



9-22-2010

Hui v. Castaneda: Beyond Cruel and Unusual

Adele Kimmel
Public Justice

Arthur Bryant
Public Justice

Amy Radon
Public Justice

Follow this and additional works at: <https://digitalcommons.lmu.edu/llr>



Part of the [Law Commons](#)

Recommended Citation

Adele Kimmel, Arthur Bryant & Amy Radon, *Hui v. Castaneda: Beyond Cruel and Unusual*, 44 Loy. L.A. L. Rev. 297 (2010).

Available at: <https://digitalcommons.lmu.edu/llr/vol44/iss1/12>

This Symposium is brought to you for free and open access by the Law Reviews at Digital Commons @ Loyola Marymount University and Loyola Law School. It has been accepted for inclusion in Loyola of Los Angeles Law Review by an authorized administrator of Digital Commons@Loyola Marymount University and Loyola Law School. For more information, please contact digitalcommons@lmu.edu.

HUI V. CASTANEDA: BEYOND CRUEL AND UNUSUAL

*Adele Kimmel, Arthur Bryant & Amy Radon**

When immigration detainee Francisco Castaneda died of penile cancer in 2008 after what appeared to be intentional neglect by federal health officials, his family members became plaintiffs in a lawsuit that Castaneda had filed against the United States and several federal Public Health Service (PHS) officers and employees. The suit alleged medical negligence by the United States and constitutional violations by the PHS officials. The PHS officials claimed immunity from suit, and the U.S. Supreme Court unanimously held that the family could not sue the federal officials directly and that the only available remedy was through a suit against the United States under the Federal Tort Claims Act. That decision has caused some to doubt the viability of so-called Bivens actions, which allow plaintiffs to seek redress against federal officials for constitutional violations. However, this Article, authored by the Castaneda family's counsel-of-record and two of their co-counsel, asserts that such doubt is unfounded because the Court anchored its holding not to its Bivens jurisprudence but to its interpretation of § 233(a) of the Public Health Service Act, which immunizes PHS officials from all civil actions. This Article argues that granting PHS personnel special immunity from Bivens actions makes little sense and that Congress should correct the incongruity exposed in Castaneda's case—that PHS physicians enjoy greater protection in suits alleging constitutional violations than do the other federal medical employees with whom they work side by side.

* Adele Kimmel (University of Virginia, J.D., 1985; University of Virginia, M.A., 1986; University of Virginia, B.A. with high honors, 1982) is Managing Attorney at the national headquarters of Public Justice in Washington, D.C. She was counsel of record for the Castaneda family in *Hui v. Castaneda*. Arthur Bryant (Harvard University, J.D., 1979; Swarthmore College, A.B. with high honors, 1976), the Executive Director of Public Justice in Oakland, California, and Amy Radon (University of Michigan, J.D., 2005; Arizona State University, B.A., 2001), Public Justice's Goldberg, Waters & Krauss Fellow in Washington, D.C., were co-counsel in *Hui v. Castaneda*. Co-counsel in the case also included Conal Doyle, of Willoughby Doyle, LLP in Oakland, California, arguing counsel in the Supreme Court; Thomas M. Dempsey of the Law Offices of Thomas M. Dempsey in Beverly Hills, California; and Leslie Brueckner, Senior Attorney at Public Justice in Oakland, California.

I. INTRODUCTION

In *Hui v. Castaneda*,¹ the U.S. Supreme Court recently held that the surviving family members and estate of an immigration detainee could not sue federal Public Health Service (PHS) officials for violating the detainee's constitutional rights.² The issue in *Castaneda* was whether the PHS officials who caused the penile amputation and death of Francisco Castaneda could be sued for conduct that, in the district court's words, was "beyond cruel and unusual."³ The PHS officials argued and the Supreme Court agreed that, even if PHS officials blatantly violated Castaneda's constitutional rights, they could not be held personally accountable.⁴ The Court unanimously held that Castaneda's family is limited to a negligence lawsuit against the United States under the Federal Tort Claims Act (FTCA)⁵ because 42 U.S.C. § 233(a) of the Public Health Service Act immunizes PHS officials from *all* lawsuits, including those alleging constitutional violations.⁶

The Supreme Court's decision in *Castaneda* has led some to question whether the case sounds the death knell for *Bivens* actions⁷ by capping off a long line of cases in which the Court has refused to allow victims of constitutional torts access to *Bivens* remedies.⁸ The

1. 130 S. Ct. 1845 (2010).

2. *Id.* at 1848.

3. *Castaneda v. United States*, 538 F. Supp. 2d 1279, 1298 (C.D. Cal. 2008).

4. *See Castaneda*, 130 S. Ct. at 1849.

5. 28 U.S.C. §§ 2671–2680 (2006).

6. *Castaneda*, 130 S. Ct. at 1848.

7. Lawsuits alleging constitutional violations by federal officials are known as "*Bivens* actions." In *Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics*, 403 U.S. 388 (1971), the Court recognized an implied federal right of action for damages to enforce the Fourth Amendment. *Id.* at 389. In recognizing the plaintiff's right to sue, the Court effectively held that federal law permits individuals to sue federal officials for constitutional violations. *Id.* at 395–96.

8. *See, e.g.*, *Wilkie v. Robbins*, 551 U.S. 537, 562 (2007) (holding that landowner did not have a *Bivens* claim against the U.S. government for an alleged trespass over an unrecorded easement on his land); *Schweiker v. Chilicky*, 487 U.S. 412, 423 (1988) (holding that the improper denial of social security benefits due to an alleged due process violation in administering a continuing disability review program did not give rise to a *Bivens* claim); *United States v. Stanley*, 483 U.S. 669, 683–84 (1987) (holding that no *Bivens* remedy arose out of activity occurring incident to or in the course of military service); *Bush v. Lucas*, 462 U.S. 367, 388–90 (1983) (holding that a federal government employee did not have a judicial remedy for alleged constitutional violations because an elaborate and comprehensive remedial system already existed for employment-related claims). Subsequent to the *Bivens* decision, the Court has only permitted a *Bivens* action in two other contexts: a Fifth Amendment equal protection claim asserted by a discharged employee of a member of Congress, *Davis v. Passman*, 442 U.S. 228, 236–38 (1979); and an Eighth Amendment claim for cruel and unusual punishment asserted by

answer is: absolutely not. As the Court noted, the outcome of *Castaneda* was determined by § 233(a)'s immunity-conferring language,⁹ not by the availability (or unavailability) of a *Bivens* remedy under the Court's existing *Bivens* jurisprudence.¹⁰ Noting the "confines of [the Court's] judicial role," the Court took special note of concerns that providing PHS personnel with absolute immunity would create an anomalous result. PHS personnel, who work alongside Bureau of Prisons (BOP) personnel in correctional facilities, would be entitled to special immunity from *Bivens* actions but BOP personnel—and other federal employees who perform the same functions as PHS officials in the same facilities—would not.¹¹ The Court nonetheless held that it was required to "read the statute according to its text," which the Court found immunized the PHS defendants from *Bivens* actions.¹²

This Article discusses the facts and procedural history of *Castaneda*, the federal statutes at issue, the Supreme Court's ruling and its implications, and the reasons that special *Bivens* immunity for PHS personnel makes no sense. We explain that the ruling in *Castaneda* was a function of the particular statute at issue and thus is unrelated to the Court's trend of limiting the availability of *Bivens* remedies. The ruling does, however, serve as an invitation to Congress to correct the incongruity of providing PHS medical personnel with greater immunity than that enjoyed by other federal medical personnel with whom the PHS personnel work side by side. No federally employed physicians should be able to violate the Constitution with impunity.

II. *HUI V. CASTANEDA*'S FACTUAL BACKGROUND AND PROCEDURAL HISTORY

Francisco Castaneda was an immigration detainee who, during his almost eleven months in the custody of U.S. Immigration and

the surviving family member of a federal prisoner, *Carlson v. Green*, 446 U.S. 14, 18–20 (1980). It has been three decades since the Court has recognized the availability of a *Bivens* remedy in any other context.

9. 42 U.S.C. § 233(a) (2006).

10. *Castaneda*, 130 S. Ct. at 1851–52, 1855.

11. *Id.* at 1854–55. In *Carlson*, the Supreme Court held that an Eighth Amendment claim for deliberate indifference to a prisoner's serious medical needs was actionable against BOP personnel under *Bivens*. 446 U.S. at 18–20.

12. *Castaneda*, 130 S. Ct. at 1855.

Customs Enforcement (ICE), received such shockingly bad medical care that the district court said that the case “should be taught to every law student as conduct for which the moniker ‘cruel’ is inadequate.”¹³ Because the PHS officials responsible for Castaneda’s medical care refused to perform a simple skin biopsy that they knew was necessary to save his life, Castaneda had his penis amputated and ultimately died of penile cancer at the age of thirty-six.¹⁴

ICE detained Castaneda at the San Diego Correctional Facility (SDCF) beginning on March 27, 2006.¹⁵ When he arrived at SDCF, he had an irregular, raised lesion on his penis that was growing, becoming more painful, bleeding, and exuding discharge.¹⁶ He promptly brought his condition to the attention of the PHS medical personnel who had been assigned through ICE’s Division of Immigration Health Services (DIHS) to provide medical care to detainees at SDCF.¹⁷ Noting Castaneda’s large “mushroomed” genital lesion and family history of cancer, the physician’s assistant who examined him the day after he arrived at SDCF recommended that Castaneda undergo a urology consultation and biopsy “ASAP.”¹⁸

Despite the physician’s assistant’s urgent request, DIHS did not approve the request until two months later.¹⁹ Moreover, even though DIHS eventually approved the request, Castaneda never got a biopsy during his remaining eight months in ICE custody.²⁰ This was not for lack of effort on Castaneda’s part. Between March 2006 and January 2007, he persistently sought treatment for his condition, which continued to deteriorate.²¹ The Court noted: “As his disease progressed, the lesion became increasingly painful and interfered with his urination, defecation, and sleep.”²² In less than eight months, the lesion had grown to the point where Castaneda’s boxer shorts

13. *Castaneda v. United States*, 538 F. Supp. 2d 1279, 1298 n.16 (C.D. Cal. 2008).

14. *Castaneda v. United States*, 546 F.3d 682, 686–87 (9th Cir. 2008); *Castaneda*, 538 F. Supp. 2d at 1285.

15. Brief for the United States as Amicus Curiae Supporting Petitioners at 3, *Hui v. Castaneda*, 130 S. Ct. 1845 (2010) (Nos. 08-1529 and 08-1547), 2009 WL 2009352.

16. *Id.*

17. *Castaneda*, 130 S. Ct. at 1849.

18. *Castaneda*, 546 F.3d at 684–85.

19. *Castaneda*, 538 F. Supp. 2d at 1281.

20. *Id.* at 1285.

21. *Castaneda*, 130 S. Ct. at 1849.

22. *Id.*

were continuously stained with blood and discharge, and he could no longer urinate while standing because the urine “spray[ed] everywhere.”²³ In December 2006, Castaneda reported a lump in his groin.²⁴

During Castaneda’s detention, a “PHS physician’s assistant and three outside specialists repeatedly advised that Castaneda needed a biopsy to ascertain whether he had cancer.”²⁵ However, the PHS defendants—Esther Hui (the physician responsible for Castaneda’s medical care during his detention at SDCF) and Stephen Gonsalves (SDCF’s Health Services Administrator)—denied requests for a biopsy and other recommended procedures by categorizing the procedures as “elective.”²⁶ Instead, Castaneda was “treated” with ibuprofen and antihistamines and given an additional allotment of boxer shorts.²⁷

In January 2007, after two more outside specialists recommended a biopsy—one describing Castaneda’s penis as a “mess”²⁸ and both concluding that he “most likely [had] penile cancer”²⁹—the procedure was finally scheduled.³⁰ Instead of providing treatment, however, ICE abruptly released Castaneda on February 5, 2007, a few days before the biopsy was to occur.³¹ Within days of his release, Castaneda went to the emergency room of Harbor-UCLA Hospital in Los Angeles, where he was diagnosed with squamous cell carcinoma of the penis.³² His penis was amputated on February 14, and he began chemotherapy after tests confirmed that the cancer had spread to his groin.³³ The treatment was unsuccessful, and Castaneda died a year later, on February 16, 2008.³⁴

23. *Castaneda*, 538 F. Supp. 2d at 1285.

24. *Castaneda*, 130 S. Ct. at 1849.

25. *Id.*

26. *Id.*

27. *Castaneda*, 538 F. Supp. 2d at 1298 n.16.

28. *Castaneda v. United States*, 546 F.3d 682, 686 (9th Cir. 2008).

29. *Id.*

30. *Castaneda*, 130 S. Ct. at 1849.

31. *Id.*

32. *Id.*

33. *Id.*

34. *Castaneda v. United States*, 538 F. Supp. 2d 1279, 1285 (C.D. Cal. 2008).

Three months before his death, Castaneda had filed a lawsuit in the U.S. District Court for the Central District of California. The lawsuit included medical negligence claims against the United States under the FTCA as well as *Bivens* claims against federal PHS officials for deliberate indifference to Castaneda's serious medical needs in violation of his Fifth and Eighth Amendment rights.³⁵ After his death, the court substituted Castaneda's sister and personal representative, Yanira Castaneda, along with his minor daughter and sole heir, Vanessa Castaneda, as plaintiffs.³⁶

The PHS defendants moved to dismiss the *Bivens* claims against them, arguing that § 233(a) "gives them absolute immunity from *Bivens* actions by making a suit against the United States under the FTCA the exclusive remedy" for injuries caused by PHS personnel in the course of their medical or related functions.³⁷ The district court denied the motion, concluding that § 233(a)'s text and legislative history show that Congress intended to preserve *Bivens* actions.³⁸ Specifically, the district court held that § 233(a), through its reference to FTCA provisions, "incorporates the provision of the FTCA which *explicitly* preserves a plaintiff's right to bring a *Bivens* action."³⁹

The district court also observed that the evidence the plaintiffs had "already produced at this early stage in the litigation is more thorough and compelling than the complete evidence compiled in some meritorious Eighth Amendment actions."⁴⁰ The court further rejected the "[d]efendants' attempt to sidestep responsibility for what appears to be, if the evidence holds up, one of the most, if not the most, egregious Eighth Amendment violations the Court has ever encountered."⁴¹ The court concluded its opinion by noting that the "[d]efendants' own records bespeak of conduct that transcends negligence by miles."⁴²

35. *Castaneda*, 130 S. Ct. at 1849.

36. *Id.* Castaneda's daughter acted through her mother, Lucia Pelayo. *Id.*

37. *Id.* at 1849–50.

38. *Castaneda*, 538 F. Supp. 2d at 1288–95.

39. *Id.* at 1289.

40. *Id.* at 1295.

41. *Id.*

42. *Id.* at 1298 n.16.

The PHS defendants filed an interlocutory appeal of the district court's immunity ruling.⁴³ Soon thereafter, the United States filed a Notice of Admission of Liability for Medical Negligence, admitting liability and causation regarding the plaintiffs' medical negligence claim.⁴⁴

The U.S. Court of Appeals for the Ninth Circuit affirmed the district court's judgment that § 233(a) does not preclude the Castaneda family's *Bivens* claims.⁴⁵ The court turned to the Supreme Court's decision in *Carlson v. Green*⁴⁶ as "the starting point" for its analysis.⁴⁷ It examined § 233(a) under *Carlson*'s two-factor test for *Bivens* preemption, which requires the party asserting preemption to demonstrate either (1) that there are "special factors counselling hesitation in the absence of affirmative action by Congress," or (2) "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 effective."⁴⁸

Looking to the statute's text and history, the Ninth Circuit concluded that § 233(a) cannot be read as a declaration of Congress's intent to substitute the FTCA for *Bivens* relief because (1) *Bivens* relief did not exist when Congress enacted § 233(a) and (2) the statute does not mention the Constitution.⁴⁹ The court found further support for this conclusion in the statute's legislative history and a later amendment to the FTCA.⁵⁰

The Ninth Circuit also concluded that the FTCA remedy and a *Bivens* remedy are not equally effective for the reasons articulated in *Carlson*.⁵¹ The court reasoned that a *Bivens* remedy, unlike the FTCA remedy, is a more effective deterrent because it is awarded against individual defendants and may include punitive damages.⁵² In addition, liability in *Bivens* cases is governed by uniform federal

43. *Hui v. Castaneda*, 130 S. Ct. 1845, 1850 (2010).

44. *Id.* at 1850 n.3.

45. *Castaneda v. United States*, 546 F.3d 682, 701–02 (9th Cir. 2008).

46. 446 U.S. 14 (1980).

47. *Castaneda*, 546 F.3d at 688.

48. *Id.* (quoting *Carlson*, 446 U.S. at 18–19).

49. *Id.* at 692.

50. *Id.* at 692–98.

51. *Id.* at 689–91.

52. *Id.* at 689–90.

rules, rather than by the law of the state in which the violation occurred, and plaintiffs may try *Bivens* cases before a jury.⁵³ After further concluding that no special factors militated against finding a *Bivens* remedy available in these circumstances, the court held that the Castaneda family's *Bivens* action could proceed.⁵⁴

On May 3, 2010, the Supreme Court reversed that decision, holding that § 233(a) provides PHS officers and employees immunity from *Bivens* actions for harms arising out of their medical or related duties.⁵⁵

III. STATUTES INVOLVED IN *HUI V. CASTANEDA*⁵⁶

[*Castaneda*] involve[d] two federal statutes addressing the scope of immunity afforded to PHS personnel: 42 U.S.C. § 233 [of the PHS Act] and 28 U.S.C. § 2679(b) [of the FTCA].

Congress enacted 42 U.S.C. § 233 as part of the Emergency Health Personnel Act of 1970, Pub. L. No. 91-623, 84 Stat. 1868. The immunity provision in § 233(a) was a response to the Surgeon General's request that PHS personnel receive protection from ordinary malpractice liability. *See* 91 Cong. Rec. H42543 (daily ed. Dec. 18, 1970) (statement of Rep. Staggers, House sponsor of bill) (noting that the Surgeon General requested the amendment because PHS doctors "cannot afford to take out the customary liability insurance as most doctors do").

Congress addressed this issue by making an action against the United States under the FTCA—a statute designed to protect federal employees from common-law tort liability—the "exclusive" remedy for people injured by PHS officials' malpractice. Section 233(a) provides:

DEFENSE OF CERTAIN MALPRACTICE AND
NEGLIGENCE SUITS

The remedy against the United States provided by sections 1346(b) and 2672 of title 28 . . . for damage for personal injury,

53. *Id.* at 690.

54. *Id.* at 700–02.

55. *Hui v. Castaneda*, 130 S. Ct. 1845, 1848 (2010).

56. This part is excerpted from the respondents' Supreme Court brief.

including death, resulting from the performance of medical . . . or related functions . . . 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 . . . whose act or omission gave rise to the claim.

42 U.S.C. § 233(a).

It was not until the following year that [the Supreme] Court decided *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388, 396–97 (1971), a case charging federal agents with constitutional violations under the Fourth Amendment and permitting, for the first time, a constitutional damages claim against them. Prior to *Bivens*, no reported decision allowed constitutional damages claims against federal officials.

Five years later, in 1976, [the Supreme] Court decided *Estelle v. Gamble*, 429 U.S. 97, 104–05 (1976), which recognized an Eighth Amendment claim against state officials under 42 U.S.C. § 1983, based on their deliberate indifference to a prisoner’s serious medical needs. Prior to *Estelle*, the Court had not recognized an Eighth Amendment claim for a prisoner’s inadequate medical care.

In 1980—ten years after Congress enacted § 233(a)—*Carlson v. Green*, 446 U.S. 14, 18–19 (1980), held that such claims are actionable against federal officials under *Bivens*. In *Carlson*, the federal defendants were medical personnel employed by the federal Bureau of Prisons (BOP) and the PHS. [The Supreme] Court found the FTCA inadequate to remedy the Eighth Amendment violation at issue that had resulted in the death of a federal prisoner, and found it “crystal clear” that “Congress views FTCA and *Bivens* as parallel, complementary causes of action.” 446 U.S. at 20.

Eight years later, in 1988, Congress amended the FTCA in response to [the Supreme] Court’s decision in *Westfall v. Erwin*, 484 U.S. 292, 299 (1988), which held that federal employees were not entitled to absolute

immunity from common-law torts committed in the scope of their employment. *See* Federal Employees Liability Reform and Tort Compensation Act of 1988 (the “Westfall Act”), Pub. L. No. 100-694, 102 Stat. 4653 (codified at 28 U.S.C. §§ 2671–80). As amended the FTCA provides:

(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 . . . of any employee of the Government . . . is exclusive of any other civil action or proceeding for money damages by reason of the same subject matter against the employee . . . Any other civil action . . . arising out of or relating to the same subject matter against the employee . . . is precluded

(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

28 U.S.C. § 2679(b)(1)–(2) (emphasis added). As the italicized language shows, although the FTCA provides all federal employees with immunity from common-law torts, it simultaneously preserves personal liability for constitutional violations—*i.e.*, *Bivens* actions.

Section 233 depends on the FTCA for much of its effect. Section 233(a) explicitly refers to the “remedy against the United States provided by sections 1346(b) and 2672 of title 28”—*i.e.*, the FTCA remedy—and provides that, where PHS officials cause certain types of damage, the FTCA remedy against the United States is exclusive. 42 U.S.C. § 233(a). The “exclusive remedy” of § 233(a) is explicitly subject to § 1346(b), which, in turn, is “[s]ubject to the provisions of chapter 171” of Title 28. 28 U.S.C. § 1346(b). Chapter 171 codifies the Westfall Act, and the Westfall Act, in turn, expressly preserves *Bivens* remedies in § 2679(b) (“The [exclusive] remedy against the United States provided by [the FTCA] . . . *does not extend or apply to a civil action against an employee of the Government . . . which is brought for a violation of the Constitution of the*

United States.”) (emphasis added).

Petitioners’ position is that § 233(a) affords them immunity from *Bivens* actions, notwithstanding that all other federal employees—including their BOP counterparts—are subject to *Bivens* liability.⁵⁷

IV. THE SUPREME COURT’S OPINION IN *CASTANEDA* AND ITS IMPLICATIONS

The ruling in *Castaneda* is not part of the Court’s general trend of limiting the availability of a *Bivens* remedy. The Court made a point of distinguishing the issue of whether a federal official is amenable to suit from the issue of whether a damages remedy is available for a particular constitutional violation under *Bivens*.⁵⁸ The Court viewed the case as involving the question of whether § 233(a) provides PHS officials with immunity from suit and “express[ed] no opinion as to whether a *Bivens* remedy is otherwise available in these circumstances.”⁵⁹ The unanimity of the opinion, atypical of the Court’s other *Bivens* rulings,⁶⁰ further evidences that the ruling in *Castaneda* was a function of the particular statute at issue, rather than a function of the Court’s views on the availability of a *Bivens* remedy. Thus, it would be a mistake to interpret *Castaneda* as limiting the availability of *Bivens* actions.

The Court viewed the question of whether PHS officials are subject to *Bivens* actions purely as an issue of statutory construction: “Our inquiry in this case begins and ends with the text of § 233(a).”⁶¹ The Court held that “[§] 233(a) grants absolute immunity to PHS

57. Brief for Respondents at 9–14, *Hui v. Castaneda*, 130 S. Ct. 1845 (2010) (No. 08-1529), 2010 WL 197357 (footnotes omitted).

58. *Hui v. Castaneda*, 130 S. Ct. 1845, 1851–52 (2010).

59. *Id.* at 1852 n.6.

60. See, e.g., *Wilkie v. Robbins*, 551 U.S. 537 (2007) (holding that a landowner did not have a *Bivens* claim against the U.S. government for an alleged trespass over an unrecorded easement on his land); *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61 (2001) (holding that under *Bivens*, no implied private right of action existed for damages against private entities acting under color of federal law); *Schweiker v. Chilicky*, 487 U.S. 412 (1988) (holding that an alleged due process violation resulting in the improper denial of social security benefits in the administration of a disability review program did not create a *Bivens* claim); *United States v. Stanley*, 483 U.S. 669 (1987) (finding no *Bivens* remedy arising out of activity incident to, or in the course of, military service).

61. *Castaneda*, 130 S. Ct. at 1850 (citing *Harris Trust & Sav. Bank v. Salomon Smith Barney, Inc.*, 530 U.S. 238, 254 (2000)).

[personnel] for actions arising out of the performance of medical or related functions within the scope of their employment by barring *all* actions against them for such conduct,” including *Bivens* actions.⁶² In the Court’s view, § 233(a) limits the recovery for such conduct to suits against the United States under the FTCA.⁶³ The Court found support for its reading in the broad language of the statute, which makes the remedy against the United States provided by the FTCA “exclusive of any other civil action” arising out of “the same subject-matter.”⁶⁴ The fact that the statute preceded the Court’s decision in *Bivens* did not affect the Court’s conclusion because the Court read the statute’s language as broad enough to cover both known and unknown causes of action.⁶⁵

The Court also found support for its reading of § 233(a) in the Westfall Act.⁶⁶ The Court viewed the Westfall Act’s explicit exception for *Bivens* claims as “powerful evidence” that Congress did not intend § 233(a)’s exclusivity provision to imply such an exception.⁶⁷

The Castaneda family offered four main arguments in support of its position that § 233(a) does not preclude *Bivens* actions against PHS personnel. The Court directly addressed and rejected three of the family’s arguments.⁶⁸

First, the family argued that the plain language of § 233(a) demonstrates that Congress did not intend to provide PHS officials with immunity from *Bivens* actions.⁶⁹ Because the immunity conferred by § 233(a) is subject to the italicized language from the Westfall Act—language that indisputably exempts *Bivens* actions

62. *Id.* at 1851 (emphasis added).

63. *Id.*

64. *Id.* (emphasis omitted) (quoting 42 U.S.C. § 233(a) (2006)).

65. *Id.*

66. *Id.*

67. *Castaneda*, 130 S. Ct. at 1851.

68. *Id.* at 1852–54.

69. *Id.* at 1852. As discussed in Part II, *supra*, that provision is expressly subject to § 1346(b) of the FTCA, which, in turn, is “[s]ubject to the provisions of chapter 171” of Title 28. 28 U.S.C. § 1346(b) (2006). Chapter 171 codifies the Westfall Act, *id.* §§ 2671–2680, which expressly preserves *Bivens* actions: “*The remedy against the United States provided by [the FTCA] . . . does not extend or apply to a civil action against an employee of the Government . . . which is brought for a violation of the Constitution of the United States.*” Federal Employees Liability Reform and Tort Compensation (Westfall) Act of 1988, Pub. L. No. 100-694, sec. 5, § 2679(b)(1)–(2)(B), 102 Stat. 4563, 4564 (emphasis added) (codified as amended at 28 U.S.C. §§ 2671–2680).

from the scope of immunity for all federal employees—the Castaneda family argued that the PHS defendants’ immunity defense was unavailing.⁷⁰ In short, the Castaneda family argued that § 233(a) incorporates by reference the Westfall Act’s exception for *Bivens* actions.⁷¹ The Supreme Court rejected this argument primarily because it read § 233(a) as incorporating only those provisions of chapter 171 of the FTCA that establish “[t]he *remedy* against the United States”⁷² and did not view the Westfall Act’s exception for *Bivens* actions to be such a provision.⁷³

Second, the Castaneda family argued that other provisions of § 233 show that subsection (a) does not preclude *Bivens* actions against PHS personnel.⁷⁴ For example, § 233(c), known as the “scope certification” provision, speaks volumes by what it does *not* include: a mechanism that triggers a federal employee’s bid for immunity in a federal court action.⁷⁵ A federal employee may not claim personal immunity under an “exclusive remedy” provision until the government or a district court certifies that the employee acted within the scope of employment when he or she committed the tort from which the suit arose.⁷⁶ Section 233(c), however, does not contain a scope-certification procedure where a PHS officer or employee faces a federal court action.⁷⁷ The Castaneda family showed that § 233(c) lacked an applicable scope-certification provision, which led the PHS defendants to use a certification provision in the FTCA that itself was subject to the FTCA’s *Bivens* exception.⁷⁸ Because of this, the family argued that § 233(a) was not intended to immunize PHS personnel from *Bivens* claims.⁷⁹

70. See *Castaneda*, 130 S. Ct. at 1852.

71. *Id.* This was the district court’s primary basis for rejecting the PHS defendants’ bid for immunity. *Castaneda v. United States*, 538 F. Supp. 2d 1279, 1289–90 (C.D. Cal. 2008).

72. 42 U.S.C. § 233(a) (2006) (emphasis added).

73. *Castaneda*, 130 S. Ct. at 1852–53.

74. *Id.* at 1853.

75. *Id.*

76. 28 U.S.C. § 2679(d)(1) (2006).

77. In a federal action, a PHS officer or employee would seek scope certification under an FTCA provision that is subject to the FTCA’s express preservation of *Bivens* actions against all federal employees. 42 U.S.C. § 233(c).

78. *Castaneda*, 130 S. Ct. at 1853–54.

79. *Id.*

In addition, the family argued that § 233(f)'s "insure or indemnify" provision,⁸⁰ which authorizes the government to indemnify or provide liability insurance for PHS personnel under certain circumstances, confirmed that § 233(a)'s exclusivity language permits *Bivens* actions.⁸¹ They asserted that the inclusion of such a provision in § 233 showed that Congress never intended to immunize PHS officials from *all* liability because absent liability, there would be no need for indemnification or insurance.⁸²

Again, the Court found these arguments unpersuasive. The Court found that scope certification by the Attorney General is not a prerequisite to immunity under § 233(a) because a PHS defendant could prove that the alleged misconduct occurred in the course of official duties pursuant to the ordinary rules of evidence and procedure.⁸³ In the Court's view, the Castaneda family's argument based on § 233(f)'s insure-or-indemnify provision was also unavailing because, even if that provision allows an injured party to proceed directly against a PHS official when that party has no FTCA remedy against the United States, that was not the case here; the Castaneda family had an FTCA remedy for the misconduct alleged.⁸⁴

Third, the Castaneda family argued that the Westfall Act's *Bivens* exception in § 2679(b)(2)(A) directly preserves a *Bivens* action against PHS officers and employees because that provision applies on its face to *all* federal employees.⁸⁵ The Court viewed this reading as effecting an "implied repeal" of the "more specific provision" in § 233(a), for which it found no support in the Westfall Act's text or history.⁸⁶

Fourth, the Castaneda family argued that § 233(a) could not be read to preclude *Bivens* actions against PHS personnel because the provision does not satisfy *Carlson's* "explicit declaration" test for *Bivens* immunity.⁸⁷ In *Carlson*, the Court held that a federal

80. 42 U.S.C. § 233(f).

81. *Castaneda*, 130 S. Ct. at 1854.

82. *Id.*

83. *Id.*

84. *Id.*

85. *Id.* at 1853.

86. *Id.*

87. *Castaneda v. United States*, 546 F.3d 682, 691–92 (9th Cir. 2008) (citing *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388, 397 (1971)).

defendant may defeat a *Bivens* action by “show[ing] 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 effective.”⁸⁸ In the Castaneda family’s view, § 233(a) could not possibly satisfy the explicit-declaration test for abrogating a *Bivens* cause of action against PHS personnel because the statutory language lacked clear proof that Congress actually contemplated that § 233(a) would abrogate a *Bivens* claim.⁸⁹ Indeed, when Congress enacted § 233(a) in 1970, it did not consider—and could not have considered—whether that provision should supplant a *Bivens* remedy because *Bivens* had not yet been decided; further, the Court did not recognize constitutional claims like those at issue in this case until ten years later when it decided *Carlson*. Put another way, § 233(a) cannot be read to preclude *Bivens* actions against PHS personnel because—as in other areas implicating the separation of powers—legislative action cannot abrogate a recognized constitutional remedy unless Congress has “clearly stated” its intent to do so.⁹⁰

The Court did not directly address these arguments in its opinion.⁹¹ Instead, the Court treated this case simply as an exercise in statutory construction. In doing so, it failed to recognize that the case was ultimately about the requirements of the Constitution. Under the explicit-declaration test for precluding a *Bivens* claim, which is a type of “clear statement rule,”⁹² a court should not hold that a recognized constitutional remedy has been abrogated unless Congress has clearly stated its intent to do so in favor of another remedy that Congress views as equally effective.⁹³ Such clear-statement rules ensure that courts do not interpret statutes in a manner that strains the boundaries of Congress’s constitutional

88. *Carlson v. Green*, 446 U.S. 14, 18–19 (1980).

89. Brief for National Experts on Health Services for Detained Persons as Amici Curiae Supporting Respondents at 6–15, *Hui v. Castaneda*, 130 S. Ct. 1845 (2010) (No. 08-1529) [hereinafter Brief for National Experts on Health Services].

90. *Id.*

91. The Court also did not address the Castaneda family’s arguments about other indicia of Congressional intent, including § 233(a)’s title and the legislative history of the Westfall Act.

92. The Court has invoked clear statement rules in a variety of contexts, including federal criminal jurisdiction, constitutional requirements for state office-holders, regulation of foreign-flagged vessels, and the courts’ habeas corpus jurisdiction. Brief for National Experts on Health Services, *supra* note 89, at 8 n.2 (citing cases).

93. *Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics*, 403 U.S. 388, 397 (1971).

power or that abrogates significant rights unless Congress clearly states an intention to do so.⁹⁴ They also ensure “that the courts do not wrongly interpret statutes in ways that impose restrictions on fundamental rights or threaten constitutional checks and balances.”⁹⁵ By treating this case as merely about statutory construction, the Court failed in its role as the ultimate arbiter of what the Constitution requires.

V. WHY THERE SHOULD BE A *BIVENS* REMEDY AGAINST PHS MEDICAL PERSONNEL

The constitutional violation at issue in *Castaneda* involved the deprivation of *human life*, not deprivation of a property or employment interest; this made the case unlike any other the Court had considered since *Carlson*. Recognizing the gravity of this deprivation, the district court found that the defendants’ actions were “beyond cruel and unusual.”⁹⁶ Given the abject cruelty of the PHS defendants’ conduct, there is no adequate alternative to *Bivens* that could remedy a constitutional violation of this nature.

As in *Carlson*, the alternative remedy for the Castaneda family is damages against the United States under the FTCA.⁹⁷ Because the United States has admitted that its employees’ medical negligence caused Castaneda’s death, the family certainly will have a remedy under the FTCA.⁹⁸ An FTCA remedy, however, is hardly an adequate substitute. This is primarily because the Castaneda family may not bring its constitutional claims for inadequate medical care against the United States under the FTCA because the United States

94. Brief for National Experts on Health Services, *supra* note 89, at 8.

95. *Id.* (citing *United States v. Bass*, 404 U.S. 336, 349 (1971)).

96. *Castaneda v. United States*, 538 F. Supp. 2d 1279, 1298 (C.D. Cal. 2008).

97. The alternative remedies available to the plaintiffs in other *Bivens* cases considered by the Court, such as restoration of benefits, back pay, seniority, or reinstatement, *see, e.g.*, *Bush v. Lucas*, 462 U.S. 367 (1983) (holding that a federal government employee did not have a judicial remedy for alleged constitutional violations because an elaborate and comprehensive remedial system existed for claims arising out of an employment relationship), would do nothing to compensate the Castaneda estate for the horrific suffering that Castaneda endured or to compensate Vanessa Castaneda for the loss of her father. It is damages or nothing for the Castaneda family.

98. 28 U.S.C. § 1346 (2006).

has not waived sovereign immunity from suits for constitutional violations.⁹⁹

The Supreme Court held in *Carlson* that a *Bivens* remedy is more effective than an FTCA remedy.¹⁰⁰ The Court enumerated four factors supporting this conclusion,¹⁰¹ but two factors in particular demonstrate why a *Bivens* remedy is far superior for redressing constitutional violations of the kind suffered by Castaneda: (1) the deterrent effect of a *Bivens* remedy and (2) the uniform rules governing *Bivens* relief.¹⁰²

The Court explained in *Carlson* that because the *Bivens* remedy is recoverable against individuals, it is a more effective deterrent against the United States than the FTCA remedy: “It is almost axiomatic that the threat of damages has a deterrent effect, surely particularly so when the individual official faces personal financial liability.”¹⁰³ Since *Carlson*, the Court has continued to confirm the importance of individual deterrence.¹⁰⁴ Deterrence remains essential today because federal medical personnel have the unique ability to impose a death sentence—without a judge or jury—by purposefully failing to treat a life-threatening disease in a prisoner with no other health care access, as the PHS defendants did in Castaneda’s case. Protecting physicians from ordinary malpractice claims is a reasonable and practical endeavor; on the other hand, “[p]rotecting individuals who intentionally inflict cruel and unusual punishment just because they happen to work for the Public Health Service is not.”¹⁰⁵ The *Castaneda* case presents the quintessential example of conduct that the *Bivens* remedy was intended to deter.¹⁰⁶

99. See *Fed. Deposit Ins. Corp. v. Meyer*, 510 U.S. 471, 478–80 (1994) (holding that the plaintiff’s constitutional tort claim is not “cognizable” under § 1346(b) because that section does not provide a cause of action for such a claim).

100. *Carlson v. Green*, 446 U.S. 14, 20 (1980).

101. *Id.* at 20–23.

102. Moreover, as explained below, the FTCA remedy is less effective now than it was when *Carlson* was decided thirty years ago, making a *Bivens* remedy all the more important.

103. *Carlson*, 446 U.S. at 21 (citation omitted).

104. *Meyer*, 510 U.S. at 485 (refusing to extend *Bivens* claims to federal agencies because “the deterrent effects of the *Bivens* remedy would be lost”); see also *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 74 (2001) (refusing to extend *Bivens* to private entities because doing so would not “advance *Bivens*’ core purpose of deterring individual officers from engaging in unconstitutional wrongdoing”).

105. *Castaneda v. United States*, 538 F. Supp. 2d 1279, 1294 n.13 (C.D. Cal. 2008).

106. In the district court’s view, the evidence that the Castaneda family had presented through the government’s own medical records made “a strong case for punitive damages because it

Similarly, the *Castaneda* case confirms the continued importance of a uniform federal remedy for constitutional violations resulting in death. Under the FTCA, state law constrains the *Castaneda* family's potential remedies, as the United States may only be held liable "in accordance with the law of the place where the act or omission occurred."¹⁰⁷ As the Ninth Circuit noted in *Castaneda*, since *Carlson* was decided, there has been a sea change in state tort law, particularly in the area of medical malpractice.¹⁰⁸ Twenty-three states have placed caps on noneconomic damages, making the variations in law from state to state even greater now than when the Supreme Court decided *Carlson* in 1980.¹⁰⁹ California law prohibits survivors from recovering pre-death pain and suffering damages and caps noneconomic damages at \$250,000 for wrongful death.¹¹⁰ In contrast, *Bivens* actions do not cap damages and the federal survival rule allows for pre-death pain and suffering.¹¹¹

The facts of *Castaneda* vividly illustrate why \$250,000 is a woefully inadequate remedy for the "Kafkaesque nightmare"¹¹² that *Castaneda* suffered. As the Supreme Court noted in *Estelle*, "In the worst cases, [a failure to provide medical care] may actually produce physical 'torture or a lingering death.'"¹¹³ "Physical torture" and "lingering death" are exactly what *Castaneda* endured. He suffered in agony for eleven months while blood and pus oozed from lesions on his penis. He needed medication to sleep because of his anxiety over his condition and lack of treatment. According to the district court, the care afforded *Castaneda* "can be characterized by one word: nothing."¹¹⁴ After ICE released *Castaneda* from custody, his penis

shows that Defendants' behavior was both callous and misleading." *Id.* at 1297. Because punitive damages are not available under the FTCA, 28 U.S.C. § 2674 (2006), a *Bivens* remedy would be particularly appropriate.

107. 28 U.S.C. § 1346(b)(1) (2006).

108. *Castaneda v. United States*, 546 F.3d 682, 690 (9th Cir. 2008).

109. *Id.* at 691.

110. CAL. CIV. PROC. CODE § 377.34 (West 2010); CAL. CIV. CODE § 3333.2(b) (West 2010).

111. *Carlson v. Green*, 446 U.S. 14, 24–25 (1980) (noting that the liability of federal agents for constitutional claims should not depend on where the violation occurred); *Bass v. Wallenstein*, 769 F.2d 1173, 1190 (7th Cir. 1985) (holding that the federal survival rule applies to civil rights claims and permits pre-death pain and suffering).

112. *Castaneda*, 546 F.3d at 694 n.12.

113. *Estelle v. Gamble*, 429 U.S. 97, 103 (1976).

114. *Castaneda v. United States*, 538 F. Supp. 2d 1279, 1295 (C.D. Cal. 2008).

was amputated, and he died slowly over the next year. It is likely that few, if any, prisoners in our nation's history have endured a more torturous and lingering death at the hands of a government medical provider.

VI. CONCLUSION

Even more than *Carlson* does, *Castaneda* shows why an FTCA remedy is an inadequate substitute for a *Bivens* remedy. As a result of the Court's ruling in *Castaneda*, however, the *Castaneda* family will only be compensated for the medical negligence that the PHS personnel committed, not for the additional quantum of harm resulting from the PHS personnel's constitutional violations. The Court's decision effectively equates simple negligence with "conduct for which the moniker 'cruel' is inadequate."¹¹⁵ The PHS personnel—whose conduct was "beyond cruel and unusual"¹¹⁶—will continue with their jobs and lives as if they did no harm. There is something terribly wrong with this lack of personal accountability. But now, only Congress can fix this. If Congress fails to amend § 233(a) to right this wrong, and PHS personnel can continue to commit egregious constitutional violations with impunity, then our system for providing detainees with medical care will itself be "beyond cruel and unusual."

115. *Id.* at 1298 n.16.

116. *Id.* at 1298.

