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## **Reservations About Extending *Bivens* to Reservations: Seeking Monetary Relief Against Tribal Law Enforcement Officers for Constitutional Violations**

**Blake R. Bertagna\***

In 1675 and 1676, New England colonial settlements were ravaged by what one colonist penned a “dredffull bludy shower” of war.<sup>1</sup> According to another colonist, the English settlements had been transformed into a “burdensome and menstrous cloth” to be cast aside.<sup>2</sup> Another colonist lamented that “[n]othing could be expected but an utter Desolation.”<sup>3</sup> June 1675 marked the beginning of what historians have called “King Philip’s War”—a brutal conflict between several American Indian peoples and English colonists residing in the New England region.<sup>4</sup>

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1. JILL LEPORE, *THE NAME OF WAR* 73 (1998) (quoting colonist Philip Walker).

2. *Id.* (quoting colonist Edward Wharton).

3. *Id.* at 72 (quoting colonist Nathaniel Saltonstall).

4. *Id.* at XV. Historians have disputed calling this war “King Philip’s War.” Some have proposed calling the war a “Puritan Conquest,” a name that reflects the colonists’ conduct and aggression that contributed to the conflict. *Id.* Others have suggested referring to the conflict as “Metacom’s Rebellion,” a name that accurately reflects King Philip’s real name, Metacom. *Id.* One other camp has proposed referring to the conflict as an Indian civil war because of the Native American involvement on both sides of the conflict. *Id.*

The war inflicted severe losses on both sides. During King Philip's War, approximately six to eight hundred English died in battle.<sup>5</sup> Based upon the total colonial population at that time, the colonists' death rate was "nearly twice that of the Civil War and more than seven times that of World War II."<sup>6</sup> American Indians fared far worse. According to one account, the English killed nearly three thousand American Indians, which is an astounding loss based upon a total population of twenty thousand.<sup>7</sup> Moreover, many Indians who survived the vicious struggle had to flee from their homes, had their property taken from them, or were sold into slavery.<sup>8</sup>

King Philip's War is merely one example of how the divergent cultures of American Indians and English colonists, and ultimately Americans, have defined a perpetual power struggle for sovereignty and identity on this land between warring peoples.<sup>9</sup> The relationship between the United States and its indigenous populations has endured for over three centuries, and still the contest for sovereignty persists today. The Federal Government's view of its relationship with, and responsibilities to, this country's indigenous people has shifted back and forth like a seesaw between separatism and paternalism.

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5. ERIC B. SCHULTZ & MICHAEL J. TOUGIAS, KING PHILIP'S WAR 4 (1999).

6. *Id.*

7. *Id.* at 5.

8. *Id.*

9. Although numerous factors, particularly the colonists' ever-growing territorial expansion, combined over a period of time to spark King Philip's War, the event that seems to have been the last straw for the Indians was a jurisdictional dispute over which sovereign had the right to try and punish several Indians who were accused of murdering another Indian. YASUhide KAWASHIMA, IGNITING KING PHILIP'S WAR 35-50, 66-87 (2001). An Indian named John Sassamon mysteriously disappeared and was later discovered dead not long after he betrayed King Philip's trust by warning the Governor of Plymouth that Philip was preparing for an attack on the English colonists. *Id.* at 85-89. Three Indian suspects were identified. Under the Indians' legal system, a murder of an Indian by Indians was a matter for the Indian legal system to resolve. *Id.* at 112-13. Under the English legal system, however, because the alleged crime occurred within the boundaries of the Plymouth colony, the colonists' courts were the appropriate forum for the murder trial. *Id.* In the end, the colonists tried the three Indians for murder, found them guilty, and sentenced them to death. *Id.* at 119-26. The murder trial symbolized another encroachment by the English colonists onto the Indians' culture and another step toward complete domination by the English, which the Indians would not sit back and allow.

In 1970, President Richard M. Nixon announced that it was time “to break decisively with the past” by entering into a new era for “tribal self-determination.”<sup>10</sup> President Nixon stated this shift in federal policy would “strengthen the Indian’s sense of self-autonomy without threatening his sense of community.”<sup>11</sup> The first piece of major legislation aimed at achieving self-determination was the Indian Self-Determination and Education Assistance Act of 1975 (“ISDEAA”).<sup>12</sup> Congress enacted the ISDEAA to “respond to the strong expression of the Indian people for self-determination by assuring maximum Indian participation in the direction of . . . Federal services to Indian communities so as to render such services more responsive to the needs and desires of those communities.”<sup>13</sup> The ISDEAA authorized the Federal Government to enter into contracts with Indian tribes under which tribes would agree to supply federally funded services that the government would have otherwise provided.<sup>14</sup>

One program that the ISDEAA enabled tribes to assume was law enforcement in Indian country,<sup>15</sup> which had traditionally been performed by the Bureau of Indian Affairs (“BIA”). Congress later enacted the Indian Law Enforcement Reform Act of 1990 (“ILERA”) to clarify the law enforcement authority that could be exercised by the BIA in Indian country and to authorize the delegation of such authority to Indian tribes.<sup>16</sup> Thus, under the ISDEAA and the ILERA, Indian tribes can em-

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10. Richard M. Nixon, Special Message to the Congress on Indian Affairs (July 8, 1970), *available at* <http://www.presidency.ucsb.edu/ws/index.php?pid=2573>.

11. *Id.*

12. Pub. L. No. 93-638, 88 Stat. 2203 (codified as amended at 25 U.S.C. §§ 450-458bbb-2 (2006)).

13. 25 U.S.C. § 450a (2006).

14. *Id.* § 450f. The author will use the term “Indian” in this Article to refer to members of federally recognized tribes.

15. The author will use the term “Indian country” in this Article to refer to territory over which an Indian tribe has a claim of sovereignty recognized by the Federal Government. *See* 18 U.S.C. § 1151 (defining “Indian Country” as “all land within the limits of any Indian reservation under the jurisdiction of the United States government,” “all dependent Indian communities within the borders of the United States,” and “all Indian allotments”).

16. Pub. L. No. 101-379, 104 Stat. 473 (codified as amended at 25 U.S.C. §§ 2801-09 (2006)).

ploy their own tribal employees or officers who are authorized to act in the same capacity as that of BIA employees or officers.

Inherently, the receipt of authority opens up the possibility for an abuse of authority. Since the Reconstruction Era following the Civil War, federal legislation has been in place to protect private citizens from, and to grant them a right to monetary relief for, the abuse of authority by those acting under color of *state* law.<sup>17</sup> A similar right of relief against those acting under color of *federal* law did not arise, however, until the U.S. Supreme Court decided to create one in 1971 with its decision in *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*.<sup>18</sup> In *Bivens*, the Court held that a private party could recover money damages from a federal officer for violations of the party's Fourth Amendment right against unreasonable searches and seizures.<sup>19</sup>

The right to monetary relief granted under *Bivens* has important implications for tribal law enforcement officers who are operating under a contract or grant of authority from the Federal Government under the ISDEAA or the ILERA. If the BIA has authorized an Indian tribe's law enforcement officers to carry out functions that the BIA would otherwise be performing, and if the Federal Government awards federal funds to that Indian tribe to carry out such functions, some might argue that such tribal officers are *de facto* federal officers and subject to liability under *Bivens*. In fact, certain plaintiffs have attempted to make such an argument. Surprisingly, even though *Bivens* was decided over thirty-five years ago, neither the courts nor the academic literature have substantively explored the availability of a *Bivens* remedy against a tribal officer for unconstitutional conduct.

This Article will engage in such an analysis. Part I briefly summarizes the history and nature of statutory relief available to private parties to seek damages against an officer acting under color of state law and provides an overview of the Supreme Court's decision in *Bivens*. Part II reviews the ISDEAA and those provisions that allow the Federal Government to enter into contracts with Indian tribes to provide law enforce-

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17. See, e.g., 42 U.S.C. § 1983.

18. 403 U.S. 388 (1971).

19. *Id.* at 389.

ment services. Part III analyzes the language of the ISDEAA and ILERA and argues that these statutes only allow the BIA to authorize tribal officers to enforce federal law, but that tribal officers already have inherent authority to enforce tribal law. As a result, a tribal officer can be considered a federal officer for purposes of *Bivens* only when he or she is acting under authority granted by the Federal Government pursuant to these two statutes, requiring that (1) the officer has express authority, either in a self-determination contract, a special commission, or some other express memorandum or agreement, to enforce federal law and that (2) the officer is in the process of enforcing federal law when he or she engages in unconstitutional conduct. Part IV discusses the Supreme Court's limited extension of *Bivens* to new contexts in the past and its current general reluctance to extend *Bivens*. Based upon Congress's active presence within the area of federal Indian policy and the Supreme Court's cautious posture on *Bivens*, Part IV argues that despite the possibility of treating a tribal officer as a federal officer in the limited circumstances described above, *Bivens* should not be extended to this new context. Part V offers a brief conclusion.

#### I. A Right to Damages for Violations of Constitutional Rights Under Color of Law

As the “[f]ather of the Constitution”<sup>20</sup> and the “principal author of the Bill of Rights,”<sup>21</sup> James Madison understood all too well the precarious predicament presented by the symbiotic relationship between power and government. Inscribed on the walls of the Library of Congress's Memorial Hall are words that Madison delivered to the Virginia State Constitutional Convention in 1829: “The essence of government is power; and power, lodged as it must be in human hands, will ever be liable to abuse.”<sup>22</sup> The Founders understood that in forming “a more perfect Union,”<sup>23</sup> they were relinquishing the “state of Nature,”

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20. Steven G. Calabresi, *Text v. Precedent in Constitutional Law*, 31 HARV. J.L. PUB. POL'Y 947, 949-50 (2008).

21. *Lee v. Weisman*, 505 U.S. 577, 589 (1992).

22. James Madison, Speech in the Virginia Constitutional Convention (Dec. 2, 1829), in JAMES MADISON: WRITINGS 824 (Jack N. Rakove ed., 2d. ed. 1999), *available at* <http://www.loc.gov/loc/walls/madison.html>.

23. U.S. CONST. pmbl.

described by John Locke, and entering into a social contract that would require them to “remain unalterably a subject” to the Union’s laws.<sup>24</sup>

Nonetheless, despite the agreement to form a government to accomplish the public good, some of the Founders, namely the Antifederalists, did not believe “that individuals should relinquish all their natural rights” because “[s]ome are of such a nature that they cannot be surrendered.”<sup>25</sup> To that end, Madison offered the Bill of Rights as a protection of Americans’ “inalienable” rights from the abuse of governmental authority.<sup>26</sup> Since 1791, Congress and the Supreme Court have created specific rights of relief, allowing individuals to seek money damages from those acting under color of state and federal law for violating those inalienable rights.

A. *42 U.S.C. § 1983*

In the aftermath of the Civil War, “race relations in the South became increasingly turbulent.”<sup>27</sup> Racist assaults were often driven by the Ku Klux Klan, which launched “a wave of murders and assaults . . . against both blacks and Union sympathizers.”<sup>28</sup> Worst of all, state governments were not effectively punishing Klan members or rendering justice to their victims: “These acts of lawlessness went unpunished . . . because Klan members and sympathizers controlled or influenced the administration of state criminal justice.”<sup>29</sup> In 1871, President Ulysses S. Grant urged Congress to enact “federal legislation to curb this rising tide of violence,”<sup>30</sup> and Congress responded rapidly

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24. JOHN LOCKE, *SECOND TREATISE OF GOVERNMENT* (1689), reprinted in *POLITICAL WRITINGS OF JOHN LOCKE* §§ 121, 131 (David Wooton ed., 1993). See also JOHN LOCKE, *TWO TREATISES OF GOVERNMENT* 288 (Peter Laslett ed., Cambridge Univ. Press 1988) (1690).

25. Brutus, *On the Lack of a Bill of Rights*, in *THE ANTIFEDERALIST PAPERS* No. 84, at 243 (Morton Borden ed., 1965).

26. See generally Paul Finkelman, *James Madison and the Bill of Rights: A Reluctant Paternity*, 1990 SUP. CT. REV. 301 (discussing Madison’s efforts to push the Bill of Rights through to ratification despite his own misgivings about them).

27. *District of Columbia v. Carter*, 409 U.S. 418, 425 (1973).

28. *Id.*

29. *Briscoe v. LaHue*, 460 U.S. 325, 337 (1983). The Civil Rights Act was “designed primarily in response to the unwillingness or inability of the state governments to enforce their own laws against those violating the civil rights of others.” *Carter*, 409 U.S. at 426.

30. *Carter*, 409 U.S. at 425-26.

by passing the Civil Rights Act of 1871 (also called the Ku Klux Klan Act of 1871).<sup>31</sup> Congress enacted the Civil Rights Act “to interpose the federal courts between the States and the people, as guardians of the people’s federal rights.”<sup>32</sup>

Section 1 of the Civil Rights Act, which was ultimately codified at 42 U.S.C. § 1983, provides a civil remedy for violations of constitutional rights caused by any person acting under color of state law.<sup>33</sup> Section 1983 “does not reach purely private conduct” or “actions of the Federal Government and its officers.”<sup>34</sup> Rather, to receive relief under § 1983, a plaintiff must first show that he or she has been “deprived of a right secured by the Constitution or laws of the United States.”<sup>35</sup> Section 1983 does not contain any substantive rights.<sup>36</sup> A plaintiff must demonstrate that “the alleged deprivation was committed under color of state law.”<sup>37</sup> To act under color of state law, the actor generally must exercise power “possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law.”<sup>38</sup> Although § 1983 was invoked sparingly until the middle of the twentieth century, it is frequently

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31. Act of Apr. 20, 1871, ch. 22, 17 Stat. 13 (1871). *See also Carter*, 409 U.S. at 426.

32. *Mitchum v. Foster*, 407 U.S. 225, 242 (1972).

33. 42 U.S.C. § 1983 (2006).

34. *Carter*, 409 U.S. at 424-25. A plaintiff can seek damages from a state official who acted under the color of state law in his or her personal capacity only. *See, e.g., Hafer v. Melo*, 502 U.S. 21, 31 (1991) (“[S]tate officials, sued in their individual capacities, are ‘persons’ within the meaning of § 1983.”). The Eleventh Amendment bars similar suits against state officials in their official capacity. *See, e.g., Will v. Mich. Dep’t of State Police*, 491 U.S. 58, 71 (1989) (holding that a suit against a state official acting in her official capacity constitutes a suit against the state and is therefore barred by the Eleventh Amendment, even if brought pursuant to § 1983). Local governments and officials can also be the subject of a § 1983 action. *See, e.g., Monell v. Dep’t of Soc. Servs.*, 436 U.S. 658, 690-91 (1978) (holding that local governments and local government officials sued in their individual capacities are liable under § 1983 if “the action alleged to be unconstitutional implements or executes a policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body’s officers” or if the unconstitutional act is governmental “custom”). In certain circumstances, private persons can be the subject of a § 1983 action, namely where they “willfully participate[ ] in joint action with state officials to deprive others of constitutional rights.” *Taylor v. List*, 880 F.2d 1040, 1048 (9th Cir. 1989).

35. *Am. Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 49 (1999).

36. *Thomas v. Roach*, 165 F.3d 137, 142 (2d Cir. 1999).

37. *Sullivan*, 526 U.S. at 49-50.

38. *West v. Atkins*, 487 U.S. 42, 49 (1988) (citation omitted).

used today as an effective shield against infringement of constitutional rights under color of state law.<sup>39</sup>

## B. Bivens

When Madison astutely observed that “power, lodged as it must be in human hands, will ever be liable to abuse,”<sup>40</sup> he wisely did not limit the potential for abuse to any specific level or branch of government. The Federal Government is as susceptible to abusing its authority as state governments. To that end, federalism was a vital component of the governmental structure created under the Constitution. In fact, the Framers’ intention in creating a federalist system was to enable the states to guard against the specter of federal tyranny.<sup>41</sup> Madison contemplated that state governments and the Federal Government would function together as “a double security . . . to the rights of the people.”<sup>42</sup>

Although Congress created a civil remedy against abuse of authority by those acting under color of state law early on, it has yet to create a parallel remedy for those acting under color of federal law. Instead, the U.S. Supreme Court created such a remedy in 1971 in *Bivens*.

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39. See, e.g., ERWIN CHEMERINSKY, FEDERAL JURISDICTION, 487-89 (5th ed. 2007).

40. James Madison, Speech at the Virginia Constitutional Convention (Dec. 2, 1829), available at [http://www.constitution.org/jm/18291202\\_vaconcon.txt](http://www.constitution.org/jm/18291202_vaconcon.txt).

41. Note, *Defending Federalism: Realizing Publius’s Vision*, 122 HARV. L. REV. 745, 746 (2008). See also THE FEDERALIST NO. 28, at 179 (Alexander Hamilton) (Jacob E. Cooke ed., 1961) (“It may safely be received as an axiom in our political system that the State governments will, in all possible contingencies, afford complete security against invasions of the public liberty by the national authority.”).

42. THE FEDERALIST NO. 51, at 291 (James Madison) (Jacob E. Cooke ed., 1961). Madison wrote the following:

In a single republic, all the power surrendered by the people is submitted to the administration of a single government; and the usurpations are guarded against by a division of the government into distinct and separate departments. In the compound republic of America, the power surrendered by the people is first divided between two distinct governments, and then the portion allotted to each subdivided among distinct and separate departments. Hence a double security arises to the rights of the people. The different governments will control each other, at the same time that each will be controlled by itself.

*Id.*

## 1. Facts and Procedural History

On November 26, 1965, Webster Bivens and his family awoke to the terror of six Federal Bureau of Narcotics agents suddenly barging into their apartment.<sup>43</sup> Federal agents, who believed that Mr. Bivens was guilty of narcotics violations, “manacled” Mr. Bivens in front of his wife and children, threatened to arrest Mr. Bivens’s entire family, and searched the home “from stem to stern.”<sup>44</sup> The agents then escorted Mr. Bivens to the federal courthouse, where they interrogated him, booked him, and subjected him to a strip search.<sup>45</sup> But shortly thereafter, Mr. Bivens was released without charges.<sup>46</sup>

The six narcotics agents had never secured a warrant for the searches and arrest and may not even have had probable cause to carry them out.<sup>47</sup> Mr. Bivens, alleging that he was humiliated and emotionally injured by the agents’ actions, decided that the agents should be held liable for unreasonable conduct.<sup>48</sup> In July 1967, Webster Bivens filed a lawsuit in federal court seeking damages in the amount of \$15,000 from each of the agents.<sup>49</sup>

Both the district court and the Second Circuit Court of Appeals ruled against Mr. Bivens.<sup>50</sup> Neither court’s conclusion should have been surprising. At the time, there was no statutory authorization for a private cause of action for damages against a federal officer for violating a private citizen’s constitutional rights. Furthermore, no court had previously determined that the Fourth Amendment, or any other amendment contained in the Bill of Rights, created an implicit private right of action for damages against a federal officer. In an earlier decision, parties had broached the issue, but the Supreme Court chose not to address the question at that time.<sup>51</sup>

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43. *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 389 (1971).

44. *Id.*

45. *Id.*

46. *Id.*

47. *Id.*

48. *Id.* at 389-90.

49. *Id.* at 389 n.1.

50. *Id.* at 389.

51. *Bell v. Hood*, 327 U.S. 678, 681 (1946).

## 2. Supreme Court Opinion

Once Mr. Bivens's case made its way to the Supreme Court, the Court had an opportunity to revisit the issue it had skirted in *Bell* twenty-five years earlier. This time, the Court addressed the question head-on and held that a violation of a private citizen's Fourth Amendment right "to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures . . . by a federal agent acting under color of his authority gives rise to a cause of action for damages consequent upon his unconstitutional conduct."<sup>52</sup>

Justice William Brennan, writing for the majority, authored a pithy opinion recognizing the newly created remedy. Justice Brennan focused most of the majority's opinion on stressing that Mr. Bivens's cause of action arose from the violation of a right that was unequivocally and absolutely created by the Fourth Amendment.<sup>53</sup> The Government had taken the position that Mr. Bivens had a remedy, but one that was available under state law only.<sup>54</sup> According to Justice Brennan, however, prior Supreme Court precedent had treated the Fourth Amendment right to be free from unreasonable search and seizure as a right independent of state law, a right whose violation could be actionable in federal court regardless of the legitimacy of the offending conduct under state law.<sup>55</sup> Justice Brennan bolstered this position by describing the potential for conflict and even hostility between state and federal laws.<sup>56</sup> The Court expressed concern that traditional state torts best suited for suing a federal official who conducts an unreasonable search or seizure, namely trespass and invasion of privacy, might fail to account for unique interests embedded in the Fourth Amendment's guarantee against unreasonable searches and seizures.<sup>57</sup>

Throughout his opinion, Justice Brennan highlighted the unique power that a federal officer exercises when operating under color of federal law. Justice Brennan noted that a federal

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52. *Bivens*, 403 U.S. at 389 (internal quotation marks and citation omitted).

53. *Id.* at 392.

54. *Id.* at 391-92.

55. *Id.* at 392-93 (citing *Gambino v. United States*, 275 U.S. 310 (1927); *Byars v. United States*, 273 U.S. 28 (1927)).

56. *Id.* at 394-95.

57. *Id.*

agent who exercises his official authority stands in a much different position vis-à-vis a private citizen than does the average private citizen.<sup>58</sup> A federal agent is endowed with a significant degree of authority to act in the name of the government and “that power, once granted, does not disappear like a magic gift when it is wrongfully used.”<sup>59</sup> As a result, “[a]n agent acting—albeit unconstitutionally—in the name of the United States possesses a far greater capacity for harm than an individual trespasser exercising no authority other than his own.”<sup>60</sup>

For these reasons, the Court decided that an independent federal right existed under federal law.<sup>61</sup> Furthermore, Justice Brennan reasoned that when a federal right is violated, federal law needs to furnish an adequate remedy to redress that violation. Justice Brennan noted that “where federally protected rights have been invaded, it has been the rule from the beginning that courts will be alert to adjust their remedies so as to grant the necessary relief.”<sup>62</sup> Quoting *Marbury v. Madison*, Justice Brennan observed that “[t]he very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury.”<sup>63</sup> Thus, as important as *recognition* of a federal right was an adequate *remedy* under federal law for its violation.

Justice Brennan recognized that there was no express or specific authoritative ground upon which the Court could recognize a right to legal damages for violation of the Fourth Amendment right.<sup>64</sup> Nonetheless, Justice Brennan created a ground for such a remedy from some general observations. First, he noted that “[h]istorically, damages have been regarded as the ordinary remedy for an invasion of personal interests in liberty.”<sup>65</sup> Second, he observed that “it is well settled that where legal rights have been invaded, and a federal statute provides

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58. *Id.* at 392.

59. *Id.*

60. *Id.*

61. *Id.*

62. *Id.* (quoting *Bell v. Hood*, 327 U.S. 678, 684 (1946)).

63. *Id.* at 397 (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803)).

64. *Id.* at 396 (“Of course, the Fourth Amendment does not in so many words provide for its enforcement by an award of money damages for the consequences of its violation.”).

65. *Id.* at 395-96.

for a general right to sue for such invasion, federal courts may use any available remedy to make good the wrong done.”<sup>66</sup> Third, Justice Brennan concluded that Mr. Bivens’s case “involve[d] no special factors counselling hesitation in the absence of affirmative action by Congress.”<sup>67</sup> For these reasons, Justice Brennan concluded that the Court had authority to create a private right of relief for damages.<sup>68</sup>

In his concurrence, Justice John Marshall Harlan added what might be seen as an additional factor that was a key to the Court’s decision to recognize a remedy in the form of monetary damages. Justice Harlan highlighted his concern that if the Court did not allow Mr. Bivens to seek such damages, Mr. Bivens would be without an adequate remedy under federal law.<sup>69</sup> Justice Harlan expressed his doubt that a plaintiff in Mr. Bivens’s position would find adequate relief in an equitable remedy, such as an injunction.<sup>70</sup> As a result, according to Justice Harlan, “it is apparent that some form of damages is the only possible remedy for someone in Bivens’ alleged position.”<sup>71</sup> Because of the obstacle that the doctrine of sovereign immunity poses against seeking legal relief against the government itself, Justice Harlan thought that a right to seek relief against the official responsible for the injury might be the only adequate remedy available to an injured individual such as Mr. Bivens.<sup>72</sup>

## II. The Indian Self-Determination and Education Assistance Act

The relationship between the Federal Government and Indian tribes residing within the United States’ borders is unique. In 1831, Chief Justice John Marshall described this relationship as “perhaps unlike that of any other two people[s] in existence” and as one “marked by peculiar and cardinal distinctions which exist nowhere else.”<sup>73</sup> Chief Justice Marshall noted the

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66. *Id.* at 396 (quoting *Bell*, 372 U.S. at 684) (internal ellipsis omitted).

67. *Id.*

68. *Id.* at 392-97.

69. *Id.* at 409-10 (Harlan, J., concurring) (“For people in Bivens’ shoes, it is damages or nothing.”).

70. *Id.* at 410 (Harlan, J., concurring).

71. *Id.* at 409-10 (Harlan, J., concurring).

72. *Id.* at 410 (Harlan, J., concurring).

73. *Cherokee Nation v. George*, 30 U.S. 1, 16 (1831).

dichotomous character of the relationship: an Indian tribe is “a distinct political society . . . capable of managing its own affairs and governing itself,” yet the land upon which Indian tribes reside “compose[s] a part of” and falls “within the jurisdictional limits” of the United States.<sup>74</sup> Stressing the latter, however, Chief Justice Marshall declined to recognize Indian tribes as “foreign nations.”<sup>75</sup> Rather, he concluded that tribes “may, more correctly, perhaps, be denominated domestic dependent nations . . . in a state of pupilage,” which led the Chief Justice to decide that “[t]heir relation to the United States resembles that of a ward to his guardian.”<sup>76</sup>

#### A. *Self-Determination and Law Enforcement*

Regardless of the accuracy of Chief Justice Marshall’s characterization of the federal-tribal relationship, this concept of the relationship as being one of fiduciary obligations such as ward-guardian (or perhaps trustee-beneficiary) has directed and defined the modern history of U.S. Indian policy.<sup>77</sup> The policy has proceeded through various stages, details of which are outside the scope of this Article, but the current stage began approximately in 1970 when President Richard M. Nixon announced the beginning of “tribal self-determination.”<sup>78</sup> The first piece of major legislation aimed at achieving self-determination was the ISDEAA.<sup>79</sup> In enacting the ISDEAA, Congress acknowledged that “the prolonged Federal domination of Indian service programs ha[d] served to retard rather than enhance the progress of Indian people and their communities by depriving Indians of the full opportunity to develop leadership skills crucial to the realization of self-government.”<sup>80</sup>

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74. *Id.* at 16-17.

75. *Id.* at 17.

76. *Id.*

77. See generally Reid Peyton Chambers, *Judicial Enforcement of the Federal Trust Responsibility to Indians*, 27 STAN. L. REV. 1213 (1975) (discussing the fiduciary relationship between the Federal Government and Indian tribes).

78. Nixon, *supra* note 10. See also Kevin K. Washburn, *Federal Criminal Law and Tribal Self-Determination*, 84 N.C. L. REV. 779, 809-31 (2006) (summarizing history of federal Indian policy).

79. See Washburn, *supra* note 78, at 817 (citing 25 U.S.C. §§ 450-458bbb-2 (2006)).

80. 25 U.S.C. § 450(a)(1) (2006). See *supra* note 12 and accompanying text (explaining how the ISDEAA codified Pub. L. No. 93-638, 88 Stat. 2203).

To change this trend, the ISDEAA authorized the Secretary of Health and Human Services and the Secretary of the Interior to enter into contracts with Indian tribes to allow tribes to “plan, conduct, and administer” certain federal programs that would otherwise be under the direction of the offices of the Departments of Health and Human Services or the Interior.<sup>81</sup> Such contracts are called “self-determination” or “638 contracts,” the latter reference arising from the public law number, Public Law 93-638, for the ISDEAA.<sup>82</sup>

Section 450f lists five categories of programs that the Secretary of the Interior may contract out to Indian tribes. One of these categories is programs “which the Secretary is authorized to administer for the benefit of Indians under the [Snyder] Act of November 2, 1921 (42 Stat. 208) [25 U.S.C. § 13], and any Act subsequent thereto.”<sup>83</sup> Section 450f clarifies that such programs are “contractable” regardless of the organization level within the Department of the Interior responsible for such programs.<sup>84</sup> This latter provision is relevant because 25 U.S.C. § 13 clarifies that the BIA, a division of the Department of the Interior, is the agency directly involved with programs provided to Indian tribes. Section 13 provides that “[t]he Bureau of Indian Affairs, under the supervision of the Secretary of the Interior, shall direct, supervise, and expend such moneys as Congress may from time to time appropriate, for the benefit, care, and assistance of the Indians throughout the United States . . . [f]or the employment of inspectors, supervisors, superintendents, clerks, field matrons, farmers, physicians, *Indian police*, Indian judges, and other employees.”<sup>85</sup>

Under § 13, the BIA is authorized to direct, supervise, and spend money for the employment of “Indian police.”<sup>86</sup> Therefore, under § 450f, Indian tribes can assume responsibility for direction and supervision of their own police force in Indian country.<sup>87</sup> Of course, there are procedures for securing self-determination contracts. Under the ISDEAA, an Indian tribe

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81. 25 U.S.C. § 450(a)(1).

82. *Demontiney v. United States*, 54 Fed. Cl. 780, 786 n.3 (2002).

83. 25 U.S.C. § 450f(a)(1)(B).

84. *Id.* § 450f(a).

85. *Id.* § 13 (emphasis added).

86. *Id.*

87. *See id.* § 450f.

must submit a proposal for a self-determination contract to the Secretary, who then has ninety days to approve and award the contract, or to deny the tribe's request.<sup>88</sup> If the Secretary denies the proposal, the Secretary must articulate his or her specific findings or legal authority as to why the proposal was unacceptable.<sup>89</sup> Throughout the course of performing under the self-determination contract, the Indian tribe must satisfy certain requirements, such as recordkeeping<sup>90</sup> and executing the contract in a competent manner.<sup>91</sup> In return for performing the self-determination contract, the Indian tribe receives federal funding for the administration of services under the contract.<sup>92</sup> By allowing Indian tribes to direct, supervise, and administer their own police force on their own lands, the Federal Government seeks to "assist [ ] Indian tribes in the development of strong and stable tribal governments, capable of administering quality programs and developing the economies of their respective communities."<sup>93</sup>

### B. *Policing Indian Country*

Before enactment of the ISDEAA, Indian tribes had little or no control over law enforcement upon their lands. With the creation of the reservation system in the early 1800s, federal troops essentially assumed complete control of law enforcement and maintenance of order on Indian lands.<sup>94</sup> Beginning in the 1860s, the Federal Government permitted American Indians to participate in law enforcement on reservations, but the Federal Government remained the controlling force behind tribal law enforcement.<sup>95</sup> During the first sixty years of the twentieth century, Indian tribes provided "grudging" and limited support to law enforcement on reservations.<sup>96</sup> Then, in the 1960s and

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88. *Id.* § 450f(a)(2).

89. *Id.*

90. *Id.* § 450c.

91. *Id.* § 450m.

92. *Id.* § 450j.

93. *Id.* § 450a(b).

94. STEWART WAKELING ET AL., U.S. DEP'T OF JUSTICE, *POLICING ON AMERICAN INDIAN RESERVATIONS* 41 (2001), available at <http://www.ncjrs.gov/pdffiles1/nij/188095.pdf>.

95. *Id.*

96. *Id.* at 42.

1970s, lobbying efforts on the part of Indian tribes highlighted the crime problem on Indian reservations, which led to the BIA's increased involvement with law enforcement on those reservations.<sup>97</sup> Although the BIA made efforts to reduce crime and "professionalize" tribal police forces, tribes themselves exercised little control over the structure and administration of their own law enforcement.<sup>98</sup> Finally, in 1975, Congress enacted the IS-DEAA in an effort to shift responsibility for law enforcement on reservations from the BIA to tribes themselves in the name of self-determination.<sup>99</sup> Since 1975, Indian tribes have increasingly entered into 638 contracts with the BIA to assume control over their own law enforcement.<sup>100</sup>

There are 562 Indian tribes currently residing within the United States' borders, whose lands cover almost fifty-three million acres.<sup>101</sup> Policing Indian country is a daunting task, and one that is miserably understaffed. A typical tribal police department has one to three police officers on patrol at any one time to protect about ten thousand tribal members spread out over approximately fifty thousand acres (equivalent to the State of Delaware).<sup>102</sup> According to a 2001 Department of Justice survey, "the ratio of police officers to residents in Indian country is 1.3 per thousand."<sup>103</sup> Many tribes do not even have their own

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97. *Id.* at 42-43. The high crime rates in Indian country are driven, in part, by the Federal Government's lack of interest and ability to properly tend to the crime occurring in Indian country. *See, e.g.*, Larry EchoHawk, *Child Sexual Abuse in Indian Country: Is the Guardian Keeping in Mind the Seventh Generation?*, 5 N.Y.U. J. LEGIS. & PUB. POL'Y 83, 99-100 (2001) ("U.S. Attorneys often decline to prosecute Major Crimes Act cases on the reservation because of a mixture of factual, legal, practical, or logistical problems."); B.J. Jones, *Welcoming Tribal Courts into the Judiciary Fraternity: Emerging Issues in Tribal-State and Tribal-Federal Court Relations*, 24 WM. MITCHELL L. REV. 457, 513 (1998) ("Federal prosecutors, busy with prosecuting a variety of more serious crimes, perhaps have been remiss in devoting the necessary attention to the problems that arise when non-Indians commit offenses in Indian country . . ."); Sarah M. Patterson, Note & Comment, *Native American Juvenile Delinquents and the Tribal Courts: Who's Failing Who?*, 17 N.Y.L. SCH. J. HUM. RTS. 801, 815-22 (2000) (discussing "crime epidemic" on Indian reservations).

98. WAKELING, *supra* note 94, at 43.

99. *Id.*

100. *Id.* at 7.

101. Bureau of Indian Affairs, Quick Facts, <http://www.doi.gov/bia/quickfacts.html> (last visited Apr. 6, 2009).

102. WAKELING, *supra* note 94, at 9.

103. *Id.* at 26.

police force.<sup>104</sup> The lack of an adequate police presence in Indian country is particularly troubling because of the high prevalence of crime on Indian reservations. According to information collected in 2000, 506.1 crimes occurred for every one hundred thousand residents throughout the United States, but 656.5 crimes occurred for every one hundred thousand residents on Indian reservations.<sup>105</sup> Even more dramatic was the finding that a resident of an Indian reservation was almost twice as likely to be the victim of an aggravated assault as any other resident throughout the United States.<sup>106</sup>

### C. *Contractual Arrangements for Policing Indian Country*

For those tribes that have police forces, there are three principal administrative arrangements. The most common exists under a 638 contract.<sup>107</sup> Under this arrangement, as described above, the tribe administers its police force under a contract with the BIA, which “establishes the department’s organization framework and performance standards and provides basic funding for the police function.”<sup>108</sup> In 1995, eighty-eight tribal police departments operated pursuant to a 638 contract.<sup>109</sup> The next most common arrangement is for a tribal police department to be directly administered by the BIA.<sup>110</sup> In 1995, sixty-four tribal police departments operated in this manner.<sup>111</sup> Under the third arrangement, a tribe can enter into a self-governance arrangement, referred to as a “compact” rather than “contract,” which exists pursuant to certain amendments

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104. *See id.* at v (“More than 200 police departments operate in Indian Country, serving an even larger number of tribal communities.”).

105. MATTHEW J. HICKMAN, U.S. DEP’T OF JUSTICE, TRIBAL LAW ENFORCEMENT, 2000, at 3 (2003), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/tle00.pdf>. To give context to the limited resources of law enforcement officials available for Indian country, consider that “[i]n 2000, the BIA and tribal agencies employed about 2,300 full-time officers and 1,160 support personnel. Other federal agencies employed over 88,000 officers and 72,000 support personnel [and] [s]tate/local agencies employed over 708,000 officers and 310,000 support personnel.” Robert McCarthy, *The Bureau of Indian Affairs and the Federal Trust Obligation to American Indians*, 19 BYU J. PUB. L. 1, 53 (2004).

106. HICKMAN, *supra* note 105, at 3.

107. WAKELING, *supra* note 94, at 7.

108. *Id.*

109. *Id.*

110. *Id.*

111. *Id.* at 8.

to the ISDEAA.<sup>112</sup> Under a self-governance compact, a tribe receives its funding as a block grant to go toward a host of federal services, granting the tribe more control over how it funds and administers its own law enforcement services.<sup>113</sup> As of 1995, twenty-two tribal police departments operated under a compact.<sup>114</sup>

### III. The Indian Law Enforcement Reform Act: Defining the Scope of the BIA's Authority Over Law Enforcement in Indian Country

Even though the ISDEAA authorized the Secretary of the Interior to transfer its responsibility for law enforcement in Indian country, and Indian tribes quickly began entering into self-determination contracts, the legal basis for the Secretary of the Interior's and the BIA's authority to exercise such jurisdiction in the first place was ambiguous. The BIA had been responsible for law enforcement in Indian country for over a century, yet the source and scope of its authority resided in a patchwork of legislative sources.<sup>115</sup> The Department of the Interior and the BIA had operated under a *mélange* of statutes, such as the Snyder Act<sup>116</sup> and the Indian Liquor Laws,<sup>117</sup> as well as various federal appropriation acts made for the purpose of "maintaining law and order on Indian reservations,"<sup>118</sup> but there was no singular, express statute giving the BIA authority to enforce the

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112. *Id.* In 1994, Congress amended the ISDEAA to allow Indian tribes to assume responsibility for all of the federal services on the reservation, rather than simply taking over a specific program, such as law enforcement. Indian Self-Determination Act Amendments of 1994, Pub. L. No. 103-13, 108 Stat. 4250 (1994). Under these self-governance compacts, the Indian tribe is awarded a block grant of federal funds, which the Indian tribe then chooses how to allocate among the various federal programs that the tribe administers under the compact. Washburn, *supra* note 78, at 819. A self-governance compact extends a great deal of flexibility and control to Indian tribes over the federal services provided on the reservation. WAKELING, *supra* note 94, at 8.

113. WAKELING, *supra* note 94, at 8.

114. *Id.*

115. S. REP. NO. 101-167, at 5 (1989), *reprinted in* 1990 U.S.C.C.A.N. 712, 713.

116. 25 U.S.C. § 13 (2006).

117. *See, e.g.*, 18 U.S.C. §§ 1154-56, 3055.

118. *See, e.g.*, First Deficiency Appropriation Act, 1944, Pub. L. No. 78-152, 58 Stat. 150, 182 (1944).

law in Indian country or defining what it was authorized to do in carrying out that function.<sup>119</sup>

In 1990, Congress passed the Indian Law Enforcement Reform Act (“ILERA”) to “provide[ ] comprehensive statutory authority for the Bureau of Indian Affairs to provide law enforcement services on Indian reservations and in Indian country.”<sup>120</sup> The ILERA created two subdivisions within the BIA: (1) the Office of Law Enforcement Services (“OLES”) became responsible for “carrying out the law enforcement functions of the Secretary in Indian country” and implementing the ILERA’s provisions;<sup>121</sup> and (2) the Branch of Criminal Investigations (“BCI”) became responsible for investigating and prosecuting offenses committed in violation of 18 U.S.C. §§ 1152 (the Federal Enclave Act) and 1153 (the Indian Major Crimes Act) in Indian country.<sup>122</sup> The ILERA expressly articulated what the BIA could do in performing its law enforcement duties (e.g., carry firearms, execute warrants, make arrests, etc.).<sup>123</sup> Additionally, the ILERA provided that the BIA could enter into agreements or contracts with Indian tribes to assist the BIA in fulfilling the law enforcement duties that it was authorized to perform under the ILERA.<sup>124</sup>

#### A. *The ILERA’s Statutory and Regulatory Language*

The ILERA makes an unequivocal distinction between the BIA’s authority to enforce federal law and the BIA’s lack of authority to enforce Indian law. Section 2802(c) states that the BIA is responsible for “the enforcement of Federal law and, *with the consent of the Indian tribe*, Indian law.”<sup>125</sup> Section 2803 asserts that the Secretary of the Interior may authorize BIA officers to “execute or serve warrants, summonses, or other orders relating to a crime committed in Indian country and issued under the laws of” the United States, but the BIA must receive authorization from the Indian tribe to authorize BIA officers to

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119. S. REP. NO. 101-167, at 5 (1989), *reprinted in* 1990 U.S.C.C.A.N. 712, 713.

120. Indian Law Enforcement Reform Act, Pub. L. No. 101-379, 104 Stat. 473 (codified as amended at 25 U.S.C. §§ 2801-09, 42 U.S.C. § 2991a).

121. 25 U.S.C. § 2802(b).

122. *Id.* § 2802(d).

123. *Id.* § 2803.

124. *Id.* § 2804(a).

125. *Id.* § 2802(c) (emphasis added).

do the same in relation to tribal laws.<sup>126</sup> Section 2803 similarly states that the Secretary of the Interior may authorize BIA officers to

make inquiries of any person, and administer to, or take from, any person an oath, affirmation, or affidavit, concerning any matter relevant to the enforcement or carrying out in Indian country of a law of either the United States or an Indian tribe *that has authorized the employee to enforce or carry out tribal laws*.<sup>127</sup>

Section 2804 recognizes the same distinction, stating that the BIA may enter into such agreements “to aid in the enforcement or carrying out in Indian country of a law of either the United States or an Indian tribe *that has authorized the Secretary to enforce tribal laws*.”<sup>128</sup> Lastly, § 2806 states that the ILERA “alter[s] neither the civil or criminal jurisdiction of . . . Indian tribes . . . nor the law enforcement, investigative, or judicial authority of any Indian tribe.”<sup>129</sup> In sum, the plain language of the ILERA makes it abundantly clear that the BIA’s inherent jurisdiction for law enforcement in Indian country reaches federal law only. To assert similar jurisdiction over tribal law, the BIA must receive the express consent of the tribe.

The regulations that the Secretary of the Interior has enacted in conjunction with the ILERA affirm this distinction. The regulations state categorically that “BIA officers will enforce tribal laws *only with* the permission of the tribe.”<sup>130</sup> The Secretary of the Interior has encouraged the BIA and contracting tribes to enter into Memoranda of Agreement (“MOAs”) and Memoranda of Understanding (“MOUs”) to describe law enforcement responsibilities of the BIA and the tribe as they relate to tribal law in Indian country.<sup>131</sup>

The Secretary of the Interior has declared that even though the BIA may have an agreement or contract with an Indian tribe, the mere existence of such an agreement or contract does

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126. *Id.* § 2803(2).

127. *Id.* § 2803(5) (emphasis added).

128. *Id.* § 2804(a) (emphasis added).

129. *Id.* § 2806(d).

130. 25 C.F.R. § 12.22 (2009) (emphasis added).

131. Internal Law Enforcement Services Policies, 69 Fed. Reg. 6,321 (Bureau of Indian Affairs Feb. 10, 2004).

not give the Indian tribe's law enforcement officers power to enforce federal law or to make them federal officers (each a critical point when evaluating the scope of *Bivens*).<sup>132</sup> Until a tribal officer is specially commissioned by the BIA to enforce federal law, the tribal officer is not a federal officer.<sup>133</sup> The prescribed method for commissioning tribal officers to execute federal law is to execute Cross Deputation Agreements ("CDAs") and issue Special Law Enforcement Commissions ("SLECs").<sup>134</sup> Tribal officers can be eligible for a SLEC once they have met certain requirements such as receiving a firearms certification and maintaining a felony-free criminal record.<sup>135</sup> These SLECs fill "a critical void in law enforcement in Indian country."<sup>136</sup> The Department of the Interior has acknowledged local and state law enforcement's lack of responsiveness to assist with certain crimes, such as domestic violence, in Indian country.<sup>137</sup> Without a special grant of authority from the BIA, "tribal law enforcement in many jurisdictions is limited to restraining these perpetrators until a county, state, or federal officer arrives."<sup>138</sup> Thus, "SLECs support the sovereignty of tribes by allowing tribal law enforcement officers to enforce Federal law, to investigate Federal crimes, and to protect the rights of people in Indian country, particularly against crimes perpetrated by non-Indians against tribal members."<sup>139</sup> The Secretary of the Interior's regulations and related memoranda illustrate how Indian tribes must take affirmative steps to have tribal officers authorized to enforce federal law, but no regulations or memoranda mention any need of power or approval from the BIA for tribes to enforce their own tribal laws. In fact, the regulations make clear that the BIA has no authority to do so without tribal consent.

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132. 25 C.F.R. § 12.21.

133. *Id.*

134. Internal Law Enforcement Services Policies, 69 Fed. Reg. at 6,321.

135. *Id.* SLECs must be renewed every three years. *Id.*

136. *Id.*

137. *Id.*

138. *Id.*

139. *Id.*

### B. *The ISDEAA-ILERA Relationship*

Although the ILERA and ISDEAA are separate statutes, as a practical matter the ILERA was an essential supplement to the ISDEAA for 638 contracts related to law enforcement. The ISDEAA implicitly endorsed the BIA's authority to carry out law enforcement services in Indian country and expressly sanctioned delegation of those services to Indian tribes,<sup>140</sup> but there really was no clear statutory basis at that time for the BIA's authority. Then came the ILERA, which laid out the BIA's law enforcement authority in Indian country and permitted transfer of that authority to tribal officers, but the ILERA did not provide for any kind of funding for an Indian tribe's law enforcement program. Thus, Indian tribes that want to assume control over law enforcement on their reservations and receive federal funding for their law enforcement programs must enter into a self-determination contract or self-governance compact pursuant to the ISDEAA.<sup>141</sup> But tribal officers who are operating under such a contract or compact are, to a certain extent, bound by the ILERA and its regulations.<sup>142</sup>

The relationship between the ISDEAA and ILERA is evident from the ILERA's language and accompanying regulations. The ILERA states that

[a]fter consultation with the Attorney General of the United States, the Secretary may prescribe under this chapter regulations relating to the enforcement of criminal laws of the United States and regulations relating to the consideration of applications for contracts awarded under the Indian Self-Determination Act to perform the functions of the Branch of Criminal Investigations.<sup>143</sup>

Thus, Congress built into the ILERA the necessary relationship between the ILERA and ISDEAA by providing that the Secretary of the Interior could promulgate regulations under the ILERA to control self-determination contracts awarded under the ISDEAA.<sup>144</sup> The ILERA not only provided an express

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140. *See generally* 25 U.S.C. §§ 450-458bbb-2 (2006).

141. *See generally* 25 U.S.C. §§ 2801-09; 42 U.S.C. § 2991a.

142. *See infra* notes 143-55 and accompanying text.

143. 25 U.S.C. § 2805 (2006).

144. *Id.*

authorization for what the BIA had already been doing in Indian country for over a century, but also for what Indian tribes had been doing under self-determination contracts for the previous decade pursuant to the ISDEAA.<sup>145</sup> Those legislators who enacted the ILERA acknowledged that tribal law enforcement officers had already been performing many of the BIA's functions in Indian country pursuant to self-determination contracts.<sup>146</sup> Congress understood that the Secretary of the Interior would need to enact regulations in relation to these ongoing practices under existing and future self-determination contracts. Congress enforced its position that the ILERA and its regulations were to work in conjunction with the ISDEAA by stating that nothing in the ILERA was to "prohibit or restrict the right of a tribe to contract the investigative program under the authority of Public Law 93-638."<sup>147</sup>

The ILERA's regulations state that an individual participating in a "tribal law enforcement program receiving Federal funding" is obligated to follow "minimum standards" in the ILERA's regulations.<sup>148</sup> The regulations assert that a tribal law enforcement program receiving federal funding is "subject to a periodic inspection or evaluation to provide technical assistance, to ensure compliance with minimum Federal standards, and to identify necessary changes or improvements to BIA policies."<sup>149</sup> Additionally, tribal law enforcement programs receiving federal funding must ensure that "all law enforcement officers complete a thorough background investigation no less stringent than required of a Federal officer performing the same duties."<sup>150</sup> Therefore, regulations that the Secretary of the Interior has enacted in connection with the ILERA refer to tribal law enforcement programs receiving federal funding, which could apply only to those self-determination contracts and self-governance compacts for law enforcement programs

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145. See *infra* note 151 and accompanying text.

146. See, e.g., *Hopland Band of Pomo Indians v. Norton*, 324 F. Supp. 2d 1067, 1073 (N.D. Cal. 2004) ("[R]outine law enforcement and police operation in Indian country" were already being carried out either directly or "under contract with the tribe." (citing H.R. REP. NO. 101-60, 101st Cong., 1st Sess. 5-6 (1989))).

147. 28 U.S.C. § 2802(d)(4)(i).

148. 25 C.F.R. § 12.11 (2009).

149. *Id.* § 12.12.

150. *Id.* § 12.32.

that have been executed under the ISDEAA. The ILERA does not set up a separate funding scheme for Indian tribes' law enforcement programs. As such, the ILERA not only establishes the basis for the BIA's authority to enforce federal law in Indian country and authorizes the transfer of that authority to tribal officers, but it also articulates guidelines for tribal officers who are acting under self-determination contracts and self-governance compacts pursuant to the ISDEAA.<sup>151</sup>

Arguably, Congress drafted the language of the ISDEAA in a sufficiently broad manner to bring the ILERA within its scope. Under the ISDEAA, the Secretary of the Interior could contract out "programs . . . which the Secretary is authorized to administer for the benefit of Indians under the Act of November 2, 1921 (42 Stat. 208), and any Act subsequent thereto."<sup>152</sup> Congress clearly understood the Snyder Act to authorize the Secretary of the Interior to administer law enforcement programs in Indian country. By the time Congress enacted the ILERA, the BIA had already specially commissioned approximately nine hundred Indian law enforcement officers.<sup>153</sup> But the ILERA also encompassed statutes that were enacted after the Snyder Act. Congress surely did not intend the language "*and any Act subsequent thereto*" to include every piece of legislation that Congress enacted after 1921, but likely intended this language to reach statutes passed as amendments of, or complements to, the Snyder Act. Section 13 of the Snyder Act authorized the

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151. In some ways, the ILERA merely established the legal grounds for what was already being done under the ISDEAA in practice. At the time that Congress enacted the ILERA, of the 900 law enforcement officers employed in Indian country, 700 had been commissioned as BIA Special Deputy Officers. S. REP. NO. 101-167, at 5 (1989), *reprinted in* 1990 U.S.C.C.A.N. 712, 713. It may have been for this very reason that Congress provided in the ILERA that the ILERA did "not invalidate or diminish any law enforcement commission or other delegation of authority issued under the authority of the Secretary before August 18, 1990." 25 U.S.C. § 2806(c). In *Hopland Band of Pomo Indians v. Norton*, the district court quoted a declaration submitted by the chairman of the Chemehuevi Indian Tribe, which maintains a reservation within the County of San Bernardino, California. 324 F. Supp. 2d at 1076 n.3. The chairman stated that from 1976 to 2000, the Chemehuevi Indian Tribe and the BIA operated under a 638 contract for wildlife and law enforcement services on the Chemehuevi Indian Reservation. *Id.* Under the contract, the BIA had issued SLECs to the Tribe's officers, authorizing them to enforce various federal laws on the Chemehuevi Indian Reservation. *Id.*

152. 25 U.S.C. § 450f(1)(B) (emphasis added).

153. S. REP. NO. 101-167, at 5 (1989), *reprinted in* 1990 U.S.C.C.A.N. 712, 713.

BIA to “direct, supervise, and expend. . . [Congressional appropriations] . . . for the benefit, care, and assistance of the Indians throughout the United States for . . . [g]eneral support and civilization . . . [and] the employment of . . . Indian police.”<sup>154</sup> The ILERA was aimed directly at clarifying and strengthening the Secretary of the Interior’s responsibility “for providing, or for assisting in the provision of, law enforcement services in Indian country.”<sup>155</sup>

In conclusion, the statutory language of the ISDEAA and ILERA and the related regulations demonstrate the partnership between these two statutes. To understand the law enforcement authority that can be exercised by an Indian tribe operating under a self-determination contract or self-governance compact, the source of that authority, and the limits of that authority, one must consult the ILERA and its provisions.<sup>156</sup>

### C. *Exceptions*

When read together, the ISDEAA and ILERA clarify that when the BIA enters into a contract or compact with an Indian tribe for law enforcement services, the BIA can authorize tribal officers to enforce federal law, but the BIA must explicitly and affirmatively do so.<sup>157</sup> Unless the BIA and an Indian tribe discuss and agree that the BIA will assist with enforcing tribal law, the BIA has no authority to do so.<sup>158</sup> In short, when tribal officers are merely enforcing tribal law, they are doing so under the tribe’s inherent sovereignty, not under any power granted by the BIA.

Congress was undoubtedly aware of the legal implications for Indian tribes and their officers, as well as for the Federal Government, by having tribal officers enforce federal law in Indian country. To that end, Congress expressly provided for two situations, and only two, in which a tribal officer could be con-

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154. 25 U.S.C. § 13.

155. 25 U.S.C. § 2802(a).

156. In *Hopland*, the district court recognized the partnership of the ISDEAA and the ILERA by holding that “those law enforcement services or programs established by the ILERA come within contracts for law enforcement services or programs under the ISDEAA.” 324 F. Supp. 2d at 1074.

157. 25 U.S.C. § 450f.

158. See *supra* notes 125-29 and accompanying text.

sidered a federal officer. Congress declared that “a person who is not otherwise a Federal employee” and who is “acting under authority granted by the Secretary under” the ILERA is considered “an employee of the Department of the Interior only for” two purposes: (1) “the provisions of law described in section 3374(c)(2) of Title 5”; and (2) “sections 111 and 1114 of Title 18.”<sup>159</sup>

### 1. Federal Tort Claims Act (“FTCA”)

Local and state law enforcement officers who are cross-deputized by the Federal Government enjoy certain immunities that federal officers who are acting under color of federal law enjoy. Title 5, § 3374(c) identifies statutory provisions under which state or local government employees assigned or on detail to a federal agency are considered protected federal employees. Section 3374(c)(2) states that “a State or local government employee on detail to a Federal agency . . . is deemed an employee of the agency for the purpose of . . . the Federal Tort Claims Act.”<sup>160</sup> Around the same time that Congress enacted the ILERA, it amended the ISDEAA to allow recovery under the FTCA for certain claims arising out of the performance of self-determination contracts.<sup>161</sup> This amendment expanded the Federal Government’s liability under the FTCA, permitting petitioners to sue the Federal Government for actions that “an Indian tribe, tribal organization or Indian contractor” commits “while acting within the scope of their employment in carrying out” a self-determination contract.<sup>162</sup> Thus, both the ILERA and ISDEAA harmoniously provide that tribal officers acting in accordance with those two statutes may qualify as federal officers for purposes of the FTCA.

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159. 25 U.S.C. § 2804(f).

160. 5 U.S.C. § 3374(c)(2). *See also* Petty v. United States, No. 02-1605, 2003 WL 22718254, at \*3 (6th Cir. Nov. 17, 2003) (cross-deputized local employees qualify as federal employees for purposes of FTCA).

161. Department of the Interior and Related Agencies Appropriation Act of 1991, Pub. L. No. 101-512, tit. III, § 314, 104 Stat. 1915, 1959-60 (1990), *as amended by* Department of the Interior and Related Agencies Appropriations Act of 1994, Pub. L. No. 103-138, tit. III, § 308, 107 Stat. 1379, 1416 (1993) (codified at 25 U.S.C. § 450f notes).

162. *Id.*

Under the FTCA, a plaintiff can sue the United States for money damages

for 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.<sup>163</sup>

Congress enacted the FTCA for the purpose of waiving “the Government’s immunity from actions for injuries to person and property occasioned by the tortious conduct of its agents acting within their scope of business.”<sup>164</sup> The FTCA arose from “a feeling that the Government should assume the obligation to pay damages for the misfeasance of employees in carrying out its work.”<sup>165</sup>

It is worth mentioning that the FTCA and *Bivens* constitute “parallel, complementary causes of action.”<sup>166</sup> They are distinct causes of action that are informed by distinct inquiries. The analysis of one does not control the outcome of the other. One of the key differences between the two is the identity of the defendant. Under the FTCA, the defendant is the United States; the FTCA does not provide a cause of action against individual government employees.<sup>167</sup> Under *Bivens*, the defendant is the individual officer.<sup>168</sup> In fact, the Supreme Court has recognized that *Bivens* is a more effective constitutional remedy than the FTCA. The Court’s conclusion was based on four findings: (1) *Bivens* provides a monetary remedy against individuals, not simply the government, which makes *Bivens* a better

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163. 28 U.S.C. § 1346(b)(1). *See also* Galvin v. Occupational Safety & Health Admin., 860 F.2d 181, 183 (5th Cir. 1988) (“It is beyond dispute that the United States, and not the responsible agency or employee, is the proper party defendant in a Federal Tort Claims Act suit.”).

164. Dalehite v. United States, 346 U.S. 15, 27-28 (1953).

165. *Id.* at 24.

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

167. Harbury v. Hayden, 522 F.3d 413, 416 (D.C. Cir. 2008). *See also* 28 U.S.C. § 2679(b)(1) (“The remedy against the United States provided by [the FTCA] . . . is exclusive . . .”).

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

deterrent against unconstitutional conduct; (2) *Bivens* allows for the recovery of punitive damages, which are statutorily prohibited under the FTCA; (3) *Bivens* allows the petitioner to have a jury trial, which is not an option in an FTCA lawsuit; and (4) *Bivens* provides more consistent and uniform protection, as FTCA actions exist only if the state in which the alleged misconduct occurred would authorize a cause of action for that misconduct.<sup>169</sup>

One other crucial distinction between *Bivens* and the FTCA is the source of the substantive cause of action. Under *Bivens*, federal law is the source of the substantive cause of action.<sup>170</sup> Under the FTCA, the law of the state where the alleged misconduct occurred provides the substantive cause of action.<sup>171</sup> A petitioner's claim for a government employee's conduct that violated her Fourth Amendment right, which may be a viable claim under *Bivens*, cannot constitute a cognizable claim under the FTCA.<sup>172</sup> Thus, "[t]he FTCA does not create new causes of action."<sup>173</sup> It merely "serves to convey jurisdiction when the alleged breach of duty is tortious under state law, or when the Government has breached a duty under federal law that is analogous to a duty of care recognized by state law."<sup>174</sup> The FTCA accomplishes this purpose by waiving the Federal Government's sovereign immunity, permitting it "to be held liable in

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169. *Carlson*, 446 U.S. at 20-22.

170. *Fed. Deposit Ins. Corp. v. Meyer*, 510 U.S. 471, 478 (1994) ("By definition, federal law, not state law, provides the source of liability for a claim alleging the deprivation of a federal constitutional right.").

171. *Id.*

172. *See id.* at 477-79 (holding that petitioner's Fifth Amendment Due Process claim was not cognizable under the FTCA). *See also* *Russ v. United States*, 62 F.3d 201, 204 (7th Cir. 1995) (citing *Meyer*, 510 U.S. at 478) ("Because the 'law of the place' refers to state law, and state law cannot provide liability for the violation of a federal constitutional right, constitutional wrongs cannot be remedied through the FTCA."). In *Carlson v. Green*, when the Supreme Court held that FTCA and *Bivens* actions are "complementary" causes of action, it did not mean that they are "integrated causes of action." *Washington v. Drug Enforcement Admin.*, 183 F.3d 868, 873 (8th Cir. 1999) (citing *Carlson*, 446 U.S. at 20-21). "That is, *Carlson v. Green* does not mean that a claimant can bring a constitutional tort cause of action under the FTCA. Rather, victims of purposeful wrongdoing on the part of federal law enforcement officers can bring specified intentional tort claims under the FTCA and constitutional tort claims under [*Bivens*]." *Id.* (citing *Carlson*, 446 U.S. at 20-21).

173. *Medina v. United States*, 259 F.3d 220, 223 (4th Cir. 2001).

174. *Id.* (citation omitted).

tort in the same respect as a private person would be liable under the law of the place where the act occurred.”<sup>175</sup>

Nonetheless, there are exceptions to this waiver. Title 28, § 2680(h) provides:

[a]ny claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights: *Provided*, That, with regard to acts or omissions of investigative or law enforcement officers of the United States Government, the provisions of this chapter and section 1346(b) of this title shall apply to any claim arising, on or after the date of the enactment of this proviso, out of assault, battery, false imprisonment, false arrest, abuse of process, or malicious prosecution. For the purpose of this subsection, “investigative or law enforcement officer” means any officer of the United States who is empowered by law to execute searches, to seize evidence, or to make arrests for violations of Federal law.<sup>176</sup>

Although the first part of § 2680(h) lists specific examples that are exceptions to the waiver, “[t]he proviso in § 2680(h) takes the claims it specifies out of the exceptions and makes the general waiver applicable to them.”<sup>177</sup> Thus, the § 2680(h) proviso “is an exception to the exceptions to the waiver of sovereign immunity,” and “[t]he net result is that the United States has waived its sovereign immunity for the claims listed in the § 2680(h) proviso.”<sup>178</sup>

Accordingly, the United States can be sued for assault, battery, false arrest, and other enumerated torts only if such torts are committed by an “investigative or law enforcement officer[ ] of the United States Government.”<sup>179</sup> Because the FTCA defines an “investigative or law enforcement officer” as one who is “empowered by law to execute searches, to seize evidence, or to make arrests for violations of Federal law,” one might assume

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175. *Id.* Generally, the Federal Government enjoys sovereign immunity from lawsuits seeking monetary damages. *See Fed. Deposit Ins. Corp.*, 510 U.S. at 475.

176. 28 U.S.C. § 2680(h) (2006).

177. *Nguyen v. United States*, 545 F.3d 1282, 1289 (11th Cir. 2008).

178. *Id.*

179. 28 U.S.C. § 2680(h).

that a tribal officer who is operating under an agreement pursuant to the ISDEAA or ILERA so qualifies.<sup>180</sup> Section 2803 of the ILERA dictates that the BIA is authorized to make arrests, execute warrants, and seize evidence to enforce federal law in Indian country.<sup>181</sup> Section 2804 of the ILERA states that the BIA can authorize tribal officers to assist with such law enforcement responsibilities and perform the enumerated actions that the BIA would ordinarily perform.<sup>182</sup> The inference of liability for tribal actors seems clear.

Federal courts, however, have decided otherwise. In *Dry v. United States*, tribal police officers arrested three individuals, members of the Choctaw Nation, for disturbing the peace and resisting arrest.<sup>183</sup> The three later sued the United States under the FTCA, alleging that the tribal officers committed several intentional torts against the plaintiffs.<sup>184</sup> The district court dismissed the plaintiffs' claims against the Federal Government.<sup>185</sup> On appeal, the Tenth Circuit had to decide the question of whether the tribal officers were federal "investigative or law enforcement officers," as that term is specifically defined in § 2680(h).<sup>186</sup> The Tenth Circuit held that when the tribal officers arrested the plaintiffs, the officers did not act as federal employees or agents, nor did they act under color of federal law.<sup>187</sup> Rather, the accused tribal officers were acting under authority inherent in their tribe's sovereignty.<sup>188</sup> As a result, "the tribal defendants acted as agents of the Tribe pursuant to their inherent sovereign power to exercise criminal jurisdiction over intratribal offenses."<sup>189</sup>

In *Trujillo v. United States* three tribal police officers of the Isleta Pueblo Tribe responded to a phone call from Erlinda Trujillo, who claimed that her estranged husband Robert Trujillo, Sr. was drunk and should not have custody of their children.<sup>190</sup>

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180. *Id.*

181. 25 U.S.C. § 2803.

182. *Id.* § 2804.

183. 235 F.3d 1249, 1251 (10th Cir. 2000).

184. *Id.* at 1252.

185. *Id.*

186. *Id.* at 1257.

187. *Id.* at 1254-55, 1258.

188. *Id.* at 1258.

189. *Id.* at 1255.

190. 313 F. Supp. 2d 1146, 1148 (D.N.M. 2003).

When tribal police officers found Mr. Trujillo, they took his two children and tried to place him under arrest, but he resisted.<sup>191</sup> Mr. Trujillo later filed a lawsuit under the FTCA, claiming that the officers physically attacked and beat him.<sup>192</sup>

The Isleta Pueblo Tribe had a 638 contract with the BIA for the tribe's law enforcement program.<sup>193</sup> Nonetheless, the district court declined to accept the position that "the mere existence of a Public Law 93-638 contract between [the] BIA and a tribe for the provision of law enforcement services automatically confers federal law enforcement authority upon the officers in tribal police departments."<sup>194</sup> The district court opined that a tribal officer cannot qualify as a federal investigative or law enforcement officer if he or she does not have authority to enforce federal law.<sup>195</sup> Examining the tribe's 638 contract, the court concluded that the contract did not state that enforcement of federal law was one of its objectives or that it allowed tribal officers to enforce federal law.<sup>196</sup> Rather, according to the BIA policy, tribal officers needed to be authorized pursuant to a SLEC to enforce federal law, which none of the three Isleta Pueblo tribal officers had received.<sup>197</sup> Lastly, when the three tribal officers encountered Mr. Trujillo, they were enforcing tribal law only.<sup>198</sup> As a result, even though the tribal officers were operating under a 638 contract, they were not federal investigative or law enforcement officers for purposes of the FTCA when they arrested Mr. Trujillo.<sup>199</sup>

The Fifth Circuit has agreed with the Tenth Circuit. In *Hebert v. United States*, a tribal officer of the Chitimacha Tribe responded to a domestic dispute between a non-Indian couple at a casino located on tribal land.<sup>200</sup> The officer ordered the boyfriend to leave the premises, but he refused, and the officer en-

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191. *Id.*

192. *Id.*

193. *Id.* at 1150.

194. *Id.*

195. *Id.*

196. *Id.* at 1151.

197. *Id.*

198. *Id.*

199. *Id.* at 1150-52. *See also* Vallo v. United States, 298 F. Supp. 2d 1231, 1237-38 (D.N.M. 2003) (holding that a tribal detention officer who did not have a SLEC was not an "investigative or law enforcement officer" under the FTCA).

200. 438 F.3d 483, 484 (5th Cir. 2006).

ded up arresting him.<sup>201</sup> During the arrest, the boyfriend was injured.<sup>202</sup> In *Hebert*, the tribe had a deputation agreement with the BIA pursuant to the ILERA.<sup>203</sup> Under the agreement, the tribal officer was cross-deputized and had a SLEC.<sup>204</sup> The boyfriend sued the United States pursuant to the FTCA.<sup>205</sup>

The Fifth Circuit distinguished the factual scenario in *Hebert* from that of *Dry*, noting that in *Dry* the plaintiffs were tribal members.<sup>206</sup> As a result, the tribal officer in *Hebert*—by arresting and injuring the non-Indian boyfriend—could not claim to have been acting under the tribe’s inherent sovereignty to resolve intratribal matters.<sup>207</sup> Nonetheless, the Fifth Circuit held that the officer was not an investigative or law enforcement officer for purposes of the FTCA.<sup>208</sup>

According to the Fifth Circuit, “the salient issue” was whether the tribal officer had acted within the scope of federal employment, and the court held that he had not.<sup>209</sup> Specifically, the court determined that at the time the tribal officer arrested the plaintiff at the casino, he was not employed as a BIA law enforcement officer or special agent, and he was not “acting in accordance with any special commission to assist the Bureau of Indian Affairs with providing law enforcement services.”<sup>210</sup> “In short, the record demonstrate[d] that no enforcement of federal law occurred when [the plaintiff] was arrested.”<sup>211</sup> Thus, according to the Fifth Circuit, even if a tribal officer is cross-deputized by the BIA and has a SLEC, that officer is not a federal officer for purposes of the FTCA (and hence, the ILERA or IS-DEAA) if he is not actually enforcing federal law when conducting the disputed law enforcement activity.<sup>212</sup>

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201. *Id.*

202. *Id.*

203. *Id.*

204. *Id.*

205. *Id.* at 485.

206. *Id.* at 487.

207. *Id.* at 486-87.

208. *Id.*

209. *Id.*

210. *Id.*

211. *Id.*

212. See also *Pais v. Sinclair*, No. EP-06-CV-137, 2006 WL 3230035, at \*3 (W.D. Tex. Nov. 2, 2006) (applying *Hebert* and holding that tribal officers were not federal law enforcement officers for purposes of the FTCA).

The Eighth Circuit evidently agrees with the Fifth and Tenth Circuits. In *Locke v. United States*, the plaintiff claimed that a tribal police officer had assaulted her during the course of an arrest.<sup>213</sup> The Sisseton-Wahpeton Sioux Tribe operated its police department under a 638 contract.<sup>214</sup> The record demonstrated that at the time of the arrest, the tribal police officer had received no federal certifications and that he was authorized to enforce tribal law only.<sup>215</sup> Although the 638 contract stated that the Tribe was obligated to “[p]rovide enforcement of all Federal, State, Tribal and local Government laws . . . in accordance with the Contractor’s area of jurisdiction” and although the tribe’s officers would sometimes accompany federal officers to enforce federal law, the district court determined that the tribal officer was not a federal law enforcement officer at the time of the arrest.<sup>216</sup> As a result, the district court dismissed the plaintiff’s FTCA claim for lack of subject matter jurisdiction,<sup>217</sup> and the plaintiff appealed. In an unpublished disposition, the Eighth Circuit affirmed.<sup>218</sup>

In *Washakie v. United States*, a district court within the Ninth Circuit relied upon the decisions in *Dry* and *Hebert* to reach the same conclusion.<sup>219</sup> In doing so, the district court distilled a two-prong analysis for determining whether a tribal police officer is a federal law enforcement officer for purposes of the FTCA.<sup>220</sup> The plaintiff in *Washakie* filed an FTCA claim against tribal officers, alleging that he was assaulted while in prison.<sup>221</sup> The district court dismissed the complaint for lack of subject matter jurisdiction on the ground that the tribal officers

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213. 215 F. Supp. 2d 1033, 1035 (D.S.D. 2002).

214. *Id.* at 1036.

215. *Id.* at 1038.

216. *Id.* at 1038-39. *See also* Johnson v. United States, No. CIV. 06-1023, 2007 WL 2688556, at \*3 (D.S.D. Sept. 11, 2007) (tribal correctional officer who had no authority to enforce federal law was not a federal law enforcement officer).

217. *Locke*, 215 F. Supp. 2d at 1036-45.

218. *Locke v. United States*, No. 02-3152, 2003 WL 21212167 (8th Cir. May 27, 2003). *See also* LaVallie v. United States, 396 F. Supp. 2d 1082, 1083-87 (D.N.D. 2005) (a tribal officer was not a federal law enforcement or investigative officer under FTCA because the tribe’s 638 contract did not expressly authorize tribal officers to enforce federal law and the tribal officer was enforcing tribal law only at the time of the arrest).

219. No. CV-05-462, 2006 WL 2938854, at \*4 (D. Idaho Oct. 13, 2006).

220. *Id.*

221. *Id.* at \*1.

were not federal law enforcement officers.<sup>222</sup> The court determined that for a tribal officer to qualify as a federal law enforcement officer, two requirements must be satisfied: (1) “a tribal police officer must be certified as a federal law enforcement officer for that officer to come under § 2680(h);” and (2) “the tribal officer must have acted under color of federal law at the time of the alleged tort.”<sup>223</sup> Because the tribal officers had not been certified or even satisfied the requirements for certification, the district court held that they were not federal law enforcement officers.<sup>224</sup>

## 2. Sections 111 and 1114

Title 18, § 111 proscribes forcible action against “any person designated in [18 U.S.C. §] 1114 . . . while engaged in or on account of the performance of official duties.”<sup>225</sup> Section 1114 in turn prohibits the killing or attempted killing of “any officer or employee of the United States or of any agency in any branch of the United States Government” or “any person assisting such an officer or employee.”<sup>226</sup> The ILERA states that a person who is not otherwise a federal employee, but who is exercising authority granted under the ILERA, is considered an employee of the Department of the Interior when acting in that capacity for purposes of 18 U.S.C. §§ 111 and 1114.<sup>227</sup> Thus, an individual who directs forcible action toward or attempts to murder a tribal police officer who is exercising law enforcement authority delegated to him or her under the ILERA may be held liable under 18 U.S.C. §§ 111 and 1114 for assaulting or attempting to kill a federal officer.

The Eighth Circuit has enjoyed considerable experience with questions of status under 18 U.S.C. §§ 111 and 1114. In

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222. *Id.* at \*4.

223. *Id.*

224. *Id.*

225. 18 U.S.C. § 111 (2006).

226. *Id.* § 1114. At one time, § 1114 enumerated a long list of specific law enforcement officers who would qualify under § 1114. *See, e.g.*, *United States v. Sapp*, 272 F. Supp. 2d 897, 902 (N.D. Cal. 2003). Over time, Congress amended the list so many times that it became “cumbersome” and an ineffective protection for federal officers. *Id.* at 903-04. In 1996, Congress amended § 1114 by removing the list of enumerated officials and replacing it with the current general language. *Id.* at 904.

227. 25 U.S.C. § 2804(f)(1)(B).

*United States v. Young*, the defendant had an altercation with a Rosebud Sioux Tribe police officer, which resulted in a conviction under § 111.<sup>228</sup> The defendant argued on appeal that the Government had not proven that the arresting officer was a federal officer for purposes of § 111, but the Eighth Circuit disagreed.<sup>229</sup> Because the tribe had a 638 contract with the BIA, and because that contract authorized the tribe's employees to execute law enforcement services that would otherwise be performed by BIA officers, the arresting officer was acting pursuant to that authority and was a federal officer within the meaning of § 111.<sup>230</sup> The Eighth Circuit noted that the mere existence of a 638 contract is insufficient to make one a federal officer for purposes of § 111, but where such a contract expressly grants the tribe authority to perform law enforcement functions ordinarily performed by the BIA pursuant to the ILERA, such a contract is enough to qualify any tribal officer acting thereunder as a federal officer for purposes of § 111.<sup>231</sup>

In *United States v. Oakie*, a tribal officer pursued the defendant and his friends in a car chase.<sup>232</sup> The defendant fired a rifle at and injured the officer.<sup>233</sup> The defendant was convicted under federal law for assault with a dangerous weapon and use of a firearm during a crime of violence, as well as for assaulting a federal officer with a dangerous weapon in violation of § 111.<sup>234</sup> Even though there was no 638 contract or ILERA agreement in place, the Eighth Circuit held that the officer was a federal officer or employee for purposes of § 111.<sup>235</sup> That the officer was employed by the Cheyenne River Sioux Tribe and was designated as a "Deputy Special Officer" by the BIA, a position which authorized such officers to investigate any violation of federal law in Indian country, was considered dispositive.<sup>236</sup>

The Eighth Circuit evidently recognizes that tribal officers qualify, without some of the typical strictures one sees in such

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228. 85 F.3d 334, 335 (8th Cir. 1996).

229. *Id.*

230. *Id.*

231. *Id.*

232. 12 F.3d 1436, 1439-41 (8th Cir. 1993).

233. *Id.* at 1439.

234. *Id.* at 1438-39.

235. *Id.* at 1440.

236. *Id.*

instances, as federal officers for purposes of 18 U.S.C. §§ 111 and 1114. Nonetheless, the Eighth Circuit has erred in ignoring a crucial limitation in the ILERA's provision for this exception. To qualify as a federal officer for purposes of this exception, the tribal officer must be "acting under authority granted by the Secretary under" the ILERA.<sup>237</sup> Another Eighth Circuit decision illustrates this problem. In *United States v. Schrader*, two Oglala Sioux tribal officers received a report about four individuals entering a home on the Pine Ridge Indian Reservation and assaulting its occupants.<sup>238</sup> The officers eventually caught up with the offenders and ended up in a physical scuffle with all of them.<sup>239</sup> All four defendants were charged with violating 18 U.S.C. § 111.<sup>240</sup> The defendants tried to get the charges dismissed at the district court level on the ground that the two tribal officers were not federal officers performing official duties for purposes of § 111; however, the district court denied their request.<sup>241</sup> The Eighth Circuit affirmed, holding that

[w]hen a 638 contract meets the definition of a § 2804(a) agreement, and when tribal officers designated under that contract enforce laws that BIA officers would otherwise enforce, § 2804(f) expressly provides that those tribal officers are afforded the same protection under 18 U.S.C. § 111 that Congress has afforded BIA employees.<sup>242</sup>

The court added that a tribal officer acting under authority granted pursuant to the ILERA qualifies as a federal officer "regardless of whether the officer is enforcing a tribal, state, or federal law, so long as he is engaged in the performance of his official duties rather than 'a personal frolic of his own.'"<sup>243</sup> Other Eighth Circuit decisions share this same mistaken analysis.<sup>244</sup>

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237. 25 U.S.C. § 2804(f) (2006).

238. 10 F.3d 1345, 1347-48 (8th Cir. 1993).

239. *Id.* at 1348.

240. *Id.* at 1347.

241. *Id.* at 1350.

242. *Id.*

243. *Id.* (quoting *United States v. Heliczer*, 373 F.2d 241, 245 (2d Cir. 1967)).

244. *See, e.g.*, *United States v. Roy*, 408 F.3d 484, 491 (8th Cir. 2005) (holding that tribal officer who initially pursued defendant for a tribal law matter, and who

In short, the Eight Circuit ignores the textual requirement that a tribal officer or employee be “acting under authority granted by the Secretary” pursuant to an agreement authorized under the ILERA.<sup>245</sup> For reasons explained above, the ILERA, ISDEAA, and their accompanying regulations unequivocally prohibit the BIA from enforcing tribal law in Indian country unless consent is received from the tribe. The Secretary of the Interior has expressly stated that the mere operation of tribal law enforcement pursuant to a 638 contract or compact does not make the tribe’s law enforcement officers federal officers.<sup>246</sup> Rather, the BIA must commission tribal law enforcement officers, on a case-by-case basis, before they exercise federal authority.<sup>247</sup> But even if the required commission has been executed, the commissioned tribal officer must still be “acting under the authority granted by the Secretary” to come within the § 111 exception.<sup>248</sup> The ILERA does not state that the tribal officer must be merely “possessing” such authority, but rather that the officer must be “acting” under that authority.<sup>249</sup> Most importantly, the only authority that the Secretary can grant to Indian tribes is the power to enforce federal law. Indian tribes already possess inherent authority to enforce tribal law in Indian country. Tribal officers cannot be “acting” under authority granted by the Secretary when the Secretary does not possess such authority. In sum, the Eighth Circuit’s position is unsupported by the ILERA’s text and directly conflicts with the Eighth Circuit’s analysis in the FTCA cases, where it has re-

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was assaulted by defendant, qualified as a federal officer under § 111 because the arresting officer was “undoubtedly performing a federal function—the provision of law enforcement services on Indian land—at the time of the incident.”); *United States v. Bettelyoun*, 16 F.3d 850, 852 (8th Cir. 1994) (upholding jury instruction that stated “[t]ribal officers who are employed by a tribe under a contract with the Bureau of Indian Affairs and who are specially commissioned deputy officers by the Bureau of Indian Affairs are federal officers for the purposes of 18 U.S.C. § 111;” and holding that tribal officers were federal officers even though they were enforcing tribal law only).

245. 25 U.S.C. §§ 2804(a), (f) (2006).

246. 25 C.F.R. § 12.21(b) (2009) (“Tribal law enforcement officers operating under a BIA contract or compact are not automatically commissioned as Federal officers; however, they may be commissioned on a case-by-case basis.”).

247. *Id.*

248. 25 U.S.C. § 2804(f).

249. *Id.*

quired the tribal officer to actually be enforcing federal law to qualify as a federal officer.<sup>250</sup>

### 3. Conclusion

Congress carved out two narrow niches where a tribal officer can assume the status of a federal officer. First, a tribal officer can be treated as a federal officer for purposes of 18 U.S.C. §§ 111 and 1114.<sup>251</sup> Second, a tribal officer can be treated as a federal officer for purposes of 5 U.S.C. § 3374(c)(2), which, as a practical matter, means for purposes of the FTCA.<sup>252</sup> On this basis alone, one could argue that Congress's act of expressly delineating two precise scenarios in which a tribal officer can qualify as a federal officer necessarily precludes the treatment of a tribal officer as a federal officer for purposes of a *Bivens* suit. Congress was likely aware of *Bivens* liability.<sup>253</sup> Yet, even though Congress debated and provided for situations when a tribal officer could qualify as a federal officer, including one scenario relating to tort liability, Congress did not provide for federal status in *Bivens* suits.

Simply because Congress allows tribal officers to qualify as federal officers in one context does not automatically mean that tribal officers can qualify as federal officers in another context. In *Snyder v. Navajo Nation*, law enforcement officers of the tribe's Division of Public Safety sued both the Indian tribe and the United States, claiming violations of the Fair Labor Standards Act ("FLSA").<sup>254</sup> The Navajo Nation had a 638 contract with the Federal Government.<sup>255</sup> The plaintiff-officers argued that because tribal officers can qualify as federal officers or employees in connection with the FTCA, this "means they are employees of the BIA for all purposes and can properly bring their FLSA suit against the United States under 29 U.S.C.

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250. See *supra* notes 213-18 and accompanying text.

251. 25 U.S.C. § 2804(f)(1)(B).

252. *Id.* § 2804(f)(1)(A).

253. See, e.g., *Cal. Indus. Prods., Inc. v. United States*, 436 F.3d 1341, 1354 (Fed. Cir. 2006) ("Congress is presumed to be aware of pertinent existing law."); *United States v. Male Juvenile*, 280 F.3d 1008, 1016 (9th Cir. 2002) ("In construing statutes, we presume Congress legislated with awareness of relevant judicial decisions.").

254. 382 F.3d 892, 894 (9th Cir. 2004).

255. *Id.* at 897.

§ 216(b).<sup>256</sup> The Ninth Circuit rejected this assertion and held that the tribal officers could not bring a FLSA case against the Federal Government.<sup>257</sup> Similarly, the ability of a tribal officer to qualify as a federal officer or employee for purposes of the FTCA, or 18 U.S.C. §§ 111 and 1114, does not mean that a tribal officer can qualify as a federal officer or employee for purposes of a *Bivens* lawsuit.<sup>258</sup>

Nevertheless, the ILERA does not expressly indicate that the two delineated exceptions are exclusive. But even if a court were to consider allowing tribal law enforcement officers to qualify as federal officers for purposes beyond the ILERA's two exceptions, such a consideration is confined by two essential guideposts. First, the Federal Government must have specially commissioned the tribal officer to enforce federal law. The primary way of executing such a commission is a SLEC.<sup>259</sup> Additionally, this threshold requirement may possibly be satisfied, in certain circumstances, by language in the self-determination contract, self-governance contract, cross-deputation agreement, or memorandum of understanding that expressly authorizes the tribal officers of the contracting tribe to enforce federal law. Second, the tribal officer must be exercising his or her official duties to enforce federal law. If the tribal officer is enforcing tribal law only, this second requirement cannot be satisfied. Therefore, even if a court looks beyond the two articulated exceptions to qualify as a federal officer for purposes of a *Bivens* suit, a tribal officer must have been commissioned to enforce federal law and must have been enforcing federal law at the time the plaintiff's constitutional rights were purportedly violated.

The ISDEAA and ILERA cannot be read or applied in isolation. The ISDEAA is the means by which Indian tribes can assume significant control over law enforcement on their reservations and receive federal funding for doing so. To understand the law enforcement authority that the Federal Government is or is not delegating to an Indian tribe when entering into a self-determination contract or self-governance compact,

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<sup>256.</sup> *Id.*

<sup>257.</sup> *Id.*

<sup>258.</sup> *Id.*

<sup>259.</sup> See *supra* note 134 and accompanying text.

however, one must refer to the ILERA and its regulations. The ILERA clarifies that tribal officers must be authorized by the Federal Government to enforce federal law in Indian country and explains the means by which such authorization can occur.<sup>260</sup> Furthermore, the ILERA places clear limits on the Federal Government's own law enforcement authority in Indian country, namely that the Federal Government cannot enforce tribal law without the tribe's consent.<sup>261</sup> Therefore, the ILERA confines the federal status of tribal law enforcement officers to two areas, and even if a court were to go beyond those two areas and consider allowing federal status for purposes of *Bivens*, the language of the ISDEAA and ILERA restricts a court's discretion. *Bivens* liability is properly extended only to tribal officers who were commissioned to enforce federal law and who were in the act of enforcing federal law when they engaged in alleged unconstitutional conduct.

#### IV. Extension of *Bivens*

Even if a court stretches the federal status of a tribal officer beyond the ILERA's two narrow exceptions, and even if a court finds that a tribal officer acted under color of federal law by being commissioned to enforce federal law and by enforcing federal law at the time the tribal officer violated a petitioner's constitutional rights, a court should decline to hold a tribal officer liable under *Bivens*. The possibility for *Bivens* liability has been around for almost forty years; however, as will be discussed below, the Supreme Court has only twice extended *Bivens* to recognize a non-statutory remedy for damages. Otherwise, "in most instances," the Supreme Court has "found a *Bivens* remedy unjustified."<sup>262</sup>

##### A. *Two Lonely Extensions*

The first extension of *Bivens* took place in *Davis v. Passman*, when the Supreme Court held that the implied cause of action in *Bivens* could be extended to a violation of the Due Pro-

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260. See *supra* notes 133-39 and accompanying text.

261. See *supra* note 130 and accompanying text.

262. *Wilkie v. Robbins*, 551 U.S. 537, 550 (2007).

cess Clause of the Fifth Amendment.<sup>263</sup> In *Davis*, a U.S. Congressman had terminated the employment of his female administrative assistant to replace her with a male.<sup>264</sup> The Congressman's former employee sued him for sex discrimination and sought damages.<sup>265</sup> The district court and Fifth Circuit, sitting *en banc*, ruled in the Congressman's favor, holding that there was no private right of action for damages for a violation of the Fifth Amendment's Due Process Clause.<sup>266</sup>

The Supreme Court reversed, determining that "[t]he equal protection component of the Due Process Clause" creates "a federal constitutional right to be free from gender discrimination."<sup>267</sup> The Court also concluded that the petitioner had a cause of action under the Due Process Clause because the judiciary is "the primary means" by which federal constitutional rights are enforced.<sup>268</sup> Finally, the Court decided that damages would be an appropriate remedy because there were "no special factors counselling hesitation in the absence of affirmative action by Congress."<sup>269</sup> Key to this conclusion were the Court's findings that "[h]istorically, damages have been regarded as the ordinary remedy for an invasion of personal interests in liberty"<sup>270</sup>; damages would be a "judicially manageable" remedy for a lack of "difficult questions of valuation or causation"; and there were "available no other alternative forms of judicial relief" because the defendant was no longer a U.S. Congressman.<sup>271</sup>

Only a year after *Davis*, the Supreme Court issued its second and, to date, final extension of *Bivens*. In *Carlson v. Green*, the Supreme Court held that the implied cause of action in *Bivens* could be extended to a violation of the Eighth Amendment's Cruel and Unusual Punishment Clause.<sup>272</sup> In *Carlson*, the plaintiff was the mother of a prison inmate who had allegedly

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263. 442 U.S. 228, 230 (1979).

264. *Id.*

265. *Id.* at 231.

266. *Id.* at 232-33.

267. *Id.* at 235.

268. *Id.* at 241-42.

269. *Id.* at 245 (citing *Butz v. Economou*, 438 U.S. 478, 504 (1978)).

270. *Id.* (quoting *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 402 U.S. 387, 395 (1971)).

271. *Id.*

272. 446 U.S. 14, 19-20 (1980).

died from personal injuries suffered at the hands of federal prison officials.<sup>273</sup> The district court and Seventh Circuit ruled in favor of the plaintiff, holding that she had sufficiently pled a cause of action under the Eighth Amendment.<sup>274</sup>

The Supreme Court affirmed, relying on two findings. First, the Court concluded that there were “no special factors counselling hesitation in the absence of affirmative action by Congress.”<sup>275</sup> The Court did not elaborate upon this *Davis*-like conclusion other than to ambivalently assert that there was nothing “to suggest that judicially created remedies against” the federal prison guards were “inappropriate.”<sup>276</sup> Second, the Court determined that there was “no explicit congressional declaration that persons injured by federal officers’ violations of the Eighth Amendment may not recover money damages from the agents but must be remitted to another remedy, equally effective in the view of Congress.”<sup>277</sup> In other words, because Congress had not explicitly precluded a damages remedy for such constitutional violations, it was a viable remedy.

The *Davis* and *Carlson* decisions were driven by the lack of an adequate remedy. In *Davis*, the former administrative assistant “lacked any other remedy for the alleged constitutional deprivation” by the former U.S. Congressman, and in *Carlson*, the deceased prisoner’s mother had only the FTCA under which to seek relief from the federal prison guards (which was not an equally effective remedy).<sup>278</sup> So, as in *Bivens*, “it [was] damages or nothing” for these plaintiffs.<sup>279</sup>

Nevertheless, since the *Davis* and *Carlson* decisions, the Supreme Court has “consistently refused to extend *Bivens* liability to any new context or new category of defendants.”<sup>280</sup> In the last three decades, the Supreme Court has faithfully upheld a position to respond “cautiously to suggestions that *Bivens*

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273. *Id.* at 16.

274. *Id.* at 17-18.

275. *Id.* at 19.

276. *Id.*

277. *Id.*

278. *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 67-68 (2001) (discussing *Davis* and *Carlson*).

279. *Davis v. Passman*, 442 U.S. 228, 245 (1979) (quoting *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 402 U.S. 387, 410 (1971)).

280. *Malesko*, 534 U.S. at 68.

remedies be extended into new contexts.”<sup>281</sup> Justice Scalia has even characterized *Bivens* as somewhat of a legal curiosity, “a relic of the heady days in which this Court assumed common-law powers to create causes of action—decreeing them to be ‘implied’ by the mere existence of a statutory or constitutional prohibition,” which days are apparently long gone.<sup>282</sup> If Justice Scalia had his way, he would limit *Bivens*, *Davis*, and *Carlson* “to the precise circumstances that they involved.”<sup>283</sup>

### B. *Special Factors Counseling Hesitation*

The Supreme Court’s decision in *Wilkie v. Robbins* is its most recent approbation of its cautious *Bivens* policy.<sup>284</sup> In *Wilkie*, the Supreme Court declined to extend *Bivens* to allow a private landowner to recover damages from Federal Government employees who had retaliated against the landowner for asserting his property rights.<sup>285</sup> To evaluate the plaintiff’s claim, the Court articulated the following two-step test:

In the first place, there is the question whether any alternative, existing process for protecting the interest amounts to a convincing reason for the Judicial Branch to refrain from providing a new and freestanding remedy in damages. But even in the absence of an alternative, a *Bivens* remedy is a subject of judgment: “the federal courts must make the kind of remedial determination that is appropriate for a common-law tribunal, paying particular heed, however, to any special factors counselling hesitation before authorizing a new kind of federal litigation.”<sup>286</sup>

The Court rested its decision at the second step of the analysis. It concluded that there were “special factors counselling hesitation” because an extension of *Bivens* to the landowner’s type of retaliation claim would deluge the judiciary with “an onslaught of *Bivens* actions” and would burden courts with resolv-

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281. *Schweiker v. Chilicky*, 487 U.S. 412, 421 (1988). *See also id.* at 421-23 (collecting cases).

282. *Malesko*, 534 U.S. at 75 (Scalia, J., concurring).

283. *Id.* (Scalia, J., concurring).

284. 551 U.S. 537 (2007).

285. *Id.* at 556-57, 562.

286. *Id.* at 550 (citation omitted) (quoting *Bush v. Lucas*, 462 U.S. 367, 378 (1983)).

ing claims under a vague standard that “would be endlessly knotty to work out.”<sup>287</sup> The Court finished by opining that a damages remedy for such a claim “may come better, if at all, through legislation” and echoing its prior declaration that “‘Congress is in a far better position than a court to evaluate the impact of a new species of litigation’ against those who act on the public’s behalf.”<sup>288</sup>

The Supreme Court has consistently balked at extending *Bivens* to areas in which Congress has actively injected itself. The Court’s inquiry into the presence of such factors goes not to “the merits of the particular remedy that [is being] sought,” but to “the question of who should decide whether such a remedy should be provided.”<sup>289</sup> If Congress has evinced an obvious effort to treat a certain area of the law or a specific legal issue, the Court has backed away and deferred to Congress in creating a remedy.

In *Bush v. Lucas*, the Supreme Court declined to extend *Bivens* to allow a federal employee to recover damages from his superior for violation of his First Amendment rights.<sup>290</sup> Because the issue was really one of “federal personnel policy,” and because Congress had participated in an extensive history of consideration and creation of remedies related to civil service in the Federal Government, the Court decided that Congress was “in a better position to decide whether or not the public interest would be served by creating” a new remedy for violation of First Amendment rights.<sup>291</sup>

Further, in *Chappell v. Wallace*, the Supreme Court refused to extend *Bivens* to allow enlisted military personnel to recover damages from their superiors for violations of their constitutional rights.<sup>292</sup> Because of “the peculiar and special relationship of the soldier to his superiors” and “the plenary constitutional authority” that Congress had historically exercised over the military, the Supreme Court found the extension of *Bivens* to be inappropriate.<sup>293</sup>

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287. *Id.* at 562.

288. *Id.* (quoting *Bush*, 462 U.S. at 389).

289. *Bush*, 462 U.S. at 380.

290. *Id.* at 368.

291. *Id.* at 390.

292. 462 U.S. 296, 304 (1983).

293. *Id.* at 300, 302.

Finally, in *Schweiker v. Chilicky*, the Supreme Court declined to extend *Bivens* to allow applicants or recipients of Social Security disability benefits to seek money damages from government officials who administered the federal Social Security program.<sup>294</sup> The Court in *Schweiker* acknowledged that Congress had failed to provide “complete relief” for individuals in the plaintiffs’ position, noting that Congress had not provided a damages remedy against government officials whose unconstitutional conduct resulted in the wrongful denial of benefits.<sup>295</sup> Nonetheless, Congress’s efforts aimed at dealing with the review of disability benefits had been “frequent and intense.”<sup>296</sup> The Supreme Court determined that Congress “is the body charged with making the inevitable compromises required in the design of a massive and complex welfare benefits program” and was the governmental branch with the highest level of competence at “balancing governmental efficiency and the rights of individuals” in the social welfare context.<sup>297</sup>

The Supreme Court’s decisions in *Bush*, *Chappell*, and *Schweiker* demonstrate the Court’s reluctance to extend *Bivens* in an area of law with which Congress has established and affirmatively perpetuated a longstanding relationship. The existence of this relationship in turn affirms an underlying common sense or pragmatic judgment that Congress is the governmental body best suited to formulate, tailor, and amend any remedies that fall within that specific legal domain. Matters of federal personnel policy, national security and military, and welfare benefits are clearly areas that have “received careful attention from Congress.”<sup>298</sup> In each area, Congress has made extensive and comprehensive regulatory efforts.

### C. Tribal Sovereignty Counseling Hesitation

The relationship between the Federal Government and American Indian tribes is no different. The Federal Government’s involvement with Indian policy is as established and extensive as its involvement with any other sphere of law. Since

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294. 487 U.S. 412, 419-20 (1988).

295. *Id.* at 425.

296. *Id.*

297. *Id.* at 425, 429 (internal brackets omitted).

298. *Id.* at 423.

the Federal Government entered into its first Indian treaty in 1778,<sup>299</sup> the United States has made “frequent and intense”<sup>300</sup> efforts to navigate its delicate relationship with Indian tribes, which has resulted in a torturous history of separationist and assimilationist policies. Between 1789 and 1871, the Federal Government entered into over 800 treaties with Indian tribes, approximately 370 of which were ratified by the Senate.<sup>301</sup> The treaties tended to share certain essential elements: “a guarantee that both sides would keep the peace, a marking of boundaries between Indian and non-Indian land, a statement that the signatory nations were placing themselves under the ‘protection’ of the U.S., and a definition of Indian fishing and hunting rights (often applied to ceded land).”<sup>302</sup>

In 1871, Congress formally terminated the era of treaty-making.<sup>303</sup> Under the Indian Appropriations Act, pre-existing treaties remained in force, but no new treaties could be executed.<sup>304</sup> Although the 1871 Act left existing treaties in place, in 1903, in *Lone Wolf v. Hitchcock*, the Supreme Court held that Congress has plenary power to abrogate Indian treaties.<sup>305</sup> The *Lone Wolf* decision delivered a crushing blow to Indian sovereignty generally and set the stage for Congress to exercise plenary power over Indian matters. In *Lone Wolf*, the Supreme Court concluded that “[p]lenary authority over the tribal relations of the Indians has been exercised by Congress from the beginning, and the power has always been deemed a political one, not subject to be controlled by the judicial department of the government.”<sup>306</sup>

Even before it formally ended treaty-making with Indian tribes, Congress had already asserted a significant presence in

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299. See Shira Kieval, Note, *Discerning Discrimination in State Treatment of American Indians Going Beyond Reservation Boundaries*, 109 COLUM. L. REV. 94, 97 (2009).

300. *Schweiker v. Chilicky*, 487 U.S. 412, 425-26 (1988).

301. See generally THE ENCYCLOPEDIA OF NATIVE AMERICAN LEGAL TRADITION (Bruce Elliot Johansen ed., 1998).

302. *Id.* at 330-31.

303. Act of March 3, 1871, c. 120, § 1, 16 Stat. 566 (1871) (codified as amended at 25 U.S.C. § 71 (2006)).

304. Comment, *Federal Plenary Power in Indian Affairs After Weeks and Sioux Nation*, 131 U. PA. L. REV. 235, 244-45 (1982).

305. 187 U.S. 553, 566 (1903).

306. *Id.* at 565.

the area of criminal jurisdiction in Indian country. In 1817, Congress enacted the General Crimes Act (“GCA”),<sup>307</sup> which made federal criminal law in areas of exclusive federal jurisdiction applicable to Indian country.<sup>308</sup> The GCA included some exceptions. First, it did not reach crimes committed by one Indian against another.<sup>309</sup> Second, the statute did not reach crimes committed by an Indian that the tribe had previously punished.<sup>310</sup> Despite its exceptions, the GCA granted considerable power to the Federal Government to prosecute crimes committed in Indian country by and against non-Indians.<sup>311</sup>

In 1885, Congress enacted the Major Crimes Act (“MCA”), which gave the Federal Government power to prosecute Indians for specific major criminal offenses committed in Indian country.<sup>312</sup> The MCA thus further extended the reach of the Federal Government into relationships between Indians and tribal sovereignty. It “intruded into an area of exclusive tribal sovereignty and made federal law enforcement officers the primary agents for adjudicating serious crimes on Indian reservations.”<sup>313</sup> Although the MCA originally enumerated seven felonies (murder, manslaughter, rape, assault with intent to kill, arson, burglary, and larceny),<sup>314</sup> Congress has since expanded the list to fifteen.<sup>315</sup> Congress most recently amended the MCA in 2006 to allow the Federal Government to prosecute “felony child abuse or neglect.”<sup>316</sup>

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307. General Crimes Act, ch. 92, 3 Stat. 383 (1817) (codified as amended at 18 U.S.C. § 1152). See also Kevin K. Washburn, *American Indians, Crime, and the Law*, 104 MICH. L. REV. 709, 716-17 (2006).

308. 18 U.S.C. § 1152 (2006) (extending sole and exclusive jurisdiction for the punishment of crimes committed in Indian country to the United States).

309. *Id.*

310. *Id.*

311. Washburn, *supra* note 307, at 716-17.

312. Major Crimes Act of 1885, ch. 119, § 9, 23 Stat. 362, 385 (codified as amended at 18 U.S.C. § 1153).

313. Washburn, *supra* note 307, at 717.

314. Washburn, *supra* note 78, at 804.

315. 18 U.S.C. § 1153(a).

316. *Id.* See also S. REP. No. 109-255, at 4 (2006) (mentioning that child abuse or neglect in Indian country cannot be prosecuted under similar state law offenses and that Indian tribes’ jurisdiction to investigate and prosecute acts of child abuse and neglect is confined to acts committed by or against an Indian and having penalties of no more than one year in custody and a \$5,000 fine). In *United States v. Kagama*, the Supreme Court upheld the Major Crimes Act. 118 U.S. 375, 381-85 (1886).

In 1953, Congress enacted Public Law 280, which granted six states—Minnesota, Alaska, California, Nebraska, Wisconsin, and Oregon—general criminal jurisdiction, as well as limited civil jurisdiction, over Indians in Indian country.<sup>317</sup> Public Law 280 established a framework to allow the other states to eventually assume similar jurisdiction if they enacted requisite affirmative legislation.<sup>318</sup> A strong negative backlash to Public Law 280's omission of a tribal consent provision culminated in a congressional amendment in 1968, requiring states to obtain such consent before assuming jurisdiction.<sup>319</sup> For the six mandatory states and those states that have opted to assume partial or total jurisdiction under Public Law 280, the statute shifted responsibility for criminal and civil law enforcement in Indian country from Indian tribes and the Federal Government to state and local law enforcement agencies.<sup>320</sup>

In 1968, Congress enacted the Indian Civil Rights Act ("ICRA").<sup>321</sup> "As separate sovereigns pre-existing the Constitution," Indian tribes have been recognized to be unrestrained by the "constitutional provisions framed specifically as limitations on federal or state authority."<sup>322</sup> This left tribal governments responsible for crafting, applying, and protecting their own members' civil rights. While perhaps well-intentioned, Congress eventually came to learn of a concerning lack of protection for Indians' civil rights by their own tribes.<sup>323</sup> Many tribes did not have any type of constitution to protect Indians' civil rights.<sup>324</sup> For those tribes who had constitutions, their protec-

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317. Pub. L. No. 280, ch. 506, 67 Stat. 588 (codified as amended at 18 U.S.C. § 1162 (2006) (mandatory states) and 25 U.S.C. § 1321 (2006) (optional states)).

318. See Carole Goldberg-Ambrose, *Public Law 280 and the Problem of Lawlessness in California Indian Country*, 44 UCLA L. REV. 1405, 1406 (1997).

319. Pub. L. No. 90-284, tit. IV, § 406, 82 Stat. 80 (1968) (codified as amended at 25 U.S.C. § 1326). See also Goldberg-Ambrose, *supra* note 318, at 1407.

320. Oliver Kim, *When Things Fall Apart: Liabilities and Limitations of Compacts between State and Tribal Governments*, 26 HAMLIN L. REV. 48, 59-60 (2002). The following nine states have chosen to opt in: Arizona, Florida, Idaho, Iowa, Montana, Nevada, North Dakota, Utah, and Washington. *Id.* at 60 n.72.

321. Pub. L. No. 90-284, §§ 201-701, 82 Stat. 73, 77-81 (1968) (codified as amended at 25 U.S.C. §§ 1301-03 (2006)).

322. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 56 (1978).

323. See *infra* notes 324-26 and accompanying text.

324. D.L. Burnett, Jr., *An Historical Analysis of the 1968 "Indian Civil Rights" Act*, 9 HARV. J. ON LEGIS. 557, 579 (1972) (background and legislative history of ICRA).

tion of civil rights was incomplete.<sup>325</sup> One significant area of concern was due process, as many tribes did not provide a right to a jury trial, a right to counsel, a right to remain silent, or any right to appeal.<sup>326</sup> Thus, Congress enacted the ICRA to impose many of the limitations contained in the Bill of Rights upon tribal governments.<sup>327</sup> In *Santa Clara Pueblo v. Martinez*, the Supreme Court clarified that except for habeas corpus claims, the ICRA could be enforced only through tribal forums.<sup>328</sup>

The ISDEAA originated in 1975, and then, in 1990, the ILERA was created. And yet, taken together, the GCA, MCA, Public Law 280, ICRA, ISDEAA, and ILERA are a mere drop in the bucket of the hundreds of statutes that Congress has enacted over the course of two hundred years to define and regulate the relationship between U.S. citizens and American Indians.<sup>329</sup> Like its involvement with federal employment, the military, and social welfare, Congress's involvement with Indian relations and policy generally is unequivocally an area that has "received careful attention from Congress" and in which Congress's responsiveness has "been frequent and intense."<sup>330</sup> Congress has been especially proactive in the areas of criminal jurisdiction and civil rights in Indian country—areas that align with policy considerations underlying *Bivens*. Congress's consistent and affirmative presence in Indian policy undoubtedly constitutes a "special factor[ ] counselling hesitation" for the extension of *Bivens* and a justification for "an appropriate judicial deference to indications that congressional inaction has not been inadvertent."<sup>331</sup>

It is not a court's job to decide whether it is good policy to permit a party to sue a tribal officer for damages for a violation

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325. *Id.*

326. *Id.*

327. 25 U.S.C. §§ 1301-03.

328. 436 U.S. 49, 65-67 (1978).

329. *See, e.g.*, Indian Gaming Regulatory Act, Pub. L. No. 100-497, 102 Stat. 2467 (1988) (codified as amended at 25 U.S.C. §§ 2710-21 (2006)); Indian Child Welfare Act of 1978, Pub. L. No. 95-608, 92 Stat. 3069 (1978) (codified as amended at 25 U.S.C. §§ 1901-63 (2006)); Indian Health Care Improvement Act, Pub. L. No. 94-437, 90 Stat. 1400 (1976) (codified as amended at 25 U.S.C. §§ 1601-83 (2006)); Indian Financing Act of 1974, Pub. L. No. 93-262, 88 Stat. 77 (1974) (codified as amended at 25 U.S.C. §§ 1451-1544 (2006)).

330. *Schweiker v. Chilicky*, 487 U.S. 412, 425-26 (1988).

331. *Id.* at 423.

of constitutional rights.<sup>332</sup> A court's job is not to determine whether Congress's response has been sufficient.<sup>333</sup> Rather, a court's inquiry in evaluating the "special factors counselling hesitation" turns on the question "of who should decide whether such a remedy should be provided."<sup>334</sup> Congress may not have provided "complete relief" to individuals whose constitutional rights are violated by tribal officers, but Congress has clearly been active in the area and has a longstanding and special relationship with the Indian tribes residing in this country.<sup>335</sup> Congress is far more competent than the judiciary to balance the policy concerns and implications of subjecting a tribal officer to legal liability for executing actions that go to the heart of tribal sovereignty. In short, "Congress is in a far better position than a court to evaluate the impact of a new species of litigation" against tribal officers and employees.<sup>336</sup>

## V. Conclusion

The sovereignty struggle between the United States Government and American Indian tribes has roots predating the creation of this country and even King Philip's War. In 1970, the Federal Government attempted to make "an historic step forward in Indian policy" by rejecting its paternalistic policies of the past and by building "upon the capacities and insights of the Indian people" so that they could "control their own destiny."<sup>337</sup> The Indian Self-Determination and Education Assistance Act and the Indian Law Enforcement Reform Act followed to shift the tide toward self-determination and self-governance in the area of law enforcement in Indian country. By enacting these two complementary statutes, Congress handed the reins of law enforcement to Indian tribes. The statutory and regulatory language of these two statutes makes clear that tribal law enforcement officers can be authorized to enforce federal law and, when doing so, they can qualify as federal officers in two narrow circumstances. But even in these two specific situations, a tri-

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332. *Bush v. Lucas*, 462 U.S. 367, 390 (1983).

333. *Schweiker*, 487 U.S. at 429.

334. *Bush*, 462 U.S. at 380.

335. *Id.* at 389.

336. *Id.*

337. *Nixon*, *supra* note 10.

bal officer must be specially commissioned to enforce federal law and must be in the act of doing so to qualify as a federal officer.

*Bivens* is not one of these two narrow exceptions. Nonetheless, even if a court were to endow a tribal law enforcement officer with the status of a federal officer for the purposes of *Bivens*, the ISDEAA and the ILERA bind a court's discretion to situations where the tribal officer was expressly authorized to enforce federal law and was in the act of enforcing federal law at the time the officer violated another's constitutional rights. Even then, the Supreme Court has articulately announced and faithfully upheld its cautious approach to the extension of *Bivens* to new contexts. Because of the highly visible, longstanding, and proactive presence that Congress has established in the area of Indian policy and law, a court has a "special factor[ ] counselling hesitation" to the extension of *Bivens* to tribal law enforcement officers.<sup>338</sup> As a result, courts must defer to Congress as the appropriate governmental arm for the creation of a monetary remedy for the violation of constitutional rights by tribal law enforcement officers and employees.

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338. *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 396 (1971).

