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PERSONAL LIABILITY TORT LITIGATION AGAINST FEDERAL EMPLOYEES – A PRIMER

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Every year, plaintiffs name thousands of current or former federal employees as defendants in civil suits, asserting claims against them in their individual capacity and seeking to recover money damages from their personal assets. Usually these claims sound in tort, and Department of Justice attorneys defend them.

I. BASICS OF INDIVIDUAL CAPACITY REPRESENTATION

It has long been the position of the Department of Justice that personal liability tort claims against federal employees implicate the interests of the United States. Accordingly, 28 U.S.C. § 517 authorizes Department of Justice attorneys to defend these claims in accordance with guidelines found in 28 C.F.R. §§ 50.15, 50.16.[2]

The guidelines cover current or former federal employees who have been "sued, subpoenaed, or charged in their individual capacities," but the guidelines do not define those terms. In some cases, plaintiffs draft their complaints so poorly it is difficult to ascertain if a personal liability claim has been asserted. Department of Justice attorneys generally look for three things. First, is the employee named in the caption as required by Federal Rule of Civil Procedure 10(a)? Second, is there an allegation the employee acted wrongfully? Third, does the prayer for relief seek money damages? If all three of these things are in the complaint, it is usually safe to conclude there is a personal liability claim and to counsel the employee to request individual capacity representation.

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2. *See also* U.S. ATTORNEY'S MANUAL § 4-5.412 (2007).

Individual capacity representation by a Department of Justice attorney is not mandatory. A federal employee may retain counsel at his own expense. But this is rare. Most employees prefer representation by a Department of Justice attorney because there is no cost to them. The guidelines require employees seeking individual capacity representation to make a request through their employing agency.[3] Unless the request is "clearly unwarranted," the agency must forward it to the appropriate litigating division along with the court papers served and an "agency statement."[4]

Usually, requests for individual capacity representation go to the Civil Division. But the Tax Division often handles requests from employees of the Internal Revenue Service in suits arising out of efforts to collect income taxes. Within the Civil Division, the Constitutional Torts Staff in the Torts Branch handles the overwhelming majority of requests. Requests in suits challenging the adequacy of medical care for incarcerated persons, however, go to the Federal Tort Claims Act Staff in the Torts Branch.

The guidelines set forth a two-part test for individual capacity representation. First, the conduct giving rise to the claim must have occurred within the scope of federal employment. Second, it must be in the interest of the United States to assign a Department of Justice attorney to defend the individual.[5] The litigating division reviews the complaint, the agency statement, and any supporting documentation to determine if these two conditions are met. In the overwhelming majority of cases, this review is routine, and the litigating division approves the employee's request as a matter of course.

In difficult or novel cases, however, and in cases where initial review suggests the request should be denied, the matter is elevated for review by more senior officials. In the Civil Division, this means the Deputy Assistant Attorney General who oversees the Torts Branch. The Deputy Assistant Attorney General may, at her option, convene the Civil Division Representation Committee to provide her with additional analysis and guidance.

If individual capacity representation is approved, the Department of Justice attorney assigned to defend the employee enters into a "full and traditional attorney-client relationship," and all communication between the employee and the Department of Justice attorney is privileged.[6] Accordingly, special measures are taken to ensure that privileged material is clearly identified and segregated in the case file. Agency counsel employed by any Department of Justice component (such as attorneys employed by components like the Federal Bureau of Investigation or the Drug Enforce-

3. *See* 28 C.F.R. § 50.15(a)(1) (2011).

4. *Id.*

5. *See* 28 C.F.R. § 50.15(a)(2); U.S. ATTORNEY'S MANUAL, *supra* note 2, § 4-5.412(B).

6. 28 C.F.R. § 50.15(a)(3).

ment Administration) are bound by the privilege as well[7] and must take the same precautions.

In contrast, counsel employed by *other* agencies have the option of being bound by the privilege or not. Department of Justice attorneys representing employees of agencies other than the Department of Justice will ascertain early in the litigation if agency counsel agree to be bound by the privilege and carefully memorialize this in the case file. If agency counsel opts out of the privilege, Department of Justice attorneys will take care to avoid any communications with agency counsel that might waive the privilege.

The guidelines on individual capacity representation include a number of terms and conditions.[8] These terms and conditions are set forth in the DOJ-399 form, which is available from the Constitutional Torts Staff. Department of Justice attorneys representing current or former federal employees in their individual capacities will ensure the client executes this form and that it is made part of the case file.

Some federal employees have purchased professional liability insurance. As of this writing, there are three companies selling this coverage: Federal Employees Defense Services, Mass Benefits Consultants, and Wright USA (formerly Wright & Company). Any federal employee who serves as a "law enforcement officer," a "supervisor or management official," or "a temporary fire line manager" is eligible for reimbursement "not to exceed one-half" of the premium paid for this type of insurance.[9] Department of Justice attorneys are eligible for reimbursement as well.[10] Department counsel assigned to represent federal employees in their individual capacities will inquire at the outset whether the client carries professional liability insurance. If so, the carrier should be promptly notified of the pending suit and kept informed as the litigation progresses.

II. Types of Personal Liability Claims Against Federal Employees Sounding in Tort

There are three types of personal liability claims sounding in tort against federal employees in their individual capacities: (1) personal liability claims premised upon an alleged violation of the Constitution;[11] (2) personal liability claims premised upon a violation of a federal statute;[12] and

7. *Id.*

8. *See* 28 C.F.R. § 50.15(a)(8)–(12).

9. Intelligence Authorization Act for Fiscal Year 2001, Pub. L. No. 106-567, § 406, 114 Stat. 2831, 2850 (2000).

10. Justice Mgmt. Div., Financial Management Policies & Procedures, Bull. No. 05-17 (2005).

11. *See, e.g.*, Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics, 403 U.S. 388 (1971) (Fourth Amendment).

12. *See, e.g.*, Brown v. Nationsbank Corp., 188 F.3d 579 (5th Cir. 1999) (Racketeer Influenced and Corrupt Organizations Act).

(3) personal liability claims premised upon a violation of state tort law.[13] This article will discuss the most common defense strategies for each type of claim.[14]

III. Common Issues That Arise When Defending Federal Employees Against Personal Liability Constitutional Tort Claims

A. Whether a Bivens remedy should be inferred at all

In *Bivens*, the Supreme Court allowed the district courts to infer a personal liability remedy for money damages against federal employees directly under the Constitution.[15] While many lawyers describe all types of personal liability claims as "*Bivens* claims," this is not correct. To be precise, a *Bivens* claim is a tort claim against a federal actor in his individual capacity seeking money damages from his personal assets and challenging conduct that allegedly violates a right secured by the Constitution.

Unlike constitutional torts claims allowed by statute (such as 42 U.S.C. § 1983), the *Bivens* remedy is judicially created. So the Supreme Court early on cautioned that where "special factors counsel hesitation," it may not be appropriate to infer a *Bivens* remedy.[16] The Court subsequently explained that a *Bivens* remedy does not lie in two situations: (1) where Congress has provided an equally effective alternative remedy and declared it to be a substitute for recovery under the Constitution, and (2) where, in the absence of affirmative action by Congress, special factors counsel hesitation.[17]

Later Supreme Court decisions show a great reticence to infer the *Bivens* remedy. In 1983, the Court declined to infer a *Bivens* remedy for a federal employee seeking to litigate a constitutional claim arising in the context of his employment because the comprehensive remedial scheme established by the Civil Service Reform Act constituted a special factor.[18] In 1988, the Court declined to infer a *Bivens* remedy for a plaintiff trying to litigate a Fifth Amendment procedural due process claim after being denied Social Security payments because the Social Security Act's review process was a special factor.[19] In 2001, the Court declined to infer a *Bivens* remedy for an inmate seeking to assert an Eighth Amendment claim against a pri-

13. *See, e.g.*, United States v. Smith, 499 U.S. 163 (1991) (medical malpractice).

14. For additional coverage of this topic, we invite your attention to Mary Hampton Mason, *You Mean I Can Be Sued? An Overview of Defending Federal Employees in Individual Capacity Civil Suits*, U.S. Atty's Bull. (U.S. Dep't of Justice, Washington, D.C.), July 2002, at 1, 1–5.

15. *Bivens*, 403 U.S. at 388.

16. *Id.* at 395–96.

17. Carlson v. Green, 446 U.S. 14, 19 (1980).

18. Bush v. Lucas, 462 U.S. 367 (1983).

19. Schweiker v. Chilicky, 487 U.S. 412 (1988).

vate prison contractor because the inmate had an alternative remedy in the form of a respondeat superior negligence claim against the corporation.[20]

> In 30 years of *Bivens* jurisprudence, we have extended its holding only twice, to provide an otherwise nonexistent cause of action against *individual officers* alleged to have acted unconstitutionally, or to provide a cause of action for a plaintiff who lacked *any alternative remedy* for harms caused by an individual officer's unconstitutional conduct. Where such circumstances are not present, we have consistently rejected invitations to extend *Bivens* . . . .[21]

In 2007, the Court stressed that a *Bivens* remedy for a claimed constitutional violation "has to represent a judgment about the best way to implement a constitutional guarantee; *it is not an automatic entitlement no matter what other means there may be to vindicate a protected interest*."[22]

The courts of appeal have been similarly disinclined to infer a *Bivens* remedy. In *Arar v. Ashcroft*, the Second Circuit, sitting en banc, declined to infer a *Bivens* remedy for an alien seeking to assert a constitutional tort claim against the Attorney General and other high-ranking executive branch employees, arising out of his extraordinary rendition from the United States to a foreign country.[23] The decision notes Arar's effort to hold the *Bivens* defendants personally liable for his rendition implicated complex questions touching upon national security, foreign policy, the protection of classified information pertaining to diplomatic relations, and the details of operational intelligence matters.[24] The court concluded these and other factors were such that it should decline Arar's invitation to infer a *Bivens* remedy, reasoning:

> Any analysis of these questions would necessarily involve us in an inquiry into the work of foreign governments and several federal agencies, the nature of certain classified information, and the extent of secret diplomatic relationships. An investigation into the existence and content of such assurances would potentially embarrass our government through inadvertent or deliberate disclosure of information harmful to our own and other states. Given the general allocation of authority over foreign relations to the political branches and the decidedly limited experience and knowledge of the federal judiciary regarding such matters, such an investigation would also implicate grave concerns about the separation of powers and our institutional competence.[25]

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20. Corr. Servs. Corp. v. Malesko, 534 U.S. 61 (2001).
21. *Id.* at 70.
22. Wilkie v. Robbins, 551 U.S. 537, 550 (2007) (emphasis supplied).
23. 585 F.3d 559 (2d Cir. 2009) (en banc).
24. *Id.* at 574–78.
25. *Id.* at 578 (citation omitted).

In *Wilson v. Libby*, the D.C. Circuit considered a personal liability constitutional tort claim brought by a Central Intelligence Agency employee and her husband against the Vice President and other senior administration officials, who allegedly improperly disclosed the employee's covert status in retaliation for her husband's protected First Amendment activity.[26] The D.C. Circuit declined to infer a *Bivens* remedy because the Privacy Act afforded plaintiffs an alternative remedy where the challenged conduct involved wrongful dissemination of private information from government records.[27]

In *Benzman v. Whitman*, the Second Circuit decided a case in which residents of Manhattan sought to assert a Fifth Amendment substantive due process claim against the head of the Environmental Protection Agency for allegedly misrepresenting the dangers posed by airborne contaminants following the September 11 terrorist attacks.[28] The Second Circuit declined to infer a *Bivens* remedy because plaintiffs had an alternative remedy in the form of a claim against a government fund set up to compensate those injured.[29] The court found "[a] *Bivens* action is a blunt and powerful instrument for correcting constitutional violations and not an 'automatic entitlement' associated with every governmental infraction."[30]

In *Mirmehdi v. United States*, the Ninth Circuit grappled with the issue of whether it was proper to infer a *Bivens* remedy for illegal aliens who alleged they had been wrongfully denied bond during their deportation proceedings.[31] The court noted the aliens had been able to challenge the propriety of their detention in both their removal proceedings and via petitions for a writ of habeas corpus.[32] The court also noted the aliens' effort to litigate a *Bivens* claim implicated sensitive issues of diplomacy, foreign policy, and national security.[33] In light of the alternative remedies available and the special factors counseling hesitation, the court declined to infer a *Bivens* remedy for the aliens.[34]

In light of this decisional authority, Department of Justice attorneys defending federal employees against personal liability constitutional tort claims will carefully consider at the outset whether it is proper for the district court to infer the *Bivens* remedy. Where the plaintiff has another way to litigate the propriety of the challenged conduct, defendants usually file a motion to dismiss, urging the district court to eschew inferring a *Bivens* remedy. This type of motion will be especially well-taken if the plaintiff's

26. 535 F.3d 697 (D.C. Cir. 2008).
27. *Id.* at 704.
28. 523 F.3d 119 (2d Cir. 2008).
29. *Id.* at 126.
30. *Id.* at 125 (citing Wilkie v. Robbins, 551 U.S. 537, 537 (2007)).
31. 662 F.3d 1073 (9th Cir. 2011).
32. *Id.* at 1080.
33. *Id.*
34. *Id.* (citing Arar v. Ashcroft, 585 F.3d 559, 572 (2d Cir. 2009)).

claim is analogous to the claims at issue in *Malesko*, *Wilkie*, *Arar*, *Wilson*, or *Benzman.* Moreover, although the decisional authority is less clear-cut, it is also possible to argue the district courts should decline to infer a *Bivens* remedy when the plaintiff can seek relief under the Administrative Procedures Act, the Freedom of Information Act, the Tucker Act, or the Immigration and Nationality Act.

B. Whether qualified immunity protects the employee from suit on a Bivens claim

If the district court infers a *Bivens* remedy, the defense of choice is qualified immunity. Although some decisions still refer to "good faith" immunity, this is a misnomer. The qualified immunity defense is wholly objective, and no inquiry into a defendant's subjective good faith is appropriate.[35] The qualified immunity inquiry remains wholly objective even when the official's subjective intent is an essential part of plaintiff's affirmative case.[36]

1. Qualified immunity basics

Qualified immunity shields government officials performing discretionary functions from liability insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.[37] The doctrine of qualified immunity may, nevertheless, even protect employees who violate the Constitution from suit.[38]

2. The concept of "clearly established law"

In essence, qualified immunity gives public officials the benefit of the doubt so long as the law at the time of their conduct did not clearly prohibit their actions.[39] Qualified immunity provides "ample room for mistaken judgments" and protects all government officials except "the plainly incompetent or those who knowingly violate the law."[40] Thus, officials are im-

35. *See* Mitchell v. Forsyth, 472 U.S. 511, 517 (1985) (observing that *Harlow* "purged qualified immunity doctrine of its subjective components"); Davis v. Scherer, 468 U.S. 183, 191 (1984) (observing that *Harlow* "rejected the inquiry into state of mind in favor of a wholly objective standard").

36. *See* Crawford-El v. Britton, 523 U.S. 574, 588 (1998) (explaining that qualified immunity "may not be rebutted by evidence that the defendant's conduct was malicious or otherwise improperly motivated," because "evidence concerning the defendant's subjective intent is simply irrelevant to that defense").

37. *See* Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982); Anderson v. Creighton, 483 U.S. 635, 640 (1987).

38. *See* Wilson v. Layne, 526 U.S. 603, 614, 618 (1999) (holding that presence of media during execution of warrant violated Fourth Amendment but granting qualified immunity because right was not clearly established).

39. *See* Hunter v. Bryant, 502 U.S. 224, 229 (1991) (per curiam) (describing qualified immunity as "accommodation for reasonable error").

40. Malley v. Briggs, 475 U.S. 335, 341, 343 (1986).

mune from claims for damages "as long as their actions could reasonably have been thought consistent with the rights they are alleged to have violated."[41]

The test, moreover, is whether reasonable officials, not judges or constitutional scholars, could have thought the defendant's conduct was permissible under the Constitution.[42] "If the law did not put the officer on notice that his conduct would be clearly unlawful, summary judgment based on qualified immunity is appropriate."[43]

When grappling with what is "clearly established," the most critical step is properly defining the right at issue. The inquiry must be "fact-specific"[44] and "must be undertaken in light of the specific context of the case, not as a broad general proposition."[45] To overcome qualified immunity, "the right the official is alleged to have violated must have been 'clearly established' in a more particularized, and hence more relevant, sense: The contours of the right must be sufficiently clear that a reasonable official would understand that *what he is doing* violates that right."[46]

This rule takes into account one of the fundamental purposes of qualified immunity, which is to bar liability when it would be "difficult for an officer to determine how the relevant legal doctrine . . . will apply to the factual situation the officer confronts."[47] The Supreme Court, therefore, has consistently begun its qualified immunity analysis by defining the claimed right with relevant specificity.[48] Thus, although plaintiffs will often attempt to bypass the second step of qualified immunity by asserting some hoary but general constitutional precept, such as "due process," "free speech," or "reasonableness," courts must look to whether, on the particular facts of the case, the right was clearly established.

3. What sort of authority makes a right clearly established?

Once the court has defined the specific right at issue, the next step is to determine whether that right is "clearly established." It goes too far to say

41. *Anderson*, 483 U.S. at 638.
42. *See Wilson*, 526 U.S. at 617.
43. Saucier v. Katz, 533 U.S. 194, 202 (2001).
44. *Anderson*, 483 U.S. at 641.
45. *Saucier*, 533 U.S. at 201.
46. *Anderson*, 483 U.S. at 640 (emphasis added).
47. *Saucier*, 533 U.S. at 205.
48. *See, e.g.*, Brosseau v. Haugen, 543 U.S. 194, 198 (2004) (per curium) (defining "the situation [the defendant] confronted" as "whether to shoot a disturbed felon, set on avoiding capture through vehicular flight, when persons in the immediate area were at risk from that flight"); Wilson v. Layne, 526 U.S. 603, 615 (1999) ("[T]he appropriate question is the objective inquiry of whether a reasonable officer could have believed that bringing members of the media into a home during the execution of an arrest warrant was lawful, in light of clearly established law and the information the officers possessed."); Conn v. Gabbert, 526 U.S. 286, 291 (1999) (defining relevant question as whether "use of a search warrant by government actors violates an attorney's right to practice his profession").

that qualified immunity applies unless the very action in question has previously been held unlawful. "In the light of pre-existing law, the unlawfulness must be apparent."[49] The "salient question" is whether the officer had "fair warning" or "fair notice" that her actions would violate the law.[50]

What constitutes fair warning varies from situation to situation.[51] Where the Constitution is specific, its plain text may clearly establish the right.[52] Most often, however, the Constitution's text is "cast at a high level of generality" such that its application to particular facts will clearly establish a governing rule only in "obvious" cases.[53] Therefore, review of decisional authority interpreting the constitutional provision at issue is usually needed.[54] The decisions need not be "fundamentally similar" or "materially similar" to the facts, especially when egregious violations are at issue—"officials can still be on notice that their conduct violates established law even in novel factual circumstances."[55]

It is not necessary for the Supreme Court to have considered the issue being litigated. Decisions from the courts of appeal can clearly establish a constitutional rule.[56] When the issue, however, is "one in which the result depends very much on the facts of each case," an officer cannot have fair notice unless the cases "squarely govern[ ]."[57] The Supreme Court has identified at least two situations in which case law is unlikely to have clearly established a constitutional rule. First, a circuit split on an issue indicates that the law is not clearly established.[58] Second, "when an earlier case expressly leaves open whether a general rule applies to the particular type of conduct at issue," the law on that conduct is not clearly established unless a later case addresses the question with "a very high degree of prior factual particularity."[59]

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49. *Anderson*, 483 U.S. at 640.

50. Hope v. Peltzer, 536 U.S. 730, 739, 741 (2002).

51. *Id.* at 740–41.

52. *See* Groh v. Ramirez, 540 U.S. 551, 563 (2004) (holding that no reasonable officer could believe the warrant that did not particularly describe objects subject to seizure could be valid given Fourth Amendment's textual requirement of particularity).

53. *Brosseau*, 543 U.S. at 199.

54. *See, e.g.*, Saucier v. Katz, 533 U.S. 194, 209 (2001) ("[N]either respondent nor the Court of Appeals has identified any *case* demonstrating a clearly established rule prohibiting the officer from acting as he did.") (emphasis added).

55. *Hope*, 536 U.S. at 741.

56. *Id.* at 741–43 (examining Eleventh Circuit precedent).

57. *Brosseau*, 543 U.S. at 201; *see also* Conn v. Gabbert, 526 U.S. 286, 292 (1999) (holding that law was not clearly established where cases all dealt with a complete prohibition of the right to engage in a certain calling, not the brief interruption which affected plaintiff).

58. *See* Wilson v. Layne, 526 U.S. 603, 618 (1999) ("If judges thus disagree on a constitutional question, it is unfair to subject police to money damages for picking the losing side of the controversy.").

59. *Hope*, 536 U.S. at 740–41 (quoting United States v. Lanier, 520 U.S. 259, 270–71 (1997)).

An official remains immune even if her conduct violated other non-constitutional standards, such as internal guidelines, ethical principles, or regulations.[60] For example, in *Magluta v. Samples*, a pretrial detainee brought a Fifth Amendment procedural due process claim against prison managers after they housed him in administrative detention and failed to provide him the periodic review mandated by a Bureau of Prisons regulation.[61] The Eleventh Circuit rejected the detainee's argument that violating the regulation was the same as violating the Constitution.[62] The controlling decisional authority interpreting the constitutional provision at issue, rather than the Code of Federal Regulation, the Court of Appeals held, supplied the standards.[63]

While agency policy does not by itself control the immunity analysis, courts sometimes examine it to see if the law is clearly established.[64] A policy proscribing the challenged conduct certainly undermines any argument the employee was not aware his conduct was unlawful.[65] On the other hand, a policy expressly allowing or requiring certain conduct may support an officer's contention that he reasonably believed his conduct was constitutional.[66] It is good to note, however, that the agency policy must be read against the decisional authority.[67]

4. Qualified immunity is more than a defense to liability

Qualified immunity protects not only against liability but also from trial and even discovery.[68] Litigation diverts official energy and resources from pressing public problems; the threat of personal liability discourages capable people from assuming public positions; and the fear of suit may deter officials from exercising judgment with the decisiveness critical to their offices.[69] Because litigation imposes these costs regardless of liability, qualified immunity "is *immunity from suit* rather than a mere defense to liability."[70] Moreover, because these costs begin to accrue as soon as a case is filed, the Supreme Court "repeatedly ha[s] stressed the importance of

60. *See* Davis v. Scherer, 468 U.S. 183, 194–96 n.12 (1984).

61. 375 F.3d 1269, 1271–72 (11th Cir. 2004).

62. *Id.* at 1279 n.7.

63. *Id.*

64. *See, e.g.*, Groh v. Ramirez, 540 U.S. 551, 564 (2004).

65. *See id.*

66. *See* Wilson v. Layne, 526 U.S. 603, 617 (1999).

67. *See* Hope v. Peltzer, 536 U.S. 730, 744 (2002) (opining that regulation appeared to be sham in light of mandates in case law); *Wilson*, 526 U.S. at 617–18 (holding that officers could rely on policy only where case law "was at best undeveloped").

68. Siegert v. Gilley, 500 U.S. 226, 232 (1991) (explaining that qualified immunity protects officials from "expensive and time consuming preparation to defend the suit on its merits" and from "not only unwarranted liability, but unwarranted demands customarily imposed upon those defending a long drawn out lawsuit").

69. *See* Harlow v. Fitzgerald, 457 U.S. 800, 814 (1982).

70. Saucier v. Katz, 533 U.S. 194, 200–01 (2001).

resolving immunity questions at the earliest possible stage in litigation."[71] If a defendant raises qualified immunity in a motion to dismiss or a prediscovery motion for summary judgment, the court should not allow discovery "until this threshold immunity question is resolved."[72]

5. The analytical framework for qualified immunity

As noted above, the qualified immunity test contains two steps. For many years, the Supreme Court mandated that the "initial inquiry" must be whether the officer's conduct violated a constitutional right.[73] If the officer's conduct did not violate a constitutional right, then "there is no necessity for further inquiries concerning qualified immunity."[74] "[I]f a violation could be made out on a favorable view of the parties' submissions," however, then "the next, sequential step is to ask whether the right was clearly established."[75]

During the 1990s, the Supreme Court warned against skipping ahead to the second step and insisted lower courts begin with the initial inquiry into whether the challenged conduct was constitutional.[76] The Court explained that addressing the steps in order advanced "the law's elaboration from case to case" by ensuring courts will "set forth principles which will become the basis for a holding that the right is clearly established."[77] Otherwise, the Court reasoned, "standards of official conduct would tend to remain uncertain, to the detriment both of officials and individuals."[78] In following years, however, enthusiasm on the Court for grappling with often difficult constitutional questions at the outset of every case where qualified immunity was in play seemed to wane. In fact, in some cases, the Court failed to follow its own instruction.[79]

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71. Hunter v. Bryant, 502 U.S. 224, 227 (1991); *see also Saucier*, 533 U.S. at 200 ("Where the defendant seeks qualified immunity, a ruling on that issue should be made early in the proceedings so that the costs and expenses of trial are avoided where the defense is dispositive.").

72. *Harlow*, 457 U.S. at 818; *see also* Crawford-El v. Britton, 523 U.S. 574, 598 (1998) ("[I]f the defendant does plead the immunity defense, the district court should resolve that threshold question before permitting discovery.").

73. *Saucier*, 533 U.S. at 201.

74. *Id.*

75. *Id.*

76. Siegert v. Gilley, 500 U.S. 226, 232 (1991) (criticizing court of appeals for assuming without deciding the "preliminary issue" of whether the plaintiff had alleged a constitutional violation); *see also* Cnty. of Sacramento v. Lewis, 523 U.S. 833, 841 n.5 (1998).

77. *Saucier*, 533 U.S. at 201.

78. *Lewis*, 523 U.S. at 842 n.5.

79. *See, e.g.*, Brosseau v. Haugen, 543 U.S. 194, 198 (2004) (per curiam) (expressing "no view" on the constitutional question itself and instead concluding that "however that question is decided, the Court of Appeals was wrong on the issue of qualified immunity"); *Saucier*, 533 U.S. at 207–08 (assuming violation could have occurred on facts alleged and proceeding directly to assessment of clearly established law).

By 2008, at least four sitting justices had signaled support for a more flexible approach.[80] Criticism of what Justice Breyer called a "rigid order of battle" was building in the courts of appeal as well.[81] In March of 2008, the Supreme Court granted certiorari in *Pearson v. Callahan* with specific instructions that clearly signaled its intention to revisit the analytical framework.[82] In addition to the questions presented by the petition, the Court directed the parties to brief and argue whether *Saucier v. Katz* should be overruled.

On January 23, 2009, *Pearson* held that it should.[83] Writing for a unanimous Court, Justice Alito began the analysis by recognizing the two-step test mandated by *Siegert* and *Saucier* "is often beneficial" to help develop constitutional law.[84] He noted, however, that requiring a threshold determination regarding the constitutionality of the challenged conduct comes at a price. It sometimes requires "substantial expenditure of scarce judicial resources on difficult questions that have no effect on the outcome of the case."[85] Constitutional tort defendants are also adversely affected

80. *See* Morse v. Frederick, 551 U.S. 393, 432 (2007) (Breyer, J., dissenting) ("*[A]lways* requiring lower courts first to answer constitutional questions is misguided . . . . I would end the failed *Saucier* experiment now."); Los Angeles Cnty. v. Rettele, 550 U.S. 609, 617 (2007) (Stevens, J., concurring) (joined by Justice Ginsburg and urging disavowal of "the unwise practice of deciding constitutional questions in advance of the necessity for doing so"); Scott v. Harris, 550 U.S. 372, 387–89 (2007) (Breyer, J., concurring) (arguing that the Court should overrule requirement announced in *Saucier*); *id.* at 386–87 (Ginsburg, J., concurring) (agreeing Court should confront *Saucier* but in a factually different case); *Brosseau*, 543 U.S. at 201–02 (Breyer, J., concurring) (joined by Justices Scalia and Ginsburg and criticizing "current rule" as "rigidly requir[ing] courts unnecessarily to decide difficult constitutional questions"); *Lewis*, 523 U.S. at 859 (Stevens, J., concurring) (opining that courts should have discretion to consider whether a particular right is clearly established first, before determining whether it exists at all).

81. *See, e.g.*, Egolf v. Witmer, 526 F.3d 104, 109 (3d Cir. 2008) ("We find in this case an exception to [*Saucier*'s] generally mandated analytic framework."); *id.* at 112 n.13 (Smith, J., concurring) (identifying cases where other circuits expressed doubts about or declined to follow *Saucier*); Clement v. City of Glendale, 518 F.3d 1090, 1093 n.4 (9th Cir. 2008) (While "we are bound to follow [*Saucier*'s rule] until further notice . . . [w]e are free to muse . . . that [it] may lead to the publication of a lot of bad constitutional law that is, effectively, cert-proof."); Robinette v. Jones, 476 F.3d 585, 592, 593 n.8 (8th Cir. 2007) (assuming without deciding that a constitutional violation occurred and declaring that posited objective of *Saucier* "would be ill served by a ruling here" on the constitutional question); Ehrlich v. Town of Glastonbury, 348 F.3d 48, 57–58 (2d Cir. 2003) (listing circumstances under which strict adherence to *Saucier* would not be appropriate); Santana v. Calderon, 342 F.3d 18, 29–30 (1st Cir. 2003) (rejecting prescribed order where analysis of whether right exists would have required federal courts to construe Puerto Rico law); Delaney v. DeTella, 256 F.3d 679, 682 (7th Cir. 2001) ("Whether the first prong of a qualified immunity defense . . . is a mandatory step or merely a recommendation remains, to some extent, a bit of an open question."). *But see, e.g.*, Moore v. Andreno, 505 F.3d 203, 208 n.5 (2d Cir. 2007) ("Despite continued criticism" of *Saucier*, "unless and until the Supreme Court heeds the plea to overrule [it], we will continue to ask first whether a constitutional violation has occurred and only then ask whether defendants are nevertheless entitled to qualified immunity.").

82. 552 U.S. 1279 (2008).

83. *Pearson v. Callahan*, 555 U.S. 223, 236 (2009).

84. *Id.*

85. *Id.* at 236–37.

when they are required to litigate a constitutional question in an area where the law is obviously not clearly established.[86]

Justice Alito also reasoned that mandating the first step in the qualified immunity analysis did little to develop the jurisprudence.[87] Some issues were so fact-bound that a decision provided little guidance in future cases.[88] Others required lower courts to decide an issue pending in a higher court with the possibility for conflicting holdings.[89] Moreover, in those cases where qualified immunity is decided in a ruling on a motion to dismiss, resolving the constitutional issue is difficult in the absence of a fully developed factual record.[90] This sometimes leads to "woefully inadequate" advocacy by the parties and the risk that a court "may not devote as much care as it would in other circumstances to the decision of the constitutional issue."[91]

Pearson also notes that mandating both steps of the qualified immunity analysis sometimes creates problems in the circuit court for defendants who prevailed in the district court. "Where a court holds that a defendant committed a constitutional violation but that the violation was not clearly established, the defendant may face a difficult situation. As the winning party, the defendant's right to appeal the adverse holding on the constitutional question may be contested."[92] Finally, adherence to *Saucier's* two step protocol departs from the general rule of constitutional avoidance and runs counter to the general rule against passing on questions of constitutionality unless such adjudication is unavoidable.[93]

Summing up its decision to abandon the mandatory two-step test for qualified immunity, *Pearson* held:

> On reconsidering the procedure required in *Saucier*, we conclude that, while the sequence set forth there is often appropriate, it should no longer be regarded as mandatory. The judges of the district courts and the courts of appeals should be permitted to exercise their sound discretion in deciding which of the two prongs of the qualified immunity analysis should be addressed first in light of the circumstances in the particular case at hand.[94]

Pearson should be a positive development for federal employees facing personal liability constitutional tort *Bivens* claims. Nothing in the decision prevents the traditional "belt and suspenders" argument that the challenged conduct did not violate the Constitution, and, even if it did, the

86. *Id.* at 237.
87. *Id.* at 238.
88. *Id.*
89. *Id.*
90. *Id.* at 237–40.
91. *Id.* at 239.
92. *Id.* at 240.
93. *Id.*
94. *Id.* at 236.

law was not clearly established. In cases presenting a close question, however, Department of Justice attorneys will be able to bypass *Saucier's* thicket and urge entitlement to qualified immunity on the ground that the law is not clearly established.

6. *Qualified immunity and the elusive "extraordinary circumstances"*

In *Harlow*, the Supreme Court suggested that even if the challenged conduct violated a constitutional right and that right was clearly established, qualified immunity might still bar suit. In this situation, qualified immunity only bars the suit "if the official pleading the defense claims extraordinary circumstances and can prove that he neither knew nor should have known of the relevant legal standard."[95] The Supreme Court has never explained precisely what circumstances are "extraordinary" enough to warrant qualified immunity, and the courts of appeal have not often grappled with this question. Nevertheless, the decisions teach that some circumstances might be extraordinary enough to warrant qualified immunity.

Several circuits agree, for instance, that an officer acting on the advice of counsel may be able to demonstrate extraordinary circumstances prevented him from recognizing clearly established law.[96] Other decisions seem to go the other way, holding that reliance on advice of counsel "is not inherently extraordinary, for few things in government are more common than the receipt of legal advice."[97] Whether advice of counsel is an extraordinary circumstance sometimes turns on:

> [1] how unequivocal, and specifically tailored to the particular facts giving rise to the controversy, the advice was, [2] whether complete information had been provided to the advising attorney(s), [3] the prominence and competence of the attorney(s), and [4] how soon after the advice was received the disputed action was taken.[98]

Aside from advice of counsel, there is little consensus on what circumstances might rise to the level of "extraordinary." Some courts have suggested that circumstances might be extraordinary when an officer relies on a state or local statute.[99] Other decisions consider reliance on the advice of

95. Harlow v. Fitzgerald, 457 U.S. 800, 819 (1982).

96. *See, e.g.*, Lawrence v. Reed, 406 F.3d 1224, 1230–31 (10th Cir. 2005); Davis v. Zirkelbach, 149 F.3d 614, 620–21 (7th Cir. 1998); Buonocore v. Harris, 134 F.3d 245, 252–53 (4th Cir. 1998); *cf.* Silberstein v. City of Dayton, 440 F.3d 306, 318 (6th Cir. 2006) (recognizing potential for advice of counsel to create extraordinary circumstances but noting Sixth Circuit has never granted qualified immunity on that ground).

97. V-1 Oil Co. v. Wyo. Dep't of Env't Quality, 902 F.2d 1482, 1488 (10th Cir. 1990).

98. *Id.* at 1489 (internal citations omitted); *accord Davis*, 149 F.3d at 620.

99. S*ee* Roska *ex rel.* Roska v. Sneddon, 437 F.3d 964, 971 (10th Cir. 2006); Mimics, Inc. v. Vill. of Angel Fire, 394 F.3d 836, 846 (10th Cir. 2005).

superior officers;[100] acts directly at the behest of a judge;[101] budgetary constraints precluding a certain course of action;[102] or an emergency precluding further factual investigation.[103]

7. Qualified immunity and the burden of pleading and persuasion

Qualified immunity is an affirmative defense that the individual defendant must plead.[104] The Supreme Court, however, has never explained what each party must prove once the defense has been asserted.[105] Of course to the extent qualified immunity is properly raised and the facts are undisputed, the defense presents a question of law to which notions of burden allocation are, in a sense, irrelevant.[106] In the absence of instructions, the courts of appeal have developed widely divergent (and sometimes elaborate) approaches to allocating the burden of demonstrating various aspects of the qualified immunity inquiry.[107]

IV. Defending Federal Employees Against Personal Liability Tort Claims Premised Upon an Alleged Violation of Federal Statutory Law

Occasionally Department of Justice lawyers will encounter a claim that seeks to recover money damages from an employee's personal assets premised upon an allegation the employee violated a federal statute.

The first inquiry is whether the statute in question provides a private right of action, and there is a four-part test: (1) whether the statute was enacted for the benefit of the plaintiff; (2) indication of legislative intent to create a private remedy; (3) consistency with the purposes of the legislative scheme; and (4) whether the cause of action would traditionally come under state law.[108] The central question is whether Congress intended to create, either expressly or by implication, a private cause of action.[109]

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100. *See, e.g.*, Liu v. Phillips, 234 F.3d 55, 58 (1st Cir. 2000).

101. *See* Lowe v. Letsinger, 772 F.2d 308, 314 (7th Cir. 1985).

102. McCord v. Maggio, 927 F.2d 844, 848 (5th Cir. 1991).

103. Rykers v. Alford, 832 F.2d 895, 899 (5th Cir. 1987).

104. Crawford-El v. Britton, 523 U.S. 574, 586 (1998); Harlow v. Fitzgerald, 457 U.S. 800, 815 (1982); Gomez v. Toledo, 446 U.S. 635, 640 (1980).

105. *See Gomez*, 446 U.S. at 642 (noting that Justice Rehnquist joined the Court's opinion based on his understanding that the opinion "le[ft] open the issue of the burden of persuasion, as opposed to the burden of pleading").

106. *See* Elder v. Holloway, 510 U.S. 510, 515–16 (1994).

107. Constraints of space preclude a circuit-by-circuit analysis of this topic here, but the rules are easily researchable.

108. Cort v. Ash, 422 U.S. 66, 78 (1975).

109. Touche Ross & Co. v. Redington, 442 U.S. 560, 575 (1979); *see also* Gonzaga Univ. v. Doe, 536 U.S. 273, 286 (2002) (focusing on congressional intent as evidenced by statutory text); Alexander v. Sandoval, 532 U.S. 275, 286–87 (2001) (same); *cf.* Thompson v. Thompson, 484 U.S. 174, 179–80 (1988) (focusing on congressional intent but looking more broadly to legislative history and allowing that private rights of action could be implied rather than explicit).

Generally speaking, courts are reluctant to find that a federal statute provides a private right of action against an individual employee.[110] There are, however, some statutes that create a private right of action, which may be asserted against a federal employee in his individual capacity.[111] If no private right of action exists for the statute upon which the plaintiff relies, it should be a simple matter to seek dismissal of the personal liability federal statutory claim under Federal Rule of Civil Procedure 12(b)(6).

If, however, the statute in question is one where the courts have found a private right of action, the defense of choice is qualified immunity. The Supreme Court has long recognized qualified immunity is available to counter not only constitutional claims but also statutory claims.[112] The courts of appeal are in accord.[113]

V. Defending Federal Employees Against Personal Liability Tort Claims Premised Upon an Alleged Violation of State Law

The general rule is that federal employees enjoy absolute immunity from personal liability in state law tort claims challenging negligent or wrongful acts undertaken while acting within the scope of their government employment.[114] The source of this absolute immunity is the Federal Employees Liability Reform and Tort Compensation Act of 1988, commonly known as the Westfall Act, which is codified at 28 U.S.C. § 2679.

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110. *See, e.g.*, Foley v. Univ. of Houston Sys., 355 F.3d 333, 340 n.8 (5th Cir. 2003) ("relief under Title VII is available only against an employer, not an individual supervisor or fellow employee"); Wheeler v. Gilmore, 998 F. Supp. 666, 668 (E.D. Va. 1998) (Privacy Act allows a private cause of action against a federal agency, not individuals); Romain v. Shear, 799 F.2d 1416, 1418 (9th Cir. 1986) (the only proper defendant in a federal employee's suit under the Age Discrimination in Employment Act is the agency head); Garcia v. SUNY Health Scis. Ctr. of Brooklyn, 280 F.3d 98, 107 (2d Cir. 2001) (Title II of the ADA does not provide for suit against a public official acting in his individual capacity); Martinez v. Bureau of Prisons, 444 F.3d 620 (D.C. Cir. 2006) (holding that no claim may be asserted against individual federal officials for violation of the Freedom of Information Act).

111. *See, e.g.*, Quon v. Arch Wireless Operating Co., 445 F. Supp. 2d 1116, 1128 (C.D. Cal. 2006) (permitting suit against individual for alleged violation of the Electronic Communications Privacy Act); Duncan v. Belcher, 813 F.2d 1335 (4th Cir. 1987) (permitting suit against individual for alleged violation of the Right to Financial Privacy Act); Bridge v. Phx. Bond & Indem. Co., 128 S. Ct. 2131, 2138 (2008) (permitting suit against individual for alleged violation of RICO Act).

112. *See* Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982) ("We therefore hold that government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established *statutory* or constitutional rights of which a reasonable person would have known.") (emphasis added).

113. *See, e.g.*, Berry v. Funk, 146 F.3d 1003, 1014 (D.C. Cir. 1998) (holding that qualified immunity may be raised as a defense to a plaintiff's statutory claims under the Federal Wiretap Act); Tapley v. Collins, 211 F.3d 1210, 1214–15 n.9 (11th Cir. 2000) (holding qualified immunity is available against statutory claim unless Congress intended to abrogate the defense of qualified immunity to claims under that act).

114. *See* Osborn v. Haley, 549 U.S. 225, 229–30 (2007).

Under the Westfall Act, the exclusive remedy for anyone injured by the negligent or wrongful act of a federal employee is a suit against the United States under the Federal Tort Claims Act (FTCA).[115] Despite this clear statutory command, Department of Justice attorneys often encounter plaintiffs who seek to recover money damages from the personal assets of federal employees for alleged violations of state tort law. Fortunately, this common pleading mistake is easily remedied. The Westfall Act permits the Attorney General to certify that the employee "was acting within the scope of his office or employment at the time of the incident out of which the claim arose."[116] If the case is pending in state court, this certification permits the case to be removed to federal court any time prior to trial.[117] The certification also causes the employee to be dismissed from the action and the United States to be substituted in his place as the only defendant in the state law tort claim.[118] From that point, the case proceeds like any other claim under the FTCA, and all the usual FTCA defenses apply.[119]

Of course, the FTCA is a limited waiver of sovereign immunity, and it expressly excludes certain claims.[120] Moreover, compliance with the FTCA's statute of limitations is a jurisdictional prerequisite.[121] Accordingly, in some cases, following the substitution of the United States as the sole party defendant under the Westfall Act, it is clear the plaintiff is not entitled to relief. Some plaintiffs respond by arguing that the substitution was improper, apparently preferring to sue the employee individually instead of pursuing a claim against the United States, which is doomed to fail. Usually, this argument is couched in terms of a challenge to the certification of scope of employment.

The Supreme Court held in *Gutierrez de Martinez v. Lamagno* that the Attorney General's certifications under the Act are judicially reviewable.[122] *Guiterrez* did not flesh out the kind of review allowed, but the lower courts have agreed that de novo review is appropriate.[123] Although certification

115. 28 U.S.C. § 2679(b)(1) (2006).

116. 28 U.S.C. § 2679(d)(1).

117. 28 U.S.C. § 2679(d)(2).

118. *Id.*

119. 28 U.S.C. § 2679(d)(4).

120. *See, e.g.*, 28 U.S.C. § 2680(a) (2006) (claims challenging discretionary decisions); 28 U.S.C. § 2680(h) (2006) (intentional torts).

121. *See* 28 U.S.C. §§ 1346(b), 2401(b) (2006).

122. *See* Gutierrez v. Puccini, 515 U.S. 417, 434 (1995).

123. *See, e.g.*, Rogers v. Mgmt. Tech., Inc., 123 F.3d 34, 36 (1st Cir. 1997); McHugh v. Univ. of Vt., 966 F.2d 67, 74 (2d Cir. 1992); Schrob v. Patterson, 967 F.2d 929, 936 n.13 (3d Cir. 1992); Maron v. United States, 126 F.3d 317, 322 (4th Cir. 1997); Palmer v. United States, 93 F.3d 196, 198–99 (5th Cir. 1996); Singleton v. United States, 277 F.3d 864, 870 (6th Cir. 2002); Sullivan v. United States, 21 F.3d 198, 201 n.6 (7th Cir. 1994); Lawson v. United States, 103 F.3d 59, 60 (8th Cir. 1996); Wilson v. Drake, 87 F.3d 1073, 1077 n.2 (9th Cir. 1996); Richman v. Straley, 48 F.3d 1139, 1145 (10th Cir. 1995); Nadler v. Mann, 951 F.2d 301, 304 n.5 (11th Cir. 1992); Haddon v. United States, 68 F.3d 1420, 1422 (D.C. Cir. 1995).

review is de novo, the plaintiff bears the burden of proof.[124] As in civil cases generally, the burden of persuasion is a preponderance of the evidence.[125] Unless challenged, a certification is conclusive evidence that the employee was acting in the scope of employment, and trial courts may not insist on affidavits or evidentiary support for it.[126] Once the plaintiff challenges the certification, however, it has no evidentiary weight, and the district court's decision is reviewed de novo.

In summary, personal liability tort claims against federal employees seeking money damages from their personal assets may be asserted under multiple theories implicating multiple areas of constitutional, statutory, and decisional authority. At the same time, federal employees have a wide variety of defense strategies at their disposal. In some cases, a claim may initially be brought against an individual employee but eventually be litigated against the United States, which brings sovereign immunity into play. In others, a defendant's assertion of entitlement to qualified immunity may result in one or more immediate appeals as of right from interlocutory orders entered by the district court.[127] Accordingly, many civil actions asserting these claims become extremely complex procedurally.[128] A skillful practitioner will never forget the *Bivenista* maxim *semper rogatio adiecta* (there is always another motion).

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124. *See, e.g.*, Day v. Mass. Air National Guard, 167 F.3d 678, 685 (1st Cir. 1999); Melo v. Hafer, 13 F.3d 736, 747 (3d Cir. 1994) (en banc); Borneman v. United States, 213 F.3d 819, 827 (4th Cir. 2000); Palmer v. Newton, 93 F.3d 196, 198–99 (5th Cir. 1996); Taboas v. Mlynczak, 149 F.3d 576, 581 (7th Cir. 1998); Larson v. Frederiksen, 277 F.3d 1040, 1041 (8th Cir. 2002); Billings v. United States, 57 F.3d 797, 800 (9th Cir. 1995); Richman v. Straley, 48 F.3d 1139, 1145 (10th Cir. 1995); Flohr v. Mackojak, 84 F.3d 386, 390 (11th Cir. 1996); Kimbro v. Velten, 30 F.3d 1501, 1505 (D.C. Cir. 1994).

125. *See, e.g.*, *Borneman*, 213 F.3d at 827; *Billings*, 57 F.3d at 800; Raisig v. United States, 34 F. Supp. 2d 1053, 1055 (W.D. Mich. 1998); Barry v. Stevenson, 965 F. Supp. 1220, 1222 (E.D. Wis. 1997).

126. *See* Rogers v. Mgmt. Tech., Inc., 123 F.3d 34, 37 (1st Cir. 1997).

127. *See* Mitchell v. Forsyth, 472 U.S. 511, 524–30 (1985) (holding that a district court's denial of a claim of qualified immunity, to the extent that it turns on an issue of law, is appealable under the collateral order doctrine, notwithstanding the absence of a final judgment).

128. *See, e.g.*, Halperin v. Kissinger, No. 91-5312, 1992 WL 394503 (D.C. Cir. Nov. 6, 1992) (remanding *Bivens* case challenging warrantless wiretaps undertaken during the Nixon administration to district court for further proceedings after nineteen years of litigation); Hartman v. Moore, 547 U.S. 250, 256 (2006) (describing *Bivens* case as having a procedural history "portending another *Jarndyce v. Jarndyce*"); Magluta v. Samples, 238 Fed. App'x 458 (11th Cir. 2007) (resolving *Bivens* case in defendants' favor after thirteen years of litigation and four decisions by the Court of Appeals).