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February 9, 1982

Dave:

Attached are copies of H.R. 24 and S. 1775 together with Ed Schmults' statements in connection with each. As I am sure you can imagine, our file on this legislation is extremely thick and I am not going to burden you with unnecessary material. (Of course, if you want additional analyses, statements, testimony, etc., you have only to ask.)

The Administration completely supports the goals of this legislation and directly supports S. 1775. Numerous General Counsels and United States Attorneys have testified in support of the legislation, following the lead of Ed Schmults. Yet, in spite of this support, I foresee a serious problem.

I had lunch with Mark Lynch of the ACLU after he testified in opposition to the legislation in November and I asked for his candid views. He indicated that they were not worried in the slightest about the legislation because there was no support for it on the Hill; he indicated that, in his judgment, the Congress was at best indifferent and they did not think there was a chance of it passing. At the time we were basking in the glow of the favorable testimony and Administration support and I chuckled to myself with respect to Mark's naivete; in retrospect, I fear his assessment of the situation was totally accurate.

The chief sponsor of the legislation in the House has been Congressman George Danielson of California. There is a well-founded rumor that he will shortly resign from the House and accept a judicial appointment in California. Thus, the catalyst who has pushed this legislation for four years in the House will no longer be there. More significantly, I have sensed that even if Danielson had remained there was not a sufficient effort being mounted to push us over the top.

While recognizing that there are tremendous matters to be considered (budget, defense, etc.), the fact remains that this legislation is crucial to the federal employees. Everyone has good intentions but, as my father use to say, the road to failure is paved with good intentions. Perhaps renewed "White House" support would serve as a new catalyst and forge an active effort rather than benign support.

Of course, this may be none of my business and you may not be in a position to do anything or inclined to leave the professionals to their task. Nevertheless, my concern is serious enough that I thought it essential that I, at least informally, advise someone in your position of my fears.

Jack

A handwritten signature in black ink, appearing to be the name 'Jack', written in a cursive style. The signature is positioned to the right of the printed name 'Jack'.

Attachments

97TH CONGRESS
1ST SESSION

S. 1775

To amend title 28 of the United States Code to provide for an exclusive remedy against the United States in suits based upon acts or omissions of United States employees, to provide a remedy against the United States with respect to constitutional torts, and for other purposes.

IN THE SENATE OF THE UNITED STATES

OCTOBER 26 (legislative day, OCTOBER 14), 1981

Mr. GRASSLEY (for himself and Mr. DOLE) introduced the following bill; which was read twice and referred to the Committee on the Judiciary

A BILL

To amend title 28 of the United States Code to provide for an exclusive remedy against the United States in suits based upon acts or omissions of United States employees, to provide a remedy against the United States with respect to constitutional torts, and for other purposes.

- 1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*
3 That subsection (b) of section 1346 of title 28, United States
4 Code, is amended—
5 (1) by inserting “(1)” after “jurisdiction of”; and

1 (2) by striking out the period at the end thereof
2 and inserting in lieu thereof “, or (2) civil actions on
3 claims against the United States, for money damages,
4 sounding in tort arising under the Constitution of the
5 United States for injury or loss of property, or personal
6 injury or death, caused by an act or omission of any
7 employee of the Government while acting within the
8 scope of his office or employment, such liability to be
9 determined in accordance with applicable Federal
10 law.”.

11 SEC. 2. Section 2672 of title 28, United States Code, is
12 amended in the first paragraph—

13 (1) by inserting “(1)” after “United States” the
14 first place it appears;

15 (2) by striking out the colon after “occurred” and
16 inserting in lieu thereof “, or (2) for claims for money
17 damages sounding in tort arising under the Constitu-
18 tion of the United States for injury or loss of property,
19 or personal injury or death, caused by an act or omis-
20 sion of any employee of the Government while acting
21 within the scope of his office or employment, such lia-
22 bility to be determined in accordance with applicable
23 Federal law:”; and

1 (3) by inserting "or any award, compromise, or
2 settlement based on a claim arising under the Constitu-
3 tion of the United States" after "25,000".

4 SEC. 3. Section 2674 of title 28, United States Code, is
5 amended—

6 (1) by striking out the comma after "claims" in
7 the first paragraph and inserting in lieu thereof "other
8 than those arising under the Constitution of the United
9 States,";

10 (2) by inserting "(a)(1)" at the beginning of the
11 first paragraph;

12 (3) by inserting "(2)" at the beginning of the
13 second paragraph; and

14 (4) by adding at the end thereof the following new
15 subsection:

16 "(b)(1) The United States shall be liable, respecting the
17 provisions of this title relating to tort claims arising under the
18 Constitution of the United States, to the extent recognized or
19 provided by applicable Federal law, and shall be entitled to
20 all defenses heretofore available to an employee of the United
21 States and to which the United States would otherwise be
22 entitled. The United States shall not be liable for interest
23 prior to judgment or for punitive damages.

24 "(2) Damages in any such case shall be the greater of
25 (A) actual damages or (B) liquidated damages of \$1,000 or,

1 in the case of a continuing tort, \$100 a day for each day of
2 violation up to a maximum of \$15,000.”.

3 SEC. 4. Subsection (a) of section 2675 of title 28,
4 United States Code, is amended by striking out the comma
5 after “employment” and inserting in lieu thereof “or upon a
6 claim against the United States for money damages for a tort
7 arising under the Constitution of the United States caused by
8 an act or omission of any employee of the Government while
9 acting within the scope of his office or employment,”.

10 SEC. 5. (a) Subsection (b) of section 2679 of title 28,
11 United States Code, is amended to read as follows:

12 “(b) The remedy against the United States provided by
13 sections 1346(b) and 2672 of this title for claims for injury or
14 loss of property or personal injury or death resulting from the
15 negligent or wrongful act or omission of any employee of the
16 Government while acting within the scope of his office or
17 employment and for claims arising under the Constitution of
18 the United States for an act or omission of any employee of
19 the Government while acting within the scope of his office or
20 employment, is exclusive of any other civil action or proceed-
21 ing arising out of or relating to the same subject matter
22 against the employee whose act or omission gave rise to the
23 claim, or against the estate of such employee, and shall also
24 be deemed an equally effective substitute for any recovery

1 against the employee in his individual capacity directly under
2 the Constitution.”.

3 (b) Subsection (d) of such section is amended to read as
4 follows:

5 “(d)(1) Upon certification by the Attorney General that
6 the defendant employee was acting within the scope of his
7 office or employment at the time of the incident out of which
8 the action arose, any such civil action or proceeding com-
9 menced in a United States district court shall be deemed an
10 action against the United States under the provisions of this
11 title and all reference thereto, and the United States shall be
12 substituted as the party defendant. After substitution, the
13 United States shall have available all defenses available to
14 the employee and all defenses to which it would have been
15 entitled if the action had originally been commenced against
16 the United States under this chapter and section 1346(b) of
17 this title.

18 “(2) Upon certification by the Attorney General that the
19 defendant employee was acting within the scope of his office
20 or employment at the time of the incident out of which the
21 action arose, any such civil action or proceeding commenced
22 in a State court shall be removed without bond at any time
23 before trial by the Attorney General to the district court of
24 the United States for the district and division embracing the
25 place wherein it is pending. Such action shall be deemed an

1 action brought against the United States under the provisions
2 of this title and all references thereto, and the United States
3 shall be substituted as the party defendant. After substitu-
4 tion, the United States shall have available all defenses avail-
5 able to the employee and all defenses to which it would have
6 been entitled if the action had originally been commenced
7 against the United States under this chapter and section
8 1346(b) of this title. The certification of the Attorney General
9 shall conclusively establish scope of office or employment for
10 purposes of removal.

11 “(3) The certification by the Attorney General under
12 subsection (d) (1) or (2) that the defendant employee was
13 acting within the scope of his office or employment shall be
14 binding and conclusive, except that in the event that the At-
15 torney General has not certified scope of office or employ-
16 ment, the employee may at any time before trial petition the
17 court to find and certify that the employee was acting within
18 the scope of his office or employment. A copy of the petition
19 shall be served upon the United States in accordance with
20 the provisions of rule 4(d)(4), Federal Rules of Civil Proce-
21 dure. In the event the petition is filed in a civil action or
22 proceeding pending in a State court, the action or proceeding
23 shall be removed without bond by the Attorney General to
24 the district court of the United States for the district and
25 division embracing the place wherein it is pending. Should

1 the district court determine that the employee was not acting
2 within the scope of his office or employment, the action or
3 proceeding shall be remanded to the State court.

4 “(4) Where a civil action or proceeding under this chap-
5 ter is precluded because of the availability of a remedy, com-
6 pensation, or other benefits from the United States as pro-
7 vided by any other law, the action or proceeding shall be
8 dismissed but in that event, the running of any limitation of
9 time for commencing or filing an application or claim in a
10 proceeding for any other remedy, compensation, or benefits
11 shall be suspended during the pendency of the civil action or
12 administrative proceeding under this chapter.

13 “(5) Whenever an action brought against a defendant
14 employee in which the United States is substituted as the
15 party defendant under this subsection is dismissed for failure
16 first to present a claim to the appropriate Federal agency
17 pursuant to section 2675(a) of this title, the claim shall be
18 deemed to be timely presented under section 2401(b) of this
19 title, if (A) the claim would have been timely if filed on the
20 date the action against the defendant employee was com-
21 menced, and (B) the claim is presented to the appropriate
22 Federal agency within sixty days after dismissal of the
23 action.”.

24 (c) Such section is further amended by adding at the end
25 thereof the following new subsection:

1 “(f) If a civil action or proceeding under section 1346(b)
2 or 2672 of this title arising under the Constitution of the
3 United States results in a judgment against the United States
4 or an award, compromise, or settlement paid by the United
5 States, the Attorney General shall forward the matter to the
6 head of the department or agency which employed the em-
7 ployee at the time of the act or omission for such further
8 administrative investigation or disciplinary action as may be
9 appropriate.”.

10 SEC. 6. (a) Section 2680 of title 28, United States
11 Code, is amended—

12 (1) by striking out the section heading and insert-
13 ing in lieu thereof the following:

14 “§ 2680. Exceptions; claims not arising under the Constitu-
15 tion of the United States”;

16 (2) by inserting “, relating to tort claims other
17 than those arising under the Constitution of the United
18 States,” in the first paragraph immediately after
19 “title”; and

20 (3) by amending subsection (h) to read as follows:

21 “(h) Any claim arising out of libel, slander, misrepresen-
22 tation, deceit, or interference with contract rights.”.

23 (b) The item relating to section 2680 in the table of
24 sections at the beginning of chapter 171 of title 28, United
25 States Code, is amended to read as follows:

"2680. Exceptions; claims not arising under the Constitution of the United States."

1 SEC. 7. (a) Chapter 171 of title 28, United States Code,
2 is amended by adding at the end thereof the following new
3 section:

4 "§ 2681. Exceptions; claims arising under the Constitution
5 of the United States.

6 "The provisions of this chapter and of section 1346(b) of
7 this title which relate to tort claims arising under the Consti-
8 tution of the United States shall not apply to actions arising
9 from the activities of the Tennessee Valley Authority, the
10 Panama Canal Company, a Federal land bank, a Federal in-
11 termediate credit bank, or a bank for cooperatives."

12 (b) The table of sections at the beginning of chapter 171
13 of title 28, United States Code, is amended by adding at the
14 end thereof the following new item:

"2681. Exceptions; claims arising under the Constitution of the United States."

15 SEC. 8. (a)(1) Subsections (a) through (d) of section
16 4116 of title 38, United States Code, are repealed.

17 (2) Subsection (e) of such section is amended—

18 (A) by striking out "(e)";

19 (B) by striking out "person to whom the immunity
20 provisions of this section apply (as described in subsec-
21 tion (a) of this section)," and inserting in lieu thereof
22 "employee of the Veterans' Administration"; and

1 (C) by striking out "Department of Medicine and
2 Surgery" and inserting in lieu thereof "Veterans' Ad-
3 ministration".

4 (b)(1) Subsections (a) through (e) of section 224 of the
5 Public Health Service Act (42 U.S.C. 233) are repealed.

6 (2) Subsection (f) of such section is amended by striking
7 out "(f)".

8 (c)(1) Subsections (a) through (e) of section 1089 of title
9 10, United States Code, are repealed.

10 (2) Subsection (f) of such section is amended by striking
11 out "person described in subsection (a)" and inserting in lieu
12 thereof "employee of the armed forces, the Department of
13 Defense, the United States Soldiers' and Airmen's Home, or
14 the Central Intelligence Agency".

15 (3) Subsection (g) of such section is amended—

16 (A) by striking out "and" at the end of clause (2);

17 (B) by redesignating clause (3) as clause (4); and

18 (C) by inserting after clause (2) the following new
19 clause:

20 "(3) the Governor of the United States Soldiers'
21 and Airmen's Home, in the case of an employee of the
22 United States Soldiers' and Airmen's Home; and".

23 (4) Subsections (f) and (g) of such section are redesignat-
24 ed as subsections (a) and (b), respectively.

1 (d)(1) Subsections (a) through (e) of section 307 of the
2 National Aeronautics and Space Act of 1958 (42 U.S.C.
3 2458a) are repealed.

4 (2) Subsection (f) of such section is amended—

5 (A) by striking out “(f)”; and

6 (B) by striking out “person described in subsection
7 (a)” and inserting in lieu thereof “employee of the Na-
8 tional Aeronautics and Space Administration”.

9 (e)(1) Subsections (a) through (e) of section 1091 of the
10 Foreign Service Act of 1946 (22 U.S.C. 817) are repealed.

11 (2) Subsection (f) of such section is amended by striking
12 out “person to whom the immunity provisions of subsection
13 (a) of this section apply,” and inserting in lieu thereof “em-
14 ployee of the Department of State (including the Agency for
15 International Development)”.

16 (3) Subsections (f) and (g) of such section are redesignat-
17 ed as subsections (a) and (b), respectively.

18 SEC. 9. Section 2520 of title 18, United States Code, is
19 amended by adding at the end thereof the following new sen-
20 tence: “This section shall not apply to any civil cause of
21 action against an officer or employee of the United States
22 while acting within the scope of his office or employment.”.

23 SEC. 10. (a) Except as provided in subsection (b), the
24 amendments made by this Act shall apply to all claims, civil

1 actions and proceedings pending on, or filed on or after, the
2 date of enactment of this Act.

3 (b)(1) With respect to any civil action or proceeding
4 pending on the date of enactment against a Federal employee
5 in his individual capacity, the plaintiff may, upon timely
6 demand, (A) retain his right to a trial by jury if the demand
7 for trial by jury is made prior to or on the date of enactment,
8 or (B) elect a trial by jury if the time for election of a trial by
9 jury pursuant to applicable law has not expired as of the date
10 of enactment, except that in any case in which a trial by jury
11 is elected under this paragraph, the provisions of section
12 2674(c) of this title, as added by section 3 of this Act, which
13 relate to liquidated damages, shall not apply.

14 (2) With respect to any civil action or proceeding pend-
15 ing against a Federal employee in his individual capacity on
16 appeal, or pending against a Federal employee in his individ-
17 ual capacity in a State court in which the time for removal
18 pursuant to section 2679(d) of this title has expired, the
19 amendments made by this Act shall not apply, except that
20 the United States shall be substituted for the defendant em-
21 ployee upon certification by the Attorney General that the
22 defendant employee was acting within the scope of his office
23 or employment at the time of the incident out of which the
24 action or proceeding arose.

1 (3) The provisions of section 2675(a) of this title shall
2 not apply to a civil action or proceeding against a Federal
3 employee in his individual capacity pending on the date of
4 enactment of this Act, if the provisions of section 2675(a)
5 were inapplicable to the action or proceeding when filed.

○



Department of Justice

STATEMENT

OF

A. MELVIN McDONALD
UNITED STATES ATTORNEY FOR ARIZONA

BEFORE

THE

COMMITTEE ON THE JUDICIARY
SUBCOMMITTEE ON AGENCY ADMINISTRATION
UNITED STATES SENATE

CONCERNING

S. 1775 - FEDERAL TORT CLAIMS ACT

ON

NOVEMBER 13, 1981

MR. CHAIRMAN AND MEMBERS OF THE SUBCOMMITTEE:

I am honored to be invited by this subcommittee to appear and address proposed legislation which would have a significant positive impact both in Arizona and within the various districts throughout the United States. I have come before this subcommittee to express my total and enthusiastic support for Senate Bill S.1775, which would amend Title 28 of the United States Code by providing for an "exclusive" remedy against the United States government for "constitutional" torts. I would like to briefly discuss a number of the more important reasons which support this proposed legislation.

1. S.1775 gives a legitimately aggrieved plaintiff a "remedy" for injuries sustained as a result of a constitutional tort perpetrated by a Federal Employee. Equally as important, the plaintiff has a solvent defendant, the United States.^{A/}

2. The proposed legislation would provide financial protection to federal law enforcement personnel and their families.^{B/}

3. The proposed legislation would not result in a significant negative impact upon the government's resources. The overwhelming majority of these cases which go to trial are won by the government and in those cases when losses do occur, the damages do not involve significant sums of money.^{C/}

4. The legislation would remedy a significant number of vexatious lawsuits which have been filed to harass or intimidate federal employees, to obtain civil discovery in criminal cases, or simply for revenge.^{D/}

5. The legislation would enable the Department of Justice to do a more effective job in representing the government and its employees. Frequently, there is pressure on the Department to settle "winnable" cases, in which the United States is properly a defendant, where liability is remote so that agents can be spared the risks of financial ruin. This "personal exposure" gives Bivens cases a genuine "nuisance" value. Additionally, the Department of Justice (which almost always represents the employee being sued) frequently has conflicts among multiple defendants or between the defendants and the government. Tremendous sums of money are expended to provide these employees private counsel at government expense.

6. The proposed legislation would significantly contribute to improved morale within the Federal Government, particularly among law enforcement personnel. Indeed, it is difficult, if not impossible, to justify the perpetuation of the "Bivens" rule of "personal liability for constitutional torts" when one considers that, in a ten year period since Bivens, where probably tens of thousands of constitutional decisions have been made nationwide, successful prosecution of these cases could be counted on two hands.

Finally, Bivens lawsuits are ruinous to the target defendants. Plaintiffs' attorneys almost inevitably name as defendants all people directly, indirectly or remotely involved in the constitutional transaction. The list of defendants is frequently as large as the attorneys' imaginations.^{E/} These lawsuits interfere with

federal employees' credit ratings with commercial institutions as well as imposing enormous strain not only on themselves but a whole class of innocent victims - their families.

In summary, the proposed amendment to the Tort Claims Act would go a long way towards satisfying the needs of all groups involved. A plaintiff injured by a constitutional tort has a sure remedy and a solvent defendant. Federal agents and their families are not threatened with financial ruin. Federal officers and prosecutors can pursue criminal investigations with traditional vigor. The vexatious plaintiff loses the key incentive to sue federal officers who may have investigated their activities. Government attorneys are no longer in the deplorable position of paying "nuisance" dollars so that remote but substantial losses would not be incurred by federal agents. Vast expenditures in hiring private attorneys where "conflicts" exist could be alleviated. To this bill, federal agencies in Phoenix and Tucson as well as this office lend their unconditional support.

FOOTNOTES

- A/ In Bivens v. Six Unknown Federal Narcotics Agents, 403 U.S. 388 at 410, Justice Harlan recognized the preferability of this type of remedy.
- "However desirable a direct remedy against the Government might be as a substitute for individual official liability, the sovereign still remains immune to suit."
- Chief Justice Burger, in dissent, spoke directly to this issue. Speaking at 403 U.S. at 421, the Chief Justice observed that:
- "Congress should develop an administrative or quasi-judicial remedy against the government itself to afford compensation and restitution for persons whose Fourth Amendment rights have been violated."
- B/ While a number of states have authorized the purchase of liability insurance on behalf of their officers and employees, the Federal Government has not authorized the purchase of such insurance. Federal employees have had difficulty obtaining coverage on their own. Berman, Integrating Governmental and Officer Tort Liability, 77 Colum. L. Rev. 1175, 1181 (1977). Bell, Proposed Amendments to the Federal Tort Claims Act, 16 Harv. J. on Legislation 1, 3 (1979).
- C/ From 1971 to 1979, only seven money judgments had been entered against federal employees on Bivens claims; pending appeal, none had been paid. See Bell, supra, 16 Harv. J. on Legislation at 2 (Footnote 5). From 1979 to October 1981, only two more judgments were won by Bivens plaintiffs. See Statement of Edward C. Schmults, Deputy Attorney on Administrative Law and Governmental Relations, U.S. House of Representatives concerning amendments to the Federal Tort Claims Act, October 13, 1981, page 4 and footnote 11.
- D/ Justice Black, in the Bivens dissent at page 429, warned of this result. He noted:
- "There is also a real danger that such suits might deter officials from the proper and honest performance of their duties."
- Justice Blackmun also warned of the real dangers of doctrine which imposes personal liability on federal officers. Speaking at page 430, he wrote:
- "Whenever a suspect imagines, or chooses to assert, that a Fourth Amendment right has been violated, he will now immediately sue the federal officer in federal court. This will tend to stultify proper

law enforcement and to make the day's labor for the honest and conscientious officer even more onerous and more critical."

E/ Former Attorney General Bell cited some examples of the totally frivolous lawsuits filed against him in the Harvard Journal of Legislation, Volume 16 at page 6, Footnote 22.

"A significant percentage of the pending suits against federal employees are frivolous. For instance, I have been sued in my individual capacity for claims arising out of events occurring before I became Attorney General and events of which I have no knowledge or connection, such as the termination of a private school teacher by a school which indirectly receives funding from the Law Enforcement Assistance Administration, physical injuries received by inmates in federal prisons allegedly inflicted by guards and other inmates, deprivation of inmates' due process rights, and injuries to resident aliens allegedly caused by a statutory amendment to the Immigration and Nationality Act.

H.R. 24

2659

Introduced January 5, 1981

97th CONGRESS

1st SESSION

H.R.

(Original signature of Member)

IN THE HOUSE OF REPRESENTATIVES

Mr. Danielson introduced the following bill; which was referred to the Committee on

A BILL

To amend title 28 of the United States Code to provide for an exclusive remedy against the United States in suits based upon acts or omissions of United States employees, to provide a remedy against the United States with respect to constitutional torts, to establish procedures whereby a person injured by a constitutional tort may initiate and participate in a disciplinary inquiry with respect to such tort, and for other purposes.

1 Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That (a) section 2679(b) of title 28, United States Code, is amended to read as follows:

"(b) The remedy against the United States provided by sections 1346(b) and 2672 of this title for claims for injury or loss of property or personal injury or death resulting from the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment is exclusive of any other civil action or proceeding arising out of or relating to the same subject matter against the employee whose act or omission gave rise to the claim, or against the estate of such employee.

(b) Section 2679(d) of title 28, United States Code, is amended to read as follows:

“(d)(1) Upon certification by the Attorney General that the defendant employee was acting within the scope of his office or employment at the time of the incident out of which the suit arose, any such civil action or proceeding commenced in a United States district court shall be deemed an action against the United States under the provisions of this title and all references thereto, and the United States shall be substituted as the party defendant. After such substitution the United States shall have available all defenses to which it would have been entitled if the action had originally been commenced against the United States under this chapter and section 1346(b).

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1 “(2) Upon certification by the Attorney General that the
2 defendant employee was acting within the scope of his office
3 or employment, at the time of the incident out of which the
4 suit arose, any such civil action or proceeding commenced in
5 a State court shall be removed, without bond, at any time
6 before trial, by the Attorney General to the district court of
7 the United States of the district and division embracing the
8 place wherein it is pending and be deemed an action brought
9 against the United States under the provisions of this title
10 and all reference thereto, and the United States shall be sub-
11 stituted as the party defendant. After such substitution the
12 United States shall have available all defenses to which it
13 would have been entitled if the action had originally been
14 commenced against the United States under this chapter and
15 section 1346(b). The certification of the Attorney General
16 shall conclusively establish scope of office or employment for
17 purposes of such removal.

18 “(3) The certification by the Attorney General under
19 subsection (d)(1) or (d)(2) that the defendant employee was
20 acting within the scope of his office or employment shall be
21 binding and conclusive, except that the defendant employee
22 may request the district court of the United States before
23 which the suit has been filed or removed to alter or modify
24 such certification or, in the event that the Attorney General
25 has not made a certification, to find and certify that such

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PAGE

employee was acting within the scope of his office or employment.

"(4) Where an action or proceeding under this chapter is precluded because of the availability of a remedy, compensation or other benefits from the United States as provided by any other law, the action or proceeding shall be dismissed, but in that event the running of any limitation of time for commencing, or filing an application or claim in, a proceeding for such other remedy, compensation, or benefits shall be deemed to have been suspended during the pendency of the civil action or administrative proceeding under this chapter.

"(5) Whenever an action brought against a defendant employee in which the United States is substituted as the party defendant under this subsection is dismissed for failure to first present a claim to the appropriate Federal agency under section 2675(a) of this title, if such claim is presented to the appropriate Federal agency under such section within 60 days after such dismissal, that claim shall be deemed to be timely presented under section 2401(b) of this title if such a claim is filed on the date the action against the defendant employee was commenced would have been timely presented under section 2401(b) of this title."

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12 SEC. 2. Section 1346(b) of title 28, United States Code,
13 is amended by inserting "(1)" after "(b)" and by adding at
14 the end thereof the following new paragraph:
15 "(2) Subject to the provisions of chapter 171 of this
16 title, the district courts, together with the United States Dis-
17 trict Court for the District of the Canal Zone and the District
18 Court of the Virgin Islands, shall have exclusive jurisdiction
19 of civil actions on claims sounding in tort for money damages
20 arising under the Constitution of the United States where
21 such tort is caused by an act or omission of an employee of
22 the Government while acting within the scope of his office or
23 employment. (The liability in any
24 such action shall be determined in accordance with applicable
25 Federal law."

1 SEC. 3. Chapter 171 of title 28, United States Code, is
 2 amended by adding at the end thereof the following new sec-
 3 tion:

4 "§ 2681. Constitutional torts

5 "(a) The head of each Federal agency may, in accord-
 6 ance with regulations prescribed by the Attorney General,
 7 consider, ascertain, adjust, determine, compromise, and settle
 8 any claim sounding in tort for money damages arising under
 9 the Constitution of the United States where such tort is
 10 caused by the act or omission of an employee while acting
 11 within the scope of his office or employment.

12 The liability with respect to any such claim
 13 shall be determined in accordance with applicable Federal
 14 law. The provisions of section 2672 shall apply with respect
 15 to claims considered, ascertained, adjusted, determined, com-
 16 promised, or settled under this subsection, except that no
 17 award, compromise, or settlement may be made under this
 18 subsection without the prior written approval of the Attorney
 19 General.

20 "(b) The United States shall be liable, with respect to a
 21 tort claim arising under the Constitution of the United
 22 States, to the extent that liability for such claim is recognized
 23 or provided by applicable Federal law, but shall not be liable
 24 for interest prior to judgment or for punitive damages. With
 25 respect to any such claim, the United States shall be liable

for (1) actual damages, (2) liquidated damages of \$1,000, or (3) in the case of a continuing violation, liquidated damages computed at a rate of \$100 per day for each violation up to a maximum of \$15,000, whichever is greater.

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The claimant shall also be entitled to receive a reasonable attorney's fee and other litigation costs reasonably

6 incurred, other than attorney fees or costs attributable to
7 processing an administrative claim filed under subsection (a)

8 of this section. The United States may not assert as a defense

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9 to a tort claim arising under the Constitution of the United

10 States, the absolute or qualified immunity of the employee

11 whose act or omission give rise to the claim, or his reason-

12 able good faith belief in the lawfulness of his conduct, except-

13 that the United States may assert such a defense if the act or

14 omission is that of a Member of Congress, a judge, or pros-

15 ecutor, or a person performing analogous functions.

16 (c) The provisions of section 2675 of this title shall

17 apply with respect to a tort claim arising under the Constitu-

18 tion of the United States described in subsection (a) of this

19 section.

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"(d)(1) The provisions of section 2679(b) of this title, relating to exclusiveness of remedy against the United States, shall apply with respect to tort claims arising under the Constitution of the United States described in subsection (a) of this section and shall be deemed an equally effective substitute for any recovery against any employee of the United States for tort claims arising under the Constitution of the United States.

"(2) The provisions of section 2679(d) of this title, relating to certification by the Attorney General, shall apply with respect to tort claims arising under the Constitution of the United States described in subsection (a) of this section.

"(e) Where an action or proceeding under section 1346(b) or 2672 of this title arising under the Constitution of the United States results in a judgment against the United States or an award, compromise, or settlement paid by the United States, the Attorney General shall forward the matter for such further administrative investigation or disciplinary action as may be appropriate to the head of the department or agency which employed the employee at the time of the employee's alleged act or omission giving rise to the claim.

1 "(g) Notwithstanding the provisions of section 2680 of
2 this title, the provisions of this chapter and section 1346(b) of
3 this title with respect to tort claims arising under the Consti-
4 tution of the United States described in subsection (a) of this
5 section shall apply to any claim set forth in subsections (a) and
6 (b) of such section 2680."

7 SEC. 4. (a) Section 2674 of title 28, United States
8 Code, is amended by inserting immediately after "claims"
9 the following: "based upon negligent or wrongful acts" or
10 omissions"

11 (b) Section 2678 of title 28, United States Code, is
12 amended by striking out "No" and inserting in lieu thereof:
13 "Except as provided in section 2681(b) of this title, no"

14 (c) Section 2680(h) of title 28, United States Code, is
15 amended to read as follows:

16 (h) Any claim arising out of libel, slander, misrepresen-
17 tation, deceit, or interference with contract rights."

18 SEC. 5. The table of sections of chapter 171 of title 28,
19 United States Code, is amended by adding at the end thereof
20 the following new item:

"2681. Constitutional torts."

21 SEC. 6. (a) Section 4116 of title 38, United States
22 Code, is amended—

- 23 (1) by repealing subsections (a) through (d); and
- 24 (2) in subsection (e)—

to dist. common law torts

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Med. Mal. practice

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1 (A) by striking out "(e)"; and
 2 (B) by striking out "person to whom the im-
 3 munity provisions of this section apply (as de-
 4 scribed in subsection (a) of this section)," and in-
 5 serting in lieu thereof "employee of the Depart-
 6 ment of Medicine and Surgery".

7 (b) Section 224 of the Public Health Service Act (42
 8 U.S.C. 233) is amended—

9 (1) by repealing subsections (a) through (e); and
 10 (2) in subsection (f) by striking out "(f)".

11 (c) Section 1091 of the Foreign Service Act of 1946 (22
 12 U.S.C. 817) is amended by repealing subsections (a) through
 13 (e).

14 (d) Section 1089 of title 10, United States Code, is
 15 amended—

16 (1) by repealing subsections (a) through (e); and
 17 (2) in subsection (f) by striking out "person de-
 18 scribed in subsection (a)" and inserting in lieu thereof
 19 "employee of the armed forces, the Department of De-
 20 fense, or the Central Intelligence Agency,".

21 (e) Section 307 of the National Aeronautics and Space
 22 Act of 1958 (42 U.S.C. 2458a) is amended—

23 (1) by repealing subsections (a) through (e); and
 24 (2) in subsection (f)—

25 (A) by striking out "(f)"; and

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1 (B) by striking out "person described in sub-
2 section (a)" and inserting in lieu thereof "em-
3 ployee of the National Aeronautics and Space
4 Administration".

5 SEC. 7. Section 2520 of title 18, United States Code, is
6 amended by adding at the end thereof the following new
7 paragraph:

8 "This section shall not apply to civil causes of action
9 against officers or employees of the United States while
10 acting within the scope of their office or employment, if
11 the United States is named or substituted as the party de-
12 fendant."

SEC. 8.(a) The amendments made by this Act shall apply
to all claims and suits filed after the date of the enact-

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1 ment of this Act, and to all claims and suits pending on such
 2 date of enactment. With respect to any pending claim or suit,
 3 ~~and with respect to any cause of action known to an ag-~~
 4 ~~grieved party before the date of the enactment of this Act for-~~
 5 ~~which no claim or suit has been filed as of such date of enact-~~
 6 ~~ment, the claimant, plaintiff, or aggrieved party, as the case~~
 7 ~~may be, may elect to retain his right to a trial by jury if, in~~
 8 ~~the case of a plaintiff who has filed suit, the demand for trial~~
 9 ~~by jury is made before such date of enactment, or if, in the~~
 10 ~~case of such a plaintiff, claimant, or aggrieved party, such~~
 11 ~~right has not expired as of such date of enactment. In any~~
 12 ~~case in which a plaintiff elects to retain his right to trial by~~
 13 ~~jury, the provisions of section 2681(b) of this title, as added~~
 14 ~~by section 3 of this Act, relating to liquidated damages,~~
 15 ~~waiver of absolute or qualified immunity, and attorneys' fees~~
 16 shall not apply.

17 (b) In the event that a case is pending on appeal on the
 18 date of the enactment of this Act, it shall be remanded to the
 19 appropriate district court for further proceedings in accord-
 20 ance with section 1346(b), and sections 1381 through 1388
 21 of title 28, United States Code, as amended and added by
 22 this Act, upon certification by the Attorney General that the
 23 defendant employee was acting within the scope of his office
 24 or employment, ~~or that he was acting solely under the color~~
 25 ~~of his office~~, at the time of the incident out of which the suit

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1 arose. In the event that the appeal was taken from a judg-
2 ment rendered in favor of a plaintiff, the judgment shall be
3 binding on the United States if it is substituted as a
4 defendant.



Department of Justice

STATEMENT

OF

EDWARD C. SCHMULTS
DEPUTY ATTORNEY GENERAL

BEFORE THE

COMMITTEE ON THE JUDICIARY
SUBCOMMITTEE ON ADMINISTRATIVE LAW
AND GOVERNMENTAL RELATIONS
U.S. HOUSE OF REPRESENTATIVES

CONCERNING

AMENDMENTS TO THE FEDERAL TORT CLAIMS ACT

OCTOBER 13, 1981

MR. CHAIRMAN AND MEMBERS OF THE SUBCOMMITTEE:

I am pleased to appear before this Subcommittee to support the purposes and the major provisions of legislation such as H.R. 24, which would make the Government liable for constitutional torts and the exclusive defendant in all tort suits involving Government employees acting within the scope of their employment. The Administration's views reflect continuity with the position of prior Administrations, which elicited broad bipartisan support. Case law eviscerating traditional doctrines of official immunity make congressional action imperative.

At present, the Federal Tort Claims Act makes the Government liable for tort claims based on the negligent or wrongful act or omission of any Government employee while acting within the scope of his office or employment, such liability to be determined "in the same manner and to the same extent as a private individual under like circumstances."1/ There are some specifically enumerated exceptions to this general grant of tort jurisdiction and liability, such as cases involving discretionary governmental functions, assault and battery, and claims arising in foreign countries. 2/

Although Congress has enacted several specific provisions that make the Government the exclusive defendant in certain situations, 3/ a plaintiff is generally permitted to sue both the federal employee allegedly responsible for misconduct as well as the United States. Suits against government employees in their personal capacities quickly dispel the widespread misconception that they are shielded from personal liability for their official acts.

In 1971, the Supreme Court, in Bivens v. Six Unknown Named Agents, 4/ declared that Congressional authorization was not required to expose individual federal officials to personal liability for violations of Fourth Amendment rights. Since that decision, there has been an exponential increase in the number of lawsuits seeking redress directly from the individual defendant's personal resources rather than from the Government. The United States can generally invoke sovereign immunity as a defense in Bivens suits, which are popularly labelled "constitutional" tort actions. The hallmark of a constitutional tort claim is a complaint against a public official seeking damages for an alleged violation of the Constitution, such as the Fourth or Fifth Amendment.

The Supreme Court has repeatedly widened the exposure of federal officials to damage liability for constitutional torts since Bivens. The Court has countenanced a damage suit against a Congressman under the Fifth Amendment, 5/ and suit against prison officials under the Eighth Amendment, even though an alternative remedy, the Federal Tort Claims Act, was available. 6/ The Court also recently affirmed, by a 4-4 vote, a decision by the United States Court of Appeals for the District of Columbia Circuit holding that the President of the United States could be held personally liable in tort damages for acts done in the course of his duties. 7/

Subordinate federal courts have extended the Bivens constitutional tort theory to claims bottomed on virtually any constitutional infraction. The Department estimates that there are at present in excess of 1,500 lawsuits pending against federal officials in their individual capacities. Several of these lawsuits involve multiple defendants, some as many as thirty to forty-five. Initially, Bivens suits were primarily filed as a result of incidents involving law enforcement activities; in recent years, however, such suits increasingly have arisen

out of regulatory or personnel actions taken by federal officials. A United States District Court ruling in 1980 holding members of the former Civil Service Commission potentially liable under the Fifth Amendment for allegedly disclosing derogatory allegations against a job applicant to another agency without notice and an opportunity to be heard is exemplary of this trend. 8/ A similar ruling was issued a few months ago against officials of the former Community Services Administration. 9/ Bivens actions have subjected countless federal employees to vexatious litigation and encouraged a timid discharge of official duties because of the fear of lawsuits. 10/ While several thousand constitutional tort actions have been filed, only nine have eventuated in money judgments against Federal employees, 11/ which illustrates the fidelity to constitutional norms exhibited by virtually all federal officials. Prudence, nevertheless, dictates the construction of statutory safeguards against adverse judgments against individual employees. 12/

The existing law of Government and employee tort liability lacks any organizing or coherent principles. While the driver of a negligently driven Government vehicle is shielded from

suit, 14/ the President and certain members of the United States Senate have been sued as individuals for monetary damages based on the allegedly wrongful disposal of the Panama Canal. 15/ While an employee cannot be sued for the unlawful seizure of a sea going vessel, 16/ an employee can be sued for the wrongful seizure of other items. 17/ While tax collectors in some circumstances are immune from suits, 18/ customs collectors are not. Government lawyers in those instances in which they represent individuals can be sued for malpractice; most Government doctors cannot. 19/ Although Government employees cannot be sued individually for patent infringement, 20/ Government flight controllers have been sued as individuals for damages arising from airplane disasters. 21/ The specter of personal lawsuits depresses morale, chills vigorous and effective public action, and unfairly burdens the conscientious public official in executing his or her federal duties.

Augmenting these problems is the fact that the Federal Tort Claims Act generally does not foreclose lawsuits against both the government and individual federal employees for common law or non-constitutional torts. Moreover, no general provision exists for indemnification of a sued federal official. Thus,

a federal official must daily confront the hazard of incurring personal financial loss for actions taken in the course of duty.

The victim of a constitutional tort is equally disserved under existing law. Litigating a constitutional claim is expensive, exhausting and unlikely to result in a collectible judgment against a federal employee. The Government is liable only for intentional torts arising from assault, battery, false imprisonment, false arrest, malicious prosecution and abuse of process, and then only if the tortfeasor is an "investigative or law enforcement officer." 22/ Even if successful, the plaintiff has difficulty proving substantial actual damages from the violation of a constitutional right, 23/ and if damages can be proven, Government employees ordinarily would be unable to pay.

Finally, the present system of employee liability is also counterproductive for the Government. The Bivens action entails expenditure of large resources and great complexity in the defense of individuals. Although employees acting within the scope of their employment are defended by Department of Justice attorneys, the Government often must retain private attorneys when ethical considerations preclude representation by Government attorneys. For example, it is inappropriate for a Department of Justice attorney

to represent an employee whose conduct may be under criminal investigation, or when multiple defendant employees raise inconsistent defenses. In some cases, the best interests of the defendant require the raising of technical or substantive defenses which the Department is reluctant to raise or is combating in other unrelated litigation. Such anguishing difficulties have repeatedly confronted the Department and individually sued defendants.

The Department's private counsel program is expensive. Despite hiring at much less than the prevailing rate, the Department has spent over two million dollars for private counsel since 1976. Whether taxpayers should underwrite the action of unsupervised attorneys advancing arguments which may be inconsistent with the legal policies of the Government is, at a minimum, questionable. Moreover, the presence of the individual employee and his private counsel makes the lawsuit difficult to settle.

These manifold flaws in the current law of official liability would be removed by the enactment of legislation such as H.R. 24. The bill would make the Government the exclusive defendant in all common law tort actions in which the Attorney General certified that the employee was acting within the scope of his employment. In addition, for the first time, the United States could be sued

for a Bivens or constitutional tort. The exclusive remedy in such a case would also be against the United States.

The Department has proposed to the Subcommittee modifications to H.R. 24 in the format of an alternative draft of the proposal. The modifications would integrate amendatory language with existing provisions of the Federal Tort Claims Act, rather than adding an entirely new provision dealing exclusively with constitutional torts, in furtherance of clarity and simplicity.

The modifications would also retain the qualified immunity defense and such other immunity defenses as have been recognized by the courts in Bivens actions as available to an individual employee. We strongly believe that such defenses advance the public interest. They frequently disprove the merits of a claim by testing the acts of the challenged official against a standard of reasonableness and good faith. Sound economic reasons also counsel retention of the defenses, since provision is made for liquidated damages in the event of proof of a constitutional tort. Furthermore, the employee and the agency have a professional interest in avoiding judicial reproaches for conduct which was motivated in good faith upon reasonable grounds. Finally, the absence of a good faith defense would make public officials reluctant to take action where the law is uncertain. To safeguard against the possibility of an adverse court judgment and financial liability, officials would be restricted to action that is indisputably legal. Regrettably, areas of legal certainty are diminishing, and

eliminating a good faith defense could discourage progressive and enlightened policies in the numerous areas where the law is unfolding or equivocal for fear of financial liability.

We do recommend, on the other hand, that §2680 exceptions to Federal Tort Claims Act jurisdiction exclude constitutional torts. The reason is that the Bivens action was prompted by situations where a wronged citizen had no other means of redress. If the statutory exceptions of §2680 are available to the United States for constitutional misconduct, the courts would incline toward allowing suit directly against the employee, thereby thwarting a cardinal purpose of the proposed legislation.

We do not support providing attorneys fees in constitutional tort cases. In our view, such a provision creates an unwarranted disparity of benefits between this type of tort and the traditional tort. The availability of attorneys fees would invite artful pleading by adroit counsel and resultant litigation over the propriety of the pleading as well as the amount of fees. In addition, courts might be pressured by the existence of such a provision to find a constitutional tort where it may not properly lie.

Certain other modifications of the Department have been previously set forth in our correspondence to Chairman Rodino.

I would emphasize once again that this legislative initiative offers a meaningful, attainable remedy to a citizen who has suffered a constitutional deprivation. At the same time, it dispels the cloud of potential personal liability that

currently hangs over almost every federal public servant. Through this legislation, the citizen can obtain redress and the public official can conscientiously perform his mission. The citizen, the Government and the public are all the beneficiaries.

You have also asked for the views of the Administration with respect to H.R. 3799, which would also amend the Federal Tort Claims Act. That bill would make the United States liable for the activities of members of the Air National Guard or the Army National Guard while engaged in training activities or duty under Sections 316, 502, 503, 504 and 505 of Title 32 of the United States Code, or any other provision of law for which a member is entitled to, or has waived, pay under Title 37. The definition of "employee of the government" would also be enlarged to include members of the Army National Guard and Air National Guard.

As you know, Mr. Chairman, the Department of Justice has testified in this Congress against S. 267, the Senate counterpart of H.R. 3799, and I have submitted a copy of that testimony for the record. In fact, the Department has opposed similar legislative proposals for over 20 years and we must oppose this legislation as well. From its inception in 1946, the Federal Tort Claims Act has provided for United States liability for the negligent or wrongful acts or omissions of federal employees acting within the scope of their employment. The predicate for this statute is the legal doctrine of respondeat superior: a master will be held vicariously liable for the acts of his servants because the master controls the conduct of the servant. However, it is settled law that members of the Army National Guard and Air National Guard are

employees of the states rather than the federal government unless they are formally called into active federal service. Maryland v. United States, 381 U.S. 41 (1965). While undergoing required training, Guardsmen remain under the day-to-day control, supervision and discipline of their state superiors. Because it would subject the United States to liability for the conduct of state employees acting under the control of state officials, H.R. 3799 is inconsistent with the basic principles of tort law which serve as the predicate for imposing liability under the Federal Tort Claims Act. The 94th Congress addressed the very issue raised by H.R. 3799 and the fact that National Guardsmen are not federal employees. In recognizing that the legislation would impose liability upon the United States where the authority over, and ability to control the conduct of, the tortfeasor was retained by others, Congress refused to indulge in "the creation of legal fictions--making National Guard personnel federal employees." Senate Report No. 94-1264, Armed Services Committee, September 20, 1976.

Moreover, Article I, Section 8, Clause 16 of the Constitution specifically reserves "to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress." As stated by the Supreme Court in Maryland v. United States, "the National Guard is the modern Militia . . .". 381 U.S. at 46. It would thus be anomalous to legislate a federal employment relationship in the face of a constitutional scheme which clearly contemplates state, rather than federal, control of the training of the National Guard. It should also be noted that such legislation would make the United States

financially responsible without limitation for the acts of persons over whom it exercises no day-to-day control. The impact upon the Treasury would not be in the interest of the United States.

Finally, you have also asked us to comment upon H.R. 3060, which would amend section 3006A of Title 18 to provide representation, indemnity or liability insurance for officers and employees of a federal public defender organization, or a community defender organization receiving periodic sustaining grants, for damages resulting from the officer's or employee's malpractice or negligence in furnishing what are termed "representational services." As a general proposition, the Department prefers the comprehensive approach taken in H.R. 24, which would immunize the federal public defender as well as all other federal employees from personal liability by creating an exclusive remedy against the United States for all torts committed within the scope of employment.

We would also note that H.R. 3060 covers "malpractice or negligence", and appears to offer no protection against intentional tortious conduct and Bivens type constitutional torts. It is easy to envision an angry witness, exposed informant, accused "real culprit" or co-conspirator, or a disappointed client seeking Fifth Amendment damages against a public defender for an alleged constitutional tort. The comprehensive legislative proposal contained in H.R. 24 would resolve this problem by providing that jurisdiction would lie against the United States for constitutional torts as the exclusive remedy.

Lastly, we oppose the inclusion of "community defender organizations" and their employees in the legislation without a careful delineation of the activities of those organizations which would be protected. The organizations are not federal entities, their employees are not federal officials, and the parent statute appears to place few controls on such organizations in terms of compensation, term of office, reports, admission to the Bar, scope of activities, etc.

In short, while we applaud the goal of H.R. 3060 in view of the threat of personal liability suits against public defenders, it would be preferable to seek prompt enactment of comprehensive Federal Tort Claims Act amendments such as are embodied in H.R. 24.

FOOTNOTES

- 1/ 28 U.S.C. 1346(b), 2672 and 2674.
- 2/ See 28 U.S.C. 2680.
- 3/ E.g., 28 U.S.C. 2679(b) (drivers of motor vehicles); 38 U.S.C. 4116 (medical personnel employed by the Veterans Administration); 26 U.S.C. 7426(d) (employees levying on property to collect federal taxes immune from suit brought by persons other than the taxpayer claiming an interest in the property); 28 U.S.C. 1498 (employees sued for patent infringement); 46 U.S.C. 746 (employees sued for unlawful seizure of sea going vessels).
- 4/ 403 U.S. 388 (1971).
- 5/ Davis v. Passman, 442 U.S. 228 (1979)..
- 6/ Carlson v. Green, 446 U.S. 14 (1980).
- 7/ Halperin v. Kissinger, No. 79-880, June 22, 1981.
- 8/ Doe v. United States Civil Service Commission, 483 F. Supp. 539 (1980).
- 9/ Conset Corporation, et al. v. Community Services Administration, et al., C.A.D.C., No. 80-1547, June 5, 1981.
- 10/ See, e.g., House Hearings at 31 (statement of John S. McNerney).
- 11/ ASKEW v. BLOEMKER, S-CIV-73-79 (S.C. Ill., Sept. 29, 1978). DEA agent was held personally liable for violating the Fourth Amendment rights of three plaintiffs by conducting a search without probable cause or a warrant; the jury awarded damages of \$22,000; plaintiffs agreed not to enforce the judgment against the uninsured Federal agent but rather to proceed against defendant state employees who were insured.
- SEGUIN v. HIGHTOWER, No. C76-182-V (W.D. Wash., Oct. 24, 1978). Customs agent held personally liable to the owner of an impounded car used in a smuggling scheme because the agent delayed four and one half months in initiating forfeiture action; the court awarded the plaintiff \$7,300 for rental value of the car plus consequential damages; the case is on appeal.

JIHAD v. CARLSON, CA No. 5-71-805 (E.D. Mich., Oct. 18, 1976). Prison guard held personally liable for \$992 to inmate for violating his right to religious freedom in placing him in segregation for refusing to shave his beard; the judgment was reversed on appeal.

WEISS v. LEHMAN, CA No. 375-36 (C.D. Idaho, July 14, 1978). Forest service ranger held personally liable for \$1,000 for violating plaintiff's Fifth Amendment rights by destroying property owned by plaintiff which had been apparently abandoned; the Ninth Circuit Court of Appeals affirmed the judgment. A Petition for Writ of Certiorari was filed in the Supreme Court. We have just been advised that the Court has granted the petition and remanded the case for reconsideration (No. 80-2159, Oct. 5, 1981) in light of Parratt v. Taylor, 49 USLW 4509, May 18, 1981.

HALPERIN v. KISSINGER, 424 F. Supp. 838 (D. D.C. 1976) and 434 F. Supp. 1193 (D. D.C. 1977). Former President Richard Nixon, H.R. Haldeman and John Mitchell held personally liable in damages for violating plaintiffs' Fourth Amendment rights in authorizing wiretaps.

DELLUMS v. POWELL, 566 F.2d 167 (D.C. Cir. 1977). Chiefs of U.S. Capitol and D.C. Police held personally liable for arrests at Capitol Building during anti-war demonstration in class action with 1,200 plaintiffs; a total judgment of approximately 2 1/2 million dollars plus interest was entered against all defendants and subsequently paid through Congressional action.

TATUM v. MORTON, 562 F.2d 1279 (D.C. Cir. 1977). Inspector of D.C. Police held personally liable for \$500 for disrupting 29 demonstrators at the White House.

SCHONEBERGER v. HINCHCLIFFE, C.A. No. 76-234 (D. Vermont, Sept. 22, 1980). FBI agent personally held liable for \$150 for retaining a firearm (for too long a period) seized during a raid for illegal aliens.

SAXNER v. BENSON, C.A. No. 75-47-C (S.D. Indiana 1981). Three members of a Federal Corrections Institution Disciplinary Committee held personally liable for \$3,000 apiece for violating an inmate's procedural due process rights; a motion for reconsideration has been filed.

12/ In the Weiss case cited in the previous footnote, the plaintiff, for example, sought a total of \$148,000 in damages. The jury thus could have awarded that amount against that forest ranger.

13/ 28 U.S.C. 2680(h).

14/ 28 U.S.C. 2679(b).

15/ Hohensee v. Carter, C.A. No. 78-345 (M.D. Pa.).

16/ 46 U.S.C. 745.

17/ See, e.g., Seguin v. Hightower, No. C-76-182-V (W.D. Washington, Oct. 24, 1978).

18/ 26 U.S.C. 7426(d).

19/ See, e.g., 38 U.S.C. 4116.

20/ 28 U.S.C. 1498.

21/ AETNA Casualty & Insurance Co. v. United States, 570 F.2d 1197 (4th Cir. 1978).

22/ 28 U.S.C. 2680(h).

23/ In Halperin v. Kissinger, 434 F. Supp. 1193 (D. D.C. 1977), for example, after plaintiffs proved that they had been subjected to unlawful telephone wiretaps for a period of twenty-one months, they were awarded nominal damages of \$1 each.