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UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

FRANCISCO CASTANEDA,	)	Case No. CV 07-07241 DDP (JCx)
	)	
Plaintiff,	)	<b>AMENDED ORDER DENYING MOTION TO</b>
	)	<b>DISMISS</b>
v.	)	
	)	[Motion filed on January 14,
THE UNITED STATES OF	)	2008]
AMERICA, <del>CALIFORNIA, GEORGE</del>	)	
MOLINAR, in his individual	)	
capacity, CHRIS HENNEFORD,	)	
in his individual capacity,	)	
<del>JEFF BRINKLEY, in his</del>	)	
<del>individual capacity, GENE</del>	)	
MIGLIACCIO, in his	)	
individual capacity, TIMOTHY	)	
SHACK, M.D., in his	)	
individual capacity, ESTHER	)	
HUI, M.D., et al.,	)	
	)	
Defendants.	)	
_____	)	

This matter comes before the Court upon the individual Public Health Service Defendants' motion to dismiss for lack of subject matter jurisdiction. After reviewing the materials submitted by the parties and reviewing the arguments therein, the Court DENIES the motion.<sup>1</sup>

<sup>1</sup> The initial order was issued with the Plaintiff's name spelled incorrectly. Other than that adjustment, this amended order is identical to the initial order.

1 **I. LEGAL STANDARD**

2 When reviewing a motion to dismiss, the Court "assum[es] all  
3 facts and inferences in favor of the nonmoving party." Libas Ltd.  
4 v. Carillo, 329 F.3d 1128, 1130 (9th Cir. 2003). In addition,  
5 where, as here, the motion to dismiss is based upon an alleged lack  
6 of subject matter jurisdiction pursuant to Federal Rule of Civil  
7 Procedure 12(b)(1), "the trial court may rely on affidavits and  
8 other evidence submitted in connection with the motion."  
9 Berardinelli v. Castle & Cooke Inc., 587 F.2d 37, 39 (9th Cir.  
10 1978).

11  
12 **II. BACKGROUND**

13 On March 27, 2006, Plaintiff Francisco Castaneda - an  
14 immigration detainee - informed the Immigration and Customs  
15 Enforcement ("ICE") medical staff at the San Diego Correctional  
16 Facility that a lesion on his penis was becoming painful, growing  
17 in size, and exuding discharge. The next day, Castaneda was  
18 examined by Anthony Walker, an ICE Physician's Assistant. Walker's  
19 treatment plan called for a urology consult "ASAP" and a request  
20 for a biopsy. (Amended Compl. ¶ 37<sup>2</sup>; Doyle Decl. Ex. 1.)

21 On April 11, 2006, ICE documented that because of Castaneda's  
22 family history - his mother died of pancreatic cancer at age 39 -  
23 penile cancer needed to be ruled out. (Doyle Decl. Ex. 2.) A  
24 Treatment Authorization Request ("TAR") was filed with the Division  
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26 <sup>2</sup> Defendants' motion to dismiss was filed before the Complaint  
27 was amended. However, the Amended Complaint contains no new  
28 allegations against the individual federal defendants and the  
parties have stipulated that Defendants' motion is responsive to  
the Amended Complaint.

1 of Immigration Health Services ("DIHS"), requesting approval for a  
2 biopsy and circumcision. The TAR noted that Castaneda's penile  
3 lesion had grown, that he was experiencing pain at a level 8 on a  
4 scale of 10, and that the lesion had a "foul odor." (Id. Ex. 3.)  
5 By this time, DIHS had determined that certain "possible  
6 infections" were not causing the lesion. (Id.) The TAR further  
7 urged that, "[d]ue to family history and pt [patient] discomfort,"  
8 a biopsy and "pertinent surgical f/u [follow up]" should be  
9 performed the "sooner the better." (Id.) DIHS approved the TAR,  
10 authorizing the biopsy, urology consult, and "pertinent surgical  
11 f/u," on May 31. (Id.)

12 On June 7, 2006, ICE sent Castaneda for a consult with  
13 oncologist John Wilkinson, M.D. Castaneda presented with a history  
14 of a fungating lesion<sup>3</sup> on his foreskin. (Id. Ex. 4.) Dr.  
15 Wilkinson

16 agree[d] with the physicians at the [M]etropolitan  
17 [C]orrectional Center that this may represent either a penile  
18 cancer or a progressive viral based lesion. I strongly agree  
19 that it requires urgent urologic assessment of biopsy and  
20 definitive treatment. In this extremely delicate area and  
21 [sic] there can be considerable morbidity from even benign  
22 lesions which are not promptly and appropriately treated. . .  
23 . I spoke with the physicians at the correctional facility. I  
24 have offered to admit patient for a urologic consultation and  
25 biopsy. Physicians there wish to pursue outpatient biopsy  
26 which would be more cost effective. They understand the need  
27 for urgent diagnosis and treatment.

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28 <sup>3</sup> The National Cancer Institute defines a "fungating lesion"  
as: "A type of skin lesion that is marked by ulcerations (breaks on  
the skin or surface of an organ) and necrosis (death of living  
tissue) and that usually has a bad smell. This kind of lesion may  
occur in many types of cancer, including breast cancer, melanoma,  
and squamous cell carcinoma, and especially in advanced disease."  
See <http://www.cancer.gov/Templates/db>  
[alpha.aspx?print=1&cdrid =367427](http://www.cancer.gov/Templates/db) (last accessed February 17, 2008).

1 (Id. (emphasis added).) On the same day, Defendant Esther Hui,  
2 M.D., spoke to Dr. Wilkinson. She noted that she was aware that  
3 Mr. Castaneda "has a penile lesion that needs to be biopsied," and  
4 that Dr. Wilkinson had offered to admit Castaneda and perform this  
5 procedure. (Id. Ex. 5.) However, Dr. Hui explained that DIHS  
6 would not admit him to a hospital because DIHS considered a biopsy  
7 to be "an elective outpatient procedure." (Id. (emphasis added).)  
8 Dr. Hui never made arrangements for the outpatient biopsy.

9 On June 12, 2006, Castaneda filed a grievance asking for the  
10 surgery recommended by Dr. Wilkinson, stating that he was "in a  
11 considerable amount of pain and I am in desperate need of medical  
12 attention." (Id. Ex. 6.) This grievance was denied. DIHS records  
13 from June 23 document that Castaneda's penis was "getting worse,  
14 more swelling to the area, foul odo[r], drainage, more difficult to  
15 urinate, bleeding from the foreskin." (Id. Ex. 7.) DIHS records  
16 from June 30, 2006 state that because Castaneda had not yet had "a  
17 biopsy performed and evaluated in a laboratory," the agency  
18 considered him to "NOT have cancer at this time." (Id. Ex.8.)  
19 DIHS acknowledged that "the past few months of the lesion [had  
20 been] looking and acting a bit more angry," yet dismissed  
21 Castaneda's concerns: "Basically, this pt needs to be patient and  
22 wait." (Id.)

23 DIHS records from one month later document that the "lesion on  
24 his penis is draining clear, foul malodorous smell, culture[s]  
25 before were negative for growth, negative RPR, negative HIV.  
26 [F]loreskin is bleeding at this time and pt states his colon feels  
27 swollen, previous rectal exam showed slightly swollen prostate,  
28 deferred today." (Id. Ex. 9.) Despite Dr. Wilkinson's emphasis

1 over a month earlier on the need for a biopsy due to the  
2 considerable likelihood of cancer, DIHS claimed to have no idea  
3 what could be causing Castaneda's ailment, noting the "unk[nown]  
4 etiology of [his] penile lesion." (Id. Ex. 9.)

5 On the same day, a report by Anthony Walker claims that  
6 Castaneda "was not denied by Dr. Hui any treatment, albeit there  
7 was no active Treatment Authorization Request (TAR) placed for  
8 approval by DIHS headquarters in Washington, DC., nor was there an  
9 emergent need." (Id. Ex. 10 (emphasis added).) Despite the  
10 alleged lack of "emergent need," the next day a TAR was submitted  
11 seeking Emergency Room ("ER") evaluation and in-patient treatment  
12 for Castaneda. There is no explanation for why ICE did not  
13 schedule him for the circumcision and biopsy ordered by Dr.  
14 Wilkinson the month before. However, the TAR did note that Dr.  
15 Wilkinson and Dr. Masters, an outside urologist,

16 both strongly recommended admission, urology consultation,  
17 surgical intervention via biopsy/exploration under anesthesia  
18 to include circumcision if non-malignant, return f/u with  
19 oncology depending upon findings, and potential treatment or  
20 surgery of any malignant findings. . . . There is now  
bleeding, drainage, malodorous smell and the lesion now  
appears to be "exploding" for lack of better words, definitely  
macerated. Request for urology and oncology inpatient  
eval[uation] and treatment with outpatient follow-up.

21 (Id. Ex. 11 (emphasis added).) The TAR was approved. (Id.)

22 Inexplicably, DIHS failed to arrange for an evaluation with  
23 Dr. Wilkinson and/or Dr. Masters, the treating doctors who were  
24 familiar with Castaneda's condition and who, indeed, had offered to  
25 continue treating him. Instead, DIHS brought Castaneda to the ER  
26 at Scripps Mercy Chula Vista on July 13, 2006. There, Dr. Juan  
27 Tovar, M.D., who examined Castaneda, documented the existence of a  
28 1.5cm by 2cm "fungating lesion with slight clearish discharge."

1 (Id. Ex. 12.) Dr. Tovar made arrangements for Castaneda to be  
2 admitted to the hospital; his impression was that Castaneda had a  
3 "penile mass" and that there was a need to "rule out cancer, versus  
4 infectious etiology." (Id.)

5 Once admitted, yet another doctor unfamiliar with Castaneda's  
6 history, Dr. Daniel Hunting, M.D., performed a brief examination  
7 the same day, but did not do the biopsy needed to rule out cancer.  
8 Instead, Dr. Hunting guessed that the problem was condyloma,  
9 commonly known as genital warts. (Id. Ex. 13.) There is no  
10 evidence from his report that Dr. Hunting asked about or was aware  
11 of Castaneda's family history of cancer. Dr. Hunting then referred  
12 Castaneda back to his "primary treating urologist," dismissed his  
13 symptoms as "not an urgent problem," and discharged him from the  
14 hospital. (Id.)

15 Four days later, Castaneda's condition was worsening. DIHS  
16 documented that the lesion was still "growing," and that Castaneda  
17 had "severe phimosis,<sup>4</sup> bleeding, and clear drainage for lesion area  
18 with foul odor." (Id. Ex. 14.) The DIHS record notes that both  
19 Dr. Masters and Dr. Wilkinson "strongly recommended" admission to a  
20 hospital, biopsy, and circumcision. (Id.) Instead, DIHS followed  
21 the suggestion of Dr. Hunting - who had only briefly examined  
22 Castaneda in the ER - and assumed Castaneda had genital warts.  
23 DIHS therefore declined to order a biopsy, although it nonetheless  
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25 <sup>4</sup> Phimosis is medically defined as a "tightness or  
26 construction of the orifice of the prepuce arising either  
27 congenitally or from inflammation, congestion, or other postnatal  
28 causes and making it impossible to bare the glans." Merriam  
Webster's Medical Desk Dictionary 613 (1996). In other words, the  
foreskin is so tight it cannot be pulled back completely to reveal  
the glans.

1 noted Castaneda would "need a resection<sup>5</sup> of the penis" due to the  
2 severity of his condition. (Id.)

3 On July 26, 2006, DIHS acknowledged that Castaneda "complains  
4 that he is being denied a needed surgery to his foreskin." (Id.  
5 Ex. 16.) ICE told Castaneda, however, that "while a surgical  
6 procedure might be recommended long-term, that does not imply that  
7 the Federal Government is obligated to provide that surgery if the  
8 condition is not threatening to life, limb or eyesight." (Id.) On  
9 August 9, DIHS again noted Plaintiff's "inflamed foreskin," but  
10 denied his request for a circumcision, claiming that "surgical  
11 removal, at the current time, would be considered elective surgery;  
12 that as such the Federal Government will not provide for such  
13 surgery." (Id. Ex. 17.)

14 On August 11, 2006, Walker submitted a TAR requesting a biopsy  
15 and circumcision by Dr. Masters, the outside urologist. (Id. Ex.  
16 18.) Dr. Masters examined Castaneda on August 22. Dr. Masters  
17 thought Castaneda might have genital warts, but noted Castaneda's  
18 family history of cancer and that Dr. Wilkinson had recommended a  
19 "diagnostic biopsy" to rule out cancer. (Id. 19.) Therefore, Dr.  
20 Masters recommended circumcision, which would at once relieve the  
21 "ongoing medical side effects of the lesion including infection and  
22 bleeding" and "provide a biopsy." (Id.) Dr. Masters told DIHS  
23 that "we will arrange for admission for circumcision at a local  
24 hospital. My principal hospital is Sharp Memorial." (Id.)

25 In spite of this unequivocal recommendation, Walker  
26 characterized Dr. Masters as stating that "elective procedures this

27 \_\_\_\_\_  
28 <sup>5</sup> Resection means the surgical removal of part of an organ.  
Webster's Medical Desk Dictionary at 697.

1 patient may need in the future are cytoscopy and circumcision."  
2 (Id. Ex. 20.) The word "elective" does not appear in Dr. Masters's  
3 report. DIHS denied the request for a circumcision. (Id.) On  
4 August 24, 2006, DIHS told Castaneda that, "according to policy,"  
5 surgery was denied because it was "elective." (Id. Ex. 21.) On  
6 August 26 and 28, Castaneda was seen by medical staff because of  
7 "complaints of stressful situation regarding medical status, unable  
8 to sleep at night; states that ICE won't allow surgical operation  
9 for lesion on penis." (Id. Ex. 22.) ICE was thus aware that  
10 Castaneda's "stress is due to a chronic medical problem which the  
11 CCA has refused to have corrected as it is considered to be  
12 elective surgery." (Id.) Castaneda was prescribed an  
13 antihistamine as treatment. (Id.)

14 On August 30, 2006, ICE sent Castaneda a letter:

15 This is to inform that the off-site specialist you were  
16 referred to for your medical condition reports that any  
17 surgical intervention for the condition would be elective in  
18 nature. An independent review by our medical team is in  
19 agreement with the specialist's assessment. The care you are  
20 currently receiving is necessary, appropriate, and in  
21 accordance with our policies.

22 (Id. Ex. 23.) As noted, Dr. Wilkinson's and Dr. Masters's reports  
23 do not in fact state that the recommended biopsy and circumcision  
24 would be elective. On the contrary, Castaneda's treating doctors,  
25 as discussed, both noted the urgency of the situation and made  
26 efforts to see Castaneda treated as quickly as possible.

27 On September 8, 2006, Castaneda complained: "I have a lot  
28 [sic] pain and I'm having discharge." (Id. Ex. 24.) ICE noted  
29 that Castaneda's current treatment was Ibuprofen (800mg), which was  
30 having "no effect" on his pain; Castaneda was having "white  
31 discharge at night," and he worried that "It's getting worse. It's

1 like genital warts, but they're getting bigger." (Id.) By October  
2 17, 2006, ICE medical staff was aware that Castaneda was bleeding  
3 from his penis; one officer "saw some dried blood on his boxers."  
4 (Id. Ex. 26.) On October 23, Walker submitted a TAR for surgery,  
5 but it was denied on October 26 because "circumcisions are not a  
6 covered benefit." (Id. Ex. 27-28.)

7 In the October 26 denial report, Defendant Claudia Mazur, a  
8 DIHS nurse, stated that "Pt has been seen by local urologist and  
9 oncologist and both are not impressed of possible cancerous  
10 lesion(s), however, there is an elective component to having the  
11 circumcision completed." (Id. Ex. 28.) This conclusion directly  
12 contradicts the July 13 TAR, which documented that Drs. Wilkinson  
13 and Masters both "strongly recommended . . . surgical intervention  
14 via biopsy/exploration" to rule out cancer. (Id. Ex. 4, 11, 19.)  
15 The TAR also documented that Castaneda "is not able to be released  
16 to seek further care due to mandatory hold and according to ICE  
17 authorities, may be with this facility for quite awhile." (Id. Ex.  
18 28.) This document thus suggests ICE officials knew that Castaneda  
19 would be unable to receive treatment in the foreseeable future.

20 DIHS noted that Castaneda's symptoms "have worsened" on  
21 November 9. (Id. Ex. 29.) Castaneda reported "a constant pinching  
22 pain, especially at night. States he constantly has blood and  
23 discharge on his shorts. [Castaneda stated] it's getting worse,  
24 and I don't even have any meds - nothing for pain and no  
25 antibiotics." (Id.) Castaneda also "complains of a swollen rectum  
26 which he states make bowel movements hard." (Id.) Castaneda was  
27 told that the "TAR was in place for surgery and is pending  
28 approval." (Id.) Yet the surgery was not provided.

1           Instead, on November 14 and 15, DIHS documented that Castaneda  
2 "complains of new, 2<sup>nd</sup> penile lesion on underside, distal penis."  
3 (Id. Ex. 30.) ICE noted that Castaneda was concerned "that his  
4 lesion 'is growing'" and that it is "moist," that "he cannot stand  
5 and urinate because the urine 'sprays everywhere' and he cannot  
6 direct the stream." (Id.) DIHS treated this condition by making a  
7 request for seven pairs of clean boxer shorts weekly. (Id.)

8           In early December, Castaneda was transferred to the San Pedro  
9 Service Processing Center. (Jawetz Decl. Ex. 1.) ACLU lawyers  
10 began to advocate on his behalf. On December 5, 2006, the ACLU  
11 sent a letter to multiple ICE officials, including Defendants Chris  
12 Henneford, Stephen Gonsalves, and George Molinar. The letter  
13 stated, in part, that "Mr. Castaneda, who has a strong family  
14 history of cancer, legitimately fears that his long term health is  
15 being jeopardized by the lack of appropriate medical care he  
16 continues to receive in ICE custody. In the short term, Mr.  
17 Castaneda continues to experience severe pain, bleeding, and  
18 discharge." (Id.) The letter requested medical treatment for  
19 Castaneda.

20           Also on December 5, a TAR was filed seeking consultation with  
21 Lawrence Greenburg, M.D., because of a "history of severe HPV  
22 infection causing large, painful, penile warts, has bleeding and  
23 pain from the lesions. May also have an underlying structural  
24 deformity of penis." (Doyle Decl. Ex. 31.) Dr. Greenberg "also  
25 recommended a circumcision and biopsy." (Jawetz Decl. Ex. 5.) On  
26 January 19, an ACLU attorney faxed another letter to ICE,  
27 requesting medical treatment for Castaneda. (Id.) On January 24,  
28 a TAR for a urology consult with Asghar Askari, M.D. was approved.

1 (Doyle Decl. Ex. 32.) The next day, Castaneda was seen by Dr.  
2 Askari, who diagnosed a fungating penile lesion that was "most  
3 likely penile cancer" and ordered a biopsy. (Id. Ex. 33.)

4 On January 29, 2007, the ACLU faxed yet another letter to ICE,  
5 urging the agency to provide Castaneda the care that had been  
6 ordered for the past ten months. (Jawetz Decl. Ex. 6.) According  
7 to Plaintiff's complaint, a biopsy was finally scheduled for early  
8 February. However, a few days before the procedure, Castaneda was  
9 abruptly released from ICE custody. Castaneda then went to the ER  
10 of Harbor-UCLA Hospital in Los Angeles on February 8, 2007, where  
11 he was diagnosed with squamous cell carcinoma. His penis was  
12 amputated on Valentines Day, 2007. According to the complaint,  
13 Harbor-UCLA confirmed that Castaneda had metastatic cancer.  
14 Castaneda began undergoing chemotherapy at Harbor-UCLA. (Amended  
15 Compl. ¶¶ 104-09.) However, the treatment was not successful, and  
16 on February 16, 2008, Mr. Castaneda died.<sup>6</sup>

17 Plaintiff Castaneda brings this lawsuit against, inter alia,  
18 the United States and individual federal officials, arguing that  
19 the refusal to provide Castaneda with a biopsy despite numerous  
20 medical orders to do so violated the United States Constitution.<sup>7</sup>  
21 Plaintiff brings state tort claims against the United States under  
22  
23

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24 <sup>6</sup> A motion to substitute the representative and heirs of his  
25 estate as the proper parties, as well as to permit the filing of a  
26 second amended complaint, is currently pending before the Court.  
27 However, this motion does not affect the instant motion to dismiss,  
and the individual federal defendants - the moving parties in the  
instant motion - do not oppose the substitution.

28 <sup>7</sup> Plaintiff also brings claims against California state  
officials. These claims are not at issue in the instant motion.

1 the Federal Torts Claims Act ("FTCA"),<sup>8</sup> and alleges federal  
2 constitutional violations against the individuals pursuant to  
3 Bivens v. Six Unknown Agents of Fed. Bureau of Narcotics, 403 U.S.  
4 388, 389 (1971) (establishing that victims of a constitutional  
5 violation by a federal agent may recover damages against that  
6 federal official in federal court).

7 The individual Public Health Service ("PHS") Defendants now  
8 bring this motion to dismiss for lack of subject matter  
9 jurisdiction.<sup>9</sup> They argue that the PHS Defendants are absolutely  
10 immune from suit, that Plaintiff must instead bring this claim as  
11 an FTCA action against the United States, and that because the  
12 United States has not waived sovereign immunity for claims of  
13 constitutional violations, this action must be dismissed.

14

15 **III. DISCUSSION**

16 This case presents an unresolved legal question in the Ninth  
17 Circuit: whether § 233(a) of the Public Health Service Act allows  
18 Castaneda to assert Bivens claims against the individual Public  
19 Health Service Defendants. The Court finds that the plain language  
20 of the statute dictates that it does.<sup>10</sup>

21

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22 <sup>8</sup> The FTCA makes the federal government liable to the same  
23 extent as a private party for certain torts committed by federal  
24 employees acting within the scope of their employment. 28 U.S.C. §  
25 1346(b)(1).

26 <sup>9</sup> These Defendants are Chris Henneford, Eugene Migliaccio,  
27 Timothy Shack, M.D., Esther Hui, M.D., and Stephen Gonsalves.

28 <sup>10</sup> Plaintiff brings a Bivens claim alleging a violation of the  
Fifth Amendment's Equal Protection Clause as well as his Eighth  
Amendment claim for inadequate medical care. Because Defendants do  
not specifically argue that Plaintiff's Fifth Amendment claim is  
also preempted by § 233(a), the Court does not address the issue,

(continued...)

1 **A. Bivens Claims are Generally Available to Remedy Eighth**  
2 **Amendment Violations, and the FTCA is Intended as a Parallel,**  
3 **Rather Than a Substitute Remedy**

4 A victim of a constitutional violation by a federal agent may  
5 bring a Bivens action to recover damages against the individual in  
6 his personal capacity unless "defendants demonstrate special  
7 factors counseling hesitation in the absence of affirmative action  
8 by Congress" or unless "defendants show that Congress has provided  
9 an alternative remedy which it explicitly declared to be a  
10 substitute for recovery directly under the Constitution and viewed  
11 as equally effective." Carlson v. Green, 446 U.S. 14, 18-19 (1980)  
12 (internal quotation marks omitted). The only question before the  
13 Court is whether Congress has explicitly provided for a substitute  
14 remedy under the circumstances in this case, so as to preclude a  
15 Bivens claim.

16 The United States Supreme Court has made "crystal clear" that  
17 in cases involving Eighth Amendment claims based on an alleged  
18 failure to provide proper medical care, "Congress views FTCA and  
19 Bivens as parallel, complementary causes of action." Id. at 20.  
20 In Carlson, the Court rejected defendants' argument that the FTCA  
21 was intended by Congress to be an adequate substitute:

22 [W]e have here no explicit congressional declaration that  
23 persons injured by federal officers' violations of the Eighth  
24 Amendment may not recover money damages from the agents but  
25 must be remitted to another remedy, equally effective in the  
26 view of Congress. Petitioners point to nothing in the Federal  
27 Tort Claims Act (FTCA) or its legislative history to show that  
28 Congress meant to pre-empt a Bivens remedy or to create an  
equally effective remedy for constitutional violations.

Id. at 19.

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10(...continued)  
except to note that its conclusion that § 233(a) allows an Eighth  
Amendment Bivens claim applies equally to any other Bivens claim.

1 According to the Court, "[f]our additional factors, each  
2 suggesting that the Bivens remedy is more effective than the FTCA  
3 remedy, also support our conclusion that Congress did not intend to  
4 limit [the aggrieved individual] to an FTCA action." Id. at 20-21.  
5 First, the threat of a Bivens claim provides stronger deterrence  
6 against future constitutional violations than an FTCA action  
7 because only the former remedy "is recoverable against  
8 individuals," and "[i]t is almost axiomatic that the threat of  
9 damages has a deterrent effect, surely particularly so when the  
10 individual official faces personal financial liability." Id. at 21  
11 (internal citations omitted).

12 Second, and relatedly, punitive damages are available in a  
13 Bivens action, but are "statutorily prohibited" in an FTCA suit,  
14 see 28 U.S.C. § 2674, so the "FTCA is that much less effective than  
15 a Bivens action as a deterrent to unconstitutional acts." Id. at  
16 22. Moreover, because 42 U.S.C. § 1983 - the counterpart to Bivens  
17 actions for constitutional violations by state officials - allows  
18 for punitive damages, "the constitutional design would be stood on  
19 its head if federal officials did not face at least the same  
20 liability as state officials guilty of the same constitutional  
21 transgression." Id. (internal quotation marks omitted).

22 Third, Bivens actions are more effective in this context  
23 because FTCA actions do not allow for jury trials. The Court found  
24 "significant[]" that plaintiffs should be able to retain the choice  
25 between courts and juries. Id. Fourth, and finally,

26 an action under FTCA exists only if the State in which the  
27 alleged misconduct occurred would permit a cause of action for  
28 that misconduct to go forward. 28 U.S.C. § 1346(b) (United  
States liable "in accordance with the law of the place where  
the act or omission occurred"). Yet it is obvious that the

1 liability of federal officials for violations of citizens'  
2 constitutional rights should be governed by uniform rules. . .  
3 . The question whether respondent's action for violations by  
4 federal officials of federal constitutional rights should be  
left to the vagaries of the laws of the several States admits  
of only a negative answer in the absence of a contrary  
congressional resolution.

5 Id. at 23. For all of the above reasons, the Court held that  
6 "[p]lainly FTCA is not a sufficient protector of the citizens'  
7 constitutional rights, and without a clear congressional mandate we  
8 cannot hold that Congress relegated respondent exclusively to the  
9 FTCA remedy." Id.

10 Since the Court's opinion in Carlson, Congress has amended the  
11 FTCA to expressly preserve parallel Bivens actions against federal  
12 employees. In 1988, it passed the Federal Employees Liability and  
13 Tort Compensation Act, which, inter alia, provided the the FTCA  
14 will be the "exclusive" remedy "of any other civil action or  
15 proceeding for money damages . . . against [a federal] employee."  
16 28 U.S.C. § 2679(b)(1). However, the Act then explains that this  
17 exclusivity "does not extend or apply to a civil action against an  
18 employee of the Government . . . which is brought for a violation  
19 of the Constitution of the United States." Id. § 2679(b)(2)(A).

20 **B. Both the Plain Language and the Legislative History of §**  
21 **233(a) Evince a Congressional Intent to Preserve Bivens**  
**Actions**

22 Defendants acknowledge that in general, victims of  
23 constitutional violations may proceed with both FTCA and Bivens  
24 claims. They nonetheless urge that as to the Public Health Service  
25 Defendants specifically, Congress has expressed an explicit intent,  
26 through the Public Health Service Act, to limit plaintiffs to an  
27 FTCA remedy. The Court disagrees.

28

1 Whether the Public Health Service Act evinces an intent to  
2 limit Mr. Castaneda's remedies against PHS Defendants for any  
3 constitutional violations to an FTCA claim is a question of  
4 statutory interpretation. When interpreting a statute, courts  
5 "look first to the plain language of the statute, construing the  
6 provisions of the entire law." Nw. Forest Resource Council v.  
7 Glickman, 82 F.3d 825, 831 (9th Cir. 1996) (internal quotation  
8 marks omitted). After that, "if the language of the statute is  
9 unclear, we look to the legislative history." Id. (internal  
10 quotation marks omitted). In this case, both the text and  
11 legislative history reveal an explicit intent to allow Bivens  
12 claims.

### 13 1. Plain Language

14 The pertinent provision of the Public Health Service Act, §  
15 233(a),<sup>11</sup> reads in its entirety as follows:

#### 16 DEFENSE OF CERTAIN MALPRACTICE AND NEGLIGENCE ACTS

17 Sec. 223.(a) The remedy against the United States provided by  
18 sections 1346(b) and 2672 of title 28 [the FTCA], or by  
19 alternative benefits provided by the United States where the  
20 availability of such benefits precludes a remedy under section  
21 1346(b) of title 28, for damage for personal injury, including  
22 death, resulting from the performance of medical, surgical,  
23 dental, or related functions, including the conduct of  
24 clinical studies or investigation, by any commissioned officer  
25 or employee of the Public Health Service while acting within  
26 the scope of his office or employment, shall be exclusive of  
27 any other civil action or proceeding by reason of the same  
28 subject-matter against the officer or employee (or his estate)  
whose act or omission gave rise to the claim.

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25 <sup>11</sup> The language of Public Law No. 91-623 has not been amended  
26 since enacted on December 31, 1970. However, the 1970 edition of  
27 the United States Code (where this statute first appeared in the  
28 Code) renumbered this section as "§ 233(a)." Although the accurate  
version is § 223(a) of the Public Health Service Act in the  
Statutes at Large, the Court will refer to the section as § 233(a)  
for ease of reference.

1 Emergency Health Personnel Act of 1970, Pub. L. No. 91-623, §  
2 223(a), 84 Stat. 1868, 1870 (1970). From this provision, it is  
3 clear that Congress intended some medical injuries caused by PHS  
4 employees to be redressable solely through the FTCA. The question  
5 is whether the provision applies to allegations of constitutional  
6 violations. Congress has expressly indicated that it does not.

7 At first glance, it may appear that § 233(a) does not address  
8 one way or another whether Congress intended constitutional claims  
9 to come under its rubric. Upon following the statutory trail,  
10 however, it turns out that Congress has in fact explicitly answered  
11 the question presented by this case.

12 Subsection 233(a) declares that “[t]he remedy against the  
13 United States provided by sections 1346(b) and 2672 of title 28, .  
14 . . shall be exclusive.” The two sections mentioned - 1346(b) and  
15 2672 - are part of the FTCA. The latter - entitled “Administrative  
16 Adjustment of Claims” - deals with how a federal agency may manage  
17 the claims against it, and is not relevant for our purposes.

18 Subsection 1346(b), however, is more instructive:

19 **b)(1)** Subject to the provisions of chapter 171 of this title,  
20 the district courts, together with the United States District  
21 Court for the District of the Canal Zone and the District  
22 Court of the Virgin Islands, shall have exclusive jurisdiction  
23 of civil actions on claims against the United States, for  
24 money damages, accruing on and after January 1, 1945, for  
25 injury or loss of property, or personal injury or death caused  
by the negligent or wrongful act or omission of any employee  
of the Government while acting within the scope of his office  
or employment, under circumstances where the United States, if  
a private person, would be liable to the claimant in  
accordance with the law of the place where the act or omission  
occurred.

26 28 U.S.C. § 1346(b)(emphasis added).

27 One little clause, almost invisible, should attract our  
28 attention: “Subject to the provisions of chapter 171 of this

1 title." This is the kind of clause that is often ignored, on the  
2 assumption that it is probably not relevant. But let us see what  
3 chapter 171 says, just in case:

4 **CHAPTER 171 - TORT CLAIMS PROCEDURE**

5 28 USCA Pt. VI, Ch. 171, Refs & Annos

6 § 2671. Definitions

7 § 2672. Administrative adjustment of claims

8 § 2673. Reports to Congress

9 § 2674. Liability of United States

10 § 2675. Disposition by federal agency as prerequisite;

11 evidence

12 § 2676. Judgement as bar

13 § 2677. Compromise

14 § 2678. Attorney fees; penalty

15 § 2679. Exclusiveness of remedy

16 § 2680. Exceptions

17 The statutory provision that is the central focus of this  
18 motion to dismiss - § 233(a) - thus explicitly incorporates by  
19 reference 28 U.S.C. § 2679. Subsection 2679(b) is dispositive  
20 here:

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

**(2)** Paragraph (1) does not extend or apply to a civil action

1 against an employee of the Government--  
2 (A) which is brought for a violation of the Constitution of  
3 the United States.

4 28 U.S.C. § 2679 (emphasis added). Therefore, § 233(a)  
5 incorporates the provision of the FTCA which explicitly preserves a  
6 plaintiff's right to bring a Bivens action. Stated differently,  
7 far from evincing the explicit intent required by Carlson that  
8 Congress intended to preclude Bivens claims, the plain language of  
9 § 233(a) unambiguously states the opposite:

10 The [exclusive] remedy against the United States provided by  
11 sections 1346(b) and 2672 of title 28 . . . for damage for  
12 personal injury, including death, resulting from the  
13 performance of medical . . . or related functions . . . by any  
14 commissioned officer or employee of the Public Health Service  
15 . . . does not extend or apply to a civil action . . . which  
16 is brought for a violation of the Constitution of the United  
17 States.

18 42 U.S.C. § 233(a); 28 U.S.C. § 2679(b).

19 The United States Supreme Court, in interpreting a provision  
20 similar to § 233(a), has confirmed that the "the FTCA is *not* the  
21 exclusive remedy for torts committed by Government employees in the  
22 scope of their employment when an injured plaintiff brings: (1) a  
23 *Bivens* action." United States v. Smith, 499 U.S. 160, 166-67  
24 (1991); see also Billings v. United States, 57 F.3d 797, 800 (9th  
25 Cir. 1995) (noting that "constitutional claims are outside the  
26 purview of the Federal Tort Claims Act"). Smith dealt with the  
27 Gonzales Act, which has a provision worded almost identically to §  
28 233(a):

**§ 1089. Defense of certain suits arising out of medical  
malpractice**

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

1 including death, caused by the negligent or wrongful act or  
2 omission of any physician, dentist, nurse, pharmacist, or  
3 paramedical or other supporting personnel (including medical  
4 and dental technicians, nursing assistants, and therapists)  
5 of the armed forces, the National Guard while engaged in  
6 training or duty . . . , the Department of Defense, the Armed  
7 Forces Retirement Home, or the Central Intelligence Agency in  
8 the performance of medical, dental, or related health care  
9 functions (including clinical studies and investigations)  
10 while acting within the scope of his duties or employment  
11 therein or therefor shall hereafter be exclusive of any other  
12 civil action or proceeding by reason of the same subject  
13 matter against such physician, dentist, nurse, pharmacist, or  
14 paramedical or other supporting personnel (or the estate of  
15 such person) whose act or omission gave rise to such action  
16 or proceeding. This subsection shall also apply if the  
17 physician, dentist, nurse, pharmacist, or paramedical or  
18 other supporting personnel (or the estate of such person)  
19 involved is serving under a personal services contract  
20 entered into under section 1091 of this title.

12 10. U.S.C. § 1089(a). Both § 1089(a) and § 233(a) address claims  
13 for "damage for personal injury, including death" which result  
14 from certain federal officials involved in the "performance of  
15 medical, dental, or related health functions." Both subsections  
16 incorporate by reference 28 U.S.C. §§ 1346 and 2672 of the FTCA,  
17 and explain that the remedy provided by those subsections "shall  
18 be exclusive of any other civil action or proceeding by reason of  
19 the same subject matter." The Supreme Court has acknowledged the  
20 FTCA's "express preservation of employee liability" for Bivens  
21 claims in the context of 10 U.S.C. § 1089. Smith, 499 U.S. at  
22 166-67. Like 10 U.S.C. § 1089, § 233(a) of the Public Health  
23 Service Act incorporates the FTCA as an exclusive remedy, and like  
24 10 U.S.C. § 1089, § 233(a) incorporates that remedy's express  
25 preservation of employee liability for Bivens claims.

26 Defendants rely heavily upon the Second Circuit's opinion in  
27 Cuoco v. Moritsuqu, 222 F.3d 99, 107 (2d Cir. 2000), which held  
28 that the plain language of § 233(a) precluded Bivens actions.

1 Although Cuoco cites § 233(a), and its incorporation of the FTCA  
2 remedy, it appears that the court, for whatever reason, was not  
3 aware of what the FTCA remedy in fact consisted. If the Second  
4 Circuit had followed the statutory trail back to 28 U.S.C. § 2679,  
5 this Court can only opine that Cuoco would have adhered to the  
6 statutory mandate preserving Bivens claims. This Court therefore  
7 respectfully requests that the Second Circuit, as well as the  
8 several other courts that have followed Cuoco, reconsider their  
9 holdings. See, e.g., Anderson v. Bureau of Prisons, 176 F. App'x  
10 242, 243 (3d Cir. 2006) (unpublished); Lyons v. United States, No.  
11 4:03CV1620, 2008 WL 141576, at \*12 n.5 (Jan. 11, 2008)  
12 (unpublished); Lee v. Guavara, C/A/ No. 9:06-1947, 2007 WL  
13 2792183, at \*14 (D. S.C. Sept. 24, 2007) (unpublished); Fourstar  
14 v. Vidrine, No. 1:06-cv-916, 2007 WL 2781894, at \*4 (S.D. Ind.  
15 Sept. 21, 2007); Hodge v. United States, No. 3:06cv1622, 2007 WL  
16 2571938, at \*4-5 (M.D. Pa. Aug. 31, 2007) (unpublished); Coley v.  
17 Sulayman, Civ. Action No. 06-3762, 2007 WL 2306726, at \*4-5 (D.  
18 N.J. Aug. 7, 2007) (unpublished); Wallace v. Dawson, No.  
19 9:05CV1086, 2007 WL 274757, at \*4 (N.D.N.Y. Jan. 29, 2007)  
20 (unpublished); Barbaro v. U.S.A., No. 05 Civ. 6998, 2006 WL  
21 3161647, at \*1 (S.D.N.Y. Oct. 30, 2006) (unpublished); Williams v.  
22 Stepp, No. 03-cv-0824, 2006 WL 2724917, at \*3-4 (S.D. Ill. Sept.  
23 21, 2006) (unpublished); Cuco v. Fed. Medical Center-Lexington,  
24 No. 05-CV-232, 2006 WL 1635668, at \*20 (E.D. Ky. June 9, 2006)  
25 (unpublished); Arrington v. Inch, No. 1:05-CV-0245, 2006 WL  
26 860961, at \*5 (M.D. Pa. March 30, 2006) (unpublished); Foreman v.  
27 Fed. Corr. Inst., No. CIV A 504-CV-01260, 2006 WL 4537211, at \*8  
28 (S.D. W. Va. March 29, 2006) (unpublished); Pimentel v. Deboo, 411

1 F. Supp. 2d 118, 126-27 (D. Conn. 2006); Whooten v. Bussanich, No.  
2 Civ. 4:CV-04-223, 2005 WL 2130016, at \*3 (M.D. Pa. Sept. 2, 2005)  
3 (unpublished); Freeman v. Inch, No. 3:04-CV-1546, 2005 WL 1154407,  
4 at \*2 (M.D. Pa. May 16, 2005) (unpublished); Dawson v. Williams,  
5 No. 04 Civ. 1834, 2005 WL 475587, at \*8 (S.D.N.Y. Feb. 28, 2005)  
6 (unpublished); Lovell v. Cayuga Corr. Facility, No. 02-CV-6640L,  
7 2004 WL 2202624, at \*2 (W.D.N.Y. Sept. 29, 2004) (unpublished);  
8 Valdivia v. Hannefed, No. 02-CV-0424, 2004 WL 1811398, at \*4  
9 (W.D.N.Y. Aug. 10, 2004) (unpublished); Cook v. Blair, No. 5:02-  
10 CT-609, 2003 WL 23857310, at \*1 (E.D.N.C. March 21, 2003)  
11 (unpublished); Brown v. McElroy, 160 F. Supp. 2d 699, 703  
12 (S.D.N.Y. 2001).

13       The Supreme Court did not rely in Carlson on the express FTCA  
14 language preserving Bivens remedies because that language was  
15 added to the FTCA in 1988 - eight years after Carlson - as part of  
16 the Federal Employees Liability Reform and Tort Compensation Act.  
17 In effect, the 1988 amendment codified the holding in Carlson and  
18 made explicit the fact that Congress did not intend for the FTCA  
19 to preempt Bivens claims. Therefore, any ambiguity that may have  
20 existed prior to the 1988 amendment has long been extinguished.  
21 Frankly, the Court is surprised that neither the parties in this  
22 case, nor the Second Circuit in Cuoco, nor the many courts that  
23 have followed Cuoco without analysis, have noticed that the FTCA  
24 explicitly preserves the right to bring Bivens claims. Therefore,  
25 according to the plain text of § 233(a), Public Health Service  
26 officials are immune from suit under the circumstances provided by  
27 the FTCA, which does not include claims for constitutional  
28

1 violations; the PHS Defendants are therefore not entitled to  
2 immunity in this case.

3 **2. Legislative History**

4 The plain text ends the inquiry. The Court is compelled to  
5 follow the direct expression of intent in § 233(a). Period. Cf.  
6 U.S. ex rel. Lujan v. Hughes Aircraft Co., 243 F.3d 1181, 1187  
7 (9th Cir. 2001) ("If the statute is ambiguous, we consider the  
8 legislative history."). It is useful nevertheless to note that  
9 the legislative history in this case is equally direct. The  
10 relevant materials provide context for what Congress envisioned by  
11 preserving Bivens claims, and make clear that not only did  
12 Congress intend to preserve the Bivens remedy, but it intended to  
13 do so specifically in the context of § 233(a).

14 **a. Congress Intended to Preserve Bivens Because of the**  
15 **Difference Between Claims for Malpractice and**  
16 **Claims for Constitutional Violations**

17 A 1988 House Committee Report of the 1988 amendment to the  
18 FTCA stated the following:

19 The second major feature of section 5 [codified at 28 U.S.C.  
20 § 2679(b)(2)(A)] is that the exclusive remedy expressly does  
21 not extend to so-called constitutional torts. See Bivens v.  
22 Six Unknown Agents of the Federal Bureau of Narcotics, 403  
23 U.S. 388 (1971). Courts have drawn a sharp distinction  
24 between common law torts and constitutional or Bivens torts.  
25 Common law torts are the routine acts or omissions which  
26 occur daily in the course of business and which have been  
27 redressed in an evolving manner by courts for, at least, the  
28 last 800 years. . . . As used in H.R. 4612, the term 'common  
law tort' embraces not only those state law causes of action  
predicated on the 'common' or case law of the various states,  
but also encompasses traditional tort causes of action  
codified in state statutes that permit recovery for acts of  
negligence. A good example of such codification or tort  
causes of action are state wrongful death actions which are  
predominantly found upon state wrongful death statutes. It  
is well established that the FTCA applies to such codified  
torts. See, e.g., Richards v. United States, 369 U.S. 1, 6-7  
(1962); Proud v. United States, 723 F.2d 705, 706-07 (9th  
Cir. 1984), cert. denied, 467 U.S. 1252 (1984) applicability

1 of recreational use statute). A constitutional tort action,  
2 on the other hand, is a vehicle by which an individual may  
3 redress an alleged violation of one or more fundamental  
4 rights embraced in the Constitution. Since the Supreme  
5 Court's decision in *Bivens*, supra, the courts have identified  
6 this type of tort as a more serious intrusion of the rights  
7 of an individual that merits special attention.  
8 Consequently, H.R. 4612 would not affect the ability of  
9 victims of constitutional torts to seek personal redress from  
10 Federal employees who allegedly violate their Constitutional  
11 rights.

12 H.R. Rep. 100-700 (1988), as reprinted in 1988 U.S.C.C.A.N. 5945,  
13 5950 (emphasis added). Thus, Congress could not have been clearer  
14 that 28 U.S.C. § 2679, which is incorporated by reference into §  
15 233(a), was intended to preserve, not preclude, Bivens actions to  
16 redress constitutional violations. This congressional statement  
17 is particularly persuasive because, as legislative history goes,  
18 committee reports are given great weight. See Abrego Abrego v.  
19 The Dow Chemical Co., 443 F.3d 676, 687 (9th Cir. 2006).

20 It is not surprising that Congress, in preserving Bivens  
21 liability, emphasized the difference between constitutional torts  
22 and garden-variety malpractice claims, for the distinction is  
23 longstanding and important. To establish an Eighth Amendment  
24 violation for inadequate medical care a plaintiff must show  
25 "deliberate indifference to [his] serious medical needs." Estelle  
26 v. Gamble, 429 U.S. 97, 104 (1976). Such deliberate indifference  
27 may "manifest[]" itself through the intentional denial or delay of  
28 care or an intentional interference "with the treatment once  
prescribed." Id. at 104-05. However, neither an accident, an  
"inadvertent failure to provide adequate medical care," nor  
"negligen[ce] in diagnosing or treating a medical condition,"  
though each may be medical malpractice, is cognizable as a federal  
constitutional claim. Id. at 105-06. In short, a constitutional

1 violation is an intentional tort - a higher standard than a  
 2 negligence suit for medical malpractice based on a personal  
 3 injury.

4 Even the legislative history from § 233(a) itself - expressed  
 5 eighteen years before Congress would amend the FTCA to explicitly  
 6 preserve Bivens claims - reveals that Congress intended by §  
 7 233(a) to immunize PHS employees from garden-variety malpractice  
 8 claims, not from constitutional violations.<sup>12</sup>

9 \_\_\_\_\_  
 10 <sup>12</sup> To the extent that § 233(a) is at all ambiguous (which it  
 11 is not) as to whether it immunizes PHS employees from  
 12 constitutional as well as malpractice claims, the title of the  
 13 statutory subsection supports the Court's conclusion. See Bhd. of  
 14 R.R. Trainmen v. Baltimore & Ohio R.R. Co., 331 U.S. 519, 528-29  
 15 (1947) (noting that "the title of a statute and the heading of a  
 16 section" may be used "[f]or interpretive purposes . . . when they  
 17 shed light on some ambiguous word or phrase"). In this case, the  
 18 title of the relevant section, "DEFENSE OF CERTAIN MALPRACTICE AND  
 19 NEGLIGENCE ACTS," clearly indicates that Congress, even before it  
 20 amended the FTCA expressly to preserve Bivens claims, intended §  
 21 233(a) to apply to malpractice and negligence actions specifically.  
 22 Far from suggesting that the subsection covers constitutional  
 23 claims, then, the title shows that Congress meant by this section  
 24 to offer immunity for certain specific claims, and that those  
 25 claims did not include intentional (constitutional) torts.

26 When the statute was codified in the United States Code at 42  
 27 U.S.C. § 233(a), the title of the subsection was changed - without  
 28 any congressional amendment - from "DEFENSE OF CERTAIN MALPRACTICE  
 AND NEGLIGENCE ACTS" to "Exclusiveness of Remedy." Compare  
 Emergency Health Personnel Act of 1970, Pub. L. No. 91-623, §  
 223(a), 84 Stat. 1868, 1870 (1970) with 42 U.S.C. § 233(a)(1970).  
 To the extent that the subsection is ambiguous, its title affects  
 its meaning. In the context of "DEFENSE OF CERTAIN MALPRACTICE AND  
 NEGLIGENCE ACTS," the grant of immunity obviously refers to  
 malpractice and negligence actions; by contrast, in the context of  
 "Exclusiveness of Remedy," the text could apply in a much broader  
 fashion.

Nevertheless, there is no doubt about which version the Court  
 must follow. "Though the appearance of a provision in the current  
 edition of the United States Code is 'prima facie' evidence that  
 the provision has the force of law, . . . it is the Statutes at  
 Large that provides the 'legal evidence of laws.'" U.S. Nat'l Bank  
of Or. v. Indep. Ins. Agents of Am., Inc., 508 U.S. 439, 449  
 (1993). As "the Code cannot prevail over the Statutes at Large  
 when the two are inconsistent," United States v. Welden, 377 U.S.  
 95, 98 n.4 (1964), the Court will consider only the original

(continued...)

1 The provision in question was not a part of the original  
2 Public Health Service Act; rather, it was introduced as an  
3 amendment in the House during a congressional debate on December  
4 18, 1970. Representative Staggers, who introduced the amendment,  
5 stated that the House "ought to" adopt the amendment so that, "in  
6 the event there is a suit against a PHS doctor alleging  
7 malpractice, the Attorney General of the United States would  
8 defend them in whatever suit may arise." 91 Cong. Rec. H42542-32  
9 (daily ed. Dec. 18, 1970) (emphasis added). Representative  
10 Staggers emphasized that the amendment was "needed because of the  
11 low salaries that [PHS doctors] receive and in view of their low  
12 salaries, they cannot afford to take out the insurance to cover  
13 them in the ordinary course of their practice of medicine." Id.  
14 (emphasis added). Representative Hall supported the amendment but  
15 urged the committee to "look[]into the general problem in the  
16 United States of malpractice insurance." Id. The House approved  
17 the amendment. In context, then, the amendment obviously stemmed  
18 from concerns over liability for unintentional malpractice, not  
19 from attempts to avoid responsibility for the kind of intentional  
20 torts that would support a constitutional violation.

21 The only mention of the amendment in the Senate occurred  
22 three days later, when Senator Javitz expressed his support for  
23 "the provision for the defense of certain malpractice and  
24 negligence suits" which would protect doctors "in the event there  
25 is a suit against a PHS doctor alleging malpractice." 91 Cong.

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26  
27 <sup>12</sup>(...continued)  
28 version entitled "DEFENSE OF CERTAIN MALPRACTICE AND NEGLIGENCE  
ACTS," and with it that title's effect on the scope of the  
provision.

1 Rec. S42977 (daily ed. Dec. 21, 1970). Aside from these  
2 instances, the amendment, as far as the Court can tell, was never  
3 mentioned. Thus, even before the 1988 FTCA amendment, far from  
4 revealing an intent to immunize PHS doctors from intentional  
5 torts, the legislative history of § 233(a) shows that the  
6 amendment was clearly intended to protect PHS doctors from  
7 ordinary medical malpractice actions.<sup>13</sup>

8 **b. Congress Intended to Preserve Bivens in the**  
9 **Specific Context of § 233(a)**

10 The legislative history of the 1988 amendment to the FTCA  
11 reveals not only that Congress intended to preserve Bivens claims,  
12 but that it so intended specifically with respect to § 233(a).  
13 Some statutory context is in order.

14 This 1988 FTCA amendment - 28 U.S.C. § 2679 - renders the  
15 FTCA the exclusive remedy for all civil actions (except, inter  
16 alia, Bivens claims) against all federal employees. The  
17 legislative history to 28 U.S.C. § 2679 explains that the  
18 intention of the provision was to "remove the potential personal  
19 liability of Federal employees for common law torts committed  
20 within the scope of their employment, and would instead provide  
21 that the exclusive remedy for such torts is through an action  
22 against the United States under the Federal Tort Claims Act."  
23 H.R. Rep. 100-700, 1988 U.S.C.C.A.N. at 5947. In the same House

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24 <sup>13</sup> Such a distinction makes sense. Protecting low-paid Public  
25 Health Service doctors from astronomical malpractice insurance  
26 premiums due to run-of-the-mill personal injury claims is a  
27 reasonable, practical endeavor. Protecting individuals who  
28 intentionally inflict cruel and unusual punishment just because  
they happen to work for the Public Health Service is not. Would an  
individual who purposefully subjected a patient to surgery without  
anesthesia deserve immunity? A civilized society can answer this  
question only in the negative.

1 Report in which it articulated its reasons for preserving Bivens  
2 actions, Congress explained that it felt comfortable awarding such  
3 a broad swath of immunity because

4 [t]here is substantial precedent for providing an exclusive  
5 remedy against the United States for actions of Federal  
6 employees. Such an exclusive remedy has already been enacted  
7 to cover the activities of certain Federal employees,  
8 including: . . . 42 U.S.C. 233 regarding Public Health  
9 Service Physicians."

10 Id. at 5948. In other words, 28 U.S.C. § 2679 provided the same  
11 immunity as § 233(a), but extended that immunity to all federal  
12 employees. After the 1988 passage of 28 U.S.C. § 2679, all  
13 federal employees - not just certain specified federal employees  
14 such as PHS officials - are covered. See Smith, 499 U.S. at 172-  
15 73 (holding that the Federal Employees Liability Reform and Tort  
16 Compensation Act, including § 2679, applies both to "employees who  
17 are covered under pre-Act immunity statutes [such as § 233(a)] and  
18 those who are not," and noting that this immunity is limited by  
19 the "preserv[ation] of employee liability for Bivens actions").

20 Congress was aware of § 233(a) when it expanded immunity to  
21 all federal employees. Indeed, provisions like § 233(a) provided  
22 the example and incentive to so broaden that immunity. At the  
23 same time, Congress made clear that this immunity was intended to  
24 cover "routine" torts, and that a plaintiff whose constitutional  
25 rights had been violated remained free to pursue a Bivens claim  
26 against the individual federal employee in question. H.R. Rep.  
27 100-700, 1988 U.S.C.C.A.N. at 5947. In light of the explicit  
28 statutory text and legislative history, there can be no doubt that  
the FTCA - and § 233(a), which incorporates the FTCA's remedies by

1 reference - expressly allows for the Bivens claim that Mr.  
2 Castaneda seeks to bring in this case.

3 **C. Plaintiff's Allegations and Evidence, if True, Prove**  
4 **Constitutional Violations**

5 Ultimately, Defendants concede that an Eighth Amendment claim  
6 for unconstitutionally-inadequate medical care is not subsumed by  
7 a claim for medical malpractice; instead, they urge that  
8 Plaintiff's claims just don't make the constitutional cut, so to  
9 speak. As Defendants put it, "[t]he bottom line is that  
10 Plaintiff's claims form the basis for a medical malpractice action  
11 (a non-constitutional tort claim) against the United States, and  
12 not a Bivens claim against each Public Health Service Defendant."  
13 (Mot. 8.) Defendants acknowledge that Plaintiff's complaint  
14 alleges that the Public Health Service Defendants "'purposefully  
15 denied him basic and humane medical care for illegal and improper  
16 reasons,'" but posit that "[t]his vague and conclusory allegation  
17 fails to state any civil rights violation." (Id. 6. (quoting  
18 Compl.)). The Court rejects Defendants' attempt to sidestep  
19 responsibility for what appears to be, if the evidence holds up,  
20 one of the most, if not the most, egregious Eighth Amendment  
21 violations the Court has ever encountered.

22 There simply can be no dispute that Plaintiff has stated a  
23 cognizable claim for an Eighth Amendment violation. Mr. Castaneda  
24 quite obviously suffered from a serious medical condition -  
25 terminal penile cancer. The only question is whether his  
26 allegations, if true, show that Defendants were deliberately  
27 indifferent to his condition. The Court finds that they do.

28

1           Indeed, the Court finds perplexing the fact that Defendants  
2 would try to argue that Plaintiff's allegations are conclusory,  
3 given that Plaintiff has submitted thirty-three exhibits of  
4 Defendants' own official medical records documenting their  
5 knowledge of the fact that several physicians had concluded that  
6 Plaintiff's lesion was very likely penile cancer, and that he  
7 needed a biopsy - a straightforward procedure - to rule cancer  
8 out. These documents show that nevertheless, Defendants refused  
9 to grant Plaintiff this simple procedure for almost eleven months,  
10 even while they noted that his pain and suffering were severe and  
11 increasing, that his penis was emitting blood and discharge, and  
12 that a second growth had developed.

13           Therefore, if Plaintiff's evidence proves true, from the  
14 first time Castaneda presented with a suspicious lesion in March  
15 2006 through his release in February 2007, the care afforded him  
16 by Defendants can be characterized by one word: nothing. The  
17 evidence that Plaintiff has already produced at this early stage  
18 in the litigation is more thorough and compelling than the  
19 complete evidence compiled in some meritorious Eighth Amendment  
20 actions. Defendants will surely have an opportunity to contest or  
21 refute the evidence presented. But their assertion that  
22 Plaintiff's claim is not even cognizable is, frankly, frivolous.

23 **D. FTCA Remedy is Not Equally Effective as a Bivens Action**

24           The circumstances of this case illustrate why, as the Supreme  
25 Court concluded in Carlson, FTCA claims against the United States  
26 are not as effective a remedy as a Bivens claim against individual  
27 federal officials. First, and most importantly, as Defendants  
28 acknowledge, Plaintiff Castaneda may not bring his constitutional

1 claims for inadequate medical care against the United States under  
2 the FTCA because the United States has not waived sovereign  
3 immunity to be sued for constitutional torts. See F.D.I.C. v.  
4 Meyer, 510 U.S. 471, 478-480 (1994). It would turn logic on its  
5 head to hold that the FTCA is an "equally effective" remedy for  
6 constitutional violations as a Bivens action, Carlson, 446. U.S.  
7 at 19, when suits under the FTCA do not even allow for  
8 constitutional claims. See Vaccaro v. Dobre, 81 F.3d 854, 857  
9 (9th Cir. 1996) (holding that prisoner plaintiff did not have to  
10 serve the United States as a defendant in his Bivens claim for  
11 inadequate medical care "[b]ecause [plaintiff] did not and could  
12 not have sued the United States or its officers in their official  
13 capacity upon a Bivens claim").<sup>14</sup>

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14  
15 <sup>14</sup> Defendants rely primarily on the Second Circuit's decision  
16 in Cuoco v. Moritsugu, 222 F.3d 99 (2d Cir. 2000), for the  
17 proposition that § 233(a) was intended by Congress to preclude  
18 Bivens actions. For several reasons, the Court does not find this  
19 non-binding authority persuasive. First, and most importantly, the  
20 court in Cuoco did not recognize that § 233(a) explicitly  
21 incorporates by reference the FTCA remedy codified at 28 U.S.C. §  
22 2679, which, as discussed, expressly preserves the right to bring  
23 Bivens claims. Second, and relatedly, Cuoco does not address  
24 whether Congress viewed the FTCA as being equally effective as a  
25 Bivens action. The Supreme Court has held that this threshold  
26 issue must be established before declaring the FTCA an exclusive  
27 remedy at the expense of a Bivens claim. See Carlson, 446 U.S. at  
28 18-19. Yet, Cuoco never makes this finding, nor does the opinion  
analyze the four factors set forth in Carlson that explain why  
remedies under the FTCA and Bivens are not equally effective. 222  
F.3d at 107-09. Third, Cuoco does not adequately examine the  
differences between a state law medical negligence claim under the  
FTCA and a constitutional claim under Bivens. On the one hand,  
Cuoco states: "Of course Congress could not, by the simple  
expedient of enacting a statute, deprive Cuoco of her  
constitutional due process rights, but that is not what § 233(a)  
does." Id. at 108. In the next sentence, however, Cuoco asserts  
that § 233(a) "protects commissioned officers or employees of the  
Public Health Service from being subject to suit while performing  
medical and similar functions by requiring that such lawsuits be  
brought against the United States instead." Id. This analysis

(continued...)

1           Indeed, Defendants' contorted reasoning is revealed by its  
2 request for relief in this motion: Defendants ask this Court to  
3 hold that Congress, through § 233(a), intended the FTCA to be the  
4 exclusive cause of action for Castaneda's constitutional claims,  
5 and then, having thus converted the claim to an FTCA action  
6 against the United States, Defendants seek dismissal on the  
7 grounds that the United States may not be sued for constitutional  
8 torts under the FTCA. The Court will not indulge this backwards  
9 argument.

10           Second, an FTCA action is only allowed to the extent it would  
11 be allowed under state law. 28 U.S.C. § 1346(b). California caps  
12 non-economic damages in medical malpractice actions at \$250,000.  
13 See Cal. Civ. Code § 3333.2. In contrast, there is no cap on  
14 damages in Bivens actions. Plaintiff has a strong argument that  
15 \$250,000 would be inadequate to compensate his "ten months of  
16 pain, bleeding, anxiety, loss of sleep, and humiliation while in  
17 ICE's custody, the amputation of his penis, and nearly a year of  
18 grueling chemotherapy," not to mention his eventual death. (Opp'n  
19 19.)

20           Third, FTCA actions, unlike Bivens claims, preclude punitive  
21 damages. Yet the evidence that Plaintiff has presented thus far -  
22 through Defendants' own records - suggests a strong case for  
23 punitive damages because it shows that Defendants' behavior was  
24 both callous and misleading. The evidence suggests that they

25 \_\_\_\_\_  
26           <sup>14</sup>(...continued)  
27 overlooks the important fact that, as discussed, the United States  
28 cannot be sued for constitutional violations. Therefore, Cuoco's  
construction of § 233(a) does exactly what it claims it cannot do:  
deprive a plaintiff of a constitutional claim by relegating him to  
an action under the FTCA.

1 refused Castaneda's request for a biopsy despite their knowledge  
2 that several medical specialists suspected cancer and "strongly  
3 recommended" a biopsy to rule out that possibility. (Doyle Decl.  
4 Ex. 11.) Worse, the evidence suggests that not only did the  
5 individual Public Health Service Defendants ignore doctor  
6 recommendations to provide Castaneda with a simple procedure, they  
7 may also have lied about those recommendations.

8 For example, Defendant Esther Hui, M.D. stated in an official  
9 report that Dr. Wilkinson considered a biopsy or circumcision for  
10 Mr. Castaneda to be "elective." (Id. Ex. 5 ("Dr. Wilkinson  
11 called" and recommended a biopsy, which is "an elective outpatient  
12 procedure"). Similarly, another official DIHS report, written by  
13 Anthony Walker, claimed that "Dr. Masters stated that elective  
14 procedures this patient may need in the future are cytoscopy and  
15 circumcision." (Id. Ex. 20.) Yet the reports of Dr. Masters and  
16 Dr. Wilkinson never mention the word "elective." On the contrary,  
17 Dr. Wilkinson worried that the lesion "may represent . . . a  
18 penile cancer" and "require[d] urgent urologic assessment of  
19 biopsy" because "even benign lesions" in that area can be deadly.  
20 (Id. Ex. 4.) Dr. Masters stated the need to "rule out malignant  
21 neoplasm" and that "appropriate treatment would be circumcision  
22 [and] . . . a biopsy." (Id. Ex. 19.)

23 Further, Dr. Hui and the DIHS included this false  
24 characterization in official reports despite the fact that a TAR  
25 recognized that both doctors "strongly recommend admission,  
26 urology consultation, surgical intervention via biopsy," and  
27 despite that fact that Dr. Wilkinson reported that he had spoken  
28 to "the physicians at the correctional facility" and "[t]hey

1 understand the need for urgent diagnosis and treatment." (Id. Ex.  
2 11, 4.) Indeed, Dr. Hui herself recognized in a report that  
3 Castaneda might have cancer but "[s]ince this is an elective  
4 outpatient procedure, we decided that we would not admit him [to  
5 the hospital to have the procedure] at this time." (Id. Ex. 5.)

6 Plaintiff's evidence also suggests why Dr. Hui was so  
7 interested in characterizing the surgery as elective; "as such the  
8 Federal Government will not provide for such surgery."<sup>15</sup> (Id. Ex.  
9 17.) Plaintiff has thus submitted compelling evidence that  
10 Defendants purposefully mischaracterized Plaintiff's medical  
11 conditions as elective in order to refuse him care. Dr. Wilkinson  
12 reported that Defendants refused to admit Castaneda to the  
13 hospital for a biopsy because they wanted a "more cost effective"  
14 treatment. (Id. Ex. 4.) Official records document Defendants'  
15 circular logic that because they would not allow him to have the  
16 biopsy, "he DOES NOT have cancer at this time"; because he does  
17 not have cancer, he therefore does not need a biopsy. (Id. Ex.  
18 8.) In other words, as long as they could label Castaneda's  
19 condition elective, Defendants could remain willfully blind about  
20 his lesion and avoid having to pay for its treatment. If

21 \_\_\_\_\_  
22 <sup>15</sup> The Court has serious questions as to the  
23 constitutionality of a policy of refusing to pay for all medical  
24 treatment that can be characterized as "elective" because, as  
25 evidenced by this case, the label fails to identify accurately who  
26 needs care. See, e.g., Brock v. Wright, 315 F.3d 158, 164 n.3 (2d  
27 Cir. 2003) ("Merely because a condition might be characterized as  
28 'cosmetic' does not mean that its seriousness should not be  
analyzed using the kind of factors" employed in normal Eighth  
Amendment jurisprudence). DIHS labeled the treatment in this case  
"elective" even while acknowledging that Castaneda's condition was  
so "severe" that he would need a "resection" - full or partial  
removal of the penis. (Doyle Decl. Ex. 14.) Indeed, Plaintiff's  
evidence suggests that Dr. Hui defined "elective" so broadly that  
she believes the term to encompass life-saving treatment.

1 Plaintiff's evidence holds up, the conduct that he has established  
2 on the part of Defendants is beyond cruel and unusual.<sup>16</sup>

3  
4

5 **IV. CONCLUSION**

6 Based on the foregoing analysis, motion to dismiss is DENIED.

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8 IT IS SO ORDERED.

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11 Dated: March 11, 2008



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DEAN D. PREGERSON

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United States District Judge

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22 <sup>16</sup> After all, Plaintiff has submitted powerful evidence that  
23 Defendants knew Castaneda needed a biopsy to rule out cancer,  
24 falsely stated that his doctors called the biopsy "elective", and  
25 let him suffer in extreme pain for almost one year while telling  
26 him to be "patient" and treating him with Ibuprofen,  
27 antihistamines, and extra pairs of boxer shorts. Everyone knows  
28 cancer is often deadly. Everyone knows that early diagnosis and  
treatment often saves lives. Everyone knows that if you deny  
someone the opportunity for an early diagnosis and treatment, you  
may be - literally - killing the person. Defendants' own records  
bespeak of conduct that transcends negligence by miles. It  
bespeaks of conduct that, if true, should be taught to every law  
student as conduct for which the moniker "cruel" is inadequate.