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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

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

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

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

28

1 **I. LEGAL STANDARD**

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

11
12 **II. BACKGROUND**

13 On March 27, 2006, Plaintiff Francisco Castaneda - an
14 immigration detainee - informed the Immigration and Customs
15 Enforcement ("ICE") medical staff at the San Diego Correctional
16 Facility that a lesion on his penis was becoming painful, growing
17 in size, and exuding discharge. The next day, Castaneda was
18 examined by Anthony Walker, an ICE Physician's Assistant. Walker's
19 treatment plan called for a urology consult "ASAP" and a request
20 for a biopsy. (Amended Compl. ¶ 37²; Doyle Decl. Ex. 1.)

21 On April 11, 2006, ICE documented that because of Castaneda's
22 family history - his mother died of pancreatic cancer at age 39 -
23 penile cancer needed to be ruled out. (Doyle Decl. Ex. 2.) A
24 Treatment Authorization Request ("TAR") was filed with the Division
25

26 ² Defendants' motion to dismiss was filed before the Complaint
27 was amended. However, the Amended Complaint contains no new
28 allegations against the individual federal defendants and the
parties have stipulated that Defendants' motion is responsive to
the Amended Complaint.

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

12 On June 7, 2006, ICE sent Castaneda for a consult with
13 oncologist John Wilkinson, M.D. Castaneda presented with a history
14 of a fungating lesion³ on his foreskin. (Id. Ex. 4.) Dr.
15 Wilkinson

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

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

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

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

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

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

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

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

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

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

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

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

15 Four days later, Castaneda's condition was worsening. DIHS
16 documented that the lesion was still "growing," and that Castaneda
17 had "severe phimosis,⁴ bleeding, and clear drainage for lesion area
18 with foul odor." (Id. Ex. 14.) The DIHS record notes that both
19 Dr. Masters and Dr. Wilkinson "strongly recommended" admission to a
20 hospital, biopsy, and circumcision. (Id.) Instead, DIHS followed
21 the suggestion of Dr. Hunting - who had only briefly examined
22 Castaneda in the ER - and assumed Castaneda had genital warts.
23 DIHS therefore declined to order a biopsy, although it nonetheless
24

25 ⁴ Phimosis is medically defined as a "tightness or
26 constriction of the orifice of the prepuce arising either
27 congenitally or from inflammation, congestion, or other postnatal
28 causes and making it impossible to bare the glans." Merriam
Webster's Medical Desk Dictionary 613 (1996). In other words, the
foreskin is so tight it cannot be pulled back completely to reveal
the glans.

1 noted Castaneda would "need a resection⁵ of the penis" due to the
2 severity of his condition. (Id.)

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

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

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

27 _____

28 ⁵ Resection means the surgical removal of part of an organ.
Webster's Medical Desk Dictionary at 697.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

14 15 **III. DISCUSSION**

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

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

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

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

(continued...)

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

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

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

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

Id. at 19.

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

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

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

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

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

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

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

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

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

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

28

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

13 **1. Plain Language**

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

16 DEFENSE OF CERTAIN MALPRACTICE AND NEGLIGENCE ACTS

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

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

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

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

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

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

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

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

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

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

4 **CHAPTER 171 - TORT CLAIMS PROCEDURE**

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

6 § 2671. Definitions

7 § 2672. Administrative adjustment of claims

8 § 2673. Reports to Congress

9 § 2674. Liability of United States

10 § 2675. Disposition by federal agency as prerequisite;

11 evidence

12 § 2676. Judgement as bar

13 § 2677. Compromise

14 § 2678. Attorney fees; penalty

15 § 2679. Exclusiveness of remedy

16 § 2680. Exceptions

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

3 **2. Legislative History**

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

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

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

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

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

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

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

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

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

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

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

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

(continued...)

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

28

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

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

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

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

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

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

(continued...)

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

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

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

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

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

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

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

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

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

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

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

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4

5 **IV. CONCLUSION**

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

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8 IT IS SO ORDERED.

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11 Dated: March 11, 2008



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DEAN D. PREGERSON

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United States District Judge

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