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Sonntag v. Dooley: Coerced Resignation Creates Fifth Amendment Bivens Remedy, 15 J. Marshall L. Rev. 693 (1982)

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CASENOTES

*SONNTAG V. DOOLEY**: COERCED RESIGNATION CREATES FIFTH AMENDMENT *BIVENS* REMEDY

A relatively recent development in constitutional case law is the affirmative recognition of a cause of action for money damages based on the violation of constitutionally guaranteed rights by federal officers.[1] This form of relief, commonly referred to as a *Bivens* remedy, originated in a landmark decision of the United States Supreme Court in 1971, *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*.[2] In *Sonntag v. Dooley*,[3] the United States Court of Appeals for the Seventh Circuit faced the question of whether a former civil service employee stated a *Bivens* suit for money damages where she alleged that continued and systematic harassment by her former superiors caused her to resign. The Seventh Circuit found that the plaintiff's coerced resignation violated the fifth amendment's proscription against the taking of property without due process of law. The court also held that the plaintiff's allegations satisfied the *Bivens* test articulated by the Supreme Court in *Carlson v. Green*,[4] thus making her *Bivens* cause of action an appropri-

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* 650 F.2d 904 (7th Cir. 1981).

1. The use of constitutional remedies in a defensive manner is well-recognized: *e.g.*, Gideon v. Wainwright, 372 U.S. 335 (1963) (criminal conviction reversed where defendant not accorded representation by counsel); Mapp v. Ohio, 367 U.S. 643 (1961) (exclusion of wrongfully obtained evidence). The use of various equitable remedies has similarly well-established constitutional roots. *See generally* Hill, *Constitutional Remedies*, 69 COLUM. L. REV. 1109, 1111 (1969). The right to money damages may be considered an aspect of constitutional remedies in general; however, as one commentator has noted, "[i]t is when the remedies are offensive or affirmative in character that conceptual difficulties arise." *Id.* at 1112. For additional discussion of the affirmative use of constitutional remedies, *see* Dellinger, *Of Rights and Remedies: The Constitution as a Sword*, 85 HARV. L. REV. 1532 (1972); Hill, *The Bill of Rights and the Supervisory Power*, 69 COLUM. L. REV. 181 (1969); Katz, *The Jurisprudence of Remedies: Constitutional Legality and the Law of Torts in* Bell v. Hood, 117 U. PA. L. REV. 1 (1968) [hereinafter cited as Katz]; Shapo, *Constitutional Tort:* Monroe v. Pape *and the Frontiers Beyond*, 60 NW. U. L. REV. 277 (1965).

2. 403 U.S. 388 (1971).

3. 650 F.2d 904 (7th Cir. 1981).

4. 446 U.S. 14 (1980).

ate means of seeking redress. The court of appeals, therefore, reversed the district court's dismissal of her complaint.[5]

The plaintiff occupied a civil service position with the Department of the Army for thirty-three years, serving as curator of the Fort Sheridan Museum at Fort Sheridan, Illinois for the last fourteen of those years. The three defendants,[6] ostensibly because of personal dislike of the plaintiff, resorted to a variety of extra-legal means to obtain her resignation or retirement.[7] After unsuccessfully attempting to halt the defendants' activities through administrative channels,[8] the plaintiff resigned. Her resignation was precipitated by the deterioration of her health, which allegedly resulted from the strain of her ordeal. She subsequently filed suit in the federal district court[9] to recover money damages from the defendants,[10] claiming that their efforts to force her resignation had wrongfully deprived her of a property interest in her civil service job without due process of law.[11]

The district court granted the defendant's motion to dismiss, holding that plaintiff had failed to state a claim upon which relief could be granted.[12] Judge Bua agreed that the plaintiff's civil service appointment was sufficient to establish a fifth

5. Sonntag v. Dooley, 650 F.2d at 906-07, *rev'g* 495 F. Supp. 348 (N.D. Ill. 1980).

6. Defendant Carlson was Director of Plans, Training and Security at Fort Sheridan until he was succeeded by defendant Dooley in 1978. Genna, the third defendant, was Chief of Plans, Operations, and Training. 650 F.2d at 905. Dooley and Genna were officers in the United States Army at the time plaintiff filed suit; Carlson had retired earlier from active duty. 495 F. Supp. at 349.

7. Plaintiff alleged that her distinguished record prevented the defendants from terminating her employment through normal administrative channels. 650 F.2d at 905. The extra-legal means consequently resorted to by the defendants were purportedly aimed at making her working conditions intolerable and included: placing unqualified subordinates under her supervision, who disobeyed her orders and then provided unfavorable and untrue performance reports to the defendants; haranguing and threatening her with threats of dismissal; transferring her to another position with no meaningful work assignments; withholding an in-grade salary increase while she was hospitalized; and demanding an unreasonable number of reports to be completed after her release from hospitalization. *Id.* at 905-06.

8. Plaintiff alleged she first filed a "long series of administrative complaints and protests" which were either "denied or ignored." *Id.* at 906.

9. Jurisdiction was premised on federal-question jurisdiction. 28 U.S.C. § 1331 (1976) (amended 1980).

10. Count I of plaintiff's complaint sought recovery from all three defendants for their participation in the plan to coerce her retirement. Count II of the complaint, directed solely to defendant Dooley, sought to recover damages on a pendent state claim for defamation. 495 F. Supp. at 349.

11. The fifth amendment provides: "No person shall . . . be deprived of life, liberty, or property, without due process of law. . . ." U.S. CONST. amend. V.

12. 495 F. Supp. at 350.

amendment property interest[13] and that the defendants' plan to force her resignation was tantamount to an unlawful discharge.[14] He nevertheless found that a suit for money damages was precluded by two considerations. First, the complaint failed to show that the plaintiff had been denied an opportunity for a fair hearing through established administrative procedures.[15] Second, the district court held that the plaintiff still had an appropriate post-resignation remedy available to her,[16] thus obviating the need for a *Bivens*-type remedy.[17]

A panel of the United States Court of Appeals for the Seventh Circuit unanimously reversed. The court of appeals agreed with the district court's conclusion that the plaintiff had asserted a constitutional claim.[18] But Judge Cummings, speaking

13. *Id.* at 349 (citing 5 U.S.C. §§ 7511(a)(1) (1976), 7513(a) (1976), and Arnett v. Kennedy, 416 U.S. 134 (1974)).

14. Defendants argued that the complaint "should be read as stating that plaintiff 'voluntarily surrendered' her job." 495 F. Supp. at 350. The district court, however, rejected this argument. *Id. See* Jenkins v. McKeithen, 395 U.S. 411 (1969) (on motion to dismiss, complaint must be construed in light most favorable to plaintiff); Conley v. Gibson, 355 U.S. 41 (1957) (motion to dismiss should not be granted unless it appears beyond doubt that plaintiff can prove no set of facts in support of claim). Additionally, the district court refuted defendants' assertion of official immunity. 495 F. Supp. at 349-50. *See* Butz v. Economou, 438 U.S. 478 (1978) (in suit for damages arising from unconstitutional action, federal officials exercising discretion are entitled only to qualified immunity, except where it is demonstrated that absolute immunity is essential for the conduct of public business).

15. 495 F. Supp. at 350. The court noted that civil service employees had an extensive administrative grievance system available to them to resolve conflicts with their employers, and that the plaintiff had attempted to use this system (*see supra* note 8). The court added: "It is no help to plaintiff's claim that she alleges that further attempts at administrative remedies would be futile since she has not alleged any fact which even remotely impeaches the fairness or adequacy of the administrative grievance proceedings available to her [and] [i]n no case can she deny that she was given the opportunity for a fair hearing . . . ." 495 F. Supp. at 350. Furthermore, any binding administrative decision was subject to judicial review under procedures established by the Administrative Procedure Act, 5 U.S.C. §§ 701-706 (1976). *But see infra* note 55.

16. 495 F. Supp. at 350 (citing Gratehouse v. United States, 512 F.2d 1104 (Ct. Cl. 1975) (civil service employee who resigned under duress is entitled to reinstatement and back pay if the merits of the claim are established)). *But see infra* note 55. The district court concluded: "This court is persuaded by the reasoning of the Court of Appeals of the Eighth Circuit in *Bishop v. Tice* . . . that the need to infer a money damage remedy for denial of procedural due process is unnecessary. . . ." 495 F. Supp. at 350. For a discussion of Bishop v. Tice, 622 F.2d 349 (8th Cir. 1980), *see infra* note 61.

17. Because the plaintiff's federal-question claim in Count I of her complaint was dismissed for failure to state a claim upon which relief could be granted, jurisdiction over the pendent state claim in Count II was destroyed. Consequently, plaintiff's complaint was dismissed in its entirety. 495 F. Supp. at 350.

18. The Seventh Circuit's agreement with the validity of plaintiff's constitutional claim was not expressly stated. However, their consideration of

for the court, held that the district court erred in its application of the *Bivens* criteria enunciated by the Supreme Court in *Carlson v. Green*.[19] As stated by the court of appeals, *Carlson* established that "a *Bivens* remedy exists for . . . constitutional violations [by federal officials] unless one of the following two exceptions exists: (1) Special factors counseling hesitation in the absence of affirmative action by Congress and (2) an alternative remedy provided by Congress."[20] The court found neither exception applicable in Sonntag's case.

With respect to the first exception, the court concluded that defendants did not enjoy " 'such independent status in our constitutional scheme as to suggest that judicially created remedies against them might be inappropriate.' "[21] Nor would *Bivens* relief inhibit them in performing their official duties, since they would still have resort to their qualified immunity.[22] Thus, there were no demonstrable "special factors counseling hesitation."[23]

As to the second exception, Judge Cummings noted that Congress had failed to provide an alternative statutory remedy explicitly designed to be both a substitute for and as effective as a *Bivens* remedy. The court found *Carlson* had held that a party could proceed under a *Bivens* claim irrespective of an available alternative remedy, unless that alternative remedy was " 'explicitly declared [by Congress] to be a *substitute* for recovery directly under the Constitution and viewed as equally effective.' "[24] The court of appeals therefore concluded that the district court had erred in holding that a *Bivens* cause of action was precluded by the mere availability of alternate relief.

The court of appeals noted that a *Bivens* cause of action was appropriate for yet another reason. The alternative administra-

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the appropriateness of plaintiff's *Bivens* cause of action concurred, *sub silentio*, with the district court's holding as to the validity of her constitutional claim. *See infra* text accompanying note 48. While the defendants questioned the scope of plaintiff's claim, they did not dispute its validity. Brief for Defendants-Appellees at 8.

19. 446 U.S. 14 (1980).

20. 650 F.2d at 906.

21. *Id.* at 907 (quoting Carlson v. Green, 446 U.S. at 19).

22. *Id. See* Butz v. Economou, 438 U.S. 478 (1978), *supra* note 14.

23. The Supreme Court has suggested very few considerations which might fall under the "special factors" proviso. *See infra* notes 33, 38 and 44. *See also* Bush v. Lucas, 647 F.2d 573, 576 (5th Cir. 1981) ("[t]here is little guidance in the Supreme Court opinions as to what 'special factors' will justify withholding a *Bivens* remedy"); Comment, Carlson v. Green, *The Inference of a Constitutional Cause of Action Despite the Availability of a Federal Tort Claims Act Remedy*, 22 WM. & MARY L. REV. 561, 565 (1981) ("[t]he Court spent little time [in *Carlson*] in determining the absence of 'special factors counselling hesitation.' ").

24. 650 F.2d at 907 (quoting Carlson v. Green, 446 U.S. at 18-19 (emphasis in original)).

tive remedies relied upon by the district court did not govern coerced resignations,[25] the gravamen of plaintiff's complaint. Moreover, the only relief these administrative remedies afforded was reinstatement and back pay. Because ill health, allegedly caused by the defendants, had rendered the plaintiff incapable of continuing work, reinstatement would have been a meaningless form of relief.[26] These latter remedies were the only ones allowed by the administrative scheme. Thus, Judge Cummings concluded: "[e]ven assuming that the district court were [sic] correct in concluding that a *Bivens* remedy cannot be implied where alternative remedies are available, there is no alternative remedy available to plaintiff here."[27]

Analysis of any case involving a *Bivens* remedy must begin with consideration of its progenitor, *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*.[28] Prior to the *Bivens* decision, federal officials who committed intentional torts generally were subject to suits for money damages only under state law.[29] In *Bivens*, however, the Supreme Court held that the fourth amendment's command against unreasonable searches and seizures gave rise to a federal cause of action for damages when that prohibition was violated by a federal of-

25. *Id.* at 907. While the grievance procedures established by the Office of Personnel Management "appl[ied] to any matter . . . in which an employee alleges that coercion . . . has been practiced against him or her," 5 C.F.R. § 771.108(a), those procedures did not apply to "a separation of action." 5 C.F.R. § 771.108(c). (References to the CODE OF FEDERAL REGULATIONS are to the sections in effect at the time of Ms. Sonntag's resignation; § 771 was revised in 1979. Coverage of the grievance system is presently set forth in 5 C.F.R. § 771.205; exclusions are listed in 5 C.F.R. § 771.206).

26. 650 F.2d at 907.

27. *Id.* at 906.

28. 403 U.S. 388 (1971). For a general discussion of the case, *see* Lehmann, *Bivens and its Progeny: The Scope of a Constitutional Cause of Action for Torts Committed by Government Officials*, 4 HASTINGS CONST. L.Q. 531 (1977) [hereinafter cited as Lehmann].

29. Lehmann, *supra* note 28, at 533. Although the *Bivens* decision was the first in which the Court recognized the availability of a constitutional cause of action against federal officials committing intentional torts, it was not the first to consider the issue. In Bell v. Hood, 327 U.S. 678 (1946), *rev'g* 150 F.2d 96 (9th Cir. 1945), the plaintiff claimed damages directly under the fourth and fifth amendments rather than under state law. The district court and the Ninth Circuit dismissed the suit for lack of federal subject-matter jurisdiction. In reversing, the Supreme Court held that there was jurisdiction to ascertain whether there was a valid cause of action. On remand, however, the district court found that the fourth and fifth amendments did not create any cause of action against federal officers. Bell v. Hood, 71 F. Supp. 813 (S.D. Cal. 1947). For further discussion of the case, *see* Katz, *supra* note 1. The door seemingly cracked open by the Court in *Bell* was later shut, however, in Wheeldin v. Wheeler, 373 U.S. 647 (1963). Although the Court there found that the plaintiff's suit for injunctive and monetary relief adequately presented a question of federal jurisdiction, it held that "Congress [had] not created a cause of action. . . ." *Id.* at 649-50.

ficer.[30] Justice Brennan, author of all three Supreme Court *Bivens* decisions, noted that the judiciary historically possessed broad powers to " 'make good the wrong done,' "[31] and that damages were the traditional remedy for invasions of personal liberty interests.[32] Therefore, he reasoned, persons injured through violation of their fourth amendment rights may sue directly under the amendment in the absence of any "special factors counseling hesitation"[33] in granting that relief or any explicit congressional declaration that "[they] instead be remitted to another remedy, equally effective in the view of Congress."[34]

In *Davis v. Passman*,[35] the Supreme Court extended the *Bivens* remedy to violations of the equal protection component

30. The plaintiff in *Bivens* sued federal narcotics agents as a result of an illegal search they had conducted in his apartment, after which he was arrested. Apparently the agents had searched the wrong apartment. Bivens alleged a cause of action under 42 U.S.C. § 1983 (Civil Rights Act) and premised jurisdiction on 28 U.S.C. §§ 1331(a), 1343(3), and 1343(4). The district court found no cause of action under § 1983 because the agents had not acted under color of state law. Citing *Bell v. Hood*, the court found no federal-question jurisdiction, and therefore dismissed the complaint. 276 F. Supp. 12 (E.D.N.Y. 1967). The Court of Appeals for the Second Circuit affirmed the dismissal, finding that "the Fourth Amendment does not provide a basis for a federal cause of action for damages arising out of an unreasonable search and seizure." 409 F.2d 718, 719 (2d Cir. 1969).

31. 403 U.S. at 396 (quoting Bell v. Hood, 327 U.S. at 684). The principle that every right should find vindication in an effective remedy is one firmly rooted in substantive constitutional case law. As Chief Justice Marshall noted: "The government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation if the laws furnish no remedy for the violation of a vested legal right." Marbury v. Madison, 5 U.S. (1 Cranch) 137, 163 (1803).

32. 403 U.S. at 395. *See also* Katz, *supra* note 1, at 8-33.

33. 403 U.S. at 396. In finding no special factors the Court merely noted: "We are not dealing with a question of 'federal fiscal policy'. . . [n]or are we asked . . . to impose liability upon a Congressional employee for actions contrary to no constitutional provision, but merely said to be in excess of the authority delegated to him by the Congress." *Id.* at 396-97.

34. *Id.* at 397. The present version of the Federal Tort Claims Act (FTCA) generally provides a remedy for intentional torts committed by law enforcement officials, *see, e.g.*, 28 U.S.C. § 2680(h) (1976). But the version in force at the time of the *Bivens* case did not. A § 1983 action was also inapplicable, *see supra* note 30. Bivens did have a state tort law remedy, but the Court found it inadequate to vindicate plaintiff's federal rights. 403 U.S. at 394-95.

35. 442 U.S. 228 (1979). Plaintiff Davis, a woman, was hired by defendant Congressman as a deputy administrative assistant, but was then terminated because defendant deemed it essential that her position be filled by a man. She brought suit for sex discrimination in violation of the fifth amendment, founding jurisdiction on 28 U.S.C. § 1331 (a Title VII action under the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e—2000e-17 (1976), was unavailable to plaintiff because Congress had excluded itself from its coverage; *see infra* note 37). The district court dismissed plaintiff's complaint, holding that the fifth amendment afforded no "private right of action." 442 U.S. at 232. The Court of Appeals for the Fifth Circuit reversed the district court. On *en banc* rehearing, the court held that "no right of action may be implied from

of the fifth amendment due process clause. Although Justice Brennan's majority opinion focused primarily on whether the plaintiff had a constitutional cause of action,[36] he also addressed the appropriateness of money damages as a form of relief. First, he concluded that the exemption of Congress from the purview of federal sex discrimination laws[37] was not a clear expression of an intent to foreclose other alternative remedies. Second, there were no "special concerns counseling hesitation."[38] Consequently, the Court held that the violation of plaintiff's constitutional rights could be redressed through money damages. Almost as an aside, the Court noted: "[O]f course, were Congress to create equally effective alternative remedies, the need for damages relief might be obviated."[39]

Curiously, that aside became the point of controversy in *Carlson v. Green*,[40] the most recent Supreme Court decision in the *Bivens* context. In *Carlson*, the Court inferred a constitutional cause of action under the eighth amendment[41] *despite* the

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the Due Process Clause of the fifth amendment." Davis v. Passman, 571 F.2d 793, 801 (5th Cir. 1978).

36. The *en banc* decision of the court of appeals applied the criteria set forth in Cort v. Ash, 422 U.S. 66 (1975) (whether a private cause of action should be implied from a federal statute), and concluded that plaintiff did not meet those criteria. Justice Brennan rejected their analogy, however, noting that "the question of who may enforce a *statutory* right is fundamentally different from the question of who may enforce a right that is protected by the Constitution." 442 U.S. at 241 [emphasis in original]. Because plaintiff had valid fifth amendment rights, and because she lacked any effective means other than the judiciary to vindicate those constitutional rights, the court concluded she was an appropriate party to invoke general federal-question jurisdiction. *Id.* at 242-44.

37. When § 717, which prohibits discrimination on the basis of "race, color, religion, sex or national origin," was added to Title VII of the Civil Rights Act to protect federal employees from discrimination, it excluded congressional employees such as the petitioner Davis, who was not in the competitive service. 442 U.S. at 247.

38. *Id.* at 246. The Court noted that a suit against a Congressman for putatively unconstitutional conduct in the course of his official duties did raise "special concerns," but that those concerns were coextensive with the shielding of the speech or debate clause. The Court expressly pretermitted the question of whether defendant's conduct was so shielded. *Id.* at 242. *But see id.* at 251 (Stewart, J., dissenting).

39. *Id.* at 248.

40. 446 U.S. 14 (1980).

41. In *Carlson*, the mother of a deceased prison inmate brought suit in federal district court against federal prison officials. Her son died because he allegedly did not receive competent medical care. She based a cause of action upon a violation of the eighth amendment's proscription against cruel and unusual punishment and asserted jurisdiction under 28 U.S.C. § 1331. Although finding the plaintiff had pleaded a constitutional violation, the district court nevertheless dismissed the complaint, holding that the state wrongful-death laws limited the amount of damages recoverable to a sum insufficient to meet § 1331(a)'s $10,000 requirement. *Id.* at 17. 28 U.S.C.

availability of an alternative remedy under the Federal Tort Claims Act (FTCA).[42] The *Carlson* decision also firmly established a two-part test for determining when a *Bivens* remedy should be available. Speaking for the Court, Justice Brennan stated that a *Bivens* cause of action could be defeated only in two situations:

> The first is when defendants demonstrate "special factors counseling hesitation" in the absence of affirmative action by Congress. The second is 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 effective.[43]

The *Carlson* Court summarily dismissed the first exception, stating that no such factors were present in the case.[44] As to the second exception, the Court noted that there was nothing in the legislative history of the FTCA to indicate Congress intended to preempt the *Bivens* cause of action; there was, in fact, congressional commentary to support the conclusion that Congress viewed the FTCA and *Bivens* as parallel and complementary to each other.[45] Additionally, Congress had explicitly stated in other provisions of the FTCA when it was to be the exclusive remedy.[46] As a final buttress to their conclusion that Congress did not intend to limit the respondent to an FTCA action, the Court observed that in some respects the relief available in a *Bivens* suit was superior to that provided by the FTCA.[47]

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§ 1331 was amended in 1980, striking out the $10,000 amount in controversy requirement. The Court of Appeals for the Seventh Circuit reversed, holding that federal common law allowed survival of a *Bivens* action whenever abated by a state survival statute. *Id.* at 17-18.

42. 28 U.S.C. § 1346(b) (1976). The availability of the FTCA remedy was not at issue until raised, *sua sponte*, by the Supreme Court. As to whether in fact the FTCA provided an alternate remedy, *see* 446 U.S. at 28 (Powell, J., concurring).

43. 446 U.S. at 18-19 (citations omitted).

44. The Court found that the defendants did not "enjoy such independent status in our constitutional scheme as to suggest that judicially created remedies against them might be inappropriate . . . Moreover, even if requiring them to defend respondent's suit might inhibit their efforts to perform their official duties, the qualified immunity accorded them . . . provides adequate protection." *Id.* at 19.

45. The Court was greatly persuaded by a Senate Report accompanying an amendment to the FTCA provision, which stated that "this provision should be viewed as a *counterpart* to the Bivens case and its progenty [sic] . . ." *Id.* at 20 (quoting S. REP. NO. 588, 93d Cong., 2d Sess. 3, *reprinted in* 1974 U.S. CODE CONG. & AD. NEWS 2789, 2791).

46. The Court cited several examples, *e.g.*, 38 U.S.C. § 4116(a) (1976); 42 U.S.C. §§ 233(a) (1976), 247b(k) (amended 1978), 2458(a) (1976); 10 U.S.C. § 1089(a) (1976); 22 U.S.C. § 817(a) (1976); 28 U.S.C. § 2679(b) (1976).

47. The Court listed four advantages a *Bivens* cause of action might have: (1) a *Bivens* remedy is a more effective deterrent; (2) punitive damages are available only in a *Bivens* claim; (3) jury trials are available

Against this backdrop, the holding reached by the Court of Appeals for the Seventh Circuit in *Sonntag v. Dooley* was precedentially consistent, if not irrefutable. The Supreme Court precedents not only supported the court's inference of a cause of action for money damages, but perhaps even mandated it.

Before inquiring into the appropriateness of the *Bivens* relief, initial consideration should be given to the plaintiff's assertion that the defendants had violated her constitutional rights. It merits emphasis that the establishment of a constitutionally protected interest is the *sine qua non* of the entire *Bivens* scheme.[48] A court presented with a *Bivens* cause of action must, therefore, first determine whether a constitutional right has been violated. It is only when this issue has been answered affirmatively that the court may proceed to consider the appropriateness of *Bivens* relief. In recognizing the validity of Sonntag's constitutional claim, the district court noted that plaintiff's civil service appointment entitled her to continued employment absent a showing of good cause for dismissal.[49] The court's conclusion that this entitlement was sufficient to establish a fifth amendment property interest was a sound one[50] and properly left undisturbed by the court of appeals.

The decision by the court of appeals to infer a cause of action for money damages likewise stands on sound footing. While there is a substantial body of pre-*Carlson* case law in which courts had denied a *Bivens* claim because of the availability of alternative relief,[51] the precedential value of those cases is

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only in a *Bivens* suit; and (4) FTCA suits are subject to the vagaries of state law, whereas a *Bivens* suit is governed by uniform federal law. 446 U.S. at 20-23.

48. *Cf.* Davis v. Passman, 442 U.S. 228, 234 (1979) (three-stage approach to *Bivens* problem, with first step being whether plaintiff asserted a constitutionally protected right).

49. 5 U.S.C. § 7513 (1979 Sup. III) provides: "(a) Under regulations prescribed by the Office of Personnel Management, an agency may take an action covered by this subchapter against an employee only for such cause as will promote the efficiency of the service."

50. The Supreme Court has held that provisions of the Lloyd-LaFollette Act, 5 U.S.C. § 7501 (1976), confer a fifth amendment property interest on a nonprobationary federal employee (such as plaintiff in *Sonntag*). Arnett v. Kennedy, 416 U.S. 134 (1974). *See also* Board of Regents v. Roth, 408 U.S. 564 (1972); Perry v. Sinderman, 408 U.S. 593 (1972).

51. *See, e.g.*, Turner v. Unification Church, 473 F. Supp. 367 (D.R.I. 1978), *aff'd per curiam* 602 F.2d 458 (1st Cir. 1979) (thirteenth amendment *Bivens* claim unnecessary with adequate state-law remedy); Treho v. United States, 464 F. Supp. 113 (D. Nev. 1978) (fourth amendment *Bivens* claim barred by FTCA remedy); People *ex rel.* Snead v. Kirkland, 462 F. Supp. 914 (E.D. Pa. 1978) (fifth amendment *Bivens* claim unnecessary where FTCA remedy available); Torres v. Taylor, 456 F. Supp. 951 (S.D.N.Y. 1978) (fifth and eighth amendment *Bivens* claims unnecessary where relief could be obtained under FTCA); McKenzie v. Calloway, 456 F. Supp. 590 (E.D. Mich.

significantly reduced by the more expansive two-prong *Carlson* test.[52] The practical effect of the *Carlson* test is to make the *Bivens* remedy *always* available to plaintiffs who successfully establish a violation of their constitutional rights by federal officers, unless the defendant can show cause why *Bivens* relief should be precluded by one of the two narrow exceptions.[53]

The court of appeals was justified in rejecting the district court's conclusion that *Bivens* relief was not "necessary or appropriate."[54] Even assuming that the alternative remedies enumerated by the district court were available to the plaintiff,[55]

1978), *aff'd*, 625 F.2d 754 (6th Cir. 1980) (fifth amendment *Bivens* suit unnecessary where Administrative Procedure Act remedy available).

52. Justice Powell, commenting on the two-prong test established by Justice Brennan's majority opinion, said "[t]he foregoing statements contain dicta that go well beyond the prior holdings of this court." 446 U.S. at 26 (Powell, J., concurring). Justice Powell was concerned that the majority's holding restricted a court's discretion in granting a judicially-created remedy. "Such a drastic curtailment of discretion would be inconsistent with the Court's longstanding recognition that Congress is ultimately the appropriate body to create federal remedies." *Id.* at 27. *Cf.* Bush v. Lucas, 647 F.2d 573 (5th Cir. 1981), *infra* note 59.

53. In taking exception to the two-prong *Carlson* test (*see supra* note 50), Justice Powell noted: "Today we are told that a court *must* entertain a *Bivens* suit unless the action is 'defeated' in one of two specified ways." Carlson v. Green, 446 U.S. 14, 26 (1980) (Powell, J., concurring) (emphasis added).

54. 495 F. Supp. at 350. *But cf. Bivens v. Six Unknown Named Agents* where Justice Brennan, in commenting on the "necessity" of recognizing plaintiff's constitutional cause of action, said: "[W]e cannot accept respondents' formulation of the question as whether the availability of money damages is necessary to enforce the Fourth Amendment." 403 U.S. at 397.

55. *See supra* notes 15 and 16 and accompanying text. The court of appeals concluded that the alternative remedies relied upon by the district court did not exist. 650 F.2d at 907. Judge Cummings stated that "[t]he administrative remedies relied upon by defendants do not cover coerced resignations." *Id. See supra* note 26. With respect to her preresignation remedy, even if the grievance procedures did govern coerced resignations, the facts of the *Sonntag* case support the conclusion that the plaintiff was denied an opportunity for a fair hearing. Section 771.116 of the Code of Federal Regulations (CFR), which established the procedures for filing any grievance, provided:

> (d) The examiner [reviewing official] shall conduct an inquiry of a nature and scope appropriate to the issues involved in the grievance. *At the examiner's discretion*, the inquiry may consist of:
>
> (1) The securing of documentary evidence;
> (2) Personal interviews;
> (3) A group meeting;
> (4) A hearing; or
> (5) Any combination of paragraphs (d)(1) through (4) of this section.

5 C.F.R. § 771.116 (1979) (emphasis added). Thus, the discretionary nature of the hearing requirements was probably insufficient to meet the fifth amendment's due process requirements. *Cf.* Paige v. Harris, 584 F.2d 178 (7th Cir. 1978) (due process requires public employee being deprived of a liberty or property interest be given notice of the charges and a hearing).

those remedies would not have pre-empted her *Bivens* claim under *Carlson*. There was no indication in the pertinent administrative remedies that Congress intended those remedies as a substitute for, or considered them equally effective as, a *Bivens* remedy.[56] The second *Carlson* exception was, therefore, inapplicable.

With respect to the first *Carlson* exception, the Supreme Court has provided little guidance as to what "special factors" will preclude consideration of a *Bivens* remedy.[57] Careful analysis, however, supports Judge Cummings' conclusion that none were present in the *Sonntag* case.

The Court of Appeals for the Fifth Circuit recently rejected a *Bivens* suit on the grounds that the federal employer-employee relationship gives rise to "special factors counseling hesitation."[58] In *Bush v. Lucas*,[59] the Fifth Circuit was persuaded

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Since judicial review under the Administrative Procedure Act, 5 U.S.C. §§ 701-706, is limited to review of the written record, presumably there can be no review when there has been no hearing. *Cf.* Dozier v. United States, 473 F.2d 866 (5th Cir. 1973) (district court review of Civil Service Commission Board of Appeals discharge of employee confined to record established in hearing and proceedings). In any case, no hearing was held for Sonntag. Moreover, the grievance procedure is limited to "employees," 5 C.F.R. § 771.115(a), which excluded Ms. Sonntag from its protection once the defendants had succeeded in forcing her resignation.

There were similar difficulties presented by the post-resignation remedy which the district court found available to Sonntag. Although a discharged employee may appeal termination to the Merit System Protection Board (MSPB), the MSPB can only review the decision of the terminating agency. 5 U.S.C. § 7701 (1976) (amended 1978). In Sonntag's case, since the defendants successfully circumvented formal discharge procedures, there could be no MSPB review.

56. Nothing in the Administrative Procedure Act intimates that Congress intended the remedies therein to exclude the *Bivens* remedy. As to what statutory language would serve to indicate Congress' intent to foreclose the *Bivens* remedy, Justice Brennan noted in *Carlson*: "[P]etitioners need not show that Congress recited any specific 'magic words' . . . Instead our inquiry . . . [with the second *Carlson* exception] is whether Congress has indicated that it intends the statutory remedy to replace, rather than to complement, the *Bivens* remedy," 446 U.S. at 19 n.5. *Cf. supra* note 46.

57. *See supra* note 23.

58. Bush v. Lucas, 647 F.2d 573, 575 (5th Cir. 1981), *aff'g* 598 F.2d 958 (5th Cir. 1979).

59. *Id.* In *Bush*, a federal employee in the aerospace program brought a fifth amendment *Bivens* suit for what he alleged was a retaliatory demotion. The Fifth Circuit held that the plaintiff had no constitutional cause of action where he had administrative remedies available to him. 598 F.2d at 961. The Supreme Court vacated and remanded "for further consideration in light of *Carlson v. Green*." 446 U.S. 914 (1980). On remand, the Fifth Circuit affirmed, finding that the situation satisfied the first *Carlson* exception. A similar theory had been advanced earlier by the Eighth Circuit in Bishop v. Tice, 622 F.2d 349 (8th Cir. 1980); that court stated: "The existence of civil service remedies, coupled with the apparent anomaly of a parallel *Bivens* style remedy, constitutes a 'special factor counseling hesitation' in the creation of a constitutionally based remedy for wrongful dismissal; we are per-

that inferring a *Bivens* remedy for an alleged retaliatory demotion "would encourage aggrieved employees to bypass the statutory and administrative remedies in order to seek judicial relief and thereby deprive the government of the opportunity to work out personnel problems within the framework it has so painstakingly established."[60]

The rationale supporting the Fifth Circuit's conclusion is, however, distinguishable from the situation presented in *Sonntag*. There is no danger that federal employees will be encouraged to bypass administrative procedures in favor of the *Bivens* claim where, as in *Sonntag*, the employee has been coerced into resigning. On the contrary, the plaintiff was forced to resort to the *Bivens* claim precisely because the defendants had deliberately circumvented due-process administrative procedures. Failure to recognize her *Bivens* suit might well have left the plaintiff in the anomalous position of having no remedy available to her at all. The Court of Appeals for the Eighth Circuit has similarly recognized the appropriateness of *Bivens* relief where the defendant has interfered with the plaintiff's access to administrative appeal procedures.[61]

The conclusion reached by the Court of Appeals for the Seventh Circuit in *Sonntag v. Dooley* was wholly in line with established, albeit fragile,[62] Supreme Court precedent. It would be mere conjecture to say whether the Supreme Court will again, if presented with the opportunity, infer *Bivens* relief where an alternative remedial mechanism other than the Federal Tort Claims Act is available. The Court may, as the Fifth Circuit did, choose to limit the scope of the *Bivens* remedy through a liberal application of the "special factors" exception. The language of

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suaded it would therefore be unwise to infer a cause of action for damages. . . ." *Id.* at 357. *But see infra* note 61.

60. 647 F.2d at 577.

61. Bishop v. Tice, 622 F.2d 349 (8th Cir. 1980). Although the court thought it "unwise" to allow a *Bivens* claim where alternative administrative relief was available, the court went on to note that those remedies were of little help where the defendants had blocked the plaintiff's access to them. The court stated: "Thus, if [plaintiff] can prove defendants interfered with his right to procedural due process, he is entitled to . . . damages. . . ." *Id.* at 357.

62. None of the three Supreme Court *Bivens* decisions had more than a five-member majority. One can only speculate whether the future of the *Bivens* cause of action will be that portended by Justice Rehnquist in his *Carlson* dissent: "*Bivens* is a decision 'by a closely divided court, unsupported by the confirmation of time,' and, as a result of its weak precedential and doctrinal foundation, it cannot be viewed as a check on 'the living process of striking a wise balance between liberty and order as new cases come here for adjudication.'" 446 U.S. at 32 (Rehnquist, J., dissenting) (quoting Kovacs v. Cooper, 336 U.S. 77, 89 (1949) (Frankfurter, J., concurring)).

Carlson is, on the other hand, broad enough to portend the continued vitality of the *Bivens* cause of action.

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