TO:    Mr. Justice Powell
FROM: Ellen
DATE: January 4, 1980
RE: No. 78-1261 Carlson v. Green

There are two issues:
1. Whether there should be a Bivens action for damages for deliberate medical mistreatment in violation of the Eighth Amendment, when the victim has an alternate remedy in the form of a malpractice action against the United States under the Federal Tort Claims Act?

2. If there is such an action, whether survival of the action is governed by Indiana statutes that would bar this claim?

On the Bivens issue, my initial impression was that it is improper to allow plaintiffs to circumvent the procedures of
the FTCA by alleging constitutional violations. The briefs have convinced me otherwise. As you pointed out in your concurrence in Davis v. Passman, a damages remedy is not constitutionally compelled for violations of all constitutional rights. Bivens itself looked to a variety of factors, and Justice Harlan's concurrence suggested that the Court look to the same sorts of discretionary policies that a legislature might in fashioning a remedy. Brown v. General Services Administration, 425 U.S. 820 (1976), looks in the same general direction, although Brown was a § 1981 action and accordingly looked primarily to congressional intent.

The basic inquiry seems to focus on the adequacy of alternative channels of enforcement to serve the policies of deterrence and compensation. The parties have somewhat muddled the role of congressional intent in this enterprise. I don't believe that Congress could properly provide for an exclusive remedy unless the remedy was also constitutionally adequate. Conversely, the absence of explicit congressional intent to fashion an exclusive remedy is not controlling. For the same reasons, I doubt that Congress' intent to provide a parallel remedy would be absolutely controlling if the redundancy of the statutory and constitutional actions was apparent. However, the evidence that Congress expressly preserved Bivens as an alternate remedy when it amended the FTCA to cover the sorts of harms alleged in that case is certainly relevant to the question whether the FTCA is in fact an effective alternative when
constitutional rights have been violated.

In this case, I think the SG misleads when he says that the FTCA is a "comprehensive remedial scheme for the kind of claim raised here." It is not. All the FTCA does is waive sovereign immunity and permit the recovery of damages against the United States "where . . . a private person would be liable to the claimant in accordance with the law of the place where the act or omission occurred." 28 U.S.C. § 1346 (b); see also 28 U.S.C. § 2674. This isn't a federal remedial scheme at all. It remits the plaintiff entirely to his state law rights. Moreover, the FTCA gives the plaintiff even less than he would have under state law in many cases, because it is hedged with protections for the United States:

1. The plaintiff cannot recover punitive damages.
2. He is not entitled to trial by jury.
3. The United States may well be entitled to use the good faith or qualified immunities provided by state law to protect individuals, not the state. Cf. Owen v. City of Independence.
4. There is an exception for acts performed by employees "exercising due care in the execution of a statute or regulation, whether or not such statute or regulation is valid." 28 U.S.C. § 2680(a) - a provision that would immunize many constitutional violations.
5. There is an exception for performance of "a
discretionary function or duty . . . whether or not the
discretion be abused," which exempts from liability all
planning decisions. Dalehite v. United States, 346 U.S. 15, 42
(19530.

6. The plaintiff must exhaust administrative remedies
before coming to court.

Not only is the plaintiff subject to "the vagaries of
common law actions," Bivens, 403 U.S. at 409 (Harlan, J.
concurring), but in some cases there will be no damages at all
because of the additional defenses of the FTCA. Finally, the
deterrent aspects of Bivens are not served to the same
extent by actions against the United States. The SG argues that
purpose will be better served because officials will institute
corrective action if liability is imposed upon the government
itself. Whatever the validity of this argument, it rests on a
theory quite different from that underlying Bivens.

Here as in Bivens, the interests protected by state
laws regulating malpractice may be inconsistent with those
served by the Eighth Amendment, for many of the same reasons
stated in Bivens. 403 U.S., at 394. And the federal interest
in uniformity is disserved by the FTCA remedy, which looks
exclusively to the laws of the 50 states. In short, this is not
a scheme specially adapted and designed - with some
modifications - to remedy a particular sort of constitutional
violation, as was Title VII. See Brown v. GSA. It merely
authorizes litigants to bring state law claims. Precisely the same situation prevailed in Bivens itself, except that the United States was not liable to suit. The addition of a solvent defendant to the picture should not change the result. Although the petitioner suggests that even Bivens should now come out the other way, Brief at 33, the alleviation of one of the concerns expressed in that decision does not seem to me to be controlling. Indeed, the fact that petitioner's logic inevitably leads to the abandonment of virtually all Bivens suits is a compelling argument against it.

This conclusion is buttressed by Congress' clear intention to preserve Bivens claims when it amended the FTCA in 1974 to provide an additional remedy for the same conduct, see Respondent's brief at 35-36, by the repeated rejections in Congress of attempts to amend the FTCA to substitute direct government liability for all individual liability in cases arising out of the performance of official duties, see Brief Amicus Curiae for the ACLU Foundation at 25-29, and by the concerns expressed by various congressmen that the FTCA remedy would be insufficient without substantial changes, see id. at 26-27 and cf. Petitioner's Brief at 37 n. 38.

The public policy concerns raised by the petitioner in the other direction are not persuasive. Brief at 38-39. The fact that a suit against the government should be preferable to the claimant is hardly a reason to deny him an alternative remedy that he may irrationally prefer or that may in unusual
circumstances (as here) be preferable. Indeed, the usual
superiority of an FTCA suit alleviates to some extent the
"floodgates" concern so often expressed in these suits. The
petitioner also says that substitution of government liability
will benefit the public because the fear of personal liability
and the burden of trial dampens the ardor of public officials.
But the doctrines of qualified and absolute immunity were
designed to meet precisely these concerns. We ought not to
strike a different (and rather one-sided) balance here.

Finally, there has been a suggestion that this
question is not properly before us. Although it is true the
question was not raised below and is not really related to the
argument, made below, that no cause of action should be implied
under the eighth amendment, it was the principal question on
which the Court granted cert. It is a question of considerable
importance and one to which the parties have devoted the lion's
share of their briefing. There is no jurisdictional bar.
Although the Court could properly refuse to consider the
question, it would probably be preferable to reach it.

II

This issue raises no difficult theoretical questions.
I am inclined to agree with the parties that Bivens actions
should generally be treated similarly to § 1983 actions. See
Wegman, 436 U.S. 584 (1978) is the controlling law. Robertson
says that state survival laws generally will govern constitutional damages actions against federal officials. But the holding there was:

a narrow one, limited to situations in which no claim is made that state law generally is inhospitable to survival of § 1983 actions and in which the particular application of state survivorship law, while it may cause abatement of the action, has no independent adverse effect on the policies underlying § 1983. . . . A different situation might well be presented . . . if state law 'did not provide for survival of any tort actions . . . . We intimate no view, moreover, about whether abatement . . . could be allowed in a situation in which deprivation of federal rights caused death.

The debate in this case is over the applicability of the possible exceptions noted in Robertson, all of which seem to turn principally on an analysis of whether application of the state law of survival would frustrate the purposes of constitutional damages actions. The issues here are muddied by a dispute over the Indiana law.

The petitioner says that all actions in Indiana "survive" to some extent. Although personal injury actions that cause a death do not "survive" in the sense that the victim's claim is completely abated, Indiana provides for a separate action for the victim's personal representative to sue in his own right or to recover damages for next of kin. This is in a legal sense a separate claim. But whether it should be treated differently for purposes of our analysis is not clear. The point should not be how the actions are labelled, for once the victim is dead the same people are likely to end up with the
recovery whether the action be labelled "survival" or "wrongful death." As long as the constitutional claim of a deceased victim can be asserted in a wrongful death action, I would be inclined to take the petitioner's view and lump both actions together to see, in sum, what may be recovered. We do not know whether Indiana law would permit a constitutional claim to be brought under the wrongful death statute, but I have no reason to believe this would not be permissible. Accordingly, I will assume that damages would be available under Indiana law for the items provided in that statute.

In the particular circumstances of this case, the recovery provided for the allegedly unconstitutional death is woefully inadequate. But that is because the victim died leaving no widow or dependent relative. I doubt that the limitation on damages in these circumstances would have any significant effect on the policies underlying Bivens. As the petitioner points out, the survival of personal injury claims may often create a windfall to nondependent relatives or even unrelated heirs. At least, the policy of compensation is less compelling when the victim has died leaving no nuclear family or dependent relatives.

The problem of deterrence is more troublesome. But the statutes, taken together, do not completely eliminate recoveries when the victim has died. Indeed, they significantly reduce recoveries only in the special circumstances presented here. I doubt that the prospect of "getting off" without
damages liability when a prospective victim has no family would significantly affect the conduct of federal officials who know that in cases where the victim survives or leaves a widow or dependents he may have to answer in damages.

I am somewhat troubled by this aspect of the case because it seems to place the Court at large to make predictive judgments as it sees fit on whether rules of law will "adequately" compensate or deter. Because I see no real benefit in the creation of a federal rule of survivorship more liberal than that provided by Indiana law, I would be inclined to avoid this exercise in creating common law rules in a largely legislative area. Even though the Court has done so in admiralty to a certain extent, Moragne v. States Marine Lines, Inc., 398 U.S. 375, 405-498 (1970), there are too many outright policy questions in fashioning survival and wrongful death actions: Who is entitled to sue? For what items of damages? The absence of a body of common law precedent would seem to me to make these questions excruciatingly difficult unless we look to state law. For these reasons, I lean to reverse the CA7 and hold that the action was properly dismissed on the basis of Indiana law. But I don't feel strongly one way or the other on this question and could easily be persuaded the other way if there is some compelling reason to believe the policies underlying Bivens would be compromised.

CONCLUSION
On the first issue, I believe the FTCA cannot be interpreted as the exclusive remedy for the injury caused by the alleged constitutional violation in this case. If that result obtains in this case, it would be difficult to distinguish the whole array of Bivens actions - indeed, the SG's brief strongly suggests that he would now apply the same rule to the facts of Bivens itself. This logic seems designed to eliminate Bivens actions entirely. While the Bivens action arguably has contributed little to enforcement of constitutional obligations while clogging the courts with amorphous suits governed by no easily discernible laws, it would seem disingenuous to overrule it indirectly in the way proposed by the SG.

On the second issue, the analysis is more straightforward but the result, in my view, less clear. I would lean to adopt the Indiana law of survivorship and reverse the CA7, with the result that the action will be barred.
78-1261 CARLSON v. GREEN (No. 6137) Argued 1/7/80

Two Q:

1. Whether a Bivens action exists under § 1983 aimed for wrongful malpractice in a federal prison - even that a claim would exist under Fed. Tort Claims Act.

2. If answer to above Q is "Yes", does a fed. comm. law or state law apply rather than state law?

Complaint alleged wrongful a replaceer malpractice. The Complaint was dismissed, must accept allegations as correct. (See part B of Complaint)
Qeller (SG)

Two Q:

1. Whether Brown action courts?

2. Whether Brown action court by fed common law rather than state law? (Reach their only if answer to 1st Q in affirmative)

Canaber Qort did not raise Q 1 in et al below (FN 4, p 163 of SG's Brief), but see FN 9 for reasons we nevertheless should consider same.

Q 2 not whether FTCA is as broad as a Brown action. Rather, it is whether FTCA provides an adequate remedy.

(P.S. said that Brown intended to make Title VII exclusive, Larg. Hist. here is not that clear. See N 31, 132 of Rights Rev)

Can only one Qort - not Brown - under FTCA.
Deutch (Reid)

Complainant alleges an 8th Amend.

claim under Exhll v. Gamble. Also alleged does degrued Risk of death w/o due process-a 5th Amend violation.

Thus this is no common law tort claim.

BRW: not a Q whether Tort claim

act or exclusive. Rather, Q is whether

an orderly atm. of justice, another

nobody is more affected.

P.S. noted there was no survival

action until Lord Campbell's Act. Nothing

in Court requires a right of survival,

it is a matter of state law.

Resh: nevertheless argue that if

death results from Court violation, there must be

survivor right.

Two statutes in B.K.: Surorvorship

or wrongful death.

This in a survivorship action

by the estate of decedent for the Court

violation of decedent's rights.

Relies on fed. conv. law

of survivorship. Justice Stewart says

there was no conv. law of survival &

therefore there can be no fed conv.

conv.
Deutsch

TPS noted that the C. has never allowed punitive damages in a Review case.

Geller (Rebd)

If there were no Fed. Tort Claims remedy there would be a Review type remedy. Must be a Fed. remedy for Court violation.
2. Federal Tort Claims Act not exclusive remedy.
   (a) Congress, in 1974, amended FICA to create a new suit against the government for
      personal injuries.
   (b) FICA not adequate as compared to Bivens: (i) limited to state law
      remedies; (ii) no jury trial; (iii) certain exceptions to
      discretion of an employee in performing a statute issued.

3. Proper Bivens claim — no contrary policy considerations in Rumsfeld — ability of
   municipal officials to sue cannot be used as restraint

Issue of survivorship


- State law applies unless adverse impact on
  public employee under 1983 — i.e., functional
  decision of Const. damage action

Indian recovery for wrongful death inadequate

- Absent wife or dependent relative

A fed. rule would be attractive here, but it
would set a wide-ranging precedent. Yet I
can go along with a uniform rule.
The Chief Justice  

We have enlarged 8th Amendment to court "reckless indifference." Gov't didn't make Treachery Act argument until we've Court. On merits think FTCA provides adequate remedy. Also

Mr. Justice Brennan  

Affirm  

Allegations support Bivens claims. If we reach FTCA argument (we need not) would hold it is inadequate. This is a Court violation. A suit vs. Gov't is not an adequate remedy. Should be able to sue individuals also.

(Please insert dissent memorandum)

Mr. Justice Stewart  

Reversal  

In doubt.
Mr. Justice White Affirm

Agree well with WJB as to Bowen.
Would reach Tort claim Act - it in
inadequate.
Apply Fed Law as to iconoclasm.

Mr. Justice Marshall Affirm

Agree with WJB & BWR

Mr. Justice Blackmun Affirm

All right. 
Agree. Ecclesiastes.
Agree. FTC Act does not
Displace Bowen.
Good liability not same on
personality liability.
Dissent. in Robinson
End statute not consistent with Fed. law.
Mr. Justice Powell

Affirm

See my notes on yellow sheet.

Mr. Justice Rehnquist

Reverse

Would not inter Bekker claim.

Agreed FTC Act is not adequate

if there were a Bekker claim.

State survivorship laws apply

in 1983 & Bekker acting both.

Mr. Justice Stevens

Affirm

Prior cases support a Court, Bekker.

Our opinion should note that Congress

has power to provide by statute the

rules for Bekker suits. The Bekker, Pearson

case tells case open door to all kinds of

suits, especially by-passing other remedies.

State statute says action survives

in 1983 and fed law can't supplement state

law of estates. State law should determine

who inherits and who administers. Fed law

can determine whether.
RE: No. 78-1261 Carlsen v. Green

Dear Chief:

I'll undertake the opinion for the Court in the above.

Sincerely,

[Signature]

The Chief Justice
cc: The Conference