FEDERAL TORT CLAIMS AMENDMENTS

HEARINGS

BEFORE THE

SUBCOMMITTEE ON CLAIMS AND GOVERNMENTAL RELATIONS

OF THE

COMMITTEE ON THE JUDICIARY HOUSE OF REPRESENTATIVES

NINETY-THIRD CONGRESS

SECOND SESSION

ON

H.R. 10439

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, AND FOR OTHER PURPOSES

MARCH 27 AND APRIL 3, 1974

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FEDERAL TORT CLAIMS AMENDMENTS

WEDNESDAY, MARCH 27, 1974

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON CLAIMS
AND GOVERNMENTAL RELATIONS,
OF THE COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The subcommittee met at 10:15 a.m., pursuant to notice, in room 2237, Rayburn House Office Building, Hon. Harold D. Donohue [chairman of the subcommittee] presiding.

Present: Representatives Donohue, Danielson, Butler, and Moorhead.

Also present: William P. Shattuck, counsel; and Alan F. Coffey, Jr., associate counsel.

Mr. DONOHUE. Let's get this meeting started.

We have on our agenda H.R. 10439, to amend title 28 of the United States Code to provide for an exclusive remedy against the United States in suits based upon actual remissions of U.S. employees and for other purposes.

[The bill referred to follows:]

93D CONGRESS
1ST SESSION

H. R. 10439

IN THE HOUSE OF REPRESENTATIVES

SEPTEMBER 20, 1973

Mr. RODINO (for himself and Mr. HUTCHINSON) introduced the following bill; which was 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, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section 1346(b) of title 28, United States Code is amended by striking the period at the end of the section and adding the following: ", or where the claims sounding in tort for money damages arise under the Constitution or statutes of the United States, such liability to be determined in accordance with applicable Federal law."

SEC. 2. Section 2672 of title 28, United States Code, is amended by inserting in the first paragraph the following language after the word "occurred" and before the colon: ", or where the claims sounding in tort for money damages arise under the Constitution or statutes of the United States, such liability to be determined in accordance with applicable Federal law".

SEC. 3. Section 2674 of title 28, United States Code, is amended by deleting the first paragraph and substituting the following:

"The United States shall be liable in accordance with the provisions of section 1346(b) of this title, but shall not be liable for interest prior to judgment or for punitive damages: *Provided*, That for claims arising under the Constitution or statutes of the United States, recovery shall be restricted to actual damages and, where appropriate, reasonable compensation for general damages not to exceed $5,000.".

SEC. 4. 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 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 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.".

SEC. 5. Section 2679 (d) of title 28, United States Code, is amended by inserting in the first sentence the words "office or" between "scope of his" and "employment.".

SEC. 6. Section 2679 (d) of title 28, United States Code, is amended by deleting the second sentence and substituting the following: "After removal 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 the Federal Tort Claims Act. Should a United States district court determine on a hearing on a motion to remand held before a trial on the merits that the employee whose act or omission gave rise to the suit was not acting within the scope of his office or employment, the case shall be remanded to the State court: *Provided*, That where such a remedy is precluded because of the availability of a remedy through proceedings for compensation or other benefits from the United States as provided by any other law, the case shall be dismissed, but in that event the running of any limitation of time for commencing, or filing an application or claim in, such proceedings for compensation of other benefits shall be deemed to have been suspended during the pendency of the civil action or proceeding under this section.".

SEC. 7. Section 2680 (h) of title 28, United States Code, is amended to read as follows: "Any claims arising out of libel, slander, misrepresentation, deceit, or interference with contract rights.".

SEC. 8. Section 4116 of title 38, United States Code, is repealed, as of the effective date of this Act.

SEC. 9. Section 223 of title II of the Public Health Service Act (58 Stat. 682, as added by section 4 of the Act of December 31, 1970, 84 Stat. 1870 (42 U.S.C. 233)), is redesignated as section 224 and is amended to read as follows:

"AUTHORITY OF SECRETARY OR DESIGNEE TO HOLD HARMLESS OR PROVIDE LIABILITY INSURANCE FOR ASSIGNED OR DETAILED EMPLOYEES

"SEC. 224. The Secretary of Health, Education, and Welfare, the Secretary of Defense, and the Administrator of Veterans' Affairs, or their designees may, to the extent deemed appropriate, hold harmless or provide liability insurance for any officer or employee of their respective departments or agencies for damage for personal injury, including death or property damage, negligently caused by an officer or employee while acting within the scope of his office or employment and as a result of the performance of medical, surgical, dental, or related functions, including the conduct of clinical studies or investigations, if such employee is assigned to a foreign country or detailed to other than a

Federal agency or institution, or if the circumstances are such as are likely to preclude the remedies of third persons against the United States described in section 2679 (b) of title 28, for such damage or injury.".

SEC. 10. This Act shall become effective on the first day of the third month which begins following the date of its enactment and shall apply to only those claims accruing on or after the effective date.

Mr. DONOHUE. We are pleased to have with us the Honorable Irving Jaffe, the Acting Assistant Attorney General of the Civil Division of the Department of Justice for the purpose of having his views presented.

TESTIMONY OF IRVING JAFFE, ACTING ASSISTANT ATTORNEY GENERAL, CIVIL DIVISION, DEPARTMENT OF JUSTICE; ACCOMPANIED BY JOHN G. LAUGHLIN, CHIEF, TORT SECTION, CIVIL DIVISION, DEPARTMENT OF JUSTICE

Mr. JAFFE. Mr. Chairman, I appreciate the opportunity to appear before this subcommittee on behalf of the Department of Justice to testify on H.R. 10439.

The underlying purpose of this bill is to provide an exclusive remedy against the United States under the Federal Tort Claims Act for claims for money damages arising out of the performance of official duties by Federal employees and to immunize these employees from personal liability for acts performed within the scope of their Federal employment. The bill also provides that the remedy and waiver of immunization provided by the Federal Tort Claims Act encompasses claims for money damages arising under the Constitution or statues of the United States.

Mr. DONOHUE. Might I interrupt you at that point, Mr. Jaffe, if you don't mind.

Mr. JAFFE. Yes, sir.

Mr. DONOHUE. What is the meaning of that language, "encompasses claims for money damages arising under the Constitution or statutes of the United States."

Mr. JAFFE. Mr. Chairman, the case of Bivens against the United States modified the doctrine that we had at the bar in the *Matteo* case. In that case, if you recall, we believe that employees would be insulated from even a trial of an action if they were acting within—out of the perimeter of their duties. In the *Bivens* case the Supreme Court said

that the Bar against Matteo did not apply if there was an invasion of the Constitution. We believe that as long as we are going to be sued for that it ought to be included in the statute expressly.

Mr. DONOHUE. Thank you.

Mr. JAFFE. To assist the subcommittee, I would like to give a brief synopsis of each section of H.R. 10439.

Section 1 amends section 1346(b) of title 28 of the United States Code to extend the exclusive jurisdiction of the U.S. district courts to include claims sounding in tort arising under the Constitution and statutes of the United States. This section also provides that the liability of the United States is to be determined in accordance with applicable Federal law. Because of the cause of action arises under the Constitution or a Federal statute, Federal law must necessarily control and would, of course, be declaratory of the decisional law as it now exists.

Mr. DONOHUE. What is meant by that?

Mr. JAFFE. We do know what Federal law means or we will know or should know on the basis of past precedent from established decisions of the courts. The liability or whatever the interpretation is of the Federal statute we will get from the Federal court, if not in the tort context, then in other context. So we feel that any tort should be determined in accordance with the decisional law of the interpretation of those statutes.

The current reference in 28 U.S.C. 1346(b) to the law of the place where the act or omission occurred will continue to apply in other tort situations which arise under State law.

Mr. DONOHUE. Would you explain that?

Mr. JAFFE. Yes. When we have an ordinary tort we don't have any Federal laws which define the torts that normally occur, but State laws do. The United States, as though it were a private party, is held accountable under existing law in accordance with State law concepts, but that is because the torts are defined in the States. No State, I would imagine, would define a tort as it arises under a Federal statute or may arise under the Federal statute or the Constitution. So if we didn't put in the provision for Federal law we would have the provision in 1346(b) which would apply State law principles which do not exist in interpreting a tort which arises under the Federal Constitution or Federal statute. That is really clarifying rather than changing anything.

Mr. DONOHUE. Well, when the claim arises under the provision of the Constitution or a Federal statute and it is tried, would the rules of evidence existing in the State court apply?

Mr. JAFFE. Well, that is a somewhat different problem because these cases would be tried in the Federal district courts and the Federal district courts do have their own rule of evidence, and the rules of evidence that would apply would be the forum, namely, the Federal district court, and is even today. They are the Federal rules of evidence which apply.

Section 2 of the bill amends section 2672 of title 28 of the United States Code to provide additionally for the administrative adjustment of claims arising under the Constitution or statutes of the United States and provides that the liability of the United States for such

claims shall be determined in accordance with applicable law. That is also a housekeeping provision if they are adding a new cause of action, so to speak, then we do want them to be submitted administratively the same way that other tort claims are now submitted.

Section 3 of the bill amends section 2674 of title 28 of the United States Code so as to provide a measure of damages for claims arising under the Constitution or statutes of the United States by providing unlimited recovery for actual damages sustained, and by permitting where appropriate, additional reasonable compensation for general damages, such damages not to exceed $5,000.

Mr. DONOHUE. Would you explain that?

Mr. JAFFE. Yes.

Under existing law the United States is not liable for punitive damages, for example, and that is not being changed. When we talk of actual damages we are speaking of the type of damages that are subject to proof such as hospital bills, medical expenses, loss of earnings, those elements which lend themselves to proof when we speak of general damages, while not punitive, are usually assessed for such vague things as pain and suffering, damage to reputation unless it can be established—I am not talking about damage to business, for example, which may be subject to actual show, but those elements of damages which do not lend themselves to mathematical computation.

Mr. BUTLER. Mr. Chairman.

Mr. DONOHUE. Mr. Butler.

Mr. BUTLER. Is there precedent for making this kind of a designation of damages as actual damages and general damages in legislation?

Mr. JAFFE. I can't answer that with respect to legislation. Judicially they may have the distinction between actual and general damages. The word "actual damages" is used in the Federal Tort Claims Act now, but not the word "general."

Mr. BUTLER. The actual damages as presently contemplated by the Federal Tort Claims Act has been interpreted judicially, I judge. Does that interpretation not include what you also include here as general damages, or are we adding something to what is entitled to be recovered under the Federal Tort Claims Act as it now exists?

Mr. JAFFE. General damages have been recoverable under the Federal Tort Claims Act as it now exists. We are trying to limit the amount of recovery for general damages, not for actual damages.

I can explain where we got the figure, too.

Mr. BUTLER. All right. I am quite sure there is a basis for that, but I want to clarify in my own mind how clearly existing legislation or existing case law define the distinction between actual damages and general damages as you use it in this proposal.

Mr. JAFFE. Existing case law does distinguish between actual damages and general damages, so it is a workable standard.

Mr. BUTLER. All right. Now, let us take the situation of an ordinary personal injury situation. Actual damages, I judge, are out of pocket expenses?

Mr. JAFFE. Yes.

Mr. BUTLER. Would loss of wages be an actual damage or general.

Mr. JAFFE. Actual.

Mr. BUTLER. Would loss of prospective wages be an actual damage or general damage?

Mr. JAFFE. That is where we get into the hairline area. It would be actual to the extent it is speculative, it might be general.

Mr. BUTLER. Well, there is so much gray area in the law, every bit of law. Of course, that is how lawyers make a living. So I understand why we have to keep those things in the law, but to write in the law deliberately a vague term like "general damages" concerns me. But I am not expert enough to criticize it except to say I would like to have some assurance from you that we are not stepping into a very creative and gray area when we really don't need one, and up to now I am not really very much reassured by what you said.

Mr. JAFFE. Let me say this. We are not creating any new gray areas. The general damages, as we use the term and as the courts use the term, have been allowed under the Federal Tort Claims Act now. It comes under the term of pain and suffering, which can't be measured by any documentary type evidence. It can't be measured in terms of dollars.

Now, future earnings to the extent that it can be demonstrated, and there are rules of damages that apply to that, are recoverable as actual damages, not general damages.

Where a person has been out of work is a direct result of damages for 1 or 2 months, there is no question about the actual damages. When a person has a permanent injury, for example, and is going to affect his ability to continue in the occupation in which he was engaged at the time of the injury, and then we begin to measure what his loss of future earnings are, that is sometimes subject to a reasonable type of computation and then it would become actual damages.

If we are going to speak, however——

Mr. BUTLER. If the guy had never had a job before, if you caught him before he had any earning capacity developed, would we not be dealing with a general damage, in which case we may have a person who is totally disabled for the rest of his life and yet he is limited to $5,000. Are we running into that problem?

Mr. JAFFE. I am advised, and I should have introduced him, John Laughlin, Chief of the Tort Section in the Civil Division, tells me if we have an 18-year-old college student who has never earned any money yet is injured to the point where his future earnings are going to be cut off, let us say he is not severely injured or injured to an extent where his earning capacity will necessarily be reduced, that we do have case law that indicates that is subject to a certain type of computation as actual damages.

Mr. BUTLER. Thank you.

Mr. DONOHUE. Explain, will you, Mr. Jaffe, the limitation of $5,000.

Mr. JAFFE. We picked the figure of $5,000, Mr. Chairman, because in a statute which we consider comparable to this type of damages which is now on the books, that for unjust imprisonment which appears in title 28, where a man is convicted, sentenced for a crime and is later found to be innocent of that crime, the damages to which he is given a cause of action are limited to $5,000. That is the type of damages which we thought was comparable to this, and we thought we would keep the same figure.

We are not locked into that figure if anyone thinks that is too low. As a matter of fact, we have urged some years ago that the other statute be increased in light of the length of time that it had been on the books. We are merely trying to be uniform to that in this particular case.

Mr. DONOHUE. You say that suffering would come under the category of general damages?

Mr. JAFFE. Yes.

Mr. DONOHUE. Let's assume a person is involved in an accident involving personal injuries, and they are of such a nature to continue for months and months and months, and he has the type of injury that is accompanied by considerable pain and suffering. Under the language, as I read it, that would come within the classification of general damages. It states here that he could not recover any more than $5,000.

Mr. JAFFE. Well, first I want to clarify one thing. This limitation only relates to constitutional—only to the cause of action that is now given for torts arising under the Constitution or Federal statute. It does not alter the right to recover general damages where he is struck by a Postal Service truck, for example, or where the injury is sustained under any circumstance, say under a State tort law which is applicable. This only relates to the constitutional Federal tort type of action. The illustration that you give, it would seem to me, Mr. Chairman, would encompass actual damages more than general damages except for the extent of the pain and suffering you mentioned.

Mr. DONOHUE. Well, I have in mind a situation where a law enforcement officer would, in the course of his duties, go into a person's home and committed an assault and battery. That would come under the Tort Claims Act as we are trying to amend it.

Mr. JAFFE. Yes.

Mr. DONOHUE. But it would be primarily a violation of, say, his constitutional rights.

Mr. JAFFE. Yes.

Mr. DONOHUE. Supposing he was injured in the course of that violation by the law enforcement officer and his injuries were such as to incapacitate him for a long time and the injuries were accompanied by pain and suffering. Under this provision he could not recover any more than $5,000.

Mr. JAFFE. For the pain and suffering. He would recover all the actual damages for the length of time he was out for his medical expenses.

Mr. DONOHUE. Apart from the actual damages?

Mr. JAFFE. Yes.

Mr. DONOHUE. Actual damages are analogous to speculative damages with respect to State courts.

Mr. JAFFE. Yes.

Mr. DONOHUE. But still he would be limited to $5,000 in the case I cited?

Mr. JAFFE. I am reminded that even that may arise under the Constitution, it would also arise under a State tort law of an assault and battery which we are waiving and we are not limiting it under those circumstances. In other words, this only relates to a cause of action

that arises under the Constitution or Federal statutes. If it arises under assault and battery, which is a State law tort, then this does not limit——

Mr. DONOHUE. But under existing law in tort claims the person would not have any cause of action.

Mr. JAFFE. Against the United States. He has one against the officer.

Mr. DONOHUE. Do you have any questions?

Mr. DANIELSON. Yes, I have.

Appropos your last response, an action against the U.S. Government would be separate and apart from his action against the individual officer of the U.S. Government?

Mr. JAFFE. Well, our proposal is to make it exclusive so his sole cause of action would be against the United States. But his cause of action against the United States would not rise only out of the Constitution or Federal statute. He would cause an action based upon the assault by the individual employee, in which case the actual damage and the general damage limitation, that is the general damage limitation, would not apply.

Mr. DANIELSON. He would no longer have a cause of action against the individual officer.

Mr. JAFFE. That is correct.

Mr. DANIELSON. But only against the U.S. Government?

Mr. JAFFE. That is correct.

Mr. DANIELSON. And the major damage—the potential damage would be limited to actual or special damages plus general damages in an amount not to exceed $5,000?

Mr. JAFFE. Well, no. What I am trying to say, if his cause of action arises solely out of the Constitution and Federal statute cause of action that we propose to give, then he would be limited in the general damages to $5,000. If his cause of action arises out of a State tort law such as assault and battery, then that limitation doesn't apply. We are waiving that, as I understand the thrust of this.

Mr. DANIELSON. I guess where I am hung up here, you talk about claims arising under the Constitution or statutes of the United States. I would assume under the Constitution of the United States assault and battery is covered, an officer of the U.S. Government not having any right to beat up on an ordinary citizen. I am just kind of wondering where you find the distinction under our civil rights which are guaranteed us by the Constitution. Aren't almost all these intentional torts forbidden by the Constitution?

Mr. JAFFE. We have no Federal common law of torts.

Mr. DANIELSON. That is correct. You are right in that regard.

Mr. JAFFE. So that as I see the thrust of the questions of the chairman and you, what you are really saying is that where we have a constitutional violation it will invariably involve one of the torts we are waiving, false arrest, malicious prosecution, or assault and battery, and whether the general damage limitation applies to that waiver when the United States is made a party.

Mr. DANIELSON. Well, I don't know. I am groping for a little information here.

Mr. JAFFE. As a matter of fact, Mr. Congressman, I think I am groping at the moment, too.

Mr. SHATTUCK. Would it be possible to plead both, assert a cause of action under traditional tort and under constitutional tort and recover for both?

Mr. DANIELSON. I am afraid it would work the other way. I am afraid almost everything would be constitutional and, therefore, anything would be limited to $5,000.

I have in mind, let's suppose—I think we are all mindful of what you could call an unreasonable search and seizure. That is forbidden by the Constitution, although we have a statutory law and no Federal common law and we may not have a Federal statute law, I am not certain, but certainly our Constitution does prohibit unreasonable search and seizures, and I think it is reasonable to rule these would be—I am not being critical, I am trying to reach something we would put a maximum general damage of $5,000 recovery here.

Mr. JAFFE. I am told what we have in mind for a constitutional or Federal statuory tort would be, for example, in the *Bivens* case where there was no assault, no personal injury. There was an allegedly unlawful search and seizure. In other words, they entered a dwelling or house under no-knock circumstances, perhaps inflicted some property damage on the doorway, I am not certain, and then we would have general damages limited to the $5,000. We are not talking about, and we would have a similar thing in false arrest, for example, where you are not talking of personal injury to the man. You are talking about an injury to reputation, say.

Mr. DANIELSON. Let me give you, if I may, an example that is very immediate in my mind because I have been requested to put a private bill on it.

We have a situation in southern California which the U.S. district court a month ago set aside a conviction, judgment of conviction, vacated a sentence, a situation in which a State, or maybe county, but at least non-Federal police officer, forged a fingerprint which in turn was used to obtain the conviction of a person who spent 2½ years in Federal prison. Now, it was the State officer who actually committed, shall I say, the intentional tort, however, he was convicted in the U.S. district court and has put 2½ years in prison.

Would that not be restricted here to the $5,000, his general damages?

Mr. JAFFE. If it had been a Federal officer who did it.

Mr. DANIELSON. It was a Federal court that convicted him, the action was brought in Federal court.

Mr. JAFFE. Our torts are only those committed under the theory of respondeat superior under the Federal Government.

But I think I can answer your question by assuming instead of a State officer who forged the fingerprint it was a Federal officer.

Mr. DANIELSON. He was a witness in the Federal prosecution, but he happened to be a State or county officer.

Mr. JAFFE. That tort would not be covered under the Federal Tort Claims Act in any event, even with or without this.

Mr. DANIELSON. And the $5,000 limitation here would not apply.

Mr. JAFFE. It would apply had it been a Federal officer, but what I had pointed out before, that is where we had picked the $5,000 figure.

Mr. DANIELSON. Because of the Court of Claims——

Mr. JAFFE. Because of the limitation and the damages that are authorized for an unjust conviction, which is one of the causes of action

that he would sue for. There he is limited to $5,000, assuming it was an unjust conviction based upon innocence, which this would be.

Mr. DANIELSON. For the purpose of argument, we have to assume that?

Mr. JAFFE. Yes.

Mr. DANIELSON. All right. I understand here.

It would seem to me that as this bill is drafted, this provision here would probably limit the general damage recovery of $5,000 in just about every situation, I would think. I can't think of where it wouldn't.

Mr. JAFFE. Well, I think it would not if there were physical injury, for example, because that would be an assault and battery. We also have pain and suffering which is general damages. And if it is such that the pain and suffering would amount, let us say to more than $5,000, it would have to be a pretty serious injury even under today's high judgments, the fact that he had a bloody nose or black eye probably wouldn't call for more than $5,000 without the limitation. It would have to be a pretty serious injury anyway to go beyond that.

Mr. DANIELSON. Thank you.

Mr. DONOHUE. Let me ask you this. We are talking about a constitutional tort or U.S. statutory tort. Is there such a thing?

Mr. JAFFE. As a statutory tort?

Mr. DONOHUE. And a constitutional tort?

Mr. JAFFE. Yes, I believe there are.

Mr. DONOHUE. If that is so, would not our Government claim sovereign immunity?

Mr. JAFFE. That is precisely that what are waiving here under the Federal Tort Claims.

Mr. DONOHUE. At the present time?

Mr. JAFFE. At the present time we have a statutory exemption for it that is not a constitutional or statutory tort, but most of those would arise under exemptions.

Mr. DONOHUE. That is the reason we have the Tort Claims Act.

Mr. JAFFE. Right.

Mr. DONOHUE. Proceed.

Mr. JAFFE. Section 4 of the bill amends section 2679(b) of title 28 of the United States Code to extend the present exclusiveness of the Tort Claims Act remedy to include all Government officers and employees. Under existing law, only Government motor vehicle operators and medical and paramedical personnel of the Veterans' Administration and the Public Health Service are personally immune from suit and civil liability for acts performed while in the scope of their Federal employment.

Mr. DONOHUE. Would you mind if I interrupt you again?

Mr. JAFFE. Yes.

Mr. DONOHUE. Congressman Wiggins, do you have a statement that you want to put in the record, or would you want to make a statement?

Mr. WIGGINS. I do not have a prepared statement, but I would like to make a statement whenever you recognize me.

Mr. JAFFE. Section 4 of the bill amends section 2679(b) of title 28 of the United States Code to extend the present exclusiveness of the Tort Claims Act remedy to include all Government officers and employees. Under existing law, only Government motor vehicle operators and

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medical and paramedical personnel of the Veterans' Administration and the Public Health Service are personally immune from suit and civil liability for acts performed while in the scope of their Federal employment.

I would like to indicate there was an inadvertent omission from this bill in section 4. We should have included, as we did elsewhere, in line 24 after the word "scope of his," we should have included "office or employment" to conform it to the same phraseology that is used throughout.

Section 5 of the bill is a technical amendment designed to make clear that the scope of the Tort Claims Act remedy extends to officers of the Government as well as employees. That is merely again adding the words "office of" after "his employment."

Mr. DONOHUE. Are officers now classed as employees?

Mr. JAFFE. They are in title V. The Federal Tort Claims Act has its own definition of "employee," and we felt that rather than have any ambiguities arising with respect to it, it should include any person acting either within the scope of his employment or the scope of his office, so we don't get into that kind of a technical dispute.

Mr. DONOHUE. Proceed.

Mr. JAFFE. Section 6 of the bill amends section 2679(d) of title 28 of the United States Code so as to include language designed to make clear that in a suit originally commenced against an officer or employee of the Government for which a remedy exists under the Federal Tort Claims Act, the United States may assert and establish such defenses to the suit as would have been available to it had the suit originally been commenced against the United States. Thus, under existing decisional law, Federal employees injured as an incident of their Government employment and who are entitled to the benefits provided by the Federal Employees Compensation Act are restricted to these compensation rights and may not sue the United States under the Federal Tort Claims Act. Similarly, military personnel who sustain injury as an incident to their military service may not sue the United States under the Federal Tort Claims Act. The proposed wording will assure preservation of these types of defenses as well as other statutory defenses peculiar to the Federal Tort Claims Act.

Section 7 of the bill amends section 2680(h) of title 28 of the United States Code so as to eliminate the present sovereign immunity of the United States for claims arising out of "assault, battery, false imprisonment, false arrest, malicious prosecution, and abuse of process." By reason of the exceptions contained in section 2680(h), a citizen's remedy for these types of specified torts has heretofore been only against the individual whose conduct gave rise to the claim. The modification of this section by the bill enlarges the waiver of immunity and provides a Tort Claims Act remedy for the types of tort most frequently arising out of activities of Federal law enforcement officers.

As you know, since the introduction of H.R. 10439, the House of Representatives on March 5, 1974, cleared for the President H.R. 8245 which amended Reorganization Plan, No. 2 of 1973. That bill has since been signed into law on March 16, 1974, and is known as Public Law 93–253.

Mr. DONOHUE. Let me ask you this: In the event that we pass the bill before us, what effect would that have on the bill that we passed which was signed into law on March 16, 1974?

Mr. JAFFE. It would extend it. It wouldn't alter it. It would make it more—as I am going to indicate—we are adding to that law features that we are proposing here. We are not limiting it, for example. Our proposal does not limit it only to Federal investigative and law enforcement officers.

The existing bill contains no monetary limitation for general damages. It does not contain the feature of exclusivity.

The Senate had added an amendment to this bill—I am speaking of H.R. 8245—which amended section 2680(h) of title 28, U.S.C., by providing that with regard to acts or omissions of investigative or law enforcement officers of the U.S. Government, the provisions of chapter 171 and section 1346(b) of title 28 would apply to any claim arising, on or after the date of enactment, out of assault, battery, false imprisonment, false arrest, abuse of process, or malicious prosecution. It defined an investigative or law enforcement officer as any officer of the United States who is empowered by law to execute searches, to seize evidence or to make arrests for violations of Federal law.

It should be noted that section 2 of H.R. 8245 is confined in its applicability to Federal investigative or law enforcement officers, while section 7 of H.R. 10439 would waive the sovereign immunity of the United States as to the same acts or omissions on the part of all Government employees.

Furthermore, in contrast to section 1 of H.R. 10439, section 2 of H.R. 8245 is silent as to the law applicable to claims which have their origin in the Constitution or statutes of the United States. Moreover, it does not provide a monetary limit with respect to claims arising under the Constitution or statutes as does section 3 of H.R. 10439.

One of the most notable deficiencies in section 2 of H.R. 8245 is, in our judgment, its failure to provide that the remedy against the United States as provided in the Federal Tort Claims Act be exclusive of any other civil action or proceeding arising out of or relating to the same subject matter. Thus, it would not preclude a suit against a law enforcement officer. In fact, a claimant will have the option of suing the individual, of claiming against the United States and then suing the United States and the individual or of claiming against and then suing the United States alone. The extension of the exclusivity provision of the present 28 U.S.C. 2679(b) to cover all Government employees is and has been a prime objective of the Department of Justice. We submit that our approach in H.R. 10439 of broadening the exclusivity provision is sound and desirable. To permit an aggrieved claimant to sue, or provide the option to sue the employee individually perpetuates our problem of providing counsel to the individuals while simultaneously representing the United States. The continued exposure of individual law enforcement officers to legal process and possibly to personal money judgments has a damaging effect on the morale and effective work habits of Government employees.

Mr. MOORHEAD. Mr. Chairman.

Mr. DONOHUE. Mr. Moorhead.

Mr. MOORHEAD. Even in cases of willful or gross negligence by the law enforcement officer they still could not be sued under this legislation and the Government would still be liable?

Mr. JAFFE. Yes.

Mr. MOORHEAD. You know, in these times when the public is so cognizant of the extreme acts of gross negligence where persons are shot where no weapons should be used at all, I think this could cut down on the care and diligence given by the police officers.

Mr. JAFFE. I suggest not. I think the proper place for disciplinary action would not be exposure to a monetary judgment. I am not speaking of criminal prosecution where the offense is so gross as to result in that, because we do proceed criminally if the law enforcement officer has acted in the gross manner you suggest.

Where the man is merely the subject of monetary recompense, I think the feeling that you have expressed is outweighed by other considerations, the most important of which, in my opinion, is that when you have a law enforcement officer who has before him the decision to make, and quickly, whether he has probable cause to make an arrest or whether he should go in to make a search on the basis of his knowledge that a crime is being committed or is about to be committed and he has to weigh against that that if I am wrong I am going to be subjected to a personal liability for perhaps a large monetary judgment, the effect of that is for him not to discharge his duty and to say I will play it safe. I don't have a warrant, I don't have a court order, and even if he has one, under *Bivens* he may be subjected to it.

I think the morale of law enforcement would better be served if they did their jobs in accordance with their best judgment at the time and the United States be held liable for the monetary damages as respondeat superior, as the master responds to the excesses of his servants and that any wrongdoing be left to the criminal process or to the internal disciplinary procedures that are available to the Government, which I think would be the deterrent for excesses.

Mr. MOORHEAD. One thing, have you gotten any cost estimates at all about what the cost of this expanded jurisdiction by the Federal Government would be?

Mr. JAFFE. Of course, that is very difficult to estimate. As you know, to attempt to even place a value on a given neglect suit is well nigh impossible.

But I would say that the cost in judgments should not be that great. We do have at the moment, by our best count—we don't classify our actions that way—approximately 110 suits now pending, either against law enforcement officers alone or suits in which the United States has also been joined because of other factors—well, I should say that even where the United States today may be sued under the Federal Tort Claims Act in most instances so may the individual employee, and they are.

As far as the cost to the Government of representation would be concerned, that is acting as counsel, it would be certainly no more expensive, perhaps even less expensive, because we represent the employees anyway.

Mr. MOORHEAD. So you are expanding it far more than just to the law enforcement officers.

Mr. JAFFE. That is correct, we are.

Mr. MOORHEAD. We should at least know what we are talking about in dollars and cents when we do something like this.

Mr. JAFFE. Well, it is almost impossible to do that. There are so many intangibles there.

Mr. MOORHEAD. Do you think this will encourage or discourage additional claims being filed?

Mr. JAFFE. Against the United States?

Mr. MOORHEAD. Well, right now they are either filed against the United States or against the employee. I mean in toto do you think this will——

Mr. JAFFE. I think I have to say when I consider that what we are doing is we are eliminating, if I confine myself to the soverign immunity that we are asking be waived, assault and battery, malicious prosecution, there is no doubt in my mind that the number of claims that would be filed would increase, because we are creating new causes of action. It would have to increase.

Mr. MOORHEAD. What is this going to do to—your total caseload is going to go up substantially. Will you need more employees?

Mr. JAFFE. If it goes up any marked way, and I can't predict how many, I suppose the answer would be yes. I don't anticipate that, because—that is, I don't anticipate any marked increase sufficient to increase the personnel who has to handle these things, to that extent, because we do use the U.S. attorneys very extensively in these areas. The cases wouldn't all be bunched in any particular district, and I would imagine that with the 94 districts that we have in the country, even if we have an increase it may not increase the load on the average of one, two, or three cases in each district. It is very difficult to say.

If, of course, 100 suits were filed in any given year in one district the answer would be yes, we would have to give more assistance to that U.S. attorney. Whether any more attorneys would have to be hired or not in our tort section—it couldn't be many, maybe one or two.

Mr. MOORHEAD. Do you know there are already tremendous pressures to have citizens groups examine the activities of police departments, which I am very much against.

I agree with you that the policemen have to be able to act with a certain degree of independence and make a decision on the scene. I really hate to see a situation where there is no possible action financially that can be taken against willful or gross negligence in situations like this without resort to a criminal trial. Take, for example, a poor police officer who has used bad judgment and given a criminal trial I don't think is always the answer to the situation. But certainly you don't have the compulsion to require him to use the kind of care and diligence that any normal individual should use if you have taken all the financial responsibility that he has away from him.

Mr. JAFFE. Well, I think, as I indicated before, that taking the financial responsibility away from him is outweighed by his knowledge that if his acts are sufficiently excessive, as we believe the acts of the Collinsville acts were, he would be subject to prosecution and it might mean the loss of his job. I think that is sufficient, both personal and financial consequences, than having a judgment obtained against him, which he wouldn't be able to pay anyway, in most instances. To me, if I may venture a personal guess, I think the thought of making him personally liable is not a necessarily deterrent and approaches a sort of vindictive type of approach. Where that has already been changed where we and the officer are going to be subjected to suit and we represent both, and may even on occasion have a con-

flict position, any judgment obtained is going to be satisfied by the United States and not by the officer. I doubt that it would be to the best interest of the United States, assuming we have a substantial judgment, we are speaking of the outrageous case rather than the minor one, if we had a judgment against us for many thousands of dollars and we paid it that we would find it profitable or worth the time and effort to seek contribution from the individual employee, although we would have that right. Where does that put us in the conflict position. We have represented him in this judgment that was obtained against him.

Mr. MOORHEAD. Do you know of any other employee, though, for any agency, private or public, at the present time that would be relieved from his liability of neglect, willful and gross neglect?

Mr. JAFFE. There are some employees who are now relieved of that. We have the Federal Drivers Act. The negligence would be very gross there. We have cases where the Federal employee was driving while drunk. We have situations where malpractice has occurred in either the VA hospitals or the Public Health Service. As the evidence upholds it was a pretty negligent act that resulted in rather severe damages and existing law excludes them. There, as here, in the medical malpractice field there as here was to assure us we would get people competent and without fear of money judgments against them and the same thing for law enforcement officers. I can give you an illustration. We have Department of Agriculture investigators who go into look at books and records. We have Defense Department auditors to look at books and records. I can see where we can get in a dispute where records should be shown or not shown and a report shown by mistake and the contractor takes it away and says you shouldn't have seen that and some sort of assault occurs. The assault may not be intentionally inflicted to create any more damage than to keep him away. He may trip over backward and hit his head and fracture his skull and even die. They are not law enforcement officers even under this definition. They don't qualify. There is no reason why they should go in to look at books and not even argue with anybody, because an argument might lead to a fight and that might lead to exposure to personal damages. It is more important that the investigative and law enforcement officers that 8245 does cover, because there I think it is exceedingly important in the interests of the United States for law enforcement officers, as most of them do, do an honest job, exercising their judgment in good faith which may on occasion turn out to be bum judgment, which may happen to all of us.

Mr. MOORHEAD. I think that is very true, but my concern of course is with the change, the overriding neglect picture that we have had in our country where a person is responsible for his own neglect or acts. I know that in the field of law enforcement there can be some very, very gross situations that arise where the action is truly not in the scope of their employment.

Mr. JAFFE. Well, if it is so gross that it is not in the scope of their employment they are not protected in existing law or anything we suggest.

Mr. MOORHEAD. You get in on debate there and you have a problem on your hands.

Mr. JAFFE. Of course, that is true.

Mr. DANIELSON. Would the gentleman yield?

I recognize the very valid concern of my colleague, Mr. Moorhead, but I am inclined to agree with the witness. You can have a liability and in fact technically a responsibility if the officer is not financially responsible to the point of being able to meet these judgments it is sort of a myth. I don't think it is any deterrent. If the judgment can't be satisfied—I ran into that attitude in my private practice. People that cannot be deterred by the spectre of judgment will not be satisfied.

I think the disciplinary action to employees, conceivably criminal prosecution combines about all the deterrent you need to prevent willful types of acts which could give rise to a judgment.

Mr. JAFFE. I might add that the Collinsville incident, which I know is well known to all of you, and which gives rise to some of the opposition to this bill which we have been trying to propose to the Congress for years prior to the Collinsville incident, the agents have been suspended indefinitely without pay pending the outcome of criminal trials which have been brought by the Department of Justice of which they are employees against them in Illinois where these events occurred. I am not following it, so I don't know what the status of the trial is, but I know they are under indictment and they are being prosecuted.

Now, that was or at least appears to have been a case of gross excess, and yet there was little or no personal injury, I might add, of any significance, that I can recall.

Mr. DONOHUE. If it is so, Mr. Jaffe, that one of the defenses of the Government would be that the employee was acting beyond the scope of his employment.

Mr. JAFFE. To be honest with you in the situation that existed even in Collinsville we would not claim it was outside the scope of his employment.

Mr. DONOHUE. But that defense would be available.

Mr. JAFFE. That would be available if we thought it was.

Mr. DONOHUE. Assume you did avail yourself of that defense, and the person having the claim delayed bringing the claim against the United States, and he would be limited under this bill in bringing the action against the United States, not against the individual employee; is that right?

Mr. JAFFE. That is correct.

Mr. DONOHUE. Let us assume he went on for 1 year and 10 months before he exercised his right against the United States. Filed his bill or complaint, went into the Federal court, and that claim was not reached for a hearing and trial, say for a year, and Government avails itself of the defense of he not acting within the scope of his employment and the case was thrown out against the United States. The statute of limitations would have run against the individual and he would be out in the cold; wouldn't he?

Mr. JAFFE. Well, my only answer I can give to that is that every statute of limitations works a hardship if a person doesn't pursue his remedies quickly, and this would be another illustration of a person having waited too long to having resolved a question he should have done much sooner.

Mr. DONOHUE. In some States they have the statute of limitations against assault and battery cases of 1 year. Let's assume that he brought his action against the United States 2 or 3 months after the incident happened, and it wasn't reached for trial or to have it disposed of beyond the 2-year period in the Federal court. In many Federal courts you have to wait that long, don't you, to have your case tried?

Mr. JAFFE. Yes. My answer is you should sue both. If we are going to move to dismiss the individual because action is exclusive or it is outside the scope of employment——

Mr. DONOHUE. Under the bill before us he does not have that option, does he, to sue both?

Mr. JAFFE. He can always sue both but not his option—we can sue both and having dismissed as to the individual because it is exclusive or we would say at that point it is outside the scope of his employment. So if he joined both he wouldn't be able to maintain the suit because of the exclusivity provision but protecting against the incident you speak of. He would know immediately if we were going to claim if it is outside the scope of employment.

Mr. DONOHUE. As I understand the situation here under existing law a person has a claim under the Tort Claims Act.

Mr. JAFFE. Right.

Mr. DONOHUE. And he brought an action against the mailman, whatever other Federal employee, the Department of Justice would come in and ask that the case brought against the individual in the State court be dismissed.

Mr. JAFFE. No, we would ask for it to be transferred to the Federal court.

Mr. DONOHUE. Assume that——

Mr. JAFFE. If it was within the scope of employment.

Mr. DONOHUE. If that issue wasn't determined until the time of trial——

Mr. JAFFE. No, no, that would be determined as a preliminary matter.

Mr. DONOHUE. In other words, that issue would be determined before the case would be finally removed from the State court into the Federal court.

Mr. JAFFE. More likely it would be determined in Federal court on removal, because the provisions as we have them now and propose suggests that requires that be removed to the Federal court and the Federal court may return it to the State court if it is determined in the Federal court that it was outside the scope of his employment. So that would still be a preliminary matter but determined in the Federal tort.

Mr. DONOHUE. You wouldn't be estopped of availing yourself of that defense?

Mr. JAFFE. We would have to raise it immediately if we wanted to raise it.

Mr. DONOHUE. I see.

Mr. SHATTUCK. Mr. Jaffe, at that point and in that situation when the case is removed what is the position of the Government regarding the administrative claims requirement to the Federal Tort Claims Act as regarding this claim that has now been removed?

Mr. JAFFE. We require the administrative claim to be filed as a jurisdictional prerequisite to bringing suit against the United States.

Mr. SHATTUCK. When it is removed from the State court to the Federal court does the Federal court hold the matter in abeyance so administrative claim can be filed? What is done at that point?

Mr. JAFFE. We can act in one way or another. If there was a pending statute of limitations about to expire I am sure the court would hold it until he filed and acted upon his administrative claim. A court might dismiss it. We would move to dismiss it, might dismiss it.

However, there is something that we have here—no, it only applies to compensation type suits.

That would be the discretion of the court.

Mr. SHATTUCK. Is there a situation here where an individual litigant could find himself dismissed then by reason of the statute of limitation expiring find himself out of either court?

Mr. JAFFE. Yes, that is always possible. For example, the place where it is possible, and it happens now where a claimant does not file an administrative claim, allows the Federal statute of limitations to run, and then finds himself without a cause of action which he has against the United States, but he also has one against the individual, and that is true today, with the exception of the Federal drivers and the medical people, he would then start a suit against the individual alone, because the statute of limitations against him may not be—wouldn't depend upon the filing of an administrative claim.

So that happens today.

Mr. SHATTUCK. This may be an unfair situation if the statute of limitations are not identical.

Mr. JAFFE. That is correct, and I think it is. I think the remedy ought to be against the United States and I think they ought to follow their statute of limitations. The question of whether or not it is within the scope of one's duty can be determined as a preliminary matter immediately.

Mr. SHATTUCK. Thank you, Mr. Chairman.

Mr. DONOHUE. You may proceed.

Mr. JAFFE. While we expressed no objection to the Senate amendments to H.R. 8245, we did so with the hope and expectation that it is a first step toward passage of the bill before the committee today.

Section 8 of the bill is a technical cleanup amendment removing the present statutory exclusiveness of the Tort Claims Act remedy to claims arising out of activities by medical and paramedical personnel of the Veterans' Administration.

Section 9 is also a technical amendment which would in effect partially repeal the present statutory exclusiveness of the Federal Tort Claims Act remedy for claims based on activities of the Public Health Service medical and paramedical personnel. This section also provides for the retention of certain language permitting certain agencies of the Government to hold harmless or provide liability insurance for certain employees and officers for damage for personal injury or caused while acting within the scope of their employment when assigned to a foreign country or another Federal agency.

In sections 8 and 9, since our proposal would make the remedy against the United States exclusive with respect to all employees, there is no reason for having separate statutory provisions making it ex-

clusive against certain types of employees of the United States. So that we would have one exclusivity provision which applied to all employees and would embrace the ones who now have their separate provision.

Now, we do retain the right of certain agencies of the Government to provide liability insurance or hold harmless agreements to personnel who are acting usually in the medical field abroad where they wouldn't be covered. The Federal Tort Claims Act does not apply to torts committed outside the United States. If we have VA doctors or Army doctors practicing their medicine in Army hospitals overseas or engaging in activities as part of their employment with the Army overseas there would be no Federal Tort Claims Act suit, and there, therefore, authorizing under existing law which we would retain.

Mr. DONOHUE. Would that be with a private insurance company?

Mr. JAFFE. Sometimes—always.

Mr. DONOHUE. Why should a private insurance company be the insurer rather than the Federal Government?

Mr. JAFFE. Because we don't want the Federal Government sued in tort in foreign countries. We don't want to increase our exposure to foreign courts, and we see no need for it in neglect cases.

Mr. DONOHUE. You may proceed if there are no questions.

Mr. DANIELSON. One question, if I may.

Mr. JAFFE. Yes, sir.

Mr. DANIELSON. Would this provision in section 9, you mention foreign countries, could there be an example of a detailing of an employee within the United States—I have in mind the Federal Energy Office, which is a nonstatutory office. It is strictly established by Executive order as I understand it, and all of the employees are borrowed from or detailed by other Government agencies. Would that situation be covered here by section 9 or do we need it?

Mr. JAFFE. No, as a matter of fact, if they are on that kind of a detail I think they are acting within the scope of their duties and we don't need it. There are situations, however, where certain types of personnel are detailed to other agencies and what a State agency—what they are doing may not normally fit within the scope of their duties. It is just a precautionary measure if what they are doing within the scope of their duties under a detail to another agency then there is no problem. This would neither add or detract from the exposure.

Mr. DANIELSON. I am trying to think of an example. If it is going to delay——

Mr. JAFFE. Sometimes we have an Army medical doctor detailed to a private hospital, and while he is detailed there we have no control over him.

Mr. DANIELSON. I see.

Mr. JAFFE. It would cover that situation.

Mr. DANIELSON. I didn't want to make a big thing out of it. I just didn't understand it.

Thank you.

Mr. JAFFE. While my statement as prepared does not cover section 10, I do want to make some reference to it. Section 10 is the last section and talks about the effective date being the first day, the third month begins following the date of enactment and shall apply to those claims accruing on or after the effective date.

I have no reason for suggesting that the act not become effective immediately on passage and personally that is the way I think it should be.

But what I wanted to mention was that in section 3 of the bill we have suggested substitute language, and in that language we have sought that the United States shall be liable in accordance with the provisions of section 1346(b) of this title. Now, section 1346(b) there provides for jurisdiction of the district courts for civil actions on claims against the United States for money damages accruing on and after January 1, 1945, for injury or loss of property.

I want it to be clear that from our point of view while the suggested amendment to the language in section 3 seems to make it a much neater package, that the provisions of this bill would, nevertheless, only apply to causes of action that arise after its effective date, whether it be 3 months later or upon its enactment.

Mr. DONOHUE. In other words, there would be no retroactive effect.

Mr. JAFFE. No retroactivity. I thought I would mention it here so if anyone should think it was, that is not our intention and I hope it would not be the Congress intention.

Now, to summarize, the principal purposes of the bill may be succinctly stated as follows: (1) to provide a citizen with an administrative and judicial remedy for wrongs which are presently excluded by the Tort Claims Act: (2) to place the pecuniary responsibility upon the employer, the United States, for acts performed by employees while acting on behalf of the United States and in the scope of their office or employment: and (3) to relieve the employee of the risk and potential of suit and personal liability for official acts while in the performance of his official responsibility. The bill might well be viewed as a significant broadening of the waiver of sovereign immunity, as reflected in the original Tort Claims Act, by removing partially the statutory exception as to certain types of intentional torts and consequently, a recognition by the Government, that a citizen should have a right to look to the Government for monetary redress of negligent or wrongful acts committed in furtherance of governmental objectives. The effective redress for such wrongs should not turn on the financial responsibility of the individual employee who may be responsible. Concomitantly, with a remedy provided against the United States on a respondeat superior basis, the need or justification for continuing the employee's exposure to suit and potential personal liability is diminished or obviated, hence the provision of H.R. 10439 which makes the remedy provided by the Tort Claims Act exclusive, to the exclusion of a comparable remedy against the employee.

If enacted, H.R. 10439 will apply only to those claims accruing on or after the effective date of enactment and, thus, will prospectively extend to all employees the same type of statutory protection from personal suit and risk of personal liability that now obtains only with respect to Government motor vehicle operators, and medical and paramedical personnel of the Veterans' Administration and Public Health Service. Equitable treatment of all Government employees without particular regard to the nature of their duties or responsibilities would seem patently to militate in favor of the enactment of H.R. 10439.

A citizen's right to claim damages against Federal employees for violations of rights assured by the Constitution has now been judi-

cially recognized by the Supreme Court and constitutes a relatively new and expanded area of employee risk to litigation and liability, particularly with respect to employees engaged in the investigation and enforcement of criminal, customs and revenue laws of the United States. The broadening of the Tort Claims Act to encompass claims which to us to be in keeping with the enlightened trend toward meaningful acceptance by a sovereign of responsibility for acts of its agents.

In sum, H.R. 10439 would provide citizens with a statutory right to judicial redress in an expanded area with assurance of satisfaction of meritorious claims; it would relieve the employee of the fear of potentially ruinous personal liability; would place all Government employees on a legal plane now reserved by statute to selected categories of employees in particular occupations. On behalf of the Department of Justice, I urge its favorable consideration by this subcommittee.

I shall be pleased to answer any questions the subcommittee may have.

Mr. DONOHUE. The gentleman from California.

Mr. DANIELSON. I have no further questions.

Thank you for your presentation.

Mr. DONOHUE. How about the other gentleman?

Thank you very much, Mr. Jaffe.

Mr. JAFFE. Thank you.

Mr. DONOHUE. We will now hear from our able and distinguished colleague from California, Mr. Wiggins.

TESTIMONY OF HON. CHARLES E. WIGGINS, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF CALIFORNIA

Mr. WIGGINS. Mr. Chairman and my fellow colleagues from California, we have you outnumbered today, Mr. Chairman.

I appreciate the opportunity to appear here and to share with the subcommittee some observations which I have with respect to the pending legislation, H.R. 10439.

I do not intend, Mr. Chairman, to speak to all of the sections of the bill. Rather, I wish to confine my observations to section 7 of the bill. Believing as I do that that section impacts the implementation of fourth amendment guarantees, and I wish to address my comments primarily to that impact.

As this subcommittee well knows, of course, the fourth amendment to the U.S. Constitution protects our citizens against unreasonable search and seizures. That amendment is not self-executing, Mr. Chairman. Accordingly, a great many years ago, the U.S. Supreme Court declared a rule of evidence that evidence which was the product of an illegal search and seizure could not be introduced in a prosecution against the person whose fourth amendment rights had been violated. A great deal of the time of the U.S. Supreme Court and all Federal courts, and in recent years State courts as well, have been devoted to defining the precise perameters of an illegal search and seizure. We all know the case books are full of cases that raise fourth amendment problems.

The exclusionary rule simply stated is that such evidence which is the product or the fruit of an illegal search and seizure may not be in-

troduced. I wish to emphasize that such a rule is not mandated by the Constitution. It is a rule of evidence only, and is subject to being altered if that be the will of the legislative body, and presumptively altered by the court itself if it wishes to review its early decisions, as I recall, in Weeks against the United States and all subsequent cases which followed.

There has been a great deal of dissatisfaction in this country, Mr. Chairman, about the rigid and mechanical application of the exclusionary rule. It often frustrates prosecutions, successful prosecutions against defendants when there is truly no question of the guilt of that defendant. Notorious cases reach the public's attention and it does no service to the Judiciary to be subject to criticism for turning loose upon society a person when the evidence of his guilt is overwhelming, but that evidence cannot be produced in court by reason of the mechanical application of the exclusionary rule.

Dissatisfaction with the exclusiory rule has been noted in very high-places. Just recently the Chief Justice of the U.S. Supreme Court, in the *Bivens* case, indicated that it is time for the courts and the Congress to consider whether there may be alternative ways of insuring fourth amendment rights. In this connection, the rationale of the exclusionary rule is that it is prophylactic in nature, that its purpose is deter lawless conduct on the part of police officers, and in that it does not necessarily bear upon the guilt or innocence of the individual at trial. It is prospective in its application to deter future police conduct by prohibiting the introduction of evidence of the instant case at trial.

Now, there are, of course, many ways in which lawlessness on the part of police officers might be deterred. The Chief Justice in *Bivens* suggested that one such way would be to create a cause of action against the sovereign, the United States in the case of Federal prosecutions, as an alternative to deterring lawlessness on the part of police officers, alternative that is to the exclusionary rule.

That's long been the law that an individual may maintain in a State court an action against any person who commits an assault, battery, false imprisonment, and other common law torts.

The legislation before us, of course, Mr. Chairman, creates a cause of action by waiving existing sovereign immunity against the Federal Government with respect to such intentional torts in section 7. It specifically speaks to the problem of assumed fourth amendment violations.

Now, I am going to make some observations, Mr. Chairman, without being too certain of my own thinking in this delicate area. One judgment which the committee, and perhaps the entire Congress ought to make, is whether the exclusionary rule ought to be continued at all. It is possible for the Congress to modify it. There have been very few empirical studies made concerning the efficacy of the exclusionary rule in deterring police conduct. So far as I know, the only such empirical study was commissioned by, I believe, the Law Enforcement Assistance Administration and published several years ago by, I believe, Mr. Chairman, a Professor Oakes—I may wish to extend by remarks and modify them to get the proper author, but I believe it was Professor Oakes. He came to the conclusion, as I recall, that it was difficult to justify the exclusionary rule on the basis of his empirical substitute is on the basis of deterring police conduct.

Well, now, this legislation creates a cause of action against the Federal Government which is one of the alternatives to the exclusionary rule. The committee should be aware that if it creates such a cause of action, but extracts no concessions with respect to a modification to the exclusionary rule, it might be that the Congress is using one of its strong levers for a modification of exclusionary rule without extracting anything in exchange.

It also might be, Mr. Chairman, that the courts will seize upon this new remedy and will use it as a vehicle for a judicial modification of the exclusionary rule, since now there is an alternative remedy. I am unable to predict whether the courts will in fact go that way.

But I would suggest to the members of the committee if that is the strong feeling, as I do, that some modification of the mechanical application of the exclusionary rule is in the public interest then it at very least ought to contain in your report or in the legislative history of this statute that the committee considers this as a workable alternative to the exclusionary rule, and inviting, perhaps, the court to seize upon that to make such modifications as it may deem appropriate in subsequent cases.

I merely wish to underscore my paramount concern, that we use up one of our options without getting anything for it. I am aware that there may be other options available to the exclusionary rule. But the one most discussed and the one suggested by the Chief Justice of the United States was the creation of such a remedy as is embodied in section 7.

Now, I may have some and do have some technical objections to section 7. I made those known in the record as the House was considering H.R. 8245, Many of those objections are relevant to this committee's consideration of the present bill, and, Mr. Chairman, accordingly, I ask unanimous consent that I may include my remarks made in the record with respect to H.R. 8245 in the record of these deliberations as well.

Mr. DONOHUE. Without objection, it will be so ordered.

[The information referred to follows:]

[From the Congressional Record, Mar. 5, 1974]

Mr. WIGGINS. Mr. Speaker, Members of the House, first let me emphasize this point: This is not a simple jurisdictional squabble between the Committee on Government Operations and the Committee on the Judiciary. This involves a very important and delicate governmental issue.

The basic thrust of the bill before us deals with governmental reorganization, a bill which is needed and which I support: but when that bill went to the Senate without hearings, an amendment was added. That amendment deals with the exclusionary rule.

I assure the Members that this is an important subject. That amendment creates a civil cause of action by amendment to the Federal Tort Claims Act for intentional torts committed by law enforcement officers. The specific problem envisioned by the proponents of the amendment were fourth amendment violations where a police officer may improperly enter the premises of a suspect.

The purpose of the amendment was to give a civil remedy to the aggrieved person for injury and damages sustained by reason of that entry.

By way of background, for many years in this country, it has been the law, adopted by the Supreme Court, that evidence obtained as a result of an illegal search and seizure is not admissible in the trial of a defendant. This judicially created doctrine is known as the "exclusionary rule."

Mr. Speaker, the implementation of that rule has raised many problems, problems which I believe are well known to the Members. There has been a great pub-

lic dissatisfaction with the effect of that rule in specific cases, because clearly on some occasions it prevents probative evidence, often decisive on the question of guilt, coming to the attention of the jury.

As recently as 1971 the Supreme Court considered this problem in the case of Bevins against Six Unnamed Federal Narcotics Agents, and in that opinion the Chief Justice suggested that perhaps the Congress ought to consider a civil remedy for persons aggrieved by reason of illegal search and seizure. In response to that invitation, a bill is now pending before the Committee on the Judiciary.

The effect of the Senate amendment is to effectively oust that committee from its consideration of this measure and to adopt a very profound and far-reaching measure without committee hearings either in the Senate or in the House. The issue is too important to be treated summarily.

I do not wish to be understood as being necessarily against the creation of a civil remedy in the case of fourth amendment violations.

I think there is a great promise for such a remedy as an alternative to the exclusionary rate, but it ought not to be adopted in haste and it ought not to be adopted absent consideration by committees having jurisdiction over that delicate subject. However, such is the situation that confronts the House right now: Whether to agree to a Senate amendment which creates this new cause of action without hearings in the Senate or without hearings on the House side.

Mr. Speaker, I want the Members all to know that the Senate proposal which is before us now raises a whole host of problems, very difficult problems, which have been researched and briefed in the document which is before me. I am going to ask unanimous consent to extend my remarks and place that brief in the Record.

Suffice it to say now, Mr. Speaker, that if this Congress acts in haste and adopts the Senate amendment, it is going to do possible prejudice to the legitimate rights of innocent persons accused of crimes, and it is going to do possible prejudice to the rights of the Government in pursuing causes of action in criminal proceedings.

Just by way of illustration only, the granting of a civil cause of action simultaneous with an arrest is to open up all forms of civil discovery proceedings, which would be totally inconsistent with an ongoing criminal trial; and this procedure may well be used solely for discovery purposes, as distinguished from the successful prosecution of a civil claim.

I wish the Members to understand this, too: That many of the victims of illegal searches and seizures are "pretty bad guys." The Members should understand that a door can be illegally kicked down and the police may find on the other side of that door a person cutting up 50 pounds of heroin. That person may not be tried and convicted, by reason of the illegal search, but we are giving him a civil cause of action for kicking down a door by reason of this legislation. Such a consequence is a fact that Members ought to ponder before they vote in haste.

The proper remedy at this time is to vote "no" on this suspension and to permit the Committee on the Judiciary to give judicious consideration to this very difficult and most delicate question involving the proper implementation of the fourth amendment of the U.S. Constitution.

Mr. BUTLER. Mr. Speaker, will the gentleman yield?

Mr. WIGGINS. I will be happy to yield to the ranking member of the subcommittee, the gentleman from Virginia (Mr. Butler).

Mr. BUTLER. Mr. Speaker, is the gentleman prepared to state with some degree of certainty what the effect of the Senate amendment is on the Federal Tort Claims Act, and on the exclusionary rule at this time?

Mr. WIGGINS. Well, I am prepared to say this: That the Federal Tort Claims Act is amended by reason of this legislation to submit the U.S. Government to a civil cause of action by reason of the international torts specified in the amendment committed by law enforcement officers.

That is a new cause of action and a new right not presently existing under the Federal Tort Claims Act.

Mr. BUTLER. But it is not correct, however, that because of this the effect on the exclusionary rule is not clear? Is that not a fair statement?

Mr. WIGGINS. I will answer in this way. Many of us have been concerned for many years about the rigid and mechanical operation of the exclusionary rule. One suggestion made by such an eminent person as the Chief Justice of the U.S. Supreme Court has been to create a civil remedy. I think that is worthy of ex-

ploration. However, under this legislation the remedy is created without the benefits of that exploration and without modifying this exclusionary rule.

Mr. BUTLER. I thank the gentleman.

It is also perfectly clear that we have not had an opportunity either in our committee or in the Senate to explore the effects of this civil remedy on the exclusionary rule and its extensive ramifications.

I understand that the gentleman has filed with his comments the brief recently prepared for the subcommittee as to the questions raised with reference to this matter.

I want to associate myself with the remarks of the distinguished gentleman from California and state most emphatically that if we are going to undertake to create a civil remedy of this extent and of this far-reaching effect without exploring it, then we are going to make a serious mistake. Doing it in the name of benefiting 900 members of the Border Patrol it seems to me once more brings the Congress of the United States into low repute with the people of the United States.

Mr. WIGGINS. I thank the gentleman for his remarks.

I believe the Members ought to realize that this Senate amendment was an emotional response to the unfortunate Collinsville case in Illinois. The Senators from Illinois were properly concerned with that incident and responded by creating on the Senate floor this civil remedy, believing that that was the typical situation, namely a wholly innocent person put upon by Federal officers.

I want to remind you that most of the people who are affected by illegal searches and seizures are not at all that innocent.

Mr. DONOHUE. Will the gentleman yield?

Mr. WIGGINS. I yield to the gentleman.

Mr. DONOHUE. This does not create a new remedy, does it? The innocent victim still has a civil remedy against the person who violates his rights. Is that right?

Mr. WIGGINS. An individual always has a remedy by reason of the tort committed on his person or on his property. This bill, however, imposes liability on the U.S. Government for this intentional misconduct of its agents.

Mr. DONOHUE. In other words, it shifts the liability from the individual to the U.S. Government?

Mr. WIGGINS. Presumably the individual remains responsible for his own torts, but it extends liability of the Government as well.

Mr. DONOHUE. And it only applies to law enforcement officers. It does not apply to any other Federal employees that might violate the rights of an individual. Is that not so?

Mr. WIGGINS. The gentleman is correct, as I understand the bill.

Mr. Speaker, since at least the time of *Bivens* v. *Six Unknown Named Federal Narcotics Agents*, 403 U.S. 388 (1971), numerous proposals have been studied for providing an adequate tort remedy for victims of illegal searches. The key word is adequate since an illusory remedy might serve to eliminate any means of redress, given the possibility that courts might see such an apparent remedy as a basis for modifying or eliminating the exclusionary rule. The problem is one of no small complexity and the proposals presented in H.R. 8245, while certainly a step in the right direction, present problems for law enforcement and for the victim of official excesses. A brief discussion of some of these difficulties follows:

I. PROBLEMS PRESENTED TO THE VICTIM

A. The remedy is not exclusive.

While this is a problem for law enforcement it also presents some difficulties to the victim of an illegal search or arrest. In a typical situation an aggrieved party would join both the offending agent or agents and the United States. The Government may well decide that the case should be settled but the agent who, proportionately, has more to lose may choose to contest the suit. Thus a recalcitrant party may force litigation where the interests of justice and the victim would require settlement. In the alternative, the U.S. attorney may be more interested in a criminal prosecution against the victim and thus might fight out a lawsuit of dubious validity in order to avoid a collateral bar on the criminal charges as might be the result of an out of court settlement.

B. Judgment as a bar.

Twenty-eight U.S.C. 2676 states that a judgment in a Torts Claim Act action is a bar to further claims. Arguably that would mean that the loser of a civil suit

could not bring a motion to suppress even where the United States had not been a party to the judgment in the suit itself. Thus, a situation could arise where the Government settled out of a case before judgment but the court held against the victim in his suit against the agent. The United States could then bring criminal charges against the victim and he might well be barred from bringing a motion to suppress because of the judgment against him, even though the Government had informally admitted wrongdoing.

C. Alternative to exclusionary rule.

The exclusionary rule has increasingly come under attack. The suggestion of Chief Justice Burger in Bivens that the rule be replaced with a tort remedy is one that has made ample support. A court might easily see this proposal as an alternative to the exclusionary rule and thus eliminate the rule in favor of a tort remedy that may, in this form, be somewhat illusory. This is especially true with indigents who have some guarantees in a criminal proceeding that they will receive both free and adequate counsel. In a civil remedy, left to their own resources and with the limit on attorney's fees contained in 28 U.S.C. 2678, they may find themselves with no remedy at all or with the ability to remedy a constitutional violation dependent on one's wealth.

D. Fifth amendment problem.

Simmons v. *United States*, 390 U.S. 372 (1968), bars the use of testimony made in suppression hearings in the underlying criminal action, thus protecting a victim's right to protest a constitutional violation while simultaneously protecting his fifth amendment rights. The Torts Claims Act of course contains no such provision and since the proceeding is civil in nature the Simmons rationale might not prevail. In any event the intended result should be spelled out clearly so that the Simmons approach is not abandoned without consideration.

E. Lack of punitive damages.

The actual damages against a victim of an illegal search may well be minimal. The collateral effects may be enormous. The Collinsville situation provides a classic example of the type of situation where the effects of the illegality go far beyond the actual damages done. The provision of 28 U.S.C. 2674 barring punitive damages is inappropriate to a situation such as illegal searches, where a proper remedy not only compensates the victim but deters the perpetrator. In fact, since a court may be highly reluctant to award damages to a victim of an illegal search where it is shown that he was found with, for instance, 50 pounds of heroin, liquidated damages may be necessary for a proper remedy.

F. No limit on discovery.

Since the civil rules provide much broader discovery than do the criminal rules, a prosecutor might use the civil suit as a means of obtaining discovery of the defendant's case. An adequate remedy would require the use of the criminal rules for discovery in those cases where the criminal proceeding, if there is one, has not been terminated.

G. Speedy trial.

A prosecutor might well use the existence of a civil suit to delay the trial of a defendant to the defendant's disadvantage. The blame for the delay could then be placed on the defendant and a remedy for the denial of the speedy trial right might then be foreclosed.

H. Civil death.

A victim of an illegal search might choose to bring his action after the criminal proceeding for any number of reasons—including desire for a speedy trial and fifth amendment worries. If the proceeding leads to incarceration the prisoner may then be faced with a civil death statute barring him from bringing civil actions. Since State law governs under the Tort Claims Act the bar might be used against him in seeking a redress for a valid grievance. An extreme example would be where the trial court had found that the search was illegal and the evidence should be suppressed but a conviction nevertheless resulted. Thus a wrong could be found where no remedy was available.

II. PROBLEMS FOR LAW ENFORCEMENT

A. The remedy is not exclusive.

An action against an agent is liable, economically, to be a futile gesture. Weighing this against the very real possibility of overly excessive caution caused by the possibility of being sued mitigates against a nonexclusive remedy. If actions are

barred against truckdrivers for their intentional torts (28 U.S.C. 2679 (b)) why should an agent acting under orders or in good faith be subject to lawsuits when the action against the Government serves the interest of both the victim and society? A bill with a provision insuring disciplinary action proportionate to the culpability is far more desirable.

B. No limit on discovery.

Again the use of the civil rules may provide a potential defendant with greater discovery than permitted under the criminal rules, thus creating a flood of frivolous law suits brought for purposes of gaining discovery rather than damages. For every motion to suppress existing today there will be one suit for damages upon the enactment of a bill permitting civil rules to be used.

C. Relation to criminal proceedings.

An adequate remedy would spell out the nature of the remedy in relation to potential criminal proceedings. Where an illegal search has taken place there is little to stop an unscrupulous prosecutor from trading a commitment not to seek an indictment for an agreement not to sue. The important question of the order of proceedings is one that should be resolved. Venue is also important since the civil suit might well take place in a district different from the criminal action and contrary results might then be reached.

D. State law problems.

The Tort Claims Act is tied to torts, not to constitutional violations, and is dependent on State law. Thus a State might have a statue forbidding all wiretapping or a case holding all wiretapping to be a tort. Would a Federal officer operating with a valid court-ordered wiretap be liable for civil damages if such acts were a tort in the State? The Supremacy Clause might not apply where the Federal statute has stated that State rule governs. If a State's rules as to night time warrants were stricter than constitutional standards would an officer, acting within the Constitution, be liable for civil damages? Added to this is the inherent problem of making important aspects of Federal criminal procedure dependent upon the State in which a Federal officer is acting and not upon nationally applicable constitutional principles.

The proposed remedy is a significant move in the right direction and the problems brought to the fore by the incidents at Collinsville certainly suggest a need for rapid congressional action. But the problems, though solvable, are very complex, and well-intended but hasty action which later turns out to be inadequate for the effective law enforcement certainly does not service either to the victim or to society in the long run.

Mr. WIGGINS. Now, I will in a moment be pleased to answer questions about my fourth amendment concerns, but I want to raise another topic as well.

It is encumbent upon our committee, Mr. Chairman, to be constantly aware upon the impact of our actions upon the administration of justice within the Federal system. We all know of the many statistics indicating that courts at the trial level are overburdened with the creation of new causes of action, that that flood of cases at the district court level is also inundating our circuit courts of appeal and in turn creating great pressures upon the U.S. Supreme Court. We have to be mindful of those statistics as we create new Federal causes of action.

Insofar as this legislation may create a cause of action which must be filed in the Federal court relating to relatively trivial claims, such as for assault and battery or for the breaking down of a door unlawfully by a Federal officer or relatively modest claims, I think it is proper for the committee to question whether those actions ought to be brought initially in the U.S. district court.

There are several possibilities. One is that we might review our existing law with respect to the jurisdiction of magistrates within the U.S. district court and consign these claims for trial before magistrates rather than to burden a U.S. district court with a typical assault and battery claim where the claim is for $500 or less.

Mr. DONOHUE. Pardon me.

Wouldn't the sitting judge have a right to refer it to a magistrate?

Mr. JAFFE. I believe the legislation permits it, Mr. Chairman. I only wish to raise the problem and suggest that the staff look into those statutes covering the jurisdiction of magistrates so that we do not in a sense demean the special dignity of a U.S. district court with claims which would not even be heard originally in many of the trial courts in a State.

Second, the committee might consider at least the possibility of permitting actions filed under these sections to be pursued in the State court. Now, if that is to be a viable option we should look at our removal statutes very carefully to see that the right to remove in an appropriate case still is vested with the U.S. attorney. I am not prepared to submit the U.S. Government to an unlimited judgment in a State court. But, on the other hand, I am somewhat reluctant to say that that fear justifies the trial of a $500 claim in the U.S. district court.

One of the options available for this committee, which I urge your study of, is the possibility at least of permitting some of these claims to be commenced in State courts so long as there is an adequate removal statute exercisable on the option of the U.S. attorney when the likely exposure of the United States is great. If that is a viable option it would do a great deal to relieve this growing and serious burden upon the U.S. district courts around the country, which, as I have indicated, is seriously impacting the courts of appeal and the U.S. Supreme Court. It is the proliferation of cases at the U.S. district court which is forcing a consideration now of a second level appellate court in this country, a national court of appeals, so-called, which many find objectionable as some fundamental change in our appellate system. But let me say, Mr. Chairman, that such a change may well be necessary unless we do something about feeding these new cases into the district court.

Mr. DANIELSON. Would the gentleman yield?

Mr. WIGGINS. Yes, I have completed my statement, and I will be pleased to answer questions.

Mr. DANIELSON. Appropos to conceivably trying these cases in a State court, article 3 of the Constitution, section 2, about halfway through the section. the first paragraph, says the judicial power of the United States shall extend to all—here we are—controversies to which the United States shall be a party. This bill contemplates that the United States shall be a party to this action, be a party defendant. I just wonder, constitutionally, whether we could, without a constitutional amendment. whether we could confer the jurisdiction on a State court in the first place, and second, whether we could confer it upon a magistrate. The reason we selected the name "magistrate" is to differentiate between—to make them nonjudges. If they are judges they serve during good behavior, it is a constitutional lifetime appointment and so forth. I think we are boxed in by the Constitution. The Founding Fathers didn't contemplate we were going to have these law suits involving in today' values $500 at least.

Mr. WIGGINS. The second part of your question is much more easily answered than the first part.

The Judiciary Committee debated at some length whether a magistrate would discharge article 3 functions. The legislation is drafted in

my opinion as to obviate the second constitutional argument made by you. The magistrates are in a sense functionaries of the district court.

Mr. DANIELSON. Referees.

Mr. WIGGINS. That is right. I know the gentleman is familiar with referees in bankruptcy practice. That is an arm of the court and they discharge many judicial functions. But there is a right of review with the U.S. district court and the allover supervision is with the U.S. district court and that is generally believed to obviate the constitutional questions.

I wouldn't wish to suggest that it is totally at ease, because our position is relatively new, and so far as I know has not been tested on constitutional grounds. Pending that I think we can assume it is constitutional.

With respect to the first question, which is much more difficult, I have not researched the question and I am not prepared to say whether article 3 vests exclusive power in the—exclusive judicial power in the United States. It clearly vests power, but what I am unable to answer without further research is whether that power can be delegated, whether it can be waived in certain instances or whether it is plenary and exclusive and must be exercised in all cases. The answer to that question, of course, isn't the answer to your question, and I confess my inability to——

Mr. DANIELSON. I have great reservations here. Section 1 says the judicial power of the United States shall be vested in one Supreme Court and such inferior courts as the Congress may from time to time ordain or establish. The judicial power we have just described shall——

Mr. WIGGINS. Of course, to recognize the judicial power of the United States is not to mandate that power be exercised in all cases, not necessarily at least. I am not positive what the case law is with respect to whether that power must be exercised in all cases.

Mr. DANIELSON. I think if we do create a cause of action we have got a problem with respect to the judicial power of the United States.

Mr. WIGGINS. It is an understanding question and one which bears directly upon my situation and I will be glad to submit something on it.

Mr. DONOHUE. Don't you think many of these cases involving very little money damages will be handled administratively, as under the Tort Claims Act? You have under the Tort Claims Act—as a matter of fact, it is required that you first submit your claim to the department involved, and they, as a result of their investigation, will determine whether or not there is liability or not. They have the right to adjust and settle cases without them ever going into courts.

Mr. WIGGINS. Indeed they do, Mr. Chairman, and I would hope so. I think we run the risk, however, of an increased litigation load in the U.S. district court. The witness who preceded me acknowledged that, and I think it is inevitable. My question to the subcommittee is simply whether that risk is necessary to take. I, of course, would submit that to you. I merely wish to raise the question.

Mr. DONOHUE. It might be appropriate at this time to ask the representative of the Department what percentage of the claims that are filed under the present Tort Claims Act are settled administratively.

Mr. LAUGHLIN. Mr. Chairman, the only reliable and comprehensive data I have knowledge of pertains to a survey conducted by the administrative conference on this administrative claims procedure for the fiscal year 1968. Astoundingly, there were approximately 22,000 claims filed with the various Government agencies, and this includes the fender benders, the five-and-dime cases, as well as the serious ones, and the precise percentage, as I recall it, was something like 84 percent of those 22,000 were disposed of at the administrative level.

As I say, that is somewhat out of date but that was the first full fiscal year where the 1966 amendments had been in effect.

I do know from my own personal experience in handling the small claims for the Department of Justice and in the payment vouchers that I see from all the Government agencies that go through the General Accounting Office—I get copies of them—I think a vast preponderance of the small claims are disposed of at the administrative level, and even the more substantial ones, I think the experience has been sufficiently favorable that merits of this administrative claim procedure have been justified, that is to say that our caseload has not been on the increase, that is, it is at a new all-time high, the cases that are in litigation.

But I hate to contemplate what it would be were it not for the claims disposed of at the administrative stage.

Mr. WIGGINS. Accepting the gentleman's statistics, and I have no reason to doubt them at all, of the some 22,000 cases 84 percent settled administratively would still leave 3,000 or 4,000 cases which are litigated. Now, that doesn't mean that this statute will deal with 3,000 or 4,000 cases, but if the same statistics pertain it is clear that it is going to have some considerable impact upon the district courts around the country, and it is an impact that they are ill equipped to bear, given the existing load upon them.

Mr. DONOHUE. Well, thank you very much.

Mr. WIGGINS. Thank you, Mr. Chairman, for permitting me to comment.

Mr. DONOHUE. We will now hear from J. Clay Smith, Chairman of the Tort Law Committee of the Federal Bar Association.

TESTIMONY OF J. CLAY SMITH, JR., CHAIRMAN, TORT LAW COMMITTEE, FEDERAL BAR ASSOCIATION

Mr. SMITH. Mr. Chairman and members of the subcommittee, I am pleased to have this opportunity to comment on H.R. 10439, a bill which would amend title 28 of the United States Code to broaden the liability of the United States in suits based upon negligent acts or omissions, including such acts or omissions sounding in tort for money damages which may arise under the Constitution or statute of the United States. I am Chairman of the Tort Law Committee of the Federal Bar Association with a membership of nearly 400 attorneys practicing in both the public and private sectors in the United States. The membership of the Tort Law Committee of the Federal Bar Association is comprised of nearly 400 attorneys, practicing in both public and private sectors in the United States and abroad. The Federal Bar Association, of course, is comprised of nearly 15,000 attorneys practicing law here in the United States and also abroad.

On November 2, 1973, I provided each member of the Tort Law Committee with a copy of H.R. 10439, a copy of the comments on the substance of the provisions of S. 2558 made by Senator Roman Hruska and the Attorney General printed in the Congressional Record on October 10, 1973, at S. 18931, along with a further breakdown of H.R. 10439 that I prepared for the membership. The members of the Tort Law Committee were requested to comment on the proposed legislation. In response to my letter, several members of the committee expressed their views in writing. A select copy of the reviews that I received on this bill is attached to the statement that you have before you. They also called me by phone or dropped in my office to register their opinions on H.R. 10439. In all candor, I was surprised at the high level of interest in this legislation. On a comparative basis, the interest of the private practitioner exceeded that of lawyers in the Federal service.

As a result of this committee activity, I am able to report that an overwhelming majority of the attorneys who wrote, called or dropped in to register their position on H.R. 10439 and S. 2558, which I believe is essentially the same as this bill, generally approved this legislation. However, there were some who voiced strong opposition to section 4 of the bill which immunizes a Federal employee from personal liability for tortious conduct even though committed while acting within the scope of his employment. For example, one member of the committee wrote and stated:

> Why should the vast number of Federal employees in this country not be personally answerable for the consequences of their conduct, as are the rest of us? I strongly oppose the proposed amendments to the extent that they immunize all Federal employees from personal liability for torts committed in the scope of their employment.

His letter is attached hereto. I must say it was Mr. Gray who is from the State of Mississippi.

This letter reflects the opinion of several of the persons who called me in connection with the legislation. However, as I indicated before, the majority of the people generally supported section 4 which would immunize Federal employees.

In addition, some members were of the opinion that the entire intentional tort section should be deleted thereby permitting the sovereign to be sued for virtually any intentional tort committed by a Federal employee acting within the scope of his employment.

Other members desire that the Judiciary Committee consider raising the current statutory level allowed for attorneys' fees under the Federal Tort Claims Act: 28 U.S.C. section 2678. Presently, as you may know the maximum fee authorized by the act is 25 percent "of any judgment" or settlement of a case in litigation, and 20 percent of any settlement obtained while the claim is pending in the administrative agency. The members believe that a 5-percent increase is warranted in the judgment and administrative categories. Even a 5-percent increase is far below the standard fee for services for similar tort claim representation across the country which range between one-third to one-half of any judgment or settlement. Some attorneys believe that the low fee schedule under the Tort Claims Laws is designed to discourage lawyers from representing persons having claims under the act.

In this connection, I should like to call to this committee's attention the fact that the Tort Claims Act is silent on the matter of attorneys' fees in instances where no judgment for the claimant is obtained or where there is an adverse determination regarding the administrative claims and no subsequent judgment is obtained on behalf of the plaintiff. Also, it is unclear whether appellate work permits the attorney to charge a fee in excess of that presently authorized by law when he is victorious in cases where the Government appeals from a decision in favor of the claimant, or the claimant's attorney appeals from a decision in favor of the Government. Since violation of the Tort Claims Act fee provision carries a possible criminal penalty, some clarifica- along the lines just mentioned would seem highly appropriate.

Section 3 of H.R. 10439 caused the greatest concern among the members of the Tort Law Committee because the members believe that as drafted section 3 of the bill restricts the damages recoverable under the Tort Claims Act for claims arising in tort for money damages arising under the Constitution or statute of the United States. Hence, the rest of my presentation will be directed to the soundness of section 3 of H.R. 10439.

First of all, let's look at the United States as a defendant. I might add many of the comments I make here today are very sensitive to me in some respects, and that is because during my 4-year tenure as a captain in the U.S. Army I administered several thousand claims for the States of Maryland, Virginia, and the District of Columbia, and so therefore I speak with some—and that hasn't been too long ago—2 years ago when I got out of the military, so I speak with some practical mechanical knowledge of the problems that private practitioners have with this particular statute, for I negotiated several claims for the U.S. Government, even claims which were beyond my jurisdiction with authorization.

Now, the statutory scheme of the proposed amendments to title 28 contained in H.R. 10439 appropriately starts by annexing language to 28 U.S.C.A. section 1346(b). If the Congress should adopt H.R. 10439, 28 U.S.C.A., section 1346(b) would read as follows. I won't read the entire statute, but summarize it.

It would permit a person to file suit for injury or loss of property or personal injury or death caused by the neglect or wrongful acts or omission of an employee of the Government while acting in his employment under the 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 [, or where the claims sounding in tort for money damages arise under the Constitution or statutes of the United States, such liability to be determined in accordance with applicable Federal law.]

It is almost, if not universally accepted that a person claiming damages under the Federal Tort Claims Act must first file an administrative claim with the "appropriate Federal agency" prior to filing suit in Federal court. This is statutory, 28 U.S.C., section 2675. The filing of an administrative claim is a sine qua non to the power of a Federal court to hear and to decide the merits of the plaintiff's claim against the United States. Hence, any claim sounding in tort for money damages arising under the Constitution or statutes of the United States would also be required to be first presented to the "appropriate Federal

agency within 2 years after such claim accrues." Therefore, what might have seemed to be an ambiguity in the legislation would seem to be clarified that the period for bringing any constitutional claim would be a period of 2 years, because, of course, the legislation as amended doesn't provide a statutory period of limitations in the legislation. So it would have to be 2 years under the current claims statute.

Section 2 of H.R. 10439 would amend 28 U.S.C. section 2672 to read as follows:

Mr. Chairman has alluded to some of the language when he was addressing questions to Congressman Wiggins. But that provision states:

> The head of each Federal agency or his designee, in accordance with regulations prescribed by the Attorney General, may consider, ascertain, adjust, determine, compromise, and settle any claim for money damages against the United States for injury or loss of property or personal injury or death caused by the negligent or wrongful act or omission of any employee of the agency 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,"

and the amending language would state:

> . . . or where the claims sounding in tort for money damages arise under the Constitution or statutes of the United States, such liability to be determined in accordance with applicable Federal law.

The other sections would remain the same.

As we understand the amendment to 28 U.S.C.A. section 2672, the head of each Federal agency or his designee, in accordance with regulations prescribed by the Attorney General may negotiate and settle claims against the United States for tortious conduct which results in (1) money damages, (2) loss of property, (3) personal injury, or (4) death, when caused by an act or omission of any employee of a Federal agency while acting within the scope of his authority. In addition, the Federal agency would now negotiate and settle claims sounding in tort for money damages arising under the Constitution or statutes of the United States; however, liability for such claims would be governed solely by Federal law rather than State law.

Now, the liability of the United States, and this is the prelude getting in opposition because of several questions raised by Members of the Congress, we feel is a very sensitive point.

As presently enacted, the liability of the United States under the Federal Tort Claims Act is stated in 28 U.S.C.A., section 2674. That provision states, as it states now:

> The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages.
>
> If, however, in any case wherein death was caused, the law of the place where the act or omission complained of occurred provides, or has been construed to provide, for damages only punitive in nature, the United States shall be liable for actual or compensatory damages, measured, by the pecuniary injuries resulting from such death to the persons respectively, for whose benefit the action was brought, in lieu thereof.

As amended, the first paragraph of 28 U.S.C.A. section 2674 would be changed by section 3 of H.R. 10439 to read as follows:

> The United States shall be liable in accordance with the provisions of section 1346(b) of this title, but shall not be liable for interest prior to judgment or for

punitive damages: Provided, that for claims arising under the Constitution or statutes of the United States, recovery shall be restricted to actual damages and, where appropriate, reasonable compensation for general damages not to exceed $5,000.

This is the provision which gave several people of the Tort Law Committee problems.

By its language, section 3 of H.R. 10439 places a statutory ceiling, as interpreted by the members of our committee, on the amount that a person injured in his business, property, or who receives personal injuries, may recover in instances in which the content of the claim (1) sounds in tort, (2) demands money damages, and (3) arises under the Constitution, or (4) statutes of the United States. Tort claims arising under the Constitution and statutes would be governed solely by applicable Federal law.

The significance of the limited damages recoverable under a claim—and it came home to me when Congressman Wiggins was talking—cannot be fully appreciated without reference to section 7 of this bill. Section 7 would amend 28 U.S.C.A., section 2680(h) of the Tort Claims Act which now reads:

The provisions of this chapater and section 1346(b) of this title shall not apply to—

(h) Any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights.

From the testimony that has been given here today we now know that Public Law 93-253, which was passed on March 16, 1974, we know this exclusionary provision does not apply to law enforcement officers. They today may be sued for intentional torts——

Mr. DANIELSON. May I ask the gentleman a question at this point? You are referring to the law which was effective March 16?

Mr. SMITH. That is right.

Mr. DANIELSON. A period of 11 days, I believe.

Is the gentleman aware of the fact that that particular proviso was, shall I say, a sport so far as our Federal legislation was concerned. There was a good deal of debate in the House as to whether it should be allowed to pass at all. I perceive at the moment a window in space through which you can shoot for more damages than the $5,000. It was not the intent of this committee to have provided it at that time. You are aware of that fact, are you not?

Mr. SMITH. I am aware of the fact that that is one piece of legislation that I expect to only as a footnote to the legislation which I am testifying on. So, therefore, because it amends the Tort Claims Act 11 days ago——

Mr. DANIELSON. And may be amended again.

Mr. SMITH. Maybe.

Mr. DANIELSON. What I wanted the gentleman to be fully aware of, that policy was not the considered and deliberate opinion of this committee, either the subcommittee or whole committee, nor generally the intention of Congress, but because of parliamentary maneuvering it happened to go through and I don't think it is something to which you should become addicted.

Mr. SMITH. Oh, no. We are not addicted to it, as a matter of fact.

Mr. DANIELSON. Resist the tendency, please.

Mr. SMITH. Okay.

Mr. DONOHUE. I hate to interrupt you at this juncture. I note there is a rollcall going on at the present time on the floor, and it is incumbent upon the members of this committee to go over and respond to that call.

Would it be convenient for you to come back at some later date——

Mr. SMITH. This grieves me muchly.

Mr. DONOHUE. What?

Mr. SMITH. It grieves me to return, because it would seem to the continuity—I would be happy to come back, but we oppose section 3 of this legislation.

Mr. DONOHUE. Then you may be in opposition to other portions of it, and we want the benefit of your views. But at the same time we have other responsibilities that we must adhere to.

So you will be notified at some later date to come before us and give us the benefit of your views.

Mr. SMITH. The Bar Association would appreciate it, because the interests of our constituents are such that——

Mr. DONOHUE. We want to accommodate you and the Bar Association and anyone else.

[The prepared statement of Mr. Smith follows:]

STATEMENT OF J. CLAY SMITH, JR., CHAIRMAN, TORT LAW COMMITTEE OF THE FEDERAL BAR ASSOCIATION [1]

I am pleased to have this opportunity to comment on H.R. 10439, a bill which would amend title 28 of the United States Code to broaden the liability of the United States in suits based upon negligent acts or omissions, including such acts or omissions sounding in tort for money damages which may arise under the Constitution or statute of the United States. I am chairman of the Tort Law Committee of the Federal Bar Association with a membership of nearly 400 attorneys practicing in both the public and private sectors in the United States.

I.

On November 21, 1973, I provided each member of the Tort Law Committee with a copy of H.R. 10439, a copy of the comments on the substance of the provisions of S. 2558 made by Senator Roman Hruska and the Attorney General printed in the "Congressional Record" on October 10, 1973, at S. 18931, along with a further breakdown of H.R. 10439 that I prepared. The members of the Tort Law Committee were requested to comment on the proposed legislation. In response to my letter, several members of the committee expressed their views in writing,[2] called me by telephone, or dropped by my office to register their opinion on the provisions of H.R. 10439. In all candor, I was surprised at the high level of interest in this legislation. On a comparative basis, the interest of the private practitioner exceeded that of lawyers in the Federal service.

As a result of this committee activity, I am able to report that an overwhelming majority of the attorneys who wrote, called or dropped into register their position on H.R. 10439 and S. 2558 generally approve of this legislation. However, there were some who voiced strong opposition to section 4 of the bill which immunizes a Federal employee from personal liability for tortious conduct even though committed while acting in the scope of his employment. For example, one member of the committee wrote:

> Why should the vast number of Federal employees in this country not be personally answerable for the consequences of their conduct, as are the rest of us?

[1] The Federal Bar Association is composed of some 15,000 attorneys throughout the United States and overseas in 104 chapters and is comprised of attorneys currently or formerly in Federal service or otherwise having a substantial interest in the practice of Federal law.

[2] See appendix for copy of the letter dated Nov. 21, 1973, and for copies of a representative selection of responding views.

I strongly oppose the proposed amendments to the extent that they immunize all Federal employees from personal liability for torts committed in the scope of their employment.

This letter reflects the opinion of several of the persons who called me in connection with the legislation.

In addition, some members were of the opinion that the entire intentional tort section should be deleted thereby permitting the sovereign to be sued for virtually any intentional tort committed by a Federal employee acting within the scope of his employment. Compare 28 U.S.C.A. § 2680(h) with section 7, H.R. 10439.

Other members desire that the Judiciary Committee consider raising the current statutory level allowed for attorneys' fees under the Federal Tort Claims Act, 28 U.S.C.A. § 2678. Presently, the maximum fee authorized by the act is 25 percent "of any judgment" or settlement of a case in litigation, and 20 percent of any settlement obtained while the claim is pending in the administrative agency. The members believe that a 5 percent increase is warranted in the judgment and administrative categories. Even a 5 percent increase is far below the standard fee for services for similar tort claim representation across the country which range between one-third to one-half of any judgment or settlement. Some attorneys believe that the low fee schedule under the Tort Claims Act is designed to discourage lawyers from representing persons having claims under the act.

In this connection, I should like to call to this committee's attention the fact that the Tort Claims Act is silent on the matter of attorneys' fees in instances where no judgment for the claimant is obtained or where there is an adverse determination regarding the administrative claims and no subsequent judgment is obtained on behalf of the plaintiff. Also, it is unclear whether appellate work permits the attorney to charge a fee in excess of that presently authorized by law when he is victorious in cases where the Government appeals from a decision in favor of the claimant, or the claimant's attorney appeals from a decision in favor of the Government. Since violation of the Tort Claims Act fee provision carries a possible criminal penalty, some clarification along the lines just mentioned would seem highly appropriate. See Smith, "How To Perfect A Claim Under the Federal Tort Claims Act," 8 A.B.A. Law Notes 41, 46 (Jan. 1972); 28 U.S.C.A. § 2678; *Elmore* v. *United States*, 404 F. 2d 56 (6th Cir. 1968).[3]

Section 3 of H.R. 10439 caused the greatest concern among the members of the Tort Law Committee because the members believe that as drafted section 3 of the bill restricts the damages recoverable under the Tort Claims Act for claims sounding in tort for money damages arising under the Constitution or statute of the United States. Hence, Part II of my presentation will be directed to the soundness of section 3 of H.R. 10439.

II.

A. THE UNITED STATES AS DEFENDANT

The statutory scheme of the proposed amendments to title 28 contained in H.R. 10439 appropriately starts by annexing language to 28 U.S.C.A. § 1346(b).

If the Congress should adopt H.R. 10439, 28 U.S.C.A. § 1346(b) would read as follows:

> (b) Subject to the provisions of chapter 171 of this title, the district courts, together with the United States District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on or after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred [, or where the claims sounding in tort for money damages arise under the Constitution or statutes of the United States, such liability to be determined in accordance with applicable Federal law.] (amending language in brackets)

It is almost, if not, universally accepted that a person claiming damages under the Federal Tort Claims Act must first file an administrative claim with the

[3] In reading "Elmore" you are reminded that the 1966 Amendment to the Federal Tort Claims Act increased attorneys' fee for judgments from 20 to 25 percent.

"appropriate Federal agency" prior to filing suit in Federal Court. 28 U.S.C.A. § 2675. The filing of an administrative claim is a *sine qua non* to the power of a Federal Court to hear and to decide the merits of the plaintiff's claim against the United States. See, e.g., *Gunstream* v. *United States*, 307 F.Supp. 366, 369 (C.D. Calif. 1969). Hence, any claim sounding in tort for money damages arising under the Constitution or statutes of the United States would also be required to be first presented to the "appropriate Federal agency within 2 years after such claim accrues." 28 U.S.C.A. § 2401(b).

Section 2 of H.R. 10439 would amend 28 U.S.C.A. § 2672 to read as follows:

> The head of each Federal agency or his designee, in accordance with regulations prescribed by the Attorney General, may consider, ascertain, adjust, determine, compromise, and settle any claim for money damages against the United States for injury or loss of property or personal injury or death caused by the negligent or wrongful act or omission of any employee of the agency 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 [, or where the claims sounding in tort for money damages arise under the Constitution or statutes of the United States, such liability to be determined in accordance with applicable Federal law"]: *Provided*, That any award, compromise, or settlement in excess of $25,000 shall be effected only with the prior written approval of the Attorney General or his designee.
>
> Subject to the provisions of this title relating to civil actions on tort claims against the United States, any such award, compromise, settlement, or determination shall be final and conclusive on all officers of the Government, except when procured by means of fraud.
>
> Any award, compromise, or settlement in an amount of $25,000 or less made pursuant to this section shall be paid by the head of the Federal agency concerned out of appropriations available to that agency. Payment of any award, compromise or settlement in an amount in excess of $2,500 made pursuant to this section or made by the Attorney General in any amount pursuant to section 2677 of this title shall be paid in a manner similar to judgments and compromises are hereby made available for the payment of awards, compromises, or settlements under this chapter. (amended language in brackets)

As we understand the amendment to 28 U.S.C.A. § 2672, the head of each Federal Agency or his designee, in accordance with regulations prescribed by the Attorney General may negotiate and settle claims against the United States for tortious conduct which results in (1) money damages, (2) loss of property, (3) personal injury, or (4) death, when caused by an act or omission of any employee of a Federal Agency while acting within the scope of his authority. In addition, the Federal Agency would now negotiate and settle claims sounding in tort for money damages arising under the Constitution or statutes of the United States; however, liability for such claims would be governed solely by Federal, rather than State law.[4]

B. LIABILITY OF UNITED STATES

As presently enacted, the liability of the United States under the Federal Tort Claims Act is stated in 28 U.S.C.A. § 2674. That provision states,

> The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages.
>
> If, however, in any case wherein death was caused, the law of the place where the act or omission complained of occurred provides, or has been construed to provide, for damages only punitive in nature, the United States shall be liable for actual or compensatory damages, measured by the pecuniary injuries resulting from such death to the persons respectively, for whose benefit the action was brought, in lieu thereof.

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[4] Under present law Federal law applies if the issue is whether an employee is a Federal employee. 28 U.S.C.A. § 2671. State law applies in cases where the question is whether the employee was acting within the scope of his employment. *Williams* v. *United States*, 350 U.S. 857 (1955). Reference to the State law is usually made in determining the elements of damages under the Tort Claims Act e.g., collateral source rule, wrongful death statutes, and pain and suffering. *Hoyt* v. *United States*, 286 F. 2d 356, 358 (5th Cir. 1961).

As amended, the first paragraph of 28 U.S.C.A. § 2674 would be changed by Section 3 of H.R. 10439 to read as follows:

> The United States shall be liable in accordance with the provisions of section 1346(b) of this title, but shall not be liable for interest prior to judgment or for punitive damages: *Provided*, That for claims arising under the Constitution or statutes of the United States, recovery shall be restricted to actual damages and, where appropriate, reasonable compensation for general damages not to exceed $5,000.

C. OPPOSITION TO SECTION 3

By its language, section 3 of H.R. 10439 places a statutory ceiling on the amount that a person injured in his business, property, or who receives personal injuries, may recover in instances in which the content of the claim (1) sounds in tort, (2) demands money damages, and (3) arises under the Constitution, or (4) statutes of the United States. Tort claims arising under the Constitution and statutes would be governed solely by applicable Federal law.

The significance of the limited damages recoverable under a claim presented under section 3 of H.R. 10439 cannot be fully appreciated without first reference to section 7 of this bill. Section 7 would amend 28 U.S.C.A. § 2680(h) of the Tort Claims Act which now reads:[5]

> The provisions of this chapter and section 1346(b) of this title shall not apply to—
>
> . . .
>
> (h) Any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights.

As amended, section 7 of H.R. 10439 would delete and thereby allow a claimant to present a claim for injury caused by a Federal employee, acting within the scope of his employment, for claims arising out of assault, battery, false imprisonment, false arrest, malicious prosecution and abuse of process. Under the proposed legislation, a claimant's exclusive remedy for the latter intentional torts is against the United States. In addition, a Federal employee would be immunized from suit in a State or Federal Court for tortious conduct causing personal injury, loss of property or death while acting within the scope of his employment. See section 4 of H.R. 10439, amending 28 U.S.C.A. § 2679(b).[6]

The members of the Tort Law Committee of the Federal Bar Association in large measure support the provision which would immunize Federal employees and their estates from personal liability in tort claims for acts or omissions done while acting within the scope of their employment. However, a minority of the members polled are of the opinion that a Federal Employee (other than those now covered by the Government Drivers Act)[7] should remain personally liable for their tortious conduct like any other citizen of the United States.

As previously stated, the section of H.R. 10439 which generated the most comment was the language in section 3 of the bill which reads: "*Provided*, That for claims arising under the Constitution or statutes of the United States, recovery shall be restricted to actual damages and, where appropriate, reasonable compensation for general damages not to exceed $5,000." The overwhelming majority of Tort Law Committee members, who called, or wrote to me regarding the bill interpreted or believed that as drafted section 3 restricted the payment of constitutional tort claims to $5,000. To that extent the members were of the opinion that there exist no factual or rational basis to permit a hypothetical "Mr. A" to recover, for example, $15,000 for a fractured skull as a result of the tortious conduct of one employee; and on the other hand, limit the recovery of "Mr. B" to $5,000 for the same injury when a claim sounding in tort may arise under the Constitution or statutes of the United States. In both cases, Messrs. A and B are both seriously injured by the tortious conduct of a Government employee; however, section 3 of the bill places a ceiling on the amount that an agency, the

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[5] See Public Law 93-253 (Mar. 16, 1974). The effect of this law is to deprive the Federal Government the defense of sovereign immunity in cases in which Federal law enforcement agents, acting within the scope of their employment, or under the color of Federal law, commit an: assault, battery, false imprisonment, false arrest, malicious prosecution, or abuse of process. Apparently, H.R. 10439 would lift this immunity to all other Federal employees.

[6] We assume that a Federal employee would remain personally liable for damages arising from libel, slander, misrepresentation, and the other intentional torts still excluded by 28 U.S.C.A. § 2680(h).

[7] 28 U.S.C.A. § 2679.

Attorney General, or a Federal court may award for claims arising under the Constitution or statutes of the United States.

Apart from the $5,000 limitation placed on constitutional or stautory tort claims, to what factual category of claims is this section 3 of the bill directed? Assume that "Mr. B's" home is broken into by Federal law enforcement officers on an erroneous tip by an informer; "Mr. B" objects to the intrusion, is assaulted, and sustains injuries. Assume further that "Mr. B" retains a lawyer who reads section 3 of H.R. 10439 and decides that his client's injuries are severe and exceed $5,000. Assume further that "Mr. B's" lawyer files the claim without alleging that "Mr. B's" claim arises under the Constitution or statutes of the United States. Can the lawyer argue that his client's claim is one solely for damages resulting from an assault or battery, and thereby avoid the $5,000 statutory ceiling? Probably not. In such a case the Government will undoubtedly argue that the factual predicate sounds in tort for money damages arising under the Constitution or statutes of the United States. See *United States* v. *Neustadt*, 366 U.S. 696 (1961).

The authority of the Congress to establish the jurisdiction of Federal Court is unquestionable. Article III, U.S. Constitution. However, in the proposed legislation, one must ask: Aside from the power to establish the jurisdiction of the courts in the Federal system, is there a rational basis for the statutory ceiling of $5,000 in section 3 of H.R. 10439?

As a starting point, the U.S. Supreme Court's statement in *Bell* v. *Hood*, 327 U.S. 678 (1945) may provide some guidance in your pursuit to answer the question just posed. As you recall, in *Bell* v. *Hood*, *supra*, petitioners brought a suit in a Federal district court to recover damages in excess of $3,000 from the respondents who were agents of the Federal Bureau of Investigation. The petitioners alleged that they had suffered damages due to the conduct of the agents imprisoning them in violation of their constitutional rights. The Court held that the facts alleged in the complaint stated a claim for which relief could be granted and arose under the constitution or laws of the United States. *Id.* at 682. The Court, speaking through Mr. Justice Black, discussed, without deciding, the question of whether damages were recoverable for the alleged wrongdoing. The Court stated,

> The issue is whether courts can grant money recovery for damages said to have been suffered as a result of Federal officers violating the fourth and fifth amendments. That question has never been specifically decided . . . Moreover where federally protected rights have been invaded, it has been the rule from the beginning that courts will be alert to adjust their remedies so as to grant the necessary relief. And it is also well settled that where legal rights have been invaded and a Federal statute provides a general right to sue for such invasion, Federal courts may use any available remedy to make good the wrong done. *Id.* at 684 (citations omitted) (emphasis added).

Thus, the Court in *Bell* v. *Hood*, *supra*, spoke to the permissibility of the adjudication of claims for money damages and the power of the Federal courts to adjust the remedy so as to grant the necessary relief "to make good the wrong done." This language should be the standard by which the measure of damages for personal injuries are determined for claims "sounding in tort for money damages arising under the Constitution or statutes of the United States" under sections 2–3 of H.R. 10439.

What is the rational basis for the proposed statutory restriction? Does *Bivens* v. *Six Unknown Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971) provide us with any guidance on this matter? In *Bivens* v. *Six Unknown Federal Narcotics Agents*, *supra*, petitioner filed suit alleging that respondent agents of the Federal Bureau of Narcotics, acting under the color of Federal authority, made a warrantless entry of his apartment, searched the apartment, and arrested him on narcotics charges—all of the acts were alleged to be done without probable cause. The United States Supreme Court, speaking through Mr. Justice Brennan, held that the complaint stated a Federal cause of action under the fourth amendment to the Constitution for which damages are recoverable upon proof of injuries resulting therefrom. The Court stated,

> In *Bell* v. *Hood*. . . ., we reserved the question whether violation of the [fourth amendment] by a Federal agent acting under color of his authority gives rise to a cause of action for damages consequent upon his unconstitutional conduct. Today we hold that it does. *Id.* at 389.

In this connection, the Court never hints that a different standard should apply to injuries for tortious acts arising under the Constitution which measures the

damages sustained by a person. On the contrary, the Court quoting *Bell* v. *Hood, supra*, states that when a "Federal statute provides for a general right to sue . . . Federal courts may use any available remedy to make good the wrong done." *Id.* at 396. The U.S. Supreme Court was well aware of the damage issues that would have to be resolved in cases of the *Bell* and *Bivens* variety. This awareness is reflected in *Bivens*. The Court stated,

> The question is merely whether petitioner, if he can demonstrate an injury consequent upon the violation by Federal agents of his fourth amendment rights, is entitled to redress his injury through a particular remedial mechanism normally available in the federal courts . . . we hold that petitioner is entitled to recover money damages for any injuries he has suffered . . . *Id.* at 397 (citations omitted) (emphasis added).

Hence, in both *Bell* and *Bivens*, the court teaches us that there must exist a causal relationship between the constitutional duty breached and the resulting injuries. If this is not the standard for the measure of damages in personal injury cases under section 3—this standard should apply to section 3 of the bill.

Hence, I ask again, what is the rational basis for limiting the jurisdictional amount recoverable for claims sounding in tort for money damages arising under the Constitution or statutes of the United States under section 3 of H.R. 10439 in instances where a claimant can prove damages in excess of $5,000?

Admittedly, neither the *Bell* nor *Bivens* opinions involved a claim arising under the Federal Tort Claims Act. Indeed, if they had, both cases may well have been dismissed pursuant to 28 U.S.C.A. § 2680(h), *supra*. However, the attractiveness of section 7 of H.R. 10439, which would, *inter alia*, allow a claim against the United States for injuries arising out of false imprisonment or false arrest is diminished by section 3 of the bill which restricts the damages recoverable to "actual damages and, where appropriate, reasonable compensation for general damages not to exceed $5,000." [8]

Let's assume that "Mr. B" is accidentally killed by a Federal law enforcement officer, who mistakenly breaks into "Mr. B's" home in which he believes a narcotics ring resides. Further, assume that "Mr. B" was married and had three children. Assume further, that "Mr. B" was a 30-year-old auto mechanic with a 33-year life expectancy, whose annual income was $10,000. Obviously, the value of the life of "Mr. B" far exceeds $5,000.[9]

No doubt "Mr. B's" wife and next-of-kin would present a claim in negligence for wrongful death. The facts in the hypothetical case are such that the claim may sound in tort for money damages arising out of a violation of the fourth amendment to the Constitution. Under the provisions of section 2 of H.R. 10439, the liability of the United States would be determined in accordance with "applicable Federal law." Under the proposed amendments to the Tort Claims Act, what is the applicable Federal law in such a case—section 3 of H.R. 10439.[10] Section 3 of H.R. 10439 limiting the recovery for death or personal injury is not consistent with the broad purpose of the Tort Claims Act: To compensate the victims of the Government's negligence and wrongs. "Jayson, Handling Federal Tort Claims" § 66; *Indian Towing Co.* v. *United States*, 350 U.S. 61, 68–69 (1955). As Jayson explains:

> This, the second basic objective of the statute, was intended to be accomplished through the Act's Waiver of the Government's traditional im-

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[8] Several members of the committee are of the opinion that the bill should specifically explain the difference, if any, between the words "actual damages" and "general damages." What is it meant by "actual" and "general" damages? See, e.g., *Ringold* v. *Land*, 212 N.C. 369, 193 S.E. 267, 268 (1937) where the court states,

> "'Actual damages' are synonymous with 'compensatory damages' and with 'general damages.' Damages for mental suffering are actual or compensatory . . . and are given to indemnify the plaintiff for the injury suffered." (citation omitted).

Other courts have stated that these terms are synonymous. *M. F. Patterson Dental Supply Co.* v. *Wadley*, 401 F.2d 167, 172 (5th Cir. 1968); *Miami Herald Publishing Co.* v. *Brown*, 66 So.2d 679, 681 (Fla. Sup. Ct. 1953). Is section 3 designed to eliminate pain and suffering as an element of damages? Designed to place a ceiling on the base upon which pain and suffering may be measured?

[9] See "Department of Health, Education, and Welfare Life Tables," vol. II–sec. 5 (1969); Roberts, "What Is a Life Worth Now?" "The Daily (Baltimore) Record," vol. 172, col. 3 at p. 1 (Jan. 11, 1974); PLI, "Damages In Personal Injury and Wrongful Death Cases," 383 (1965). See also, "Jayson, Handling, Federal Tort Claims", § 213.

[10] In a wrongful death situation, does this mean that no claim involving wrongful death is permissible in cases sounding in tort arising under the Constitution or statute of the United States? Is there a general Federal wrongful death statute? If not, would other Federal wrongful death-type statutes apply? *E.g.*, Jones Act, 45 U.S.C. § 51; Death on the High Seas Act, 46 U.S.C. §§ 761–768. Is there another statute under which "Mr. B's" family may seek relief or other benefits for the wrong done? If so, what are those statutes? What are those benefits?

munity from suit for tort and through its provisions for administrative and judicial remedies under which the Government's liability was to be equated to that of a private individual. *Ibid.*

The broad and troubling questions which I have raised concerning the rational basis for placing the $5,000 ceiling on constitutional tort claims under section 3 need to be answered.[11] What is the intent of Congress? Indeed, at least one Federal district court has recently invited briefs on the issue of whether a serviceman may sue for damages for constitutionally impermissible conduct resulting in wrongful death. *James* v. *United States*, 358 F.Supp. 1381, 1386–1388 (D.R.I. 1973). However, in *James*, the court stated, "There is no occasion to decide these troubling issues. Though given ample time and opportunity to do so, counsel for plaintiff has chosen not to amend the complaint to allege a constitutional tort of the *Bivens* variety." *Id.* at 1387.

Although speculative on my part, it is possible that the $5,000 ceiling is inserted to protect the government from anticipated frivolous, Constitutional tort claims. You may be aware that prior to 1946, a ceiling or the amount that could be recovered on tort claims, administratively or judicially, was a provision common to most tort claim bills. It has been documented that:

> Generally, the maximum proposed for property damage claims was higher than for personal injury or death. There were bills which would have limited property damage claim recovery to $5,000, to $7,500, and to $50,000. The limitation proposed for personal injury or death generally was fixed at $5,000, or $7,000, or $10,000.
>
> . . . Moreover, there was fear expressed by some that to permit claims in unlimited amounts would open the doors of the Treasury unduly, that it would engender fraud, ambulance chasing, and other evils. Jayson, *supra* at § 59.04 (citations omitted).

The fears that the floodgates would open to abusive tort claims has not happened. In connection with *Bivens type* claims, the courts have been swift to dismiss frivolous claims, and no doubt will continue to do so. See *Jones* v. *Bales*, 58 F.R.D. 453, 461–466 (N.D. Ga. 1972). In addition, since there is no right to jury trial under the Tort Claims Act, it is likely that Federal judges will award reasonable damages under the facts and circumstances presented to them, 28 U.S.C.A. § 2402.

Therefore, I ask again, what is the rational basis for the $5,000 ceiling contained in section 3 of H.R. 10439, especially, as stated by the Court in *Bivens*, an "agent acting—albeit unconstitutionally—in the name of the United States possess a far greater capacity for harm than an individual trespasser exercising no authority other than his own." *Bivens* v. *Six Unknown Federal Narcotics Agents*, 388 U.S. 388, 392 (1971).

In sum, the Tort Law Committee of the Federal Bar Association favors the proposed amendments to title 28 of the United States Code, but has reservations about the purpose, intent and the scope of the limitation of section 3 of H.R. 10439. The Tort Law Committee desires a specific statement in connection with section 3 of the bill. The committee wishes to reserve the right to submit additional comments on the provisions of this bill.[12] Thank you.

APPENDIX

Re Request for comments on proposed amendments to Tort Claims Act.

THE FEDERAL BAR ASSOCIATION,
Washington, D.C., November 21, 1973.

DEAR COLLEAGUE: Enclosed for your consideration, review, comments, and appropriate reference is a legislative proposal "To amend Title 28 of the United States Code to provide an exclusive remedy against the United States in suits based upon acts or omissions of United States employees, and for other purposes." The proposed amendments to the Tort Claims Act are significant because they,

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[11] Some members of the committee recognize that the word "actual" damages may well permit attorneys to present claims in excess of $5,000, but the consensus is that if the language in section 3 is not designed to create, by way of limitation, another means to measure damages in constitutional torts where personal injury results that both the Justice Department and the Congress should express a clear statement to that effect.

[12] For example, the filing of a tort claim in a State or Federal court should not bar a claim under the Tort Claims Act under *Gunstream* circumstances. *Gunstream* v. *United States*, 307 F. Supp. 366, 369 (C.D. Calif. 1969). Also, what "statutes" of the United States are covered by the language in section 3 of H.R. 10439?

inter alia, would immunize all federal employees from personal liability in tort for acts done in the scope of their employment and also immunize them from claims sounding in tort for relief arising under the Constitution or federal statutes of the United States.

The enclosed legislation was introduced by Senator Roman Hruska (by request) in the Senate on October 10, 1973, as S. 2558; and introduced in the House of Representatives by Congressman Peter W. Rodino (for himself and Congressman Edward Hutchinson) on September 20, 1973, as H.R. 10439. Senator Hruska's introductory statement to S. 2558 contains a summary of the proposed amendments to the Tort Claim Act which was printed in the *Congressional Record* on October 10, 1973, at S. 18931 enclosed herein. I urge you to read the enclosed materials, and to forward any comments that you may have regarding this legislation to the undersigned by January 10, 1974. The Tort Claim Committee may be asked to comment on the proposed legislation. Therefore, your comments, whether favorable or not, are welcomed.

Generally, the proposed amendments would:

(1) Make federal law applicable to actions for money damages on claims sounding in tort arising under the Constitution or statutes of the United States.

(2) Limit the recovery of damages recovered for claims under (1) to actual damages; however, where appropriate, reasonable compensation for general damages; however, where appropriate, reasonable compensation for general damages not to exceed $5,000 may be awarded. [Presumably, this provision places no statutory ceiling on other types of claims traditionally covered by the Tort Claims Act.]

(3) Provide for the immunity of all federal employees (and their estates) from personal liability in tort claims for acts or omissions done in the scope of their employment by making the Tort Claims Act the exclusive remedy for the recovery of money damages for torts committed by federal employees.

(4) Make available to the United States, after the removal of a state court action against a federal employee to a United States District Court, all defenses it would have had, if the plaintiff had originally filed the law suit in federal court, e.g., a motion to dismiss because the claimant or his attorney failed to file an administrative claim in the appropriate federal agency within the two year statute of limitation.

(5) Permit one other possible basis (defense by the Government) for dismissal of the suit after removal:

(a) the availability of a remedy through proceedings for compensation or other benefits from the United States.

(b) In the latter event, suspends the running of any limitation of time for commencing, or filing an application or claim for benefits during the pendency of the civil action [presumably from the date the law suit was filed in a state court until a final disposition is made by a federal court].

(6) Permit a claimant to recover damages for injuries arising out of assault, battery, false imprisonment, false arrest, malicious prosecution; thereby, enlarging the Government's liability in the intentional tort categories, heretofore limited.

(7) Section 223 of Title II of the Public Health Act is redesignated as Section 224 and authorizes the Secretary of HEW, the Secretary of Defense and the Administration of Veterans Affairs to hold harmless, or provide liability insurance for any officer or employee of the agency with respect to tort claims arising from injuries or death caused by officers or employees acting within the scope of their employment as the result of the negligent performance of medical, surgical, dental, or related functions while assigned to a foreign country or detailed to other than a federal agency.

(8) The act would become effective three months following the date of enactment.

Sincerely,

J. CLAY SMITH, JR.,
Chairman, Tort Claims Committee.

Enclosure.

[H.R. 10439, 93d Cong., 1st sess.]

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, and for other purposes

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section 1346(b) of title 28, United States

Code is amended by striking the period at the end of the section and adding the following: ", or where the claims sounding in tort for money damages arise under the Constitution or statutes of the United States, such liability to be determined in accordance with applicable Federal law."

SEC. 2. Section 2672 of title 28, United States Code, is amended by inserting in the first paragraph the following language after the word "occurred" and before the colon: ", or where the claims sounding in tort for money damages arise under the Constitution or statutes of the United States, such liability to be determined in accordance with applicable Federal law".

SEC. 3. Section 2674 of title 28, United States Code, is amended by deleting the first paragraph and substituting the following:

"The United States shall be liable in accordance with the provisions of section 1346(b) of this title, but shall not be liable for interest prior to judgment or for punitive damages: *Provided*, That for claims arising under the Constitution or statutes of the United States, recovery shall be restricted to actual damages and, where appropriate, reasonable compensation for general damages not to exceed $5,000.".

SEC. 4. Section 2679(b) of title 28, United States Code, is amended to read as follows:

"(b) The remedy against the United States provided by section 1346(b) and 2672 of this title for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his 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.".

SEC. 5. Section 2679(d) of title 28, United States Code, is amended by inserting in the first sentence the words "office or" between "scope of his" and "employment.".

SEC. 6. Section 2679(d) of title 28, United States Code, is amended by deleting the second sentence and substituting the following: "After removal 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 the Federal Tort Claims Act. Should a United States district court determine on a hearing on a motion to remand held before a trial on the merits that the employee whose act or omission gave rise to the suit was not acting within the scope of his office or employment, the case shall be remanded to the State court: *Provided*, That where such a remedy is precluded because of the availability of a remedy through proceedings for compensation or other benefits from the United States as provided by any other law, the case shall be dismissed, but in that event the running of any limitation of time for commencing, or filing an application or claim in, such proceedings for compensation of other benefits shall be deemed to have been suspended during the pendency of the civil action or proceeding under this section.".

SEC. 7. Section 2680(h) of title 28, United States Code, is amended to read as follows: "Any claims arising out of libel, slander, misrepresentation, deceit, or interference with contract rights.".

SEC. 8. Section 4116 of title 38, United States Code, is repealed, as of the effective date of this Act.

SEC. 9. Section 223 of title II of the Public Health Service Act (58 Stat. 682, as added by section 4 of the Act of December 31, 1970, 84 Stat. 1870 (42 U.S.C. 233)), is redesignated as section 224 and is amended to read as follows:

"AUTHORITY OF SECRETARY OF DESIGNEE TO HOLD HARMLESS OR PROVIDE LIABILITY INSURANCE FOR ASSIGNED OR DETAILED EMPLOYEES

"SEC. 224. The Secretary of Health, Education, and Welfare, the Secretary of Defense, and the Administrator of Veterans' Affairs, or their designees may, to the extent deemed appropriate, hold harmless or provide liability insurance for any officer or employee of their respective departments or agencies for damage for personal injury, including death or property damage, negligently caused by an officer or employee while acting within the scope of his office or employment and as a result of the performance of medical, surgical, dental, or related functions, including the conduct of clinical studies or investigations, if such employee is assigned to a foreign country or detailed to other than a Federal agency or

institution, or if the circumstances are such as are likely to preclude the remedies of third persons against the United States described in section 2679(b) of title 28, for such damage or injury.".

SEC. 10. This Act shall become effective on the first day of the third month which begins following the date of its enactment and shall apply to only those claims accruing on or after the effective date.

[From the Congressional Record, Oct. 10, 1973]

By Mr. HRUSKA (by request):

S. 2558. 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 omission of U.S. employees and for other purposes. Referred to the Committee on the Judiciary.

Mr. HRUSKA. Mr. President, I am pleased to introduce, on behalf of the administration, a bill which would amend title 28 of the United States Code to broaden the liability of the United States in suits based upon acts or omissions of its employees occurring within the scope of their employment, and to provide for an exclusive remedy against the United States in suits based upon these acts or omissions.

When the Federal Tort Claims Act was enacted in 1946, the primary purpose was to put the Federal Government on a par with private employers in situations where employees committed torts within the scope of their employment. Accordingly, the Tort Claims Act states that the United States will be liable for the negligent or wrongful act of its employees "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." Despite this language, various exceptions to Government liability were written into the Federal Tort Claims Act, including those in 28 U.S.C. 2680(h), which presently reads as follows:

Any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights.

When the Federal Tort Claims Act was first adopted, it was thought that claims based upon these torts could be too easily exaggerated and defense against them by the Government would be too difficult. Experience with the act, however, has indicated that many of these exceptions can be abolished without unduly hampering the operation of the Government or the administration of the Tort Claims Act, and thereby take a significant step toward achieving the act's primary purpose of putting Government on a par with private employers who are liable for the intentional torts of their employees. The bill I am introducing would amend 28 U.S.C. 2680(h) by limiting the number of exceptions to Government liability in that section, thereby rendering the United States liable for torts of assault, battery, false arrest, false imprisonment, malicious prosecution, and abuse of process committed by its officers and employees within the scope of their employment.

While enlarging the scope of the area in which the citizen may obtain relief from the Government, this bill at the same time would enlarge the scope of protection of Government officials. Under existing law, the liability of the United States is an alternative to and not in lieu of the liability of the employee who committed the tort. Federal employees particularly law enforcement agents, are being sued in their individual capacities in greater numbers for acts performed within the scope of their employment and are, therefore, exposed to personal money judgments. These suits are sometimes for vindictive and harassment purposes. It is reasoned that the intimidating threat of suit against the individual Federal employee has an effect on his job performance through loss of initiative and lowering of morale.

Since passage of the Tort Claims Act, Congress has passed three statutes which protect certain Government employees from suits based upon scope of employment acts of the employees: namely, Government drivers, medical personnel of the Veterans' Administration, and Public Health Service personnel. These statutes provide that the exclusive remedy available to the injured citizen is against the Government employer. It appears to be an inconsistency that some public servants are immune from suit while others remain personally liable for wrongful acts or omissions in the scope of their employment. It is believed that

the general principle of immunity of Federal employees is a desirable one and that further piecemeal legislation should be avoided.

The bill I am introducing would accomplish equality of treatment by broadening the present statutory immunity of Government employees from personal liability in tort, and from claims sounding in tort for relief arising under the Constitution or Federal statutes of the United States, to all Federal employees. In so doing, the bill assures the citizen aggrieved or damaged by the employee a reasonable avenue of redress and an assurance in meritorious claims of full monetary recompense.

While I am not unalterably wed to each and every provision of this bill, I believe it will serve as an excellent vehicle for the needed reforms of the Federal Tort Claims Act. Therefore, I urge that it receive prompt hearings, upon proper referral, as well as full consideration and debate so that we may enact worthy legislation in this area.

Mr. President, I ask unanimous consent that the bill be printed in the RECORD following my remarks along with a section-by-section analysis and the Attorney General's letter of transmittal.

There being no objection, the bill and material were ordered to be printed in the RECORD, as follows:

S. 2558

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled. That Section 1346(b) of Title 28, United States Code is amended by striking the period at the end of the Section and adding the following: ", or where the claims sounding in tort for money damages arise under the Constitution or statutes of the United States, such liability to be determined in accordance with applicable federal law."

SEC. 2. Section 2672 of Title 28, United States Code, is amended by inserting in the first paragraph the following language after the word "occurred" and before the colon: ", or where the claims sounding in tort for money damages arise under the Constitution or statutes of the United States, such liability to be determined in accordance with applicable federal law".

SEC. 3. Section 2674 of title 28, United States Code, is amended by deleting the first paragraph and substituting the following:

"The United States shall be liable in accordance with the provisions of section 1346(b) of this title, but shall not be liable for interest prior to judgment or for punitive damages: *Provided*, That for claims arising under the Constitution or statutes of the United States, recovery shall be restricted to actual damages and, where appropriate, reasonable compensation for general damages not to exceed $5,000."

SEC. 4. 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 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 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."

SEC. 5. Section 2679(d) of title 28, United States Code, is amended by inserting in the first sentence the word "office or" between "scope of his" and "employment."

SEC. 6. Section 2679(d) of title 28, United States Code, is amended by deleting the second sentence and substituting the following:

"After removal 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 the Federal Tort Claims Act. Should a United States district court determine on a hearing on a motion to remand held before a trial on the merits that the employee whose act or omission gave rise to the suit was not acting within the scope of his office or employment, the case shall be remanded to the State court: *Provided*, That where such a remedy is precluded because of the availability of a remedy through proceedings for compensation or other benefits from the United States is provided by any other law, the case shall be dismissed, but in that event the running of any limitation of time for commencing, or filing an application or claim in, such proceedings for compensation of other benefits shall be deemed to have been suspended during the pendency of the civil action or proceeding under this section."

SEC. 7. Section 2680(h) of title 28, United States Code, is amended to read as follows:

"Any claims arising out of libel, slander, misrepresentation, deceit, or interference with contract rights."

SEC. 8. Section 4116 of title 38, United States Code, is repealed, as of the effective date of this Act.

SEC. 9. Section 223 of title II of the Public Health Service Act, 58 Stat. 682, as added by section 4 of the Act of December 31, 1970, 84 Stat. 1870 (42 U.S.C. 233), is redesignated as section 224 and is amended to read as follows:

"Authority of Secretary of designee to hold harmless or provide liability insurance for assigned or detailed employees."

"SEC. 224. The Secretary of Health, Education and Welfare, the Secretary of Defense and the Administrator of Veterans Affairs, or their designees may, to the extent deemed appropriate, hold harmless or provide liability insurance for any officer or employee of their respective departments or agencies for damage for personal injury, including death or property damage, negligently caused by an officer or employee while acting within the scope of his office or employment and as a result of the performance of medical, surgical, dental, or related functions, including the conduct of clinical studies or investigations, if such employee is assigned to a foreign country or detailed to other than a Federal agency or institution, or if the circumstances are such as are likely to preclude the remedies of third persons against the United States described in section 2679(b) of Title 28, for such damage or injury."

SEC. 10. This Act shall become effective on the first day of the third month which begins following the date of its enactment and shall apply to only those claims accruing on or after the effective date.

SECTION-BY-SECTION ANALYSIS OF THE BILL TO PROVIDE FOR AN EXECUTIVE REMEDY AGAINST THE UNITED STATES IN SUITS BASED UPON ACTS OR OMISSION OF U.S. EMPLOYEES AND FOR OTHER PURPOSES

Section 1. Section 1 amends Section 1346(b) of Title 28 of the United States Code to extend the exclusive jurisdiction of the United States District Courts to include claims arising under the Constitution and statutes of the United States. Section 1 also provides that the liability of the United States is to be determined in accordance with applicable Federal law. Because the cause of action arises under the Constitution or Federal statute, Federal law must necessarily control; hence, the reference to Federal law in Section 1 is merely declaratory of the decisional law in its present state. The current reference in 28 U.S.C. 1346(b) to the law of the place where the act or omission occurred will continue to apply in routine tort situations which arise under State law.

Section 2. Section 2 amends Section 2672 of Title 28 of the United States Code to provide additionally for the administrative adjustment of claims arising under the Constitution or statutes of the United States and provides that the liability of the United States for such claims shall be determined in accordance with applicable Federal law.

Section 3. Section 3 amends Section 2674 of Title 28 of the United States Code so as to provide a measure of damages for claims arising under the Constitution or statutes of the United States by providing unlimited recovery for actual or liquidated damages sustained, and by permitting where appropriate, additional reasonable compensation for general damages but not to exceed $5,000.

Section 4. Section 4 amends Section 2679(b) of Title 28 of the States Code to extend the present exclusiveness of the Tort Claims Act remedy to include all government officers and employees. Under existing law, only government motor vehicle operators, and medical, and paramedical personnel of the Veterans Administration and the Public Health Service are personally immune from suit and civil liability for acts performed while in the scope of their Federal employment.

Secton 5. Section 5 amends Section 2679(d) of Title 28 of the United States Code by inserting the words "office or" between "scope of his" and "employment" appearing in the first sentence of 2679(d). This amendment is a technical amendment designed to make clear that the scope of the Tort Claims Act remedy extends to officers of the Government as well as employees.

Section 6. Section 2679(d) presently reads in relevant part as follows:

"Upon a certification by the Attorney General that the defendant employee was acting within the scope of his employment at the time of the incident out of

which the suit arose, any such civil action or proceeding commenced in a State court shall be removed without bond at any time before trial by the Attorney General to the district court of the United States for the district and division embracing the place wherein it is pending and the proceedings deemed a tort action brought against the United States under the provisions of this title and all references thereto."

Section 6 amends Section 2679(d) so as to include language designed to make clear that in a suit originally commenced against an officer or employee of the government for which a remedy exists under the Federal Tort Claims Act, the United States may assert and establish such defenses to the suit as would have been available to it had the suit originally been commenced against the United States. Thus, under existing decisional law federal employees injured as an incident of their government employment and who are entitled to the benefits provided by the Federal Employees' Compensation Act, 5 U.S.C. 8101 *et seq.*, are restricted to their compensation rights and may not sue the United States under the Federal Tort Claims Act. Similarly, miliary personnel who sustain injury as an incident of their military service (by Supreme Court decision. *Feres* v. *United States*, 340 U.S. 135 (1950), may not sue the United States under the Tort Claims Act. Section 6 will assure preservation of these types of defenses as well as other statutory defenses peculiar to the Federal Tort Claims Act.

Section 7. Section 7 amends Section 2680(h) of Title 28 of the United States Code so as to eliminate the present sovereign immunity of the United States for claims arising out of "assault, battery, false imprisonment, false arrest, malicious prosecution, and abuse of process." By reason of the 2680(h) exception, a citizen's uncertain remedy for these types of specified torts has heretofore been only against the individual whose conduct gave rise to the claim. The bill modifies the scope of the present 28 U.S.C. 2680(h) exception, enlarges the waiver of immunity, and thus provides a Tort Claims Act remedy for the types of torts most frequently arising out of activities by federal law enforcement officers.

Section 8. Section 8 is a technical amendment: it repeals Section 4116 of Title 38, United States Code which presently extends the exclusiveness of the Tort Claims Act remedy to claims arising out of activities by medical and paramedical personnel of the Veterans' Administration. With the enactment of this bill, Section 4116 of Title 38 is no longer necessary and is appropriately repealed.

Section 9. Section 9 is also a technical amendment and would effect the partial repeal of 42 U.S.C. 233 which, like 38 U.S.C. 4116, presently extends the exclusiveness of the Tort Claims Act remedy to include claims based upon activities of Public Health Service medical and paramedical personnel. Section 9 also provides for a retention (as a redesignated Section 224 of Title 42 U.S.C.) of language peculiar to the Public Health Service which presently appears in 42 U.S.C. 233(f).

Section 10. Section 10 assures the prospective application of the provisions of the bill by providing that the Act becomes effective of the first day of the third month following its enactment and applies only to those claims occuring on or after the effective date.

OFFICE OF THE ATTORNEY GENERAL,
Washington, D.C., September 17, 1973.

THE VICE PRESIDENT,
U.S. Senate,
Washington, D.C.

DEAR MR. VICE PRESIDENT: Enclosed for your consideration and appropriate reference is a legislative proposal "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 employers, and for other purposes."

This proposal is intended to provide for the immunity of Federal employees from personal liability in tort for acts done in the scope of their employment and immunity from claims sounding in tort for relief arising under the Constitution or federal statutes of the United States. The Federal Tort Claims Act as passed in 1946 did not bar suits against Government employees who committed torts. However, if a civil action is brought against the Government under 28 U.S.C. 1346(b), a judgment in such action constitutes a complete bar to any action

against Federal employees for damages for the same act or omission, 28 U.S.C. 2676.

Three statutes were subsequently enacted which barred suit against three particular classes of Federal employees—Government drivers, medical personnel of the Veterans Administration, and Public Health Service personnel. The Government Drivers Act passed in 1961, Public Law 87-258, provides that the remedy by suit against the United States under 28 U.S.C. 1346(b) shall be the exclusive remedy when the damage claimed results from the operation of a motor vehicle by an employee of the Government while acting within the scope of his office or employment. The procedure by which the Drivers Act is invoked is set forth in 28 U.S.C. (b)-(c). The action is usually brought in the State court and is removed to the Federal court upon certification by the Attorney General that the defendant employer was acting within the scope of his office or employment at the time of the accident. Upon removal, the United States is substituted for the employee as defendant and the action proceeds in the manner prescribed for any other tort claim against the United States.

A similar statute was enacted in 1965, Public Law 89-311, 38 U.S.C. 4116, with respect to medical personnel of the Veterans Administration, and in 1970, Public Law 91-623, 42 U.S.C. 233, with respect to Public Health Service personnel. In succeeding sessions of Congress, bills have been introduced proposing the protection of other classes of Federal employees such as FBI agents and the flying personnel of the Federal Aviation Agency.

It is this Department's opinion that the general principle of immunity of Federal employees is a desirable one and that piecemeal legislation should be avoided. Accordingly, this proposed bill would afford equality of treatment by extending the immunity from personal liability in tort, and from claims sounding in tort for relief arising under the Constitution or federal statutes of the United States to all Federal employees.

The proposed bill would amend 28 U.S.C. 1346(b) and 28 U.S.C. 2672 by extending the applicability of these sections to include claims sounding in tort for money damages arising under the Constitution of the United States.

The proposed bill would amend 28 U.S.C. 2679(b) by extending its applicability to all Federal employees acting within the scope of their office or employment. Further provisions of the proposals are intended to make it clear that the previously existing tort remedy against Federal employees, as well as any claims sounding in tort arising under the Constitution or federal statutes of the United States, is now barred and that the exclusive remedy for compensation in these matters is pursuant to the procedures of the Federal Tort Claims Act.

The proposed bill would also amend 28 U.S.C. 2680(h) by limiting the number of exceptions in that Section, thereby rendering the United States liable for torts of assault, battery, false arrest, false imprisonment, malicious prosecution, and abuse of process committed by its officers and employees within the scope of their employment.

The proposed bill would repeal Section 4116 of Title 33, United States Code, and Section 233(a)(b)(c)(d)(e) of Title 42, relating respectively to medical personnel of the Veterans Administration and the Public Health Service, as the proposed bill provides broad coverage for federal employees. Finally, the proposed bill would continue authority by the Secretary of Health, Education and Welfare and would provide authority for the Secretary of Defense and the Administrator of Veterans Affairs to hold harmless or provide liability insurance for medical personnel assigned to foreign countries or detailed to other than a Federal agency or institution, or where circumstances would likely preclude remedies of third persons against the United States described in Section 2679(b) of Title 23.

I recommend the introduction and prompt enactment of this proposal.

The Office of Management and Budget has advised that there is no objection to the submission of this legislation from the standpoint of the Administration's program.

Sincerely,

_____,

Attorney General.

PLUNKETT, COONEY, RUTT, WATERS,
STANCZYK & PEDERSEN,
Detroit, Mich., December 26, 1973.

Re proposed amendment to Tort Claims Act

THE FEDERAL BAR ASSOCIATION,
Washington, D.C.

(Attention: Mr. J. Clay Smith, Jr., Chairman Tort Claims Committee).

DEAR MR. SMITH: This is in response to your letter of November 21, 1973, asking for comments on the proposed amendment to the Federal Tort Claims Act.

To the extent that the proposed amendment broadens the scope of the Federal Tort Claims Act to eliminate exclusion of some of the specific intent torts previously excluded, I think that the amendment should be supported.

My personal opinion, based upon the statements of Mr. Hruska, is that the proposed broadening of the Federal Tort Claims Act constitutes a "smoke screen" to allow a significant reduction of the benefits available under the Act by limiting the amount recoverable to $5,000. I do not concur with the statement placed parenthetically in your letter that the amendment places no statutory ceiling on other types of claims. If this is indeed the intent of the amendment, it should be spelled out more specifically. To say that the Act is broadened by including recovery for a list of intentional torts but that the recovery for all torts shall be limited to $5,000, amounts to a significant reduction in benefits available to the public.

My guess would be that if we compared the total settlement value of all cases brought for intentional torts and dismissed under the present statute with the total amount recovered for negligent injuries under the present statute which would be limited to $5,000 under the new statute, we would find that the government will be saving many thousands of dollars by enactment of the amendment.

To say that the amendment makes the litigant in Federal Court equal with the litigant in the State Court, is ridiculous. A seriously injured person in State Court might be entitled to recover $500,000 for a permanent disabling injury. Under the new amendment, he would be limited to $5,000.

Because of the inequity presented by these types of situations, my personal comment would be that the amendment would be acceptable only if the $5,000 limitation were either totally deleted or applied clearly to the Act to the intentional torts and then only to those intentional torts which do not have the propensity of serious bodily harm.

Very truly yours,

PLUNKETT, COONEY, RUTT, WATTERS,
STANCZYK & PEDERSEN,
STANLEY A. PROKOP.

GRAY, MONTAGUE & JACKSON,
Hattiesburg, Miss., December 7, 1973.

Re Proposed amendments to Tort Claims Act

THE FEDERAL BAR ASSOCIATION,
Washington, D.C.

(Attention Honorable J. Clay Smith, Jr., Tort Claims Committee).

GENTLEMEN: Why should the vast number of Federal employees in this country not be personally answerable for the consequences of their conduct, as are the rest of us?

I strongly oppose the proposed amendments to the extent that they immunize all Federal employees from personal liability for torts committed in the scope of their employment.

Your truly,

R. A. GRAY, III.

HARRY S. WENDER,
Washington, D.C., December 14, 1973.

J. CLAY SMITH, ESQ.,
Chairman, Tort Claims Committee, The Federal Bar Association,
Washington, D.C.

DEAR CLAY: I am grateful to you for sending me H.R. 10439 and S. 2558, constituting proposed amendments to the Federal Tort Claims Act. Please be advised that I endorse all aspects of the proposed legislation except the "No

Fault" provisions. They are clearly antagonistic to the original principles of this legislation and should be vigorously opposed by the Federal Bar Association.

With kindest personal regards, I am

Cordially yours,

HARRY S. WENDER.

JACK H. OLENDER,
Washington, D.C., December 11, 1973.

Re: H.R. 10439 and S. 2558

J. CLAY SMITH, Jr., Esquire,
Chairman, Tort Claims Committee, The Federal Bar Association,
Washington, D.C.

DEAR MR. SMITH: Harry Wender has sent me a copy of your correspondence on these bills. I oppose the no-fault feature which denies the right to full compensation.

If I, as an associate member of the Federal Bar Association, am eligible, I would be happy to serve on your committee.

Sincerely yours,

JACK H. OLENDER.

SINDELL, SINDELL, BOURNE, STERN & SPERO,
Cleveland, Ohio, December 7, 1973.

Re proposed amendments to Tort Claims Act

Mr. J. CLAY SMITH, Jr.,
Chairman, Tort Claims Committee, Federal Bar Association,
Washington, D.C.

DEAR MR. SMITH: I read with interest your letter of November 21, 1973 and enclosures, and I would like to make the following brief comments.

1. Section 3 of HR 10439 is, of course, highly objectionable for many reasons. The words, "actual damage" and "general damage", are obviously not defined and do not have a commonly understood meaning. If this is an attempt to virtually exclude damages for pain, suffering and disability, it is obviously completely unjustified. Your letter states that presumably this Section would not apply to the ordinary cases arising out of the Tort Claims Act, but is seems to me that since the Federal Tort Claims Act is a statute of the United States, it might very well be argued that this virtually eliminates the claims under the Federal Tort Claims Act.

2. With reference to the exceptions contained in Title 28, Section 2680 (H), changed by Section 7 of the House Bill, it seems to me that the whole (H) of Section 2680 ought to be repealed. If the torts covered by (H) are committed in the scope of employment by the United States, the United States should be liable therefore.

I see no objections to the other provisions of this House Resolution 10439.

My attention has been called to HR 8245, reported November 29, 1973 which in its Section 2 also attempts to amend Section 2680 of Title 28 with reference to (H) of that Section. It apparently seeks to make the United States liable for assault, battery, etc. committed by investigative or law enforcement officers of the United States, but it is obvious that HR 10439 has the better provisions since it is not limited to the investigative and law enforcement offices of the United States.

Sincerely yours,

CURT E. STERN.

KANNER, STEIN & BAROL,
Philadelphia, Pa., December 28, 1973.

THE FEDERAL BAR ASSOCIATION,
Washington, D.C.
(Attention J. Clay Smith, Jr., Esq.).

DEAR MR. SMITH: You asked me to comment on the proposed amendment to the Tort Claim Act.

The amendment to section 3 requires special attention. Under the proposed amendment, a person who has a leg amputated because of the negligent operation of a mail truck, could only recover his actual damages which would be the hospi-

talization, the surgeon's fee and loss of any wage. He could not recover for the permanent inconvenience due to the amputation for the rest of his life.

I do not know who Mr. Hruska is, but if he did not mean to restrict this as it reads, he should further amend Section 3 by adding: "Said actual damages shall include, but not be limited to pain and suffering, inconvenience and impairment of the right to enjoy life." This merits serious consideration on our part.

Trusting this information may be helpful, I remain

Very truly yours,

DAVID KANNER.

DONALD W. MARKHAM,
Washington, D.C., December 6, 1973.

J. CLAY SMITH, JR., Esq.,
Chairman, Tort Claims Committee,
Federal Bar Association,
Washington, D.C.

DEAR MR. SMITH: This is in response to your letter of November 21, 1973, requesting comments on S. 2558 and H.R. 10439. I have reviewed the bills and the accompanying comments contained in the excerpts from the "Congressional Record" and have the following comments on the proposed legislation.

The need for amendment to the Federal Tort Claims Act, to immunize federal employees from personal suits arising as a result of actions taken within the scope of their employment, has been sadly neglected. While Senator Hruska, in his comments, speaks of law enforcement agents as the prime beneficiaries of this legislation, I would like to point out that there is a large group of federal employees whose exposure to tort liability is far greater than law enforcement agents, and the possibility of personal litigation has, in at least one instance in my personal experience, resulted in a near collapse of the individual's personal, financial and psychological life. This group of federal employees, air traffic controllers, employed by the Department of Transportation, Federal Aviation Administration, is engaged in the profession of shepherding aircraft with as many as 350 passengers across our skies. A mistake on the part of any one of the more than 20,000 controllers employed by the federal government can result in the death of all or many of these passengers. The exposure speaks for itself.

In 1969, an airliner crashed in the Midwest, killing over 80 passengers and crew. Suit was instituted against the United States and litigation proceeded on its normal course. When settlement prospects seemed to dwindle, and due to the failure of certain of plaintiffs' attorneys to file timely suits in accordance with the Federal Tort Claims Act, several suits were filed in both the state and federal courts against the individual air traffic controller, exposing him to millions of dollars of personal liability. Obviously, few federal employees, or, for that matter, any individual with normal means, could withstand even a partial recovery on any of the approximately 20 suits that were started against him. While no judgment was entered against the controller, there can be no doubt that this added pressure contributed significantly to the ultimate settlement of the passengers' suits by the United States. While I have specific knowledge of this one instance, I am aware that this tactic is becoming more prevalent in this type of litigation. For example, the controllers involved in the crash of the L–1011 in Florida last year and in the Juneau, Alaska, crash of 1971 were personally sued. In both cases, the personal suits were dismissed on jurisdictional grounds prior to trial.

While I am unaware of any recovery entered against an air traffic controller, if such a judgment were issued, the United States would be powerless to pay such a judgment without a private relief bill. Likewise, the United States is unable to assume a law suit filed against one of its employees without specific statutory authority. This, of course, is contrary to the tort law of the private sector, where employees may bargain collectively for or the employer may voluntarily assume a law suit against one of its employees. Such an option is not available to federal employees.

I have limited my comments to air traffic controllers, but I should think, for example, that equal exposure would be faced by government pilots, military or civilian, and technical experts whose responsibilities, for instance, might deal with navigational aids or radar facilities. These federal employees, and others

in many fields of endeavor permeating the government, like the air traffic controller or law enforcement official, are exposed to a unique liability situation not found in the private sector by the fact of their employment in the government, and therefore deserve the protection offered by these two bills.

Two other comments I would make concerning S. 2558 and H.R. 10439 relate to sections 3 and 9. Section 3, apparently limiting "general damages" to $5,000, would meet with immediate opposition from plaintiffs' bar if the intent of the drafter was to place a limit on recoveries. However, it is my feeling that section 3 is in need of redrafting to clarify its intent and, at the very least, define the term "general damages" to avoid ambiguity. Lastly, section 9 of the bills, the amendment to the Public Health Service Act, allowing the Secretaries of Health, Education and Welfare, and Defense, and the Administrator of Veterans Affairs, to execute hold-harmless agreements or provide liability insurance for its officers, might well be extended to other agencies of the federal government, since, again drawing on the Department of Transportation, many of its employees are assigned to duty in foreign countries as advisors and technicians, and logically would need the same protection as the Federal employees engaged in medical work covered by this section. I do not venture an opinion on whether or not the Public Health Service Act is the appropriate vehicle for such authority.

Couched in this background, I feel that a responsible position taken by the Federal Bar Association supporting at least the provisions of S. 2558 and H.R. 10439, immunizing federal employees, would inure to the benefit, not only of federal employees, and hence to the federal government, but to both the plaintiffs' and defendants' bars. Under S. 2558 and H.R. 10439, litigation involving federal employees acting within the scope of their employment will be limited to suits against the United States, a defendent having sufficient assets to reimburse any and all plaintiffs' just and reasonable claims, and at the same time remove the very real fear that I know exists in the minds of many of those employees that their employment with the federal government exposes them to an intolerable liability by the unique nature of their employment.

Sincerely,

JONATHAN B. HILL.

KANNER, STEIN & BAROL,
Philadelphia, Pa., December 11, 1973.

THE FEDERAL BAR ASSOCIATION,
Washington, D.C.
(Attention J. Clay Smith, Jr., Esq.).

DEAR MR. SMITH: You asked me to comment on the proposed amendment to the Tort Claim Act.

The amendment to section 3 requires special attention. Under the proposed amendment, a person who has a leg amputated because of the negligent operation of a mail truck, could only recover his actual damages which would be the hospitalization, the surgeon's fee and loss of any wage. He could not recover for the permanent inconvenience due to the amputation for the rest of his life.

I do not know who Mr. Hruska is, but if he did not mean to restrict this as it reads, he should further amend Section 3 by adding: "Said actual damages shall include, but not be limited to pain and suffering, inconvenience and impairment of the right to enjoy life." This merits serious consideration on our part.

Trusting this information may be helpful, I remain

Very truly yours,

DAVID KANNER.

DEUTSCH, KERRIGAN & STILES,
New Orleans, January 22, 1974.

J. CLAY SMITH, JR., Esq.,
Chairman, Tort Claims Committee,
The Federal Bar Association,
Washington, D.C.

DEAR MR. SMITH: Somewhat belatedly, because of a period of hospitalization, I am responding to your letter of November 21st concerning proposed amendments to the Federal Tort Claims Act.

Although we do practically no claimants' work and are strictly on the defense side of tort litigation, I must say that I am somewhat uneasy about the proposed

changes. As Lester Jayson knows I spent about four years of my life doing nothing but study the ins and outs of every word of the Act as it existed during the period 1948 through 1952. Fortunately or unfortunately I was caught up in the throes of the Texas City disaster litigation, which explosion landed me in New Orleans for the rest of my life.

In the first place, it seems to me that the addition of the language to Section 1346(b), the jurisdictional part of the Tort Claim Act, brings in almost an inconsistency. Apparently, if a government vehicle driver disobeys an Army regulation as to the speed at which the government driver should operate, the liability of the United States would be determined under some vague concept of "federal law". The whole thrust of the original Tort Claims Act was to have the United States treated like any other litigant with respect to ordinary torts.

For that reason, I am somewhat concerned about the confusion that is going to arise when the courts start to interpret the proposed language for 1346(b).

In addition, when you get to Chapter 171 of Title 28, although it is called "Tort Claims Procedure", those who were working in the fields like myself usually consider this the liability section of the Tort Claims Act that's distinguished from the venue-jurisdiction sections. For that reason, the incorporation of Section 1346(b) within Section 2674 seems incongruous if only from the viewpoint of purity of style and concept. In addition, again there is I think a complete incongruity between liability as a private person and the attempt to make such liability different if there are torts arising under statutes or the Constitution of the United States. The latter might be true of all tort claims involving the United States.

Moreover, the term "actual damages" and the term "general damages", are not inconsistent. Actual damages are general damages in Louisiana because pain, suffering and that sort of thing are general damages. The term "actual damages" seems more like the term "special damages", which we use to refer to specific things like loss of earnings, medical expenses and so forth.

As I said at the outset, I have no interest in this matter from the viewpoint of an attorney for plaintiffs. But, it just seems to me that the changes would create more problems than they would cure.

If I can make the next annual convention of the FBA I'll look forward to seeing you.

With kindest regards, I am,

Sincerely yours,

RALPH L. KASKELL, Jr.

MARKOWITZ, KAGEN & GRIFFITH,
York, Pa., December 20, 1973.

Re request for comments on proposed amendments to Tort Claims Act

J. CLAY SMITH, JR., Esquire,
Chairman, Tort Claims Committee, Federal Bar Association, Washington, D.C.

DEAR MR. SMITH: I have received your letter of November 21, 1973, together with enclosures, and I wish to submit the following comments to you relative to the proposed amendments. On the whole, I feel that the proposed amendments are unwise and generally do not afford relief in the appropriate direction. I believe that the bill represents a step backward, rather than any progress being made in the enlargement of rights of citizens to seek redress from their government.

Amendments to Section 1346(b) of Title 28 and Section 2672 of Title 28 negate the decisional law in those circuits that hold that, under certain circumstances, Federal officers and empoyees may be sued under the Civil Rights Act (42 U.S.C. 1981 et seq.) because these claims sound in tort. I realize that most circuits do not permit suit against Federal officials or employees under the Civil Rights Act, but, nevertheless, there are at least two circuits that do permit such law suits, and this language would effectively bar relief by those citizens in the circuits where suit is permitted. The Civil Rights Act does, in fact, sound in tort. For example, a suit would lay for malicious prosecution, as well as for violation of the Civil Rights Act in certain, appropriate circumstances. The language, in my opinion, would unnecessarily broaden the scope of administrative review and intrude the administrative process into those areas where it has heretofore not been permitted. I do not believe that the language adds anything, but on the contrary, detracts from exising law and will only insert confusion in an area where it is not proper.

Section 3 of the amendatory Act represents a distinct step backwards. It limits relief for pain and suffering, loss of limb, disfigurement, death, etc., but provides no increase in the benefits which are presently available under the Act. The attempt to limit these particular items of damage does not, in my judgment, improve the relief that a person is entitled. It fails to recognize the fact that a person who loses a leg or an arm or undergoes severe disfigurement because of the negligence of an employee of the United States is just as much entitled to compensation as the person who is injured by a private citizen. It would, in my judgment, create two distinct classes of citizens, as well as taking away rights that have heretofore been enjoyed by a person under the Federal Tort Claims Act.

Insofar as Sections 4 and 5 are concerned, I would have no objection to either of them, provided that other changes and comments contained in my letter would be observed.

Insofar as the amendment of Section 2680(h) By-Section 7 of the Amendatory Act is concerned, I believe that the entire Section should be eliminated and that these matters should be brought within the pervue of the Federal Tort Claims Act. All of the action that is taken are generally intentional acts, and as such, would subject the private citizen to liability were he to engage in them. Again, in an effort to make the government more responsive to the citizen, I believe that a citizen should have redress against his government for those intentional acts that are performed while a person is within the scope and course of his employment. The amendment contemplated by Section 7 is certainly a step in the right direction, but in my judgment, does not go far enough.

If the administration is committed to the amendment of the Federal Tort Claims Act and desires to improve it, I would offer two additional suggestions.

First, I would delete Section 2675(b) in its entirety. I do not believe that a person should be bound by offers of settlement that he makes or statements of claim initially made in an effort to compromise their claims. Many times, laymen do not engage counsel, but, instead, attempt to settle the claim themselves. They have no appreciation of the real value of their claim and if they were unfortunate enough to understate it, they would be bound by this understatement, even though a court would conclude that the claim has additional value. I believe that the real purpose of the section was to encourage the compromise of claims against the government, without resort to the courts, and as such, that section is really detrimental to the object which is sought to be obtained.

Second, I would amend Section 2678 to provide for a flat 25% fee, irregardless of the provision under which the action is brought. When the Federal Tort Claims Act was originally enacted, the economic circumstances in the country were completely different than they are today. The cost of living, as well as the cost of operating an office has increased for the legal profession. Congress should take cognizance of this fact and provide adequate compensation for the lawyer who is successful in obtaining redress for his client. Generally, a 25% contingent fee is way below the fee normally charged in the ordinary tort action. For example, the standard in York County, which is a relatively small and rural county, is a minimum of 35% if settled before trial, 40% if a verdict is recovered and 50% if an appeal is taken. Thus, a flat 25% fee is certainly not out of line in accordance with the standards existing in the profession today. The only justification for keeping the contingent fee at an unreasonably low level is to discourage a claimant from seeking counsel, or more importantly, to discourage counsel from representing a claimant against the United States. There has to be a recognition by Congress of the fact that the laws of economics do not stop or stand still for the legal profession.

Very truly yours,

LEWIS H. MARKOWITZ.

McDONALD & McDONALD,
Miami, Fla., February 28, 1974.

Re S. 2558 and H.R. 10439 Immunity

FEDERAL BAR ASSOCIATION,
Washington, D.C.

GENTLEMEN: I have just reviewed Mr. Jonathan Hill's comments in regard to S. 2558 and H.R. 10439 to Amend the Federal Tort Claims Act to immunize Federal employees from personal suits arising as a result of their employment.

My comments, as Mr. Hill's, are directed toward the air traffic control group. Mr. Hill's argument for the Amendment appears to be based on the uncontested fact that an individual controller's mistake can result in hundreds of deaths of passengers aboard an airliner. Therefore, Mr. Hill argues they should be immunized because the Government has a deeper pocket.

Mr. Hill's comments fail to note that if an air traffic controller is responsible for the deaths of hundreds of persons, he should not be able to thumb his nose at the widow and children of the decedent, but should be held to account for his act. If this results in Congress passing a bill to pay for the controller's mistake or expedites settlement from the Government, this is all to the good.

I, for one, as a pilot take comfort in the fact that the controllers are aware of their personal, legal liabilities when acting within the scope of their employment. The Amendment should not be adopted.

Sincerely,

EUGENE H. STEELE.

[From the Legal Eagle News, January 1974 (a publication of the Lawyer-Pilots Bar Association)]

ACT IMMUNIZES FEDERAL EMPLOYEES

FEDERAL BAR ASSOCIATION,
Washington, D.C.

GENTLEMEN: This is in response to your letter of November 21, 1973, requesting comments on S. 2558 and H.R. 10439. I have reviewed the bills and the accompanying comments contained in the excerpts from the "Congressional Record" and have the following comments on the proposed legislation.

The need for amendment to the Federal Tort Claims Act, to immunize federal employees from personal suits arising as a result of actions taken within the scope of their employment, has been sadly neglected. While Senator Hruska, in his comments, speaks of law enforcement agents as the prime beneficiaries of this legislation, I would like to point out that there is a large group of federal employees whose exposure to tort liability is far greater than law enforcement agents, and the possibility of personal litigation has, in at least one instance in my personal experience, resulted in a near collapse of the individual's personal, financial and psychological life. This group of federal employees, air traffic controllers, employed by the Department of Transportation, Federal Aviation Administration, is engaged in the profession of shepherding aircraft with as many as 350 passengers across our skies. A mistake on the part of any one of the more than 20,000 controllers employed by the federal government can result in the death of all or many of these passengers. The exposure speaks for itself.

In 1969, an airliner crashed in the Midwest, killing over 80 passengers and crew. Suit was instituted against the United States and litigation proceeded on its normal course. When settlement prospects seemed to dwindle, and due to the failure of certain of plantiffs' attorneys to file timely suits in accordance with the Federal Tort Claims Act, several suits were filed in both the state and federal courts against the individual air traffic controller, exposing him to millions of dollars of personal liability. Obviously, few federal employees, or, for that matter, any individual with normal means, could withstand even a partial recovery on any of the approximately 20 suits that were started against him. While no judgment was entered against the controller, there can be no doubt that this added pressure contributed significantly to the ultimate settlement of the passengers' suits by the United States. While I have specific knowledge of this one instance, I am aware that this tactic is becoming more prevalent in this type of litigation. For example, the controllers involved in the crash of the L-1011 in Florida last year and in the Juneau, Alaska, crash of 1971 were personally sued. In both cases, the personal suits were dismissed on jurisdictional grounds prior to trial.

While I am unaware of any recovery entered against an air traffic controller, if such a judgment were issued, the United States would be powerless to pay such a judgment without a private relief bill. Likewise, the United States is unable to assume a law suit against one of its employees without specific statutory authority. This, of course, is contrary to the tort law of the private sector, where employees may bargain collectively for or the employer may voluntarily assume a law suit against one of its employees. Such an option is not available to federal employees.

I have limited my comments to air traffic controllers, but I should think, for

example, that equal exposure would be faced by government pilots, military or civilian, and technical experts whose responsibilities, for instance, might deal with navigational aids or radar facilities. These federal employees, and others in many fields of endeavor permeating the government, like the air traffic controller or law enforcement official, are exposed to a unique liability situation not found in the private sector by the fact of their employment in the government, and therefore deserve the protection offered by these two bills.

Two other comments I would make concerning S. 2558 and H.R. 10439 relate to sections 3 and 9. Section 3, apparently limiting "general damages" to $5,000, would meet with immediate opposition from plaintiffs' bar if the intent of the drafter was to place a limit on recoveries. However, it is my feeling that section 3 is in need of redrafting to clarify its intent and, at the very least, define the term "general damages" to avoid ambiguity. Lastly, section 9 of the bills, the amendment to the Public Health Service Act, allowing the Secretaries of Health, Education and Welfare, and Defense, and the Administrator of Veterans Affairs, to execute hold-harmless agreements or provide liability insurance for its officers, might well be extended to other agencies of the federal government, since, again drawing on the Department of Transportation, many of its employees are assigned to duty in foreign countries as advisors and technicians, and logically would need the same protection as the federal employees engaged in medical work covered by this section. I do not venture an opinion on whether or not the Public Health Service Act is the appropriate vehicle for such authority.

Couched in this background, I feel that a responsible position taken by the Federal Bar Association supporting at least the provisions of S. 2558 and H.R. 10439, immunizing federal employees, and hence to the federal government, but to both the plaintiffs' and defendants' bars. Under S. 2558 and H.R. 10439, litigation involving federal employees acting within the scope of their employment will be limited to suits against the United States, a defendant having sufficient assets to reimburse any and all plaintiffs' just and reasonable claims, and at the same time remove the very real fear that I know exists in the minds of many of those employees that their employment with the federal government exposes them to an intolerable liability by the unique nature of their employment.

Sincerely,

JONATHAN B. HILL.

CHAPTER 1. GENERAL

SECTION 1. APPLICATION

1. Purpose

The instructions in this handbook provide FAA personnel with administrative and operational guidance for the efficient operation of facilities and the provision of satisfactory service to the aviation public.

2. Scope

The services of the Air Traffic Service are provided to the aeronautical public through facilities located within the United States, its possessions and territories, and through certain facilities which have been established in foreign countries by international agreement.

3. Inter-regional ATC operational requirements

Facilities located within the center's area of an adjacent region shall comply with the adjacent region's procedural directives governing inter-facility operational requirements. Although these facilities are not under its administrative jurisdiction, the region responsible for the administration of the center shall provide these directives to the appropriate facilities in the other region's area of jurisdiction. These facilities shall coordinate directly on mutual procedural or operational requirements.

4. Incompatible regional directives

When resolution of procedural or operational problems is not possible or when the adjacent region's directives are incompatible with those published by the administratively responsible region, the facility shall notify its own region for resolution.

5. National airspace system (NAS) changes

When programs are initiated which will result in inauguration, commissioning, alteration, or decommissioning of NAS components (navaids, facilities, services,

etc.). AT personnel shall ensure, to the extent practicable, that effective dates of such actions coincide with the U.S. 28-day cycle of effective dates for charting.

6. Legal liabilities of personnel

The provisions of the Federal Tort Claims Act, Public Law 601, 79th Congress, permit the filing of suit against the Government for damages to or loss of property, and for 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 such circumstances where the United States, if a private person, would be liable to the claimant for such damage, loss, injury or death in accordance with the law of the place where the act or omission occurred. While the Act permits such suits to be filed against the Government, every FAA employee is individually liable for any negligent act or omission he may commit while acting within the scope of his employment: that is, while carrying out his duties. As a practical matter, this possible liability does not constitute a substantial threat to the employee's resources. There are several reasons for this.

The Federal Government as employer is responsible for the acts of its employees, and injured persons seeking to recover large sums of money for damages will be be represented by attorneys who are aware of the penurious condition of Government employees, as compared to the Government itself. Accordingly, they will either sue the Government only or, at least, join the Government as a defendant with the employee. In either case, whether the employee is named as defendant or not, the Federal Government will pay the entire amount of any judgment against it, and the employee is not required to pay anything: the entire costs of the judgment and the defense of the suit will be borne by the Government.

Even if initially the employee were sued, and the Government not joined in any way, this would generally not lead to the employee's having to pay personally any resultant judgment. In any case where an employee is so named as defendant, he should immediately contact the Regional Attorney. The Regional Attorney will contact the United States Attorney, and the defense of the suit will generally be conducted by the Department of Justice at no cost to the employee.

Even if a money judgment were obtained against an employee, individually, the FAA would, in a proper case, institute action seeking passage by the Congress of a private bill for the relief of the employee. Such a bill would have an excellent prospect of passage.

FAA employees are thus afforded protection from personal liability. It is emphasized that this protection extends only to acts committed within the scope of their employment. It would not extend, for example, to acts performed by an employee while driving a Government vehicle for private purposes. However, it would generally include the issuance by controllers of air traffic clearances which did not meet prescribed separation minima.

Mr. SHATTUCK. At this point, Mr. Chairman, we have two statements that have been presented for filing as a part of the record. One is by Representative Sikes, and the other by Representative Chappell.

Mr. DONOHUE. Without objection, they will be made a part of the record at this point.

[The prepared statements of Hon. Robert L. F. Sikes and Hon. Bill Chappell, Jr., follow:]

STATEMENT BY HON. ROBERT L. F. SIKES, A REPRESENTATIVE FROM THE STATE OF FLORIDA

It is an honor for me to appear before this Committee to support at least one aspect of the bill pending before you.

I speak to the problem of granting immunity from law suits to military medical personnel during the performance of their duties at civilian hospitals or facilities.

As you know, the difficulty in recruiting and retaining doctors for the military services is a serious one. There are many reasons for this and I do not suggest the matter of liability to law suits is a prime factor in the failure to keep doctors in the uniformed services.

But it is a factor and, as we move even closer to a critical shortage of doctors, I believe it incumbent upon this Congress to do all it can to provide every reasonable tool to meet and overcome this shortage.

Some law suits arise from charges of malpractice while military personnel are acting in the performance of their duties. My bill would bring military medical people on a par with similar personnel who serve with the Public Health Service or the Veterans Administration. Military medical teams treat many patients who are in the civilian sector. This includes dependents and retirees. Some military doctors have been given an opportunity also to practice in civilian communities where there is a serious shortage of civilian doctors.

Military medical personnel also are encouraged to continue their training during their time in uniform. To accomplish this, the services assign a doctor with a particular expertise to a civilian hospital and he performs his duties while there in the process of gaining additional training. During this training period, the military doctor works in concert with the civilian doctor and is engaged in the treatment of civilians during this period.

At these times, the military doctor is exposed to law suits for malpractice and he has no protection against them. He is not making enough money to be able to afford malpractice insurance, as do civilian doctors. He is not protected as are the doctors working for the Public Health Service or the Veterans Administration to the extent that the Attorney General will defend them and the federal government pay any damages resulting from an adverse decision.

I believe this to be unfair and I have introduced a bill, H.R. 13368, which would place military medical personnel on the same basis as doctors with the Public Health Service and the Veterans Administration.

I am told by high officials in the military medical field that this lack of protection has caused some military doctors to decline the opportunity to further their training, thus denying the military the services of highly trained experts in particular fields.

The bill you have before you would go far beyond the bill I have introduced and I do not speak today to the merit of bringing most or all federal employees under such a blanket of protection.

I do, however, urgently suggest you give every consideration to the problem I have discussed here today as regards military medical people. They are doing a fine job, often under difficult circumstances. In times of emergency, their services are desperately needed. In times of peace, we seek to train them in skills which are in short supply.

If we are to continue to provide our men and women in uniform the world's finest medical care, we must provide the military doctors the protection accorded others in similar circumstances.

Mr. Chairman, I thank you for this opportunity to speak before this committee on this important matter.

STATEMENT BY HON. BILL CHAPPELL, A REPRESENTATIVE FROM THE STATE OF FLORIDA

Mr. Chairman, I am pleased to be able to express my support today for legislation granting federal employees immunity from civil liability for torts committed while acting within the scope of their employment.

There have been, in recent years, various attempts to provide immunity to select groups within the federal service. This legislation would provide equality of treatment by extending immunity from personal liability in tort, and from claims sounding in tort for relief arising under the Constitution or federal statutes of the U.S. to all federal employees acting within the scope of their office or employment. Current law extends this right only to medical personnel of the Veterans' Administration, personnel of the Public Health Service and to government drivers. I feel that it is unjustifiable to extend this immunity only on a piecemeal basis.

One particular case in point which demonstrates the need for this type of legislation concerns the situation of medical and dental personnel of the Armed Services. Many medical personnel in the Armed Services today are required as part of their official duties to practice medicine at various civilian institutions. Because of the lack of immunity for these physicians, the possibility exists that they could be individually sued and become liable for a judgment. The individual physician is forced to weigh the cost of malpractice insurance premiums against the likelihood that he will be sued and the potential size of any judgment against him. With today's all-volunteer force, this situation has serious implications

with regard to recruitment of qualified medical personnel. These doctors want protection while they are not practicing on the military installations and in many cases might refuse civilian advance training because of the lack of protection. While no military medical personnel have yet been convicted in a malpractice suit, the possibility remains. This was clearly shown in a recent case in Alameda County, California, in which two Navy doctors were named in a malpractice suit. Although the Department of Justice did represent these doctors in the suit, individual responsibility for the payment of claims against them would have remained with the doctors if a judgment had been obtained.

The recruitment of qualified medical professionals in the Armed Services is critical as is evidenced by legislation to readjust the pay structure for medical officers and other health professionals, scheduled for Congressional action soon. It has proven to be difficult enough to retain these medical officers because of the tremendous differences between the military pay scales and the earnings of civilian physicians without expecting these physicians to either practice with no protection from claims in malpractice suits or to pay the enormous costs of malpractice insurance.

Mr. Chairman, I feel this legislation would go a long way toward providing retention and recruitment incentives for military medical personnel and in providing equality of treatment for all federal employees. To approach this problem on a piecemeal basis would necessitate the enactment of similar legislation in the near future to remedy corresponding situations in other areas of federal employment. For these reasons, I urge your favorable consideration of this bill to provide for exclusive remedy against the United States in suits based upon acts or omissions of all United States employees.

Mr. DONOHUE. If there are no further questions, the committee will stand adjourned until April 3 when we will continue with Mr. Smith's testimony.

[Whereupon, at 12:15 p.m., the subcommittee was adjourned.]

FEDERAL TORT CLAIMS AMENDMENTS

WEDNESDAY, APRIL 3, 1974

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON CLAIMS AND
GOVERNMENTAL RELATIONS OF THE
COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The subcommittee met at 10:30 a.m., pursuant to notice, in room 2226, Rayburn House Office Building, Hon. Harold D. Donohue [chairman of the subcommittee] presiding.

Present: Representatives Donohue, Danielson, Jordan, Butler, Froehlich, and Moorhead.

Also present: William P. Shattuck, counsel; and Alan F. Coffey, Jr., associate counsel.

Mr. DONOHUE. This hearing will now come to order. The hearing this morning is a continuation of a hearing that was started last week on H.R. 10439 to amend title 28 of the United States Code to provide for an exclusive remedy against the United States in suits all based upon acts or omissions of the U.S. employees, and for other purposes.

When the hearing was adjourned last week, J. Clay Smith was before us presenting the views of his Tort Law Committee. So we will now ask Mr. Smith to come forward and continue with his testimony.

[See Mr. Smith's prepared statement at p. 38.]

TESTIMONY OF J. CLAY SMITH, JR., TORT LAW COMMITTEE—Resumed

Mr. SMITH. As previously stated, section H.R. 10439——

Mr. DONOHUE. You are now reading from page 11?

Mr. SMITH. Yes, sir. I am.

Mr. DONOHUE. You may proceed.

Mr. SMITH. As previously stated, the section of H.R. 10439 which generated the most comment was the language in section 3 of the bill which reads:

> Provided, that for claims arising under the Constitution or statutes of the United States, recovery shall be restricted to actual damages and, where appropriate, reasonable compensation for general damages not to exceed $5,000.

The overwhelming majority of Tort Law Committee members, who called, or wrote to me regarding the bill interpreted or believed that as drafted section 3 restricted the payment of constitutional tort claims to $5,000. To that extent, the members were of the opinion that there exists no factual or rational basis to permit a hypothetical "Mr. A" to

recover, for example, $15,000 for a fractured skull as a result of the tortious conduct of one employee; and on the other hand, limit the recovery of "Mr. B" to $5,000 for the same injury when a claim sounding in tort may arise under the Constitution or statutes of the United States. In both cases, Messrs. A and B are both seriously injured by the tortious conduct of a Government employee; however, section 3 of the bill places a ceiling on the amount that an agency, the Attorney General, or a Federal court may award for claims arising under the Constitution or statutes of the United States.

Apart from the $5,000 limitation placed on constitutional or statutory tort claims, to what factual category of claims is this section 3 of the bill directed? Assume that "Mr. B's" home is broken into by Federal law enforcement officers on an erroneous tip by an informer; "Mr. B" objects to the intrusion, is assaulted, and sustains injuries. Assume further that "Mr. B" retains a lawyer who reads section 3 of H.R. 10439 and decides that his client's injuries are severe and exceed $5,000. Assume further that "Mr. B's" lawyer files the claim without alleging that "Mr. B's" claim arises under the Constitution or statutes of the United States. Can the lawyer argue that his client's claim is one solely for damages resulting from an assault or battery, and thereby avoid the $5,000 statutory ceiling? Probably not. In such case the Government will undoubtedly argue that the factual predicate sounds in tort for money damages arising under the Constitution or statutes of the United States, thereby bringing the tort claim within the $5,000 limitation. See *United States* v. *Neustadt*, 336 U.S. 696 (1961).

The authority of the Congress to establish the jurisdiction of Federal court is unquestionable.

Mr. SHATTUCK. What is your authority or basis for the distinction you have just made?

Mr. SMITH. Between the assault and battery?

Mr. SHATTUCK. Between the assault and battery and the constitutional situation.

Mr. SMITH. The *United States* v. *Neustadt*, 366 U.S. 969 (1961). In that case, this was a case where the attorney—well, where it involved a VA hospital and it involved a claim of negligence on the part of the Government but actually, the factual predicate of the claim is that the Government had misrepresented a certain item to the plaintiff. This is in a VA purchasing of a house or something of this nature. The plaintiff tried to argue that this was negligent. On the other hand, the Government defended that this arose under one of the exceptions, under one of the torts that the Government could not be sued for, that is, misrepresentation. And the court looked at the facts and said, now, the attorney here probably has a good theory that it was negligence but the factual predicate was misrepresentation and therefore, you cannot plead negligence to avoid one of the exclusionary torts.

And I think that in this case, though the factual predicate of the hypothetical was that "Mr. B" was assaulted and battered when law enforcement officers broke into his home, the lawyer knowing that if he comes in and says this is a constitutional violation, that the $5,000 limitation is going to apply to the question, is going to wonder can I just plead or can I just file a claim for assault and battery without alleging the constitutional tort? And I can not. And I think that the Government and the administrator of the Tort Claims Statute would

say the claim sounds in tort but it arises under the Constitution because there has been a violation of the fourth amendment. And therefore, it will take the case out of the situation where a person may receive unlimited damages.

And I think then the provision, the section 3 would be applicable.

And as I understand the testimony from last week, the testimony is that the pain and suffering element of this statute would all be under the general damages, which means that "Mr. A" can be driving down the street and be struck by a postal truck and he can have medical damages of let us say, $3,000. Now, generally, when a lawyer receives medical bills from a hospital for $3,000, he tries to measure the damages for the fractured skull, you know, what is the value when a person's skull is fractured and you have medical damages for $3,000? Well, traditionally, there are ways to measure that. In some places, you measure the severity of the injury. In some States there are rules that maybe it is three times the special damages which, of course, would mean that the damages would go to $9,000. Now, let us take that same hypothetical and apply it to a constitutional tort. The policeman or the law enforcement officers break in and fracture someone's skull. And let us assume for purposes of argument that this is a constitutional type tort under *Bivens* or *Bell* type situation. Now, let us look at section 3.

Section 3 has two parts to it. It talks about the "recovery shall be restricted to the actual damages and where appropriate reasonable compensation for general damages."

Now, I am told that pain and suffering, because it is speculative and not subject to mathematical calculation, would fall under the general damages and that you could not receive more than $5,000 for pain and suffering. But if you had $3,000 worth of medical bills, you could receive unlimited recovery. Well, it means that someone who receives a fractured skull for a constitutional tort will recover let us say for the same injury more than a person who was struck by a postal truck might receive and yet they might have the same amount of damages simply because pain and suffering is limited to $5,000 under my interpretation and last week because of the statement of Mr. Jaffee simply because it is a constitutional tort.

Getting back to question, Mr. Shattuck, it means that more than likely the Government now would attempt I would think—and I have administered several hundred of these type claims—would try to bring most of the claims where a law enforcement officer is involved under the constitutional type claims and thereby limiting the recovery to $5,000 in connection with pain and suffering.

Mr. DONOHUE. Have you studied the history behind 1346(b)?

Mr. SMITH. 1346(b)?

Mr. DONOHUE. That is the section, is it not?

Mr. SMITH. Yes, sir. This language is annexed to 1346(b) as a jurisdictional provision in order to file suit. And then it is now amending another section which is—and which is the section that I am concerned with—title 28, section 2674.

Mr. SHATTUCK. I believe in the testimony, if I might just interrupt at this point——

Mr. SMITH. Yes, sir.

Mr. SHATTUCK [continuing]. The witness on behalf of the Department of Justice last week commented on the figure of $5,000.

Mr. SMITH. He did, sir.

Mr. SHATTUCK. And indicated that the reference made by the Department was to a provision in title 28 which limits the recovery and——

Mr. SMITH. In cases where a prisoner has been unjustly imprisoned.

Mr. SHATTUCK. Yes, unjust conviction, and there is jurisdiction provided in section 1495, title 28 for that type of case in the Court of Claims and there is a $5,000 limitation in the procedural section, section 2513 of that title.

Mr. SMITH. But what I am still concerned about is are we just pulling a figure out of another statute without any rational connection? That figure was never rationalized as to why it should be applicable here. As a matter of fact, I think Mr. Jaffee indicated, well, if you have any problems with the $5,000, it can be increased. I think that is in his testimony.

So if that is where the $5,000 came from, the question that I ask is, is that a rational basis to include it in the tort claims statute? I do not think we got an answer and I must say that I do not think that it is rational and that there is a rational connection between the other statute and the tort claims statute. Because the history of the tort claims statute says and the cases suggest that when a person is injured, when the Government waive its immunity, that the Government is to be treated as a private person. If that is the case, then it seems to me that it would be quite unfair to a person who has been injured because of a constitutional type injury to receive less than a person who was struck by a postal truck. And as a matter of fact, the court in *Bivens* makes this statement. The court states:

> An agent acting albeit unconstitutionally in the name of the United States poses a far greater capacity for harm than an individual trespasser exercising no authority other than his own.

In other words, the court is saying that in the constitutional type torts that a person may be injured more severely in many instances than a common law type tort.

The other point that I should take up at this point, since I think that the question has gotten to the heart of the testimony here and the position of the Tort Law Committee is on page 16, and the rest of the testimony for that matter, in the footnote, it states:

> Several members of the Committee are of the opinion that the bill should specifically explain the difference, if any, between the words "actual damages" and "general damages."

What is meant by actual and general damages in other words? In the case that I referred to in the footnote, the court states:

> "Actual damages" are synonymous with "compensatory damages" and with "general damages." Damages for mental suffering are actual or compensatory and are given to indemnify the plaintiff for the injury suffered.

Now, let us take that particular statement "mental suffering or actual or compensatory." Now here we have a statute which from the testimony last week the witness testified that pain and suffering, which would include mental suffering, or general damages because they could

not be mathematically calculated and yet, the case law seems to suggest that mental damages, that damages for mental suffering are not solely general damages but actual damages. So it seems that if the language of section 3 is going to be clear when lawyers in the private sector or when Government lawyers or when judges have to construe this language that it is incumbent upon the Congress to make sure that the language being used is consistent with the case law as it exists.

And to this degree, we would urge that as drafted section 3 is ambiguous and that it ought to be clarified.

As I understand the testimony last week and as I understood the statute when I read it and as the members of the Tort Law Committee understand it, they understand section 3 to limit pain and suffering to $5,000 and they do not see a rational basis for it.

Mr. DONOHUE. I see. Would you proceed with your statement? You're on page 12.

Mr. SMITH. As a starting point, the U.S. Supreme Court's statement in *Bell* v. *Hood*, 327 U.S. 678 (1945) may provide some guidance in your pursuit to answer the question just posed. As you recall, in *Bell* v. *Hood*, *supra*, petitioners brought a suit in a Federal district court to recover damages in excess of $3,000 from the respondents who were agents of the Federal Bureau of Investigation. The petitioners alleged that they had suffered damages due to the conduct of the agents imprisoning them in violation of their constitutional rights.

Now, skipping a little bit, the court held in this case that it is settled that where legal rights have been invaded and a Federal statute provides a general right to sue for such invasion, Federal courts may use any available remedy to make good the wrong done.

That is in the quote in the middle of the page there.

Thus, the court in *Bell* v. *Hood supra*, spoke to the permissibility of the adjudication of claims for money damages and the power of the Federal courts to adjust the remedy so as to grant the necessary relief "to make good the wrong done." This language should be the standard by which the measure of damages for personal injuries are determined for claims "sounding in tort for money damages arising under the Constitution or statutes of the United States" under sections 2–3 of H.R. 10439.

Now, also, Mr. Chairman, in the *Bivens* case, in skipping a little to the quote at the bottom of the page on page 14, the court stated in *Bivens:*

> In *Bell* v. *Hood*, we reserved the question whether violation of the fourth amendment by a Federal agent acting under color of his authority gives rise to a cause of action for damages consequent upon his unconstitutional conduct. Today we hold that it does.

Mr. BUTLER. Is it fair to say your statement is directed to your informal remarks you just gave?

Mr. SMITH. I think so. I think that the thrust of the point that I made was picked up when I responded to Mr. Shattuck's question and would only add one additional item and that is if the committee has any questions in connection with our interpretation, I would be happy to answer the questions and I think that would facilitate the testimony. I think that I have pretty much indicated our position on section 3 of the bill.

Mr. BUTLER. Mr. Chairman, may I ask a question?

Mr. DONOHUE. You may proceed.

Mr. BUTLER. With reference to the difference between actual damages and general damages, you made some reference during the course of your statement to that basic problem.

Mr. SMITH. Yes, sir.

Mr. BUTLER. Is it your feeling that this distinction is susceptible to statutory language that would delineate the gray areas or establish a line of distinction between the two?

Mr. SMITH. Might I answer your question this way. If it is the intent of section 3 to limit pain and suffering to $5,000 because it is deemed to be general damages, then my answer would be yes, that there is no rational basis to limit pain and suffering to $5,000.

Does that answer your question?

Mr. BUTLER. No, sir. I just want to know whether we can spell out what we mean by "actual damages" and what we mean by "general damages" in the statute.

Mr. SMITH. I do not think so, sir.

Mr. BUTLER. That was the impression I got from your testimony but I wanted to be sure that was clear.

Mr. SMITH. Yes.

Mr. BUTLER. Thank you.

Mr. MOORHEAD. Mr. Chairman?

Mr. DONOHUE. Oh, I beg your pardon. Mr. Moorhead?

Mr. MOORHEAD. You mentioned that if the Federal Government was going to open themselves up for suit or claims in these areas that you felt that they should go all of the way and permit the specific damages that a jury or board might find including pain and suffering, but do not you think it is proper or that the Government can also feel that they want to compensate people for their out-of-pocket cost or for the damages that they have suffered beyond pain and suffering and that they want to limit their overall liability?

Mr. SMITH. Of course, the Congress can always limit the jurisdiction of the courts and of course I would have to answer your question by saying that if there is a rational basis for a Congress to limit its jurisdiction, then of course it can. My question is in this instance, is there in this instance a rational basis to limit the jurisdictional amount when a claim sounds in tort and arises under the Constitution? And under the tort claims statute we are not dealing with juries. There is no right to a jury trial under the statute——

Mr. MOORHEAD. I understand that.

Mr. SMITH. So therefore I would think that a judge would certainly be a guardian. We have to faith that judges will guard the reasonableness of the tort claim and will not judge or decree or order an unreasonable judgment.

Mr. MOORHEAD. But the State courts in workmen's compensation make a limitation so it is not wide open in those areas.

Mr. SMITH. Well, the Government is protected in that instance because military individuals may not bring claims under the workmen's compensation type theory so therefore, a whole host of people are excluded and may not bring claims just because of the workmen's compensation type theory.

Well, I think that answers the question. I do not see the limitation as to pain and suffering having an unreasonable basis when, as indicated before, another gentleman can be struck and be severely injured by a postal truck and received $15,000 justifiably but someone else, who may be injured, merely because it is a constitutional claim, can only recover a certain level of pain and suffering but both of the gentlemen have received the same injury and have the same extent of hospitalization and suffered the same expense so it just does not seem to be rational.

Mr. MOORHEAD. Would you think it would be more rational if we put the same limitation on both?

Mr. SMITH. I think not. Simply because if the recovery is limited to $5,000 pain and suffering, I just do not see that as a way out simply because when a person is injured, he is injured and he lies in that bed and accumulates injury and if you are just going to say that we are the Government and we are going to pay you $5,000 for your medical bills and ignore all of that pain and suffering that you have endured through the operations and so on, well it just does not seem to be reasonable, especially since the Government has waived its immunity. And, as the statute says, should be treated like a private person. If it is going to waive its immunity and be treated like a private person, then it should be treated like a private person and I do not think it should limit or seek to limit its damages to $5,000 in connection with pain and suffering. I just do not see the rationale based on that, sir.

Mr. MOORHEAD. Thank you.

Mr. DONOHUE. Counsel?

Mr. SHATTUCK. Mr. Chairman, if I may, I have a question.

Mr. Smith, I don't want to extend the testimony unduly but——

Mr. SMITH. I understand.

Mr. SHATTUCK [continuing]. But I would like to suggest there is a reference in *Bivens* that draws a distinction between the Federal constitutional tort that you have been discussing and the normal traditional tort, the common law tort and the court said:

> The interest protected by State laws regulating trespass and the invasion of privacy and those protected by the fourth amendment's guarantee against unreasonable searches and seizures may be inconsistent and even hostile.

So that in *Bivens* itself there appears to be a distinction drawn between these types of torts. Would this not have a bearing on your conclusion that a cause of action would have to sound in tort under the Constitution in the limitation of damages situation that you have just described?

Mr. SMITH. When I responded to your question before?

Mr. SHATTUCK. Well, I just wanted to suggest that there appears to be a distinction drawn in this statement by the court between these two causes of action so they may be independent.

Mr. SMITH. I don't think that the court would construe it that way. Simply because I think what would happen is that the court would look at the factual predicate arising under sounding in tort. The assault and battery sounds in tort but, if it is a fourth amendment, it arises under the Constitution. But when you have a police officer, I am sure you can always bring the tort under the Constitution. And the

hypothetical that I gave, in that instance where you have an informer who gives a trip and he breaks through the door and he accidentally or mistakenly assaults and batters——

Mr. SHATTUCK. I understand. This is the point you made before.

Mr. SMITH. The point that I am making is I do not think that under the tort claims statute—well, under common law you would maybe have the two distinct causes of action but that is the practical problem section 3 raises with an attorney who sits down and starts to draft his complaint or the claim which he files with the Federal Government. He is boxed in. I do not think that he can try to avoid that limitation by merely saying it is an assault and battery when the factual predicate—well, when looking at all of the facts, the case itself sounds in tort and it arises under the Constitution. And if I were in Government claims, I would say that it is a constitutional type tort.

Mr. SHATTUCK. Thank you very much.

Mr. DONOHUE. Any other questions of this witness? If not, you are excused.

Mr. SMITH. Thank you for inviting me back this week.

Mr. DONOHUE. We will now hear from Vernon McKenzie, Deputy Assistant Secretary, Department for Health Resources and Programs, Department of Defense.

[The prepared statement of Vernon McKenzie follows:]

STATEMENT OF VERNON MCKENZIE, DEPUTY ASSISTANT SECRETARY OF DEFENSE, HEALTH RESOURCES AND PROGRAMS

Mr. Chairman and members of the subcommittee: I am Vernon McKenzie, Deputy Assistant Secretary of Defense for Health Resources and Programs. I have been designated to represent the Department of Defense in connection with the military health personnel aspects of this legislation. I am accompanied by Vice Admiral Donald L. Custis, Surgeon General of the Navy, and Mr. Robert L. Gilliat, an attorney in the Office of the General Counsel of the Department of Defense.

I have a brief prepared statement which I would like to present to the Subcommittee.

Section 4 of the bill deals with the provisions which are of particular concern to my office and the three military medical services. Section 4 would amend section 2679(b) of title 28, United States Code, to extend the present exclusiveness of the Tort Claims Act remedy to include all government officers and employees. Under existing law, only government motor vehicle operators and medical and paramedical personnel of the Veterans' Administration and the Public Health Service are personally immune from suit and civil liability for acts performed while in the scope of their Federal employment. Section 4 of this legislation would, in effect, grant the medical and paramedical personnel of the Department of Defense the same immunity that comparable health personnel of the Veterans' Administration and Public Health Service have had for several years.

Military and civilian health personnel of the Department of Defense now face the possibility of being sued as individuals and held individually liable for incidents which occur while they are performing duties on behalf of the government. The problem concerning the individual liability of its health care personnel has long been a matter of concern to the Department of Defense. The threat of this sort of liability to our military and civilian personnel who must discharge their official duties has an adverse effect on their efficiency and morale. This threat is surely inequitable in view of the fact that our health personnel are often required to perform functions which carry built-in risks of suits for damage based on negligence, without having the voluntary choice of whether they will perform these functions. There is a large group of Department of Defense health personnel, both civilian and military, who, in their daily work, are exposed to the threat of suits for negligent actions or omissions despite the fact that they have little or no choice, either in the patients they are required to

treat, or in the medical procedures they are required to perform. While there have been no judgments in recent years against such personnel for negligent actions or omissions, the constant exposure to the threat of such action does have an adverse effect on the efficiency and morale of the personnel concerned.

The courts very properly require health personnel to adhere to accepted standards of diagnosis, treatment, care and the like. This requirement in and of itself is not burdensome. However, medicine is not an exact science. Thus, in many instances suits in tort are founded on bad medical results even when there are no negligent actions or omissions involved in the case. Moreover, in tort suits against private practitioners, juries are awarding increasingly large amounts as damages to plaintiffs. These trends are known to our military and civilian health personnel and are cause for much apprehension on their part.

Some of our military and civilian health personnel who may feel particularly anxious about the possibility of suit against them personally feel impelled to take private professional liability insurance to protect them in their work involving practices and procedures as to which they have little or no choice. The cost of such insurance, when and if it can be privately obtained, results in an unwarranted and significant reduction in pay.

The removal of this long standing problem is one of the many steps which we believe will be necessary in order for us to achieve an all-volunteer health force, thus obviating the need to revive the so-called doctor draft.

We have been provided a copy of the statement concerning this legislation which was presented before the Subcommittee last week by the Honorable Robert L. F. Sikes. We have reviewed Representative Sikes' statement and are in agreement with and fully support the views which he expresses.

For the reasons I have outlined, the Department of Defense recomemnds that the Subcommittee act favorably on the bill.

I appreciate this oportunity of appearing before the Subcommittee. My colleagues and I will be happy to answer any questions you may have regarding these matters.

TESTIMONY OF VERNON McKENZIE, DEPUTY ASSISTANT SECRETARY OF DEFENSE, HEALTH RESOURCES AND PROGRAMS DEPARTMENT OF DEFENSE; ACCOMPANIED BY VICE ADM. DONALD L. CUSTIS, AND ROBERT L. GILLIAT

Mr. McKenzie. Mr. Chairman and members of the subcommittee, I have been designated to represent the Department of Defense in connection with the military health personnel aspects of this legislation. I am accompanied by Vice Admiral Donald L. Custis, Surgeon General of the Navy, and Mr. Robert L. Gilliat, an attorney in the Office of the General Counsel of the Department of Defense.

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Military and civilian health personnel of the Department of Defense now face the possibility of being sued as individuals and held individually liable for incidents which occur while they are performing duties on behalf of the government. The problem concerning the individual liability of its health care personnel has long been a matter of concern to the Department of Defense. The threat of this sort of liability to our military and civilian personnel who must discharge their official duties has an adverse effect on their efficiency and morale. This threat is surely inequitable in view of the fact that our health personnel are often required to perform functions which carry built-in risks of suits for damage based on negligence without having the voluntary choice of whether they will perform these functions which carry built-in risks of suits for damage based on negligence, without having the voluntary choice of whether they will perform these functions. There is a large group of Department of Defense personnel, both civilian and military, who, in their daily work, are exposed to the threat of suits for negligent actions or omissions despite the fact that they have little or no choice, either in the patients they are required to treat, or in the medical procedures they are required to perform. While there have been no judgments in recent years against such personnel for negligent actions or omissions, the constant exposure to the threat of such action does have an adverse effect on the efficiency and morale of the personnel concerned.

The courts very properly require health personnel to adhere to accepted standards of diagnosis, treatment, care and the like. This requirement in and of itself is not burdensome. However, medicine is not an exact science. Thus, in many instances suits in tort are founded on bad medical results even when there are no negligent actions or omissions involved in the case. Moreover, in tort suits against private practitioners, juries are awarding increasingly large amounts as damages to plaintiffs. These trends are known to our military and civilian health personnel and are cause for much apprehension on their part.

Some of our military and civilian health personnel who may feel particularly anxious about the possibility of suit against them personally feel impelled to take private professional liability insurance to protect them in their work involving practices and procedures as to which they have little or no choice. The cost of such insurance, when and if it can be privately obtained, results in an unwarranted and significant reduction in pay.

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We have been provided a copy of the statement concerning this legislation which was presented before the subcommittee last week by the Honorable Robert L. F. Sikes. We have reviewed Representative Sikes' statement and are in agreement with and fully support the views which he expresses.

For the reasons I have outlined, the Department of Defense recommends that the subcommittee act favorably on the bill.

I appreciate this opportunity of appearing before the subcommittee. My colleagues and I will be happy to answer any questions you may have regarding these matters.

Mr. Chairman, if I might at this point, I would like to cite a particular case that has recently come to my attention of a young military physician, which I think perhaps explains the problems that we are particularly concerned with in a good perspective. Now, this young physician is a major. He is an orthopedic surgeon and he is stationed at a military installation in California. A member of his family, who is also a physician, in previous years had had a large judgment against him in a malpractice suit. The amount exceeded the amount of his coverage under his malpractice insurance and it was ruinous to this particular physician's family. With this example constantly before him, the young man was one of those that I refer to in my statement, one of those people being compelled to obtain insurance on his own. He did so but since he was stationed in California, which is the State which has the highest premiums for malpractice insurance, he was required to pay approximately $6,300 last year as the premium for his coverage. At the present time, he receives in pay from the military and allowance, a total really of approximately $25,000. The result is that 25 percent of his pay and allowances went for his premium for malpractice insurance. Recently he became even more concerned when he was notified by his insurance company that premium for this year when he renews, assuming that he does, will be increased 47 percent so that his new premium will probably be $9,200, which works out to about 37 percent of his military pay and allowances.

Now, as you know, we are having great difficulty in retaining young physicians in order to achieve an all volunteer health force. It is true that yesterday the House passed a bill which would authorize us to add up to $15,000 to this young man's pay although the Senate version of the bill has a $10,000 maximum and I would assume that something in between will be worked out in conference.

But even if some figure such as $12,000 is added to this young man's military income——

Mr. MOORHEAD. May I interupt?

Mr. MCKENZIE. Yes, sir.

Mr. MOORHEAD. You say there had been several years since there had been a suit against any——

Mr. MCKENZIE. No, sir, not several years since a suit was filed but we have not been able to locate in recent years a judgment actually being rendered.

Mr. MOORHEAD. Would not a possible solution be to provide a defense by the Government so that if there was not gross negligence just to have the Government pay the damages rather than try to make a total change?

Mr. MCKENZIE. Well, in recent years the Government has been paying in the cases of the type that I am referring to.

Mr. MOORHEAD. Why should these people be so worried then?

Mr. MCKENZIE. Because there is always lurking in their minds the possibility that a judgment will be rendered against them.

Mr. MOORHEAD. But if they see that several years have gone by where no one has really been held liable, I mean they are rational people and they aren't going to get excited about that.

I agree with you that the whole judgment area in this medical malpractice is way out of line and something has to be done about it, but

I wonder how serious the situation is viewed when they have not paid a judgment for some time.

Mr. McKenzie. Well, we made a survey at a particular installation some years ago back, Mr. Moorhead, and the results of that survey indicated that approximately 10 percent of the military physicians at that institution whether rightly or wrongly, did worry to such an extent that they had on their own taken out malpractice insurance.

Mr. Moorhead. I would think also it might be looked into that if the exposure is relatively light for the medical personnel in the services, that they are paying too much in malpractice insurance and there might be some kind of program worked out there that would avoid these excessive premiums.

Mr. McKenzie. We have been unable to locate an insurance company which will issue a policy based solely on the degree of exposure of the military physician.

Mr. Moorhead. Thank you.

Mr. Donohue. Well, couldn't the Government be self-insured?

Mr. McKenzie. I would defer to Mr. Gilliat.

Mr. Gilliat. Well, yes, they certainly could and under one provision of the Justice Department's bill under certain circumstances overseas there would be the option of either obtaining malpractice insurance or in effect assuming liability for the individual. But in a sense by requiring an individual with a complaint to bring his action under the Tort Claims Act, the Government is in the best position to defend itself against any liability that may accrue as a result of negligence by a military physician.

Mr. Danielson. Under the bill, section 4 to which the gentlemen has referred, under the bill is the $5,000 general damage incorporated or would that be without limit?

Mr. Gilliat. Well, we would be subject to the general provisions of that bill, that is the bill which we have endorsed, the Justice Department's bill. That is the administration's bill.

Mr. Danielson. I think we are talking about two different things. Under section 3 of the bill we are talking about claims arising under the Constitution or statutes which have the general damage of $5,000.

Mr. Gilliat. Oh, I'm sorry.

Mr. Danielson. Under section 4 of the bill to which the gentlemen is referring, we are talking about claims arising from negligence and it is my understanding there is no limit?

Mr. Gilliat. I am sorry. I misunderstood your question, sir. There would be no——

Mr. Danielson. There would be no limit?

Mr. Gilliat. Yes.

Mr. Danielson. Do you have, sir, or could you give us some valid accurate data as to the number of civil actions which have been filed against the medical personnel of the Defense Department let us say in the last 5 years?

Mr. Gilliat. I can not give you that now. I can supply that for the record if you would like it for the past 5 years?

Mr. Danielson. I would like it.

Mr. Gilliat. All right.

[The information referred to follows:]

MALPRACTICE ACTIONS AGAINST MILITARY PHYSICIANS

	Value of loss	Physicians sued in personal capacity	Amount of claim
I. ARMY			
Calendar year:			
1969	15	0	$4,931,000
1970	9	0	3,600,000
1971	22	1	22,804,500
1972	27	3	10,398,329
1973	29	5	18,406,000
Total	102	9	60,139,829
Amount of claims against physicians in their personal capacity			4,286,000
II. NAVY			
Calendar year:			
1969	9	NA [1]	NA
1970	14		
1971	24		
1972	32		
1973	43		

[1] The Navy does not maintain statistics in dollar amounts or on those cases which physicians sued in their personal capacity.

	Number	Amount
III. AIR FORCE		
1. Fiscal year 1971: [1]		
(a) Foreign countries: Claims (MCA): (no closing records in computer)		
(b) United States:		
(1) Claims (FTCA):		
Denied	26	
Paid	13	$79,683.00
ODO [2]	67	
Claims total	106	79,683.00
(2) Actions opened (FTCA)	23	
Grand total	129	
2. Fiscal year 1972:		
(a) Foreign countries: Claims (MCA): (no closing records in computer)		
(b) United States:		
(1) Claims (FTCA):		
Denied	39	
Paid	13	209,032.27
ODO	10	
Claims total	62	209,032.27
(2) Actions opened (FTCA)	23	
Grand total	85	
3. Fiscal year 1973:		
(a) Foreign countries:		
Claims (MCA):		
Denied	2	
Paid	1	3,000.00
ODO	1	
(b) United States:		
(1) Claims (FTCA):		
Denied	31	
Paid	12	67,690.00
ODO	10	
Claims total (foreign and United States)	57	70,690.00
(2) Action opened (FTCA)	21	
Grand total	78	
4. Fiscal year 1974 (Mar. 31, 1974):		
(a) Foreign countries:		
Claims (MCA):		
Denied	3	
Paid	2	57,000.00
ODO	3	

Footnote at end of table.

	Number	Amount
4. Fiscal year 1974 (Mar. 31, 1974)—Continued		
(b) United States:		
(1) Claims (FTCA):		
Denied	31	
Paid	11	$229,186.46
ODO	11	
Claims total (foreign and United States)	53	286,186.46
(2) Actions opened (FTCA): (through Mar. 31, 1974)	22	
Grand total	75	
(3) Tort claims pending (Mar. 31, 1974)	99	64,536.07
(4) Tort actions pending (Mar. 31, 1974)	41	

[1] Statistics not available for fiscal years 1969 and 1970.
[2] Otherwise disposed of.

Note: For fiscal years 1973 and 1974 (through Mar. 31, 1974) 9 suits were pending against medical personnel in their personal capacity and in 2 cases the suit is exclusively against the individual physician.

Mr. GILLIAT. I have with me the current cases pending. There are 48 in the Army, 52 for the Navy; 38 for Air Force currently pending.

Mr. DANIELSON. They would be based on in effect medical malpractice?

Mr. GILLIAT. Medical malpractice only. There are 357 in total for the United States but that, of course, involves more than the Armed Forces.

Mr. DANIELSON. In response to a question from my colleague, Mr. Moorhead, I believe you said the Defense Department does provide a legal defense in these matters?

Mr. GILLIAT. The Defense Department seeks to obtain the assistance of the Justice Department on behalf of the young men that were sued in their personal capacity and there are a variety of circumstances and they respond to those factual circumstances as they see fit. Under some circumstances, for example, the young man in a training program in a civilian hospital may be covered by that civilian hospital's malpractice insurance and it may be left to the defense of the hospital attorneys, for example and so there are a lot of varieties of circumstances.

Mr. DANIELSON. But suppose he does not have that type of coverage?

Mr. GILLIAT. Yes, the Justice Department, I believe has uniformly come to their assistance.

Admiral CUSTIS. Well, I wonder if I may back up a minute?

Mr. GILLIAT. I am unaware of any situation, I will phrase it that way, where they did not.

Admiral CUSTIS. I might, if I may, address several issues that we have been talking about and the last one first. One of the precipitating factors of our current, and by our I mean Navy medicine's, acute concern is based on a case where the Justice Department elected not to come, at least in the time frame that would allay the anxiety of the people involved to come to the defense of two of our active duty Navy officers in Oakland. The circumstance here was that they were in a training program, and by training program I mean they were in training for a specialty in medicine leading to certification—I might say parenthetically that these training programs curriculum is under the authority of civilian accrediting agencies and it is not for us to define these programs because we must conform to what is required on the part of an accrediting body and civilian medical authority—and in order to satisfy the requirements of this training program, these two young men were on rotation outside of the naval hospital in a civilian

hospital specifically Hidleman's Hospital and the case that they became involved in was a lady was in need of a thyroidectomy. The operating surgeon was a civilian staffman on the hospital, which these two military types were assisting him. A nerve was cut—well, to make a long story short, she sued for $1,500,000.

The two military doctors had no malpractice insurance and they were named with several others involved in the case and the Department of Defense chose not to represent them because had they done so, the hospital insurance company would back out of the picture. It so happens in that case that it was widely publicized. There was near mutiny on the part of the staff of the Oakland Naval Hospital in terms of our other medical residents refusing to similarily be exposed. This got around all over the medical community, the naval medical community and there was a sort of protests and threats to drop out of training programs. It was a major crisis.

I might say that a sensible doctor would look at the record and see that few people have wound up having a judgment against them and yet we have through the years on the part of our JAG and by the Department of Defense been advised to pass on to our people the advice that they best carry their own private medical malpractice insurance. I, for one, for example, am a practicing surgeon and have carried my own insurance for years.

The matter of exposure is not as slight as one might think.

First of all, the active duty man may not sue a doctor but his dependent may sue and may individualize the doctor. Not only that but we are heavily committed on the matter of graduate training and we are becoming more so.

I think the other thing that adds to the crisis is that everybody is more and more conscious of how this business is building. It is a sign of the times.

I attended a seminar at the American College of Surgeons in Houston last week on the subject of malpractice. It was said at that seminar that the way things are going incidencewise, that of all the physicians in practice today in the United States between now and 1980 two out of three will be involved in a major malpractice suit. The settlement out of court is getting to be so large in size that premiums in the case of California, for instance, premiums for neurosurgery, plastic surgery, orthopedics, are as high as $15,000 to $20,000 a year. Now all of this is at a time when we are trying to adjust to and build a new profile in an All Volunteer Force environment.

As Mr. McKenzie pointed out, it becomes suddenly a much more major issue to us than ever before and there are a couple of other things——

Mr. DANIELSON. I would like to have the question first answered if I may, Admiral. The question is, in how many instances is counsel not provided, as far as you know?

The Admiral has mentioned one case.

Mr. GILLIAT. I don't believe that the Department of Justice needs my defense, but I happen to have a letter here from them on this case and they did say:

> We are endeavoring to have the county of Alameda and its insurers accept responsibility for the doctors' actions. We have no intention of leaving them defenseless and would represent them if they will not do so.

So I would think it would be unfair to characterize the Justice Department as unwilling. I think there was a misunderstanding in that case.

Mr. DANIELSON. Did you say you could furnish for us a table on experience on how many actions have occurred involving individual doctors?

Mr. GILLIAT. Yes, sir. For 5 years.

Mr. DANIELSON. And also if you could add to that where the Government provided defense, it would be of value in final consideration of this measure.

My concern here is trying to balance some equities. Quite obviously you got to bear in mind the public interest. If a citizen is damaged and sustains injury as a result of negligence, he or she must look somewhere to be made whole. Now whether we are to look at the individual physician—and I do not know, maybe we are to look to the Government because it is not unusual for the Government to provide its own insurance in similar situations and maybe that is where we ought to look—but somebody has to provide equity.

Counsel has just told me that in effect, the Government is a self-insurer under the Federal Tort Claims Act so maybe that does meet the need. But my concern is that somebody has to bear the loss, in my opinion, when someone is injured as a result of negligence by somebody else. So somebody has to bear the loss and I do not believe it should be the person who suffers the damage. Maybe the Government should just simply bear the loss. Maybe this language would be proper to restrict the claim to be a claim against the Government.

I wonder what effect this would have upon the morale of the medical corps of the Defense Department if they were relieved of all personal responsibility? Could the Admiral help me on that?

Admiral CUSTIS. I think that is the most important need we have, Mr. Danielson. Incidentally, I think it is very important to point out one more thing and that is that Federal Tort Claims Act is not applicable overseas and our people——

Mr. DANIELSON. True.

Admiral CUSTIS [continuing]. In overseas hopitals are totally exposed.

Mr. DANIELSON. That is true. That is an area that we should probably consider here, too.

Admiral CUSTIS. There is one more relatively new element here and that is we are rapidly expanding the concept of paramedical personnel in frontline patient care both in the civilian sector and in the military. They are going to be coming into the picture now more and more. These, too, are exposed to malpractice.

And I think referring back to that matter of morale, Mr. Danielson, the other thing we have a hard time explaining to our people is why the physician in the Veterans' Administration is treated differently than the physician in the military.

Mr. DANIELSON. Counsel has pointed out to me that in section 9, there is a provision which permits the Secretary of Health, Education, and Welfare and the Department of Defense to extend appropriate liability insurance in these situations. I trust that that would take care of this void in our system right now.

I think the gentleman should also bear in mind, and I know the problem of malpractice insurance is a very grave problem and a very serious one and the expense is almost unbelievable in some instances, but on the voluntary military force concept one counterbalancing factor is that, if these very same doctors go into nonmilitary private practice outside of the military service, they are going to pay these malpractice premiums also.

Mr. McKenzie. That is true, Mr. Danielson, but their income at that point in time would greatly exceed the income of their contemporaries in the military medical corps thus enabling them to better bear those large premiums.

Mr. Danielson. Well, having been in the Navy and having been in the Government, I am aware that there are certain compensatory fringes here and there and they may not be in balance, be in precise balance, but they are to be considered. Thank you for your help here. My goal is to see if we can't come to an equitable solution.

Mr. Gilliat. Mr. Danielson, one other thing, I think I should point out in connection with your question about whether the United States would defend the individual doctor when he is sued in his personal capacity, it is the view of the Justice Department that any judgment against the doctor—and we haven't had any of those recently—would nevertheless have to be borne by him. In the United States there would be no appropriation authority and without special release it would be his burden.

Mr. Danielson. I did recognize that. I'm just trying to understand this.

Mr. Donohue. Ms. Jordan?

Ms. Jordan. I have one question, Admiral. You mentioned the extensive use of paramedical personnel. You mentioned they would be exposed to some malpractice liability. I'm concerned about their adherence to reasonable standards of care and not just saying that we need this bill because we know that these are people who are going to be more careless than the licensed physician is.

Now, what kind of training, what kind of communication is made with them about their responsibility and capability for their own acts?

Admiral Custis. First of all, Ms. Jordan, these people are formally trained to function in definite parameters of care. Their training in the case of the Armed Forces consists of 1 year of diagnostic work; work in diagnosis and treatment of minor elementary problems. Their main function in the case of the Armed Forces will be to screen and refer to the proper specialty clinic in the case of primary care.

And I think the danger you speak of probably has a much greater potential in the civilian sector where they are not under close scrutiny or as close scrutiny and supervision of physicians in many cases.

I think, however, the problem is not so much that we can picture there are going to be improperly trained and unrestrained paramedicals turned loose as it is that these paramedics are going to be most reluctant to accept responsibility because of their insecurity knowing that they are subject to a malpractice suit. This same thing, for example, at a different level is being seen in the country in general in the civilian sector. There are probably more laboratory work done and more overconsulting and more expensive care and perhaps at the same

time more reluctance to tackle problem ridden cases on the part of the medical profession of the United States than ever before simply because of the fear of suit. It is backfiring. It causes a deleterious effect on the quality of care in the United States not so much in the military, for obvious reasons, Ms. Jordan.

Ms. JORDAN. Thank vou. I have no further questions, Mr. Chairman.

Mr. DONOHUE. Mr. Coffey

Mr. COFFEY. No questions.

Mr. DONOHUE. Any other questions?

Mr. Moorhead?

Mr. MOORHEAD. No.

Mr. DONOHUE. Well, thank you very much, gentlemen. If there are no further questions, I declare this hearing closed.

[Whereupon, at 11:15 a.m., the subcommittee recessed subject to the call of the Chair.]

APPENDIX

OFFICE OF THE ATTORNEY GENERAL,
Washington, D.C., September 17, 1973.

THE SPEAKER,
House of Representatives,
Washington, D.C.

DEAR MR. SPEAKER: Enclosed for your consideration and appropriate reference is a legislative proposal "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, and for other purposes."

This proposal is intended to provide for the immunity of Federal employees from personal liability in tort for acts done in the scope of their employment and immunity from claims sounding in tort for relief arising under the Constitution or Federal statutes of the United States. The Federal Tort Claims Act as passed in 1946 did not bar suits against Government employees who committed torts. However, if a civil action is brought against the Government under 28 U.S.C. 1346(b), a judgment in such action constitutes a complete bar to any action against Federal employees for damages for the same act or omission. 28 U.S.C. 2676.

Three statutes were subsequently enacted which barred suit against three particular classes of Federal employees—Government drivers, medical personnel of the Veterans Administration, and Public Health Service personnel. The Government Drivers Act passed in 1961, Public Law 87–258, provides that the remedy by suit against the United States under 28 U.S.C. 1346(b) shall be the exclusive remedy when the damage claimed results from the operation of a motor vehicle by an employee of the Government while acting within the scope of his office or employment. The procedure by which the Drivers Act is invoked is set forth in 28 U.S.C. 2679(b)–(c). The action is usually brought in the State court and is removed to the Federal court 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 accident. Upon removal, the United States is substituted for the employee as defendant and the action proceeds in the manner prescribed for any other tort claim against the United States.

A similar statute was enacted in 1965, Public Law 89–311, 38 U.S.C. 4116, with respect to medical personnel of the Veterans Administration, and in 1970, Public Law 91–623 42 U.S.C. 233, with respect to Public Health Service personnel. In succeeding sessions of Congress, bills have been introduced proposing the protection of other classes of Federal employees such as FBI agents and the flying personnel of the Federal Aviation Agency.

It is this Department's opinion that the general principle of immunity of Federal employees is a desirable one and that piecemeal legislation should be avoided. Accordingly, this proposed bill would afford equality of treatment by extending the immunity from personal liability in tort, and from claims sounding in tort for relief arising under the Constitution or Federal statutes of the United States to all Federal employees.

The proposed bill would amend 28 U.S.C. 1346(b) and 28 U.S.C. 2672 by extending the applicability of these sections to include claims sounding in tort for money damages arising under the Constitution of the United States.

The proposed bill would amend 28 U.S.C. 2679(b) by extending its applicability to all Federal employees acting within the scope of their office or employment. Further provisions of the proposals are intended to make it clear that the previously existing tort remedy against Federal employees, as well as any claims sounding in tort arising under the Constitution or Federal statutes of the United States, is now barred and that the exclusive remedy for compensation in these matters is pursuant to the procedures of the Federal Tort Claims Act.

The proposed bill would also amend 28 U.S.C. 2680(h) by limiting the number of exceptions in that Section, thereby rendering the United States liable for torts of assault, battery, false arrest, false imprisonment, malicious prosecution, and abuse of process committed by its officers and employees within the scope of their employment.

The proposed bill would repeal Section 4116 of Title 38, United States Code, and Section 233(a)(b)(c)(d)(e) of Title 42, relating respectively to medical personnel of the Veterans Administration and the Public Health Service, as the proposed bill provides broad coverage for all Federal employees. Finally, the proposed bill would continue authority in the Secretary of Health, Education and Welfare and would provide authority for the Secretary of Defense and the Administrator of Veterans Affairs to hold harmless or provide liability insurance for medical personnel assigned to foreign countries or detailed to other than a Federal agency or institution, or where circumstances would likely preclude remedies of third persons against the United States described in Section 2679(b) of Title 28.

I recommend the introduction and prompt enactment of this proposal.

The Office of Management and Budget has advised that there is no objection to the submission of this legislation from the standpoint of the Administration's program.

Sincerely,

ELLIOT RICHARDSON,
Attorney General.

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 omission of United States employees and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That Section 1346(b) of Title 28, United States Code is amended by striking the period at the end of the Section and adding the following: ", or where the claims sounding in tort for money damages arise under the Constitution or statutes of the United States, such liability to be determined in accordance with applicable federal law."

Sec. 2. Section 2672 of Title 28, United States Code, is amended by inserting in the first paragraph the following language after the word "occurred" and before the colon: ", or where the claims sounding in tort for money damages arise under the Constitution or statutes of the United States, such liability to be determined in accordance with applicable federal law.

Sec. 3. Section 2674 of Title 28, United States Code, is amended by deleting the first paragraph and substituting the following:

"The United States shall be liable in accordance with the provisions of Sec. 1346(b) of this title, but shall not be liable for interest prior to judgment or for punitive damages: *Provided,* That for claims arising under the Constitution or statutes of the United States, recovery shall be restricted to actual damages and, where appropriate, reasonable compensation for general damages not to exceed $5,000."

Sec. 4. 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 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 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."

Sec. 5. Section 2679(d) of title 28, United States Code, is amended by inserting in the first sentence the words "office or" between "scope of his" and "employment."

Sec. 6. Section 2679(d) of title 28, United States Code is amended by deleting the second sentence and substituting the following: "After removal 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 the Federal Tort Claims Act. Should a United States district court determine on a hearing on a motion to remand held before a trial on the merits that the employee whose act or omission gave rise to the suit was not acting within the scope of his office or employment, the case shall be remanded to the State court: *Provided,* That where such a remedy is precluded because of the availability of a remedy through proceedings for compensation or other benefits from the United States as provided by any other law, the case shall be dismissed, but in that event the running of any limitation of time for commencing, or filing an application or claim in, such proceedings for compensation of other benefits shall be deemed to have been suspended during the pendency of the civil action or proceeding under this section."

Sec. 7. Section 2680(h) of title 28, United States Code, is amended to read as follows. "Any claims arising out of libel, slander, misrepresentation, deceit, or interference with contract rights."

Sec. 8. Section 4116 of title 38, United States Code, is repealed, as of the effective date of this Act.

Sec. 9. Section 223 of Title II of the Public Health Service Act, 58 Stat. 682, as added by Section 4 of the Act of December 31, 1970, 84 Stat. 1870 (42 U.S.C. 233), is redesignated as Section 224 and is amended to read as follows: "Authority of Secretary of designee to hold harmless or provide liability insurance for assigned or detailed employees."

"Sec. 224. The Secretary of Health, Education and Welfare, the Secretary of Defense and the Administrator of Veterans Affairs, or their designees may, to the extent deemed appropriate, hold harmless or provide liability insurance for any officer or employee of their respective departments or agencies for damage for personal injury, including death or property damage, negligently caused by an officer or employee while acting within the scope of his office or employment and as a result of the performance of medical, surgical, dental, or related functions, including the conduct of clinical studies or investigations, if such employee is assigned to a foreign country or detailed to other than a Federal agency or institution, or if the circumstances are such as are likely to preclude the remedies of third persons against the United States described in section 2679(b) of Title 28, for such damage or injury."

Sec. 10. This Act shall become effective on the first day of the third month which begins following the date of its enactment and shall apply to only those claims accruing on or after the effective date.

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Federal Tort Claims Amendments
Hearing...
Subcommittee on Claims and
Governmental Relations of the
Committee on the Judiciary.
House of Representatives.
1974

1 Book