICE Immigration, Detention, and Removal Procedures, Hearing before the Subcomm. on Immigration, Citizenship, Refugees, Border Security, and International Law of the H. Comm. on the Judiciary*, 110th Cong., 2d Sess., Serial No. 110-80, at 118-19 (Feb. 13, 2008), <http://judiciary.house.gov/hearings/printers/110th/40742.PDF> [hereinafter *Problems with ICE Hearing*].

193. *Id.* See *Presentation on Medical Care and Deaths in ICE Custody, Problems with ICE Immigration, Detention, and Removal: Immigration Detainee Medical Care, Hearing before the Subcomm. on Immigration, Citizenship, Refugees, Border Security, and International Law of the H. Comm. on the Judiciary*, 110th Cong., 1st Sess. (October 4, 2007) (Testimony of Francisco Castaneda), [http://www.aclu.org/files/images/asset\\_upload\\_file841\\_32062.pdf](http://www.aclu.org/files/images/asset_upload_file841_32062.pdf) [hereinafter *October 4, 2007 Hearing*].

194. Mooty, *supra* note 155, at 235-36.

195. *Id.* at 236.

196. *Id.*

197. *Id.*

as the Red Cross, United Nations or other governmental or non-governmental agencies have not bothered to investigate the immigrant detainee system.<sup>198</sup>

The executive branch has responded to calls for change, as the Obama Administration's newly appointed ICE supervisor John Morton has pledged to turn immigration detention into a "truly civil detention system."<sup>199</sup> Still, immigration experts claim that they have seen virtually nothing of the proposed reforms, which should include legally binding standards that govern basic levels of care and conditions inside immigration detention facilities, because simply having the government consolidate its oversight is not enough to hold facilities accountable.<sup>200</sup>

The ACLU has suggested that Congress strengthen the statutory right to appointed counsel for all those facing removal from the United States, mandate that no detainee be housed in a facility that does not comply with detention standards, and require all immigration detainee deaths be publicly reported from ICE to Congress on a regular basis.<sup>201</sup> Recommendations for ICE oversight of the immigrant detention system include: 1) regulatory codification of detention standards in line with internationally recognized human rights principles, 2) development of non-penal alternatives to detention, 3) provision of constitutionally adequate custody review before an immigration judge or impartial adjudicator, and 4) transfer of complete medical records when detainees are moved to allow for prompt administration of needed treatment.<sup>202</sup>

### *B. Other Immigrant Detainees' Experiences and Press Involvement*

The ACLU has written that Castaneda's plight, although extreme, was by no means an isolated case, listing Martin Hernandez-Banderas, Winston Carcamo, and Jose Arias Forero as other ICE detainees mistreated by Dr. Hui at the SDCF.<sup>203</sup> In Hernandez-

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198. *Id.*

199. The Public Record Report, *supra* note 30.

200. *Id.*

201. Problems with ICE Hearing, *supra* note 192, at 119.

202. *Id.*

203. ACLU Brief, *supra* note 2, at 21-22.

Banderas v. United States, the Complaint alleged that Dr. Hui despite having actual knowledge that he was a newly diagnosed diabetic, his blood sugars were abnormally high and uncontrolled by insulin, he could no longer walk and was confined to a wheelchair, and his leg was deteriorating and dying due to a serious skin condition known as cellulitis, intentionally misrepresented his condition in medical records in order to downplay its seriousness and protect herself from liability.<sup>204</sup> As a result he was ultimately taken to an offsite hospital, where he remained for a month and suffered permanent physical deformity and impairment, including a recommendation to amputate his leg due to severe tissue death.<sup>205</sup> A Washington Post investigation revealed that an internal review had concluded that DIHS medical personnel did not appreciate the severity of Hernandez-Banderas' diabetic foot wounds, did not properly treat them, and did not bring in a qualified person to evaluate the problem.<sup>206</sup>

In another instance, detainee Carcamo suffered an injury requiring removal of his right eye, and at the time of the surgery, he was told he needed a prosthetic eye implant to preserve the physical integrity of the eye socket and prevent the spread of infection. After being detained at the SDCF, Carcamo claimed his family would pay for the procedure, and still the SDCF delayed it for more than six months, supposedly because the injury "didn't happen here" and DIHS policy did not cover "elective or pre-existing conditions."<sup>207</sup> By the time the procedure finally occurred, it caused Carcamo severe pain, since in the meantime, his bones had shifted and the eye socket had begun to close.<sup>208</sup>

Despite the fact that Forero suffered a serious shoulder injury and complained of severe pain in his right arm and shoulder, medical personnel at the SDCF told him there was nothing wrong and that he was faking the pain, though when he finally received an MRI it revealed a complete tear of his right rotator cuff.<sup>209</sup> After his arrival, he did not receive surgery for eight months, and the SDCF ignored

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204. *Id.* at 22-23 (citing Hernandez-Banderas Compl. ¶¶ 18-21, 38-39, 54, 59).

205. *Id.* at 23 (citing Hernandez-Banderas Compl. ¶¶ 1, 59).

206. *Id.* (citing Priest & Goldstein Report, *supra* note 161).

207. *Id.* at 23-24 (citing Woods Compl. ¶¶ 91-94).

208. *Id.* at 24.

209. *Id.* (citing Woods Compl. ¶¶ 80-83).

the doctor's orders for him to receive follow-up care and physical therapy.<sup>210</sup> After a complete re-injury from officer use of excessive force, he did not receive a subsequent MRI for four months.<sup>211</sup>

Victoria Arellano, who suffered from advanced AIDS, died while in custody at another facility, and a summary of her death concluded that PHS staff at all levels failed to recognize symptoms of meningitis, failed to rule out various infections, delayed necessary lab work pursuant to a facility policy described as "dangerous" and ultimately provided her with incorrect medication.<sup>212</sup>

While detained at ICE, Boubacar Bah suffered a skull fracture and intracranial bleeding and was taken to the health unit where PHS personnel misdiagnosed his behavior as a disciplinary matter, restrained him, and approved his placement in a segregation cell.<sup>213</sup> Over a number of hours, guards repeatedly requested medical attention for Bah as he began foaming at the mouth, lost consciousness, and became unresponsive, but the guards received no response and Bah died after undergoing emergency surgery.<sup>214</sup>

Further evidence indicates that the officials engaged in a cover-up in order to hide Bah's mistreatment, as a recent New York Times investigation showed that ICE told a reporter she could learn nothing about the Bah case from government authorities, when in fact records proved that while he lay in a coma after emergency surgery, ten agency managers conferred at length about sending Bah back to Africa to avoid embarrassing publicity and the high costs of long-term care at \$10,000 per month.<sup>215</sup> Ultimately, officials decided to

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210. *Id.*

211. *Id.*

212. Representatives Brief, *supra* note 40, at 28-29. See October 4, 2007 Hearing, *supra* note 193, at 1, 54; Priest & Goldstein Report, *supra* note 161.

213. *Id.* at 29. See Will Coley, *What Really Happened to Boubacar Bah*, N.Y. TIMES VIDEO (Jan. 9, 2010; 10:56 PM), <http://detentionwatchnetwork.wordpress.com/2010/01/09/ny-times-video-what-really-happened-to-boubacar-bah/>.

214. *Id.*

215. *Id.* at 30-31. See Nina Bernstein, *Officials Obscured Truth Of Migrant Deaths in Jail*, N.Y. TIMES, Jan. 9, 2010, at A1 [hereinafter Bernstein January 2010 Report]. The same report indicated that another detainee's medical charge was altered by health personnel after his death to indicate that he had been given pain medication not actually administered. *Id.*



pursue a “humanitarian release” to cousins in New York, despite the family’s protest that they had no way to care for him.<sup>216</sup>

In fact, the evidence assembled by Congress, as well as material collected through Freedom of Information Act requests and by the New York Times, Washington Post, CBS News, and other independent media reveal tragedy after tragedy in which detainees have been denied safe and humane medical care.<sup>217</sup> A Washington Post report concluded that detainees “are locked in a world of slow care, poor care, and no care, with panic and cover-ups among employees watching it happen.”<sup>218</sup> The report went on to expose “a hidden world of flawed medical judgment, faulty administrative practices, neglectful guards, ill-trained technicians, sloppy record-keeping, lost medical files and dangerous staff shortages.”<sup>219</sup>

The GAO supports this premise, as Department of Homeland Security inspections have demonstrated noncompliance with medical standards in facilities where deaths occurred.<sup>220</sup> In particular, ICE

216. ACLU Brief, *supra* note 2, at 21-22. See Bernstein January 2010 Report, *supra* note 215. Just a few days prior to the planned release, he died. *Id.*

217. *Id.* at 26-27. See Nina Bernstein, *Hurdles Shown in Detention Reform*, N.Y. TIMES, Aug. 20, 2009; 60 MINUTES, *Detention in America*, <http://cbsnews.com/stories/2008/05/09/60minutes/main4083279.shtml>; Amy Goldstein & Dana Priest, *In Custody, In Pain: Beset by Medical Problems as She Fights Deportation, A U.S. Resident Struggles to Get the Treatment She Needs*, WASH. POST, May 12, 2008, at A1; Amy Goldstein & Dana Priest, *Suicides Point to Gaps in Treatment Errors in Psychiatric Diagnoses and Drugs Plague Strained Immigration System*, WASH. POST, May 13, 2008, at A1; Amy Goldstein & Dana Priest, *Some Detainees Are Drugged for Deportation: Immigrants Sedated Without Medical Reason*, WASH. POST, May 14, 2008, at A1; Bob Egelko, *U.S. Admits Negligence in Detainee’s Death*, S.F. CHRONICLE, Apr. 29, 2008, at B-3; Amanda Milkovits and Karen Lee Ziner, *Immigrant Died of Drug Combination*, PROVIDENCE JOURNAL, (Sept. 20, 2007, 2:18 PM), [http://www.projo.com/news/content/immigrant\\_death\\_09-20-07\\_E676L34.3425f5d.html](http://www.projo.com/news/content/immigrant_death_09-20-07_E676L34.3425f5d.html). See also ABA COMMISSION ON IMMIGRATION, *Panel on Health Care for Immigration Detainees: What Should Be the Standard?*, <http://www.abanow.org/2009/02/health-care-for-immigration-detainees-what-should-be-the-standard/?audio> (last visited Feb. 13, 2009).

218. *Id.* at 27 (quoting Priest & Goldstein, *supra* note 161).

219. *Id.*

220. Representatives Brief, *supra* note 40, at 27-28. See U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-09-308R, DHS: ORGANIZATIONAL STRUCTURE AND RESOURCES FOR PROVIDING HEALTH CARE TO IMMIGRATION DETAINEES (Feb. 23, 2009) (Letter from Alicia P. Cackley, Dir. of Health Care, to H. & S.

figures show that 107 persons have died since October 2003, though reports indicate that the agency undercounts the number of detention deaths and discharges other detainees shortly before they die,<sup>221</sup> as in Castaneda's case where his detention was abruptly ended when PHS employees realized that they might be held liable for refusing to provide him with even minimally adequate medical care. A subsequent report by the Washington Post concluded that actions or omissions by medical staff members may have contributed to at least thirty of the 107 detainee deaths.<sup>222</sup>

These cases and others demonstrate that the deliberate indifference and suffering that Castaneda endured was not an isolated problem, and these allegations go far beyond the sort of negligent malpractice that the FTCA intended to compensate.<sup>223</sup> Without a *Bivens* remedy, victims and their families now have no cause of action available in order to address such cruel and unusual conduct.<sup>224</sup> *Bivens* liability for constitutional violations would have generated pressure from within DIHS to reform policies encouraging the excessive restriction of immigrant detainee medical care and eventually would have spurred the appropriate government officials to address the matter.<sup>225</sup>

## VI. CONCLUSION

While employees of the federal government police and prison system may be found individually liable for violations of the Federal Constitution and state employees are similarly liable for violations of the Federal Constitution under § 1983, there no longer exist any

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Subcomm. on Homeland Security), <http://www.gao.gov/new.items/d09308r.pdf>; June 4, 2008 Hearing, *supra* note 29, at 34-43; DEPARTMENT OF HOMELAND SECURITY, OIG, ICE POLICIES RELATED TO DETAINEE DEATHS AND THE OVERSIGHT OF IMMIGRATION DETENTION FACILITIES (June 2008), [http://www.dhs.gov/xoig/assets/mgmt/rpts/OIG\\_08-52\\_Jun08.pdf](http://www.dhs.gov/xoig/assets/mgmt/rpts/OIG_08-52_Jun08.pdf).

221. *Id.* at 28. See Nina Bernstein, *Officials Say Fatalities Of Detainees Were Missed*, N.Y. TIMES, Aug. 18, 2009, at A10 (ICE revealed that it had omitted ten in-custody deaths from an official list produced to Congress and the public); Bernstein January 2010 Report, *supra* note 215.

222. *Id.* See Priest & Goldstein, *supra* note 161.

223. *Id.* at 24-25.

224. *Id.* at 25.

225. *Id.*

private rights of action against individual PHS employees for constitutional violations.<sup>226</sup>

The *Castaneda* decision further provides that state affiliated, for-profit CCA facilities now have the benefit of sovereign immunity and will not be held liable for violations of our Constitution, so long as they are staffed by PHS employees. One problem with this pseudo-private immigrant detainee system is that these companies may not be held accountable in the same way that the government is held responsible should it fail to behave ethically. For instance, members of Congress and the President are regularly voted in and out of office, and although they are appointed, high-level employees at federal, state, and local agencies are subject to political pressure.<sup>227</sup>

Back in 1970, Congress's intent in passing § 233(a) was to increase funds available to those who were not in a position to provide for their own healthcare needs, since at the time medical malpractice insurance far exceeded claims made against government agencies providing healthcare to individuals.<sup>228</sup> Unfortunately, the PHSA is now being used to prevent detainees from seeking justice against individuals who violated their constitutional rights by providing substandard and reckless medical care,<sup>229</sup> which is quite ironic.

The Washington Post documented that Dr. Hui in 2008 sent a memo to DIHS medical director Timothy Shack claiming her colleagues were worried they might be sued because of the

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226. Representatives Brief, *supra* note 40, at 31. Considering that state officials are held accountable for their constitutional violations under § 1983, "the constitutional design would be stood on its head if federal officials did not face at least the same liability as state officials guilty of the same constitutional transgression." *Castaneda v. United States*, 538 F.Supp.2d at 1298. Thus, there should be uniform rules governing liability of federal officials for violations of citizens' constitutional rights, and these rights should not be left to the vagaries of the laws of the several states. *Castaneda v. United States*, 538 F.Supp.2d at 1298.

227. Voting is the people's solution when they disapprove of acts or policies put forth by government employees.

228. Griffith, *supra* note 58, at 34.

229. *Amici* indicate that the cost of malpractice insurance, even individual liability insurance covering both medical malpractice and *Bivens* constitutional violations, would amount to about \$300 per year. National Health Experts Brief, *supra* note 26, at 22. If the federal government decided to cover this cost for its PHS physicians, it would be interesting to know if it would even come close to the amount of money spend defending Dr. Hui in this action alone.

substandard care they were giving detainees, as the agency's mission of keeping the detainee medically ready for deportation often conflicts with the standards of care in the wider medical community.<sup>230</sup> Thus, the Supreme Court's provision of sovereign immunity to individual PHS physician helps to legitimize these knowingly wrongful acts.<sup>231</sup>

On the other hand, if Dr. Hui was a private sector employee, she would likely have ceased being a physician a long time ago. Although it is not likely to occur, total privatization of the immigrant detention system would decrease the costs of the United States government defending doctors such as Dr. Hui, who has been sued multiple times by immigrant detainees and their families for providing medical care so grossly negligent, it rises to the level of a constitutional violation.<sup>232</sup>

At the very least, an economic analysis should be conducted to determine the cost of public versus private liability in the context of *Bivens* constitutional claims, as it seems both ethical and responsible to force these costs on the individual at fault and not on United States taxpayers. Protecting Dr. Hui under the doctrine of absolute immunity without exposing her to the individual risk of medical malpractice or *Bivens* constitutional claims allows her to practice medicine in any way she so chooses. As a result, neither she nor any other PHS physician will be held accountable for their frequent failures to uphold the principle that their utmost duty should be to their patients.

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230. ACLU Brief, *supra* note 2, at 26 (citing Priest & Goldstein, *supra* note 161).

231. Vincent Blasi, *The Checking Value in First Amendment Theory*, 2 AM. BAR FOUND. RESEARCH J. 521 (1977) (pointing out that "the abuse of official power is an especially serious evil...the potential impact of government on the lives of individuals is unique because of its capacity to employ legitimized violence.")

232. ACLU Brief, *supra* note 2, at 21-22.

