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AMENDMENTS TO THE FEDERAL TORT CLAIMS ACT: S. 2117

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JOINT HEARING

BEFORE THE

SUBCOMMITTEE ON CITIZENS AND SHAREHOLDERS RIGHTS AND REMEDIES

AND THE

SUBCOMMITTEE ON ADMINISTRATIVE PRACTICE AND PROCEDURE

OF THE

COMMITTEE ON THE JUDICIARY UNITED STATES SENATE

NINETY-FIFTH CONGRESS

SECOND SESSION

ON

AMENDMENTS TO THE FEDERAL TORT CLAIMS ACT: S. 2117

Part 1

JANUARY 26, 1978

Printed for the use of the Committee on the Judiciary

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U.S. GOVERNMENT
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[2] See letter of April 10, 1978, at p. 52.

AMENDMENTS TO THE FEDERAL TORT CLAIMS ACT: S. 2117

THURSDAY, JANUARY 26, 1978

U.S. SENATE, SUBCOMMITTEE ON CITIZENS AND SHAREHOLDERS RIGHTS AND REMEDIES, AND SUBCOMMITTEE ON ADMINISTRATIVE PRACTICE AND PROCEDURE OF THE COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The subcommittees met, pursuant to notice, at 9:30 a.m., in room 235, Russell Office Building, Hon. Howard M. Metzenbaum, chairman of the Subcommittee on Citizens and Shareholders Rights and Remedies, presiding.

Present: Senators Metzenbaum and Thurmond.

Staff present: Herman Schwartz, chief counsel of the Subcommittee on Citizens and Shareholders Rights and Remedies; Irene Emsellem, chief counsel, Subcommittee on Administrative Practice and Procedure; Charles Ludlam, counsel, Subcommittee on Administrative Practice and Procedure; and Patricia Hoff, counsel to Senator Wallop.

Also present: Patricia Wald, Assistant Attorney General for Legislative Affairs.

OPENING STATEMENT OF HON. HOWARD M. METZENBAUM, U.S. SENATOR FROM THE STATE OF OHIO, CHAIRMAN OF THE SUBCOMMITTEE ON CITIZENS AND SHAREHOLDERS RIGHTS AND REMEDIES

Senator METZENBAUM. Today we open hearings on S. 2117, which amends the Federal Tort Claims Act with respect to constitutional violations by Federal officials.

[A copy of S. 2117 will be found on p. 39 of the appendix. Proposed amendments submitted by Senator Eastland and the Justice Department follow the bill at pp. 44 to 51. S. 2117 as amended appears at p. 52 and the Federal Tort Claims Act as amended by S. 2117 as amended appears at p. 57.]

We are pleased to welcome the Attorney General and others to this opening hearing. Our sole witness today will be Attorney General Griffin Bell, and our hearings will be conducted jointly with the Subcommittee on Administrative Practice and Procedure, chaired by the distinguished Senator from South Dakota, Senator James Abourezk.

In the future, we will be scheduling additional hearings on the bill, at which representatives of the community and other Government agencies will be heard. Because the bill is still in the process of

being modified by the Department of Justice, it seemed appropriate to defer such testimony until the Department's final product is available for consideration.

The bill has been prepared by the Department of Justice and is an administration proposal.[1] Its most significant feature is this: in cases where Federal officials have violated a person's constitutional rights, that person will be able to sue the United States—which waives sovereign immunity for these matters—but not the individual official. This is the reverse of the present situation, as we understand it. The administration has proposed this bill because it will eliminate the need for the Government either to defend the individual employee or—where the official may be guilty of a criminal act—to obtain outside private counsel for him or her, at great expense. The Government has also stressed that such suits impair morale of Government employees.

In return for removing the opportunity to sue the individual officials, the bill would provide for a remedy directly against the United States, and the possibility of some kind of administrative remedy.

This bill has occasioned a great deal of criticism and discussion. Common Cause, the American Civil Liberties Union, and many others have raised many questions about the bill, both in general and with respect to details. A copy of two letters setting out some of these criticisms and questions has been provided the subcommittee and will be made a part of the record of this hearing.

[The letters will be found on p. 70 and p. 74 of the appendix.]

The fundamental issue comes down to this: if damages can no longer be exacted from individuals who violate constitutional rights, what alternative sanctions can be imposed on such officials? Are administrative remedies available and adequate? What remedies are available against former employees and presidential appointees? Does this bill create a risk that there will be no sanctions at all to deter grave constitutional violations, no matter how outrageous or unjustified they are?

These are the most basic issues. In addition many questions have been raised about details of the bill. Our subcommittee submitted some of these questions to the Department on December 14, 1977, and received a set of replies dated January 20, 1978; they will also be made a part of the record. We appreciate the Department's cooperation in this matter and both the subcommittee questionnaire and the Department's replies will be made a part of this record.

[The questions will be found on p. 80 and the answers on p. 90 of the appendix.]

Mr. Attorney General, we are eagerly looking forward to your testimony. Senator Abourezk, who was to be here, cannot be here. But he does have some questions to which he would like written responses. And his opening statement will be inserted into the record at this point.

[The questions submitted by Senator Abourezk on February 7, 1978 will be found on p. 104 and the answers returned by the Justice Department on March 13, 1978, will be found on p. 114 of the appendix. A sec-

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[1] See letter of Attorney General to Vice President Mondale of September 17, 1977, at p. 26 in the appendix.

ond set of questions sent by Senator Abourezk to the Department on March 21, 1978, appears on p. 131 and the Department's answers of April 20, 1978, appear on p. 136 of the appendix.]

STATEMENT OF HON. JAMES ABOUREZK, U.S. SENATOR FROM THE STATE OF SOUTH DAKOTA, CHAIRMAN, SUBCOMMITTEE ON ADMINISTRATIVE PRACTICE AND PROCEDURE

I want to thank Chairman Metzenbaum for agreeing to hold this hearing on S. 2117 jointly with the Subcommittee on Administrative Practice and Procedure. Although the bill was referred to the Citizens Rights Subcommittee, of which Senator Metzenbaum is Chairman, the Administrative Practice Subcommittee has substantial expertise and interest in this area. I look forward to working closely with Chairman Metzenbaum during the consideration of S. 2117.

S. 2117 is one of the most significant pieces of legislation to be considered by the Senate Judiciary Committee this year. The bill proposes a fundamental—and potentially threatening—change in the system by which we hold executive branch officials accountable for violating the constitutional rights of American citizens.

My intense interest in this bill results from a six-month investigation which the Subcommittee on Administrative Practice and Procedure has just completed on the Justice Department policy of hiring private legal counsel to represent Federal employees in civil suits alleging the violation of constitutional rights. This investigation will shortly result in the issuance by the subcommittee, probably on Monday of next week, of a 1,200 page staff report on this subject.[1] The staff report will explain in vivid detail one reason why the Justice Department is so interested in S. 2117. Specifically, major developments—some of which are not yet public knowledge—have occurred which jeopardize the Department's policy of hiring private counsel to represent Federal employees.

As much as the Department has had headaches with its policy of hiring private counsel to defend Federal employees, S. 2117 as drafted is not the answer. As introduced S. 2117 would immunize Federal officials from being held accountable in civil suits for violating the constitutional rights of Americans. This would eliminate the Department's need to hire private counsel to represent Federal employees. Under the bill the United States—and not the Federal employee—will be the defendant.

While this might provide a tidy solution to the problem involved in hiring private counsel, it is at a cost I am unwilling to accept. I am frank to say that, as presently drafted, S. 2117 will do little to prevent a repetition of the lawlessness by Federal employees disclosed over the past several years, and, might, in fact, encourage it.

The major problem with the bill as drafted is that in immunizing Federal officials from any accountability through civil actions, S. 2117 substitutes no effective alternative system of accountability. Instead, the bill relies on civil service disciplinary procedures which have proven to be so inadequate and ineffectual in the past. Perhaps if these civil service disciplinary proceedings had been adequate and effective, there would be no need for this bill today. At a minimum, therefore, the basic elements of an effective disciplinary procedure must be included in the bill.

My opposition to the bill as drafted is tempered by the fact that the Justice Department has demonstrated its sensitivity to the threat posed by the existing language of the bill and is apparently willing significantly to amend the bill. The Department has been open to suggestions for amendments and has met on a number of occasions with individuals concerned about the bill. The Department has carried on these discussions in good faith and I have every expectation that these meetings will produce amendments which will alter the basic thrust of the bill.

I do not want to intrude on these discussions—which are still going on—but I do want to outline the types of amendments which I would support.

First, it is clear to me that the present civil service procedures must be strengthened.

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[1] See "Justice Department Retention of Private Legal Counsel to Represent Federal Employees in Civil Suits,"' Staff Report of the Subcommittee on Administrative Practice and Procedure, Senate Judiciary Committee, May 1978.

The Civil Service Commission has under consideration various proposals, parts of which could be included in S. 2117. One such measure, proposed by the Administration would split the Commission into two entities, one of which would regulate employee conduct. The proposals are for this latter agency to conduct disciplinary proceedings in which aggrieved parties have substantially more rights to participate. Proposals for this type of fundamental reform will take some time to draft and to become law. However, as part of consideration of the Tort Claims Act Amendment I would expect the Administration to commit itself to a basic framework to strengthen civil service disciplinary proceedings as well as assurances that the Administration will join with Congress in establishing a comprehensive accountability mechanism.

The necessity to balance the immunity provisions in S. 2117 can not await that process. Some language—however brief—which will guarantee that existing civil service proceedings will, in fact, be instituted whenever a Tort Claims Act suit is filed for constitutional torts is essential to this bill. In addition, Civil Service disciplinary proceedings should be made to extend to any violation of the constitutional rights of Americans by a Federal employee. Finally, in a disciplinary proceeding, aggrieved parties must be given the right to participate and to appeal any ruling which does not impose sanctions on Federal employees responsible for violating constitutional rights. I am delighted to hear the Attorney General say in his opening statement that he is "personally agreeable" to an amendment along these lines. I am sure that with the Department's assistance such an amendment can be drafted.[2]

Second, for Federal officials for whom civil service disciplinary proceedings are not available or appropriate, plaintiffs must be given the choice either to sue the government under the Tort Claims Act or to sue the employee in his individual capacity. Civil Service proceedings, for example, are not available for former government employees and are not appropriate for high level Presidential appointees. Under the amendment I suggest a plaintiff would not be able to join the United States and the employee as co-defendants but would have to make an irrevocable choice of which to sue. The Justice Department should be given clear authority to represent Federal employees who are sued in their individual capacity. It is my understanding that few plaintiffs would choose to sue such Federal employees in their individual capacity because the likelihood of recovering damages from the employee is substantially less than recovering from the government.

I had determined two other amendments to be essential and I understand that the Department has agreed to them during the course of its discussion on the bill. One is to eliminate a "good faith" defense on the part of the Government.[3] The other would allow class action suits and authorize the award of attorneys fees to plaintiffs.[4] One other area that needs to be addressed is the level of minimum damage which can be recovered by a successful plaintiff.

With amendments along the lines I suggest, I can see some merit in the bill. At present plaintiffs are often unable to recover damages because Federal employees can raise a defense of qualified "good faith" immunity. And, as I have mentioned of the Department's present program of hiring of private counsel is in real jeopardy.

Let me close by saying that I am sympathetic with the need to defend Federal employees who responsibly and vigorously perform their duties. It is also a good policy—as the subcommittee staff report will confirm—to avoid the problems created by the Department's hiring of private legal counsel.

In pursuing these two objectives, however, one must remember that the recent deluge of civil suits against Federal officials and the evolution of the Department's policy of hiring private counsel to defend these suits are direct consequences of past widespread government lawlessness. In attempting to mitigate this situation we must guard against encouraging the opposite result. It would be both ironic and tragic for us to comfort and encourage Federal employees who intentionally violate the constitutional rights of Americans in our concern over the plight of innocent Government employees harassed by civil suits. Clearly, this bill must ensure the accountability of officials by providing effective safeguards against abuse.[5]

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[2] See amendment at p. 49.
[3] See p. 48 of the appendix.
[4] See p. 48 of the appendix.
[5] See recommendation of the Senate Intelligence Committee at p. 145 in the appendix.

TESTIMONY OF GRIFFIN B. BELL, ATTORNEY GENERAL OF THE UNITED STATES; ACCOMPANIED BY IRVING JAFFE, DEPUTY ASSISTANT ATTORNEY GENERAL, CIVIL DIVISION

General BELL. Mr. Chairmen and members of the subcommittees, I appear before the subcommittees today in support of the administration's request to amend the Federal Tort Claims Act. I am accompanied by Irving Jaffe, Deputy Assistant Attorney General, Civil Division, who will address specific provisions of the bill and respond to your detailed questions concerning them.

The legislation before this subcommittee today would redefine the relationship between the Federal employee and the private citizen. It would remove an unjust and counterproductive burden now weighing on the shoulders of Government employees, the possibility of being held liable for a sizable judgment in a civil suit brought for the way he performs his job. It would permit a citizen aggrieved by a Federal employee to sue the U.S. Government, a financially responsible defendant.

The opportunity to institute disciplinary proceedings against an employee who violates another person's constitutional rights would be strengthened without in any way diminishing the employee's liability for criminal prosecution. Finally, it would save the U.S. Government's funds by not requiring it to hire private attorneys to represent individual defendants and will simplify lawsuits against the United States.

The bill would accomplish these objectives by expanding the bases upon which the United States can be held liable for the conduct of its employees under the Tort Claims Act, and by making suits against the Government the exclusive remedy in such cases. The Congress has already recognized the merit of these objectives by completely immunizing the operators of our motor vehicles from civil suits and almost all Government physicians from malpractice suits.

The concept of immunizing Federal employees from civil liability for the performance of their duties is one of the most venerable doctrines in American jurisprudence and recognized by the Supreme Court more than 80 years ago. Versions of the immunity doctrine designed to protect members of the judicial branch run even deeper into our Anglo-American common law; and immunity for members of the legislative branch is found, of course, in the Constitution.

One of the rationales for protecting officers and employees of all branches of the Government from civil liability is to protect and encourage fearless, vigorous, and effective exercise of their job responsibilities which, even when properly discharged, undoubtedly will, from time to time, displease some of those who are affected by their actions.

In recent years, the doctrine of absolute immunity for Federal employees has come under understandable attack in light of the tragedy of Watergate.

Heretofore, a Federal official was completely immunized from personal liability and from the need to defend the suit against him if he established that the challenged conduct was performed within the scope of the outer parameters of his official duties and that those

duties involved an element of discretion. More recently, however, the courts have qualified the immunity of a Government officer by requiring him to prove, in addition, his good faith belief in the lawfulness of his conduct.

Such liability for Federal employees serves no constructive purpose. First, it is of little use to the citizen plaintiff who rarely recovers substantial sums from individual employees.

Second, it is neither a practical nor realistic deterrent of improper or unlawful activity for the very reason that large judgments are so infrequent. Judges and juries are understandably reluctant to make such awards against Government workers. For those who say that the threat of suit deters improper conduct, it is equally true that the threat of suit deters proper conduct. For a punishment to be an effective deterrent it must be predictable.

Third, the prospect of being required to submit to the frequently long and probing process of civil discovery in the face of adverse publicity in the press, even with the reasonable expectation of eventual vindication, is inhibiting to the performance of one's job responsibilities and is destructive of morale. Let us remember that the very great majority of the millions of Federal workers are honest, law abiding, and conscientious.

The possibility of civil damage actions for these people tends to discourage taking difficult assignments and performing such assignments thoroughly and courageously. Instead, it has the effect of causing otherwise responsible officials to worry about "covering" themselves. I know this is true in the Justice Department and in other departments and agencies of the Federal Government.

If civil liability of Federal employees is removed, however, I recognize that some sort of mechanism should be established to insure the fair and effective disciplining of a Government employee who has violated a citizen's constitutional rights. This bill would not affect such an employee's liability under the criminal laws, but criminal liability alone is not a complete system of accountability.

To this end, I am personally agreeable to provisions which would assure effective and fair procedures to discipline an employee who has violated another's constitutional rights, procedures in which the injured person can participate in a meaningful way.[1] We understand, however, the administration is considering such new procedures.

From a deterrent point of view, I believe that the prospects of disciplinary action and, if the conduct is criminal, the possibility of criminal prosecution, will be sufficiently strong to discourage improper conduct in the future.

A problem related to the decreasing scope of immunity given to Federal employees is the need to hire private attorneys at an ever increasing rate to perform the representational functions traditionally undertaken by department employees. The problem results from the fact that with the erosion of absolute immunity from civil suit, Federal employees are increasingly being subjected to personal suits for damages. Most suits based on constitutional torts name several employees. Frequently these Federal defendants have conflicting

[1] See Department's proposed amendment to S. 2117 at p. 49 in the appendix.

accounts of underlying facts. In other cases, arguments that could best protect them from individual liability may conflict with broader policy interests of the United States. In such instances, ethical considerations prevent the department's attorneys from representing the employees.

Under present legislation there are only two alternatives. The first is to deny the Federal worker representation for conduct undertaken within the scope of his employment and require him to retain private counsel at rates that are certain to create financial disaster. The second choice is to spend the taxpayer's money to hire private attorneys to represent the employee on an independent basis without any supervision by me. Neither alternative is satisfactory.

Denying all forms of Government legal assistance for the performance of Government work would produce chaotic results. It is in the Government's interest to represent or provide representation to its employees who are sued as a necessary incident to the preservation of morale and the effective performance of their duties. It is not untoward for any employer to provide such representation to his employee. The choice of hiring private counsel also presents unsatisfactory results. The cost of private counsel is proving to be a highly expensive undertaking even though the maximum fees we have persuaded private attorneys to accept are frequently less than half their normal rates. In fiscal 1977, the Department spent over $600,000 in private counsel fees. In the first quarter of the current fiscal year, the Department paid approximately $240,000 in fees. If the first quarter figures continue at their present rate through the remainder of fiscal 1978, we will be experiencing a 60-percent increase in private counsel fees.

Notwithstanding these difficulties, the retention of private counsel is the most viable alternative by which the Government can fulfill its obligations to itself and to its employees when it cannot represent them.

Under the amendments to the Tort Claims Act proposed in this bill, the United States would become exclusively liable for all constitutional torts and most of the common law torts of its employees. Individual Federal employees would not be named as defendants in such lawsuits; and, as a result, there would no longer be many conflicts or any need to provide them with costly representation.

For the first time, this bill will provide that the United States would make itself liable in damages for the conduct of its employees for acts or omissions in most common law torts and for all actions which violate certain constitutional rights of individual Americans.[1] Each citizen would be guaranteed a financially solvent defendant.

Of equal significance is the fact that the United States will not raise the immunity defenses now available to its employees who are sued personally.[2] Even though the defenses have been greatly reduced in scope, they still afford a Federal employee with an eventual means of avoiding civil liability if the employee can establish his good faith belief in the lawfulness of his conduct.

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[1] See questions and answers at p. 131 to 139 in the appendix.
[2] See Department amendment at pp. 48, 49.

Under the proposed legislation, the United States could not raise the good faith of its employees as a defense to liability for constitutional torts. As a practical matter, the liability of private citizens to recover damages for constitutional torts would be greatly increased if they need only prove violation of their constitutional rights regardless of the good faith of a Government employee.

The bill assures a monetary recovery for constitutional torts by providing for liquidated damages where actual damages are small or nonexistent. Under present law, a plaintiff must usually establish concrete injury to receive damages. Such proof is often impossible in the case of nonviolent conduct involving violations of constitutional rights which are of an intangible nature. The bill would remedy this inequity by providing for the payment of liquidated damages upon the showing of a tortious constitutional violation alone.

I view the Tort Claims Act amendments as one of the most important pieces of legislation that I have proposed from the standpoint of both our country's citizens and its employees. The legislation attempts to strike a difficult and careful balance between redressing Government wrongs suffered on occasion by individual Americans and the undisputed need to permit our Federal employees to conduct the affairs of Government in an uncowardly manner. The interests are very competitive ones. No piece of legislation can fully accommodate one without impairing the other. Under current Federal law, neither interest is being well served. I believe, however, that the bill before you goes a long way to strike as satisfactory an accommodation of both interests as I have been able to find.

This concludes my overview statement, Mr. Chairman. I and the other Department officials present will be happy to answer any questions the subcommittees may wish to raise.

Senator METZENBAUM. General Bell, what is the aegis of this bill? How did it develop? Did it come about by reason of the expenses of hiring private attorneys and a rapid escalation of those costs? Was it the fact that various Government employee organizations came in and said that this is becoming a special problem?

I am not questioning the validity of the legislation in toto. Rather, I am saying, how did the Attorney General's office happen to draft this bill? It hasn't been before Congress before; has it?

Mr. JAFFE. Excuse me. Yes, it has. We introduced a similar bill—not quite as expansive, but to accomplish the same purposes—in 1973 in the 93d Congress. The bill was assigned number H.R. 10439, I believe.[1] And a similar bill was introduced by a Member of the House—an identical bill—early in this session. [H.R. 9219] The problem is longstanding.

Senator METZENBAUM. I guess that still does not answer my question. It does answer——

General BELL. Let me answer that since I'm the one who got it introduced this year.

I did not know about the bill Mr. Jaffe is speaking of.

When I first became Attorney General I was told we owed about $4 million in attorneys fees to private lawyers, obligations undertaken by the previous administration. I started checking up; it de-

[1] See copy of H.R. 10439 at p. 215 in the appendix.

veloped that that figure was highly exaggerated. Nevertheless, we did owe money to a number of outside lawyers. I started trying to find out how we happened to get these lawyers.

Some we got because a defendant on a civil suit was under investigation under criminal allegations; so, we had a conflict. We could not be prosecuting and defending at the same time. At least that was the ruling that had been made by Attorney General Levi.

Others were far more complicated. We might have a case, let's say, of 15 or 20 defendants. Some defendants would be agencies; some, individuals. There might be some conflict in positions of some of the defendants. So, we had to get outside counsel.

In one suit—I have forgotten the name of it—I had to get an outside lawyer to interview all the defendants to see if there was any conflict in the positions before we could decide about getting outside counsel. We were able to go forward with that case—I was told—without getting outside counsel. So, it is terribly complicated.[1]

I visited FBI offices around the country. I found out that the agents were buying liability insurance—something like malpractice policies—because they were so worried about civil suits.

Then the last thing that happened: I was being brought these papers to sign substituting the United States as a party for the drug manufacturers who made the swine flu shots. Congress, in its wisdom, passed a law substituting the United States as defendant anytime a drug manufacturer was sued.[2] It struck me as rather odd that we would do that for drug manufacturers, but we would not do it for our own employees.

So, that was some of the background of it. I directed that we get a bill drawn and get it introduced. I went to see the chairman of the Judiciary Committee, Senator Eastland. I mentioned it to him, and I also mentioned it to Chairman Rodino. I mentioned it to other people. I did not find anybody opposing it; so, we went forward.

I am glad to know about the other legislation that Mr. Jaffe mentioned. But, until this moment, I thought this was a product of my own imagination.

Senator METZENBAUM. I think, Mr. Jaffe, I might correct that. The other bill was not constitutional violations.

Mr. JAFFE. Yes, sir, it was; it included constitutional violation. It was an exclusivity bill. It made the United States the exclusive defendant in both constitutional and common law torts.

General BELL. One other fact I left out that persuaded me: We had one case where we were liable. There was clear liability. I said, well, it seems to me we ought to have some arrangement where the Government could just pay these damages and just admit liability. You know, if you are wrong you ought to say that you are wrong. I found out we could not do that. You cannot get individuals to do whatever you tell them to do sometimes.

Cointel would be a good set of cases. If somebody sued you on Cointel tort, and the Government was the defendant—in a lot of those cases I would admit liability. You would have long trials for

[1] See "Justice Department Retention of Private Legal Counsel to Represent Federal Employees in Civil Lawsuits," staff report of Subcommittee on Administrative Practice and Procedure.

[2] See copy of swine flu bill at p. 212 in the appendix.

damages whereas, under these liquidated damages provisions, you pay damages.

It seems to me that would be in the interest of the country, particularly at this time where we are in the tail end of the healing process, as I call it. I would like to clean up a lot of these things that we have had in the past. This would be a way to do it.

Senator METZENBAUM. Of the accumulation of legal fees that you had facing you when you came in, what percentage of the total would you say came about by that which we might say were Watergate related? Were any of them, or were many of them?

General BELL. Mr. Jaffe?

Mr. JAFFE. None of those at that time were related to Watergate. But most of them did involve constitutional type violations.

Senator METZENBAUM. Most of Cointel——

Mr. JAFFE. No; that came later. Cointel was just recently begun.

Senator METZENBAUM. The thrust of my questioning has to do with whether or not this is largely a temporary problem growing out of a series of revelations of unconstitutionality or unconstitutional acts or violations of law in recent years which we might hopefully think might be behind us in the main. Do you think this is a continuing problem and process?

General BELL. I think it will be continuing. I think it will continue. We have an unusual number right now, but I think it will continue.

Based upon my experience as a Federal judge, we have a litigious society—take prisoners' suits for example. Prisoners seem to get some therapeutic value out of suing people. They sue a lot of people. I am sued quite often now about things I have never heard of and don't know anything about.

I was accused recently of being a coconspirator in a case that started a long time ago. They just added me, and I never knew there was such a case in existence.

Well, I don't know that I ought to have to be named about something I don't know anything about.

Senator METZENBAUM. I heard you were thinking about it when you were down there in Atlanta before you ever joined the administration.

General BELL. Maybe I was. I do not think it serves any useful purpose to have all these Government people named themselves in these kinds of cases. You have got to get a lawyer to go to court just to handle frivolous cases. It would just give better control.

To answer the question specifically, we will always have some suits against Government agencies; and this is not a bad thing. You know we are more conscious now of our constitutional rights than we have ever been. If a citizen feels denied or deprived or feels that they ought to be vindicated from some constitutional right, why not go to court? And why shouldn't the Government respond? But, at the same time, we have got to be careful to have some disciplinary procedure or device so that the employee will be punished.

In the drug cases—as I understand the law—we can sue the drug manufacturer if we find they are negligent. We have got to defend the case. But, if they were negligent in the manufacturing process,

we can turn around and sue them. That is one technique that we might use here—or just a plain disciplinary procedure.

Then you have got a complication. Sometimes the Government employee has retired or resigned. We have got to find out what we do in those cases. But I would say this. Even in the future, if we don't have as many cases as we are having right at this time, it still would be a good thing to have this law.

Senator METZENBAUM. I think one of the major concerns has to do with the matter of employee accountability. I think this bill should not do anything to cause that not to be a factor.

General BELL. I will agree to that.

Senator METZENBAUM. The question is how to obtain accountability.

In your statement you talk about certain procedures. Could you give us some idea of the kind of procedures you are contemplating under that language?

General BELL. I'll take a shot at it. We will use the FBI for an example because that is probably the most visible agency in the Government for suit purposes.

If there is a complaint now filed against an agent under the procedure set up by Attorney General Levi or, indeed, anyone in the Justice Department, we refer it to what we call the Office of Professional Responsibility. There is such an office in the FBI. They then have an administrative hearing. Or, if I see something myself that I want to refer, that takes that same route.

They impose discipline. It could be a reduction in rank. It can be suspension or reprimand. And then it comes up on appeal to the Attorney General eventually. If the punishment is not high enough, you can send it back. In fact, in a case that was released recently, it was sent by Attorney General Levi—it was referred to the Office of Professional Responsibility for review. Of course, the Department of Justice did not think sufficient action had been taken.

Now, this is already in place—all these kinds of procedures. But, as I understand, there are a lot of instances in setting up procedures so that the person whose rights have been violated can participate in these administrative procedures. That is something we do not have now; that would be a new thing. I do not object to doing that, incidentally.

Senator METZENBAUM. Mr. Attorney General, realistically speaking, is that very effective? You know, there was an issue in this country—we don't hear too much about it now—about whether, if we had a complaint with the police department, the issue should be taken before a civilian review board or whether it should be before the police themselves.

Now the FBI is checking on themselves and their own fellow workers. Whether it is the FBI or any other agency, can Congress and the American people really expect that there will be an independent thorough investigation? I give you an example, one that is in high profile at the moment. The investigation made in-house in the Marston matter has created a lot of public discussion. I am not sitting here judging right or wrong. Suffice it to say that the public media have questioned the fact of in-house investigation.

Yes; it is a step in the right direction that the individual can participate in the hearing. But, going beyond that—for example, there have been a lot of FBI wrongdoings in recent months and years.

How many FBI officers have been disciplined in the course of the past three years, would you say?

General BELL. I do not know, but I can give you figures. There have been some, and there have been people in the Department of Justice.

[The information on disciplining of FBI agents follows:]

DEPARTMENT OF JUSTICE,
Washington, D.C., May 11, 1978.

Hon. HOWARD M. METZENBAUM,
Chairman, Subcommittee on Citizens and Shareholders Rights and Remedies, Committee on the Judiciary, U.S. Senate, Washington, D.C.

DEAR MR. CHAIRMAN: This is in response to your request that the Department supply statistics reflecting Federal Bureau of Investigation disciplinary action against Bureau agents who were accused of committing so-called constitutional torts.

We have been advised by the Bureau that during 1977, there was a total of 69 allegations against FBI personnel occupying the position of Special Agent or above. No allegations of constitutional tort were made against service support personnel. Investigation determined that no administrative action was warranted in 64 cases due to the fact that the allegations were determined to be unfounded. In 2 cases the personnel involved were disciplined. Of the total number of allegations, 2 were withdrawn; 1 case involved Agent personnel of another agency.

I hope that this material will be helpful to the Subcommittee.

Sincerely,

PATRICIA M. WALD,
Assistant Attorney General.

General BELL. Since you brought up the Marston matter, I would like to respond to that.

I have had myself investigated twice in the last month on incidents arising in the great State of Pennsylvania. The first one was in Pittsburgh, where the New York Times say that I and Mr. Egan, the Associate Attorney General, had obstructed justice in that we were trying to put an unqualified U.S. attorney who was then being investigated by the FBI. I asked that the Office of Professional Responsibility investigate me on that. They have, and they will be reporting soon.

In the Marston matter, there was a charge by Marston—and the media strongly implied—that I knew of an investigation of a Congressman at the time the President spoke to me. I thought that it ought to be clarified inasmuch as I did not know, so I made an affidavit saying that I did not know.

Now, I do not know what else I can do. I could convene a grand jury and go there and tell them that I did not know anything about it.

Then I went further and got affidavits from people under me, which got it up to the point that there was some suggestion that he was a suspicious character; but that was never brought up any higher. So, I think it is very clear that I did not know.

Then I directed somebody to go and get a statement from the President to see if he knew. I do not think that I have heard of an Attorney General doing that before.

I do not know anything else I can do about that except to advise the public—as I propose to do in a few days—as to whether or not there was an investigation.

Senator METZENBAUM. Let me say this. You are almost proving my point. My point is not whether there was independence, whether you knew or did not know—and I do not sit here in judgment on the Marston case.

The point I am making is this. Because the committee making the investigation was an in-house investigating committee, its credibility has been attacked—not by me, but by the media nationally.

General BELL. Because it is in-house.

Senator METZENBAUM. It is in-house. That's the question I am asking about in this matter.

General BELL. There is no other place to go.

Senator METZENBAUM. Well, I think——

General BELL. Well, if you want to create some other place, it would suit me fine. I would be glad to appear before the Senate Judiciary Committee——

Senator METZENBAUM. There are some other——

General BELL [continuing]. To say that I did not know about any investigation in the Marston matter.

I will be glad to appear in Times Square, if you want to convene a trial there. As I told somebody the other day, the United Nations or The Hague would be fine with me. But you are never going to connect me with knowing it.

Senator METZENBAUM. To discuss the Marston case further, let me say that a newspaper man came in to see me yesterday. I said, "Well, they got affidavits from the Attorney General and from the President." He said, "No; they did not get an affidavit from the President." And I said, "No; they got a statement from the President; they said that they didn't need to have him under oath."

Then he said to me, "They never spoke to the President." And I said, "That isn't what I read in the paper. I understood they did speak to him." Well, I don't know, and I am really not sitting in judgment.

The point that I am making is this. I think, if you are going to have effective accountability, that either you have to have, in this kind of a matter, a special prosecutor or a special investigator—a totally independent person or persons. Or, in the case of employees, you have to have some kind of a review board that is totally unresponsive to the agency that is itself involved in the alleged wrongdoing. Or else the person who claims to have been wronged will never feel that they got justice; and probably the American people, when they learn about it, will not think they got justice. It will always be suspect—whether it is the CIA investigating its own people, or Cointel, or whether it is HEW or any other agency.

General BELL. I have no objection to having some outside group; that's why we have courts now for crime. But, if you want to have something short of that, you could have some outside group. I have no objection to that. I appreciate the point you are making.

Senator METZENBAUM. I think that what I am trying to say is that I would feel more comfortable—and I don't have anything spe-

cifically in mind because I am not the author of this legislation nor am I that much of an authority on it—if the disciplinary agency or the individual were totally unconnected to the agency in which the individual is working. Some have suggested the Civil Service Commission. I am, frankly, not certain that I buy that concept myself. I think, conceivably, that there might be some special kind of disciplinary review board or something of the kind. I throw this out to you as a consideration of the kind of thing that I think some further thought should be given to.

General BELL. Let me make a suggestion of a middle ground on that. There is a way that you can appeal what the agency does in its own disciplinary proceedings. This would make the agency be more careful, but there would not be too many appeals.

Senator METZENBAUM. To whom would you appeal?

General BELL. You would have some outside group; the Civil Service Commission or——

Senator METZENBAUM. In other words, you have an in-house disciplinary procedure——

General BELL. Right.

Senator METZENBAUM. And then with the right to review.

General BELL. Right.

Senator METZENBAUM. I think that would be——

General BELL. It would be a more practical way to do it.

Senator METZENBAUM. I think the only point that I am making is this. As a part of this bill we ought to have this kind of program or perhaps certainly in place so we know what is going to happen.

General BELL. I am in agreement with that.

I will tell you, if you get into a position where I am, where you have to work out something like the discipline of a person and you feel like you ought to make it public and you know you are going to generate civil suits which might in the end be terribly costly to the person, then it may impair your thinking when you are prepared to discipline someone. Or, if you discipline him, you don't want to make it public. But, if you close the record, it would probably become public. So, it really interferes with management because management includes some disciplinary action. That is another reason why we need some legislation of this kind.

Senator METZENBAUM. In these proceedings, who would initiate the proceeding? The citizen? If the citizen were to initiate it, how would he or she go about doing so?

General BELL. Mr. Jaffe and his group have been studying that, so I prefer him to answer that.

Mr. JAFFE. We have been considering that. While there are some problems that have to be determined, regardless of which way we determine some of the other problems, the citizen—that is, the person who was injured, the person whose rights were violated—would be able to initiate the proceeding. He would, in our contemplation, not only be able to participate; he would be able to question witnesses.[1] He would be able—in our thinking so far—himself to appeal to the Civil Service Commission, at which place he could get an entirely new trial; that is, a completely new trial.

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[1] See Department amendment § 7802(c)(1) on p. 49.

The Civil Service Commission would not merely review, as it does today, whether the procedures of the agency and its own regulations were followed. He would have a new trial, if you will, or at least a new investigation.[2]

There is some talk—we have not fully resolved that part of the thing—as to whether or not the citizen himself may seek judicial review from his dissatisfaction with anything the Civil Service Commission does.[3]

These are all the possibilities we are considering. But the initiation of the complaint, investigation, by the citizen is something we in the department at least have all agreed upon.

Senator METZENBAUM. Mr. Jaffe, you are doing what I am doing; and it is bothering me a bit—like we have done in the name of our subcommittee. We keep talking about the rights of the citizen. Somehow we ought to find a word that is more apt, because noncitizens have rights as well.

Mr. JAFFE. That is correct. I changed the word "citizens" to "persons" every now and then when I saw it.

Senator METZENBAUM. Our subcommittee name has that. I have used it; you have used it. I think we all understand that we are not talking about citizens, but persons.

When do you see the Department, Mr. Jaffe, being able to resolve some of these questions as to various problems and issues that are still unresolved pertaining to this legislation?

Mr. JAFFE. Well, frankly, the only problem that I see that is unresolved is unquestionably one of the most important. That is what we have come to call accountability. It has to do with the ways and means of disciplining.

I think we have resolved all other questions; I think we have, with certain amendments that we are prepared to propose.

It is very difficult for me to make an estimate because it involves not only our ideas—"our" being the Department of Justice—but it may involve the Office of Management and Budget. It certainly would involve the Civil Service Commission. Agencies' views would have to be made known because it would impose a much greater burden on them than they have yet experienced.

So, I cannot give you an estimate. But I would hope that we could do it with reasonable dispatch.

Senator METZENBAUM. Well, I know that the Attorney General is anxious to move the bill.

Mr. JAFFE. Yes.

Senator METZENBAUM. The chairman of the subcommittee wants to be cooperative, but I want to be certain that we understand that we are not going to move the bill until we get this issue resolved. So, at this point I want to make it clear that we will not be dragging our feet if you won't drag your feet.

Mr. JAFFE. We are mindful of that. We would like to have this bill go forward, and that is enough impetus for us to act as quickly as we can.

I would hope to be able to do it in a matter of a few weeks. The only reason I cannot give you a definite deadline is because, if it

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[2] See Department amendment § 7802(c)(2) on p. 50.
[3] See Department amendment § 7804 on p. 50.

was only the Department of Justice that had to work this out, I could give you a time.

Senator METZENBAUM. I will not pressure you on it. I just want you to understand that the corollary of moving the bill is that we resolve the question.

Mr. JAFFE. I had assumed that, Senator.

Senator METZENBAUM. Will the individual person be able to prosecute both the suit and the administrative procedures simultaneously?

Mr. JAFFE. Well, we have discussed that. We would consider that undesirable for many practical reasons.

General BELL. We had a meeting on that yesterday. I concluded we could not agree to that.[1] I think some people wanted us to do that, but that would just have exacerbated the problem. We would have two proceedings going at the same time. There would be nothing to be gained by doing that. It would be sort of a—not a double recovery, but a double procedure. It is unnecessary, in my judgment.

Senator METZENBAUM. Would you then be forcing the individual into an election?

General BELL. Only if the individual wanted to go strictly by disciplinary proceedings.

If the individual wants to claim damages, then I think that route ought to be taken first. Then, if damages are awarded and the disciplinary proceedings results in no discipline, then I think the citizen ought to be able to appeal that somewhere.

Senator METZENBAUM. Let us take an example——

General BELL. On the other hand, if the citizen says, "I don't care anything about any damages; I would just like to have a disciplinary proceeding," then I think they ought to waive damages in that instance.

Senator METZENBAUM. Let's take some specific examples. Let me take an elementary one.

I can think of many cases, such as a drunken driver who goes out and causes a personal injury or property damage and perhaps should be subject to disciplinary proceedings. Now, I do not think the individual who suffers by reason of that fact should be deprived of recovering adequate damages. It may be very great pecuniary damages, but that individual may also say that "I think it is a terrible thing that my Government lets a person stay on, and they do nothing to him; he is just going to stay on in the same position."

There may be many other kinds of cases where you really need both remedies. I am not even sure the matter of disciplinary proceeding is a remedy. But I think it is a question of saying, "Well, why isn't the Government doing something about this particular person who violated my civil rights, my constitutional rights, my legal rights? Even though I am going to get damages, it still seems that they ought to be doing something."

General BELL. I agree with that. You would get damages, and you would get the disciplinary proceeding. I just say go for damages first to see if you are entitled to damages. You might find the person was not drunk. So, that is just a waste to go both ways at the same time.

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[1] See Department amendment § 7802(a) at p. 49.

Senator METZENBAUM. Give me the rationale as to why the individual should not be permitted to proceed on both fronts at the same time. I am having trouble following that.

General BELL. There is no rationale to it; it is just a complete waste. Why should you have two lawsuits when you can get by with one? That's what is wrong with our court system now; we have so many things like that going on.

I tell you the truth. I would rather not have the bill if we are going to get so complicated that it will fall of its own weight.

Now, the idea of presuming somebody is guilty before they have a trial and starting a disciplinary proceeding—suppose they find in the disciplinary proceeding they are not guilty and then in the court suit that they are?

Senator METZENBAUM. But, as a matter of fact, that probably would be an element of evidence in the case that in the disciplinary proceeding they were found not to have been subjected to discipline, that they had not done anything wrong.

Mr. JAFFE. It would not be the same proceeding at all, Senator. Nothing that would occur in the court case—if the United States was the defendant—would permit us, for example, to discuss the good faith of the employee. It would not permit us to bring in any of the evidence—not any of it, really—that the employee would have available in the disciplinary proceeding. So, the evidence in one would not even be remotely admissible in the other.

Senator METZENBAUM. I am willing to agree with that. But, having said that, let's assume that John Jones works for you in one of your departments. He goes out and drives this automobile, and he is the same drunk driver. He is driving while intoxicated. And he is charged in a criminal court for DWI and he is charged in a civil court with a damage suit. Now, you might have two cases going with a degree of burden of proof in both those cases.

It really does not preclude one going forward absent the other. It does not say which one has to go before the other. And I am really repeating in saying, what is the rationale for saying we only want one to go forward and not the other?

First of all, the statute of limitations might be running against the individual while the disciplinary proceeding is going on.

Second of all, while the civil proceeding is proceeding forward. it may be two years for that pattern to be disposed of. Meanwhile, that person could do the same thing over and over again. Also, if it happened to be an appointee, he might even have left the Government by that time.

I can't quite——

General BELL. Let's take a better example instead of driving a car, because that is already covered by law. Let's take some FBI agents breaking down somebody's door and breaking into a house without a warrant. Presumably the FBI or the Attorney General would be responsible enough to start a disciplinary proceeding in that case.

What we are thinking about now is the citizen being able to participate and to get redress in case our system was inadequate to the extent that we failed to punish it. Now, that citizen could sue for damages at the same time.

It may be that this is a nonproblem that we are discussing. I do not think we can discuss it very well until we write it out. We have not written it out yet. It may be that, once we have written it out, I will agree with you.

Senator METZENBAUM. I think you ought to reconsider the statement saying that if you had to have this you would not want the bill at all.

I do not come forward with any preconceived idea. I walked into this hearing not even thinking about this subject, but as we talked about it and it developed, it does give me some concern. I think we ought to be talking further about it.

General BELL. I think we are trying to accomplish the same thing. Oftentimes you gain when you articulate things in writing.

Senator METZENBAUM. Let me ask you this. Suppose an individual who files a complaint before a disciplinary proceedings needs a lawyer and has some court costs, or some deposition costs, whatever the case may be. It is contemplated that those costs will be covered if he or she prevails or she did not prevail? Has any thought been given to the subject?

Mr. JAFFE. In the administrative proceeding?

Senator METZENBAUM. Yes.

Mr. JAFFE. I do not recall that that was discussed. We could consider it.

General BELL. It was not discussed yesterday.

Senator METZENBAUM. I suggest that at least it be brought on the table and thought about and discussed, hopefully with my staff.

Mr. JAFFE. Very well. But that would introduce a factor which would have some bearing on whether you could have both simultaneously and other considerations.

Senator METZENBAUM. The question does not mean that I am presupposing the answer.

Mr. JAFFE. I understand.

General BELL. I think it would not be a bad thing to put a lawyer in the matter. You can discipline a lawyer. You can make him sign a rule 11 certificate, and you eliminate frivolous cases; whereas the pro se type matter gets to be a problem.

So, I think, other than giving a person a lawyer—which we like to do in our country—there could be another advantage to it. So, we will look at that.[1]

Senator METZENBAUM. I think at least part of the reason for our preliminary hearing is to open these concerns and raise the issues.

Mr. JAFFE. Senator, I would like to correct a statement I made before in case it was misunderstood.

I said, in outlining an administrative procedure that we had been considering—I indicated that judicial review from the Civil Service Commission to the courts by the person who was aggrieved was under consideration.

The Attorney General has already expressed the view that he would favor judicial review.

Senator METZENBAUM. Judicial review by——

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[1] The Department disciplinary proceeding amendment at p. 49 does not provide for attorney's fees.

Mr. JAFFE. At the person's instigation. The employee has that right.

Senator METZENBAUM. One of the questions my staff has raised is what kind of sanctions or procedures could be used with respect to presidential appointees and ex-employees, since no administrative proceeding is possible against them? Then, what is your view with respect to the question of whether the individual would have the right to sue either the Government or the individual?

General BELL. That is the same category of people who have retired. You have a substantial number of people that you could not reach with an administrative proceeding: retired people, somebody who resigned, Presidential appointees. We never resolved that yesterday.

At one point, Irving Jaffe had the idea that we would make public findings. It would be like a public censure. That would be one thing you could do. You could go ahead with some commission and just make public what happened. That could include a reprimand.[1]

But you could not do something like discharging people or docking their pay unless you wanted to dock their pension, and I expect that would get too complicated to pass. We did not say anything about that. We have not thought, really, of a good answer to that.

Senator METZENBAUM. I think it is a problem. Public censure or reprimand would be significant, as I see it, if you were talking about a high-level, high-profile individual. In most of the cases, you are talking about low level, low profile people, and the very best you might get is a 1-inch item in some newspaper somewhere which would not be very significant.

General BELL. Right.

Senator METZENBAUM. I think one question I would like to propose to you in those cases where the person had left the Government is whether or not in those instances there ought to be an election of remedies—that the person would have a right to sue the Government or the individual.

General BELL. That is what we are thinking about.[2]

I know that in one investigation that we just released, most everyone in that matter has already left the Government.

Senator METZENBAUM. How many criminal prosecutions have been brought for violations of constitutional rights such as Cointel, wiretapping, et cetera, done by the Government? We know of the Kearney matter, but we do not know of any others.

General BELL. None that I know of. There might be some I do not know about. The only one I have brought since I have been Attorney General is the Kearney matter.

I looked at the Cointel, and the statute of limitations had run. Some of those Cointel matters are not crimes. Whether you would agree with Cointel or not is a different question, but you have to find a crime. The last I saw, there were 291 Cointel people that were being notified that they may have lost a right. But the people who did that were not necessarily committing crimes. The Cointel thing had been wound up by the time I got to Washington.

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[1] See Department amendment § 7803 at p. 50.
[2] See Department answers to subcommittee questions at p. 119 in the appendix.

I have a sufficient number of problems without going back opening up some that have been closed.

The FBI break-in, I brought one.

Senator METZENBAUM. Mr. Jaffe, do you know of any?

Mr. JAFFE. No; I cannot recall any; but that would not normally come within the province of my activities since we handle no criminal matters.

When I consulted with the Criminal Division and the Civil Rights Division, it is possible that they can retrieve this information. But they have it indexed only under the statute that they may have proceeded under.

Senator METZENBAUM. I cannot believe that there——

Mr. JAFFE. We did have the *Collinsville* case in which indictments were returned against either six or eight defendants—I am not sure—who were Federal drug enforcement agents. They were indicted, tried, and acquitted.

Senator METZENBAUM. In that case they brought civil, administrative proceedings at the same time they brought criminal proceedings.

Mr. JAFFE. Prior to the criminal proceedings.

Senator METZENBAUM. Prior.

Mr. Jaffe, will you have them figure out their own retrieval processes and advise the subcommittee in writing what other cases, if any, have been brought with respect to prosecutions other than the *Kearney* and the *Collinsville* cases, either under Cointel, wiretapping, or any other similar kinds of procedure? I think the record ought to show whether there were any more than these two instances. It is somewhat indefinite at this point. I think it probably ought to be searched out.

Mr. JAFFE. I will try. The difficulty is that even the retrieval system that I understand is in place does not separately identify Federal employees, for example; so that, even if we were to determine what statutes might be applicable, and we drew all the files on that, we would have to go through every one to see if they were, at the time of the indictment, either current or former Federal employees.

General BELL. We will do our best to get that.

Senator METZENBAUM. I appreciate that.

[The information referred to follows:]

STATISTICS ON FEDERAL CIVIL RIGHTS PROSECUTIONS OF FEDERAL EMPLOYEES AS OF FEBRUARY 1978

The following is a list of criminal prosecutions undertaken by the Civil Rights Division and the Criminal Division of the Department of Justice over the past ten years against federal employees for criminal conduct amounting to violations of another's civil rights.

United States v. *Bloemker, et al.* (5–CR–73–80, S.D. Ill. August 24, 1973), a case involving 10 narcotics agents assigned to the St. Louis office of the Office of Drug Abuse Law Enforcement, resulted from a series of entries into private homes which became known as the Collinsville Raids. The agents were searching, without warrants, for members of a suspected drug ring when they broke into a number of wrong houses. All agents were acquitted after trial. The statutes involved were Title 18 U.S.C. §§ 242, 371 and 2236.

United States v. *Goldston* (CR. No. 77–138, W.D.N.Y. July 28, 1977), involved an agent of the Alcohol, Tobacco and Firearms Division of the Treasury Department in Buffalo, New York who was accused of assaulting and beating a hand-cuffed teenager in the head with his service revolver. The defendant pled nolo contendere and was sentenced to an $800 fine and 1 year of probation. Goldston was also dismissed by the Alcohol, Tobacco and Firearms Division.

United States v. *Kearney* (CR. No. 77-245, S.D.N.Y. April 7, 1977), involves a former FBI supervisor in the Bureau's New York office for violation of statutes proscribing mail interception (18 U.S.C. § 1702) and wiretapping without proper authorization (18 U.S.C. § 2511) as well as conspiracy to engage in both types of conduct. This case is pending.

United States v. *Bartell* (Cr. No. ——, D.N.J. June 14, 1974), involved an Alcohol, Tobacco and Firearms agent who was attempting to purchase illegal guns from an individual who was proving reluctant to sell them. Accordingly, the agent had two informants beat the victim to convince him to make the gun sales. The victim then made the sales and the agent arrested him. The agent plead guilty to violating 18 U.S.C. § 241 and was sentenced to a five year suspended term with four years of probation.

United States v. *Wade, et al.* (Cr. No. ——, W.D. Tex. March, 1976), involved counts against two Customs patrol officers on conspiracy and endeavoring to intercept communications of the targets of a Custom's investigation. Charges against one officer were dismissed on procedural grounds after jeopardy had attached; the second officer was convicted on both counts and given concurrent sentences of two years with execution suspended in lieu of five years unsupervised probation. The statutes involved were 18 U.S.C. §§ 371 and 2511.

General BELL. We have a number of cases we brought against State police officers, for example, in civil rights cases. I have brought some of those indictments since I have been here and have had some convictions.

Mr. JAFFE. And you understand, Senator, that, in exercising a prosecutive judgment as to whether to institute a criminal proceeding, if for example, the agent acted under a warrant which was later declared to be invalid, under existing criminal law—even in title 18 now—that reliance would be a complete defense; that is, the fact that he had one. So, even if we thought he had acted improperly or had used poor judgment, it would not be sufficient as a proper exercise of prosecutive judgment to have indicted him. He has so many defenses.

Senator METZENBAUM. One of the concerns we understandably would have is whether or not there has been a reluctance to move forward on a criminal basis.

Senator THURMOND. Mr. Chairman, I regret that I cannot stay for this hearing. I am on this Criminal Code matter as a ranking member of Judiciary. I just wanted to explain that to you and to the Attorney General.

Senator METZENBAUM. Thank you for stopping by, Senator.

Mr. JAFFE. We will try, Mr. Chairman, to get all the information we can. I doubt that we could get it, but I would like to get to you any information where we considered seriously prosecution and then did not take it.

Senator METZENBAUM. Mr. Jaffe, these are such unusual cases where the Government is prosecuting its own people that I cannot believe we cannot find it, whether it is in the retrieval system or in John Smith's head—how many John Smiths there are, I do not know.

One of the thrusts of my question comes back to my original inquiry concerning the matter of the agency judging its own people. What I am concerned about, the thrust of my question, has to do with whether or not there have been a host of instances in which there may or may not have been basis for prosecution, but that somebody leaned over backwards because he did not want to prose-

cute a part of the team. It is the kind of thing, frankly, that the Attorney General has had the courage to go forward in the prosecution of the *Kearney* case, but certainly has been subjected to unbelievable pressure as to what a terrible thing he is doing because he is prosecuting somebody in the FBI.

What I am asking about is, how many other cases have there been where it was questionable as to whether somebody did not have the courage of their convictions as does the Attorney General to move forward in that area?

Mr. JAFFE. Senator, I would merely like to say this, since you mention the reluctance to prosecute a member of the team. My own experience that deals with civil fraud, for example, frequently involves bribery, antikickback, or anything which involves a Government employee who is acting in concert, say, with a Government contractor or with someone else—in those cases, invariably we will give immunity to the person who extended the bribe or to the contractor because we think it more important to get after the Government employee than it is to retrieve the money from the person who extended the bribe.

Our thinking at least—and I have observed it in Government in all the years I have been there—is that, when it is a Government employee who is involved in wrongdoing, it is more important to reach him for the integrity of the Government than it is to reach his coconspirator who is outside the Government.

I merely offer you that for the way we have traditionally acted in those limited areas in which I have participated.

Senator METZENBAUM. Then I am certain that your investigation of the records will provide some supporting indication——

Mr. JAFFE. Those would not be the constitutional wrongs, which I understood your question was addressed to.

Senator METZENBAUM. That is correct.

General BELL. We had plenty of prosecutions of Government employees, but not for constitutional wrongs.

Senator METZENBAUM. There are various organizations that represent Federal employees. Have any of them asked for or been consulted about this legislation?

General BELL. There has been some talk about them.

Mr. JAFFE. I think there has been some talk, but I did not participate in any conversation with representatives of the employee unions.

General BELL. Let me ask Patricia Wald about that. Would you answer that, Ms. Wald?

Ms. WALD. They are certainly aware of the legislation, Mr. Chairman; we have had some phone conversations with them. I do not think they have been asked at this point to come down on one side or the other or to express themselves. They have not come to us and expressed any particular views with regard to the legislation.

Senator METZENBAUM. But all of the unions or labor organizations representing Federal employees are quite aware that this legislation is pending?

Ms. WALD. Certainly the major ones are, Mr. Chairman; that is right.

Senator METZENBAUM. Is there any hard evidence that Federal employees have been inhibited in their proper activities by suits?

Were those FBI agents that you were saying had purchased malpractice-type insurance?

General BELL. It is FBI agents. I have not got any hard evidence, but I have a hard feeling that the FBI agents were very worried about civil suits. Of course, I want them to be certain to get authority. But that does not keep them from being sued.

You see, a civil suit is a devastating thing, given modern rules of procedure, discovery process. A lot of them live in fear or dread of being sued, of being wiped out just paying lawyers.

Senator METZENBAUM. I am having difficulty understanding where they would have problems in their proper activities.

General BELL. Not everyone agrees what is proper and not proper; that is how you get into a lawsuit.

Mr. JAFFE. Senator, about 2 years ago, I was asked to go to a meeting at HUD. I was asked to attend a meeting at HUD shortly after a suit was instituted against two HUD inspectors for the damage to a house adjoining one that had been taken over by HUD.

Their liability was predicated on their not having performed their duties in inspecting the house that HUD had obtained to see to it that it had no fire hazards, that the place was relatively clean of anything that might create a fire. The broad description of their duties certainly would have included that.

When a fire did break out, which originated in the HUD-owned, unoccupied house and spread to the house next door, the owner of the house next door sued the two agents for all the damages he suffered on the ground that they had negligently performed their duties.

He sued them individually. He did not sue the United States. When they were told that, if a judgment was obtained against them—we tendered our representation—that it would be their responsibility, HUD called for a meeting which I attended. I explained what the law was. I explained that we had every hope that we would be successful in the case; our record has been very good on that.

I was told then that their inspectors were going to either quit their jobs, would require indemnity, or they would not do their duties at all. They would refuse to go out to these places. Or, if they did go out to these places, it would be very costly to HUD because they would take the place apart. They would either not do their duties or do them in such an oppressive manner that the interests of the Government would not be served.

Senator METZENBAUM. What was the bottom line? What finally happened?

Mr. JAFFE. What finally happened was that we got the case dismissed.

General BELL. There are not too many of these cases lost in the end. But it is a matter of paying the lawyers and managing the case that gets to be the problem.

Mr. JAFFE. It is the conflict cases that give us the problem—not when we represent; I am not trying to sound conceited.

General BELL. These FBI agents I talked to were not worried about losing the cases in the end. They are willing to be put in the hands of a jury. But they know what lawyers cost. They read about

all these lawyers' legal fees. They do not have the money to pay the lawyers.

Senator METZENBAUM. Is it the department's intention to make various exceptions in section 2680, such as discretionary acts and acts pursuant to statute or regulation, inapplicable to constitutional torts?

Mr. JAFFE. Yes.[1]

Senator METZENBAUM. With respect to the amendments referred to in the questionnaire which we submitted to you, have all of them been submitted today?

Mr. JAFFE. All of the responses have been submitted.

Senator METZENBAUM. You have a lot of amendments with you?

Mr. JAFFE. I have some amendments with me. I do not know whether I am free to give them to the subcommittee or even if the Attorney General is, because I think we have to run this through the Office of Management and Budget, except for certain clarifying ones.

Senator METZENBAUM. We will not press you on it. Whenever you are ready, we will be ready.

Mr. JAFFE. I do have them prepared.

Ms. WALD. We have informed OMB about them, so you are free to submit them.

Mr. JAFFE. I am told that I am free to submit them because we have cleared them through OMB.

I have a copy of those that I prepared. These are unintelligible unless you can look at the bill at the same time.

Senator METZENBAUM. Why don't you or Ms. Wald work them out?

Mr. JAFFE. I will turn them over to Mr. Schwartz.

[The amendments submitted by the Department appear at p. 48 of the appendix.]

In answer to your last question, the amendment that we propose for all the exemptions that remain in Section 2680—it is my proposal to amend 2680, the preamble which I have here, so that it will read "except for tort claims arising under the Constitution of the United States, the provisions of this chapter and section 1346(b) of this title shall not apply to, and the United States shall not substitute itself in."[2]

I am following that preamble. Then you have the exceptions listed.

We do amend subdivision (h) of that section.

Senator METZENBAUM. We will get into that.

Mr. JAFFE. You will get into that.

Senator METZENBAUM. My final question is this. The bill is to apply to all pending cases. Is there not a constitutional question with respect to making it retroactive?

Mr. JAFFE. We have researched that. We concluded that there is not—that is, there may be a constitutional question; but we believe that it can be done. That is not free from doubt. We would expect the retroactivity provision to be litigated.

Senator METZENBAUM. Will you make available to the subcommittee that legal memo?

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[1] See Department amendment on pp. 48, 49.

[2] See p. 49 in the appendix.

Mr. JAFFE. Yes.

General BELL. Surely.

Mr. JAFFE. I would like to say that we would be able to prepare a legal memo.

Senator METZENBAUM. I thought you said that you had a legal memo.

Mr. JAFFE. We do, but I do not know whether I would like to submit what we have or whether I would like to prepare a new one.

General BELL. We would like to get an opinion from the Office of Legal Counsel anyway.

I hope it can be made retroactive because we need to dispose of a lot of the suits we have.

[The memorandum referred to will be found on p. 139 of the appendix.]

Senator METZENBAUM. I am sure you recognize—or you would not be working on the legal question—that there is a valid legal question.

General BELL. Yes.

Senator METZENBAUM. The subcommittee would certainly want to have that.

[The letter from the Justice Department appears at p. 52 in the appendix.]

Having said that, Mr. General, I think that that concludes our inquiry for this morning. We are very grateful to you for being with us.

The subject that we have before us is one that is provocative and has many aspects to it.

Senator Abourezk has some written questions that he will be submitting to you. [See pp. 104–139.] Staff may have certain additional questions. The staff will be prepared to work with your staff relative to seeing whether we can resolve all or most of the questions to see whether or not then we have certain remaining ones or where we are at that point.

Thank you very much.

General BELL. Thank you, Mr. Chairman.

Mr. JAFFE. Thank you, Mr. Chairman.

Senator METZENBAUM. We adjourn.

[Whereupon, at 10:55 a.m., the meeting was adjourned, subject to the call of the Chair.]

APPENDIX

LETTER OF ATTORNEY GENERAL TO VICE PRESIDENT MONDALE, SEPTEMBER 16, 1977

IDENTICAL SUBMISSION
TO THE SPEAKER

Office of the Attorney General
Washington, D. C. 20530

September 16, 1977

The Vice President
United States Senate
Washington, D.C. 20510

Dear Mr. Vice President:

Attached for your consideration and appropriate reference is a draft 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."

The purposes of the proposed legislation are threefold: first, to provide the victims of common law and "constitutional torts" committed by federal employees with a remedy against a financially responsible defendant; second, to protect federal employees from suits for money damages arising out of the performance of their duties; and, third, to eliminate the need for the Department of Justice to hire private attorneys to represent individual federal employees against whom such suits might be brought. The proposed bill would achieve these purposes by expanding the bases upon which the United States can be held liable for the conduct of its employees under the Tort Claims Act and by making suits against the government the exclusive civil remedy in such cases.

The concept of immunizing federal employees from suits based upon the performance of their duties is not new. Several existing statutes provide, on a piecemeal basis, immunity to specific categories of federal employees such as those who operate motor vehicles and medical and paramedical employees of some, but not all, government departments and agencies. This bill would expand that immunity so as to protect all federal employees in situations in which a remedy was available against the government.

Under the draft bill, in suits alleging traditional common law torts, the government would be liable -- and the federal employees immune -- if the employee was acting within the scope of his office or employment. The determination of

whether the employee was acting within the scope of his office or employment would be made on the basis of state law, just as it has been during the thirty years that the Tort Claims Act has been in existence. In suits alleging constitutional violations, however, the basis of government liability -- and, consequently, of employee immunity -- would be broader; liability would arise if the employee acted "under color of" his office or employment, even though not "within the scope of" his office or employment. It might be possible to describe, with greater specificity than by use of the phrase "under color of" the circumstances under which the government will be subject to, and the employee immune from, suits alleging constitutional violations. It does not seem wise to attempt to do so, however, since any such attempt would probably result in the omission of situations not now forseeable. Procedurally, the Federal Tort Claims Act provides that the Attorney General is to certify in each case that the individual employee was acting within the scope of his employment or under the color of his office in order for the employee to have immunity. The flexibility that this procedure provides seems preferable to a statutory designation of the parameters of the activities that might be engaged in under the color of an employee's office. Moreover, an individual plaintiff would be hard pressed to dispute such a certification, since its effect would be to provide the plaintiff with a solvent defendant without in any way diminishing his chances of recovery. Even if a judge were to raise the color of office question sua sponte, the certification by the Department of Justice should be very persuasive on the issue.

It should be noted that this bill would not provide the government employee with absolute immunity from the consequences of his tortious conduct. Rather he would be subject to appropriate disciplinary action where his conduct resulted in the payment of damages by the government. Under such circumstances, the Attorney General would be required by the bill to refer the matter for appropriate investigation and disciplinary action to the head of the department or agency involved. From a deterrent point of view, the prospect of disciplinary action and, if the conduct is criminal, the possibility of criminal prosecution, should be sufficient to prevent irresponsible individual action.

It might be argued that in an egregious case the individual employee should be personally liable in a third party action by the United States. Although the argument is plausible on its face, there are persuasive reasons for rejecting it.

First, experience shows that egregious cases are extremely rare. Second, one of the main purposes of the amendment is to improve employee morale and foster good faith, vigorous performance of duty, unimpaired by the threat of personal involvement in a lawsuit. To provide for third party actions so as to cover the rare instances in which they might be appropriate would be counter-productive in terms of achieving this purpose. Moreover, if a third party action against the employee were permitted, the employee would seek to intervene as a matter of right and would request the government to provide him with private counsel, and his presence in the suit would jeopardize the government's control of the litigation. While the statute could, of course, prohibit intervention, such a provision would hardly be conducive to improved employee morale. Finally, the overwhelming majority of federal employees would be unable personally to satisfy a judgment of more than a very modest amount. Thus, to permit a lawsuit over against them would be essentially a punitive gesture. For all of these reasons and in view of the deterrent effect of possible disciplinary action and even criminal prosecution, it seems undesirable and unnecessary to subject individual government employees to the added threat of civil liability.

As noted above, in addition to protecting government employees against individual lawsuits, the proposed legislation would expand the bases upon which the United States could be sued in lieu of its employees. It would do so by creating a statutory cause of action against the United States for the constitutional torts of any of its agents. Such a cause of action presently exists only for certain constitutional torts (assault, battery, false imprisonment, false arrest, abuse of process and malicious prosecution) committed by investigative or law enforcement officers. It should be noted, however, that this expansion of government liability will not result in the protection of all federal employees from individual lawsuits based on acts committed during the course of their employment or under color of their office. This is because the exclusivity provision of the bill is applicable only if there exists a remedy against the United States and because, even if the proposed amendments are enacted, suits against the United States will not be possible under the circumstances enumerated under Section 2680 of the Federal Tort Claims Act. Among the types of suits against the United States that would continue to be prohibited under that section are actions for libel, slander, misrepresentation, deceit or interference with contract rights (28 U.S.C. 2680 (h)). Thus, assuming that no constitutional violation was involved, government employees would continue to be individually liable in such cases.

In addition to expanding the bases for suits against the government, the bill would also enhance the remedy available to victims of constitutional torts committed by government employees; they would be entitled to at least liquidated damages of $1,000 (where actual damages in a greater amount cannot be proved) and could recover a reasonable attorney's fee and other litigation costs reasonably incurred.

The provisions for recovery of liquidated damages, attorney's fees and litigation costs are based on the existing civil remedy against individual agents provided in the wiretap statute, 18 U.S.C. 2520. That statute would be "repealed" or modified with respect to suits based on acts performed by federal employees within the scope of their office or employment or under color of such office or employment. The victim's remedy in such cases would be against the United States. This approach is necessary in order to eliminate the necessity of employing private counsel in such cases and to avoid creating an unwarranted distinction between violations of the wiretap statute and other constitutional torts. The alternative provision in 18 U.S.C. 2520 for compensation in the form of liquidated damages to be computed at a rate of $100 per day for each day the violation continues has been included for wiretap violations. The provision for punitive damages now found in the wiretap statute has not been included in the proposed amendment. The Federal Tort Claims Act has always precluded the award of punitive damages against the United States. Since the victim's remedy will no longer be against the individual who wronged him, but rather against the government, the imposition of punitive damages would penalize only the taxpayer without serving any meaningful deterrent purpose. Moreover, as pointed out above, the potential threat of disciplinary action or criminal prosecution should be sufficient to prevent the kind of excesses that would justify an award of punitive damages against an individual.

Under this bill, state law would be applicable to any liability question in an action based upon traditional common law negligence. In suits based upon constitutional tort theories, federal law would be determinative. Federal law obviously should govern the interpretation of the Federal Constitution.

As has always been the case, state law would govern the measure of damages in traditional common law tort cases. State law would also govern the measure of damages in constitutional

tort cases. While it could be provided that federal law should govern the damages issue in cases involving constitutional violations, there is very little federal law of damages in this area and it seems undesirable to burden the federal courts with the task of fashioning such law when state damage law would be appropriate in almost all cases. The only exception to the application of the state law of damages is that provided for liquidated damages for constitutional torts discussed above.

With respect to defenses to liability, the draft bill provides, as does the existing wiretap statute, that in constitutional tort cases "a good faith reliance on a court order or legislative authorization shall constitute a complete defense." In order to alleviate concern that this language might preclude the United States from asserting a good faith, reasonable belief defense on any basis other than a court order or legislative authorization, the bill explicitly provides that this provision is to be "without any effect or limitation upon any other defenses." Because the good faith, reasonable belief defense is a developing area of law, it is believed advisable to allow opportunity for further development rather than to attempt more specific statutory language.

The question of whether all defenses available to an agent of the government in a suit against him personally should also be available to the government itself is not without controversy. With respect to constitutional violations, it is the view of some that recovery should be permitted against the United States irrespective of defenses available to its agents. Essentially, this view is predicated on the belief that, as between the innocent citizen damaged by the constitutional wrong of a mistaken government agent and the government who set the agent in motion, it is more equitable to require the government to pay for the loss. The fact that the government routinely accepts liability for the negligent conduct of its agents, makes it difficult to explain why it does not also accept liability for the intentional, albeit mistaken, constitutional torts of those agents. The draft bill provides for actual or compensatory damages in such cases.

Mechanically the statute provides that, upon the certification of scope of employment or color of office, a lawsuit filed in state court will be removed to federal district court. Then, regardless of whether the suit was initiated in state or federal court, the United States will be substituted as the party defendant in place of the individual federal employee. The suit will then proceed just as if it had been initiated against the United States under the Federal Tort Claims Act.

The Federal Tort Claims Act requires that one must present a claim administratively to the agency or department that was responsible for the conduct in question and allow that department or agency an opportunity to investigate and reach a decision on the claim prior to filing suit. This requirement will continue to apply to all such Federal Tort Claims Act suits.

It is my view that this legislation is most urgently needed, both by government employees who may be defendants in possible tort actions and by the public who may be plaintiffs in such actions.

The Office of Management and Budget has advised this Department that enactment of this legislation would be consistent with the Administration's program.

Sincerely,

William B Bell

Attorney General

___ CONGRESS
___ SESSION

S. _____

(NOTE.—Fill in all blank lines except those provided for the date and number of bill.)

IN THE SENATE OF THE UNITED STATES

Mr. _____

introduced the following bill; which was read twice and referred to the Committee on _____

A BILL

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

(Insert title of bill here)

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 claim sounding in tort for money damages arisesunder the Constitution of the United States when such employee of the Government is acting within the scope of his office or employment, or under the color thereof, 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 claim sounding in tort for money damages arisesunder the Constitution of the United States when such employee of the Government is acting within the scope of his office or employment, or under the color thereof, such liability to be determined in accordance with applicable Federal law".

SEC. 3. Section 2674 of title 28, United States Code, is amended by (a) inserting in the first paragraph the following language after the word "claims" and before the comma: "based upon negligent or wrongful acts or omissions"; and (b) by adding as a third paragraph the following:

"The United States shall be liable, respecting the provisions of this title relating to tort claims arising under the Constitution of the United States, to the same extent as entitlement to compensation is recognized under the tort law of the place where the violation occurred, but shall not be liable for interest prior to judgment or for punitive damages: Provided, however, That for a claim arising under the Constitution of the United States, such compensation shall not be less than liquidated damages of $1,000, except that for a claim arising from the interception or disclosure of a wire or oral communication in violation of chapter 119 of title 18, such compensation shall not be less than liquidated damages computed at the rate of $100 a day for each day of violation or $1,000 whichever is higher, plus a reasonable attorney's fee and other litigation costs reasonably incurred; and Provided further, that without any effect or limitation upon any other defenses, a good faith reliance on a court order or legislative authorization shall constitute a complete defense to any claim or suit arising under the Constitution of the United States, but, notwithstanding the existence of such defense, the United States shall, when it has determined that the officer or employee was acting within the scope of his office or employment or under color thereof, reimburse the person whose constitutional rights were violated for the actual or compensatory damages sustained.".

SEC. 4. Section 2675(a) of title 28, United States Code, is amended by inserting the following language after "employment,":

"or upon a claim for money damages arising from the violation of the Constitution of the United States by any employee of the Government while acting within the scope of his office or employment or under the color thereof,".

SEC. 5. Section 2679(b) of title 28, United States Code, is amended to read as follows:

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

SEC. 6. Section 2679(d) of title 28, United States Code, is amended to read as follows:

"(d)(1) Upon certification by the Attorney General that the defendant employee was acting within the scope of his office or employment, or in claims arising under the Constitution of the United States that the employee was acting within the scope of his office or employment or under

the color thereof, at the time of the incident out of which the suit arose any such civil action or proceeding commenced in a United States district court shall be deemed an action against the United States under the provisions of this title and all references thereto, and the United States shall be substituted as the party defendant. After such substitution the United States shall have available all defenses to which it would have been entitled if the action had originally been commenced against the United States under this chapter and section 1346(b).

"(d)(2) Upon certification by the Attorney General that the defendant employee was acting within the scope of his office or employment, or in claims arising under the Constitution of the United States that the employee was acting within the scope of his office or employment or under the color thereof, 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 of the district and division embracing the place wherein it is pending and be deemed an action brought against the United States under the provisions of this title and all references thereto, and the United States shall be substituted as the party defendant. After such substitution the United States shall have available all defenses to which it would have been entitled if the action had originally been commenced against the United States under this chapter and section 1346(b). The certification of the Attorney General shall conclusively establish scope of office or employment and in claims arising under the Constitution of the United States, acting under color of office or employment for

purposes of such initial removal. Should a district court of the United States determine on a hearing on a motion to remand held before trial on the merits that the employee defendant was not acting within the scope of his office or employment, and in claims arising under the Constitution of the United States, acting within the scope of his office or employment or under color thereof, the case shall be remanded to the state court in which it was initially filed.

"(d)(3) The provisions of this chapter and section 1346(b) shall not apply in cases where the United States has not waived its sovereign immunity under this chapter.

"(d)(4) Where an action or proceeding under this chapter 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 action or proceeding shall be dismissed, but in that event the running of any limitation of time for commencing, or filing an application or claim in, such proceeding for compensation or other benefits shall be deemed to have been suspended during the pendency of the civil action or proceeding under this chapter.".

SEC. 7. Section 2679 of title 28, United States Code, is amended by adding a new subsection (f) as follows:

"(f) Where an action or proceeding under section 1346(b) or 2672 arising under the Constitution of the United States results in a judgment against the United States or an award, compromise or settlement paid by the United States, the Attorney General shall forward the matter for such further administrative investigation or disciplinary action as may be appropriate to the head of the department or agency by which the employee whose violation or act or omission gave rise to the claims was employed.".

SEC. 8. Section 2680(h) of title 28, United States Code, is amended to read as follows:

"(h) Any claim arising out of libel, slander, misrepresentation, deceit, or interference with contract rights.".

SEC. 9. (a) Subsections (a) through (d) of section 4116 of title 38, United States Code, are repealed, and subsection (e) of that section is amended by deletion of the designation "(e)", by deleting the words "person to whom the immunity provisions of this section apply (as described in subsection (a) of this section)," and inserting in lieu thereof the words "employee of the Department of Medicine and Surgery".

(b) Subsections (a) through (e) of section 224 of the Public Health Service Act, as added by section 4 of the Act of December 31, 1970, and renumbered (42 U.S.C. 233(a) through (e)), are repealed, and subsection (f) is amended by deletion of the designation "(f)".

(c) Subsections (a) through (e) of section 1091 of the Foreign Service Act of 1946, as added by section 119 of the Act of July 12, 1976 (22 U.S.C. 817(a) through (e)) are repealed.

(d) Subsections (a) through (e) of section 1089, title 10, United States Code, are repealed. Subsection (f) is amended by deleting the words "person described in subsection (a)" and inserting in lieu thereof the words "employee of the armed forces, the Department of Defense, or the Central Intelligence Agency,".

(e) Subsections (a) through (e) of section 307 of the National Aeronautics and Space Act of 1958, as added by section 3 of the Act of October 8, 1976 (42 U.S.C. 2458a(a) through (e)), are repealed, and subsection (f) is amended by the deletion of the designation "(f)", by the deletion of the words "person described in subsection (a)" and by the insertion

in lieu thereof of the words "employee of the National Aeronautics and Space Administration".

SEC. 10. Section 2520, title 18, United States Code, shall not apply to civil causes of action against officers or employees of the United States while acting within the scope of their office or employment, or while acting under the color of such office or employment.

SEC. 11. This Act shall apply to all claims and suits pending on the date of enactment or filed or accruing thereafter.

COPY OF S. 2117

95TH CONGRESS
1ST SESSION

S. 2117

IN THE SENATE OF THE UNITED STATES

SEPTEMBER 21, 1977

Mr. EASTLAND introduced the following bill; which was read twice and referred to the Committee on the Judiciary

A BILL

To amend title 28 of the United States Code to provide for an exclusive remedy against the United States in suits based upon acts or omissions of United States employees, 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 claim sounding in tort for money damages arises under the Constitution of the United States when such employee of the Government is acting within the scope of his office or employment, or un-

der the color thereof, 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 claim sounding in tort for money damages arises under the Constitution of the United States when such employee of the Government is acting within the scope of his office or employment, or under the color thereof, such liability to be determined in accordance with applicable Federal law".

SEC. 3. Section 2674 of title 28, United States Code, is amended by (a) inserting in the first paragraph the following language after the word "claims" and before the comma: "based upon negligent or wrongful acts or omissions"; and (b) by adding as a third paragraph the following:

"The United States shall be liable, respecting the provisions of this title relating to tort claims arising under the Constitution of the United States, to the same exent as entitlement to compensation is recognized under the tort law of the place where the violation occurred, but shall not be liable for interest prior to judgment or for punitive damages: *Provided, however,* That for a claim arising under the Constitution of the United States, such compensation shall not be less than liquidated damages of $1,000, except that for

a claim arising from the interception or disclosure of a wire or oral communication in violation of chapter 119 of title 18, such compensation shall not be less than liquidated damages computed at the rate of $100 a day for each day of violation or $1,000 whichever is higher, plus a reasonable attorney's fee and other litigation costs reasonably incurred: *And provided further,* That without any effect or limitation upon any other defenses, a good faith reliance on a court order or legislative authorization shall constitute a complete defense to any claim or suit arising under the Constitution of the United States, but, notwithstanding the existence of such defense, the United States shall, when it has determined that the officer or employee was acting within the scope of his office or employment or under color thereof, reimburse the person whose constitutional rights were violated for the actual or compensatory damages sustained.".

SEC. 4. Section 2675 (a) of title 28, United States Code, is amended by inserting the following language after "employment,": "or upon a claim for money damages arising from the violation of the Constitution of the United States by any employee of the Government while acting within the scope of his office or employment or under the color thereof,".

SEC. 5. Section 2679 (b) of title 28, United States Code, is amended to read as follows:

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

SEC. 6. Section 2679 (d) of title 28, United States Code, is amended to read as follows:

"(d) (1) Upon certification by the Attorney General that the defendant employee was acting within the scope of his office or employment, or in claims arising under the Constitution of the United States that the employee was acting within the scope of his office or employment or under the color thereof, at the time of the incident out of which the suit arose any such civil action or proceeding commenced in a United States district court shall be deemed an action

against the United States under the provisions of this title and all references thereto, and the United States shall be substituted as the party defendent. After such substitution the United States shall have available all defenses to which it would have been entitled if the action had originally been commenced against the United States under this chapter and section 1346 (b).

"(d) (2) Upon certification by the Attorney General that the defendant employee was acting within the scope of his office or employment, or in claims arising under the Constitution of the United States that the employee was acting within the scope of his office or employment or under the color thereof, 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 of the district and division embracing the place wherein it is pending and be deemed an action brought against the United States under the provisions of this title and all references thereto, and the United States shall be substituted as the party defendant. After such substitution the United States shall have available all defenses to which it would have been entitled if the action had originally been commenced against the United States under this chapter and section 1346 (b). The certification

of the Attorney General shall conclusively establish scope of office or employment and in claims arising under the Constitution of the United States, acting under color of office or employment for purposes of such initial removal. Should a district court of the United States determine on a hearing on a motion to remand held before trial on the merits that the employee defendant was not acting within the scope of his office or employment, and in claims arising under the Constitution of the United States, acting within the scope of his office or employment or under color thereof, the case shall be remanded to the State court in which it was initially filed.

"(d) (3) The provisions of this chapter and section 1346(b) shall not apply in cases where the United States has not waived its sovereign immunity under this chapter.

"(d) (4) Where an action or proceeding under this chapter 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 action or proceeding shall be dismissed, but in that event the running of any limitation of time for commencing, or filing an application or claim in, such proceeding for compensation or other benefits shall be deemed to have been suspended during the pendency of the civil action or proceeding under this chapter.".

SEC. 7. Section 2679 of title 28, United States Code, is amended by adding a new subsection (f) as follows:

"(f) Where an action or proceeding under section 1346 (b) or 2672 arising under the Constitution of the United States results in a judgment against the United States or an award, compromise, or settlement paid by the United States, the Attorney General shall forward the matter for such further administrative investigation or disciplinary action as may be appropriate to the head of the department or agency by which the employee whose violation or act or omission gave rise to the claims was employed.".

SEC. 8. Section 2680 (h) of title 28, United States Code, is amended to read as follows:

"(h) Any claim arising out of libel, slander, misrepresentation, deceit, or interference with contract rights.".

SEC. 9. (a) Subsections (a) through (d) of section 4116 of title 38, United States Code, are repealed, and subsection (e) of that section is amended by deletion of the designation "(e)", by deleting the words "person to whom the immunity provisions of this section apply (as described in subsection (a) of this section)," and inserting in lieu thereof the words "employee of the Department of Medicine and Surgery".

(b) Subsections (a) through (e) of section 224 of the Public Health Service Act, as added by section 4 of the Act

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of December 31, 1970, and renumbered (42 U.S.C. 233 (a) through (e)), are repealed, and subsection (f) is amended by deletion of the designation "(f)".

(c) Subsections (a) through (e) of section 1091 of the Foreign Service Act of 1946, as added by section 119 of the Act of July 12, 1976 (22 U.S.C. 817(a) through (e)) are repealed.

(d) Subsections (a) through (e) of section 1089, title 10, United States Code, are repealed. Subsection (f) is amended by deleting the words "person described in subsection (a)" and inserting in lieu thereof the words "employee of the Armed Forces, the Department of Defense, or the Central Intelligence Agency,".

(e) Subsections (a) through (e) of section 307 of the National Aeronautics and Space Act of 1958, as added by section 3 of the Act of October 8, 1976 (42 U.S.C. 2458a (a) through (e)), are repealed, and subsection (f) is amended by the deletion of the designation "(f)", by the deletion of the words "person described in subsection (a)" and by the insertion in lieu thereof of the words "employee of the National Aeronautics and Space Administration".

SEC. 10. Section 2520, title 18, United States Code, shall not apply to civil causes of action against officers or employees of the United States while acting within the scope

of their office or employment, or while acting under the color of such office or employment.

SEC. 11. This Act shall apply to all claims and suits pending on the date of enactment or filed or accruing thereafter.

Amendments of Senator Eastland

To extend the provisions of section 2679 of title 28 to judgments entered on or after January 1, 1975.

[S. 2117, 95th Cong., 1st sess.]

AMENDMENTS intended to be proposed by Mr. Eastland to S. 2117, 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, viz: On page 9, line 3, after "Sec. 11.", insert "(a)".

On page 9, after line 5, add the following new subsection:

"(b) Any judgment entered on or after January 1, 1975, against any employees of the Government (as defined in section 2671 of title 28, United States Code) resulting from a suit which, if pending on the date of enactment of this Act, would have been within the purview of subsection (b) of section 1346 and chapter 171 of title 28, United States Code, as amended by this Act, shall, to the extent of the liability of the employee of the Government under such judgment, be deemed to have been an action brought against the United States under such subsection and chapter, as amended by this Act, the United States shall be deemed to have been substituted as a party defendant in lieu of such employee of the Government, and the United States shall, to the extent of the liability of that employee, be responsible for payments necessary to satisfy that liability.".

Amendments Submitted by Department of Justice at Hearing on January 26, 1978, Regarding "Good Faith," Class Actions, and Section 2680 Exemptions

1. Amend subparagraph (b) of Sec. 3 by adding in the first proviso, after "$1,000," and before "except," on page 2, line 25, the words "plus a reasonable attorney's fee and other litigation costs reasonably incurred."

2. On page 3, line 2, change "in violation of" to "as defined in."

3. On page 3, line 7, delete the language following the colon to the word "sustained" on line 17, and substitute the following:

"*With the further proviso, however*, that the United States may not assert as a defense to a suit against it alleging a Constitutional tort, the absolute or qualified immunity of the employee (except members of Congress, judges or prosecutors or those performing such functions) or his good faith belief in the lawfulness of his conduct."

4. Sec. 3 is further amended by adding a subparagraph (c) at the end thereof to read as follows:

"Section 2678 of Title 28, United States Code is amended by inserting at the beginning thereof the words 'Except as otherwise provided by the third paragraph of Section 2674 of this title,' and changing the word 'No' to 'no'."

5. Sec. 4 is amended by inserting "(a)" after "Sec. 4" on page 3, line 18, and by adding subsection "(b)" to Sec. 4 and further amending Section 2675(a) of Title 28, by changing the period at the end of Section 2675(a) to a semicolon and adding the following language—

"*Provided, however*, that upon a claim for money damages arising from the violation of the Constitution of the United States, class actions in conformity with the requirements of the Federal Rules of Civil Procedure may be instituted provided that the claim presented to the appropriate Federal agency expressly asserts the representative nature of the claim and specifically describes the members of the class, the common interests of the claimant and such members, and the basis upon which the claimant believes he can fairly and adequately protect the interests of the class as their representative."

6. Amend Sec. 6 of the bill by deleting subsection "(d)(3)" of Section 2679(d) of Title 28, on page 6, lines 13 to 15, and renumbering subsection "(d)(4)" on page 6, line 16, to "(d)(3)".

7. Amend Sec. 8, on page 7, lines 12 to 15, to read as follows:

"Sec. 8(a). The preamble to Section 2680 of Title 28, United States Code, is amended to read as follows:

"Except for tort claims arising under the Constitution of the United States, the provisions of this chapter and section 1346(b) of this title shall not apply to and the United States shall not substitute itself in—"

(b) Section 2680(h) of Title 28, United States Code, is amended to read as follows:

"(h) any claim arising out of libel, slander, misrepresentation, deceit, or interference with contract rights."

Amendment Submitted by Department of Justice on April 10, 1978, Regarding Disciplinary Procedures [1]

Title 5, United States Code, is amended by adding a new chapter 78 containing new sections 7801, 7802, 7803, 7804, 7805, and 7806 as follows:

"Section 7801. *Definitions*

For the purposes of this chapter:

(1) "Person" means any natural person subject to the Constitution of the United States;

(2) "Federal agency" means a Federal agency, as defined in section 2671 of title 28, United States Code, which employs or employed an "employee" defined in subsection (3) of this section;

(3) "Employee", unless otherwise described, means a present "employee of the Government" as defined in section 2671 of title 28, United States Code; and

(4) "Disciplinary Action" means removal, suspension without pay, demotion, admonishment or reprimand for such cause as will promote the efficiency of the service.

Section 7802. *Administrative inquiries*

(a)(1) Where a claim filed by a person under section 2675 of title 28, United States Code, arising under the Constitution of the United States, results in an administrative award, compromise or settlement paid by the United States, and except as provided in section 7803, such person within 30 days of execution of the award, compromise or settlement, may submit a written request to the head of the Federal agency or his designee to initiate an administrative inquiry of the acts of the employee which gave rise to the claim, as provided by rules, regulations, and instructions issued pursuant to subsection (b) of this section.

(a)(2) Where a civil action brought in any court by a person under section 1346(b) of title 28, United States Code, on a claim arising under the Constitution of the United States, results in a judgment against the United States, or a settlement or compromise executed by the United States, and except as provided in section 7803, such person within 30 days after time for appeal of the judgment has expired, or within 30 days after execution of the settlement or compromise, may submit a written request to the head of the Federal agency or his designee to initiate an administrative inquiry of the acts of the employee which gave rise to the claim, as provided by rules, regulations, and instructions issued pursuant to subsection (b) of this section.

(b) Within 60 days of the effective date of the regulations described in section 7805 of this chapter, the head of each Federal agency to which such regulations are applicable shall issue rules, regulations, and instructions for initiating and conducting an administrative inquiry requested under subsection (a)(1) or (a)(2).

(c) A person who has requested an inquiry under subsection (a)(1) or (a)(2) of this section;

(1) May submit a statement, and if a hearing is held, give testimony, pursuant to the rules, regulations, and instructions issued under subsection (b), and shall be notified of the action taken on such request or inquiry and the reasons therefore, and

[1] See letter of April 10, 1978, at p. 52 in the appendix. This amendment would add a new § 12 to the bill.

(2) may, within 30 days from notification of the action of the Federal agency, appeal its action (A) to the Secretary of Defense or his designee if the employee is a uniformed member of the Armed Forces as described in section 101(4) of title 10 of the United States Code, (B) to the Secretary of the Department in which the United States Coast Guard is operating or his designee if the employee is a member of the Coast Guard, (C) to the head of an agency or his designee with a personnel system under the Foreign Service Act of 1946, as amended (22 U.S.C. 801 *et seq.*), if the employee is an employee of the Foreign Service, (D) to the head of an agency or his designee with a personnel system under the Public Health Service Acts, as amended (42 U.S.C. 191 *et seq.*), if the employee is an employee or the Public Health Service, (E) to a reviewing entity or agency designated by the President to review the proceeding concerning an employee engaged in intelligence activities, or (F) to the Civil Service Commission in any other case. Such appeal process shall include de novo review of the acts of the employee which gave use to the request under subsection (a)(1) or (a)(2). Such review shall be conducted pursuant to regulations issued under section 7805 of this chapter, and shall include the issuance of a final decision with a statement of reasons and a recommendation of disciplinary action if any.

Section 7803. *Former employees; present and former Presidential appointees.*

With respect to a claim against a former employee or a present or former appointee of the President, a person who has met the requirements of § 7802(a) of this chapter shall be entitled to request an administrative inquiry based upon his claim described in subsection (a)(1) and (a)(2) of section 7802 of this chapter by (A) the Secretary of Defense if the former employee or present or former Presidential appointee is a uniformed member of the Armed Forces as described in section 101(4) of title 10 of the United States Code, (B) the Secretary of the Department in which the United States Coast Guard is operating if the former employee or present or former Presidential appointee is a member of the Coast Guard, (C) the head of an agency with a personnel system under the Foreign Service Act of 1946, as amended (22 U.S.C. 801 *et seq.*), if the former employee or present or former Presidential appointee is an employee of the foreign service, (D) to the head of an agency or his designee with a personnel system under the Public Health Service Acts, as amended (42 U.S.C. 191 *et seq.*), if the former employee or present or former Presidential appointee is an employee of the Public Health Service, (E) to a reviewing entity or agency designated by the President to review the proceeding concerning a former employee or present or former Presidential appointee engaged in intelligence activities, or (F) the Civil Service Commission in any other case. Such inquiries shall result in a written report to be made public not less than 30 days after service of the report on the former employee or present or former Presidential appointee whose conduct has been the subject of the administrative inquiry.

Section 7804. *Judicial Review*

(a) A person who has obtained a final decision as provided by subsection (c)(2) of the section 7802 of this chapter may within 30 days thereof petition for its review in a district court of the United States which may affirm the decision or may set it aside and remand for further proceedings if the decision is found to be arbitrary or capricious based upon a review of the decision, statement of reasons, and recommended disciplinary action if any, issued pursuant to subsection (c)(2) of section 7802 of this chapter. Such review shall be held *in camera* for matters specifically protected from disclosure by statute or executive order or if the District Court determines that *in camera* review is in the interests of national security.

(b) A former employee or a present or former Presidential appointee whose conduct has been the subject of an administrative inquiry under section 7803 of this chapter may within 30 days after service upon him of the report of such inquiry, petition for its review in a district court of the United States which may enjoin the public release of such report if found by the court to be arbitrary or capricious.

Section 7805. *Regulations*

(a) Except as otherwise provided in this chapter, the Civil Service Commission with the approval of the Attorney General, within 90 days of enactment of this chapter, shall issue such regulations as it deems necessary and appropriate for the implementation of sections 7802–7804 of this chapter. The head of each Federal agency subject to the administrative review provisions of subsection 7802(c)(2)(F) of this chapter shall comply with such regulations and shall issue rules, regulations and instructions not inconsistent therewith.

(b) The Secretary of Defense, within 90 days of enactment of this chapter, shall issue such regulations as he deems necessary and appropriate for the implementation of sections 7802-7804 of this chapter. The head of each Federal agency which is enumerated in section 101(4) of title 10 of the United States Code shall, with respect to such uniformed members of the Armed Forces, comply with such regulations and shall issue rules, regulations, and instructions not inconsistent therewith.

(c) The reviewing entity or agency designated by the President for reviewing the conduct of employees or officers engaged in intelligence activities, within 90 days of the enactment of this chapter, shall issue such regulations as it deems necessary and appropriate for the implementation of section 7802–7804 of this chapter. The head of each Federal agency having employees or officers engaged in intelligence activities shall comply with such regulations and shall issue rules, regulations and instructions not inconsistent therewith.

(d) The Secretary of the Department in which the United States Coast Guard is operating, within 90 days of the enactment of this chapter, shall issue such regulations as are necessary and appropriate for the implementation of sections 7802–7804 of this chapter.

(e) The head of the agency with a personnel system under the Foreign Service Act of 1946, as amended, within 90 days of the enactment of this chapter, shall issue such regulations as are necessary and appropriate for the implementation of sections 7802–7804 of this chapter.

(f) The head of the agency with a personnel system under the Public Health Service Acts, so amended, within 90 days of the enactment of this chapter, shall issue such regulations as are necessary and appropriate for the implementation of sections 7802–7804 of this chapter.

Section 7806. *Miscellaneous*

(a) Nothing in this chapter shall affect the rights of an employee to appeal or to seek review or other means of redress of any disciplinary action taken against him which he would have under other provisions of law. However, an employee, who was the subject of a disciplinary action recommended by the Civil Service Commission pursuant to subsection 7802(c), shall not be required by any other provision of law to appeal an agency disciplinary action to the Commission prior to seeking any judicial review of that action.

(b) If an employee is not entitled under other provisions of law to seek administrative or judicial review of any disciplinary action taken against him, he may in the event a complainant seeks administrative review provided by section 7802(c)(2) of this chapter, participate in such review and give evidence or testimony if a hearing is held, and to the extent provided by section 7804 of this chapter, petition for judicial review of a final decision if any disciplinary action recommended under subsection 7802(c)(2) of this chapter is greater than that determined by the employing Federal agency under subsection 7801(c)(1).

(c) Nothing in this chapter shall affect the availability of defenses which an employee may raise in any administrative or judicial proceeding.

(d) Nothing in this chapter shall require a Federal agency to delay its disciplining of an employee, or empower the Civil Service Commission to reduce the severity of disciplinary action imposed by an agency against an employee who would not have a right to seek the Civil Service Commission's review of such action under other provisions of law.

Letter From Justice Department to Senator Metzenbaum, April 10, 1978, Regarding Disciplinary Proceeding Amendment and Retroactivity

Department of Justice,
Washington, D.C., April 10, 1978.

Hon. Howard M. Metzenbaum,
Chairman, Subcommittee on Citizens and Shareholders Rights and Remedies, Committee on the Judiciary, U.S. Senate, Washington, D.C.

Dear Mr. Chairman: Pursuant to your request I am forwarding a draft amendment to S. 2117, 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." [See p. 49]

The draft amendment would establish a mechanism by which the victim of a so-called constitutional tort could initiate and participate in an agency discipline proceeding directed against the employee tortfeasor. We believe that our draft discipline proceeding will prove a more than adequate replacement for the victim-initiated sanctions against employees presumably lost by insulating employees from individual civil liability. The Office of Management and Budget has advised us that it has no objection to the amendment from the standpoint of the President's program.

I am also forwarding, pursuant to your request, a memorandum prepared by the Department's Office of Legal Counsel concerning the constitutionality of section 11 of S. 2117.[1] As you know section 11 would make the bill applicable to all claims and suits pending on the date of enactment.

The memorandum concludes that the only constitutional question presented by the section is whether Congress can extinguish a plaintiff's right to a jury trial in a pending case. There is no constitutional question, the memorandum determines, posed by either the substitution of the United States as defendant or the abolition of claims for punitive damages in pending cases.

You will note that the memorandum presents three solutions to the Seventh Amendment problem caused by abrogating the plaintiff's right to a jury trial in a pending case. If the Subcommittee agrees with the Office of Legal Counsel that there are problems with the retroactivity provision, the option acceptable to this Department would be that which would allow the continuance of trial by jury pending cases against the Government. We would be pleased to work with the Subcommittee staff in drafting such an amendment to the bill.

I trust that having been supplied with the Administration's disciplinary amendment, and our views on the constitutionality of the bill's retroactivity provision, your Subcommittee can now begin mark-up of S. 2117. We, of course, stand ready to assist you in any way that we can.

Sincerely,

Patricia M. Wald,
Assistant Attorney General.

S. 2117 With Amendments Proposed by the Justice Department [2]

[S. 2117, 95th 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 claim sounding in tort for money damages arises under the Constitution of the United States when such employee of the Government is acting within the scope of his office or employment, or under the color thereof, such liability to be determined in accordance with applicable Federal law.".

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[1] See memo on p. 139.

[2] Matter proposed to be stricken from bill by Department amendments is enclosed in black brackets. New language proposed for the bill in Department amendments is printed in italic. The Department amendments of January 26 and April 10 are included.

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 th colon: ", or where the claim sounding in tort for money damages arises under the Constitution of the United States when such employee of the Government is acting within the scope of his office or employment, or under the color thereof, such liability to be determined in accordance with applicable Federal law".

SEC. 3. (*a*) Section 2674 of title 28, United States Code, is amended by

(*1*) [(a)] inserting in the first paragraph the following language after the word "claims" and before the comma: "based upon negligent or wrongful acts or omissions"; and

(*2*) [(b)] by adding as a third paragraph the following:

"The United States shall be liable, respecting the provisions of this title relating to tort claims arising under the Constitution of the United States, to the same extent as entitlement to compensation is recognized under the tort law of the place where the violation occurred, but shall not be liable for interest prior to judgment or for punitive damages: *Provided, however,* That for a claim arising under the Constitution of the United States, such compensation shall not be less than liquidated damages of $1,000, *plus a reasonable attorney's fee and other litigation costs reasonably incurred,* except that for a claim arising from the interception or disclosure of a wire or oral communication *as defined in* [in violation of] chapter 119 of title 18, such compensation shall not be less than liquidated damages computed at the rate of $100 a day for each day of violation or $1,000 whichever is higher, plus a reasonable attorney's fee and other litigation costs reasonably incurred: *With the further proviso, however, that the United States may not assert as a defense to a suit against it alleging a Constitutional tort, the absolute or qualified immunity of the employee (except Members of Congress, judges or prosecutors or those performing such functions) or his good faith belief in the lawfulness of his conduct.* [*And provided further,* That without any effect or limitation upon any other defenses, a good faith reliance on a court order or legislative authorization shall constitute a complete defense to any claim or suit arising under the Constitution of the United States, but, notwithstanding the existence of such defense, the United States shall, when it has determined that the officer or employee was acting within the scope of his office or employment or under color thereof, reimburse the person whose constitutional rights were violated for the actual or compensatory damages sustained.".] *and*

(*b*) *by amending section 2678 of title 28, United States Code, by inserting at the beginning thereof the words "Except as otherwise provided by the third paragraph of section 2674 of this title," and changing the word "No" to "no".*

SEC. 4. (*a*) Section 2675(a) of title 28, United States Code, is amended by inserting the following language after "employment,": "or upon a claim for money damages arising from the violation of the Constitution of the United States by any employee of the Government while acting within the scope of his office or employment or under the color thereof,"*; and* [.]

(*b*) *Section 2675(a) of title 28, United States Code, is further amended by changing the period at the end of section 2675(a) to a semicolon and adding the following language—*

"Provided, however, that upon a claim for money damages arising from the violation of the Constitution of the United States, class actions in conformity with the requirements of the Federal Rules of Civil Procedure may be instituted provided that the claim presented to the appropriate Federal agency expressly asserts the representative nature of the claim and specifically describes the members of the class, the common interests of the claimant and such members, and the basis upon which the claimant believes he can fairly and adequately protect the interests of the class as their representative."

SEC. 5. Section 2679(b) of title 28, United States Code, is amended to read as follows:

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

SEC. 6. Section 2679(d) of title 28, United States Code, is amended to read as follows:

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

"(d)(2) Upon certification by the Attorney General that the defendant employee was acting within the scope of his office or employment, or in claims arising under the Constitution of the United States that the employee was acting within the scope of his office or employment or under the color thereof, 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 of the district and division embracing the place wherein it is pending and be deemed an action brought against the United States under the provisions of this title and all references thereto, and the United States shall be substituted as the party defendant. After such substitution the United States shall have available all defenses to which it would have been entitled if the action had originally been commenced against the United States under this chapter and section 1346(b). The certification of the Attorney General shall conclusively establish scope of office or employment and in claims arising under the Constitution of the United States, acting under color of office or employment for purposes of such initial removal. Should a district court of the United States determine on a hearing on a motion to remand held before trial on the merits that the employee defendant was not acting within the scope of his office or employment, and in claims arising under the Constitution of the United States, acting within the scope of his office or employment or under color thereof, the case shall be remanded to the State court in which it was initially filed.

[**"(d)(3) The provisions of this chapter and section 1346(b) shall not apply in cases where the United States has not waived its sovereign immunity under this chapter.**]

"(d)(*3*) [**(4)**] Where an action or proceeding under this chapter 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 action or proceeding shall be dismissed, but in that event the running of any limitation of time for commencing, or filing an application or claim in, such proceeding for compensation or other benefits shall be deemed to have been suspended during the pendency of the civil action or proceeding under this chapter.".

SEC. 7. Section 2679 of title 28, United States Code, is amended by adding a new subsection (f) as follows:

"(f) Where an action or proceeding under section 1346(b) or 2672 arising under the Constitution of the United States results in a judgment against the United States or an award, compromise, or settlement paid by the United States, the Attorney General shall forward the matter for such further administrative investigation or disciplinary action as may be appropriate to the head of the department or agency by which the employee whose violation or act or omission gave rise to the claims was employed.".

SEC. 8. (*a*) *The preamble to section 2680 of title 28, United States Code, is amended to read as follows:*

"Except for tort claims arising under the Constitution of the United States, the provisions of this chapter and section 1346(b) of this title shall not apply to and the United States shall not substitute itself in—"

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

"(h) Any claim arising out of libel, slander, misrepresentation, deceit, or interference with contract rights.".

SEC. 9. (a) Subsections (a) through (d) of section 4116 of title 38, United States Code, are repealed, and subsection (e) of that section is amended by deletion of the designation "(e)", by deleting the words "person to whom the immunity provisions of this section apply (as described in subsection (a) of this

section)," and inserting in lieu thereof the words "employee of the Department of Medicine and Surgery".

(b) Subsections (a) through (e) of section 224 of the Public Health Service Act, as added by section 4 of the Act of December 31, 1970, and renumbered (42 U.S.C. 233 (a) through (e)), are repealed, and subsection (f) is amended by deletion of the designation "(f)".

(c) Subsections (a) through (e) of section 1091 of the Foreign Service Act of 1946, as added by section 119 of the Act of July 12, 1976 (22 U.S.C. 817 (a) through (e)) are repealed.

(d) Subsections (a) through (e) of section 1089, title 10, United States Code, are repealed. Subsection (f) is amended by deleting the words "person described in subsection (a)" and inserting in lieu thereof the words "employee of the Armed Forces, the Department of Defense, or the Central Intelligence Agency,".

(e) Subsections (a) through (e) of section 307 of the National Aeronautics and Space Act of 1958, as added by section 3 of the Act of October 8, 1976 (42 U.S.C. 2458a (a) through (e)), are repealed, and subsection (f) is amended by the deletion of the designation "(f)", by the deletion of the words "person described in subsection (a)" and by the insertion in lieu thereof of the words "employee of the National Aeronautics and Space Administration".

SEC. 10. Section 2520, title 18, United States Code, shall not apply to civil causes of action against officers or employees of the United States while acting within the scope of their office or employment, or while acting under the color of such office or employment.

SEC. 11. This Act shall apply to all claims and suits pending on the date of enactment or filed or accruing thereafter.

SEC. 12. Title 5, United States Code, is amended by adding a new chapter 78 containing new sections 7801, 7802, 7803, 7804, 7805, and 7806 as follows:

"Section 7801. Definitions

For the purposes of this chapter:

(1) "Person" means any natural person subject to the Constitution of the United States;

(2) "Federal agency" means a Federal agency, as defined in section 2671 of title 28, United States Code, which employs or employed an "employee" defined in subsection (3) of this section;

(3) "Employee", unless otherwise described, means a present "employee of the Government" as defined in section 2671 of title 28, United States Code; and

(4) "Disciplinary Action" means removal, suspension without pay, demotion, admonishment or reprimand for such cause as will promote the efficiency of the service.

Section 7802. Administrative inquiries

(a)(1) Where a claim filed by a person under section 2675 of title 28, United States Code, arising under the Constitution of the United States, results in an administrative award, compromise or settlement paid by the United States, and except as provided in section 7803, such person within 30 days of execution of the award, compromise or settlement, may submit a written request to the head of the Federal agency or his designee to initiate an administrative inquiry of the acts of the employee which gave rise to the claim, as provided by rules, regulations, and instructions issued pursuant to subsection (b) of this section.

(a)(2) Where a civil action brought in any court by a person under section 1346(b) of title 28, United States Code, on a claim arising under the Constitution of the United States, results in a judgment against the United States, or a settlement or compromise executed by the United States, and except as provided in section 7803, such person within 30 days after time for appeal of the judgment has expired, or within 30 days after execution of the settlement or compromise, may submit a written request to the head of the Federal agency or his designee to initiate an administrative inquiry of the acts of the employee which gave rise to the claim, as provided by rules, regulations, and instructions issued pursuant to subsection (b) of this section.

(b) Within 60 days of the effective date of the regulations described in section 7805 of this chapter, the head of each Federal agency to which such regulations are applicable shall issue rules, regulations, and instructions for initiating and conducting an administrative inquiry requested under subsection (a)(1) or (a)(2).

(c) a person who has requested an inquiry under subsection (a)(1) or (a)(2) of this section;

(1) may submit a statement, and if a hearing is held, give testimony, pursuant to the rules, regulations, and instructions issued under subsection (b), and shall be notified of the action taken on such request or inquiry and the reasons therefore, and

(2) may, within 30 days from notification of the action of the Federal agency, appeal its action (A) to the Secretary of Defense or his designee if the employee is a uniformed member of the Armed Forces as described in section 101(4) of title 10 of the United States Code, (B) to the Secretary of the Department in which the United States Coast Guard is operating or his designee if the employee is a member of the Coast Guard, (C) to the head of an agency or his designee with a personnel system under the Foreign Service Act of 1946, as amended (22 U.S.C. 801 et seq.), if the employee is an employee of the Foreign Service, (D) to the head of an agency or his designee with a personnel system under the Public Health Service Acts, as amended (42 U.S.C. 191 et seq.), if the employee is an employee of the Public Health Service, (E) to a reviewing entity or agency designated by the President to review the proceeding concerning an employee engaged in intelligence activities, or (F) to the Civil Service Commission in any other case. Such appeal process shall include de novo review of the acts of the employee which gave use to the request under subsection (a)(1) or (a)(2). Such review shall be conducted pursuant to regulations issued under section 7805 of this chapter, and shall include the issuance of a final decision with a statement of reasons and a recommendation of disciplinary action if any.

Section 7803. Former employees; present and former Presidential appointees

With respect to a claim against a former employee or a present or former appointee of the President, a person who has met the requirements of section 7802 (a) of this chapter shall be entitled to request an administrative inquiry based upon his claim described in subsections (a)(1) and (a)(2) of section 7802 of this chapter by (A) the Secretary of Defense if the former employee or present or former Presidential appointee is a uniformed member of the Armed Forces as described in section 101(4) of title 10 of the United States Code, (B) the Secretary of the Department in which the United States Coast Guard is operating if the former employee or present or former Presidential appointee is a member of the Coast Guard, (C) the head of an agency with a personnel system under the Foreign Service Act of 1946, as amended (22 U.S.C. 801 et seq.), if the former employee or present or former Presidential appointee is an employee of the foreign service, (D) to the head of an agency or his designee with a personnel system under the Public Health Service Acts, as amended (42 U.S.C. 191 et seq.), if the former employee or present or former Presidential appointee is an employee of the Public Health Service, (E) to a reviewing entity or agency designated by the President to review the proceeding concerning a former employee or present or former Presidential appointee engaged in intelligence activities, or (F) the Civil Service Commission in any other case. Such inquiries shall result in a written report to be made public not less than 30 days after service of the report on the former employee or present or former Presidential appointee whose conduct has been the subject of the administrative inquiry.

Section 7804. Judicial review

(a) A person who has obtained a final decision as provided by subsection (c)(2) of the section 7802 of this chapter may within 30 days thereof petition for its review in a district court of the United States which may affirm the decision or may set it aside and remand for further proceedings if the decision is found to be arbitrary or capricious based upon a review of the decision, statement of reasons, and recommended disciplinary action if any, issued pursuant to subsection (a)(2) of section 7802 of this chapter. Such review shall be held in camera for matters specifically protected from disclosure by statute or executive order or if the District Court determines that in camera review is in the interests of national security.

(b) A former employee or a present or former Presidential appointee whose conduct has been the subject of an administrative inquiry under section 7803 of this chapter may within 30 days after service upon him of the report of such inquiry, petition for its review in a district court of the United States which may enjoin the public release of such report if found by the court to be arbitrary or capricious.

Section 7805. Regulations

(a) Except as otherwise provided in this chapter, the Civil Service Commission with the approval of the Attorney General, within 90 days of enactment of this

chapter, shall issue such regulations as it deems necessary and appropriate for the implementation of sections 7802–7804 of this chapter. The head of each Federal agency subject to the administrative review provisions of subsection 7802 (c) (2) (F) of this chapter shall comply with such regulations and shall issue rules, regulations and instructions not inconsistent therewith.

(b) The Secretary of Defense, within 90 days of enactment of this chapter, shall issue such regulations as he deems necessary and appropriate for the implementation of sections 7802–7804 of this chapter. The head of each Federal agency which is enumerated in section 101(4) of title 10 of the United States Code shall, with respect to such uniformed members of the Armed Forces, comply with such regulations and shall issue rules, regulations, and instructions not inconsistent therewith.

(c) The reviewing entity or agency designated by the President for reviewing the conduct of employees or officers engaged in intelligence activities, within 90 days of the enactment of this chapter, shall issue such regulations as it deems necessary and appropriate for the implementation of sections 7802–7804 of this chapter. The head of each Federal agency having employees or officers engaged in intelligence activities shall comply with such regulations and shall issue rules, regulations and instructions not inconsistent therewith.

(d) The Secretary of the Department in which the United States Coast Guard is operating, within 90 days of the enactment of this chapter, shall issue such regulations as are necessary and appropriate for the implementation of sections 7802–7804 of this chapter.

(e) The head of the agency with a personnel system under the Foreign Service Act of 1946, as amended, within 90 days of the enactment of this chapter, shall issue such regulations as are necessary and appropriate for the implementation of sections 7802–7804 of this chapter.

(f) The head of the agency with a personnel system under the Public Health Service Acts, so amended, within 90 days of the enactment of this chapter, shall issue such regulations as are necessary and appropriate for the implementation of sections 7802–7804 of this chapter.

Section 7806. Miscellaneous

(a) Nothing in this chapter shall affect the rights of an employee to appeal or to seek review or other means of redress of any disciplinary action taken against him which he would have under other provisions of law. However, an employee, who was the subject of a disciplinary action recommended by the Civil Service Commission pursuant to subsection 7802(c), shall not be required by any other provision of law to appeal an agency disciplinary action to the Commission prior to seeking any judicial review of that action.

(b) If an employee is not entitled under other provisions of law to seek administrative or judicial review of any disciplinary action taken against him, he may in the event a complainant seeks administrative review provided by section 7802 (c) (2) of this chapter, participate in such review and give evidence or testimony if a hearing is held, and to the extent provided by section 7804 of this chapter, petition for judicial review of a final decision if any disciplinary action recommended under subsection 7802(c) (2) of this chapter is greater than that determined by the employing Federal agency under subsection 7801(c) (1).

(c) Nothing in this chapter shall affect the availability of defenses which an employee may raise in any administrative or judicial proceeding.

(d) Nothing in this chapter shall require a Federal agency to delay its disciplining of an employee, or empower the Civil Service Commission to reduce the severity of disciplinary action imposed by an agency against an employee who would not have a right to seek the Civil Service Commission's review of such action under other provisions of law.

Federal Tort Claims Act as Amended by S. 2117 [1]

§ 1291. Final decisions of district courts

The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for

[1] Matter proposed to be stricken from the Tort Claims Act is enclosed in black brackets. New language proposed for the act is printed in italic. All Justice Department amendments to S. 2117 of Jan. 26 and Apr. 10 are shown.

the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court.

§ 1346. United States as defendant

(b) Subject to the provisions of chapter 171 of this title, the district courts, together with the United States District Court for the District of the Canal Zone, and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and 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 claim sounding in tort for money damages arises under the Constitution of the United States when such employee of the Government is acting within the scope of his office or employment, or under the color thereof, such liability to be determined in accordance with applicable Federal law.*

(c) The jurisdiction conferred by this section includes jurisdiction of any set-off, counterclaim, or other claim or demand whatever on the part of the United States against any plaintiff commencing an action under this section.

§ 1402. United States as defendant

(a) Any civil action against the United States under subsection (a) of section 1346 of this title may be prosecuted only:

(1) Except as provided in paragraph (2), in the judicial district where the plaintiff resides;

(2) In the case of a civil action by a corporation under paragraph (1) of subsection (a) of section 1346, in the judicial district in which is located the principal place of business or principal office or agency of the corporation; or if it has no principal place of business or principal office or agency in any judicial district (A) in the judicial district in which is located the office to which was made the return of the tax in respect of which the claim is made, or (B) if no return was made, in the judicial district in which lies the District of Columbia. Notwithstanding the foregoing provisions of this paragraph a district court, for the convenience of the parties and witnesses, in the interest of justice, may transfer any such action to any other district or division.

(b) Any civil action on a tort claim against the United States under subsection (b) of section 1346 of this title may be prosecuted only in the judicial district where the plaintiff resides or wherein the act or omission complained of occurred.

(c) Any civil action against the United States under subsection (e) of section 1346 of this title may be prosecuted only in the judicial district where the property is situated at the time of levy, or if no levy is made, in the judicial district in which the event occurred which gave rise to the cause of action.

(d) Any civil action under section 2409a to quiet title to an estate or interest in real property in which an interest is claimed by the United States shall be brought in the district court of the district where the property is located or, if located in different districts, in any of such districts.

§ 1504. Tort claims

The Court of Claims shall have jurisdiction to review by appeal final judgments in the district courts in civil actions based on tort claims brought under section 1346(b) of this title if the notice of appeal filed in the district court has affixed thereto the written consent on behalf of all the appellees that the appeal be taken to the Court of Claims.

§ 2110. Time for appeal to Court of Claims in tort claims cases

Appeals to the Court of Claims in tort claims cases, as provided in section 1504 of this title, shall be taken within ninety days after the entry of the final judgment of the district court.

§ 2401. Time for commencing action against United States

(b) A tort claim against the United States shall be forever barred unless it is presented in writing to the appropriate Federal agency within two years after such claim accrues or unless action is begun within six months after the date of mailing, by certified or registered mail, of notice of final denial of the claim by the agency to which it was presented.

§ 2402. Jury trial in actions against United States

Any action against the United States under section 1346 shall be tried by the court without a jury, except that any action against the United States under section 1346(a)(1) shall, at the request of either party to such action, be tried by the court with a jury.

§ 2411. Interest

(a) In any judgment of any court rendered (whether against the United States, a collector or deputy collector of internal revenue, a former collector or deputy collector, or the personal representative in case of death) for any overpayment in respect of any internal revenue tax, interest shall be allowed at an annual rate established under section 6621 of the Internal Revenue Code of 1954 upon the amount of the overpayment, from the date of the payment or collection thereof to a date preceding the date of the refund check by not more than thirty days, such date to be determined by the Commissioner of Internal Revenue. The Commissioner is authorized to tender by check payment of any such judgment, with interest as herein provided, at any time after such judgment becomes final, whether or not a claim for such payment has been duly filed, and such tender shall stop the running of interest, whether or not such refund check is accepted by the judgment creditor.

(b) Except as otherwise provided in subsection (a) of this section, on all final judgments rendered against the United States in actions instituted under section 1346 of this title, interest shall be computed at the rate of 4 per centum per annum from the date of the judgment up to, but not exceeding, thirty days after the date of approval of any appropriation Act providing for payment of the judgment.

§ 2412. Costs

Except as otherwise specially provided by statute, a judgment for costs, as enumerated in section 1920 of this title but not including the fees and expenses of attorneys may be awarded to the prevailing party in any civil action brought by or against the United States or any agency or official of the United States acting in his official capacity, in any court having jurisdiction of such action. A judgment for costs when taxed against the Government shall, in an amount established by statute or court rule or order, be limited to reimbursing in whole or in part the prevailing party for the costs incurred by him in the litigation. Payment of a judgment for costs shall be as provided in section 2414 and section 2517 of this title for the payment of judgments against the United States.

§ 2414. Payment of judgments and compromise settlements

Payment of final judgments rendered by a district court against the United States shall be made on settlements by the General Accounting Office. Payment of final judgments rendered by a State or foreign court or tribunal against the United States, or against its agencies or officials upon obligations or liabilities of the United States, shall be made on settlements by the General Accounting Office after certification by the Attorney General that it is in the interest of the United States to pay the same.

§ 2671. Definitions

As used in this chapter and sections 1346(b) and 2401(b) of this title, the term—

"Federal agency" includes the executive departments, the military departments, independent establishments of the United States, and corporations primarily acting as instrumentalities or agencies of the United States, but does not include any contractor with the United States.

"Employee of the government" includes officers or employees of any federal agency, members of the military or naval forces of the United States, and persons acting on behalf of a federal agency in an official capacity, temporarily or permanently in the service of the United States, whether with or without compensation.

"Acting within the scope of his office or employment", in the case of a member of the military or naval forces of the United States, means acting in line of duty.

§ 2672. Administrative adjustment of claims

The head of each Federal agency or his designee, in accordance with regulations prescribed by the Attorney General, may consider, ascertain, adjust, deter-

mine, 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 claim sounding in tort for money damages arises under the Constitution of the United States when such employee of the Government is acting within the scope of his office or employment, or under the color thereof, 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 $2,500 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 in like causes and appropriations or funds available for the payment of such judgments and compromises are here by made available for the payment of awards, compromises, or settlements under this chapter.

The acceptance by the claimant of any such award, compromise, or settlement shall be final and conclusive on the claimant, and shall constitute a complete release of any claim against the United States and against the employee of the government whose act or omission gave rise to the claim, by reason of the same subject matter.

§ 2673. Repealed.

§ 2674. Liability of United States

The United States shall be liable, respecting the provisions of this title relating to tort claims. *based upon negligent or wrongful acts or omissions* 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.

The United States shall be liable, respecting the provisions of this title relating to tort claims arising under the Constitution of the United States, to the same extent as entitlement to compensation is recognized under the tort law of the place where the violation occurred, but shall not be liable for interest prior to judgment or for punitive damages: Provided, however, That for a claim arising under the Constitution of the United States, such compensation shall not be less than liquidated damages of $1,000, plus a reasonable attorney's fee and other litigation costs reasonably incurred, except that for a claim arising from the interception or disclosure of a wire or oral communication as defined in chapter 119 of title 18, such compensation shall not be less than liquidated damages computed at the rate of $100 a day for each day of violation or $1,000 whichever is higher, plus a reasonable attorney's fee and other litigation costs reasonably incurred:

With the further proviso, however, that the United States may not assert as a defense to a suit against it alleging a constitutional tort, the absolute or qualified immunity of the employee (except members of Congress, judges or prosecutors or those performing such functions) or his good faith belief in the lawfulness of his conduct.

§ 2675. Disposition by federal agency as prerequisite; evidence

(a) An action shall not be instituted upon a claim against the United States for money damages for injury or loss of property or personal injury or death

caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment; *or upon a claim for money damages arising from the violation of the Constitution of the United States by any employee of the Government while acting within the scope of his office or employment or under the color thereof,* unless the claimant shall have first presented the claim to the appropriate Federal agency and his claim shall have been finally denied by the agency in writing and sent by certified or registered mail. The failure of an agency to make final disposition of a claim within six months after it is filed shall, at the option of the claimant any time thereafter, be deemed a final denial of the claim for purposes of this section. The provisions of this subsection shall not apply to such claims as may be asserted under the Federal Rules of Civil Procedure by third party complaint, crossclaim, or counterclaim[.]*; Provided, however, that upon a claim for money damage arising from the violation of the Constitution of the United States, class actions in conformity with the requirements of the Federal Rules of Civil Procedure may be instituted provided that the claim presented to the appropriate Federal agency expressly asserts the representative nature of the claim and specifically describes the members of the class, the common interests of the claimant and such members, and the basis upon which the claimant believes he can fairly and adequately protect the interests of the class as their representative.*"

(b) Action under this section shall not be instituted for any sum in excess of the amount of the claim presented to the federal agency, except where the increased amount is based upon newly discovered evidence not reasonably discoverable at the time of presenting the claim to the federal agency, or upon allegation and proof of intervening facts, relating to the amount of the claim.

(c) Disposition of any claim by the Attorney General or other head of a federal agency shall not be competent evidence of liability or amount of damages.

§ 2676. Judgment as bar

The judgment in an action under section 1346(b) of this title shall constitute a complete bar to any action by the claimant, by reason of the same subject matter, against the employee of the government whose act or omission gave rise to the claim.

§ 2677. Compromise

The Attorney General or his designee may arbitrate, compromise, or settle any claim cognizable under section 1346(b) of this title, after the commencement of an action thereon.

§ 2678. Attorney fees; penalty

Except as otherwise provided by the third paragraph of Section 2674 of this title, no attorney shall charge, demand, receive, or collect for services rendered, fees in excess of 25 per centum of any judgment rendered pursuant to section 1346(b) of this title or any settlement made pursuant to section 2677 of this title, or in excess of 20 per centum of any award, compromise, or settlement made pursuant to section 2672 of this title.

Any attorney who charges, demands, receives, or collects for services rendered in connection with such claim any amount in excess of that allowed under this section, if recovery be had, shall be fined not more than $2,000 or imprisoned not more than one year, or both.

§ 2679. Exclusiveness of remedy

(a) The authority of any federal agency to sue and be sued in its own name shall not be construed to authorize suits against such federal agency on claims which are cognizable under section 1346(b) of this title, and the remedies provided by this title in such cases shall be exclusive.

[(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, resulting from the operation by any employee of the Government of any motor vehicle while acting within the scope of his office or employment, shall hereafter be exclusive of any other civil action or proceeding by reason of the same subject matter against the employee or his estate whose act or omission gave rise to the claim.]

"*(b) The remedy against the United States provided by sections 1346(b) and 2672 of this title for claims for injury or loss of property or personal injury or*

death resulting from the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment or for claims arising from the violation of the Constitution of the United States by any employee of the Government while acting within the scope of his office or employment or while acting under the color thereof is exclusive of any other civil action or proceeding arising out of or relating to the same subject matter against the employee whose violation or act or omission gave rise to the claim, or against the estate of such employee.".

(c) The Attorney General shall defend any civil action or proceeding brought in any court against any employee of the Government or his estate for any such damage or injury. The employee against whom such civil action or proceeding is brought shall deliver within such time after date of service or knowledge of service as determined by the Attorney General, all process served upon him or an attested true copy thereof to his immediate superior or to whomever was designated by the head of his department to receive such papers and such person shall promptly furnish copies of the pleadings and process therein to the United States attorney for the district embracing the place wherein the proceeding is brought, to the Attorney General, and to the head of his employing Federal agency.

[(d) 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. Should a United States district court determine on a hearing on a motion to remand held before a trial on the merits that the case so removed is one in which a remedy by suit within the meaning of subsection (b) of this section is not available against the United States, the case shall be remanded to the State court.]

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

(d)(2) Upon certification by the Attorney General that the defendant employee was acting within the scope of his office or employment, or in claims arising under the Constitution of the United States that the employee was acting within the scope of his office or employment or under the color thereof, 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 of the district and division embracing the place wherein it is pending and be deemed an action brought against the United States under the provisions of this title and all references thereto, and the United States shall be substituted as the party defendant. After such substitution the United States shall have available all defenses to which it would have been entitled if the action had originally been commenced against the United States under this chapter and section 1346(b). The certification of the Attorney General shall conclusively establish scope of office or employment and in claims arising under the Constitution of the United States, acting under color of office or employment for purposes of such initial removal. Should a district court of the United States determine on a hearing on a motion to remand held before trial on the merits that the employee defendant was not acting within the scope of his office or employment, and in claims arising under the Constitution of the United States, acting within the scope of his office or employment or under color thereof, the case shall be remanded to the State court in which it was initially filed.

(d) (3) Where an action or proceeding under this chapter 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 action or proceeding shall be dismissed, but in that event the running of any limitation of time for commencing, or filing an application or claim in, such proceeding for compensation or other benefits shall be deemed to have been suspended during the pendency of the civil action or proceeding under this chapter.

(e) The Attorney General may compromise or settle any claim asserted in such civil action or proceeding in the manner provided in section 2677, and with the same effect.

(f) Where an action or proceeding under section 1346(b) or 2672 arising under the Constitution of the United States results in a judgment against the United States or an award, compromise, or settlement paid by the United States, the Attorney General shall forward the matter for such further administrative investigation or disciplinary action as may be appropriate to the head of the department or agency by which the employee whose violation or act or omission gave rise to the claims was employed.

§ 2680. Exceptions

Except for tort claims arising under the Constitution of the United States, the provisions of this chapter and section 1346(b) of this title shall not apply to and the United States shall not substitute itself in—

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

(a) Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.

(b) Any claim arising out of the loss, miscarriage, or negligent transmission of letters or postal matter.

(c) Any claim arising in respect of the assessment or collection of any tax or customs duty, or the detention of any goods or merchandise by any officer of customs or excise or any other law-enforcement officer.

(d) Any claim for which a remedy is provided by sections 741–752, 781–790 of Title 46, relating to claims or suits in admiralty against the United States.

(e) Any claim arising out of an act or omission of any employee of the Government in administering the provisions of sections 1–31 of Title 50, Appendix.

(f) Any claim for damages caused by the imposition or Establishment of a quarantine by the United States.

(g) Repealed.

(h) Any claim arising out of libel, slander, misrepresentation, deceit, or interference with contract rights.

[(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: *Provided*, That, with regard to acts or omissions of investigative or law enforcement officers of the United States Government, the provisions of this chapter and section 1346(b) of this title shall apply to any claim arising, on or after the date of the enactment of this proviso, out of assault, battery, false imprisonment, false arrest, abuse of process, or malicious prosecution. For the purpose of this subsection, "investigative or law enforcement officer" means any officer of the United States who is empowered by law to executive searches, to seize evidence, or to make arrests for violations of Federal law.]

(i) Any claim for damages caused by the fiscal operations of the Treasury or by the regulation of the monetary system.

(j) Any claim arising out of the combatant activities of the military or naval forces or the Coast Guard, during time of war.

(k) Any claim arising in a foreign country.

(*l*) Any claim arising from the activities of the Tennessee Valley Authority.

(m) Any claim arising from the activities of the Panama Canal Company.

(n) Any claim arising from the activities of a Federal land bank, a Federal intermediate credit bank, or a bank for cooperatives.

AMENDMENTS TO MISCELLANEOUS STATUTES (SECTIONS 9 AND 10 OF S. 2117)

(Section 9(a) of S. 2117)

VETERAN'S BENEFITS, 38 U.S.C. 4116

§ 4116. Defense of certain malpractice and negligence suits

[(a) The remedy—

(1) against the United States provided by sections 1346(b) and 2672 of title 28, or

(2) through proceedinges for compensation or other benefits from the United States as provided by any other law, where the availability of such benefits precludes a remedy under section 1346(b) or 2672 of title 28,

for damages for personal injury, including death ,allegedly arising from malpractice or negligence of a physician, dentist, podiatrist, optometrist, nurse, physician assistant, expanded-function dental auxiliaries, pharmacist, or paramedical (for example, medical and dental technicians, nursing assistants, and therapists) or other supporting personnel in furnishing medical care or treatment while in the exercise of such person's duties in or for the Department of Medicine and Surgery shall hereafter be exclusive of any other civil action or proceeding by reason of the same subject matter against such physician, dentist, podiatrist, optometrist, nurse, physician assistant, expanded-function dental auxiliaries, pharmacist, or paramedical or other supporting personnel (or such person's estate) whose act or omission gave rise to such claim.

(b) The Attorney General shall defend any civil action or proceeding brought in any court against any person referred to in subsection (a) of this section (or such person's estate) for any such damage or injury. Any such person against whom such civil action or proceeding is brought shall deliver within such time after date of service or knowledge of service as determined by the Attorney General, all process served upon such person or an attested true copy thereof to such person"s immediate superior or to whomever was designated by the Administrator to receive such papers and such person shall promptly furnish copies of the pleading and process therein to the United States attorney for the district embracing the place wherein the proceeding is brought, to the Attorney General, and to the Administrator.

(c) Upon a certification by the Attorney General that the defendant was acting in the scope of such person's employment in or for the Department of Medicine and Surgery 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 of the district and division embracing the place wherein it is pending and the proceeding deemed a tort action brought against the United States under the provisions of title 28 and all references thereto. 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. 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 such person's office or employment, the case shall be remanded to the State court.

(d) The Attorney General may compromise or settle any claim asserted in such civil action or proceeding in the manner provided in section 2677 of title 28, and with the same effect.

(e)] The Administrator may, to the extent the Administrator deems appropriate, hold harmless or provide liability insurance for any *employee of the Department of Medicine and Surgery* [person to whom the immunity provisions of this section apply (as described in subsection (a) of this section)], for damage for personal injury or death, or for property damage, negligently caused by such person while furnishing medical care or treatment (including the conduct of clinical studies or investigations) in the exercise of such person's duties in or for the Department of Medicine and Surgery, if such person is assigned to a foreign country, detailed to State or political division thereof, or is acting under any other circumstances which would preclude the remedies of an injured third per-

son against the United States, provided by sections 1346(b) and 2672 of title 28, for such damage or injury.

(Section 9(b) of S. 2117)

PUBLIC HEALTH SERVICE, 42 U.S.C. 233

§ 233. Civil actions or proceedings against commissioned officers or employees—Exclusiveness of remedy

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

Attorney General to defend action or proceeding; delivery of process to designated official; furnishing of copies of pleading and process to United States attorney, Attorney General, and Secretary

(b) The Attorney General shall defend any civil action or proceeding brought in any court against any person referred to in subsection (a) of this section (or his estate) for any such damage or injury. Any such person against whom such civil action or proceeding is brought shall deliver within such time after date of service or knowledge of service as determined by the Attorney General, all process served upon him or an attested true copy thereof to his immediate superior or to whomever was designated by the Secretary to receive such papers and such person shall promptly furnish copies of the pleading and process therein to the United States attorney for the district embracing the place wherein the proceeding is brought, to the Attorney General, and to the Secretary.

Removal to United States district court; procedure; proceeding upon removal deemed tort action against United States; hearing on moton to remand to determine availability of remedy against United States; remand to State court or dismissal

(c) Upon a certification by the Attorney General that the defendant was acting in 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 of the district and division embracing the place wherein it is pending and the proceeding deemed a tort action brought against the United States under the provisions of Title 28 and all references thereto. Should a United States district court determine on a hearing on a motion to remand held before a trial on the merit that the case so removed is one in which a remedy by suit within the meaning of subsection (a) of this section is not available against the United States, 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 the event the running of any limitation of time for commencing, or filing an application or claim in, such proceedings for compensation or other benefits shall be deemed to have been suspended during the pendency of the civil action or proceeding under this section.

Compromise or settlement of claim by Attorney General

(d) The Attorney General may compromise or settle any claim asserted in such civil action or proceeding in the manner provided in section 2677 of Title 28 and with the same effect.

Assault or battery

(e) For purposes of this section, the provisions of section 2680(h) of Title 28 shall not apply to assault or battery arising out of negligence in the performance of medical, surgical, dental, or related functions, including the conduct of clinical studies or investigations.

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

(f)] The Secretary or his designee may, to the extent that he deems appropriate, hold harmless or provide liability insurance for any officer or employee of the Public Health Service for damage for personal injury, including death, negligently caused by such 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 a State or political subdivision thereof or to a non-profit institution, and 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.

(Seceion 9(c) of S. 2117)

FOREIGN RELATIONS, 22 U.S.C. 817

§ 817 *Malpractice protection—Exclusiveness of remedies; immunity of professional and supporting personnel*

[(a) The remedy—

(1) against the United States provided by sections 1346(b) and 2672 of Title 28, or

(2) through proceedings for compensation or other benefits from the United States as provided by any other law, where the availability of such benefits precludes a remedy under such sections,

for damages for personal injury, including death, allegedly arising from malpractice or negligence of a physician, dentist, nurse, pharamacist, or paramedical (including medical and dental assistants and technicians, nursing assistants, and therapists) or other supporting personnel of the Department of State (including the Agency for International Development) in furnishing medical care or related services, including the conducting of clinical studies or investigations, while in the exercise of his or her duties in or for the Department of State or any other Federal department, agency, or instrumentality shall be exclusive of any other civil action or proceeding by reason of the same subject matter against such physician, dentist, nurse, pharmacist, or paramedical or other supporting personnel (or his or her estate) whose act or omission gave rise to such claim.

Civil actions defended by United States Government; delivery of and recipients of pleadings and process

(b) The United States Government shall defend any civil action or proceeding brought in any court against any person referred to in subsection (a) of this section (or his or her estate) for any such damage or injury. Any such person against whom such civil action or proceeding is brought shall deliver, within such time after date of service or knowledge of service as determined by the Attorney General, all process served upon him or her or an attested true copy thereof to whomever was designated by the Secretary to receive such papers and such person shall promptly furnish copies of the pleading and process therein to the United States attorney for the district embracing the place wherein the proceeding is brought, to the Attorney General, and to the Secretary.

Removable actions or proceedings; certification; venue; remand or dismissal: suspension of limitations

(c) Upon a certification by the Attorney General that the defendant was acting within the scope of his or her employment in or for the Department of State or any other Federal department, agency, or instrumentality 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 of the district and division embracing the place wherein it is pending and the proceeding deemed a tort action brought against the United States under the provisions of Title 28 and all references thereto. Should a United States district court determine on a hearing on a motion to remand held before a trial on the merits that the case so removed is one in which a remedy by suit within the meaning of subsection (a) of this section is not available against the United States, the case shall be remanded to the State court except that where such 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 or other benefits shall be deemed to have been suspended during the pendency of the civil action or proceeding under this section.

Compromise or settlement of claims

(d) The Attorney General may compromise or settle any claim asserted in such civil action or proceeding in the manner provided in section 2677 of Title 28 and with the same effect.

Nonapplication of section 2680(h) of Title 28 to the enumerated torts arising out of negligence in furnishing medical care or related services

(e) For purposes of this section, the provisions of section 2680(h) of Title 28 shall not apply to any tort enumerated therein arising out of negligence in the furnishing of medical care or related services, including the conducting of clinical studies or investigations.

Protection of professional and supporting personnel, by holding harmless or providing liability insurance, against damages for injuries or death negligently caused in furnishing medical care or related services during foreign area assignments or non-Federal service, or under circumstances precluding judicial or administrative remedies.

(f)][(a)] The Secretary may, to the extent he deems appropriate, hold harmless or provide liability insurance for any person to whom the immunity provisions of subsection (a) of this section apply, for damages for personal injury, including death, negligently caused by any such person while acting within the scope of his or her office or employment and as a result of the furnishing of medical care or related services, including the conducting of clinical studies or investigations, if such person is assigned to a foreign area or detailed for service with 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 provided by sections 1346(b) and 2672 of Title 28 for such damage or injury.

Medical care or related service within scope of employment

[(g)] (*b*) For purposes of this section, any medical care or related service covered by this section and performed abroad by a covered person at the direction or with the approval of the United States Ambassador or other principal representative of the United States in the area shall be deemed to be within the scope of employment of the individual performing the service.

(Section 9(d) of S. 2117)

ARMED FORCES, 10 U.S.C. 1089

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

[(a) The remedy against the United States provided by sections 1346(b) and 2672 of title 28 for damages for personal injury, including death, caused by the negligent or wrongful act or omission of any physician, dentist, nurse, pharmacist, or paramedical or other supporting personnel (including medical and dental technicians, nursing assistants, and therapists) of the armed forces, the Department of Defense, or the Central Intelligence Agency in the performance of medical, dental, or related health care functions (including clinical studies and investigations) while acting within the scope of his duties or employment therein or therefor shall hereafter be exclusive of any other civil action or proceeding by reason of the same subject matter against such physician, dentist, nurse, pharmacists, or paramedical or other supporting personnel (or the estate of such person) whose act or omission gave rise to such action or proceeding.

(b) The Attorney General shall defend any civil action or proceeding brought in any court against any person referred to in subsection (a) of this section (or the estate of such person) for any such injury. Any such person against whom such civil action or proceeding is brought shall deliver within such time after date of service or knowledge of service as determined by the Attorney General, all process served upon such person or an attested true copy thereof to such person's immediate superior or to whomever was designated by the head of the agency concerned to receive such papers and such person shall promptly furnish copies of the pleading and process therein to the United States attorney for

the district embracing the place wherein the action or proceeding is brought, to the Attorney General and to the head of the agency concerned.

(c) Upon a certification by the Attorney General that any person described in subsection (a) was acting in the scope of such person's duties or 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 of the district and division embracing the place wherein it is pending and the proceeding deemed a tort action brought against the United States under the provisions of title 28 and all references thereto. Should a United States district court determine on a hearing on a motion to remand held before a trial on the merits that the case so removed is one in which a remedy by suit within the meaning of subsection (a) of this section is not available against the United States, the case shall be remanded to the State court.

(d) The Attorney General may compromise or settle any claim asserted in such civil action or proceeding in the manner provided in section 2677 of title 28, and with the same effect.

(e) For purposes of this section, the provisions of section 2680(h) of title 28 shall not apply to any cause of action arising out of a negligent or wrongful act or omission in the performance of medical, dental, or related health care functions (including clinical studies and investigations).

[(f)] (*a*) The head of the agency concerned or his designee may, to the extent that he or his designee deems appropriate, hold harmless or provide liability insurance for any *employee of the Armed Forces, the Department of Defense, or the Central Intelligence Agency,* [person described in subsection (a)] for damages for personal injury, including death, caused by such person's negligent or wrongful act or omission in the performance of medical, dental, or related health care functions (including clinical studies and investigations) while acting within th scope of such person's duties if such person is assigned to a foreign country or detailed for service with other than a Federal department, agency, or instrumentality or if the circumstances are such as are likely to preclude the remedies of third persons against the United States described in section 1346(b) of title 28, for such damage or injury.

[(g)] (*b*) In this section, "head of the agency concerned" means—

(1) the Director of Central Intelligence, in the case of an employee of the Central Intelligence Agency;

(2) the Secretary of Transportation, in the case of a member or employee of the Coast Guard when it is not operating as a service in the Navy; and

(3) the Secretary of Defense, in all other cases.

(Section 9(e) of S. 2117)

PUBLIC HEALTH AND WELFARE, 42 U.S.C. 2458a

§ 2458a. Malpractice and negligence suits against the United States—Exclusive remedy

[(a) The remedy against the United States provided by sections 1346(b) and 2672 of Title 28 for damages for personal injury, including death, caused by the negligent or wrongful act or omission of any physician, dentist, nurse, pharmacist, or paramedical or other supporting personnel (including medical and dental technicians, nursing assistants, and therapists) of the Administration in the performance of medical, dental, or related health care functions (including clinical studies and investigations) while acting within the scope of his duties or employment therein or therefor shall hereafter be exclusive of any other civil action or proceeding by reason of the same subject matter against such physician, dentist, nurse, pharmacist, or paramedical or other supporting personnel (or the estate of such person) whose act or omission gave rise to such action or proceeding.

Attorney General to defend any civil action or proceeding for malpractice or negligence; service of process

(b) The Attorney General shall defend any civil action or proceeding brought in any court against any person referred to in subsection (a) of this section (or the estate of such person) for any such injury. Any such person against whom such civil action or proceeding is brought shall deliver within such time after date of service or knowledge of service as determined by the Attorney General, all process served upon such person or an attested true copy thereof to such

person's immediate superior or to whomever was designated by the Administrator to receive such papers and such person shall promptly furnish copies of the pleading and process therein to the United States Attorney for the district embracing the place wherein the proceeding is brought to the Attorney General and to the Administrator.

Removal of actions; certification by Attorney General; remand to State court

(c) Upon a certification by the Attorney General that any person described in subsection (a) of this section was acting in the scope of such person's duties or 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 of the district and division embracing the place wherein it is pending and the proceeding deemed a tort action brought against the United States under the provisions of Title 28, and all references thereto. Should a United States district court determine on a hearing on a motion to remand held before a trial on the merits that the case so removed is one in which a remedy by suit within the meaning of subsection (a) of this section is not available against the United States, the case shall be remanded to the State court.

Compromise or settlement of claims

(d) The Attorney General may compromise or settle any claim asserted in such civil action or proceeding in the manner provided in section 2677 of Title 28, and with the same effect.

Applicability of other provisions of law

(e) For purposes of this section, the provisions of section 2680(h) of Title 28, shall not apply to any cause of action arising out of a negligent or wrongful act of omission in the performance of medical, dental, or related health care functions (including clinical studies and investigations).

Liability insurance for persons assigned to foreign countries or non-Federal agencies

(f)] (*a*) The Administrator or his designee may, to the extent that the Administrator or his designee deem appropriate, hold harmless or provide liability insurance for any *employee of the National Aeronautics and Space Administration* [person described in subsection (a) of this section] for damages for personal injury, including death, caused by such person's negligent or wrongful act or omission in the performance of medical, dental, or related health care functions (including clinical studies and investigations) while acting within the scope of such person's duties if such person is assigned to a foreign country or detailed for service with other than a Federal department, agency, or instrumentality 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.

(Section 10 of S. 2117)

CRIMES AND CRIMINAL PROCEDURES, 18 U.S.C. 2520

§ 2520. Recovery of civil damages authorized

Any person whose wire or oral communication is intercepted, disclosed, or used in violation of this chapter shall (1) have a civil cause of action against any person who intercepts, discloses, or uses, or procures any other person to intercept, disclose, or use such communications, and (2) be entitled to recover from any such person—

[(a) actual damages but not less than liquidated damages computed at the rate of $100 a day for each day of violation or $1,000, whichever is higher;

(b) punitive damages; and

(c) a reasonable attorney's fee and other litigation costs reasonably incurred.

A good faith reliance on a court order or legislative authorization shall constitute a complete defense to any civil or criminal action brought under this chapter or under any other law.

[Section 10 of S. 2117 states that Section 2520, title 18, United States Code, above shall not apply to civil causes of action against officers or employees of the United States while acting within the scope of their office or employment, or while acting under the color of such office or employment.]

Letter of ACLU to Raymond S. Calamaro, October 3, 1977

AMERICAN CIVIL LIBERTIES UNION

Washington Office

October 3, 1977

Hon. Raymond S. Calamaro
Deputy Assistant Attorney General
Office of Legislative Affairs
Department of Justice
Room 1603
Constitution Ave. Bet. 9th & 10th Sts.
Washington, DC 20530

Dear Ray:

We have completed a preliminary review of the Department's 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."

We support certain aspects of this proposal and believe that it can represent a progressive step for victims of "constitutional torts" committed by federal employees. We have some concerns about the proposal as drafted, however, and would like to bring them to the Department's attention in the hope that we can work together in drafting amendments.

1. Good faith defense

Section 3 of the bill provides, "That without any effect or limitation upon any other defenses, a good faith reliance on a court order or legislative authorization shall constitute a complete defense to any claim or suit arising under the Constitution of the United States,...." As the Department acknowledges in its letter to the Vice President,[1] "The question of whether all defenses available to an agent of the government in a suit against him personally should also be available to the government itself is not without controversy." Since the good faith defense was developed to ensure that individual employees would not be deterred in the performance of their duties and responsibilities, we submit that there is no justification for allowing the government itself to assert good faith as a defense.

[1] Hereinafter "the letter." [See p. 26.]

600 Pennsylvania Avenue, S.E. Washington, D.C. 20003 (202) 544-1681

John H. F. Shattuck, Director • Jay A. Miller, Associate Director • Kathleen Miller, Legislative Representative
William F. Ware, Pamela S. Horowitz, Legislative Counsel • Ellen Leitzer, Staff Counsel • Jerry J. Berman, Legislative Associate
Norman Dorsen, Chairperson, Board of Directors • Aryeh Neier, Executive Director

As the letter concedes, "The fact that the government routinely accepts liability for the negligent conduct of its agents, makes it difficult to explain why it does not also accept liability for the intentional, albeit mistaken, constitutional torts of those agents." For this reason, the bill allows for an award of actual or compensatory damages even where the good faith defense is available. Thus, the only practical effect of the good faith provision is to preclude a minimum recovery. Particularly since the good faith defense is a "developing area of law," proof of the existence or non-existence of the defense will require the expenditure of countless hours of judicial time in each case where it is asserted. This drain on judicial resources cannot be justified where the only effect is the preclusion of a minimum recovery and where, in the absence of individual defendants, the rationale for the defense does not exist.

Since "as between the innocent citizen damaged by the constitutional wrong of a mistaken government agent and the government who set the agent in motion, it is more equitable to require the government to pay for the loss," and since the availability of a good faith defense can only result in the expenditure of precious judicial resources, with no countervailing benefit, the proposal should be amended to prohibit the assertion of a good faith defense.

2. Individual liability.

The bill totally immunizes individual employees from liability in situations where a remedy is available against the government. Thus, even an individual who acted with malice and an intent to inflict harm would incur no personal liability for the consequences of his/her actions; and the innocent victim of such actions would be unable to recover punitive damages, even though such an award clearly would be justified as a matter of equity.

The letter states that this approach is warranted because "experience shows that egregious cases are extremely rare." It appears to us that the rarity of such cases cuts in favor, rather than against, the imposition of personal liability. Moreover, the potential imposition of personal liability provides a necessary deterrent. Given the severity (and therefore unlikelihood) of criminal prosecution, the only real deterrent under the proposed legislation is the possibility of disciplinary action, which is plainly inadequate.

Since an award of punitive damages would be justified where the employee acted with malice, it is no answer to suggest that, because most federal employees would be able to satisfy only a modest judgment, a lawsuit against them would be "essentially a punitive gesture." In any event, from the viewpoint of an innocent victim, even a modest amount is better than none.

In short, we believe that the retention of individual liability, in cases where the employee acted with malice or an intent to inflict harm, is necessary for its deterrent value and as a matter of public policy, since it promotes confidence in government and provides for the equitable treatment of innocent victims of such misconduct. Accordingly, we believe that in egregious cases the victim of a constitutional tort committed by a federal employee should be able, at the outset, to sue both the government and the individual employee. At the least, we would urge that the proposal be amended to provide for suit against the individual employee in those cases where, in the course of the initial litigation against the government, it is determined that the employee acted with malice or intent to inflict harm. To avoid due process problems with respect to the employee, such a determination would not be binding in a subsequent suit against the employee. Rather, the statute specifically would provide that the issue of individual liability be determined de novo.

3. Availability of alternative remedy

Section 6(d)(4) of the proposed bill provides that "[w]here an action or proceeding under this chapter 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 action or proceeding shall be dismissed, ..." By providing that the FTCA action shall be dismissed, the bill leaves the victim without a remedy if it is subsequently determined that s/he is not in fact entitled to compensation or other benefits under another law and if, in the meanwhile, the time for filing a suit under the FTCA has expired. The bill should thus be amended to provide that, where an alternative remedy may be available, the FTCA claim should be held in abeyance until proceedings for compensation or other benefits under the other law have been completed and shall be dismissed only if the claimant's entitlement to other benefits is established during the alternate proceedings.

4. Certification by Attorney General

The proposed bill provides that the Attorney General shall certify whether "the employee was acting within the scope of his office or employment or under color thereof, ..." While this certification is subject to review by the district court in cases where suit originally was filed in state court, it is apparently conclusive where the suit originates in federal court. Since the determination as to whether the employee was acting within the scope of his office or under color thereof, is a question of law, it should be made in each instance by the court and not by the Attorney General.

In addition to the above-outlined reservations, we already have expressed our concerns relative to the availability of class actions and jury trials under the proposed legislation and understand that the Department is looking into these matters. We also understand

that the omission of costs and attorneys' fees in non-wiretap cases is a drafting error which the Department intends to correct.

We are prepared to submit a more detailed analysis of the proposal at a later date, but we wanted to put our initial reactions in writing for your review and consideration. We look forward to working with you on this and other matters of mutual concern.

Sincerely,

John H.F. Shattuck
Director

Pamela S. Horowitz
Legislative Counsel

cc: Hon. Patricia Wald
Hon. Barbara Babcock
Hon. Irving Jaffe

Letter From Common Cause, the American Civil Liberties Union and Others to Attorney General, November 21, 1977

21 November 1977

The Honorable Griffin B. Bell
Attorney General
Washington, DC 20530

Dear Mr. Attorney General:

We have completed a review of the legislation drafted by the Department of Justice to amend the Federal Tort Claims Act (H.R. 9219/S. 2117). We have grave doubts about the wisdom and practical effects of the bill as drafted and would like to share our concerns with you in the hope that this legislation will be reexamined.

Our most fundamental concern stems from the impact this proposal would have on the accountability of government officials for their actions. It is astonishing to us that an Administration which came to office promising to end an era of government lawlessness and official misconduct should now propose to insulate federal officials from liability for their conduct -- even where these officials willfully violate the constitutional rights of citizens. In the wake of Watergate, the Nixon impeachment proceedings, and the scandals of the federal intelligence agencies, public sentiment clearly favors strengthening the accountability of individual government officials. We had thought the Carter Administration shared this view and were heartened when Vice President Mondale, in an August speech to the American Bar Association, stated, "To ensure adherence to the rule of law, we are committed to ... greater accountability of officials and stronger safeguards against abuse." Now, however, the Department has proposed legislation, in the form of amendments to the Federal Tort Claims Act, which would have precisely the opposite effect.

Our detailed reservations about the bill can best be summarized in relation to its purposes as outlined in your letter of September 17 to the Vice President.

I. Protection of Federal Employees from Individual Liability

The letter states that a primary purpose of the proposed legislation is "to protect federal employees from suits for money damages arising out of the performance of their duties." The bill thus immunizes individual employees from liability in all situations where a remedy is available against the government.

As a matter of principle and practical effect, we are greatly troubled by the notion that federal employees — even where they act with malice, intent, or reckless disregard for the rights of others -- are entitled to protection from suits for money damages arising out of actions taken during the course of their employment.

The Department's desire to immunize federal employees from civil liability is particularly disturbing since it comes at a time when both the Congress and the courts are recognizing the need to tighten the system of accountability for the violation of constitutional rights by federal officers.

Last year, the Senate Intelligence Committee, chaired by Senator Frank Church, recognized the need for expanded civil remedies against intelligence officials both to insure that citizens injured by illegal or improper intelligence activity will obtain effective redress and to deter recurrent intelligence abuses. Accordingly, the Church Committee recommended that a cause of action be available against the government and the individual officer. 1/

Beginning in 1971 when it held that a violation of the Fourth Amendment by federal agents gives rise to a cause of action for damages, 2/, the Supreme Court has moved to tighten individual accountability for constitutional violations committed by federal officers. In so doing, it has rejected the notion of absolute immunity for officers of the executive branch of government, holding that, as to them, only a qualified immunity, dependent on the existence of the official's good faith belief in the reasonableness of his or her actions, is available. 3/

Your letter to the Vice President concedes that it is "plausible" to argue that "in an egregious case the individual employee should be personally liable" but then gives four reasons for rejecting this argument. We do not find any of these reasons persuasive.

Your letter first observes that "egregious cases are extremely rare." This seems to us to cut in favor, rather than against, the imposition of personal liability. The letter then states that "one of the main purposes of the [bill] is to...foster good faith, vigorous performance of duty," and the threat of personal liability "would be counter-productive [to] this purpose." But this purpose is already served by the good faith defense which is available to any employee sued for acts performed in the course of official conduct.

1/ Final Report of the Select Committee to Study Governmental Operations with Respect to Intelligence Activities, United States Senate, 94th Cong., 2d Sess., Report No. 94-755 at 337.
2/ Bivens v. Six Unknown Named Agents, 403 U.S. 388 (1971).
3/ Scheuer v. Rhodes, 416 U.S. 232 (1974).

The two other justifications offered for individual immunity similarly do not withstand analysis. Your letter states that if personal liability were to exist, the employee would seek to intervene and this "would jeopardize the government's control of the litigation." As the letter notes, however, there are other solutions to this problem. In any event, we do not believe that the fear of jeopardizing the government's control over litigation is a sufficient reason to override the principle of individual accountability.

As the final reason for rejecting the view that the individual employee should be personally liable in an egregious case, your letter states that a lawsuit against the employee "would be essentially a punitive gesture." Since, under traditional principles of equity, an award of punitive damages would be proper in an egregious case, we do not perceive a basis for objecting to the "punitive" nature of such a lawsuit.

The immunization of federal employees from civil liability would not only abrogate the principle of individual accountability, it also would remove an existing deterrent against illegal conduct. In proposing to remove this deterrent, the Department has not attempted to replace it with a new accountability mechanism but instead would rely solely on existing alternatives, i.e., the possibility of disciplinary action and the threat of criminal prosecution.

We believe that the threat of civil liability does deter unconstitutional conduct and that neither existing disciplinary practices nor the threat of criminal prosecution will serve an adequate deterrent function. In many cases conduct which would permit the imposition of civil liability is not criminal, and the threat of criminal prosecution is therefore theoretically, as well as practically, non-existent. Since the proposed bill does not mandate the commencement of disciplinary proceedings nor specify the types or range of penalties that may be imposed, it retains all the weaknesses of the existing disciplinary system. While we, of course, are interested in new approaches to the need for individual accountability, we cannot accept the view that the mere possibility of some undefined disciplinary action is an adequate deterrent against unconstitutional conduct by federal employees.

II. The Provision of a Remedy against the Government

Your letter states that an additional purpose of the proposed legislation is "to provide the victims of common law and 'constitutional torts' committed by federal employees with a remedy against a financially responsible defendant." Since we are all aware of the practical limitations of private damage actions against individual government employees, the expansion of governmental liability for torts committed by federal employees could represent a progressive step for the victims of such tortious conduct. As contemplated by the bill, however, the expansion of governmental liability would be of extremely limited value in enhancing recovery for tort victims.

Several aspects of the bill substantially reduce the likelihood of an enhanced recovery, particularly for victims of constitutional torts. First, the bill contains no provision for punitive damages because "[t]he Federal Tort Claims Act has always precluded the award of punitive damages against the United States." This statement in your letter to the Vice President ignores the distinction between common law torts, which the FTCA always has covered, and constitutional torts, which it has not. In constitutional tort cases the harm is often non-economic, making it difficult to prove actual or compensatory damages. Thus, for purposes of constitutional torts, the question of how "financially responsible" the defendant is becomes somewhat academic unless punitive damages are available. Moreover, the fact that punitive damages are not presently allowed under the FTCA does not dispose of the public policy issue as to whether Congress, in considering other changes to the Act, should eliminate that restriction, at least in some instances.

Second, although the bill provides for nominal liquidated damages, it allows the government to raise a good faith defense, which would preclude even that minimum recovery. Since the good faith defense was developed to ensure that individual employees would not be deterred from the vigorous performance of their duties and responsibilities, the rationale for the defense does not exist when the government itself is the defendant. Your letter implicitly acknowledges this analysis by noting that "[t]he question of whether all defenses available to an agent of the government in a suit against him personally should also be available to the government itself is not without controversy." Indeed, the Church Committee, addressing the need for a legislative scheme which would afford effective redress to citizens injured by improper federal intelligence activity, concluded last year that the good faith defense "should be available solely to individual defendants and should not extend to the government." 4/

Given the contrary recommendation of the Church Committee and the bill's avowed purpose of enhancing the remedy available to persons injured by the unconstitutional conduct of federal employees, we do not understand why the bill extends the good faith defense to the government.

A third aspect of the bill undermines the claim that it will increase the amount of damages that may be recovered by the victims of constitutional wrongdoing. The bill retains exceptions to governmental liability presently found in §2680(a) and §2680(h) of the Federal Tort Claims Act. Section 2680(a) provides that the Act shall not apply to--

> Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused. (Emphasis added.)

4/ Final Report of the Select Committee, supra.

While the scope of this twofold exemption is the subject of debate, there is no question that the government seeks to rely on the exemption in a large number of cases. If the Federal Tort Claims Act is extended to cover constitional torts, reliance on the exception certainly will increase, rendering the potential gain to constitutional tort victims largely illusory.

III. Eliminating the Need to Hire Outside Counsel

The third stated purpose of the bill is to eliminate the need for the government to hire private attorneys to represent individual federal employees against whom suits for money damages have been brought.

Based on the information available to us, there is serious doubt as to whether the government has the legal authority to hire outside counsel in cases of this nature. In any event, the government certainly is not required to do so, and we understand that private attorneys have been hired in only a handful of cases.

We are sensitive to the government's concern relative to its present practice, but we do not believe that a handful of cases should prompt a legislative proposal which abrogates the principle of individual accountability and removes a necessary deterrent. At the very least, alternative approaches to this problem should be explored.

While we have other questions about the bill, such as the availability of class actions and of attorneys' fees, the foregoing comments serve to highlight our major concerns. One final point needs to be made, however, about the final section of the bill. Although your letter nowhere mentions it, the bill's last section provides that it "shall apply to all claims and suits pending on the date of enactment...." Quite apart from the potential unfairness of the bill's retroactivity clause to those citizens presently litigating claims against individual government officials, this provision raises serious constitutional questions. 5/ The letter's failure to even mention the bill's retroactivity feature thus seems to us a rather serious omission.

We sincerely hope that our comments will prompt a reexamination of the proposed bill. Needless to say, we would welcome the opportunity to work with the Department in developing an approach to the problem of civil liability and individual accountability which would address our mutual concerns.

Yours sincerely,

John Shattuck
American Civil Liberties Union

David Cohen
Common Cause

5/ See, e.g., Carr v. United States, 422 F.2d 1007,1010-1011 (4th Cir.,1970).

Alan Morrison
Public Citizen

James Lorenz
Council for Public
Interest Law

David M. Levy
National Legal Aid
and Defender Assn.

Morton Halperin
Project on National
Security Studies
and Civil Liberties

Edward F. Snyder
Friends Committee on
National Legislation

Robert Borosage
Center for National
Security Studies

Leon Shull
Americans for Democratic
Action

Letter From Senator Metzenbaum to Attorney General, December 14, 1977: Questions on S. 2117

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United States Senate
COMMITTEE ON THE JUDICIARY
SUBCOMMITTEE ON CITIZENS
AND SHAREHOLDERS RIGHTS AND REMEDIES
WASHINGTON, D.C. 20510

December 14, 1977

The Honorable Griffin S. Bell
Attorney General of the United States
Department of Justice
Washington, D.C.

Dear Judge Bell:

As you know, we are opening our hearings on S. 2117 on January 26, 1978. We are especially pleased that you will testify before our subcommittee on that date.

The bill has raised a great many questions. To resolve some of these, we would greatly appreciate your responses to the enclosed set of questions. In order to evaluate them adequately and to obtain the maximum benefit from your appearance, it would be helpful to have those responses by January 13, 1978.

Thanking you in advance, I remain,

With warmest regards,

Howard M. Metzenbaum
Chairman

HMM/hsm

Enclosure

QUESTIONS FOR THE DEPARTMENT OF JUSTICE ON S. 2117

Section 3 of S. 2117

1. Is "wrongful," as used in S. 2117, different from "constitutional," and intended to be applicable only to common-law torts?

2. Page 3, lines 1-2 and 19-21. Please set forth the intended differences in scope and meaning between "liability" in line 1 and "extent of compensation" in line 20, and the reasons for the different choices of applicable law.

3. Page 2, line 23 - p. 3, 1, 7. Is it intended that other constitutional violations will be treated in the same manner as wiretapping violations, i.e., one hundred dollars a day plus attorneys fees and costs?

3. Page 3, lines 7-11. Why limit Government liability when the employee has a good faith defense? Should not the United States be held liable, regardless of the individual employee's reliance on a court order or legislative authorization, if that order or authorization - both of which are actions by the United States - resulted in a violation of a person's constitutional rights?

5. Page 3, line 8. What "other defenses" are intended to be covered by the second proviso of subparagraph (b)?

6. Page 3, lines 16-17. (a) Why is there a limitation to "actual or compensatory damages sustained" where a good faith defense is found to exist?

(b) What kinds of injuries are included therein? I.e., does this include compensation for emotional distress and other types of intangible injury?

(c) If emotional or other intangible injuries are not included in "actual or compensatory damages sustained," why not?

7. Page 3, lines 11-17. Are all violations of the Wiretap Act, (ch. 119, Title 18) considered "constitutional" violations for purposes of subparagraph b so that any violation of that Act would support "reimbursement /of/ the person whose constitutional rights were violated for the actual or compensatory damage sustained, " regardless of the existence of a good faith defense?

8. Page 2, lines 5-6. How is the reasonable attorney's fees provision of Section 3 affected by the 25% limitation of 28 U.S.C. § 2678? Would this not be a serious problem if the recovery is only one hundred dollars a day or one thousand dollars?

9. By setting $1000 as the minimum damages, is it contemplated that in Constitutional Tort cases $1000 will become the standard damage award because damages are usually hard to prove?

Section 2676

1. How does this relate to the exclusivity of the remedy provided for in Section 5 of S. 2117?

2. Why is a Constitutional Tort suit against an employee in his individual capacity precluded for any subject matter "arising out of or relating to" that subject matter, when in non-constitutional Tort cases such a suit would be barred only for "the same subject matter" (Section 2676)?

Section 2679, Section 5 of S. 2117

1. (a) Exclusivity was limited to motor vehicle suits before, but is now extended to all FTCA claims. Is that correct?

(b) Not included in exclusivity before were all negligence matters not involving a motor vehicle. What problems in those areas justify the extension of exclusivity outside the motor vehicle area to other wrongful acts or omissions?

(c) Why were motor vehicles originally singled out for this special treatment?

2. (a) Were any civil suits filed against the United States or individual federal officials as a result of the Collinsville, Illinois raids and other intrusions by Drug Enforcement personnel?

(b) If so, what were the results?

3. (a) How many civil actions have been filed against individual federal employees for violations of the Constitution since January 1, 1968?

(b) With respect to each such suit, please indicate:

(i) The facts and alleged constitutional violation.

(ii) The result to date.

(iii) Who is defending these suits, including whether the United States is paying for the defense.

(iv) What defenses are being raised.

4. (a) How many criminal proceedings have been instituted against individual federal employees to date for violations of the Constitution since January 1, 1968?

(b) With respect to each such proceeding, please indicate:

(i) The facts and alleged constitutional violations.

(ii) Whether any indictments issued.

(iii) Whether the indictments, if any, have been disposed of, and if so, what the disposition was?

(iv) If the United States is paying for the defense.

(v) What defenses are being raised.

5. Does the new section 2679 (d) (3) mean that the "exclusive" remedy provision in section 2679(b) does not apply for claims where sovereign immunity has not been waived, e.g., cases falling within the exceptions in section 2680?

Section 2679 (d), Section 6 of S. 2117, p. 4, lines 18-24; p. 5, lines 8-16

1. (a) Does the Attorney General have absolute and total discretion to determine whether to certify "scope of office" or "color of law" for purposes of substitution or removal?

(b) What, if any, recourse does the employee have if the Attorney General fails or refuses to certify?

2. (a) Can the certification be challenged by a party (a) if it is under 2679 (d) (1)?;(b) if it is under § 2679 (d) (2)?

(b) If there is a difference in the ability to challenge the certification between 2679 (d) (1) and 2679 (d) (2), please set forth the reasons for the difference.

3. Will the Attorney General make the certification if the Attorney General determines that the employee was not acting in good faith reliance upon either a court order or legislative authorization?

Section 2679 (f), Section 7 of S. 2117.

1. (a) What powers, procedures and remedies -- other than criminal prosecution -- presently exist by which the federal government may discipline federal employees who violate the constitutional rights of American citizens?

(b) May the federal government assess any civil fine against such employee?

(c) May the federal government bring any type of civil action for damages against such employee?

2. (a) With respect to internal disciplinary proceedings, how many have been filed against government employees for violations of the Constitution since January 1, 1968?

(b) With respect to each such proceeding, please indicate:

(i) The agency in which such proceeding took place.

(ii) The facts and alleged constitutional violation.

(iii) The results of any such proceeding.

(c) Were any such proceedings filed in connection with:

(i) the Collinsville drug raid?

(ii) any Cointelpro operations?

(iii) any CHAOS operations?

3. With respect to each disciplinary proceeding referred to in 2.--

(a) In those cases in which guilt was found,

(i) what sanctions were imposed?

(ii) Were any of the subjects subsequently promoted or given merit increases

(iii) Were their careers affected in any way?

(b) In cases where the subjects were found innocent, what were the basis for the findings - factual innocence or an affirmative defense such as superior orders?

(c) With respect to each such disciplinary proceeding, will the Subcommittee staff be permitted to examine the agency files?

4. Were there Civil Service Commission proceedings in this matter or were they in the particular agency?

5. (a) What, if anything, was the role of the Department of Justice Office of Professional Responsibility?

(b) Does the Office of Professional Responsibility have jurisdiction over alleged misconduct by employees of agencies other than the Department of Justice?

6. What procedures are involved in these administrative proceedings?

7. Is the "forwarding" under paragraph (f) supposed to involve any recommendation by the Attorney General?

8. Does the head of the Department or agency have complete discretion as to how he will react to the "forwarding" by the Attorney General?

9. Does the United States have any conflict of interest in investigating or prosecuting a federal employee for acts with respect to which the United States in a Tort Claims Act case against such employee has been substituted as a defendant?

10. Of what evidentiary value in an "administrative investigation or disciplinary action" (page 7, line 8) is a court finding of liability in a Constitutional Tort case?

Section 2680 (a): "Execution of statute or regulation"

(a) Will this provision exclude from Governmental liability all situations in which an individual acts under an unconstitutional regulation or an unconstitutional statute?

(b) Why should the United States not be held liable when its officials execute an unconstitutional regulation promulgated by a Federal official acting in violation of the Constitution?

(c) Why should the United States not be held liable for violation of someone's constitutional rights by an unconstitutional statute?

Section 2680 (a). "Discretionary act"

(a) Does this exclude liability even if a federal official violates constitutional rights by an abuse of discretion?

(b) Aren't many if not most constitutional violations a product of discretionary action?

(c) Weren't the Cointelpros involving unconstitutional mail openings and wiretappings adopted in the exercise of discretion?

Section 268 (h), Section 8 of S. 2117.

Why the exclusion in subsection (h) if the act also involves a violation of the Constitution? More specifically, why should the United States not be liable for misrepresentation, deceit and interference with contract rights, if those activities violate constitutional rights? Didn't many of the Cointelpro operations involve misrepresentation, deceit, and efforts to get people fired?

Section 2680 (k)

Why the exclusion in subsection (k) for constitutional violations "arising in a foreign country", at least where the victims are American? For example, the violations involved in the Berlin Democratic Club case.

28 U.S.C. § 2401

Would 28 U.S.C. 2401 bar the filing of a claim for a Constitutional Tort if the existence of the tort had been concealed by the United States or if there is some other valid reason why the claimant was unaware of the facts underlying the claim?

28 U.S.C. § 2402

Does section 2402 bar jury trials in Constitutional Tort cases?

Jaffe Memorandum to Calamaro of December 13, 1977

1. Can the text of a new subsection (f) of § 2679 be made available to the Subcommittee?

2. Please set forth in detail the "serious problems" that would be presented by the elimination of the good faith defense insofar as "discovery" and "the relationship between good faith and accountability" are concerned.

3. Does the memorandum modify the bill, as it was introduced? I.e., are we to assume that the changes referred to in the memorandum in §§ 2679 (f), 2579 (d) (3), attorneys fees and class actions, will in fact be made and that consideration of the bill should proceed on that understanding?

Letter From Attorney General to Senator Metzenbaum, January 20, 1977: Answers to Questions on S. 2117

Department of Justice
Washington, D.C. 20530

ASSISTANT ATTORNEY GENERAL
CIVIL DIVISION

January 20, 1978

Honorable Howard M. Metzenbaum
Chairman
Subcommittee on Citizens and
Shareholders Rights and Remedies
Committee on the Judiciary
Washington, D. C. 20510

Dear Mr. Chairman:

I regret the delay in responding to your letter of December 14, 1977, addressed to the Attorney General, and referred to me, to which was attached a number of questions relating to S. 2117. The delay, in part, has been occasioned by the Department's consideration of comments submitted by representatives of a number of public interest groups and the preparation of some changes in S. 2117 which we intend to propose to your Subcommittee.

At the request of Mr. Herman Schwartz, your Chief Counsel, I also set forth some of the broad purposes of this bill. One of the hazards of Government service is that of being sued for what are often difficult decisions made in areas where there are few precedents, or for simply making a mistake. It would be demoralizing for Government employees to face the prospect of paying counsel fees for suits based on acts performed within the scope of their employment. Thus, it has long been the tradition of the Justice Department to defend individuals sued for such acts, as part of the general responsibility to represent the Government in litigation.

But in the past two or three years an increasingly large number of suits have been filed against officers and employees of the Government seeking monetary damages against them personally, not only for common law torts, but for alleged Constitutional violations. Some of the conduct alleged to have been performed, would, if established, constitute violations of Federal criminal statutes. This circumstance immediately raised a conflict of interest problem in those instances in which the Department was conducting criminal investigations and had not yet reached a prosecutive decision. Under the Code of Professional Responsibility, the Attorney General cannot at the same time engage in a criminal investigation of an individual and represent that some individual in a civil suit seeking damages for the same conduct which is the subject of the criminal investigation. In most of these civil suits many Government officers and employees are joined as defendants. This, too, frequently presents a conflict of interest because the interests of each defendant in the defense of the suit are not the same.

As a consequence, we have been compelled to retain the services of private attorneys to represent the Federal officers and employees, at least until such time in the criminal situation that we had determined to seek an indictment or the possible conflict of interest had been resolved. The cost of private counsel has been huge. We consider it imperative that means be found to eliminate these high costs and yet preserve the morale and efficiency of the Government employee. By waiving the Government's sovereign immunity from suits for Constitutional violations committed by its officers or employees and making the United States the exclusive defendant both in those cases and in suits against employees based upon common law tort, we eliminate the conflicts and the necessity for employing private counsel. S. 2117 accomplishes this purpose.

At the same time, the bill offers to the citizen who has been injured or whose rights have been violated a solvent defendant and, we believe, a more effective remedy. The bill merely extends, with respect to the exclusivity of the remedy against the United States, that which the

Congress has already done in the Federal Drivers Act and in the piecemeal bits of legislation for most of the physicians in the Federal service with respect to malpractice suits. The legislation does not, at the same time, immunize the individual officer or employee from all responsibility for his conduct. If his actions violate the criminal laws he is still subject to prosecution for those offenses; if the employee's conduct is not criminal, he is subject to disciplinary proceedings. In this regard, Justice Department representatives have considered alternative mechanisms to insure a fair but effective system for disciplining wrongdoing by Federal employees. We look forward to discussing these with your Subcommittee.

We believe, moreover, that substituting the Government as the exclusive defendant will ultimately enable a more reasonable and fair litigating posture in these cases. When representing the United States alone, we are better able to settle cases and waive defenses where that is just, than when the rights and reputations of individuals are at stake.

The responses to your several questions are attached. Should you have any further inquiries, we will be pleased to respond to them.

Very truly yours,

Barbara Allen Babcock

BARBARA ALLEN BABCOCK
Assistant Attorney General

JUSTICE DEPARTMENT RESPONSES TO DECEMBER 14, 1977, QUESTIONS ON S. 2117

SECTION 3 OF S. 2117 (28 U.S.C. § 2674)

Question 1. Is "wrongful," as used in S. 2117, different from "constitutional," and intended to be applicable only to commonlaw torts?

Answer. Yes. The proposed amendment incorporates into §2674 the language in §1346(b) that so describes common law torts.

Question 2. Page 2, lines 1–2 and 19–21. Please set forth the intended differences in scope and meaning between "liability" in line 1 and "extent of compensation" in line 20, and the reasons for the different choices of applicable law.

Answer. "Liability" in lines 1–2 of page 2 refers to the determination that a constitutional violation has occurred from which a remedy in damages will flow.

"Extent of Compensation" in lines 19–21 refers to the damages that will flow from the determination of liability. The determination of liability for violation of the Constitution involves the interpretation and construction of the Constitution and therefore must be governed by Federal law. Damages, on the other hand in the area of torts, have always been determined under state law under which there is a large body of precedent. There is very little Federal law in the area of tort damages; therefore, we do not disturb the current basis for determining damages in accordance with applicable State law except to the extent that we provide for liquidated damages in the proposed bill.

Question 3. Page 2, line 23—p. 3, 1, 7. Is it intended that other constitutional violations will be treated in the same manner as wiretapping violations, *i.e.*, $100 a day plus attorneys fees and costs?

Answer. It is intended that $100 per day, with a minimum of $1,000, apply only to wiretapping victims. Other constitutional violations are governed by the minimum liquidated damage provision of $1,000. The $100 per day provision for wiretapping was prompted by our desire to retain the damage formula prescribed by 18 U.S.C. §2520 for wiretapping offenses since we make 18 U.S.C. §2520 inapplicable to officers and employees of the United States by §10 of the bill. Moreover, there are few, if any, other constitutional violations which are of a continuing nature, as wiretaps frequently are. As to any that might exist, we are prepared to consider a more suitable liquidated damage provision. Attorneys' fees and reasonable costs are applicable to all Constitutional violations. We are submitting an amendment to clarify any ambiguity.

Question 4. Page 3, lines 7–11. Why limit *Government* liability when the employee has a good faith defense? Should not the United States be held liable, regardless of the individual employee's reliance on a court order or legislative authorization, if that order or authorization—both of which are actions by the United States—resulted in a violation of a person's constitutional rights?

Answer. We have decided to yield on the question of asserting the defense of "good faith" on behalf of the Government and will request that the proviso appearing on page 3, lines 7–17 be deleted.[1]

Question 5. Page 3, line 8. What "other defenses" are intended to be covered by the second proviso of subparagraph (b)?

Answer. The reference to "other defenses" will, as indicated above, be deleted. It would therefore appear that apart from jurisdictional questions the only defense remaining to the Government will be that no constitutional violation occurred or has been established, or does not sound in tort.

Question 6. Page 3, lines 16–17. (a) Why is there a limitation to "actual or compensatory damages sustained" where a good faith defense is found to exist?

Answer. Inasmuch as we intend to delete the "good faith" defense on behalf of the Government, the reference to "actual or compensatory damages" will no longer be a limitation.

Question 7. Page 3, lines 11–17. Are all violations of the Wiretap Act, (ch. 119, Title 18) considered "constitutional" violations for purposes of subparagraph b so that any violation of that Act would support "reimbursement [of] the person whose constitutional rights were violated for the actual or com-

[1] See p. 48.

pensatory damage sustained," regardless of the existence of a good faith defense?

Answer. Same response to question 4 above, which makes this question inapplicable and moot.

Question 8. Page 3, lines 5–6. How is the reasonable attorney's fees provision of Section 3 affected by the 25 percent limitation of 28 U.S.C. §2678? Would this not be a serious problem if the recovery is only one hundred dollars a day or one thousand dollars?

Answer. It is our belief that 28 U.S.C. §2678 is applicable to common law torts and would not apply to the fee provision as proposed in the new third paragraph of section 2674(b). However, to avoid any ambiguity, we shall propose an amendment to §2678.

Question 9. By setting $1,000 as the minimum damages, is it contemplated that in constitutional tort cases $1,000 will become the standard damage award because damages are usually hard to prove?

Answer. With respect to constitutional torts, a claimant will be entitled to recover whatever compensation is recognized under the tort law of the state in which the violation occurred. Because we are aware that compensatory damages are seldom suffered in cases of constitutional torts, we have provided for damages in a minimum sum of not less than $1,000 plus reasonable attorney's fees and litigation costs.

SECTION 2676

Question 1. How does this relate to the exclusivity of the remedy provided for in Section 5 of S. 2117?

Answer. This section complements the exclusivity of the remedy provided in Section 5 of S. 2117. Section 2676 protects the employee in such cases in which the remedy against the United States is not exclusive.

Question 2. Why is a constitutional tort suit against an employee in his individual capacity precluded for any subject matter "arising out of or relating to" that subject matter, when in non-constitutional Tort cases such a suit would be barred only for "the same subject matter" (Section 2676)?

Answer. In dealing with constitutional torts, we considered it prudent to use the broader term "arising out of or relating to" that subject matter rather than the narrower term "the same subject matter" as appears elsewhere in the Act. In making this judgment we were mindful of the facility with which a Constitutional violation might be alleged and the ease with which such an allegation could be divorced from other possible causes of action arising out of or related to the same subject matter. We also took into account that in common law torts the liability of the United States could only arise if the conduct which forms the basis of the suit was performed "within the scope of his [employee's] office or employment." In constitutional torts we have broadened the liability of the United States to include "while acting under the color" of his office or employment. These considerations seem, to us, to require a broader description of the subject matter to which that conduct related.

SECTION 2679, SECTION 5 OF S. 2117

Question 1. (a) Exclusivity was limited to motor vehicle suits before, but is now extended to all FTCA claims. Is that correct?

Answer. (a) Exclusivity was not limited to motor vehicle suits but has also heretofore been made applicable to suits against most physicians employed by the United States for malpractice through piecemeal legislation in statutes other than the Federal Tort Claims Act. See, for example, the statutes repealed in Section 9 of S. 2117. Exclusivity is now extended to all torts under the Federal Tort Claims Act except those common law torts still excepted under Section 2680.

Question (b) Not included in exclusivity before were all negligence matters *not* involving a motor vehicle. What problems in those areas justify the extension of exclusivity outside the motor vehicle area to other wrongful acts or omissions?

Answer. We had, in the past, experienced conflict of interest problems in common law tort areas of sufficient magnitude to have prompted us to propose legislation similar to this in 1973 to the 93rd Congress (No. H.R. 10439). For example, suits have been instituted against the United States under the

Federal Tort Claims Act in which the plaintiffs have joined the Federal employee air traffic controllers. Courts have, on several occasions, challenged the right of the Attorney General to represent both the United States and the air traffic controllers on the ground that there was an inherent conflict between the two. On other occasions, suits have been instituted against multiple defendants who were Federal employees who offered conflicting versions of the facts, thus making it impossible for the Attorney General to represent all of the defendants or, in fact, any of them. These conflict situations are recurrent problems.

Question (c) Why were motor vehicles originally singled out for this special treatment?

Answer. Negligence suits arising out of automobile accidents very often did not join the United States as a defendant, in order to keep the suit in State courts. Although the Attorney General represented the employees, any judgment obtained became a personal obligation of the employee. In many instances, particularly in the Postal Service, employees were required to operate their own automobiles for official business. This resulted in substantially higher insurance costs which the employee paid. The happenstance of whether or not the United States was sued at the plaintiff's option or whether a Government or private vehicle was used gave rise to different consequences and created serious morale problems.

Question 2 (a) Were any civil suits filed against the United States or individual federal officials as a result of the Collinsville, Ill., raids and other intrusions by Drug Enforcement personnel?

Answer (a) Civil suits were filed against individual Federal officials, but not against the United States, as a result of the Collinsville, Ill., raids. Other suits have also been brought against Drug Enforcement personnel.

Question (b) If so, what were the results?

Answer. Two of the Collinsville raid suits were dismissed after trial. In a third case, a judgment of dismissal against the agents was affirmed on appeal. A fourth, in which the agents were successful in the district court, on motion was reversed on appeal and the case remanded for trial. The trial has not yet been held. In a fifth suit, after trial before a jury, the plaintiff's complaint was dismissed and counterclaims by the agents resulted in judgments in their favor under which the agents were awarded $15,000 each. This case was appealed by plaintiff and is pending. No suit was filed against the United States as an outgrowth of the Collinsville raids. During the criminal prosecution of the Drug Enforcement agents in the Collinsville cases by the Civil Rights Division, the Department withdrew its representation in the civil suits because of the conflict. After the acquittal of the agents in the criminal case, the Department again tendered its representational services to the agents in the civil suits, which were accepted.

Question 3. (a) How many civil actions have been filed against individual federal employees for violations of the Constitution since January 1, 1968?

Answer. The Department of Justice records are not maintained in such a manner as would enable us to retrieve data which would reflect civil actions against individual Federal employees for violations of the Constitution. We do, however, have some information with respect to such suits which we have compiled recently, but which are not complete, which include suits begun as early as 1969. A list of such suits is attached.[1]

Question (b) With respect to each such suit, please indicate:

(i) The facts and alleged constitutional violation.

(ii) The result to date.

(iii) Who is defending these suits, including whether the United States is paying for the defense.

Answer. The attached list will reflect responses to (i), (ii), and (iii). In each case, as indicated, the defendants are represented either by the Department or by private counsel except for FBI Agent Kearney for whom we provide no representation. In both situations, the United States is paying for the defense.

Question. (iv) What defenses are being raised.

Answer. The defenses raised will depend on the vagaries of each case. Generally, the defense of absolute or qualified immunity and jurisdictional de-

[1] See p. 101 following.

fenses addressed to venue, service of process or subject matter are interposed.

Question 4. (a) How many criminal proceedings have been instituted against individual Federal employees to date for violations of the Constitution since January 1, 1968?

Answer. We find it difficult to respond to this question because it is problematic as to which sections of the Criminal Code relate to Constitutional violations. If the subcommittee furnishes the sections of the Criminal Code which it believes relate to constitutional violations, we will try to determine which prosecutions thereunder involved individual Federal employees, and the disposition of the case. This information is, of course, either in the Criminal Division or the Civil Rights Divison.

Question. (b) With respect to each proceeding, please indicate:

(i) The facts and alleged constitutional violations.

(ii) Whether any indictments issued.

(iii) Whether the indictments, if any, have been disposed of, and if so, what the disposition was?

(iv) If the United States is paying for the defense.

(v) What defenses are being raised.

Answer. The United States does not pay for the defense of a criminal suit brought under a Federal indictment.

Question 5. Does the new section 2679(d)(3) mean that the "exclusive" remedy provision in section 2679(b) does not apply for claims where sovereign immunity has not been waived, e.g., cases falling within the exceptions in section 2680?

Answer. Yes, insofar as the exceptions relate to common law torts. The remedy against the United States is exclusive for constitutional torts.

SECTION 6 OF S. 2117 (§ 2679(D))

Question 1. (a) Does the Attorney General have absolute and total discretion to determine whether to certify "scope of office" or "color of law" for purposes of substitution or removal?

Answer. Yes, the Attorney General has complete discretion to determine whether to certify that an employee was acting within the scope of his office or employment or under color thereof. That certification is intended not to be reviewable in a state court for purposes of removal. However, the determination of whether an employee is acting within the scope of his office or under color thereof is reviewable in the Federal courts and is sometimes done by a United States District Court Judge, *sua sponte.*

Question. (b) What, if any, recourse does the employee have if the Attorney General fails or refuses to certify?

Answer. In the absence of exclusivity, an employee's challenge of a failure to certify would serve little purpose since he would, in any event, be jointly and severally liable for the tort. Moreover, if the plaintiff has sued him personally, and has not sued the United States, it is difficult to see how the employee could compel the joinder of the United States. If, however, there is exclusivity of remedy against the United States, and the Attorney General refused to certify, there appears to be no reason why the employee, sued in a state court, may not challenge the jurisdiction of the state court on the ground that the United States is the only proper party defendant and the United States district court has exclusive jurisdiction because the acts complained of were performed by him within the scope of his duties or office. The certification by the Attorney General is merely evidence of his determination; it is that certification which the state court may not review for the purposes of removal. It is another matter, absent the certification, for the state court to make a determination as to the scope of the defendant's duties for purposes of deciding its own jurisdiction.

Question 2. (a) Can the certification be challenged by a party (a) if it is under 2679(d)(1); (b) if it is under § 2679(d)(2)?

Answer. The United States district court may always determine whether a Federal employee whose conduct forms the basis of an action before it, was acting within the scope of his office or employment. The certification (as distinguished from the underlying determination of the Attorney General) as such, is not being reviewed. Under § 2679(d)(2), a state court must accept

the certification of the Attorney General for purposes of removal to the Federal court.

Question. (b) If there is a difference in the ability to challenge the certification between 2679(d)(1) and 2679(d)(2), please set forth the reasons for the difference.

Answer. Whether a Federal employee was acting within the scope of his employment presents a Federal question and upon it depends the applicability of the Federal Tort Claims Act and the attendant interest of the United States. The certification of the Attorney General, should, for purposes of removal, be binding on a state court but not on a Federal court. If a state court should disagree with the Attorney General, we would be faced with the possibility of compelling the Attorney General to assert the interests of the United States and the Federal questions they involve in a state court without power of removal.

Question 3. Will the Attorney General make the certification if the Attorney General determines that the employee was not acting in good faith reliance upon either a court order or legislative authorization?

Answer. Yes. The determination of whether or not an employee is acting within the scope of his office or employment cannot depend on the propriety of his conduct. To interpret it otherwise would make a mockery of the Federal Tort Claims Act. However, criminal conduct, especially that which violates Federal criminal statutes, cannot fall within the scope of any Federal employee's duties or employment. In the case of Constitutional torts, we have extended the requisite determination to include "color of office," which is much broader, and may include criminal conduct.

SECTION 2679(F), SECTION 7 OF S. 2177

Question 1. (a) What powers, procedures and remedies—other than criminal prosecution—presently exist by which the federal government may discipline federal employees who violate the constitutional rights of American citizens?

Answer. The current provisions of law under which adverse actions are instituted against employees under both agency and Civil Service Commission regulations are governed by 5 U.S.C. § 7501. These provisions are sufficiently broad to encompass any misconduct or improper discharge of one's duties, including the violation of a citizen's rights.

Question. (b) May the Federal Government assess any civil fine against such employee?

Answer. In the context of employee disciplinary matters, employees may be suspended without pay for varying periods of time.

Question. (c) May the Federal Government bring any type of civil action for damages against such employee?

Answer. In disciplinary proceedings there is no known basis upon which the Government may institute civil action for damages against the employee. In many other contexts, of course, the Government may sue Federal employees to recover monies from such employee, such as bribery, presentation of false claims, conversion of Government property, etc.

Question 2. (a) With respect to internal disciplinary proceedings, how many have been filed against government employees for violations of the Constitution since January 1, 1968?

(b) With respect to each such proceeding, please indicate:

(i) The agency in which such proceeding took place.

(ii) The facts and alleged constitutional violation.

(iii) The results of any such proceeding.

Answer. (a) and (b). The statistics and details with respect to these questions are not available to the Department and cannot be ascertained.

Questions and Answer. (c) Were any such proceedings filed in connection with:

(i) the Collinsville drug raid?

Yes.

(ii) any Cointelpro operations?

No.

(iii) any CHAOS operations?

No.

Question 3. With respect to each disciplinary proceeding referred to in 2.—(a) In those cases in which guilt was found, (i) what sanctions were imposed?

Answer. All six Drug Enforcement Agents were suspended, without pay, for 30 days. Some had agency hearings, some did not. One appealed unsuccessfully to the Civil Service Commission. After acquittal in criminal trial, all were restored, suspension was revoked (except unsuccessful appellant) and each received back pay.

Question. (ii) Were any of the subjects subsequently promoted or given merit increases?

Answer. Not definitely ascertained, but we think not.

Question. (iii) Were their careers affected in any way?

Answer. All agents were transferred and the Agent in Charge was demoted.

Question. (b) In cases where the subjects were found innocent, what were the basis for the findings—factual innocence or an affirmative defense such as superior orders?

Answer. Each of the Drug Enforcement agents was acquitted on the criminal charges for which they were tried, based on the facts. The agents have so far been successful in their civil suits and have each obtained a substantial judgment against one of the plaintiffs. In neither the criminal nor the civil cases did any of the agents defend on the basis of "superior orders," or any such similar defense.

Question. (c) With respect to each such disciplinary proceeding, will the subcommittee staff be permitted to examine the agency files?

Answer. Yes.

Question 4. Were there Civil Service Commission proceedings in this matter or were they in the particular agency?

Answer. With respect to disciplinary proceedings against the Collinsville Drug Enforcement agents, all proceedings were in the agency initially—one agent appealed to the Civil Service Commission.

Question 5. (a) What, if anything, was the role of the Department of Justice Office of Professional Responsibility?

Answer. The Department's Office of Professional Responsibility did not come into existence until 1975 and played no role in proceedings against the Drug Enforcement agents involved in the Collinsville raids.

Question. (b) Does the Office of Professional Responsibility have jurisdiction over alleged misconduct by employees of agencies other than the Department of Justice?

Answer. No.

Question 6. What procedures are involved in these administrative proceedings?

Answer. Administrative procedures, generally stated, are governed by 5 U.S.C. §7501, and by regulations promulgated by each agency and by the Civil Service Commission. Each employee is entitled to notice of the charges by the agency, an opportunity to respond, receipt of a written decision, and appeal within the agency or to the Civil Service Commission, or both, and judicial review in a court of competent jurisdiction.

Question 7. Is the "forwarding" under paragraph (f) supposed to involve any recommendation by the Attorney General?

Answer. "Forwarding" does not contemplate any recommendation by the Attorney General.

Question 8. Does the head of the Department or agency have complete discretion as to how he will react to the "forwarding" by the Attorney General?

Answer. Yes.

Question 9. Does the United States have any conflict of interest in investigating or prosecuting a federal employee for acts with respect to which the United States in a Tort Claims Act case against such employee has been substituted as a defendant.

Answer. No.

Question 10. Of what evidentiary value in an "administrative investigation or disciplinary action" (page 7, line 8) is a court finding of liability in a Constitutional Tort case?

Answer. None. Since the Federal employee in the disciplinary action was not a party to the court suit in which liability was found. Moreover, the employee would have defenses in the administrative proceeding which were unavailable

to the United States in the court suit, such as his good faith belief in the lawfulness of his conduct.

We recognize that the provisions of our proposed subsection (f) to Section 2679 may not be adequate. We are prepared to support and assist in drafting a stronger provision to insure that officers and employees who act improperly respecting the Constitutional rights of the public be disciplined and that the person whose rights have been violated be permitted to participate in such proceedings in a meaningful way.

SECTION 2680 (A): "EXECUTION OF STATUTE OR REGULATION"

Question. (a) Will this provision exclude from Governmental liability all situations in which an individual acts under an unconstitutional regulation or an unconstitutional statute?

Answer. Yes.

Question. (b) Why should the United States not be held liable when its officials execute an unconstitutional regulation promulgated by a Federal official acting in violation of the Constitution?

Answer. The Congress has carefully exempted the United States from liability when the claim is based upon an invalid statute or regulation.

Question. (c) Why should the United States not be held liable for violation of someone's constitutional rights by an unconstitutional statute?

Answer. Same as above. There are usually remedies at law for the correction or relief from unconstitutional regulations or statutes. The Federal Tort Claims Act deals with the kind of tortious conduct for which private persons would be liable. In general, these are intentional torts.

SECTION 2680 (A). "DISCRETIONARY ACT"

Question. (a) Does this exclude liability even if a federal official violates constitutional rights by an *abuse* of discretion?

Answer. Yes, because the statute expressly so provides.

Question. (b) Aren't many if not most constitutional violations a product of discretionary action?

Answer. Discretionary action is a term of art and has a meaning somewhat narrower than its normal usage. The extent to which constitutional violations may involve discretion are not within the meaning or the purpose of the phrase as used in §2680(a).

Question. (c) Weren't the Cointelpros involving unconstitutional mail openings and wiretappings adopted in the exercise of discretion?

Answer. Whatever the discretion was that underlay the activities undertaken in the Cointelpro programs it does not fall within the meaning of the phrase in §2680(a).

SECTION 2680 (H), SECTION 8 OF S. 2117

Question. Why the exclusion in subsection (h) if the act also involves a violation of the Constitution? More specifically, why should the United States not be liable for misrepresentation, deceit and interference with contract rights, if those activities violate constitutional rights? Didn't many of the Cointelpro operations involve misrepresentation, deceit, and efforts to get the people fired?

Answer. To the extent that a constitutional right has been violated through the devices of misrepresentation, deceit, or interference with contract rights, the bill proposes to waive the sovereign immunity of the United States and the suit will proceed. The exclusions, however, should be retained to immunize the United States from liability when misrepresentation, deceit, or interference with contract rights are asserted as common law torts. It should be noted that few tort suits have been brought against individual employees on these grounds, since there is usually an adequate remedy and ample relief under other provisions of law for such matters.

SECTION 2680 (K)

Question. Why the exclusion in subsection (k) for constitutional violations "arising in a foreign country", at least where the victims are American? For example, the violations involved in the Berlin Democratic Club case.

Answer. If a constitutional violation can arise in a foreign country, then this bill waives the sovereign immunity of the United States from liability for such a tort and the exclusion in subsection (k) will be inoperative as to Constitutional violations but would remain for common law torts.

28 U.S.C. § 2401

Question. Would 28 U.S.C. 2401 bar the filing of a claim for a constitutional tort if the existence of the tort had been concealed by the United States or if there is some other valid reason why the claimant was unaware of the facts underlying the claim?

Answer. The applicability of the statute of limitations or whether it has been tolled, or the determination of the date when the cause of action accrues, will be determined by the courts. In malpractice cases, for example, the courts have generally held that the cause of action first accrues when the claimant knows or should have known that his injury was caused by Government medical personnel.

28 U.S.C. § 2402

Question. Does section 2402 bar jury trials in constitutional tort cases?

Answer. Yes. Jury trials in constitutional tort cases would be barred.

JAFFE MEMORANDUM TO CALAMARO OF DECEMBER 13, 1977

Question 1. Can the text of a new subsection (f) of §2679 be made available to the subcommittee?

Answer. The text of §2679(f) is currently being considered for revision.

Question 2. Please set forth in detail the "serious problems" that would be presented by the elimination of the good faith defense insofar as "discovery" and "the relationship between good faith and accountability" are concerned.

Answer. Since, as we have indicated, we have decided not to assert the defense of good faith on behalf of the Government, this question has become moot.

Question 3. Does the memorandum modify the bill, as it was introduced? I.e., are we to assume that the changes referred to in the memorandum in §§2679(f), 2579(d)(3), attorneys fees and class actions, will in fact be made and that consideration of the bill should proceed in that understanding?

Answer. The memorandum was internal and was intended to be the predicate for further discussion with certain public interest organizations and it may not therefore be considered as modifying the bill. However, certain changes referred to in the memorandum will be made. We will make clear that attorney's fees and costs of litigation apply to all constitutional violations. We intend to include a provision that will permit class actions that meet the requirements of the Federal Rules of Civil Procedure. We shall also propose several other clarifying changes in language.

ATTACHMENT TO ATTORNEY GENERAL LETTER OF JANUARY 20, 1977: LIST OF CIVIL CASES

Lawsuit	Civil action No.	Filing date	Subject	Status	Private counsel retained
Abramovitz v. Ahern	N77-207 (D. Conn.)	May 1977	Electronic and physical surveillance by FBI and local officials.	Early discovery	No.
Alliance to End Repression v. Rockford	74-C-3268 (N.D. Ill.)		See ACLU v. City of Chicago	do	No.
ACLU v. City of Chicago	75-C-3295 (N.D. Ill.)	October 1975	FBI and DOD investigatory practices against anyone in Chicago.	do	No.
Afrikan People's Party v. Martin	77-684 (E.D. Pa.)	February 1977	Search of plaintiff's offices	do	No.
Anderson v. Nixon	76-1794 (D.D.C.)	September 1976	Government's investigatory practices of plaintiff.	Mid discovery	Yes.
Askew v. Bloemker	S-CIV-73-79 (S.D. Ill.)	April 1973	DEA investigatory practices	Trial in March 1978	No.
Beard v. O'Neal	76-C-4706 (N.D. Ill.)	December 1976	Wrongful death	Mid discovery	No.
Berlin Democratic Club v. Brown	74-310 (D.D.C.)		Electronic surveillance, mail opening	On appeal	Yes.
Black Panther Party v. Levi	76-2205 (D.D.C.)	December 1976	Government investigatory practices against BPP (wiretaps, break-ins, mail opening, COINTELPRO).	Defendants' motion for dismissal pending.	Yes.
Blackburn v. Kearney	77-Civ. 3211 (S.D.N.Y.)	July 1977	FBI break-ins, mail opening and wiretapping.	Stayed pending disposition of related criminal matter.	Yes.
Blair v. Baumgardner	77-C-390 (E.D. Wis.)	June 1977	COINTELPRO	Mid discovery	No.
Briggs v. Goodwin	74-803 (D.D.C.)		Perjury and violation of right to counsel	On appeal	No.
Burhart v. Saxbe	74-826 (E.D. Pa.)	July 1974	Electronic surveillance	Cross motions for summary judgment pending.	No.
Church of Scientology of California v. Lindberg	CV 77-2654-WMB	July 1977	Search and seizure of church premises and papers; continuing scheme to harass church and its members.	Stayed pending disposition of related criminal matter.	No.
Civil Liberties Legal Defense Fund v. Kleindienst	72-2518-C	August 1972	Electronic surveillance	Discovery completed	No.
Clavir v. Levi	76-CIV-1071 (S.D. N.Y.)	March 1976	Electronic surveillance; break-ins, mail covers.	Discovery	No.
Cleaver v. Bates	77-1423	July 1977	Electronic surveillance, CIA mail opening	Early discovery	Yes.
Cole v. Kearney	77-Civ. 3643 (S.D.N.Y.)	do	FBI break-ins, mail opening and wiretapping.	Stayed pending disposition of related criminal matter.	Yes.
Cole v. Richardson	73-2322 (C.D. Cal.)	October 1973	Electronic surveillance	On appeal	No.
Cruikshank v. U.S	76-0362 (D. Hawaii)	September 1976	CIA mail opening [U.S. only defendant]	Trial set for March 1978	No.
Davidov v. Bell	4-77-152 (D. Minn.)	April 1977	Surveillance of anti-war activists	Early discovery	No.
Dellinger v. Mitchell	1768-69 (D.D.C.)		FBI electronic surveillance		No.
Driver v. Helms	75-0224 (D.R.I.)		CIA mail opening	On appeal	Yes.
Driver v. U.S	77C-919 (E.D.N.Y.)	May 1977	do	Trial in February 1978	No.
Ellsberg v. Mitchell	(D.D.C.)		Electronic surveillance		No.
Fonda v. Gray	73-2442-MML (C.D. Cal.)	October 1973	Electronic surveillance, mail opening, break-in, false arrest, pretext telephone calls, bank record examination.	Mid discovery	Yes.
Forsyth v. Kleindienst	72-197 (E.D. Pa.)	February 1972	Electronic surveillance	Defendants' motion for summary judgment pending.	No.

ATTACHMENT TO ATTORNEY GENERAL LETTER OF JANUARY 20, 1977: LIST OF CIVIL CASES—Continued

Lawsuit	Civil action No.	Filing date	Subject	Status	Private counsel retained
Founding Church of Scientology v. Kelley	77–175 (D.D.C.)	January 1977	Governmental investigatory practices against plaintiff.	Plaintiffs' motion to dismiss pending.	No.
Fusion Energy Foundation v. FBI	77–479 (W.D. Pa.)		FBI investigatory practices directed against plaintiff.	Mid discovery; part of suit dismissed.	No.
Ghandi v. Police Dept. of the City of Detroit	4–72019 (E.D. Mich.)		Search and seizure; use of informants; surveillance.	Mid discovery	No.
Grove Press v. CIA	75–3493 (S.D.N.Y.)		CIA mail opening		Yes.
Halkin v. Helms	75–1773 (D.D.C.)	October 1975	CIA investigatory practices and NSA interception of communications.	do	Yes.
Hallinan v. Mitchell	C–75–0558 (N.D. Cal.)	March 1975	Electronic surveillance	On appeal	No.
Halperin v. Kissinger	1187–73 (D.D.C.)		do	do	No.
Hampton v. Hanrahan	70–C–1384 (N.D. Ill.)		Wrongful death	do	No.
Heller v. Gibson	76–1001 (D.D.C.)	June 1976	False arrest	Mid discovery	No.
Hobson v. Wilson	76–1326 (D.D.C.)	July 1976	FBI investigatory practices (electronic surveillance, informants).	do	No.
Institute for Policy Studies v. Mitchell	74–316 (D.D.C.)	February 1974	Electronic surveillance; informants	Late discovery	No.
Jabara v. Kelley	39065 (E.D. Mich.)	October 1972	FBI electronic surveillance, bank record examination and physical surveillance; NSA interception of communications.	Defendants' motion for summary judgment pending.	No.
Kenyatta v. Moore		August 1977	COINTELPRO		No.
Kinoy v. Mitchell	70–5698 (S.D.N.Y.)	December 1970	Electronic Surveillance	Defendants' motion to dismiss and for summary judgment pending.	No.
Lake v. Kissinger			do		No.
Lamont v. Haig	75–0271 (D.D.C.)	April 1975			
Lamont v. U.S.	77–Civ. 1029 (E.D.N.Y.)	May 1977	CIA mail opening	Trial set for February 1978	Yes.
Lawrenson v. Kearney	77–Civ. 3542 (S.D.N.Y.)		FBI wiretapping	Stayed pending disposition of related criminal matter.	No.
McAllister v. Kleindienst	72–197 (E.D. Pa.)		Electronic surveillance	Stayed pending decision in Foryth and Burkhart.	No.
Miles v. Kelley	77–M–0501–S (N.D. Ala.)	April 1977	COINTELPRO		No.

Murrell v. City of Kankakee	77–C–4101 (N.D. Ill.)	November 1977	House search by DEA	Early discovery	No.
Moore v. Levi	75–Civ–6203 (S.D.N.Y.)		Electronic surveillance		No.
National Lawyers Guild v. The Attorney General		March 1977	FBI Investigatory practices directed against NLG.		No.
Offner v. Kearney	77–Civ. 2946 (S.D.N.Y.)		FBI wiretapping	Stayed pending disposition of related criminal matter.	No.
Pacquette v. City of Henderson	LV–76–89 (D. Nev.)		Electronic surveillance	Early discovery	No.
Paton v. LaPrade	1091–73 (D.N.J.)	July 1973	FBI mail cover	Late discovery; expected to go to trial.	No.
Price v. Kearney	77–Civ. 2181 (S.D.N.Y.)		FBI wiretapping	Stayed pending disposition of related criminal matter.	No.
Robertson v. Adsit	77–M–328 (D. Col.)	April 1977	Break-in by FBI informant	Defendants' motions for dismissal and summary judgment pending.	Yes.
Sell v. Austin Independent School District	A–76–CA–55 (W.D. Tex.)	1976	COINTELPRO	Mid-discovery	No.
Sigler v. LeVan	EP77–CA35 (W.D. Tex.)	March 1977	Wrongful death	Beginning discovery	Yes.
Silkwood v. Kerr-KcGee	76–0888B (W.D. Okla.)		Conspiracy to conceal violation of civil rights.	Defendants' motion for summary judgment due to be filed.	No.
Sinclair v. Kleindienst	610–73 (D.D.C.)		Electronic surveillance; bad faith prosecution.	Late discovery	No.
Smith v. Nixon	76–0798 (D.D.C.)		Electronic surveillance	Defendant's motion for dismissal pending.	No.
Sociallst Workers Party v. Attorney General	73–Civ. 3160 (S.D.N.Y.)		FBI investigatory practices directed against SWP (wiretapping, mail opening, break-ins); NSA interception of communications.	Late discovery	Yes.
Socialist Workers Party v. Rochford	75–C–3361 (N.D. Ill.)				No.
Spock v. U.S.	76–Civ. 4457 (S.D.N.Y.)	October 1976	NSA interception of communications	Defendants' motion for dismissal pending.	No.
United Klans of America v. McGovern	77–G–1160 W (N.D. Ala.)	August 1977	COINTELPRO	Dismissed; motion for reconsideration pending.	No.
War Resisters League v. Regional Commissioner of Customs.	(S.D.N.Y.)				
Weinberg v. Mitchell	C–75–0817 (N.D. Cal.)	May 1975	Electronic surveillance	On appeal	No.
Wilson v. U.S.	77C–975 (E.D.N.Y.)	July 1976	CIA mail opening [U.S. only defendant]	Trial set for February 1978	No.
Zweibon v. Mitchell	2025–71 (D.D.C.)		Electronic surveillance	Defendant's motion for summary judgment pending.	No.
52 May Day Cases	(D.D.C.)		May Day		No.

Letter From Senator Abourezk to Attorney General, February 7, 1977: First Set of Questions on S. 2117

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United States Senate

COMMITTEE ON THE JUDICIARY
SUBCOMMITTEE ON
ADMINISTRATIVE PRACTICE AND PROCEDURE
WASHINGTON, D.C. 20510

February 7, 1978

The Honorable Griffin B. Bell
Attorney General
Department of Justice
9th and Constitution Ave., N.W.
Washington, D.C. 20530

Dear Mr. Attorney General:

At the January 26th hearing on S. 2117 before the Subcommittees on Administrative Practice and Procedure and on Citizens and Shareholder Rights and Interests, Senator Metzenbaum mentioned that I would be submitting written questions to you. Attached are these questions. In order to expedite consideration of this bill I would appreciate your providing me with written answers by Friday, March 3.

Sincerely,

James Abourezk

James Abourezk
Chairman,
Subcommittee on Administrative
Practice and Procedure

GENERAL QUESTIONS BASED ON PREPARED STATEMENT

1. On page 5 of your statement you say that you are "personally agreeable to provisions which would assure effective and fair procedures to discipline an employee who has violated another's constitutional rights, procedures in which the injured person can participate in a meaningful way."

   Are you saying that at least an outline of the essentials of such procedures should be included in this bill?

2. In your statement, you say that "for punishment to be an effective deterrent it must be predictable." (page 4)

   Would you, therefore, support a provision in the bill requiring that a disciplinary proceeding automatically be commenced against a federal employee whenever a constitutional tort case involving him is filed against the government?

3. In your statement you say "the possibility of civil damage actions for (honest, law abiding and conscientious civil servants) tends to discourage taking difficult assignments and performing such assignments thoroughly and courageously. Instead, it has the effect of causing otherwise responsible officials to worry about 'covering' themselves. I know this is true in the Justice Department but do not doubt that it applies in every department and agency of the Federal Government." (page 4).

a. Please explain why you believe civil servants who are in fact honest, law-abiding and conscientious have these worries.

b. If they were assured that they would not have to pay their legal fees, why does the prospect of civil damage actions have any adverse impact on federal employees who are "honest, law-abiding and conscientious"?

c. Why should the Congress accept the Department's judgment that civil damage actions deter honest civil servants from fearless performance of their duties when the Supreme Court has rejected these very same arguments in refusing to give civil servants absolute immunity?

d. On what basis do you conclude that the personal liability of civil servants "serves no constructive purpose" when the courts have repeatedly ruled that civil servants should be personally liable? (page 3).

e. Is it an "unjust ...burden" for a government employee to be held liable for a sizeable judgment in a civil suit" if that employee has intentionally violated the constitutional rights of an individual? (page 1)

f. Isn't it true that civil damage actions do have a deterrent effect on employees who are not honest, law-abiding and conscientious?

g. If it is true that civil damage actions have a deterrent effect on such employees, isn't it necessary that any bill immunizing such employees maintain such deterrence through an alternative accountability procedure?

ACCOUNTABILITY OF HIGH GOVERNMENT OFFICIALS AND FORMER GOVERNMENT OFFICIALS

1. Is it possible or appropriate for presidential appointees and former government officials to be subjected to civil service disciplinary proceedings?
2. Does the Department have any specific alternative system of accountability to recommend for Presidential appointees and former employees in addition to existing accountability mechanisms?
   a. If the Department has no recommendation for such an alternative system for presidential appointees and former employees, how does the bill provide the "sort of mechanism" you "recognize...should be established to insure the fair and effective disciplining" of federal employees"? (page 5).
   b. Particularly with respect to presidential appointees, do you believe passage of the Special Prosecutor bill, now pending in the House Judiciary Committee, would compensate in part for the immunity given to Presidential appointees by this bill and if so, should adoption of the Special Prosecutor bill be a prerequisite to immunizing Presidential appointees from civil damage actions?

c. Does the Department support giving plaintiffs an election either to sue a former federal official or a Presidential appointee in his individual capacity or to sue the government under the Tort Claims Act?

3. Does the Department believe that criminal prosecution will be "sufficient(ly) strong to discourage improper conduct" by Presidential appointees and former employees but concede that it is not sufficiently strong to discourage such conduct by other federal employees and, if so, explain why this is true?

4. If plaintiffs are given an election to bring a tort suit against a Presidential appointee or former employee in his individual capacity or against the government, do you believe that most such suits would be brought against the government because of the absence of a good faith defense and "deep pockets"?

5. Doesn't the fact that high government officials have more power potentially to abuse the constitutional rights of individuals mean that it is more--not less--important to preserve intact all available accountability mechanisms applicable to such employees?

6. In order to be effective and credible with the public isn't it necessary that disciplinary proceedings against an employee be conducted by an agency other than that for which the employee worked?

7. In addition to agreeing to include new disciplinary procedures in S. 2117, can you give the Subcommittee assurances that you will work with the Civil Service Commission to implement the details of these disciplinary procedures in the Civil Service reform proposals?

8. The Department has indicated that it is unable to provide the Subcommittee with a detailed discription of the effectiveness of existing disciplinary proceedings. What agency in the Executive Branch is able to provide this information?

9. How can the Department argue that "from a deterrent point of view ...the prospects of disciplinary action ...will be sufficient strongly to discourage improper conduct" when not one person in the CHAOS and COINTELPRO operations has yet been disciplined? (page 5).

10. If there is no election of remedies for an aggrieved plaintiff in suing a government employee, can't an employee avoid any accountability by leaving the government prior to the commencement of disciplinary action or during the course of the proceeding?

11. How many Presidential appointees or former government officials are defendants in pending Constitutional Tort cases in which the Department is involved?

    a. How many of these Presidential appointees and former government officials are being represented by private counsel retained by the Department?

    b. Approximately what percentage is this of all of the Constitutional Tort cases in which private counsel have been retained?

    c. If the number and percentage of Presidential appointees and former employees being represented by private counsel is small, then wouldn't the Department's cost problems in hiring private counsel largely be solved by immunizing present employees who are not Presidential appointees?

ATTORNEY GENERAL CERTIFICATION

1. Under section 5 of the bill the Attorney General must certify whether a defendant employee in a constitutional torts case was "acting within the scope of his office or employment or under the color thereof, at the time of the incident out of which the suit arose..." For a common-law tort case the Attorney General must certify whether a defendant employee was "acting within the scope of his office or employment..."

   How does the Attorney General determine whether a case incolves a constitutional or a common law tort?

2. Under which standard does the Attorney General make a certification if a complaint alleges both constitutional and common law torts?

3. Is it of any relevance in making a certification in a constitutional tort case that the defendant employee has been indicted or convicted of a crime related to the subject matter of the tort case, and if so, describe such relevance?

   a. Please answer the same question with respect to a common-law tort case.

4. Please provide a list of cases or other precedent which describes the technical meaning of "color" of authority.

5. When a District Court is making a determination on a motion to remand whether an employee was acting under "color" of office, to what precedent can it turn?

FURTHER NEED FOR PRIVATE COUNSEL

1. Of the individuals who have been represented by private counsel retained by the Department, what percentage were:

   (a) "targets"of criminal investigations;

   (b) had a conflict with other defendants;

(c) wished to raise legal arguments not in the interest of the United States to assert, respectively?

2. In a situation where a federal employee is being sued in a civil tort suit while a target of a criminal investigation or a defendant in a criminal case, would the Department support statutory authority to reimburse the employee for private counsel fees in the civil case, if, after a determination on the merits in the criminal case, the investigation is closed or the individual has been found innocent?

3. Would the Department support an amendment giving it statutory authority to retain private counsel only when there is a conflict among federal employees?

   a. Would the Department suggest legislative language to accomplish this purpose?

MINIMUM DAMAGE FIGURE

1. What is the basis for the $1000 minimum figure for liquidated damages?

2. What objection if any, would the Department have to raising the minimum damage recovery?

3. How much money has been paid in damages to citizens under the wiretap statute?

4. What is the Department's estimate of the cost of this bill will be over the next few years for constitutional torts?

5. What has been the yearly cost to the government for awards in common-law tort cases?

6. Under the liquidated damage provision in section 3 of the bill, does a claimant recover a minimum of $1000 for each suit he wins for for each separate violation of his constitutional rights he proves?

a. Would the Department support an amendment to the bill which provides "that for each claim arising under the Constitution of the United States, such compensation shall not be less than liquidated damages of $1000" in order to permit a larger recovery of liquidated damages in cases where a series of constitutional violations occurs?

7. Would the Department support a provision allowing a plaintiff in a constitutional torts case to elect to have an advisory jury empanelled to recommend to the judge the amount of damages which should be awarded?

JURY TRIALS

1. Does the Department oppose permitting jury trials in constitutional tort cases for any reason other than because existing law does not permit juries for common-law torts?
2. Are juries informed in Tort Claims Act cases that the federal employee whose conduct is involved is not personally liable?

SECTION 2680 EXCEPTIONS

1. How many law suits have been brought under Section 2680(h) since it was amended?
2. What amount of damages has been awarded to plaintiffs in Section 2680(h) suits?
3. What is the relative success rate of plaintiffs bringing constitutional tort cases under Section 2680(h) and similar cases against law enforcement officers in their individual capacity?
4. Has it been the Department's experience that plaintiffs bring constitutional tort suits against law enforcement officers in their individual capacity even though the officer can raise a good faith defense?

"GOOD FAITH" DEFENSE

1. The Department has agreed to delete the "good faith" provision in Section 3 of the bill. Under this amendment can the government still raise a good faith defense in a wiretap case?

SUBROGATION

1. Would the Department support a provision, such as that contained in the Swine Flu bill, giving the government the right to bring civil actions against federal employees to subrogate any damages which the government has paid in a constitutional tort case based on that employee's conduct?

Letter From Justice Department to Senator Abourezk, March 13, 1977: Answers to First Set of Questions on S. 2117

ASSISTANT ATTORNEY GENERAL
LEGISLATIVE AFFAIRS

Department of Justice
Washington, D.C. 20530

March 13, 1978

Honorable James Abourezk
Chairman
Subcommittee on Administrative
Practice and Procedure
Committee on the Judiciary
United States Senate
Washington, D. C. 20510

Dear Mr. Chairman:

I have enclosed the answers to the questions that you submitted to the Attorney General on February 7th concerning S. 2117, the Department's proposed amendments to the Federal Tort Claims Act.

Sincerely,

Patricia M. Wald

Patricia M. Wald
Assistant Attorney General

GENERAL QUESTIONS BASED ON PREPARED STATEMENT

Question 1: On page 5 of your statement you say that you are "personally agreeable to provisions which would assure effective and fair procedures to discipline an employee who has violated another's constitutional rights, procedures in which the injured person can participate in a meaningful way."

Are you saying that at least an outline of the essentials of such procedures should be included in this bill?

Answer 1: Yes. A draft of such provisions has been prepared for early submission to the Congress, and is now in the process of being considered by OMB.

Question 2: In your statement, you say that "for punishment to be an effective deterrent it must be predictable." (page 4)

Would you, therefore, support a provision in the bill requiring that a disciplinary proceeding automatically be commenced against a federal employee whenever a constitutional tort case involving him is filed against the government:

Answer 2: No, not automatically. A victim should be permitted to institute disciplinary proceedings after he has administratively or judicially established that a constitutional tort has been committed against him. An agency may, of course, institute disciplinary proceedings when it believes them to be appropriate.

Question 3: In your statement you say "the possibility of civil damage actions for (honest, law abiding and conscientious civil servants) tends to discourage taking difficult assignments and performing such assignments thoroughly and courageously. Instead, it has the effect of causing otherwise responsible officials to worry about 'covering' themselves. I know this is true in the Justice Department but do not doubt that it applies in every department and agency of the Federal Government." (page 4).

Question 3(a): Please explain why you believe civil servants who are in fact honest, law-abiding and conscientious have these worries.

Answer 3(a): Our experience shows most torts, even of a constitutional nature, are not committed maliciously, or with the intent to violate another's constitutional rights. In almost all instances the wrong is committed with a good faith belief on the part of the employee that what he is doing is lawful and permissible. The thought that his view of the law, if challenged, will subject him to personal suit and liability, will cause him to hesitate or even refuse to perform his duties notwithstanding assurances from his superiors.

Question 3(c): Why should the Congress accept the Department's judgment that civil damage actions deter honest civil servants from fearless performance of their duties when the Supreme Court has rejected these very same arguments in refusing to give civil servants absolute immunity?

Answer 3(c): The Supreme Court has not rejected the concept that civil damage actions deter honest civil servants from the fearless performance of their duties. What the Supreme Court has done, is to reduce the scope of immunity available to "state" officials under the Civil Rights Act in order to comport with congressional intent that the Act provide a vehicle for obtaining redress against state officials by injured persons. See in this regard Scheuer v. Rhodes, 416 U.S. 232 (1974). The Supreme Court has never rejected the concept that federal officials are absolutely immune from civil liability in the context of common law constitutional tort cases for discretionary conduct undertaken within the outer parameters of their duties.

Question 3(d): On what basis do you conclude that the personal liability of civil servants "serves no constructive purpose" when the courts have repeatedly ruled that civil servants should be personally liable? (page 3).

Answer 3(d): As noted at pages 3-4 of the Attorney General's statement, the general inability of plaintiffs

to obtain monetary judgments against government employees in light of the qualified immunity defense, the questionable deterrent effect of potential civil liability on government employees intent on doing wrong, the negative impact on the morale of government employees acting properly, and the fact that there always has and continues to be criminal liability for criminal wrongdoers, combines to produce a result having virtually no salutary benefit.

Question 3(e): Is it an "unjust ...burden" for a government employee to be held liable for a sizeable judgment in a civil suit" if that employee has intentionally violated the constitutional rights of an individual? (page 1)

Answer 3(e): No, it is not an unjust burden, the difficulty comes in subjecting all government employees to the burden of civil litigation where most acted in a responsible, nontortious manner. In the words of Judge Learned Hand:

> "it does indeed go without saying that an official, who is in fact guilty of using his powers to vent his spleen upon others, or for any other personal motives not connected with the public good, should not escape liability for the injuries he may so cause; and, if it were possible in practice to confine such complaints to the guilty, it would be monstrous to deny recovery. The justification for doing so is that it is impossible to know whether the claim is well founded until the case has been tried, and that to submit all officials, the innocent as well as the guilty, to the burden of a trial and to the inevitable danger of its outcome, would dampen the ardor of all but the most resolute, or the most irresponsible, in the unflinching discharge of their duties."

Gregoire v. Biddle, 177 F.2d 579 (2d Cir. 1949), cert. denied, 339 U.S. 949 (1950). Few complaints do not charge intentional violations of constitutional rights. It is the manner in which a plaintiff's complaint is drafted which subjects

an employee to suit. The history of litigation in this area establishes that seldom has a tort been intentional in the malicious sense. We consider it more fitting for the employer to respond in damages for those few cases in which constitutional rights are violated intentionally and to take appropriate disciplinary actions against the employee.

Question 3(f) Isn't it true that civil damage actions do have a deterrent effect on employees who are not honest, law-abiding and conscientious?

Answer 3(f): This may be, but in order to reach dishonest, nonlaw-abiding and nonconscientious employees, many more honest, law-abiding and conscientious employees are subjected to suit. In this regard, note the above quotation from Gregoire v. Biddle, supra.

Question 3(g): If it is true that civil damage actions have a deterrent effect on such employees, isn't it necessary that any bill immunizing such employees maintain such deterrence through an alternative accountability procedure?

Answer 3(g): Yes, and we are proposing such a procedure. See Answer 2 below.

ACCOUNTABILITY OF HIGH GOVERNMENT OFFICIALS AND FORMER GOVERNMENT OFFICIALS

Question 1: Is it possible or appropriate for presidential appointees and former government officials to be subjected to civil service disciplinary proceedings?

Answer 1: No. The CSC has no authority with respect to presidential appointees or former government officials.

Question 2: Does the Department have any specific alternative system of accountability to recommend for Presidential appointees and former employees in addition to existing accountability mechanisms?

Answer 2: Yes. We have drafted an amendment and are circulating for comment in the Executive Branch. We will submit it to the committee as soon as this process is finished.

Question 2(a): If the Department has no recommendation for such alternative system for presidential appointees and former employees, how does the bill provide the "sort of mechanism" you "recognize...should be established to insure the fair and effective disciplining" of federal employees"? (page 5).

Answer 2(a): Not applicable.

Question 2(b): Particularly with respect to presidential appointees, do you believe passage of the Special Prosecutor bill, now pending in the House Judiciary Committee, would compensate in part for the immunity given to Presidential appointees by this bill and if so, should adoption of the Special Prosecutor bill be a prerequisite to immunizing Presidential appointees from civil damage actions?

Answer 2(b): The Special Prosecutor bill provides no greater assurance that proper disciplinary action will be instituted than is available now under existing law. In any event criminal liability for wrongdoing is already available to the Department of Justice prosecutors and U.S. Attorneys.

Question 2(c): Does the Department support giving plaintiffs an election either to sue a former federal official or a Presidential appointee in his individual capacity or to sue the government under the Tort Claims Act?

Answer 2(c): No.

Question 3: Does the Department believe that criminal prosecution will be "sufficient(ly) strong to discourage improper conduct" by Presidential appointees and former employees but concede that it is not sufficiently strong to discourage such conduct by other federal employees and, if so, explain why this is true?

Answer 3: We believe criminal prosecution is sufficiently strong to deter conduct of Presidential appointees and former government employees if it is criminal. There is much conduct, however, which though not criminal calls for disciplinary measures other than prosecution to which current employees may be subjected.

Question 4: If plaintiffs are given an election to bring a tort suit against a Presidential appointee or former employee in his individual capacity or against the government, do you believe that most such suits would be brought against the government because of the absence of a good faith defense and "deep pockets"?

Answer 4: This is speculative, but we would think most plaintiffs would prefer a financially responsible defendant.

Question 5: Doesn't the fact that high government officials have more power potentially to abuse the constitutional rights of individuals mean that it is more--not less--important to preserve intact all available accountability mechanisms applicable to such employees?

Answer 5: We view our proposed discipline proceeding as an attempt to provide an accountability procedure for those employees who are beyond the reach of the political process. Because Presidential appointees are exposed to political pressures, we see no need to provide a special discipline procedure for them.

Question 6: In order to be effective and credible with the public isn't it necessary that disciplinary proceedings against an employee be conducted by an agency other than that

for which the employee worked?

Answer 6: In our opinion, no. However, the disciplinary provisions we are drafting to provide for the review by an agency other than that by which the employee is employed. The provisions additionally provide for judicial review.

Question 7: In addition to agreeing to include new disciplinary procedures in S. 2117, can you give the Subcommittee assurances that you will work with the Civil Service Commission to implement the details of these disciplinary procedures in the Civil Service reform proposals?

Answer 7: We understand that the Civil Service reform proposals have already been submitted to the Congress.

Question 8: The Department has indicated that it is unable to provide the Subcommittee with a detailed description of the effectiveness of existing disciplinary proceedings. What agency in the Executive Branch is able to provide this information?

Answer 8: Our inability did not relate to the effectiveness of existing disciplinary proceedings, but rather to our inability to retrieve adequate data relating to such proceedings in light of the extremely costly and burdensome task of canvassing every Executive Branch component. It is our understanding that unless a federal employee seeks review of an adverse action before the Civil Service Commission, no single agency would have the information you seek.

Question 9: How can the Department argue that "from a deterrent point of view ...the prospects of disciplinary action ...will be sufficiently strong to discourage improper conduct" when not one person in the CHAOS and COINTELPRO operations has yet been disciplined? (page 5)

Answer 9: The Department's proposed amendment provides for a disciplinary proceeding to be initiated by a victim

of governmental wrongdoing. This potential for outside initiation should provide an enhanced deterrent over existing disciplinary mechanisms.

Question 10: If there is no election of remedies for an aggrieved plaintiff in suing a government employee, can't an employee avoid any accountability by leaving the government prior to the commencement of disciplinary action or during the course of the proceeding?

Answer 10: While we believe there is less, if any, need for an accountability mechanism against an employee who leaves the government either prior to the institution of disciplinary proceedings or during their pendency, we agree that this is a reasonable question and welcome proposed solutions from the Congressional subcommittees considering this legislation.

Question 11: How many Presidential appointees or former government officials are defendants in pending Constitutional Tort cases in which the Department is involved?

Answer 11: A response with respect to all pending cases containing allegations of constitutional tort is not possible as no list exists of such cases. With respect to the list of so-called "constitutional tort" cases which you have already received, there are approximately 300 Presidential appointees or former government officials sued in their individual capacity. For purposes of the tally, all former government employees were counted as "former government officials." Each time the same Presidential appointee or former government employee was named a defendant in a different suit, he was counted as a new statistic. Finally, the figure of 300 does not include defendants in the 52 May Day cases in which John Mitchell, Richard Kleindienst, and Will Wilson (former Assistant Attorney General, Criminal Division), are generally named as defendants.

Question 11(a): How many of these Presidential appointees and former government officials are being represented by private counsel retained by the Department?

Answer 11(a): Approximately 70 of the 300 Presidential appointees and former government employees referenced in the answer to Question 11, are being retained by private counsel retained by the Department.

Question 11(b): Approximately what percentage is this of all of the Constitutional Tort cases in which private counsel have been retained?

Answer 11(b): Approximately 85 percent.

Question 11(c): If the number and percentage of Presidential appointees and former employees being represented by private counsel is small, then wouldn't the Department's cost problems in hiring private counsel largely be solved by immunizing present employees who are not Presidential appointees?

Answer 11(c): As can be seen by the answer to Question 11(b), the cost of providing private counsel for Presidential employees and former government employees represents a substantial portion of the overall cost of the Department's private counsel program.

ATTORNEY GENERAL CERTIFICATION

Question 1: Under section 5 of the bill the Attorney General must certify whether a defendant employee in a constitutional torts case was "acting within the scope of his office or employment or under the color thereof, at the time of the incident out of which the suit arose..." For a common-law tort case the Attorney General must certify whether a defendant employee was "acting within the scope of his office or employment..."

How does the Attorney General determine whether a case involves a constitutional or a common law tort?

Answer 1: The United States will substitute itself for all constitutional torts and most common law torts except for those defined by 28 U.S.C. §2680. In determining whether or not an employee was acting within the scope of his duties or under the color of his office, that determination must be made upon an examination of the facts in each

particular case as it is under existing law.

Question 2: Under which standard does the Attorney General make a certification if a complaint alleges both constitutional and common law torts?

Answer 2: Certification is the process by which the Attorney General determines whether to substitute the United States for the purpose of removing a suit from state court to federal court. It does not involve a determination of whether a complaint alleges a constitutional or a common law tort. Nevertheless, in making a determination of whether a constitutional or common tort has been alleged, the Attorney General must rely on the underlying facts presented by the complaint.

Question 3: Is it of any relevance in making a certification in a constitutional tort case that the defendant employee has been indicted or convicted of a crime related to the subject matter of the tort case, and if so, describe such relevance?

Answer 3: No. The certification as noted in the answer to Question 2 above, is not a determination but rather a statement that the employee was acting within the scope of his employment or under the color of his office.

Question 3(a): Please answer the same question with respect to a common-law tort case.

Answer 3(a): With respect to a common-law tort, we have never yet made a determination that conduct which is criminal and for which a federal indictment or conviction has resulted and which conduct also forms the basis of a civil suit, is conduct within the scope of an employee's office or employment.

Question 4: Please provide a list of cases or other precedent which describes the technical meaning of "color" of authority.

Answer 4: There are many cases in the civil rights area which discuss color of authority. See e.g. Screws v. United States, 325 U.S. 91, 111 (1945); Monroe v. Pape, 365 U.S. 167, 172 (1961). It is our intention, broadly speaking, that if a government employee commits a tortious violation of a person's constitutional rights, and does so under the guise of his federal office, whether or not within the scope of his federal employment, that the United States would be responsible.

Question 5: When a District Court is making a determination on a motion to remand whether an employee was acting under "color" of office, to what precedent can it turn?

Answer 5: There is ample federal case law discussing color of office in other contexts which the District courts utilize.

FURTHER NEED FOR PRIVATE COUNSEL

Question 1: Of the individuals who have been represented by private counsel retained by the Department, what percentage were:

(a) "targets" of criminal investigations;
(b) had a conflict with other defendants;
(c) wished to raise legal arguments not in the interest of the United States to assert, respectively?

Answer 1: We are unaware of any cases in which private counsel are currently being retained for defendants who are "targets" of federal criminal investigations. Of the approximately 90 defendants for whom private counsel are retained, 9 instances involve reason (c) only [desire to raise a legal argument not in the interest of the United States to assert], 20 instances involve reason (b) alone [conflicts with other defendants], and the balance involve a combination of reasons (b) and (c).

Question 2: In a situation where a federal employee is being sued in a civil tort suit while a target of a criminal investigation or a defendant in a criminal case, would the Department support statutory authority to reimburse the employee for private counsel fees in the civil case, if,

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after a determination on the merits in the criminal case, the investigation is closed or the individual has been found innocent?

Answer 2: There may be instances in which it would be unduly harsh to require an employee to pay legal fees after he has been vindicated of the conduct for which he was investigated or prosecuted. For this reason, we are studying all aspects of the current policy against representation and reimbursement.

Question 3: Would the Department support an amendment giving it statutory authority to retain private counsel only when there is a conflict among federal employees?

Answer 3: While we believe the Attorney General has the authority to hire private counsel under existing law, we would have no objections to specific statutory authority that would ratify it. The other conflicts of interest which persuaded us to provide private counsel are equally compelling for the benefits of such legislation if our proposed amendments to the Federal Tort Claims Act are not enacted.

Question 3(a): Would the Department suggest legislative language to accomplish this purpose?

Answer 3(a): If the Congress desires to enact such legislation, we would be happy to assist in its drafting.

MINIMUM DAMAGE FIGURE

Question 1: What is the basis for the $1000 minimum figure for liquidated damages?

Answer 1: We used as a guide the minimum damage figure of $1000 prescribed by the Congress itself in 18 U.S.C. §2520, and it seemed acceptable to use because possible damages in constitutional tort cases are more often than not substantially less than that figure.

Question 2: What objection if any, would the Department have to raising the minimum damage recovery?

Answer 2: Considering that for constitutional torts we are also providing for the payment of reasonable attorney's fees and other litigation costs, we consider the $1000 figure as more than adequate.

Question 3: How much money has been paid in damages to citizens under the wiretap statute?

Answer 3: We are unaware of any payments made by federal employees under 18 U.S.C. §2520.

Question 4: What is the Department's estimate of the cost of this bill will be over the next few years for constitutional torts?

Answer 4: It is impossible to estimate.

Question 5: What has been the yearly cost to the government for awards in common-law tort cases?

Answer 5: With respect to cases handled by the Torts Section of the Civil Division which constitute the substantial portion of common law tort claims defended by the Department following amounts have been paid to opposing parties over the last five fiscal years:

Fiscal Year	Amounts Awarded to Opponents
1977	$32,523,785.00
1976	43,947,314.00
Transition Quarter (July 1, to Sept. 30, 1976)	8,100,000.00
1975	27,852,312.00
1974	33,282,327.00
1973	26,901,518.00

Question 6: Under the liquidated damage provision in section 3 of the bill, does a claimant recover a minimum of $1000 for each suit he wins for each separate violation of

his constitutional rights he proves?

Answer 6: Except for wiretap violations for which the amendments make specific provisions, tortious constitutional violations usually result from single acts. To the extent that this may not be so, the assessment of the minimum damage figure must be left to judicial evolution.

Question 6(a): Would the Department support an amendment to the bill which provides "that for each claim arising under the Constitution of the United States, such compensation shall not be less than liquidated damages of $1000" in order to permit a larger recovery of liquidated damages in cases where a series of constitutional violations occurs?

Answer 6(a): Because of the facility in artfully drafting pleadings which claim continuous violations where none exist, we prefer to leave such questions to judicial evolution.

Question 7: Would the Department support a provision allowing a plaintiff in a constitutional torts case to elect to have an advisory jury empanelled to recommend to the judge the amount of damages which should be awarded?

Answer 7: No. The damages contemplated by the Federal Tort Claims Act are actual and compensatory, not punitive. We recognize, of course, that a court may if it wishes, empanel an advisory jury, and nothing in the proposed legislation would change that.

JURY TRIALS

Question 1: Does the Department oppose permitting jury trials in constitutional tort cases for any reason other than because existing law does not permit juries for common-law torts?

Answer 1: Yes, we oppose for reasons set forth in the answers to Question 7 on this page, above.

Question 2: Are juries informed in Tort Claims Act cases that the federal employee whose conduct is involved is not personally liable?

Answer 2: Juries are not permitted in cases brought under the Federal Tort Claims Act, and I am unaware of any cases against both the United States and its employees where there has been a non-jury trial as to the United States and a jury trial with respect to the individually sued employees.

SECTION 2680 EXCEPTIONS

Question 1: How many lawsuits have been brought under Section 2680(h) since it was amended?

Answer 1: The following number of cases arising under P.L. 93-253 [amending 28 U.S.C. §2680(h)] handled by the Torts Section of the Civil Division are set forth below together with the amount of damages awarded to opponents as requested by Question 2 below:

Fiscal Year	No. of Cases	Amount Awarded to Opponents
1977	17	$22,000.00
1976	2	7,000.00
Transition Quarter	1	0.00
1975	0	0.00
1975	0	0.00

Question 2: What amount of damages has been awarded to plaintiffs in Section 2680(h) suits?

Answer 2: See Answer to Question 1 above.

Question 3: What is the relative success rate of plaintiffs bringing constitutional tort cases under Section 2680(h) and similar cases against law enforcement officers in their individual capacity?

Answer 3: We are aware of only two cases in which awards were made against federal employees sued in their individual capacities -- Halperin v. Kissinger, in which $5 [redacted] was awarded plaintiffs, and Dellums v. Powell, in which $12 million dollars was awarded. Halperin is on appeal and in Dellums the Court of Appeals vacated the award in part remanding it for a new trial. In view of the uncertain state of the Dellums award, and the proportionately large number of common law "Bivens" actions which have been brought without resulting in any award, it would appear that the "success rate" under §2680 of the Federal Tort Claims Act is significantly greater.

Question 4: Has it been the Department's experience that plaintiffs bring constitutional tort suits against law enforcement officers in their individual capacity even though the officer can raise a good faith defense?

Answer 4: Yes.

"GOOD FAITH" DEFENSE

Question 1: The Department has agreed to delete the "good faith" provision in Section 3 of the bill. Under this amendment can the government still raise a good faith defense in a wiretap case?

Answer 1: No.

SUBROGATION

Question 1: Would the Department support a provision, such as that contained in the Swine Flu bill, giving the government the right to bring civil actions against federal employees to subrogate any damages which the government has paid in a constitutional tort case based on that employee's conduct?

Answer 1: No, although applicable to the swine flu situation, a subrogation provision would not provide government employees with the necessary immunity from civil suit sought by the bill.

Letter From Senator Abourezk to Attorney General, March 21, 1978: Second Set of Questions on S. 2117

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United States Senate
COMMITTEE ON THE JUDICIARY
SUBCOMMITTEE ON
ADMINISTRATIVE PRACTICE AND PROCEDURE
WASHINGTON, D.C. 20510

March 21, 1978

Honorable Griffin B. Bell
Attorney General
Department of Justice
9th and Constitution Avenue N. W.
Washington, D. C. 20530

Dear Mr. Attorney General:

On February 7, 1977, I submitted to you certain questions regarding S. 2117, the Department's proposed amendment to the Federal Tort Claims Act. I have received your March 13, 1978, response to these questions. I appreciate your providing these responses.

Since that time it has come to my attention that a number of courts have held that constitutional torts not covered by the 1974 amendments to 28 U.S.C. 2680(h) nonetheless come under the jurisdiction of the Tort Claims Act. I was frankly surprised to learn this as I had assumed that the bill brought these constitutional torts under the Tort Claims Act "for the first time." If it is true that the Act already covers most constitutional torts, the principal effect of the bill would appear to be to take away an existing Bivens remedy from an aggrieved plaintiff and not to substitute a new remedy under the Tort Claims Act for this Bivens remedy.

In addition I understand that the Department is resisting vigorously these rulings which bring constitutional torts--even those which appear to fall under the express terms of the 1974 amendment--under the Tort Claims Act. I am at a loss to understand the Department's resistance to these rulings, given the Department's avowed interest in settling these cases, in avoiding the costs of private counsel, in compensating plaintiffs, and in relieving federal employees of personal liability.

This new information raises substantial doubts about the effect of the Department's bill. I am no longer sure that the effect

of the bill is to substitute a new accountability system for an old one. The effect now appears to be to deprive plaintiffs of an election of existing remedies. To resolve this matter, please respond to the attached questions as soon as possible.

Thank you very much for your assistance.

Sincerely,

James Abourezk
Chairman
Subcommittee on Administrative
Practice and Procedure

SUPPLEMENTAL QUESTIONS TO THE DEPARTMENT

1. On page 7 of your statement you say that the bill would bring constitutional torts under the F.T.C.A. "for the first time." Yet many constitutional torts are already brought as F.T.C.A. suits under the 1974 amendment to Section 2680(h) and trial courts have held other constitutional torts not covered by the 1974 amendment to be legitimate F.T.C.A. cases. (e.g., Birnbaum v. U.S., 436 F. Supp. 967; Lamont v. U. S.; Socialist Workers Party v. Attorney General; Black v. U. S., 389 F. Supp. 529; Avery v. U.S. 434 F. Supp. 937; and Cruikshank v. U. S., 431 Supp. 1355). [1]

   What types of constitutional tort cases would, in fact, be brought under the F.T.C.A. by the bill which courts have not yet already accepted as F.T.C.A. cases?

2. You argue that the Department wants constitutional tort suits to be brought under the F.T.C.A. because then the Department could simply "admit liability" (transcript at page 17), avoid retaining private counsel, and relieve federal employees of personal liability.

   a. Why then has the Department vigorously resisted bringing the cases cited above under the F.T.C.A.?

[1] See opinion at pp. 274 to 314.

b. Why is the Department attempting narrowly to construe the 1974 amendment to Section 2680 (h), for example in the case of Norton v. Turner, 427 F. Supp. 138, when if successful the result will be to encourage more tort suits to be brought against federal employees in their individual capacity and perhaps require the retention of private counsel?

c. If the Department is, in fact, interested in assuring that victims of unconstitutional acts be compensated, why is the Department contesting F.T.C.A. jurisdiction in the cases cited above?

d. If the Department, in fact, believes that $1000. is a reasonable minimum recovery in a constitutional tort case, why is it arguing in the Birnbaum case that the $1000 judgment awarded is too large?

e. Wouldn't it cost far less to accept these cases as F.T.C.A. cases and settle them than to pay Department and private counsel to defend them?

f. In accepting these constitutional tort cases as F.T.C.A. cases and in settling them, doesn't the Department avoid any adverse precedent on the scope of the various section 2680 exemptions in non-constitutional tort cases which otherwise may result if the Department litigates the applicability of the F.T.C.A.?

g. If these cases are accepted as F.T.C.A. cases, aren't plaintiffs already entitled to attorneys fees?

h. If these cases are accepted as F.T.C.A. cases and the Department adopts a policy of not raising the section 2680 exemptions, do plaintiffs have any need for a bill which waives these exemptions?

i. If these cases are accepted as F.T.C.A. cases, isn't the Department already precluded from raising a "good faith defense" by cases such as Norton v. Turner?

j. If the F.T.C.A. can already be construed to cover constitutional torts, isn't the principal purpose of the bill to make such suits an exclusive remedy not to provide a new remedy for plaintiffs?

k. Given the availability of F.T.C.A. jurisdiction for constitutional torts, isn't the only clear advantage in the bill to plaintiffs the $1000. liquidated damage provision?

Letter From Justice Department to Senator Abourezk, April 20, 1978: Answers to Second Set of Questions on S. 2117

ASSISTANT ATTORNEY GENERAL
CIVIL DIVISION

Department of Justice
Washington, D.C. 20530

April 20, 1978

Honorable James Abourezk
Chairman
Subcommittee on Administrative
Practice and Procedure
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

I have enclosed the answers to questions you submitted to the Attorney General under cover of your letter of March 21, 1978, concerning S.2117, the Department's proposed amendments to the Federal Tort Claims Act.

Sincerely,

Barbara Allen Babcock

BARBARA ALLEN BABCOCK
Assistant Attorney General
Civil Division

Enclosure

Justice Department Answers to Second Set of Questions to the Department [1]

Question 1. On page 7 of your statement you say that the bill would bring constitutional torts under the F.T.C.A. "for the first time." Yet many constitutional torts are already brought as F.T.C.A. suits under the 1974 amendment to Section 2680(h) and trial courts have held other constitutional torts not covered by the 1974 amendment to be legitimate F.T.C.A. cases. (e.g., *Birnbaum* v. *U.S.*, 436 F. Supp. 967 [2]; *Lamont* v. *U.S.*; *Socialist Workers Party* v. *Attorney General; Black* v. *U.S.*, 389 F. Supp. 529; *Avery* v. *U.S.*, 434 F. Supp. 937 [3] and *Cruikshank* v. *U.S.*, 431 Supp. 1355).[4]

What types of constitutional tort cases would, in fact, be brought under the F.T.C.A. by the bill which courts have *not* yet already accepted as F.T.C.A. cases?

Answer 1. It is the Department's view that Congress did not intend the Federal Tort Claims Act to apply to torts sounding in violation of the Constitution, particularly where no comparable common law tort existed. Reliance on the cited district court actions for the contrary proposition is questionable since each involved conduct which, although arguably characterized as a constitutional tort, could also be denominated as a common law tort, *e.g.*, invasion of privacy and trespass.[5] Indeed, with respect to the CIA's mail opening program, courts have split evenly on whether recovery is permissible under the Federal Tort Claims Act.[6] Even assuming that conduct violating the Fourth Amendment, which is at issue in all of the cited actions, does state a cause of action against the United States under the Federal Tort Claims Act, plaintiffs in many pending Bivens actions against government employees allege constitutional torts based on the First, Fifth, Sixth, and Ninth amendments which do not have any common law equivalents (e.g., First Amendment chill on freedom of speech and assembly, denial of due process as a result of discrimination). In the event courts were to recognize the validity of these alleged constitutional torts, none could be brought under the Federal Tort Claims Act as presently worded. In addition, other torts sounding both in constitutional and common law, such as libel and slander (alleged to interfere with the First Amendment right of assembly), may be barred by the present exemptions set forth in 28 U.S.C. §2680.

Question 2. You argue that the Department wants constitutional tort suits to be brought under the F.T.C.A. because then the Department could simply "admit liability" (transcript at page 17), avoid retaining private counsel, and relieve federal employees of personal liability.

a. Why then has the Department vigorously resisted bringing the cases cited above under the F.T.C.A.?

Answer 2a. The Department does not believe Congress has waived sovereign immunity under the Federal Tort Claims Act to actions sounding in constitutional tort. Advocating an opposite view, even if it serves as an expedient means for partially achieving that which is sought by the proposed amendments to the Tort Claims Act, would, of course, not justify a construction contrary to congressional intent, and in any event, it would not provide exclusivity of remedy against the United States and thus avoid either the need to retain private counsel or the negative effect on employee morale caused by the threat of protracted litigation and the possibility of personal liability.

Question 2b. Why is the Department attempting narrowly to construe the 1974 amendment to Section 2680(h), for example in the case of *Norton* v.

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[1] See p. 131.
[2] See opinion at p. 274.
[3] See opinion at p. 298.
[4] See opinion at p. 308.
[5] The district court in *Socialist Workers Party* v. *The Attorney General*, S.D.N.Y., has never ruled that constitutional torts may be persued against the United States under the Federal Tort Claims Act.
[6] Three courts have found that mail opening under the CIA's mail opening program does not state a cause of action under the Federal Tort Claims Act. D.D.C. (*Norman Hardy* v. *United States*, No. 76–1423); N.D. Cal. (*Julius Siebel* v. *United States*, No. C–76–1737); S.D. Iowa (*Norman Murphy* v. *CIA*, No. C–76–12). Three Courts have reached a contrary ruling. E.D.N.Y., Weinsten, J. (*Birnbaum* v. *United States*, 436 F. Supp. 967; *Driver* v. *United States*, No. 77–C–919; *Wilson* v. *United States*, No. 77–C–975; *Lamont* v. *United States*, No. 79–C–1029; *MacMillen* v. *United States*, No. 77–C–597); D. Conn. (*Avery* v. *United States*, 434 F. Supp. 937); D. Hawaii (*Cruikshank* v. *United States*, 431 F. Supp. 1355).

Turner, 427 F. Supp. 138,[7] when if successful the result will be to encourage more tort suits to be brought against federal employees in their individual capacity and perhaps require the retention of private counsel?[8]

Answer 2b. The Department urged, as it believed it should, that it was entitled under the theory of respondent superior to the same defenses that were available to its employees under the 1974 amendments to section 2680(h). Only exclusivity of remedy against the United States will reduce suits against federal employees and largely eliminate the need for private counsel.

Question 2c. If the Department is, in fact, interested in assuring that victims of unconstitutional acts be compensated, why is the Department contesting F.T.C.A. jurisdiction in the cases cited above?

Answer 2c. As discussed in its answer to Questions 1, the Department does not believe that the Federal Tort Claims Act waived sovereign immunity with regard to the broad array of constitutional torts that have been recognized in recent years. Moreover, absent an exclusive remedy against the United States, the cost of private counsel will probably exceed the amount of compensation likely to be awarded under our proposed amendments.

Question 2d. If the Department, in fact, believes that $1,000 is a reasonable minimum recovery in a constitutional tort case, why is it arguing in the *Birnbaum* case that the $1,000 judgment awarded is too large?

Answer 2d. The amount of $1,000 as a minimum liquidated damage figure was considered appropriate as an offset to the fact that an aggrieved party could no longer seek recovery from the individual tort feasor. Absent such consideration, an award of $1,000 when based on actual damages suffered may be excessive in cases where no physical, monetary, or psychological harm was suffered such as in *Birnbaum, supra.*

Question 2e. Wouldn't it cost far less to accept these cases as F.T.C.A. cases and settle them than to pay Department and private counsel to defend them?

Answer 2e. We do not believe that we may lawfully submit the United States to liability under the Federal Tort Claims Act for most constitutional torts. But aside from that, the question presumes that most constitutional tort cases are brought only for the purpose of recovering a monetary award. The Department's experience is that such suits are also brought to gain broad discovery of federal law enforcement and intelligence collection operations, effectuate changes in policy, and sometimes achieve personal satisfaction by winning in court. Such motives would not be satisfied by an early offer of monetary settlement. Private counsel at government expense would, of course, still be needed during these prolonged proceedings.

Question 2f. In accepting these constitutional tort cases as F.T.C.A. cases and in settling them, doesn't the Department avoid any adverse precedent on the scope of the various section 2680 exemptions in nonconstitutional tort cases which otherwise may result if the Department litigates the applicability of the F.T.C.A.?

Answer 2f. The Federal Tort Claims Act constitutes a limited congressional waiver of sovereign immunity. If the Department believes Congress did not consent for the United States to be sued for a particular variety of conduct, it cannot, without additional congressional authority, offer monetary settlements in lawsuits predicated on such conduct for any reason, whether or not it is for the purpose of avoiding adverse precedent.

Question 2g. If these cases are accepted as F.T.C.A. cases, aren't *plaintiffs* already entitled to attorneys fees?

Answer 2g. No, see 28 U.S.C. 2412.

Question 2h. If these cases are accepted as F.T.C.A. cases and the Department adopts a policy of not raising the section 2680 exemptions, do *plantiffs* have any need for a bill which waives these exemptions?

Answer 2h. The exemptions are of a jurisdictional nature which the Department has no authority to waive. As noted in the answer to Question 1, the courts are evenly divided over whether various exemptions set forth by section 2680 are applicable in actions based on the CIA's mail opening program. The proposed amendments would clarify the situation by expressly making the exemptions inapplicable to constitutional torts.

Question 2i. If these cases are accepted as F.T.C.A. cases, isn't the Department already precluded from raising a "good faith defense" by cases such as *Norton* v. *Turner?*

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[7] See opinion at p. 315.
[8] See plaintiff's reply brief in court of appeals at p. 330.

Answer 2i. No. The Department does not believe that the court in *Norton* v. *Turner* correctly decided the issue of whether the Department may raise the defenses of its employees in suits brought under the Federal Tort Claims Act.

Question 2j. If the F.T.C.A. can already be construed to cover constitutional torts, isn't the principal purpose of the bill to make such suits an exclusive remedy not to provide a new remedy for plaintiffs?

Answer 2j. As previously stated, the Department does not believe that the Federal Tort Claims Act applies to constitutional torts except those committed in specially defined areas by carefully described employees. If it did, then the desirable remaining purposes of the proposed amendments would be to make the Federal Tort Claims Act the exclusive remedy for obtaining civil redress from constitutional torts committed by federal employees, to improve morale and effective performance by honest employees, and at the same time, to substantially eliminate the high cost of retaining private counsel—three objectives which the Department believes are emminently worthwhile by themselves.

Question 2k. Given the availability of F.T.C.A. jurisdiction for constitutional torts, isn't the only clear advantage in the bill to plaintiffs the $1,000 liquidated damage provision?

Answer 2k. Again, as noted earlier, the Department does not believe the Federal Tort Claims Act applies to most constitutional torts, and if the Act does, the Department believes the government is not barred from raising all defenses available to its employees. Thus the $1,000 minimum liquidating damage provision is only one of several benefits which will be gained by the aggrieved person under the proposed amendments. Additionally, private counsel fees would still be required to be expended.

Memorandum of Office of Legal Counsel, of April 8, 1978, on Constitutionality of Retroactivity of S. 2117 [1]

This memorandum responds to your request for our views on the constitutionality of retroactive application of proposed amendments to the Tort Claims Act. The bill in question, S. 2117, 95th Cong., 1st Sess. (1977), would provide, inter alia, an action against the Government as the exclusive remedy for certain claims alleging tortious conduct by U.S. employees. It would apply to common law tort claims as well as tort claims arising under the Constitution so long as the alleged tortious conduct was committed by Government employees acting within the scope of their employment or under color of law. Section 11 of the bill—the section specifically at issue here—would apply these provisions to all claims pending at the time S. 2117 is enacted.[2] The bill would extinguish claims against individual Government employees and replace them with claims against the United States. Recovery under these claims, however, would be limited to the amount of compensatory damages proved, *i.e.*, punitive damages would not be allowed. Additionally, as in all other cases under the Tort Claims Act, 28 U.S.C. §§1346 and 2402, jury trials would not be available. For the reasons that follow we are of the opinion that the denial of punitive damages to persons with pending claims would not be inconsistent with the Constitution. However, we believe that S. 2117's proposed retroactive extinguishment of the right to a jury trial does present constitutional problems which should be carefully considered.

The questions whether Congress can deny jury trials and punitive damage recoveries to those claimants with pending claims raise the issue, which has been frequently litigated, whether and to what extent Congress is empowered to enact "retroactive" legislation.[3] The provision of the Constitution which

[1] See letter of Apr. 10, 1978 on p. 52.

[2] Concerning the issue whether there is any vested interest in a cause of action growing out of a common law tort or a constitutional tort prior to judgment, there is some horn-book dictum to the effect that there is no vested interest in such claims. However, we have found that the scattered judicial decisions do not support that view of the law. Instead, it appears that plaintiffs do have protectable interests in causes of action prior to judgment. See *Massa V. Nastri,* 125 Conn. 144, 3 A.2d 839 (1939). The only cases that have tolerated the abrogation of pending causes of action are those arising under the "Portal-to-Portal Act," and those cases carefully limit their holding to the abrogation of rights created by statute. *See Battaglia* v. *General Motors Corp.,* 169 F.2d 254 (2nd Cir. 1948); *Seese* v. *Bethlehem,* 168 F.2d 58 (4th Cir. 1948).

[3] Although in *Smallwood* v. *Gallardo,* 275 U.S. 56, 61 (1927), Mr. Justice Holmes reasoned that to "apply [a] statute to present suits is not to give it retrospective effect," we will assume retroactive effect for purposes of this memorandum.

limits the Federal Government's power to enact retroactive legislation is the Due Process Clause of the Fifth Amendment. However, that clause "generally does not prohibit retrospective civil legislation, unless the consequences are particularly 'harsh and oppressive.'" *United States Trust Co. of New York* v. *New Jersey*, 431 U.S. 1, 17 n.3 (1977),[4] citing *Welch* v. *Henry*, 305 U.S. 134, 147 (1938) and *Usery* v. *Turner Elkhorn Mining Co.*, 428 U.S. 1, 14—20 (1976).

In *Usery* the Court stated:

[O]ur cases are clear that legislation readjusting rights and burdens is not unlawful solely because it upsets otherwise settled expectations. [citations omitted] This is true even though the effect of the legislation is to impose a new duty or liability based on past acts. [citations omitted] *Id.* at 16.

Usery involved the constitutionality of the retroactive aspects of title IV of the Federal Coal Mine Health and Safety Act of 1969, 83 Stat, 150, 30 U.S.C. § 901 *et seq.* (1970 ed. and Supp. IV). In upholding the Act, the Court concluded:

In sum, the Due Process Clause poses no bar to requiring an operator [of a coal mine] to provide compensation for a former employee's death or disability due to pneumoconiosis [black lung disease] arising out of employment in its mines, even if the former employee terminated his employment in the industry before the Act was passed. 428 U.S. at 19-20.

In so holding, the Court discussed at some length the sorts of considerations which properly should be brought to bear on retroactivity questions. After noting that a more demanding standard would probably be appropriate for judging the retrospective aspects of legislation than for judging fully prospective laws, the Court acknowleded the importance of deferring to Congress' judgment where questions such as the allocation of costs and burdens are concerned. *Id.* at 16-19. The Court's analysis suggests that it applied in that case a test much like the rational basis test commonly invoked in evaluating Equal Protection cases.

Although other decisions have ruled on the scope of Congress' power to legislate in a manner that may have retroactive consequences, none have squarely identified the test or standard against which such legislation is to be judged. *See, e.g., Fleming* v. *Rhodes*, 331 U.S. 100, 102 (1947). For example, the Court in *United States Trust Co.*, suggested that retroactive civil legislation would satisfy the requirement of due process so long as it was not "harsh and oppressive." 431 U.S. at 17 n. 13. Our review of the decisions dealing with retroactive legislation indicates that an analysis much like that articulated several years ago by Professor Hochman in a major article on this question may explain the results in those cases. He suggested the following general approach:

> [I]t is submitted that the constitutionality of such a statute is determined by three major factors, each of which must be weighed in any particular case. These factors are: the nature and strength of the public interest served by the statute; the extent to which the statute modifies or abrogates the asserted preenactment right, and the nature of the right that the statute alters.

Hochman, *The Supreme Court and the Constitutionality of Retroactive Legislation*, 73 Harv. L. Rev. 692, 697 (1960).

Professor Hochman's analysis is quite similar to the approach the Supreme Court has articulated in a related context. The Court has long grappled with the more general question whether new legislation, administrative regulations, and judicial decisions should be applied to pending cases. *See, e.g., United States* v. *Schooner Peggy*, 1 Cranch (U.S.) 103, 2 L. Ed. 49 (1801); *Thorpe* v. *Housing Authority*, 393 U.S. 268 (1969). As a result of Court decisions in these cases, a general rule has now been fashioned to deal with those situa-

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[4] In *United States Trust Co.*, the Court considered retroactive State legislation; thus the Due Process Clause of the Fourteenth Amendment was the relevant constitutional provision. The Fifth Amendment's Due Process Clause applies to Federal legislation. The Contract Clause, Article I, Section 10 of the Constitution was also an issue in *United States Trust Co.*, but since that Clause by its terms only prohibits States from passing laws which impair contractual obligations it is no bar to Federal action. However, some commentators have opined that there is a "tendency for the contract clause and the due process clause to coalesce." Hale, *The Supreme Court and the Contract Clause*, 57 Harv. L. Rev. 852, 890–91 n. 18 (1944); Hochman, *The Supreme Court and the Constitutionality of Retroactive Legislation*, 73 Harv. L. Rev. 692 (1960).

tions in which Congress has not stated with specificity whether a new law is to be applied to pending cases. That rule, stated in summary form, is that new legislation will be applied by the courts to pending cases unless to do so would occasion some "manifest injustice." *Bradley* v. *United States*, 416 U.S. 696, 717 (1974). In determining whether a law will have that effect if applied to pending cases, the Court has identified three considerations: "(a) the nature and identity of the parties, (b) the nature of their rights, and (c) the nature of the impact of the change in law upon those rights." *Id.* These, then, are the factors that a court would consider in deciding whether to apply new legislation to pending cases when Congress has not spoken to that issue. They are considerations rooted in the due process clause, and are quite similar to the ones that Congress must address in making judgments on the application of new laws to existing cases.

With these several formulations in mind, we may address the questions presented by the Federal Torts Claims Act amendments. The several tests may be reduced to a straightforward inquiry: If Congress, in the exercise of its broad discretionary authority, determines that it is in the public interest to extinguish pending punitive damage claims or to bar jury trials in pending cases, would that action so adversely affect the significant rights of individual claimants as to deprive them of due process?

1. Punitive damages

The punitive damage question is the easier of the two. The appropriateness of allowing punitive damage awards is peculiarly a question of public policy, and appears always to have been so understood. *Smith* v. *Hill*, 12 Ill. 2d 588, 147 N.E. 2d 321 (1958); *see also Washington Gas Light Co.* v. *Lansden*, 172 U.S. 534 (1899); *cf. Curtis Publishing Co.* v. *Butts*, 388 U.S. 130 (1967). They are allowed to particular plaintiffs not to compensate them for injuries or damage they have suffered but to make an example of the defendant in order to deter him and others from engaging in similar conduct in the future. *Washington Gas Light Co.* v. *Lansden*, 172 U.S. 534 (1899); *Rosenbloom* v. *Metromedia*, 403 U.S. 29, 84 (1971) (dissenting opinion of Justices Marshall and Stewart). The individual plaintiff, even after his cause of action has accrued and his action has been filed has no "vested right" to a punitive damage recovery,[5] and indeed even in cases in which all of the elements justifying such an award have been proved it remains within the discretion of the trier of fact to determine whether an award will be made. *Whiteis v. Yamaha Intern. Corp.*, 531 F. 2d 968, 973 (10th Cir. 1976); *Williams* v. *Farmers and Merchants Insur. Co.*, 457 F. 2d 37, 40 (8th Cir. 1972); *Smith* v. *Hill, supra.*

It is within Congress' authority to conclude that punitive damage awards are not necessary to deter tortious conduct by government employees. Congress could also find it in the public interest to relieve public employees of the concern for defending against such claims. Since barring punitive damage recoveries does not deprive individual plaintiffs of rights to which they have any substantial entitlement, we do not think that courts would find this amendment to be "harsh and oppressive" or to occasion any "manifest injustice." [6]

2. Retroactive Abrogation of Jury Trials

The bill would also extinguish the right to jury trials for claims based upon certain categories of tortious conduct by Government employees. This would be accomplished by abolishing the present common law cause of action against the employee and creating in its stead a cause of action against the

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[5] *Smith v. Hill, supra,* held that a vested right in punitive damages arises only when such damages have been allowed by a judgment in the plaintiff's favor. 12 Ill. 2d 595, 147 N.E. 2d 325.

[6] The Illinois Supreme Court, in *Smith* v. *Hill, supra,* considered a claim that an Illinois statute disallowing punitive damage claims in breach of promise to marry cases was unconstitutional. Quickly disposing of this claim the Illinois court held:

> The act in barring punitive damages merely establishes a "public policy" that in the interest of society in the particular class of cases such damages should not be awarded. Such damages being allowed in the interest of society, and not to recompense solely the individual, to deny them cannot be said to deny any constitutional right . . . 12 Ill. 2d at 598, 147 N.E. 2d at 327.

The court thus ruled that the legislature could, at its discretion, restrict or deny punitive damages. Since punitive damages are intended to benefit society and not the injured party, the court found that the plaintiff had no significant personal interest in their allowance or disallowance.

United States. That Congress can do this—at least prospectively—is now beyond legal dispute. The Supreme Court in *Silver* v. *Silver*, 280 U.S. 117, 122 (1929), in sustaining the abolition of a gratuitous passenger's right to sue his host for negligence, held:

> the Constitution does not forbid the creation of new rights, or the abolition of old ones recognized by the common law. . . .

It has been held that a statute replacing a common law cause of action against a Government employee with a statutory remedy against the Government for injuries caused by tortious acts of the employee in the course of his employment, does not violate the Seventh Amendment. In *Nistendirk* v. *McGee*, 225 F. Supp. 881 (W.D. Miss. 1963), the court considered the constitutionality of 28 U.S.C. § 2679(b) which provides that claims for injuries caused by Government employees driving motor vehicles in the scope of their employment shall be tried as if they were brought under the Federal Tort Claims Act. Thus, as under S. 2117, there would be no right to a jury trial. See 28 U.S.C. § 2402. The court, in upholding 28 U.S.C. § 2679(b)'s denial of a jury trial, reasoned:

> Plaintiff's common law action against defendant McGee has been abolished, and a statutory action under § 1346, Title 28, United States Code, has been substituted in its place. There no longer exists any cause of action against McGee, and since the cause of action given against the government is a statutory one, the guarantees of the Seventh Amendment do not apply.

See also *Wolfe* v. *Merrill National Laboratories*, 433 F. Supp. 231 (M.D. Tenn. 1977); *Sparks* v. *Wyeth Laboratories, Inc.*, 431 F. Supp. 411 (W.D. Okla. 1977); *Gustafson* v. *Peck*, 216 F. Supp. 370 (N.D. Iowa 1963).

That Congress is empowered to deny jury trials prospectively to newly created actions against the Government is clear. The question at hand, however, is whether Congress can constitutionally deny jury trials in pending claims by abolishing those claims and substituting new causes of action.[7] This proposed action, when measured against the various standards of constitutionality for retroactive legislation, raises serious doubts. There is a crucial difference between the interest at stake where punitive damage awards are extinguished and the nature of the plaintiff's interest in a jury trial. Jury trials are guaranteed, in certain cases, by the Seventh Amendment. Once that right attaches its abrogation cannot lightly be undertaken.

While Congress enjoys considerable latitude in fashioning tools to deal with the matters within its constitutionally cognizable areas of power, that power is not unlimited. *Anniston Mfg. Co.* v. *Davis*, 301 U.S. 337 (1937), for example, allows abrogation of rules of procedure in pending cases but conditions such action upon the substitution of a general procedure which is "fair and adequate." *ID.* at 352. The court there focused on questions of burdens of proof and the use of presumptions—aspects of civil proceedings which are protected by the Constitution only under the general umbrella of the Due Process Clause. It did not deal with the abrogation of a right specifically provided by one of the Bill of Rights Amendments, and we know of no other case in which the court has been willing to find a "fair and adequate" alternative to some constitutionally protected right.

Although procedural matters may impact heavily upon a particular case, e.g., burdens of proof, presumptions, etc., courts have maintained a clear distinction between these and fundamental rights. The right to jury trial is plainly considered to be a fundamental right and as such is to be distinguished from procedural rights. In this regard the court in *Colgrove* v. *Battin*, 413 U.S. 149 (1975) stated;

> Consistently with the historical objective of the Seventh Amendment, our decisions have defined the jury trial right preserved in cases covered by the Amendment as "the substance of the common law right of trial by

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[7] In discussing this issue we use the term "pending claims" to mean the point at which the right to jury trial attaches. We believe that this occurs when a plantiff has filed his complaint in federal court and has either already demanded, or has not yet waived (pursuant to Rule 38, F.R. Civ. P.), his Seventh Amendment right to a jury trial at the time this bill becomes law. Although we have found no decisions precisely on point we think it reasonable to conclude on the basis of the language of the Amendment itself that the right does not attach until there is a "suit" and until there is a "value in controversy" which exceeds the minimal $20 requirement. Thus, the pendency of an administrative claim would not satisfy this requirement; nor would the mere existence of an alleged injury.

jury, as distinguished from mere matters of form or procedure. . . ." [citations omitted] *Id.* at 156.[8]

This distinction is further illustrated in *Chase Securities Corp.* v. *Donaldson*, 325 U.S. 304 (1945). There the Supreme Court upheld a statute which extended the statute of limitations in a pending suit thereby frustrating the defendant's effort to dismiss the action. After noting that "[n]o one has a vested right in any given mode of procedure," the Court disposed of the case on the ground primarily that the protections afforded by the statutes of limitation have "never been regarded as what now is called a fundamental right." *Id.* at 314. The right to trial by jury, being guaranteed by the Constitution, is undoubtedly a fundamental right.[9]

In the absence of any directly controlling judicial precedent, we cannot conclude with very much confidence that this proposed amendment would, or would not, survive a due process challenge. The cases do make plain, however, that what is being dissolved here is an important substantive right. That being the case, the inquiry will focus on what public purposes are being served by its abrogation. The considerations that support the bar to punitive damages and that support the substitution of the Government as defendant in the stead of the individual government employee would seem to have little relevance to the jury trial issue.

It is worth noting that in other related contexts Congress has declined to apply the jury trial bar to pending claims. For instance, the Federal Driver's Act, 28 U.S.C. § 2679(b–e), which substituted the Government as defendant in claims growing out of motor vehicle incidents contained a specific provision applying it only prospectively. Pub. L. No. 87–258, § 2.

Likewise, the statute which substituted the Government as defendant in cases growing out of alleged torts by armed forces medical personnel, was limited by Congress to prospective application. Pub. L. No. 94–464, 10 U.S.C.A. § 1089. The same approach was adopted with respect to claims against Veterans Administration medical personnel. Pub. L. No. 89–506, 38 U.S.C. § 4611.[10]

Given this cautious history, and given the analysis suggested by the cases, it would seem almost certain that the jury trial question would be a subject of litigation. Absent some strong legislative rationale supporting application of the amendment to pending cases, we would recommend against supporting language that would purport to bar jury trials in those cases in which the right has attached.

The central point is that the bill as presently drafted contemplates taking away a jury trial right in particular cases in which a plaintiff has elected to pursue that right, and we know of no satisfactory way of supporting a

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[8] See also *Baltimore & Carolina Line Inc.* v. *Redman*, 295 U.S. 654, 657 (1934).

[9] The cases indicate that courts shield certain basic rights from retroactive infringement. As stated in *Carr* v. *United States*, 422 F.2d 1007 (4th Cir. 1970), questions of constitutional dimension may be raised by retroactive application of a law to pending claims. *Carr* was an action for personal injuries involving federal employees. The court held that the Federal Drivers Act, 28 U.S.C. § 2679(b-e) abrogated a federal employer's common law action against a Government driver acting within the scope of his employment. The court further upheld the constitutionality of this Act even though it did not provide the plaintiff with some new benefit as a *quid pro duo*. However, the court was careful to distinguish its holding from *Richmond Screw Anchor Co.* v. *United States*, 275 U.S. 331 (1928) by stating:

> There the Supreme Court dealt with statutes whose combined effect deprived a patent owner of his right to sue for infringement, but the patent in that case had been issued prior to the enactment of the relevant legislation. There was, therefore, a vested right in being which was sought to be abrogated. By contrast, here the accident occurred over four years after the enactment of the Drivers Act. Therefore, under *Silver*, Carr had no interest entitled to constitutional protection. *Id.* at 1010–11.

Although the precise issue in *Carr* was whether the "just compensation" provision of the Fifth Amendment was violated, the court focused on whether Carr had an "interest entitled to constitutional protection" which came into being before the passage of the Drivers Act.

[10] But see Pub. L. No. 94–350. 22 U.S.C.A. § 817(a) (State Department medical personnel) and Pub. L. No. 91–623, 42 U.S.C. § 233 (Public Health Service medical personnel). Neither of these provisions are expressly limited in their application to prospective claims. However, we were orally advised by Mr. K. E. Malmborg, Assistant Legal Advisor for Management, Department of State, that he is not aware of any attempt to apply Pub. L. 94–350 to claims pending at the time of the enactment of that law. At this writing we have not received a response from HEW regarding a similar inquiry of the foregoing provisions mandating that they be applied to pending claims. Further, there is no discussion in the legislative history of either of these provisions to indicate that pending claims would be abolished.

congressional judgment that substitutes some other mechanism in the place of that right. It is for that reason that we have concluded that there must be some very strong basis for any action that would abrogate the right in pending cases if there is to be any chance of success against constitutional challenge.

With the matter in this posture, we see essentially three alternatives:

(1) Amend the bill to provide that plaintiffs in pending cases (who have either already elected a jury trial or who have not yet waived that opportunity) may elect either to proceed against the individual and to enjoy their jury trial prerogative or to proceed against the United States as a substituted defendant without a jury trial.[11]

(2) Substitute the United States as defendant in all cases covered by the amendment, but allow the plaintiff to retain his jury trial right. This would, in essence, constitute a limited consent by the United States to a jury trial action against itself.

(3) Carve out pending cases in which jury trials have been requested and allow the plaintiffs to proceed as they are at present against the defendant individually, but provide that any judgment against him shall be indemnified by the Government. Presumably, although we have not researched the issue, the fact of indemnification could be withheld from the jury.

CONCLUSION

For the reasons stated we believe that S. 2117 does raise a substantial constitutional question, and one that we would resolve against the constitutionality of the bill as presently drafted. The selection of an alternative is essentially a policy matter and we lack the knowledge base to render very much in the way of useful advice on that issue.

LARRY A. HAMMOND,
Deputy Assistant Attorney General,
Office of Legal Counsel.

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[11] It should be noted that for the reasons set forth above, we think that in either event the bill could abolish the right to seek punitive damages. Stripped of the punitive damage benefit, it seems reasonable to assume that most plaintiffs would prefer to litigate against the more "financially responsible" party.

94TH CONGRESS
2d Session

SENATE

REPORT
No. 94-755

INTELLIGENCE ACTIVITIES AND THE RIGHTS OF AMERICANS

BOOK II

FINAL REPORT

OF THE

SELECT COMMITTEE
TO STUDY GOVERNMENTAL OPERATIONS

WITH RESPECT TO

INTELLIGENCE ACTIVITIES
UNITED STATES SENATE

TOGETHER WITH

ADDITIONAL, SUPPLEMENTAL, AND SEPARATE VIEWS



APRIL 26 (legislative day, APRIL 14), 1976

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Chapter IV. Conclusions and Recommendations

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C. Recommendations

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vii. Civil Remedies Should Be Expanded

Recommendation 91 expresses the Committee's concern for establishing a legislative scheme which will afford effective redress to people who are injured by improper federal intelligence activity. The recommended provisions for civil remedies are also intended to deter improper intelligence activity without restricting the sound exercise of discretion by intelligence officers at headquarters or in the field.

As the Committee's investigation has shown, many Americans have suffered injuries from domestic intelligence activity, ranging from deprivation of constitutional rights of privacy and free speech to the loss of a job or professional standing, break-up of a marriage, and impairment of physical or mental health. But the extent, if any, to

which an injured citizen can seek relief—either monetary or injunctive—from the government or from an individual intelligence officer is far from clear under the present state of the law.

One major disparity in the current state of the law is that, under the Reconstruction era Civil Rights Act of 1871, the deprivation of constitutional rights by an officer or agent of a state government provides the basis for a suit to redress the injury incurred;[66] but there is no statute which extends the same remedies for identical injuries when they are caused by a federal officer.

In the landmark *Bivens* case, the Supreme Court held that a federal officer could be sued for money damages for violating a citizen's Fourth Amendment rights.[67] Whether monetary damages can be obtained for violation of other constitutional rights by federal officers remains unclear.

While we believe that any citizen with a substantial and specific claim to injury from intelligence activity should have standing to sue, the Committee is aware of the need for judicial protection against legal claims which amount to harassment or distraction of government officials, disruption of legitimate investigations, and wasteful expenditure of government resources. We also seek to ensure that the creation of a civil remedy for aggrieved persons does not impinge upon the proper exercise of discretion by federal officials.

Therefore, we recommend that where a government official—as opposed to the government itself—acted in good faith and with the reasonable belief that his conduct was lawful, he should have an affirmative defense to a suit for damages brought under the proposed statute. To tighten the system of accountability and control of domestic intelligence activity, the Committee proposes that this defense be structured to encourage intelligence officers to obtain written authorization for questionable activities and to seek legal advice about them.[68]

To avoid penalizing federal officers and agents for the exercise of discretion, the Committee believes that the government should indemnify their attorney fees and reasonable litigation costs when they are held not to be liable. To avoid burdening the taxpayers for the deliberate misconduct of intelligence officers and agents, we believe the government should be able to seek reimbursement from those who willfully and knowingly violate statutory charters or the Constitution.

Furthermore, we believe that the courts will be able to fashion discovery procedures, including inspection of material in chambers, and to issue orders as the interests of justice require, to allow plaintiffs with substantial claims to uncover enough factual material to argue their case, while protecting the secrecy of governmental information in which there is a legitimate security interest.

The Committee recommends that a legislative scheme of civil remedies for the victims of intelligence activity be established along the

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[66] 42 U.S.C. 1983.

[67] *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388 (1971).

[68] One means of structuring such a defense would be to create a rebuttable presumption that an individual defendant acted so as to avail himself of this defense when he proves that he acted in good faith reliance upon: (1) a written order or directive by a government officer empowered to authorize him to take action; or (2) a written assurance by an appropriate legal officer that his action is lawful.

following lines to clarify the state of the law, to encourage the responsible execution of duties created by the statutes recommended herein to regulate intelligence agencies, and to provide relief for the victims of illegal intelligence activity.

Recommendation 91.—Congress should enact a comprehensive civil remedies statute which would accomplish the following:[69]

(a) Any American with a substantial and specific claim[70] to an actual or threatened injury by a violation of the Constitution by federal intelligence officers or agents[71] acting under color of law should have a federal cause of action against the government and the individual federal intelligence officer or agent responsible for the violation, without regard to the monetary amount in controversy. If actual injury is proven in court, the Committee believes that the injured person should be entitled to equitable relief, actual, general, and punitive damages, and recovery of the costs of litigation.[72] If threatened injury is proven in court, the Committee believes that equitable relief and recovery of the costs of litigation should be available.

(*b*) Any American with a substantial and specific claim to actual or threatened injury by violation of the statutory charter for intelligence activity (as proposed by these Domestic Intelligence Recommendations) should have a cause of action for relief as in (a) above.

(*c*) Because of the secrecy that surrounds intelligence programs, the Committee believes that a plaintiff should have two years from the date upon which he discovers, or reasonably should have discovered, the facts which give rise to a cause of action for relief from a constitutional or statutory violation.

(*d*) Whatever statutory provision may be made to permit an individual defendant to raise an affirmative defense that he acted within the scope of his official duties, in good faith, and with a reasonable belief that the action he took was lawful, the Committee believes that to ensure relief to persons injured by governmental intelligence activity, this defense should be available solely to individual defendants and should not extend to the government. Moreover, the defense should not be available to bar injunctions against individual defendants.

* * * * * * *

[69] Due to the scope of the Committee's mandate, we have taken evidence only on constitutional violations by intelligence officers and agents. However, the anomalies and lack of clarity in the present state of the law (as discussed above) and the breadth of constitutional violations revealed by our record, suggest to us that a general civil remedy would be appropriate. Thus, we urge consideration of a statutory civil remedy for constitutional violations by any federal officer; and we encourage the appropriate committees of the Congress to take testimony on this subject.

[70] The requirement of a substantial and specific claim is intended to allow a judge to screen out frivolous claims where a plaintiff cannot allege specific facts which indicate that he was the target of illegal intelligence activity.

[71] "Federal intelligence officers or agents" should include a person who was an intelligence officer, employee, or agent at the time a cause of action arose. "Agent" should include anyone acting with actual, implied, or apparent authority.

[72] The right to recover "costs of litigation" is intended to include recovery of reasonable attorney fees as well as other litigation costs reasonably incurred.

LEGISLATIVE HISTORY OF SECTION 2680(h)



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July 29, 1977

Legislative History

An Act

To amend Reorganization Plan Numbered 2 of 1973, and for other purposes.

Public Law 93-253, 88 Stat. 50

H.R. 8245; 93d Congress

Approved March 16, 1974

(References are to pages in the Congressional Record)

1973		Vol. 119
May 30	H.R. 8245 introduced by Mr. Holifield, et al., and referred to House Committee on Government Operations.	17392
June 14	Hearings on H.R. 8245 before a Subcommittee of the House Committee on Government Operations.	---
June 21	Reported (H. Rept. 93-303).	20777
July 17	Debated and passed House.	24183-24184
July 18	Referred to Senate Committee on Government Operations.	24522
November 29	Reported with amendments (S. Rept. 93-588).	38559
November 30	Passed Senate, amended.	38968-38969
December 3	Passage reconsidered; bill further amended and passed Senate.	39185
1974		Vol. 120
March 5	House concurs in Senate amendments.	5285-5290

1974		Vol. 120
March 16	Approved (Public Law 93-253).	9281

Appendix

Copy of Public Law 93-253.
Copy of hearings held on H.R. 8245.
Copies of House and Senate Reports.
Copies of debate from the Congressional Record.

Calendar No. 564

93D CONGRESS, 1st Session | SENATE | REPORT No. 93-588

AMENDING REORGANIZATION PLAN NO. 2 OF 1973, AND PROVIDING A REMEDY AGAINST THE UNITED STATES FOR INTENTIONAL TORTS OF ITS INVESTIGATIVE AND LAW ENFORCEMENT OFFICERS

NOVEMBER 20, 1973.—Ordered to be printed

Mr. ERVIN, from the Committee on Government Operations, submitted the following

REPORT

[To accompany H.R. 8245]

The Committee on Government Operations, to which was referred the bill (H.R. 8245) to amend Reorganization Plan No. 2 of 1973, and for other purposes, having considered the same, reports favorably thereon with amendments and recommends that the bill as amended do pass.

PURPOSE

The purpose of H.R. 8245, as amended, is (1) to repeal those sections of Reorganization Plan No. 2 of 1973 which transferred to the Secretary of the Treasury certain functions vested by law in the Attorney-General, of the Department of Justice regarding the inspection of persons and documents at U.S. ports of entry; and (2) to provide a remedy against the United States for the intentional torts of its investigative and law enforcement officers.

BACKGROUND

Section 1. Reorganization Plan No. 2 of 1973 established in the Department of Justice a new agency, the Drug Enforcement Administration, and transferred to the Secretary of the Treasury functions vested by law in the Attorney General, or the Department of Justice, regarding the inspection of persons and documents at U.S. ports of entry. This function involves approximately 900 immigration inspectors who, under the provisions of the Reorganization Plan, were transferred from the Immigration and Naturalization Service of the Department of Justice to the Customs Bureau of the Department of the Treasury.

During the course of Committee consideration of Plan No. 2 of 1973, it became apparent that there was wide-scale opposition to the proposed transfers by the immigration inspectors involved, by the American Federation of Government Employees and by Members of Congress. Following discussions between administration and union representatives, certain understandings were reached whereby the administration agreed not to implement the transfer provided for in the Plan. A memorandum embodying the terms of the agreement was placed in the files of the Committee, and the American Federation of Government Employees agreed to withdraw its opposition to the Plan.

During floor debate in the House of Representatives on H. Res. 382, to disapprove Reorganization Plan No. 2, Congressman Holifield, Chairman of the House Committee on Government Operations, explained the situation and gave assurances that prompt action would be taken to consider and report a bill repealing the objectionable portions of Reorganization Plan No. 2. The resolution of disapproval was defeated and the Plan became effective on July 1, 1973.

H.R. 8245, which passed the House of Representatives on July 17, 1973, would repeal section 2 and subsection 6(b) and modify section 8 of Reorganization Plan No. 2 of 1973, thus nullifying the transfers of the immigration inspectors provided for in the Plan.

Section 2. This section represents a Committee amendment to the bill as it passed the House. This amendment proposed by the chairman, and Senators Percy and Javits grows out of hearings held by the Committee on the Reorganization Plan last spring. During the course of these hearings several incidents were brought to the Committee's attention in which Federal narcotics agents engaged in abusive, illegal and unconstitutional "no-knock" raids. The Committee's amendment is designed to prevent future abuses of the Federal "no-knock" statute (21 U.S.C. 879).

The most notorious of these raids occurred on April 29 of this year in Collinsville, Illinois. In separate incidents involving the same Justice Department agents, "no-knock" raids were conducted into two different homes in Collinsville. The agents entered the two houses without warrants in violation of the Federal "no-knock" statute, kicked in the doors without warning, shouting obscenities, and threatening the occupants with drawn weapons. The terrified inhabitants were only temporarily relieved when the agents left after discovering that they had entered the wrong houses.

There is no effective legal remedy against the Federal Government for the actual physical damage, much less the pain, suffering and humiliation to which the Collinsville families have been subjected. Since they were not then suspects, nor are they now Federal defendants, they cannot move in a prosecution to suppress evidence, the traditional remedy for violation of Fourth Amendment rights. Indeed there was not any evidence seized in these raids because, of course, the agents were at the wrong addresses. Furthermore, neither family can recover from the Federal Government in a civil action because of the doctrine of sovereign immunity.

As a general principle under present law, if a Federal agent violates someone's constitutional rights—for instance, Fourth Amendment

rights against illegal search and seizure—there is no remedy against the Federal Government. This ancient doctrine—sovereign immunity—stands as a bar.

Only recently was there even a right of action against the offending officers themselves. In the case of *Bivens* v. *Six Unknown Federal Narcotics Agents*, 403 U.S. 388 (1971), the Supreme Court held that the Fourth Amendment and elementary justice require that there be a right of action against the Federal agents for illegal searches conducted in bad faith or without probable cause. Of course, Federal agents are usually judgment proof so this is a rather hollow remedy.

For years scholars and commentators have contended that the Federal Government should be liable for the tortious acts of its law enforcement officers when they act in bad faith or without legal justification. However, the Federal Torts Claims Act (28 U.S.C. 2671–2680) the embodiment of sovereign immunity in the United States Code, protects the Federal Government from liability where its agents commit intentional torts such as assault and battery. The injustice of this provision should be manifest—for under the Federal Torts Claims Act a Federal mail truck driver creates direct federal liability if he negligently runs down a citizen on the street but the Federal Government is held harmless if a federal narcotics agent intentionally assaults that same citizen in the course of an illegal "no-knock" raid.

Committee Action

The Committee amendment to the bill, contained in a new section 2 thereof, would add a proviso at the end of the intentional torts exception to the Federal Tort Claims Act (28 U.S.C. 2680(h)). The effect of this provision is to deprive the Federal Government of the defense of sovereign immunity in cases in which Federal law enforcement agents, acting within the scope of their employment, or under color of Federal law, commit any of the following torts: assault, battery, false imprisonment, false arrest, malicious prosecution, or abuse of process. Thus, after the date of enactment of this measure, innocent individuals who are subjected to raids of the type conducted in Collinsville, Illinois, will have a cause of action against the individual Federal agents and the Federal Government. Furthermore, this provision should be viewed as a counterpart to the *Bivens* case and its progenty, in that it waives the defense of sovereign immunity so as to make the Government independently liable in damages for the same type of conduct that is alleged to have occurred in *Bivens* (and for which that case imposes liability upon the individual Government officials involved).

The Committee realizes that under the Federal Tort Claims Act, Government tort liability for intentional conduct is unclear. For example certain intentional torts such as trespass and invasion of privacy are not always excluded from Federal Tort Claims Act coverage. Obviously, it is the intent of the Committee that these borderline cases under the present law, such as trespass and invasion of privacy, would be viewed as clearly within the scope of the Federal Torts Claims Act, if the amendment is adopted.

This whole matter was brought to the attention of the Committee in the context of the Collinsville raids, where the law enforcement

abuses involved Fourth Amendment constitutional torts. Therefore, the Committee amendment would submit the Government to liability whenever its agents act under color of law so as to injure the public through search and seizures that are conducted without warrants or with warrants issued without probable cause. However, the Committee's amendment should not be viewed as limited to constitutional tort situations but would apply to any case in which a Federal law enforcement agent committed the tort while acting within the scope of his employment or under color of Federal law.

The administration is aware of this amendment to H.R. 8245, which is the product of over 2 months of discussion between the staff of the Committee, the Office of Management and Budget and the Department of Justice. The Committee has been informed that the administration, and, in particular, the Department of Justice, has no objection to the amendment. Therefore the Committee urges speedy adoption of this measure as a minimal first step in providing a remedy against the Federal Government for innocent victims of Federal law enforcement abuses.

Costs

Since it is not possible to forecast the number of civil damage suits which may be brought against the United States under the provisions of this bill, or the amount damages assessed against the United States, if any, it is not possible to estimate the costs which may result.

Changes in Existing Law

In compliance with subsection 4 of rule XXIX of the Standing Rules of the Senate, changes in existing law made by the bill, as reported, are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new matter is printed in italic, and existing law in which no change is proposed is shown in roman):

REORGANIZATION PLAN NO. 2 OF 1973

Prepared by the President and transmitted to the Senate and the House of Representatives in Congress assembled, March 28, 1973, pursuant to the provisions of Chapter 9 of Title 5 of the United States Code.

LAW ENFORCEMENT IN ILLICIT DRUG ACTIVITIES

Section 1. Transfers to the Attorney General. There are hereby transferred from the Secretary of the Treasury, the Department of the Treasury, and any other officer or any agency of the Department of the Treasury, to the Attorney General all intelligence, investigative, and law enforcement functions, vested by law in the Secretary, the Department, officers, or agencies which relate to the suppression of illicit traffic in narcotics, dangerous drugs, or marihuana, except that the Secretary shall retain, and continue to perform, those functions, to the extent that they relate to searches and seizures of illicit narcotics, dangerous drugs, or marihuana or to the apprehension or detention of persons in connection therewith, at regular inspection locations at ports of entry or anywhere along the land or water borders of the United States: *Provided*, That any illicit narcotics, dangerous drugs,

marihuana, or related evidence seized, and any person apprehended or detained by the Secretary or any officer of the Department of the Treasury, pursuant to the authority retained in them by virtue of this section, shall be turned over forthwith to the jurisdiction of the Attorney General; *Provided further*, That nothing in this section shall be construed as limiting in any way any authority vested by law in the Secretary of the Treasury, the Department of the Treasury, or any other officer or any agency of that Department on the effective date of this Plan with respect to contraband other than illicit narcotics, dangerous drugs, and marihuana; and *Provided further*, That nothing in this section shall be construed as limiting in any way any authority the Attorney General, the Department of Justice, or any other officer or any agency of that Department may otherwise have to make investigations or engage in law enforcement activities, including activities relating to the suppression of illicit traffic in narcotics, dangerous drugs, and marihuana, at ports of entry or along the land and water borders of the United States.

[Sec. 2. Transfers to the Secretary of the Treasury. There are hereby transferred to the Secretary of the Treasury all functions vested by law in the Attorney General, the Department of Justice, or any other officer or any agency of that Department, with respect to the inspection at regular inspection locations at ports of entry of persons, and documents of persons, entering or leaving the United States: *Provided*, That any person apprehened or detained by the Secretary or his designee pursuant to this section shall be turned over fothwith to the jurisdiction of the Attorney General: and, *Provided further*, That nothing in this section shall be construed as limiting, in any way, any other authority that the Attorney General may have with respect to the enforcement, at ports of entry or elsewhere, of laws relating to persons entering or leaving the United States.]

Sec. 3. Abolition. The Bureau of Narcotics and Dangerous Drugs, including the Office of Director thereof, is hereby abolished, and section 3(a) of Reorganization Plan No. 1 of 1968 is hereby repealed. The Attorney General shall make such provision as he may deem necessary with respect to terminating those affairs of the Bureau of Narcotics and Dangerous Drugs not otherwise provided for in the Reorganization Plan.

Sec. 4. Drug Enforcement Administration. There is established in the Department of Justice an agency which shall be known as the Drug Enforcement Administration, hereinafter referred to as "the Administration."

Sec. 5. Officers of the Administration. (a) There shall be at the head of the Administration the Administrator of Drug Enforcement, hereinafter referred to as "the Administrator." The Administrator shall be appointed by the President by and with the advice and consent of the Senate, and shall receive compensation at the rate now or hereafter prescribed by law for positions of level III of the Executive Schedule Pay Rates (5 U.S.C. 5314). He shall perform such functions as the Attorney General shall from time to time direct.

(b) There shall be in the Administration a Deputy Administrator of the Drug Enforcement Administration, hereinafter referred to as "the Deputy Administrator," who shall be appointed by the President by and with the advice and consent of the Senate, shall perform such

functions as the Attorney General may from time to time direct, and shall receive compensation at the rate now or hereafter prescribed by law for positions of level V of the Executive Schedule Pay Rates (5 U.S.C. 5316).

(c) The Deputy Administrator or such other official of the Department of Justice as the Attorney General shall from time to time designate shall act as Administrator during the absence or disability of the Administrator or in the event of a vacancy in the office of Administrator.

Sec. 6. Performance of transferred functions. [(a)] The Attorney General may from time to time make such provisions as he shall deem appropriate authorizing the performance of any of the functions transferred to him by the provisions of this Reorganization Plan by any officer, employee, or agency of the Department of Justice.

[(b) The Secretary of the Treasury may from time to time make such provisions as he shall deem appropriate authorizing the performance of any of the functions transferred to him by the provisions of this Reorganization Plan by any officer, employee, or agency of the Department of the Treasury.]

Sec. 7. *Coordination.* The Attorney General, acting through the Administrator and such other officials of the Department of Justice as he may designate, shall provide for the coordination of all drug law enforcement functions vested in the Attorney General so as to assure maximum cooperation between and among the Administration, the Federal Bureau of Investigation, and other units of the Department involved in the performance of these and related functions.

Sec. 8. *Incidental transfers.* (a) So much of the personnel, property, records, and unexpended balances of appropriations, allocations, and other funds employed, used, held, available or to be made available in connection with the functions transferred to the Attorney General [and to the Secretary of the Treasury] by this Reorganization Plan as the Director of the Office of Management and Budget shall determine shall be transferred to the Department of Justice [and to the Department of the Treasury, respectively,] at such time or times as the Director shall direct.

(b) Such further measures and dispositions as the Director of the Office of Management and Budget shall deem to be necessary in order to effectuate transfers referred to in subsection (a) of this section shall be carried out in such manner as he shall direct and by such Federal agencies as he shall designate.

Sec. 9. *Interim Officers.* (a) The President may authorize any person who, immediately prior to the effective date of this Reorganization Plan, held a position in the Executive Branch of the Government to act as Administrator until the office of Administrator is for the first time filled pursuant to the provisions of this Reorganization Plan or by recess appointment as the case may be.

(b) The President may similarly authorize any such person to act as Deputy Administrator.

(c) The President may authorize any person who serves in an acting capacity under the foregoing provisions of this section to receive the compensation attached to the office in respect to which he so serves. Such compensation, if authorized, shall be in lieu of, but not in addi-

tion to, other compensation from the United States to which such person may be entitled.

SEC. 10. *Effective date.* The provisions of this Reorganization Plan shall take effect as provided by section 906(a) of title 5 of the United States Code or on July 1, 1973, whichever is later.

Chapter 171 of Title 28. Tort Claims Procedure

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Sec. 2680. Exceptions.

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: *Provided that, with regard to acts or omissions of investigative or law enforcement officers of the United States government, the provisions of this chapter and section 1346(b) of this title shall apply to any claim arising on or after the enactment of this Proviso out of assault, battery, false imprisonment, false arrest, abuse of process or malicious prosecution. For the purpose of this subsection 'investigative or law enforcement officer' means any officer of the United States who is empowered by law to execute searches, to seize evidence or to make arrests for violations of Federal law.*

26-729 O - 78 - 11

House Debate on Section 2680(h)

H. Res. 947

Resolved, That upon the adoption of this resolution the bill H.R. 8245, to amend Reorganization Plan Numbered 2 of 1973, with the Senate amendments thereto be, and the same is hereby, taken from the Speaker's table to the end that the Senate amendments be, and the same hereby are, agreed to.

The SPEAKER. Is a second demanded?

Mr. HORTON. Mr. Speaker, I demand a second.

Mr. WIGGINS. Mr. Speaker, I demand a second.

The SPEAKER. Is the gentleman from New York (Mr. HORTON) opposed to the legislation?

Mr. HORTON. No, I am not, Mr. Speaker.

Mr. WIGGINS. Mr. Speaker, I am opposed to the resolution.

The SPEAKER. Does the gentleman from California demand a second?

Mr. WIGGINS. Mr. Speaker, I demand a second.

The SPEAKER. Without objection, a second will be considered as ordered.

There was no objection.

The SPEAKER. The Chair recognizes the gentleman from California (Mr. HOLIFIELD).

Mr. HOLIFIELD. Mr. Speaker, I am calling up H.R. 8245 to rectify an inequity and to alleviate a serious problem in the Immigration and Naturalization Service.

As Members will recall, Reorganization Plan No. 2 of 1973 was allowed to go into effect by a vote of 281 to 130 on June 7, 1973. The effective date as specified in the plan was July 1, 1973. The plan dealt primarily with the creation of a new Drug Enforcement Administration in the Department of Justice but contained provisions affecting the Immigration and Naturalization Service in Justice and the Bureau of Customs in Treasury. During the consideration of that plan it was brought to the attention of the committee that section 2 of the plan as drawn would produce difficulties in administration which had not been foreseen. Section 2 would have transferred a number of employees—approximately 900—of the INS to the Department of the Treasury who would be made a part of the inspection force of the Bureau of Customs. Representatives of the employees of the INS in testimony before the committee and in other representations to the administration pointed out the difficulties that would result from this transfer. They agreed to withdraw their opposition to the plan if the administration and our committee would submit to the Congress a bill deleting section 2. This was the only way in which the plan could be remedied as we all know reorganization plans cannot be amended during their consideration by the Congress.

H.R. 8245 is the result of that commitment and would accomplish the objective agreed to. That bill passed the House unanimously on July 17, 1973. It was returned to us by the Senate, however, on December 3, 1973, with an amendment that would permit the Government to be sued by those who are victims of acts or omissions of investigative or law enforcement officers of the U.S. Government. The Senate amendment

PROVIDING FOR AGREEING TO SENATE AMENDMENTS TO H.R. 8245, TO AMEND REORGANIZATION PLAN NUMBERED 2 OF 1973

Mr. HOLIFIELD. Mr. Speaker, I move to suspend the rules and pass the resolution (H. Res. 947) to agree to Senate amendments to H.R. 8245, to amend Reorganization Plan Numbered 2 of 1973.

The Clerk read as follows:

was precipitated by the unfortunate incident in Collinsville, Ill., last year in which officers of the Bureau of Narcotics and Dangerous Drugs of the Justice Department were involved in an illegal entry, assault, battery, and the destruction of property of an innocent citizen. Technically, since the amendment amends an act not in the jurisdiction of the Committee on Government Operations it would be considered nongermane.

As my colleagues know, I am one who has objected to nongermane amendments being placed on House bills by the Senate. I am, however, sympathetic with the objective that the amendment seeks to achieve as I deplore the apparent violation of personal and constitutional rights which the Collinsville incident revealed.

I also believe very strongly that the Immigration Service should be able to make its plans for future activity with the certainty that the passage of this legislation will provide. We have a very serious problem of illegal aliens in this country. Los Angeles County in my State and the Southwest generally are being literally overrun by aliens who find ways to get through the border patrol and our INS inspectors at ports of entry. This is a problem that demands immediate and concerted attention and the stepped-up activity of the INS if we are not to be completely inundated. But as long as congressional action is unfinished, the uncertainty about jobs and status among INS personnel is having a severe effect on morale and work in the INS. General Chapman, the new head of the Immigration and Naturalization Service, called on me to express his great concern about the problem, as have numerous other officials of the Justice Department and the administration. The American Federation of Government Employees, which represents a number of the INS personnel, has also made representations about the need for a quick resolution of this problem.

I have, therefore, requested the forebearance of Members who object to the procedure which is often followed by the Senate so that we can put this matter behind us and get on with the important task of strengthening the Immigration Service as the Director of OMB promised that it would be strengthened.

I am aware that there is pending before the Donohue subcommittee of the Committee on Judiciary legislation requested by the administration which is more comprehensive in scope than the Ervin amendment in this bill. In view of the circumstances, however, I feel we should not hold up the passage of this bill pending action on the broader legislation.

This action today on the Senate amendment does not foreclose further legislation from the Judiciary on the anti-no-knock problem.

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

Mr. HOLIFIELD. I yield to the gentleman from Massachusetts.

Mr. DONOHUE. Mr. Speaker, I favored Reorganization Plan No. 2 as it was presented to the House on June 5, 1973, when it was represented by Chairman HOLIFIELD that he had agreed with the representatives of the employees of the Immigration and Naturalization Service that if they withdrew their opposition to Reorganization Plan No. 2 as presented, his committee would present to the Congress a bill deleting section 2 which would have had the effect of transferring the Immigration and Naturalization inspecting force from the Justice Department to the Bureau of Customs. I am, therefore in favor of H.R. 8245 which is the result of that commitment. I accept the principle agreed to by the Government Operations Committee with the representatives of the employees of the inspections force of the Immigration and Naturalization Service. However, I have reservations about its passage in its present form for the reason that in H.R. 8245 as it is before us today, there is a nongermane amendment inserted by the Senate when H.R. 8245 was before that body. This is an amendment entirely unrelated to the subject matter of H.R. 8245 as it passed the House, and the amendment is not within the jurisdiction of the Committee on Government Operations but within the jurisdiction of the House Committee on the Judiciary since it involves an amendment to the Tort Claims Act.

I conclude from the statement of the gentleman that he is a strong opponent to nongermane amendments.

Mr. HOLIFIELD. That is right.

Mr. DONOHUE. And he is a strong opponent for one committee to invade the jurisdiction of another committee.

Mr. HOLIFIELD. That is right.

Mr. DONOHUE. Therefore, the gentleman says that these amendments with reference to no-knock law should not be in here.

Mr. HOLIFIELD. That is right.

Mr. DONOHUE. Now, did the gentleman take any steps to remove them or to correct them?

Mr. HOLIFIELD. Yes; I conferred with the people on the other side and they are adamant. Senator ERVIN put this amendment on. They are adamant in getting this.

The gentleman knows the problems we have dealing with the other side. I could not get this bill from the Speaker's desk under unanimous consent. I had to take this route and risk my own bill by getting a two-thirds vote in order to save the 900 men that were going to be transferred from the Immigration and Naturalization Service.

Mr. DONOHUE. Could this matter not have been referred to the Committee on Rules?

Mr. HOLIFIELD. Mr. Speaker, I tried to get a waiver from the Rules Committee on nongermane amendments to the FEA bill so that I could pick up the Senate bill. I tried to get a waiver, and the Rules Committee tells me that they are against giving waivers on nongermane amendments, and I think they are right. I believe the Rules Committee ought to develop a rule which would face this terrible problem we have.

This is one of the frustrations of committees of the House which are expert in certain fields and are trying to do a good job. When a bill goes over there, they hang Christmas tree ornaments all over it.

Mr. Speaker, I am just as much against this practice as the gentleman from Massachusetts is, but we are now 6 months into this year; Reorganization Plan No. 2 is in effect; the administration has not yet put into effect all these things, but are going to put them into effect. I am doing this in desperation.

If I do not get a two-thirds vote today, I will go to the Rules Committee and try to get a waiver.

Mr. DONOHUE. Mr. Speaker, could this matter not have been handled otherwise by having it go to a committee on conference?

Mr. HOLIFIELD. Mr. Speaker, I could not get it from the Speaker's desk except by unanimous consent to go to conference, and I was informed that I could not get it.

Mr. DONOHUE. Did the gentleman ask that a conference committee be formed to iron out the differences between the House version and the Senate version?

Mr. HOLIFIELD. Mr. Speaker, I did not, because under the parliamentary situation I must rise and ask unanimous consent to take from the Speaker's desk the legislation and send it to conference. I could not get that. I was told that different Members would object.

Mr. DONOHUE. Did the gentleman make that request in the House?

Mr. HOLIFIELD. No, I did not make it because I felt it was futile. I had been told by Members that they would object to it.

Mr. DONOHUE. Is that not the customary procedure?

Mr. HOLIFIELD. No, it is not the customary procedure. It is one of the customary procedures. Another way is to put it under suspension for a two-thirds vote. Another way is to get the Rules Committee to waive the point of order against nongermane amendments. I was told that I could not get that.

Mr. DONOHUE. Did the gentleman make the request of the Rules Committee?

Mr. HOLIFIELD. I talked to some of the Members.

Mr. DONOHUE. I mean formally.

Mr. HOLIFIELD. No, but I will go before the committee and ask them for a rule if this bill is defeated today. They tell me they will turn it down, but I will still go before the committee and ask them.

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 en-

forcement 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 public 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, from 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 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 intentional 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 is it 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 exploration. 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 both 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 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 potentiall 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 statute 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 victim and unnecessarily detrimental to effective law enforcement certainly does no service either to the victim or to society in the long run.

Mr. HOLIFIELD. Mr. Speaker, I yield such time as he may use to the gentleman from Texas (Mr. WHITE).

Mr. WHITE. Mr. Speaker, I am in favor of this legislation to prevent the transfer of 900 immigration inspectors to the Bureau of Customs for very compelling reasons.

There are 433 official ports of entry into the United States. We have about 1,200 inspectors who in 1971 had to cope with 225 million persons—including 91 million citizens, many more than once—passing through these points. In 1971 alone, inspectors—and border patrolmen—had to contend with the arrival of 383,000 aircraft flights originating outside the United States and 90,000 ship arrivals. The importance of the task of our immigration inspectors is further illustrated by the number of illegal aliens who have gained surreptitious entry into the United States. Estimates vary from 1 to 2 million and up to 10 million.

With this alarming manpower shortage in our border enforcement program,

the INS can ill afford to lose 900 immigration inspectors to the Bureau of Customs, where the crossover of jurisdictions between the Justice and Treasury Departments will almost surely hamper our border enforcement activities.

Mr. WIGGINS. Mr. Speaker, I yield 5 minutes to the gentleman from New York (Mr. HORTON).

Mr. HORTON. Mr. Speaker, I rise in support of H.R. 8245.

This bill was brought before the House to repeal those parts of Reorganization Plan No. 2 of 1973 which transferred to the Bureau of Customs the document inspections authority and some 900 officers of the Immigration and Naturalization Service. No other aspects of the plan are affected by this bill.

Just to set the record straight, it was brought out that this was a transfer of personnel from the Immigration and Naturalization Service that would not benefit the reorganization plan. There was an agreement between those who were concerned about it and the administration that section 2 would not be put into effect. Because we could not amend Reorganization Plan No. 2, we agreed that we would approve it, but later repeal section 2. H.R. 8245 is that repealer and it was passed by the House unanimously.

I agree with what the chairman, the gentleman from California (Mr. HOLIFIELD) said, that unfortunately the Senate has attached to this bill, H.R. 8245, a nongermane amendment. The Committee on Government Operations had no control over this Senate action.

I urge the Members to vote for H.R. 8245 in order to carry out the obligations and the promises that have been made to these people who agreed that the Reorganization Plan numbered 2 should go through back in June of last year with the understanding that we would try to repeal section 2. I agree with the gentleman from California (Mr. HOLIFIELD) that nongermane Senate amendments ought not to be attached to House bills. As the gentleman from California (Mr. HOLIFIELD) has indicated, we did everything we could to try to bring this bill without this nongermane amendment to the floor.

I personally am in favor of the amendment that has been put on by the Senate because it is an attempt to prevent the type of thing that happened in Collinsville, Ill. But, aside from my own personal views, it is not germane to the jurisdiction of the Committee on Government Operations. But it is important that we get Reorganization Plan numbered 2 corrected, and we have to do it by passing H.R. 8245.

The SPEAKER. The time of the gentleman has expired.

Mr. HOLIFIELD. Mr. Speaker, I yield 2 additional minutes to the gentleman from New York (Mr. HORTON) so that I may make a statement.

Mr. Speaker, will the gentleman yield?

Mr. HORTON. I yield to the gentleman from California.

Mr. HOLIFIELD. Mr. Speaker, I hold in my hand H.R. 10439 which was introduced by the gentleman from New Jersey (Mr. RODINO) and the gentleman from Michigan (Mr. HUTCHINSON) on September 20, 1973. That is almost 6 months ago. That is the bill that I referred to, the so-called omnibus bill on the Tort Claims Act.

The Committee on the Judiciary has been a busy committee, we all know that, and I am not criticizing the committee, but I am saying that in these 6 months they have not acted upon the bill that would have corrected this thing. The emergency situation has arisen whereby we are trying to save the border patrol from being transferred into the Custom Service, which as everybody agrees is not the kind of reorganization to be made.

So, because of that 6-month delay in not taking care of a matter by the Committee on the Judiciary, we are faced with a Senate amendment to a bill dealing with this emergency problem of the border patrol, and that is why we are having to take this course of action today.

Mr. HORTON. Mr. Speaker, I thank the gentleman from California (Mr. HOLIFIELD) for his comments, and I think he has made a very important point. This legislation has been before the Committee on the Judiciary, this omnibus bill, and so far as I know there have not been any indications as to any hearings being scheduled on the bill, and so far as I know nothing will happen to it until after the Easter recess. I believe that this bill is very important insofar as Reorganization Plan No. 2 is concerned, so I would respectfully urge the Members of the House to vote for H.R. 8245 notwihstanding the nongermane amendment.

Mr. HOLIFIELD. I yield such time as he may consume to the gentleman from California (Mr. DANIELSON).

Mr. DANIELSON. Mr. Speaker, and Members of the House, I rise in support of the measure now pending before the House, recognizing the fact that the amendment added by the Senate is a nongermane amendment, and does pertain to the jurisdiction of the Committee on the Judiciary.

I would like to point out that, first of all, the nature of the amendment which has been added by the Senate is a very proper amendment and one that most of us could and should support. Second, that the Committee on the Judiciary now has pending before it the bill which was introduced by the chairman, the gentleman from New Jersey (Mr. RODINO) and the gentleman from Michigan (Mr. HUTCHINSON), H.R. 10439, which will provide for a review of the entire Tort Claims Act, and it will probably be before us within the next few months, and will be able to deal fully with the subject matter of the Senate amendment that is now before us, to either eliminate it from the statutes, to increase its scope, or modify it, to do whatever the Committee on the Judiciary might seem to think is the proper thing to do. But certainly we should not hold the Reorganization Plan No. 2 hostage because of the Senate nongermane amendment.

I therefore urge a vote for this measure.

Mr. HOLIFIELD. Mr. Speaker, I yield such time as he may consume to the gentleman from California (Mr. VAN DEERLIN).

Mr. VAN DEERLIN. Mr. Speaker, I represent a district which has the busiest border-crossing point in the entire world. I have known and respected the chairman of the Committee on Government Operations for more than two decades. His legislative skills in a difficult parliamentary proceeding have always been obvious. He finds ways to pass good laws. I therefore have no hesitancy in rising now in support of the legislation that he brings before us under this suspension of the rules.

Mr. WIGGINS. Mr. Speaker, I yield such time as he may consume to the gentleman from Massachusetts (Mr. DONOHUE).

Mr. DONOHUE. Mr. Speaker, I might repeat I am not opposed to the bill amending Reorganization Plan No. 2, as originally passed by the House but I am conscious of the rules of the House. The rule of the House which emphasize its opposition to nongermane amendments, and that is what we have here in this bill.

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

Mr. WIGGINS. I yield to the gentleman from Indiana.

Mr. DENNIS. I thank the gentleman for yielding.

Mr. Speaker, I walked in here today knowing nothing about this particular measure. I used to be on the Immigration Subcommittee. I am very sympathetic with the needs of the Border Patrol, but here, because of a parliamentary problem, as I understand it, we are about to deal with imposing a very serious potential financial obligation on the Government of the United States, and with a serious constitutional proposition in connection with the exclusionary rule.

With all due respect to the chairman, and with due respect for his problems, I have to query whether we really ought to go into things so fundamental because of a parliamentary situation created by the aberrations of the other body. Therefore, I am going to oppose the suspension under the circumstances.

Mr. HOLIFIELD. Mr. Speaker, of course, we are handling this legislation in complete accord with the Rules of the House. When we handle a bill under suspension, we suspend the Rules of the House, including the rule of germaneness. That is the way we are operating on this bill and two more bills we have scheduled today. We will do exactly the same thing with them. We will suspend the Rules of the House, which will include the rule of germaneness. Of course, this is a technical argument that can be made, but if the gentleman from Massachusetts—who is my friend and on my Committee on Government Operations, and who has been very courteous to me

on this matter—is going to hold hearings on this matter, we are going to send this bill back over to the Senate. I do not know how long it will lie there before it is accepted. I do not know.

I am sure that if he is going to hold hearings on this matter and modify or eliminate or expand this particular provision of law, which all of us admit ought to be done, he will have an opportunity to do it expeditiously. He could bring in a simple bill on this within a week from his committee and do whatever he wants to do with this particular part of the Tort Claims Act.

I say we are faced here with a realistic situation. We are proceeding under the Rules of the House, and the rules at this time provide for suspension of the Rules of the House in order to get at those things which we want to get to today in all three of these suspensions. The other two are not from my committee. So I hope that the House will sustain the motion to accept H.R. 8245 with the amendment.

Mr. WIGGINS. Mr. Speaker, I have no further requests for time. I yield back the balance of my time.

The SPEAKER. The question is on the motion offered by the gentleman from California (Mr. HOLIFIELD) that the House suspend the rules and agree to the House resolution (H. Res. 947).

The question was taken; and the Speaker announced that the ayes appeared to have it.

Mr. DONOHUE. Mr. Speaker, I demand a recorded vote.

A recorded vote was refused.

Mr. BUTLER. Mr. Speaker, I object to the vote on the ground that a quorum is not present and make the point of order that a quorum is not present.

The SPEAKER. Evidently a quorum is not present.

The Sergeant at Arms will notify absent Members.

The vote was taken by electronic device, and there were—yeas 317, nays 86, not voting 28, as follows:

[Roll No. 59]

YEAS—317

Abdnor
Abzug
Adams
Addabbo
Alexander
Anderson, Calif.
Anderson, Ill.
Andrews, N.C.
Andrews, N. Dak.
Annunzio
Arends
Armstrong
Aspin
Asfalls
Barrett
Bell
Bennett
Bergland
Bevill
Biaggi
Biester
Bingham
Boggs
Boland
Boiling
Bowen
Brademas
Breaux
Breckinridge
Brinkley
Brooks
Broomfield
Brotzman
Brown, Calif.
Brown, Mich.
Brown, Ohio
Broyhill, N.C.
Buchanan
Burke, Calif.
Burke, Mass.
Burlison, Mo.
Byron
Carney, Ohio
Carter
Casey, Tex.
Cederberg
Chamberlain
Chisholm
Clark
Clausen, Don H.
Clay
Cleveland
Cohen
Collins, Ill.
Conable
Conte
Conyers
Corman
Coughlin
Cronin
Culver
Daniel, Dan
Daniels, Dominick V.
Danielson
Davis, Ga.
Davis, S.C.
de la Garza
Delaney
Denholm
Dent
Derwinski
Diggs
Dingell
Donohue
Downing
Drinan
Duiski
du Pont
Eckhardt
Edwards, Ala.
Edwards, Calif.
Eilberg
Erlenborn
Esch
Eshleman
Evins, Tenn.
Fascell
Findley
Fish
Fisher
Flood
Flowers
Foley
Ford
Forsythe
Fountain
Fraser
Frelinghuysen
Frenzel
Frey
Fulton
Fuqua
Gaydos
Gettys
Giaimo
Gibbons
Gilman
Ginn
Gonzalez
Grasso
Gray
Green, Oreg.
Green, Pa.
Griffiths
Grover
Gude
Gunter
Guyer
Hamilton
Hanley
Hanna
Hanrahan
Hansen, Idaho
Hansen, Wash.
Harrington
Hastings
Hays
Hébert
Hechler, W. Va.
Heckler, Mass.
Heinz
Helstoski
Henderson
Hillis
Hinshaw
Holifield
Holtzman
Horton
Hosmer
Howard
Huber
Hudnut
Hungate
Hunt
Ichord
Jarman
Johnson, Calif.
Johnson, Colo.
Johnson, Pa.
Jones, Ala.
Jones, N.C.
Jones, Tenn.
Jordan
Karth
Kastenmeier
Kazen
Kemp
King
Koch
Kyros
Landrum
Latta
Leggett
Lehman
Lent
Litton
Long, Md.
Lujan
McCloskey
McCollister
McCormack
McDade
McFall
McKay
McKinney
McSpadden
Madden
Madigan
Maraziti
Martin, N.C.
Mathias, Calif.
Matsunaga
Mazzoli
Meeds
Melcher
Metcalfe
Mezvinsky
Milford
Miller
Minish
Mink
Mitchell, Md.
Mitchell, N.Y.
Mizell
Moakley
Moilohan
Moorhead, Pa.
Morgan
Mosher
Murphy, Ill.
Murtha
Natcher
Nedzi
Nelsen
Nichols
Nix
Obey
O'Brien
O'Hara
O'Neill
Owens
Parris
Passman
Patman
Patten
Perkins
Pettis
Peyser
Pickle
Pike
Poage
Podell
Preyer
Price, Ill.
Pritchard
Quie
Quillen
Railsback
Rangel
Rarick
Rees
Regula
Reuss
Rhodes
Riegle
Rinaldo
Roberts
Robison, N.Y.
Rodino
Roe
Roncallo, Wyo.
Roncallo, N.Y.
Rooney, Pa.
Rose
Rosenthal
Rostenkowski
Roush
Roy
Roybal
Ruppe
Ryan
St Germain
Sarasin
Sarbanes
Satterfield
Schroeder
Seiberling
Shipley
Shriver
Shuster
Sikes
Sisk
Skubitz
Slack
Smith, Iowa
Stanton, J. William
Stanton, James V.
Stark
Steed
Steele
Steelman
Stephens
Stokes
Stuckey
Studds
Sullivan
Symington
Talcott
Taylor, N.C.
Teague
Thompson, N.J.
Thomson, Wis.
Thone
Tiernan
Towell, Nev.
Udall
Ullman
Van Deerlin
Vander Jagt
Vander Veen
Vanik
Veysey
Vigorito
Waggonner
Waldie
Walsh
Ware
Whalen
White
Widnall
Wilson, Bob
Wilson, Charles H., Calif.
Wilson, Charles, Tex.
Winn
Wolff
Wright
Wydler
Wylie
Wyman
Yates
Yatron
Young, Alaska
Young, Ga.
Young, Ill.
Young, Tex.
Zablocki
Zwach

NAYS—86

Archer
Ashbrook
Ashley
Badillo
Baker
Bauman
Beard
Blackburn
Bray
Broyhill, Va.
Burgener
Burke, Fla.
Burleson, Tex.
Butler
Camp
Chappell
Clancy
Clawson, Del
Cochran
Collier
Collins, Tex.
Conlan
Cotter
Crane
Daniel, Robert W., Jr.
Davis, Wis.
Dellenback
Dennis
Devine
Dickinson
Duncan
Eilberg
Froehlich
Gooding
Gross
Gubser
Haley
Hammer-schmidt
Harsha
Hicks
Hogan
Holt
Hutchinson
Ketchum
Kuykendall
Landgrebe
Lott
McClory
McEwen
Mahon
Mallary
Mann
Martin, Nebr.
Mathis, Ga.
Mayne
Michel
Moorhead, Calif.
Myers
Pepper
Powell, Ohio
Price, Tex.
Robinson, Va.
Rogers
Rousselot
Runnels
Ruth
Sandman
Scherle
Schneebeli
Sebelius
Smith, N.Y.
Snyder
Spence
Steiger, Ariz.
Steiger, Wis.
Symms
Taylor, Mo.
Thornton
Wampler
Whitten
Wiggins
Williams
Wyatt
Young, Fla.
Young, S.C.
Zion

NOT VOTING—28

Blatnik
Brasco
Burton
Carey, N.Y.
Dellums
Dorn
Evans, Colo.
Goldwater
Hawkins
Jones, Okla.
Kluczynski
Long, La.
Macdonald
Mailliard
Mills
Minshall, Ohio
Montgomery
Moss
Murphy, N.Y.
Randall
Reid
Rooney, N.Y.
Shoup
Staggers
Stratton
Stubblefield
Treen
Whitehurst

So (two-thirds having voted in favor thereof) the rules were suspended and the resolution was agreed to.

The Clerk announced the following pairs:

Mr. Kluczynski with Mr. Rooney of New York.

Mr. Burton with Mr. Brasco.

Mr. Hawkins with Mr. Murphy of New York.

Mr. Montgomery with Mr. Carey of New York.

Mr. Blatnik with Mr. Dellums.

Mr. Staggers with Mr. Mailliard.

Mr. Reid with Mr. Shoup.

Mr. Moss with Mr. Treen.

Mr. Stratton with Mr. Mills.

Mr. Stubblefield with Mr. Whitehurst.

Mr. Dorn with Mr. Randall.

Mr. Evans of Colorado with Mr. Minshall of Ohio.

Mr. Macdonald with Mr. Jones of Oklahoma.

Mr. Long of Louisiana with Mr. Goldwater.

The result of the vote was announced as above recorded.

A motion to reconsider was laid on the table.

Boger, Gitenstein, and Verkuil Article, 54 North Carolina Law Review 497 (1976)

THE FEDERAL TORT CLAIMS ACT INTENTIONAL TORTS AMENDMENT: AN INTERPRETATIVE ANALYSIS

JACK BOGER
MARK GITENSTEIN
PAUL R. VERKUIL

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THE FEDERAL TORT CLAIMS ACT INTENTIONAL TORTS AMENDMENT: AN INTERPRETATIVE ANALYSIS

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MARK GITENSTEIN††
PAUL R. VERKUIL†††

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†† A.B. Duke, 1968; J.D. Georgetown, 1972. This article does not purport to represent the views of Senator Ervin, the Senate Subcommittee on Constitutional Rights, or the Senate Government Operations Committee, with which Mr. Gitenstein worked at the time of passage of the legislation that is the subject of this article. Nor do Mr. Gitenstein's views necessarily reflect the position of the Senate Select Committee on Intelligence, where he is currently employed.

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I. INTRODUCTION

In March 1974, with little warning or fanfare, Congress passed a major amendment[1] to the Federal Tort Claims Act that had the effect of broadly reappraising government responsibility for the torts of its officials. The amendment brings within the ambit of the FTCA a group of intentional torts previously excluded, raising once more long standing questions about the continued viability of the doctrine of sovereign immunity. But since the amendment became law with little public reaction, its full implications have not yet been felt or assessed, and it remains largely ignored in practice. This makes such an assessment particularly timely and important. This article will describe the amendment, the events that led to its enactment, and the methods by which it should be interpreted and implemented by the bar and the courts. Careful attention will be paid to the amendatory process, since it is believed that through an understanding of that process the amendment can serve as a spur to greater reform of the sovereign immunity doctrine.

Part of the following discussion will be devoted to reconciling the existing FTCA scheme with the amendment's requirements in order to provide a roadmap to practice under the new provision. If our guess is right, many lawyers who formerly had slight contact with the FTCA will soon find themselves immersed in it. Therefore, we have reviewed some of the basic provisions of the Act in order to show how the amendment will operate in practice.

The intentional torts amendment was passed during a period that witnessed a remarkable series of events urgently demonstrating the need for increased government responsibility for the tortious and unconstitutional acts of its officials. From a background of the Jackson State and Kent State tragedies in May 1970,[2] the Supreme Court's decision in

1. 28 U.S.C.A. § 2680(h) (Supp. 1976), *amending* 28 U.S.C. § 2680(h) (1970). The amendment became effective on March 16, 1974.

2. The Jackson and Kent State litigations both raised the issue of the necessity for state governments to take responsibility for the constitutional injuries caused by their officials. *See* Verkuil, *Immunity or Responsibility for Unconstitutional Conduct: The Aftermath of Jackson State and Kent State*, 50 N.C.L. REV. 548 (1972). For resolutions of that issue see Burton v. Waller, 502 F.2d 1261 (1974), *cert. denied*, 421 U.S.

Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics[3] in June 1971, the May Day mass arrests in Washington in 1971,[4] and the Attica debacle in September 1971,[5] the focus upon responsibilities for abuses of governmental authority is not surprising. And even today the public is being made aware of activities by the Federal Bureau of Investigation that have violated rights long thought to be within the basic protections of the Constitution.[6] But the pressures that led Con-

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939 (1975); Krause v. Ohio, 31 Ohio 2d 32, 285 N.E.2d 736, *appeal dismissed*, 409 U.S. 1052 (1972).

3. 403 U.S. 388 (1971).

4. *See* Apton v. Wilson, 507 F.2d 83 (D.C. Cir. 1974); Sullivan v. Murphy, 478 F.2d 938 (D.C. Cir. 1973).

5. *See* N.Y. Times, Sept. 10, 1971, at 1, col. 2. *See generally* T. WICKER, A TIME TO DIE (1975).

6. Hearings conducted by the Senate Intelligence Committee in the fall of 1975 revealed serious abuses by the intelligence agents of the FBI. Those abuses involved violations of constitutional and common law rights of thousands of United States citizens. In a statement before the Government Operations Committee, Senator Mondale, Chairman of the Senate Intelligence Committee Domestic Intelligence Subcommittee, summarized those abuses as follows:

> As chairman of the Subcommittee on Domestic Intelligence of the Select Committee, I have spent the past few months immersed in the evidence of gross abuse of the rights of American citizens by the FBI and other domestic intelligence agencies. The Bureau's "neutralization" of Dr. Martin Luther King is a case in point. Between 1963 and his death in 1968, the FBI placed Dr. King under intensive physical and electronic surveillance, including in sixteen instances installing bugs in Dr. King's hotel rooms. The FBI decided to use the information it had obtained through this electronic surveillance to "dethrone" King, and to cultivate and promote a new leader of the civil rights movement. It used the information to attempt to block Dr. King's being awarded honorary college degrees. The Bureau attempted to block Dr. King's audience with the Pope and to discredit him with other churches and the clergy. It mailed a hotel "bug" tape to King with an enclosed blackmail letter.
>
> Throughout this period the FBI obtained absolutely no evidence that Dr. King was involved in any criminal or violent activity. There was no evidence that Dr. King was connected with the Communist Party in any way.
>
> Yet the FBI activities directed at Dr. King were not unique. Our public hearings in the fall documented similar activities against thousands of other domestic dissidents through the FBI COINTELPRO program. We heard evidence of surveillance of thousands of law abiding citizens by the FBI. The public record discloses the details of the Nixon administration's Huston plan to coordinate intelligence activities in a concerted attempt to deprive American citizens of their constitutional rights. We have also documented the CIA's Operation CHAOS; the NSA's electronic surveillance of millions of international telephone conversations of American citizens.
>
> This is only a partial list but the point is obvious! Domestic intelligence programs of the federal government have presented and if not checked will continue to present a "clear and present danger" to the rights of speech, association, privacy, and the rule of law.

122 CONG. REC. S 1808 (daily ed. Feb. 18, 1976). Neither Dr. King, his family, the victims of COINTELPRO, nor any of the other victims of federal government domestic intelligence abuses have an effective cause of action against the federal government. Although the amendment to section 2680(h) of the Federal Tort Claims Act discussed in this article may expand government liability to a limited extent, as a general matter those abuses that involve defamation (*e.g.*, the King case and COINTELPRO) or sim-

gress directly to enact the FTCA amendment did not emerge from these events. Rather, the impetus was specifically provided by events that occurred on the night of April 23, 1973, when federal and state narcotics agents mistakenly stormed the homes of two Collinsville, Illinois, families in an attempt to apprehend suspected cocaine dealers.[7]

II. Legislative History

A. *Collinsville*

Herbert and Evelyn Giglotto awoke in their Collinsville, Illinois, townhouse at about 9:30 p.m. on April 23, 1973, to the sound of someone smashing down their door and bursting into their home. Mr. Giglotto lept from bed; as he entered the hallway outside his bedroom, he found himself confronted by perhaps five shabbily dressed men. Brandishing pistols, they forced Giglotto back into his bedroom. They threw him face down on his bed, tied his hands behind his back, and put a pistol to his head. Said one, "You move, you're dead. I'm going to shoot you."[8]

Evelyn Giglotto, clad only in a negligee, stood horrified as one of the intruders screamed abuses at her incapacitated husband. Then several turned on her, forcing her into a similar position, while others searched the upstairs room. About fifteen men had come into the bedroom by this time, some entering and then leaving. Cursorily, the men identified themselves as federal officers, flashing a badge at Mr. Giglotto and telling him the house had been under surveillance for three weeks. The couple, unsure what to think, could hear other men beginning to ransack the downstairs. Throughout the ordeal Giglotto, a pistol held to his head, tried to identify himself, but the intruders refused to respond. Some ten to fifteen minutes after the invasion began, one of the men came into the room holding the Giglottos' bankbook and insurance papers. "Well, we have the wrong people," he said. The

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ply involve a violation of first amendment rights are not necessarily actionable under the new amendment.

7. The incident was widely reported by local and national news media. These reports are described herein to show the basis of congressional action, not the truth of each allegation. See 119 Cong. Rec. 23242 (1973). The Giglottos and the Askews testified to details of the raids before a Senate subcommittee on May 18, 1973. *Hearings on Reorganization Plan No. 2 of 1973 Before the Subcomm. on Reorganization, Research, and International Organizations of the Senate Comm. on Government Operations*, 93d Cong., 1st Sess., pt. 3, at 461, 475 (1973) [hereinafter cited as *1973 Hearings*]. See note 220 *infra*.

8. 119 Cong. Rec. 23246 (1973), *quoting* St. Louis Post-Dispatch, Apr. 29, 1973, at 1A, col. 1.

men, without apology, untied the couple and permitted them to sit up on their bed. Even at this point, when Herbert Giglotto tried to put on his pants, they were ripped from his hand. "I told you not to move." The agents departed without explanation, leaving behind a smashed television, a broken camera, scattered books, scratched furniture, and a shattered antique vase.[9]

Thirty minutes later, at the nearby home of the Donald Askews, a similar raid took place. Mr. and Mrs. Askew and their son were seated at the kitchen table eating dinner when their dog began barking in the living room. Mrs. Askew went to investigate and was startled to see a man at the window. She screamed to her husband, who looked up to find two men standing at his kitchen door—one holding a sawed-off shotgun—and a third man standing at another door. As in the Giglotto raid, the men were shabbily dressed, and Askew later said he thought they were some sort of motorcycle gang. "I figured my boy had been in a fight or something and they were going to shoot him." Askew shouted at them to leave and tried to hold closed the kitchen door. After a struggle the invaders flashed gold badges and insisted they were special agents. Although bewildered, Askew unlocked the door. His wife, who had been threatened by the man at the living room window, fell unconscious in the bedroom. On her revival, the Askews sat down in their living room while the agents, still holding pistols, rummaged through the house. The agents offered little explanation for their presence. Finally, confessing they had acted on a "bad tip," they left, giving Donald Askew a telephone number to call.[10]

The agents, it became known the next day, had been under the direction of the St. Louis office of Drug Abuse Law Enforcement (DALE),[11] a nationwide program established a year earlier on January 1, 1972, by executive order of President Richard Nixon.[12] DALE, which operated from thirty-eight local offices throughout the country, had been formed to supplement the work of the Bureau of Narcotics and Dangerous Drugs (BNDD) by providing a force of attorneys and investigators, drawn from BNDD and state and local law enforcement units, who would mount a sustained push against heroin and cocaine traffic. The Collinsville raids had come as part of an effort to stem cocaine dealing in the eastern St. Louis area. A month-long investiga-

9. *Id.*
10. *Id.* at 23247.
11. *Id.*
12. Exec. Order No. 11,641, 3A C.F.R. 137 (Supp. 1972).

tion had led to five arrests earlier on the day of the raids,[13] and later that week BNDD arrested Robert Piker, a suspected cocaine dealer, who gave as his address an apartment adjacent to the Giglottos'.[14]

B. *Administrative and Judicial Reaction*

The St. Louis DALE office's initial response to the Collinsville raids was to absorb the impact of adverse publicity with minimum damage to its ongoing program. The office had apparently been effective its first year in apprehending drug pushers and making charges against them stick.[15] In its campaign, however, the fledgling DALE reportedly was operating in unhealthy competition with BNDD and was concerned with its own administrative survival.[16] Thus the days immediately after the Collinsville raids saw a local bureaucratic scramble to mute the impact of the invasions. Yet as public opinion began to bear heavily, higher officials recognized the necessity to expose and investigate what had occurred. The initial insistence that the raids had been conducted under authority of an arrest warrant gave way to the admission that no warrant had issued; indeed, that permission to conduct the raids had been specifically denied.[17] Reports of two earlier raiding improprieties by the St. Louis office surfaced. In one, agents searching a house in which they eventually found heroin engaged in an alleged "personal vendetta of wanton destruction," slashing paintings, destroying lamps and appliances, and otherwise abusing their powers of investigation.[18] That raid had brought a suit by the American Civil Liberties Union.[19]

Another incident had occurred on October 17, 1972, when DALE agents accosted Sterling Bell, Jr., a predental student at Southern Illinois University, outside the hospital where he worked. Wearing long hair and old clothes, one agent allegedly approached Bell, cursing and demanding identification. He showed a badge to Bell briefly, but the

13. 119 CONG. REC. 23249 (1973), *quoting* St. Louis Post-Dispatch, May 1, 1973, at 9A, col. 1.

14. *Id.* at 23250-51, *quoting* St. Louis Post-Dispatch, May 3, 1973, at 3A, col. 1.

15. *1973 Hearings, supra* note 7, at 456-57; *id.* at 551-52 (Exhibit 51, Statement of J. Michael Fitzsimmons, Jr., Regional Director, Region V, Office for Drug Abuse Law Enforcement).

16. 119 CONG. REC. 23251-52 (1973), *quoting* St. Louis Post-Dispatch, May 4, 1973, at 1A, col. 5; *1973 Hearings, supra* note 7, at 446.

17. 119 CONG. REC. 23248-49 (1973), *quoting* St. Louis Post-Dispatch, Apr. 30, 1973, at 1A, col. 1.

18. *Id.* at 23250, *quoting* St. Louis Post-Dispatch, May 2, 1973, at 8A, col. 1.

19. *Id.* at 23250, 20862, *quoting* The National Observer, June 23, 1973.

student, uncertain whether the man was serious—"We were standing in front of Malcolm Bliss Mental Hospital and I thought it was some sort of nut from there"—turned to walk away. The agent reportedly spun him around and cocked his fist, at which point Bell hit him. The student was then jumped by four other officers. After a struggle they produced handcuffs; Bell claimed he realized only then that his accosters were police officers.

The agents, who later admitted Bell was not the man they sought, nevertheless processed a charge against him for assaulting a police officer with malice and intent to maim.[20] One officer who was injured by Bell in the struggle filed suit against him for damages. Bell, because of legal expenses, was forced to drop out of Southern Illinois University, and his wife reportedly became so psychologically disturbed by the incident that she had to leave her job.[21]

The *St. Louis Post-Dispatch* soon reported that certain of the agents involved in these earlier alleged abuses were also central figures in the Giglotto and Askew raids.[22] On May 1, after an investigation, Myles Ambrose, the special assistant attorney general in charge of DALE, suspended four DALE agents. He also requested that St. Louis police officers who had been involved in the raid be taken off further assignments in collaboration with DALE agents.[23] Later, however, when one of the suspended agents was discovered by the press to have participated in a raid in Maryville, Illinois, it was revealed that Ambrose's "suspension" consisted of a full-pay reassignment of the agents to the St. Louis office of BNDD, where they engaged in "limited duty" actions, including planning and coordination of further raids.[24] This discovery prompted further public clamor.

At the national level a memorandum deploring the actions of those involved in the raids was circulated among the thirty-eight branches of the agency, warning all personnel that such conduct would not be tolerated.[25] More significantly, at the administrative level, a new agency that became DALE's successor, the Drug Enforcement Administra-

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20. *Id.* at 23245, *quoting* St. Louis Post-Dispatch, Apr. 27, 1973, at 1A, col. 6.
21. *Id.* at 23257, *quoting* St. Louis Post-Dispatch, June 20, 1973, at 25A, col. 1.
22. *Id.* at 23250, *quoting* St. Louis Post-Dispatch, May 2, 1973, at 1A, col. 2-3.
23. *Id.* at 23249, *quoting* St. Louis Post-Dispatch, May 1, 1973, at 1A, col. 2.
24. *Id.* at 23255-56, *quoting* St. Louis Post-Dispatch, June 12, 1973, at 12A, col. 6.
25. *1973 Hearings, supra* note 7, at 550 (Exhibit 49, Memorandum from Myles J. Ambrose, Special Assistant Attorney General, Office for Drug Abuse Law Enforcement, to Regional Directors, Chief Investigators, Attorneys in Charge and All Personnel, May 3, 1973).

tion (DEA), issued on July 16, 1973, a new statement to all officers concerning search and seizure policy. The statement forbade use of "[t]he 'no-knock' authority contained in 21 U.S.C. 879 . . . unless specifically authorized by the Administrator or Deputy Administrator."[26] Further guidelines discouraged forced entry of a premises with or without a warrant unless probable cause existed to believe a suspect was within. Also, enforcement teams were ordered to "wear distinctive markings, such as badges, caps, or other devices, to identify themselves to the public and their fellow officers in all cases involving forced entry and [to] give prior notice of authority and purpose before forcing entry after being denied admission."[27]

While these administrative changes were valuable as procedural barriers against further abuses, they of course in no way redressed the injuries suffered by the Askews and Giglottos. The raiding agents had told the Askews before they left how to contact BNDD officials who would pay them for property damage.[28] Discussions were held with both couples soon after the raids, but the government offers of reparations proved unsatisfactory.[29]

While the Askews' property loss consisted of a single broken door, Mrs. Askew required hospitalization, beginning within a month of the raid. Donald Askew claimed to have spent so much time talking to government investigators and to his own lawyers that he was forced to sell his service station business. He also alleged that neighbors and business customers became unfavorably disposed toward him because of his association with a drug raid.[30] On April 25, 1973, the Askews filed a damage suit for $100,000 in federal district court against the federal agents involved in the raid, alleging assault, false imprisonment and violation of civil rights.[31]

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26. Drug Enforcement Administration, Search and Arrest: A Statement of Policy, *reprinted in* 119 CONG. REC. 24284-85 (1973).

27. *Id.* at 24285.

28. According to Herbert Giglotto, two federal employees came to his home to appraise damages the day after the raid. They apparently promised to pay for property damages. Accounts suggest Askew was given similar information on the evening of the raid. *Id.* at 23246-47, *quoting* St. Louis Post-Dispatch, Apr. 29, 1973, at 27A, col. 3.

29. As Herbert Giglotto told a *St. Louis Post-Dispatch* reporter: "Yes, they sent two young men out the next day to take an appraisal for what damages they did. They were very polite. And that's when it started getting to me . . . . I don't think the impact of what they did to our lives . . . all they were interested in was how much to replace the bookcase, and how much does it cost to repair the television." *Id.* at 23246, *quoting* St. Louis Post-Dispatch, Apr. 29, 1973, at 27A, col. 1.

30. *Id.* at 23246-47, 23242-43, *quoting* St. Louis Post-Dispatch, Apr. 29, 1973, at 27A, col. 3; N.Y. Times, July 4, 1973, at 38, col. 1.

31. *Id.* at 23243-44.

The Giglottos maintained that they were the victims of repeated disturbances subsequent to the raid—that FBI investigators visited their neighbors trying to uncover damaging information about them, that they received threatening midnight phone calls promising "revenge," that both their cars were sideswiped. Finally, on July 3, saying "[w]e just can't take the harassment any more," the family fled Collinsville for an undisclosed new home.[32] The Giglottos also filed a damage action, seeking one million dollars.[33]

A Madison County, Illinois, grand jury was convened on May 3, 1973, to consider possible state criminal violations by the federal agents.[34] A federal grand jury began investigation on May 7.[35] After several weeks of inquiry both the Civil Rights Division of the Justice Department and the FBI were brought in to supplement the federal grand jury's work.[36] At this time, the investigation was broadened to include the Giglottos' charges of BNDD harassment after the raid as well as the Sterling Bell incident. This flurry of activity did not eliminate certain potential conflicts of interest, however. The BNDD, the FBI and the Civil Rights Division are all agencies of the Justice Department. More seriously, the same federal grand jury that was eventually asked to consider possible action against the DALE agents had, only a week earlier, returned indictments against alleged drug dealers after hearing testimony from those same agents.[37]

C. *Congressional Reaction*

(1) Investigation

The Collinsville raids came at a time when several United States Senators had been working in areas related to those events. Senator Charles Percy of Illinois had scheduled subcommittee hearings in Illinois for May 18, 1973, on a proposal to meld BNDD and DALE into one superagency, the Drug Enforcement Administration.[38] Later Per-

32. *Id.* at 23242-43, *quoting* N.Y. Times, July 4, 1973, at 38, col. 1.
33. *Id.*
34. *Id.* at 23251-52, *quoting* St. Louis Post-Dispatch, May 4, 1973, at 1A, col. 7.
35. *Id.* at 23252, *quoting* St. Louis Post-Dispatch, May 7, 1973, at 11A, col. 4.
36. *Id.* at 23257, *quoting* St. Louis Post-Dispatch, June 20, 1973, at 1A, col. 4.
37. *Id.* at 23253, *quoting* St. Louis Post-Dispatch, May 13, 1973, at 3A, col. 1.
38. The Drug Enforcement Administration was finally established by the Reorganization Plan No. 2 of 1973, effective July 1, 1973, as amended March 16, 1974. Pub. L. No. 93-253, § 1, 88 Stat. 50 (codified at 28 U.S.C.A. § 509 (Supp. 1975)). For an account of the development and principal features of the plan, designed to place primary responsibility for federal drug law enforcement on DEA, see S. REP. No. 469, 93d Cong., 1st Sess. (1973).

cy, expressing shock at the tactics used by the Collinsville agents, invited both the Giglottos and the Askews to testify at the hearings.[39] He stressed the need for reorganization of the narcotics agencies, suggesting that "bureaucratic infighting" might have been behind the raids. At the hearings Percy also struck out against the no-knock authority given drug agents by 21 U.S.C. § 879.[40]

Another Senator who responded to the raids by blasting "no-knock" authority was Sam Ervin of North Carolina. In a speech before the Senate on May 10, 1973, Ervin, long a critic of "no-knock" searches, cited two incidents in Massachusetts and the Collinsville raids to support his contention that the "no-knock" authority granted by 21 U.S.C. § 879 was a "giant step in conversion of our free society into a police state."[41] Ervin acknowledged that the Collinsville tactics—the entrance without *any* warrant—exceeded even no-knock boundaries, but implied that the law itself had encouraged such unlawful abuses. Ervin promised that unless he received satisfactory explanation of the incident from DALE's Myles Ambrose, he would "introduce legislation repealing or modifying the Justice Department's authority to conduct no-knock searches."[42]

Coincident with these public utterances, both Senators initiated correspondence and discussions, attempting to ferret out details of the raids and the broader contours of search and seizure methods employed by the drug agencies.[43] From this inquiry the Senators recognized that even repeal of the "no-knock" law would do nothing to recompense

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39. *1973 Hearings, supra* note 7, at 446.

40. *Id.* at 474. 21 U.S.C. § 879(b) (1970) reads:

> Any officer authorized to execute a search warrant relating to offenses involving controlled substances the penalty for which is imprisonment for more than one year may, without notice of his authority and purpose, break open an outer or inner door or window of a building, or any part of the building, or anything therein, if the judge or United States Magistrate issuing the warrant (1) is satisfied that there is probable cause to believe that (A) the property sought may and, if such notice is given, will be easily and quickly destroyed or disposed of, or (B) the giving of such notice will immediately endanger the life or safety of the executing officer or another person, and (2) has included in the warrant a direction that the officer executing it shall not be required to give such notice. Any officer acting under such warrant, shall, as soon as practicable after entering the premises, identify himself and give the reasons and authority for his entrance upon the premises.

41. 119 CONG. REC. 15170 (1973). Senator Ervin reemphasized these points on May 13, 1973, in an address at Chapel Hill to the graduates of the University of North Carolina School of Law.

42 *Id.* at 15171.

43. Letter from Sam J. Ervin, Jr. to Myles J. Ambrose, May 7, 1973, copy on file in the University of North Carolina Law Library; *1973 Hearings, supra* note 7, at 548-50 (Exhibit 48, Letter from Charles H. Percy to Myles J. Ambrose, April 30, 1973).

financially the victims of abuse by federal officers. Several sources Ervin contacted, including John Laughlin, Chief of the Torts Section of the Civil Division of the Department of Justice, pointed out that the sovereign immunity bar, which precluded successful civil suits against the federal government for otherwise tortious activity, would limit the Giglottos and the Askews to suits for compensation against individual federal officers.[44]

Ervin learned, however, that the Justice Department had recently prepared legislation to alter this responsibility by accepting federal liability for tortious acts, in exchange for legal immunity for officers in their individual capacities. The proposed vehicle for the Justice Department-sponsored change was an amendment of the Federal Tort Claims Act.[45] At that point Senators Ervin and Percy began to explore their own amendment to the FTCA.

(2) The Existing Legal Framework

The legal idiosyncrasies of "sovereign immunity," the general term for the issue around which proposals and counterproposals developed during the next several months, proved so complex that the parties involved, because of political exigencies, were unable to deal adequately with the manifold problems raised by their proposals. It would be helpful at this juncture, before continuing with a description of the development of the new legislation, to sketch briefly the principal laws, doctrines and cases which littered the field and with which the drafters had to struggle.[46]

Sovereign immunity was an English doctrine traditionally said to be rooted in the idea that "the king could do no wrong." It precluded suit directly against the crown, although modern scholarship has demonstrated that many devices were quite regularly employed to circumvent

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44. Memorandum from Mark Gitenstein and Harvey Stuart, Staff Counsel, Constitutional Rights Subcommittee of the Senate Committee on the Judiciary, to Bob Smith, Chief Counsel, Senate Committee on Government Operations, at 3, copy on file in the University of North Carolina Law Library.

45. 28 U.S.C. §§ 1346(b), 1402, 1504, 2110, 2401-02, 2411-12, 2671-80 (1970).

46. For accounts and analyses of governmental immunity in the United States *see generally* Borchard, *Governmental Responsibility in Tort: VII*, 28 COLUM. L. REV. 577, 734 (1928); Borchard, *Governmental Responsibility in Tort*, 36 YALE L.J. 1, 757, 1039 (1926-27); Borchard, *Government Liability in Tort*, 34 YALE L.J. 1, 129, 229 (1924-25); Davis, *Tort Liability of Governmental Units*, 40 MINN. L. REV. 751 (1956); Jaffe, *Suits Against Governments and Officers: Sovereign Immunity*, 77 HARV. L. REV. 1 (1963); James, *Tort Liability of Governmental Units and Their Officers*, 22 U. CHI. L. REV. 610 (1955).

the injustice and unworkability of such a doctrine strictly construed.[47] For various reasons, the American colonies, after fighting to overthrow English monarchy, did not reject sovereign immunity, however inconsistent such a course seemed with republican philosophy. Some have suggested that this survival in seemingly alien political soil had to do with the economic precariousness of the new union, but it is likely that some properly limited variant of the doctrine is a necessary aspect of government.[48] Chief Justice John Marshall specifically embraced the idea in *Cohens v. Virginia*,[49] a case in which the Supreme Court held that the United States was immune from suit unless it had given its consent to the action.[50] The susceptibility of the states to suits by United States citizens also was the subject of a celebrated early case, *Chisholm v. Georgia*,[51] in which the Supreme Court found the state of Georgia subject to suit by a citizen of South Carolina.[52] Principally in reaction to *Chisholm*, the eleventh amendment was ratified to limit state liability.[53] In 1855, by passage of the Court of Claims Act, the federal government began to acknowledge that an absolute bar against suit was impractical.[54] Later, in 1887, the Tucker Act[55] was passed to expand jurisdiction over contractual issues. However, until 1946, most private grievances outside the contractual area were answered—if at all—only by the passage of private bills through Congress.[56] In 1946, the federal government broadened its own liability considerably by passage of the Federal Tort Claims Act,[57] which permitted recovery against the

47. Jaffe, *supra* note 46, at 1-19.

48. *See* notes 167-70 *infra*.

49. 19 U.S. (6 Wheat.) 264 (1821).

50. *Id.* at 411-12.

51. 2 U.S. (2 Dall.) 419 (1793).

52. U.S. CONST. amend. XI reads: "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." While the amendment speaks only of suits by citizens of another state or of foreign states, the Supreme Court subsequently extended the exclusion to include suits by a state's own citizens in Hans v. Louisiana, 134 U.S. 1 (1890).

53. Act of Feb. 24, 1855, ch. 122, § 1, 10 Stat. 612 (codified at 28 U.S.C. §§ 171-74 (1970)). Initially the act established the court only as an advisory body to Congress, which had power of approval over the court's recommendations. By Act of March 3, 1863, ch. 92, § 7, 12 Stat. 766, Congress gave the court the right to render final judgments (now codified at 28 U.S.C. § 2519 (1970)).

54. Act of March 3, 1887, ch. 359, § 1, 24 Stat. 505 (codified at 28 U.S.C. §§ 1346(a), 1491 (1970), *as amended*, (Supp. II, 1972)).

55. Act of Mar. 3, 1887, ch. 359, 24 Stat. 505 (codified in scattered sections of 28 U.S.C.).

56. *See generally* Holtzoff, *The Handling of Tort Claims Against the Federal Government*, 9 LAW & CONTEMP. PROB. 311 (1942); Note, *Tort Claims Against the United States*, 30 GEO. L.J. 462 (1942).

57. Act of Aug. 2, 1946, ch. 753, tit. IV, 60 Stat. 842. An analytical account of

government for the *negligent* acts of its employees.[58] Certain subsequent congressional acts abrogating immunity defenses have created other pockets of exceptions to the general rule of federal nonliability.[59]

It is important in this brief review to distinguish between the federal government's liability for the acts of its employees and employees' *individual* liability for the same acts. While federal "entity" liability developed pursuant to the doctrines and statutes sketched above, individual liability was generally determined under *state* statutory and common law.[60] Thus, while the federal treasury could not be tapped for an illegal invasion of a citizen's privacy, the federal officer or employee involved could lose his private fortune if state law permitted. Federal laws were enacted in the post-Civil War period that allowed a federal recovery against state officials who exceeded their authority. The rediscovery since the 1950's of the Civil Rights Act of 1871,[61] for example, has provided a meaningful federal remedy for a wide range of opprobrious action by state officials, but the concurrent growth of an individual immunity doctrine has clouded the ultimate effectiveness of that remedy.[62]

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the enactment of the FTCA may be found in 1 L. JAYSON, HANDLING FEDERAL TORT CLAIMS: ADMINISTRATIVE & JUDICIAL REMEDIES § 60 (1974) [hereinafter cited as JAYSON]. For a bibliography on the FTCA see Gantt, *Indexed Bibliography of the Federal Tort Claims Act* (pt. 2), 24 FED. B.J. 226 (1964); Gerwig & Gantt, *Indexed Bibliography to the Federal Tort Claims Act—1965-1969*, 29 FED. B.J. 129 (1969-70).

58. Actually, the scope of the FTCA is somewhat broader than negligent torts—it permits suits for the intentional torts of trespass and invasion of privacy. *See* notes 98-99 and accompanying text *infra*.

59. For a comprehensive treatment of all compensatory remedies available under statute to litigants against the federal government, see JAYSON, *supra* note 56, §§ 1-21.

60. It is also important at the state law level to distinguish state governmental liability from municipal liability, and the liability of various governmental entities from that of state or local officers and employees. For an example of the bewildering complexity of state governmental tort law, one need look no further than to Illinois, the state in which the Giglottos and Askews resided. Recent Illinois experience with sovereign immunity issues is detailed in Kionka, *The King is Dead, Long Live the King: State Sovereign Immunity in Illinois*, 59 ILL. B.J. 660 (1971); Comment, *Illinois Tort Claims Act: A New Approach to Municipal Tort Immunity in Illinois*, 61 NW. U.L. REV. 265 (1966); Note, *Torts—Local Governmental And Governmental Employees Tort Immunity Act*, 49 CHI.-KENT L. REV. 221 (1972).

61. 42 U.S.C. § 1983 (1970). *E.g.*, Monroe v. Pape, 365 U.S. 167 (1961).

62. In Pierson v. Ray, 386 U.S. 547 (1967), the Supreme Court declared that a judge sued under section 1983 had absolute immunity for judicial acts under well-established principles. *Id.* at 553-54. Furthermore, federal defenses of "good faith" and "probable cause" were declared available to law enforcement officials accused of prosecuting defendants illegally. *Id.* at 555-57. Recently, the Supreme Court has held that a section 1983 damage action against the Governor of Ohio and officers and members of its National Guard was not barred by any sovereign immunity principles lurking in the eleventh amendment, but that those defendants were entitled to immunity defenses that

The irony of section 1983 was that federal law provided an aggrieved plaintiff a recovery against illegal actions by state officials even as it neglected federal relief for misdeeds of federal officials. A breakthrough in developing a federal remedy against individual federal employees came in 1971, not through legislative action but from the Supreme Court, in the case of *Bivens v. Six Unknown Named Agents*.[63] In that case Mr. Justice Brennan accepted the argument that a cause of action for damages against federal officers could rest on the fourth amendment of the Constitution.[64] Although *Bivens* did not spell out the nature and number of such "constitutional" torts, subsequent lower court cases have extended its logic to other types of constitutional injury.[65]

(3) Legislative Proposals and Counterproposals

The specter of broad *Bivens* liability, as well as the activities of Senators Ervin and Percy, seemed clearly to have been a major motive behind the Justice Department's willingness in 1973 to propose new legislation broadening federal governmental liability under the FTCA. The decision was reached that the federal government should absorb the impact of suits that might otherwise financially devastate individual federal law enforcement officers. The Justice Department proposal had four principal features. First, it was to have created a new federal cause of action "where the claims for money damages sounding in tort arise under the Constitution or statutes of the United States, such liability to be determined in accordance with applicable federal law."[66] The Department's reference to torts arising "under the Constitution" was clearly an invitation for the federal courts to expand their "constitutional tort" theory, substituting (or at least supplementing) federal employee liability with federal governmental liability for constitutional torts. By this language, the Justice Department drafters apparently meant to refer to and create a federal statutory claim equivalent to those torts that had

became more generous as their responsibilities increased. Scheuer v. Rhodes, 416 U.S. 232 (1974). *See also* Wood v. Strickland, 420 U.S. 308 (1975).

63. 403 U.S. 388 (1971).

64. *Id.* at 389.

65. *See* Paton v. La Prade, 524 F.2d 862 (3d Cir. 1975) (*Bivens* extended to damage claims under the first amendment); Farber v. Rizzo, 363 F. Supp. 386, 398 (E.D. Pa. 1973) (first amendment); Johnston v. National Broadcasting Co., 356 F. Supp. 904 (E.D.N.Y. 1973) (sixth amendment).

66. Undated draft of a Department of Justice bill, copy on file in the University of North Carolina Law Library [hereinafter cited as Justice Draft].

been judicially recognized in *Bivens*,[67] with the explicit intention that "the case law in federal actions following *Bivens* will become the applicable law."[68] The drafters were following Justice Harlan's conclusion in *Bivens* that a uniform body of federal law was highly preferable to variegated liability under fifty different state laws.[69]

However, the Department's proposal to create a federal cause of action "when the claims . . . arise under . . . statutes of the United States" was somewhat more ambiguous. A reasonable interpretation would have been that the Department merely meant by "statutes" to refer to the FTCA itself (or to other statutes explicitly permitting suit against the government)[70] and that such intent was manifested in the phrase qualifying the "statutes" language, which read: "such liability to be determined in accordance with applicable Federal law."[71]

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67. Letter from Mike McKevitt of the Department of Justice to Robert B. Smith, General Counsel, Senate Committee on Government Operations, Sep. 27, 1975, at 1, copy on file in the University of North Carolina Law Library [hereinafter cited as McKevitt Letter].

68. *Id.*

69. *Id.* at 1-2. *See* 403 U.S. at 409 (concurring opinion).

70. In a conversation on August 30, 1973 with H. McLean Redwine, Legislative Attorney of the Justice Department, Mark Gitenstein directly raised the issue of the scope of the term "statutes." Neither party seemed to have considered a reading limited to the FTCA or other statutes waiving sovereign immunity. In a next-day recapitulation of the major points of their conversation, Gitenstein wrote: "Would the word 'statute' contained in sections 1 and 2 be interpreted to include Federal regulations? If that were the case, an agent who violated regulations promulgated by a Federal agency would also subject the Federal Government to liability, which would be an excellent added deterrent to irresponsible activity by Federal law enforcement agents." Letter from Mark Gitenstein to H. McLean Redwine, Legislative Attorney, Department of Justice, Aug. 31, 1973, at 2, copy on file in the University of North Carolina Law Library [hereinafter cited as Gitenstein Letter]. The Justice Department eventually responded to the query by stating, "[w]e doubt that the word 'statute' contained in Sections 1 and 2 would (or should) be interpreted to include Federal regulations, and we have serious misgivings as to whether the word 'regulation' should be added to the proposal." McKevitt Letter, *supra* note 67, at 4.

71. The effect of the qualifying language "in accordance with applicable Federal law" also received attention: "[W]hat is the meaning of the phrase 'such liability to be determined in accordance with applicable Federal law' found in sections 1 and 2 of the proposal? Would that language refer a court to the *Bivens* case, and to case law under 42 U.S.C. 1983? How does this phrase relate to earlier language in 28 U.S.C. 1346(b) suggesting that liability is to be determined by the law of the place of the tort?" Gitenstein Letter, *supra* note 70, at 1. In response to this query by Gitenstein the Justice Department stated in a followup letter:

> Traditional ordinary types of tort actions will continue to be determined by state law. Actions sounding in tort which arise under the Constitution or statutes of the United States were judicially recognized as valid causes of action in *Bivens* . . . .
>
> This remedy was fashioned by the Supreme Court to provide relief in situations not provided for by state law. The proposed statutory language was selected for the reason that there is no such state law and the case law in federal actions following *Bivens* will become the applicable law.

McKevitt Letter, *supra* note 67, at 1.

It appeared that the Justice Department read *Bivens* as recognizing tort claims not only from constitutional violations by government authorities but from statutory violations as well. This notion that a remedy in tort automatically had become available whenever the government violated its own statutes was thoroughly novel. The idea was not explicit in *Bivens*, and the significance of such a profoundly far-reaching proposal seems not to have been completely grasped by the federal drafters. Nevertheless, recognition of such liability was one intended feature of the Justice proposal, and it remains important today.[72]

A second feature, and perhaps the principal motivating factor, was to have been a substitution of governmental liability for individual employee liability. To this end the proposed bill made the governmental remedy exclusive.[73] The Department was able to advance several reasons for the proposed limitation, including improvement of federal employee morale, increase of governmental effectiveness by freeing employees from worry about personal liability, provision of a more appropriate means of employee "discipline," and elimination of the possibility of conflict of interest caused by the Justice Department's long-standing tradition of defending suits against federal employees.[74]

In advocating this shift to exclusive governmental liability, the Department also pointed to section 2679 of the FTCA, which makes recovery against the government the exclusive remedy for damages resulting from negligent operation by federal employees of motor vehicles.[75] The Justice Department argued that such special treatment for certain employee acts was unfair, and that a uniform provision covering all federal acts would be more equitable. Of course, the counter-argument was that the agents were acting intentionally and should not be immunized from liability. The only effective deterrent to such activity might be individual agent liability.

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72. *See* notes 98-101 and accompanying text *infra*.

73. 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.

Justice Draft, *supra* note 66.

74. McKevitt Letter, *supra* note 67, at 4-6.

75. *Id.* at 4-5. See 28 U.S.C. §§ 2679(b)-(d) (1970).

A third feature was to have been a restriction of liability to "actual damages" and "where appropriate, reasonable compensation for general damages not to exceed $5,000." The absence of a provision for punitive damages[76] and the limitation on general damages could be troublesome in circumstances involving constitutional torts or invasion of privacy, in which damages are not easily objectified.

The final principal feature of the Justice Department proposal was, in some respects, the most startling. It was to abolish immunity, not merely for the acts of Justice Department or law enforcement personnel, but for tortious acts of *all federal governmental employees.*[77] This most salutary feature of the Justice proposal was ultimately narrowed to coverage of federal investigative and law enforcement officers.[78]

The two Senate committees most concerned with broadening federal liability—the Government Operations Committee and the Subcommittee on Constitutional Rights—prepared several counterproposals.

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76. The pertinent section of the draft bill reads as follows:

> 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."

Justice Draft, *supra* note 66, § 3. The exclusion of punitive damages would have been consistent with prior FTCA law, which does not permit punitive recovery. *See* text accompanying notes 189-91 *infra*.

In clarifying the use of its terms, the Justice Department wrote:

> General damages are those damages actually incurred but which are incapable of specific ascertainment or measurement. Special damage includes items such as medical bills, lost income, property damage, etc. General, as opposed to special damages, include damages for intangible items such as hurt feelings, mental anguish, pain, suffering, humiliation, etc.
>
> We have limited general damages to no more than $5,000 as a means of defining "reasonable" in terms of reasonable general damages. It must be borne in mind that an aggrieved person will receive his full out of pocket loss without any general damage award. . . . We feel that a dollar limit for general damages is appropriate so that courts will not begin to assess punitive damages under the guise of compensating a plaintiff. There is some room for difference on what constitutes a reasonable sum.

McKevitt Letter, *supra* note 67, at 2.

77. The Justice Department proposed to modify 28 U.S.C. § 2680(h) to read as follows: "Any claims arising out of libel, slander, misrepresentation, deceit or interference with contract rights." Justice Draft, *supra* note 66, § 5. Since section 2680(h) details certain *exclusions* from the FTCA, only the torts named in the draft section would have continued to be immune from suit.

78. White House officials negotiating on the amendment to H.R. 8245 refused to accept an amendment to section 2680 that would encompass all federal employees. Indeed, Administration support of many features of the comprehensive Justice Department proposal was less than enthusiastic.

One version, which included direct repeal of the no-knock laws[79] for drug agents, did not meet with favor and was abandoned.[80] Instead, the committee staffs turned to the issue on which there was apparent Administration willingness to move and which, after all, they had identified as the most disgraceful aspect of the Collinsville raids—the inadequate federal liability for tortious abuses.

The committee draft[81] that received serious attention, while adopting the new cause of action as drafted by the Justice Department, differed from the Justice Department proposal in two major respects. First, it suggested permitting "all actual, general and consequential damages and, where appropriate, reasonable compensation for punitive or exemplary damages not to exceed $50,000."[82] Secondly, it did not make the governmental remedy exclusive; instead, by omitting any exclusivity provision, it permitted a plaintiff to sue *both* the government and its employee. The committee draft did accept the Justice Department's understanding of the sources of the new cause of action, however. The Senate memorandum articulated its understanding of the measure in the following terms:

> This section further states that liability of the government is to be determined by "applicable federal law." By this it is intended that the courts look to the *Bivens* case, and the cases that have arisen as a result of that decision; that the courts look to the case law

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79. Repeal of the no knock statute was finally enacted. Pub. L. No. 93-481, —, 88 Stat. 1455, *repealing* 21 U.S.C. § 879(b) (1970).

80. Undated draft, entitled "A Bill to protect the constitutional and common law rights of citizens who are the victims of tortious acts or omissions by agents or employees of the Federal Government, and for other purposes," copy on file in the University of North Carolina Law Library.

81. Undated draft bill of the Senate Committee on Government Operations, entitled "To Amend Reorganization Plan Numbered 2 of 1973," copy on file in the University of North Carolina Law Library [hereinafter cited as Senate Draft].

82. *Id.* § 5. In a memorandum clarifying its proposal, the Senate Committee observed:

> This provision is designed to provide complete compensation for all out-of-pocket expenses *and* all possible related or consequential damages including pain, suffering and humiliation. Of course, in many cases where a federal agent violates the constitutional rights of a citizen via an illegal search there are no out-of-pocket expenses or actual damages to the victim but only severe humiliation. This provision is designed to make it clear that the victim is entitled to complete compensation for that humiliation, pain and suffering even if there are no actual damages.

Senate Comm. on Gov't Operations, Memorandum on No-Knock Legislation, Aug. 28, 1973, at 4, copy on file in the University of North Carolina Law Library [hereinafter cited as Senate Memorandum]. It is questionable whether this view accurately stated the law relating to damages for "humiliation." As Professor Dobbs has made clear, what we are talking about in these cases is general damages for a dignitary injury which may be more than nominal even though there is no economic or physical injury. D. DOBBS, HANDBOOK OF THE LAW OF REMEDIES § 7.1, at 509-10 (1973).

> under section 1983 . . . in which state agents are held liable for their unconstitutional acts; and that courts look to the relevant case law under the FTCA. In referring the courts to the case law under section 1983 it is intended that the federal government be liable to the same extent and in the same manner as state officials under section 1983.[83]

This statement indicated that, like the Justice Department, the Senate committees were attacking the problem almost exclusively from the perspective of *Bivens* and section 1983, without realizing that the *Bivens* analysis had itself been necessary only because no statute had been passed to give the courts power to award damages to an injured individual for government misdeeds.

On one point, however, the Senate committees were clearly insistent on distinguishing their recommendation from prior law. The federal government was not to be allowed to escape liability under the new statute by retreating behind various "defenses" that had been created under *Bivens*[84] or section 1983.[85] Thus the Senate memorandum declared:

> It is not the intention of this amendment to allow any other defenses [besides those in section 2680(h)] that may be available to individual defendants by state or federal law, custom or practice to be asserted [by] the government. Congress does not oppose, however, the assertion of defenses of good faith and reasonable belief in the validity of the search and arrest on behalf of individual government defendants, so long as it is understood that the government's liability is not co-terminous with that of the individual defendants.[86]

Thus, despite the constant reference in legislative documents to *Bivens* and section 1983, the proposed federal liability was meant to differ in this very crucial aspect from its historical analogues.

In the main, both the legislative committees and the Justice Department failed fully to grasp that by drafting a comprehensive bill to define federal intentional tort liability they could have obviated any necessity to

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83. Senate Memorandum, *supra* note 82, at 3. The temptation to equate *Bivens* recoveries with section 1983 appears irresistible and the courts are beginning to do so with increasing frequency. *See, e.g.*, Paton v. La Prade, 524 F.2d 862 (3rd Cir. 1975).

84. Under *Bivens* theory, as expounded by the Second Circuit on remand from the Supreme Court, a law enforcement officer could defend against liability by asserting the good faith of his action and the reasonable belief in the validity and necessity of the arrest and search. Bivens v. Six Unknown Named Agents, 456 F.2d 1339 (2d Cir. 1972).

85. Section 1983 has been interpreted to contain a broad defense of good faith. *See* note 62 and accompanying text *supra*.

86. Senate Memorandum, *supra* note 82, at 5.

rely on analogies to *Bivens*' "constitutional tort" theory or on section 1983 case law that had developed largely as a result of statutory inadequacies. Furthermore, the narrow parameters of the legislative activity, restricted to an amendment to section 2680(h), meant that the drafters did not direct attention to the peculiar idiosyncrasies of the Federal Tort Claims Act.[87] Therefore, the drafters ignored certain basic problems in using the FTCA as a vehicle for their intended purpose. Instead, all attention seemed directed at achieving a compromise between administrative and legislative positions based on a preoccupation with the *Bivens* and section 1983 background.

(4) Passage

The Justice Department proposal was submitted to the Vice President, as President of the Senate, by the Attorney General on September 17, 1973.[88] The bill was subsequently introduced as Senate Bill No. 2558 by Senator Roman Hruska on October 10, 1973, and referred to the Committee on the Judiciary.[89] Senator Ervin decided to exert legislative pressure for his own version by appending it to House of Representatives Bill No. 8245, a bill pending in the Senate Committee on Government Operations.[90] Since that bill made significant changes in the organization of the federal drug control apparatus, it had some ostensible connection with the changes Ervin sought in the FTCA. However, the more pertinent reason for employing H.R. 8245 was Ervin's knowledge that the Administration and other interested parties[91] wanted the bill passed quickly. In subsequent negotiations, therefore, the Administration agreed to drop its restriction of recovery to

87. *See* text following note 110 *infra.*

88. Letter from Attorney General Elliot Richardson to Vice President Spiro Agnew, Sept. 17, 1973, together with the revised Justice Department Draft, entitled "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 [*sic*] of United States employees and for other purposes," copies on file in the University of North Carolina Law Library.

89. 119 CONG. REC. 33494 (1973).

90. The original intent of H.R. 8245 is detailed in H.R. REP. NO. 303, 93d Cong., 1st Sess. 3-6 (1973). The purpose of H.R. 8245 was twofold: (1) to establish the Drug Enforcement Agency as a successor to BNDD and DALE; (2) to repeal a transfer of 900 agents from the Immigration and Naturalization Service of the Justice Department to the Customs Bureau in the Treasury Department. *Id.* at 1.

91. On November 6, 1973, Ervin received a letter from Congressman Chet Holifield, Chairman of the House Committee on Government Operations, requesting quick action on H.R. 8245 because of Immigration and Naturalization Service pressure. Holifield alluded to the "non-germane" amendments which Ervin's committee was considering and asked that they be dealt with separately. Letter from Chet Holifield to Honorable Sam J. Ervin, Chairman, Committee on Government Operations, Nov. 1, 1973, copy on file in the University of North Carolina Law Library.

"actual damages" plus $5,000 in "general damages." In exchange, the legislative committees gave up a litigant's right to sue both the federal government and the individual malefactor.[92] Also, inexplicable except as a result of preoccupation with Collinsville, the Senate committees permitted liability to be restricted to "acts or omissions of investigative or law enforcement officers." Other federal employees and officers were excluded from coverage, though the initial Justice Department position had offered the possibility of suit against any federal employee.

On November 28, the Administration, in a letter from the Executive Office of the President, agreed "not to object" to the addition of the Senate Committee's amendment to H.R. 8245.[93] The next day, the bill was reported out to the full Senate, voted upon, and returned to the House on December 4, 1973, as amended.[94] Although some further delay ensued, the bill as amended finally passed in the House on March 5, 1974—though not without strenuous dissent[95]—and became law on March 16, 1974.[96]

III. The Amendment

A. *Basic Features*

The text of the new amendment is quite brief. It supplements 28 U.S.C. § 2680(h) as follows:

> The provisions of this chapter and 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: *Provided, That, with regard to acts or omissions of investigative or law enforcement officers of the United States Government, the provision of this chapter and section 1346 (b) of this title shall apply to any claim arising, on or after the enactment of this proviso, out of assault, battery, false imprisonment, false arrest, abuse of process, or malicious prosecution. For the purpose of this subsection, 'investigative or law enforcement*

92. Letter from Frederic V. Malek, Deputy Director, Office of Management and Budget, to Sam Ervin, Nov. 28, 1973, copy on file in the University of North Carolina Law Library.

93. S. Rep. No. 588, 93d Cong., 1st Sess. 4 (1973).

94. 119 Cong. Rec. 38559, 39309 (1973).

95. Representative Wiggins was particularly concerned about lack of House debate on the amendment. He opposed the amendment unless its passage was connected to careful congressional investigation of the fourth amendment's exclusionary rule. *See* 120 Cong. Rec. H 1398-1402 (daily ed. Mar. 5, 1974). See text accompanying notes 198-205 *infra*.

96. 120 Cong. Rec. H 2383 (daily ed. Apr. 2, 1974).

> *officer' means any officer of the United States who is empowered by law to execute searches, to seize evidence, or to make arrests for violations of Federal law.*[97]

Since section 2680(h) establishes exclusions from FTCA coverage, the amendment, by excepting suits against law enforcement officers from the operation of the section, permits such suits.

Cursory reading of section 2680(h) probably accounts for the frequent statement that the FTCA excludes "intentional" torts from coverage. Actually, the list beginning "assault, battery . . . " omits mention of a number of intentional torts, most notably trespass and invasion of privacy, that have never been excluded from FTCA coverage. Successful suits have been brought against the federal government for trespass,[98] and it is likely that the willingness of DALE officials to settle with the Giglottos and Askews[99] reflected recognition that trespass claims might well have been successful. The amendment's failure to refer to trespass and invasion of privacy therefore does not reflect a legislative disinclination to permit suits on such causes of action; rather, such suits were possible prior to the amendment. In fact, the report of the Committee on Government Operations of the Senate explicitly states:

> The Committee realizes that under the Federal Tort Claims Act, Government tort liability for intentional conduct is unclear. For example certain intentional torts such as trespass and invasion of privacy are not always excluded from Federal Tort Claims Act coverage. Obviously, it is the intent of the Committee that these borderline cases under the present law, such as trespass and invasion of privacy, would be viewed as clearly within the scope of the Federal Tort Claims Act . . . .[100]

It is clear, however, that the amendment does not permit suit on all intentional torts previously excluded from FTCA coverage. Libel,

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97. 28 U.S.C.A. § 2680(h) (Supp. 1976) (emphasis added), *amending* 28 U.S.C. § 2680(h) (1970).

98. *See, e.g.*, Hatahley v. United States, 351 U.S. 173 (1956); Black v. United States, 389 F. Supp. 529 (D.D.C. 1975); Ira S. Bushey & Sons, Inc. v. United States, 276 F. Supp. 518 (E.D.N.Y. 1967), *aff'd*, 398 F.2d 167 (2d Cir. 1968). *See generally* Annot., 23 A.L.R.2d 574 (1952). In addition, federal courts have permitted recovery to plaintiffs assaulted or battered by third parties when the government's negligence has been alleged to have permitted the assaults. Gibson v. United States, 457 F.2d 1391 (3d Cir. 1972); Rogers v. United States, 397 F.2d 12, 15 (4th Cir. 1968); Muniz v. United States, 305 F.2d 285 (2d Cir. 1962) en banc, *aff'd*, 374 U.S. 150 (1963). Assaults and batteries arising out of negligence by employees of the Public Health Service in the performance of medical, surgical or dental procedures can properly be the subjects of claims under 42 U.S.C. § 233(e) (1970).

99. *See* notes 28-29 *supra*.

100. S. REP. No. 588, 93d Cong., 1st Sess. 3 (1973).

slander, misrepresentation, deceit and interference with contractual rights were omitted from the language of the amendment and continue to be "protected" governmental activities.[101]

The amendment carefully limits its effect to "investigative or law enforcement officers of the United States government"—a term that is defined to mean "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." Well-established constitutional,[102] statutory[103] and case law[104] distinctions between federal "officers" and federal "employees" seem invoked by the amendment's definition, although that was apparently not the intent of the drafters. Nevertheless, the amendment seems likely to be interpreted to preclude suit against either federal employees[105] or federal officers without the statutory power to search, seize evidence, or make arrests. This patchwork coverage may therefore prove an occasional refuge against liability, necessitating a check of federal statutes to ascertain whether those who violated a citizen's rights fall within the limitations of this clause. While the definition should reach those federal officials who are most likely to commit intentional torts, the restrictions may prove unfortunate in certain circumstances. For example, if those at Collinsville who committed tortious acts were federal "employees,"[106] liability under the FTCA would in all likelihood be precluded.

On the other hand, whole areas of potential liability, not contemplated by those who drafted with Collinsville in mind, are created by the amendment. The warden of a federal penitentiary is appointed by the

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101. *See, e.g.*, United States v. Neustadt, 366 U.S. 696 (1961) (misrepresentation); Dupree v. United States, 264 F.2d 140 (3d Cir.), *cert. denied*, 361 U.S. 823 (1959) (interference with contract); Di Silvestro v. United States, 181 F. Supp. 860 (E.D.N.Y.), *cert. denied*, 364 U.S. 825 (1960) (libel).

102. "[The President] shall nominate and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the Supreme Court, and all other Officers of the United States . . . ." U.S. CONST. art. II, § 2.

103. *E.g.*, 5 U.S.C. § 2104 (1970), which defines officers to include only those required by law to be appointed in the civil service by the President, a court of the United States, the head of an executive agency, or the secretary of a military department.

104. Burnap v. United States, 252 U.S. 512 (1920); United States v. Smith, 124 U.S. 525 (1888); United States v. Mouat, 124 U.S. 303 (1888); United States v. Hartwell, 73 U.S. (6 Wall.) 385 (1867); Hoeppel v. United States, 85 F.2d 237 (D.C. Cir.), *cert. denied*, 299 U.S. 557 (1936); Hobson v. Hansen, 265 F. Supp. 902 (D.D.C. 1967).

105. On the question of who are "employees" under the FTCA see Annot., 57 A.L.R.2d 1448 (1958).

106. Apparently certain BNDD *employees* had, at the time of the Collinsville raids, statutory authority to execute searches and make arrests. 21 U.S.C. § 878 (1970).

Attorney General[107] and is empowered to conduct searches.[108] Therefore, the statute would seem to permit certain prisoners, unlawfully held, first to secure release on a habeas corpus petition and thereafter to recover damages from the federal government for false imprisonment.[109] Other unforeseen occasions for litigation may be available under the amendment, awaiting only recognition by creative attorneys. For example, illegal seizure of evidence from a criminal defendant currently constitutes a routine ground for a suppression hearing prior to trial. There is no apparent reason why it should not in the future also be the occasion for the initiation of a civil suit against the government.[110]

In any case, as indicated earlier, no use of the amendment is possible without constant attention to the peculiarities of the FTCA. Because of a perhaps hasty decision to draft this intentional tort provision into the FTCA—a statute originally framed with negligence liability in mind—several key assumptions of the new amendment's drafters almost certainly lack foundation. Three of the most serious problem areas deserve close attention.

B. *Special Features of the FTCA*

(1) The Law of the Place

The jurisdictional provision under which FTCA suits are brought reads in pertinent part:

> Subject to the provisions of chapter 171 of this title, the district courts, together with the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and 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,

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107. 18 U.S.C.A. § 4001(b)(1) (Supp. 1976).

108. *See* Stroud v. United States, 251 U.S. 15, 21 (1919); Hayes v. United States, 367 F.2d 216, 221 (10th Cir. 1966).

109. The United States may clearly be held liable for negligent treatment of a prisoner under certain circumstances. United States v. Muniz, 374 U.S. 150 (1963). *See also* Fleishour v. United States, 244 F. Supp. 762 (N.D. Ill. 1965), *aff'd*, 365 F.2d 126 (7th Cir.), *cert. denied*, 385 U.S. 987 (1966).

110. This was a particular concern of Representative Wiggins, who opposed this amendment on the floor of the House. See 120 CONG. REC. H 1400 (daily ed. Mar. 5, 1974).

> if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.[111]

The new intentional tort claims, of course, fall within the clause of section 1346 permitting suit for a "wrongful" act or omission.[112]

The first feature in this section that requires comment is the phrase "in accordance with the law of the place." The impact of that phrase, as the history of its application to negligence actions since 1946 makes clear,[113] is that there is no uniform federal law of tort liability. When sovereign immunity was abrogated in 1946, Congress did not see the need to fashion a single law of federal negligence liability. Instead, Congress apparently reasoned that it was appropriate for both plaintiff and defendant to be governed by the usual rules of liability in the place where the accident occurred. Thus, for example, a federal mail truck driver who accidentally struck another vehicle in Florida would be subject to whatever liability that state imposed upon negligent drivers generally.[114] Such a variegated pattern of culpability may make sense in the context of negligent tort recovery, but its rationale in suits against law enforcement officials for intentional torts seems unjustified. The amendment seeks to establish a standard of appropriate conduct for all federal officials who are charged with responsibility for ensuring constitutional rights. To make this demonstrably federal standard dependent upon state law turns the liability question on its head. The Collinsville raids, it should be recalled, were carried out in Illinois by federal agents operating out of DALE's St. Louis, Missouri, office. Few would contend that the elements of a claim against such misconduct should vary because the officers crossed a state line to make their raid. While it may be true that elements defining intentional torts may, like those of negligence, be similar in many states, the possibilities for

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111. 28 U.S.C. § 1346(b) (1970). Venue of an FTCA claim is governed by *id.* § 1402(b).

112. The House committee version, which included claims arising out of "negligent or wrongful act or omission," prevailed over the Senate bill, which covered only claims arising out of negligence. H. REP. No. 2245, 77th Cong., 2d Sess. 11 (1942). *See* Myers & Myers, Inc., v. United States Postal Service, 527 F.2d 1252 (2d Cir. 1975) (questioning whether termination of contract is "wrongful act").

113. "What this means is that the Act does not create new causes of action—in the sense of inventing new types of torts—but provides for the acceptance of liability by the United States for the misconduct of its employees when such misconduct constitutes an actionable wrong under the law of the state where it occurred, subject to the other restrictions or limitations of the Tort Claims Act." 1 JAYSON, *supra* note 57, § 217.01, at 9-133.

114. *E.g.*, Beit v. United States, 260 F.2d 386 (5th Cir. 1958); *see* American Exchange Bank v. United States, 257 F.2d 938 (7th Cir. 1958).

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uneven coverage remain and must be taken into account under the amendment. And claims and defenses are not the only aspects of a suit governed by state law. Damages are also assessed in accordance with the applicable state standard,[115] except insofar as that standard is contrary to the explicit terms of the FTCA.[116] Under section 2674, for instance, prejudgment interest may not be recovered in an FTCA suit.[117] More importantly, section 2674 precludes the recovery of punitive damages—often an important element of an intentional tort recovery—except in the circumscribed instance explained in the statute.[118]

One of the strangest results inferred by courts from the "law of the place" doctrine involves "scope of employment."[119] After a sharp split among circuit courts[120] the Supreme Court held in *Williams v. United States*[121] that state respondeat superior law would determine whether a government employee in an FTCA action was acting within the scope of his employment for liability purposes.[122] This recourse to state law principles has been held appropriate even as to the actions of military personnel.[123] By contrast, whether one is a "federal employee" within the meaning of the FCTA is a question of federal law.[124] But since the amendment by its terms applies to federal "officers," and since the

115. *Cf.* Williams v. United States, 379 F.2d 719 (5th Cir. 1967).

116. *Cf.* Buchanan v. United States, 305 F.2d 738 (8th Cir. 1962).

117. *E.g.*, Mills v. Tucker, 499 F.2d 866 (9th Cir. 1974).

118. "If, however, in any case wherein death was caused, the law of the place where the act or omission complained of 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." 28 U.S.C. § 2674 (1970). This provision is clearly meant to permit damages under statutes such as the Massachusetts Death Act. *See* Massachusetts Bonding & Ins. Co. v. United States, 352 U.S. 128 (1956).

119. *See* text accompanying note 111 *supra*.

120. *Compare* United States v. Lushbough, 200 F.2d 717 (8th Cir. 1952); United States v. Eleazer, 177 F.2d 914 (4th Cir. 1949), *cert. denied*, 339 U.S. 903 (1950); *and* Hubsch v. United States, 174 F.2d 7 (5th Cir.), *cert. granted*, 338 U.S. 814, *opinion on settlement*, 338 U.S. 440 (1949), *appeal dismissed per stipulation*, 340 U.S. 804 (1950); *with* Christian v. United States, 184 F.2d 523 (6th Cir. 1950); *and* Murphey v. United States, 79 F. Supp. 925 (N.D. Cal. 1948), *rev'd*, 179 F.2d 743 (9th Cir. 1950).

121. 350 U.S. 857 (1955) (per curiam).

122. *See, e.g.*, Henderson v. United States, 429 F.2d 588 (10th Cir. 1970); United States v. Holcombe, 259 F.2d 505 (4th Cir. 1958); see Annot., 6 A.L.R. FED. 373 (1971).

123. Williams v. United States, 350 U.S. 857 (1955); Badger State Mut. Cas. Co. v. United States, 383 F. Supp. 1226 (E.D. Wis. 1974), *criticized in* Faix, *Althea Williams Revisited: "Line of Duty" Cases—Need for Reconsideration*, 26 FED. B.J. 12 (1966).

124. LeFevere v. United States, 362 F.2d 352 (5th Cir. 1966); Pattno v. United States, 311 F.2d 604 (10th Cir. 1962).

legacy of section 1983 litigation is available to aid the definitional process, the question of scope of employment in litigation under the amendment should be answered independently of prior interpretations under the general provisions of the FTCA.[125]

(2) "Private Person" Analogy

A second feature of the FTCA that poses problems for suits brought under the new amendment is the phrase that holds the federal government liable "under circumstances where the United States, if a private person, would be liable."[126] This restriction is repeated at another place in the Act: "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 . . . ."[127] As was true with the "law of the place" doctrine, the "private person" doctrine seems more appropriately applied to negligent torts than to intentional tortious activity. Many law enforcement activities that might call forth an FTCA suit have no clear private analogies, and state standards of liability may not exist.[128] When it comes to liability for constitutional torts, there is by definition no analogy to equivalent injuries by private persons. Even in the negligence area, the ambiguity of the doctrine generated serious judicial disagreement for the first decade after the adoption of the FTCA.[129] The history of interpre-

125. For comparison, it may be useful to turn to the "under color of law" discussion in Monroe v. Pape, 365 U.S. 167, 171-87 (1961), which made it clear that state officials would be acting under color of law (or here, within the scope of their employment) when they violated a person's constitutional rights in derogation of specific statutory duties to the contrary.

126. 28 U.S.C. § 1346(b) (1970).

127. *Id.* § 2674.

128. As Louis Jaffe remarked, "the complex and various activities of government and the activities of private enterprise are as different as they are alike, and the application of a doctrine of *respondeat superior* to government raises a host of problems for which the private law provides doubtful analogies." Jaffe, *supra* note 46, at 211.

129. In one of the first important cases, Feres v. United States, 340 U.S. 135 (1950), plaintiffs' deceased had perished in a barracks fire while on active military duty. Plaintiff alleged negligent failure to maintain an adequate night watch and careless use of barracks with certain dangerous heating defects. Among other justifications for rejecting the claim the Supreme Court stated: "One obvious shortcoming in these claims is that plaintiffs can point to no liability of a 'private individual' even remotely analogous to that which they are asserting against the United States. . . . For no private individual has power to conscript or mobilize a private army." *Id.* at 141. The restrictive reading espoused in *Feres* was continued in Dalehite v. United States, 346 U.S. 15 (1953), in which the Supreme Court agreed with a circuit court's rejection of governmental liability based on negligent firefighting by the Coast Guard, finding no "analogous liability" to the law of torts. *Id.* at 42. Two years later, in Indian Towing Co. v. United States, 350 U.S. 61 (1955), the Court was faced with a plaintiff whose barge

tation of the doctrine, however, demonstrates a gradually more flexible reading of the clause that has extended rather than restricted the government's liability.

Rayonier Inc. v. United States,[130] a case in which the Forest Service had mismanaged a firefighting effort in a public forest, causing damage to private citizens, clarified any doubts about the Court's intention to move toward greater governmental liability. The district court had dismissed on the ground that firefighting was without private analogy.[131] On appeal, the government relied upon earlier cases like *Dalehite v. United States*[132] and *Indian Towing Co. v. United States*[133] suggesting that liability be analyzed along the governmental-versus-proprietary lines that had been developed in the law governing municipal corporations.[134] The Supreme Court rejected the municipal corporation analogy entirely: "We expressly decided in *Indian Towing* that the United States' liability is not restricted to the liability of a municipal corporation or other public body . . . . To the extent that there was anything to the contrary in the *Dalehite* case it was necessarily rejected by *Indian Towing*."[135] In an important interpretation of the congressional intent behind the FTCA, the Court continued:

> It may be that it is "novel and unprecedented" to hold the United States accountable for the negligence of its firefighters, but the very purpose of the Tort Claims Act was to waive the Government's traditional all-encompassing immunity from tort actions and to establish novel and unprecedented government liability.[136]

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had run aground because of Coast Guard negligence in failing to keep a lighthouse operational. The Government argued, naturally, that there was no "private person" analogy. The majority opinion, however, distinguished *Feres* as merely precluding suits by servicemen for service-related injuries. *Dalehite* was rejected for reasons not fully expressed. With reasoning which presaged—if indeed it did not initiate—a broader reading of the clause, the Court remarked: "The Government reads the statute as if it imposed liability to the same extent as would be imposed on a private individual 'under the same circumstances.' But the statutory language is 'under like circumstances,' and it is hornbook tort law that one who undertakes to warn the public of danger and thereby induces reliance must perform . . . in a careful manner." *Id.* at 64-65.

130. 352 U.S. 315 (1957).

131. *See* 225 F.2d 642, 644 (9th Cir. 1955) (affirming dismissal by the District Court).

132. 346 U.S. 15 (1953).

133. 350 U.S. 61 (1955).

134. 225 F.2d at 645-46. For a discussion of governmental versus proprietary functions in municipal corporation tort immunity see W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 131, at 977-84 (4th ed. 1971).

135. 352 U.S. at 319. This analysis had already been rejected by certain lower federal courts. Eastern Airlines, Inc. v. Union Trust Co., 221 F.2d 62 (D.C. Cir. 1955); Somerset Seafood Co. v. United States, 193 F.2d 631 (4th Cir. 1951); Cerri v. United States, 80 F. Supp. 831 (N.D. Cal. 1948).

136. 352 U.S. at 319. It is important to note that even if the state government

Most subsequent cases have followed *Rayonier*'s lead in holding the government liable for activities in which negligence has been clear.[137]

Against this background, an expansive reading of the "private person" doctrine in the intentional tort context seems justified. Furthermore, the insistence by the Senate drafters that no special governmental defenses preclude federal liability[138] should mean, at the least, that the government could claim no defenses—apart from those in the FTCA itself—that are unavailable to a private defendant. Thus, for example, an erroneous forced entry by law enforcement officers into an apartment should be tortious under the FTCA even if the search met constitutional requirements of probable cause and "reasonableness." Under well-known standards of tort law, a trespass can be committed even if the offender does not intend the violation but inadvertently wanders onto another's land.[139] Of course such a remedy would clearly move beyond redress merely for "constitutional torts." Although certain language in the legislative report seems to stop short of such an expanded concept of liability,[140] the sense of Congress' action in response to Collinsville tends to reinforce this broader interpretation.

(3) The Due Care Defense and the "Discretionary Function Exception"

The FTCA is not simply a signpost directing a litigant toward state law. Two very important federal defenses drafted into section 2680(a) offer serious impediments to a successful claim against the government. The section reads:

> The provisions of this chapter and section 1346(b) of this title shall not apply to—
>
> (a) Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the

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would be immune from suit under state law for an alleged act or omission, an FTCA plaintiff can nevertheless sue the United Sates if a private individual would be liable under the law of that state. Big Head v. United States, 166 F. Supp. 510 (D. Mont. 1958).

137. United States v. Muniz, 374 U.S. 150 (1963); Downs v. United States, 522 F.2d 990 (6th Cir. 1975).

138. *See* text accompanying notes 84-86 *supra*.

139. W. PROSSER, *supra* note 134, § 13, at 74.

140. *See* text accompanying note 166 *infra*.

> Government, whether or not the discretion involved be abused.[141]

As Jayson has observed:

> It is evident from the legislative history and the courts' interpretation of section 2680(a) that the *first* clause of the section was designed to prevent litigants from utilizing a suit in tort under the Act as a means of testing the constitutionality or legality of laws or regulations, and that the *second* was designed to remove from the coverage of the Act claims based upon governmental conduct which, under traditional principles, falls within the broad ambit of so-called discretionary functions.[142]

Because negligent torts, almost by definition, do not occur in "the exercise of due care," there have been few cases interpreting that clause. The clause could experience much greater litigation in the intentional torts context, however, since it is reminiscent of the good faith immunity defense that has been developed under section 1983.[143] If DALE regulations covering search and seizure methods, for example, were to be drafted in such a fashion that they mandated or even permitted tortious conduct, the government might argue that a law enforcement officer's "due care" execution of such regulations in "good faith" should insulate the government from suit under the FTCA.

Fortunately, the slim precedent in this area appears to refute such a broad reading of the clause. In *Hatahley v. United States*,[144] eight Navajo families who lived on public lands in San Juan County, Utah, sued the federal government to recover damages for the destruction of their horses, which had been permitted to roam freely. Apparently federal agents, who wished the Indians to leave their homesites, had used Utah's "abandoned horse statute" to round up and destroy the animals.[145] After finding that the FTCA was applicable and that the agents were acting within the scope of their employment,[146] the United States Supreme Court turned to the question of the section 2680(a) exclusions:

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141. 28 U.S.C. § 2680(a) (1970). A number of cases have interpreted the discretionary function exception not merely as a defense but as a jurisdictional barrier. *E.g.*, Sickman v. United States, 184 F.2d 616 (7th Cir. 1950); Coates v. United States, 181 F.2d 816 (8th Cir. 1950); Sisley v. United States, 202 F. Supp. 273 (D. Alas. 1962).

142. Jayson, *Applications of the Discretionary Function Exception*, 24 FED. B.J. 153, 154 (1964).

143. *See* note 62 *supra*.

144. 351 U.S. 173 (1956).

145. *Id.* at 175-76.

146. *Id.* at 180.

> The first portion of section (a) cannot apply here, since the government agents were not exercising due care in their enforcement of the federal law. "Due care" implies at least some minimal concern for the rights of others. Here, the agents proceeded with complete disregard for the property rights of the petitioners.[147]

This language would seem to indicate that actions taken by law enforcement officers in the execution of otherwise valid regulations that happen to infringe private rights have not been taken "in due care." Indeed, the question *Hatahley* invites is for what does an officer exercise due care if not for the rights of those whom his actions are affecting?

More expansively interpreted, however, *Hatahley* could form the basis for an attack against the clause's apparent exemption for any actions taken pursuant to *invalid* regulations or statutes—regulations that infringe a citizen's rights on their face, rather than merely as applied. The Court's reading of "due care" to imply at least some minimal concern for the rights of others might be characterized as an insistence that such rights cannot be ignored with impunity, either by the party taking the action *or* by the party drafting guidelines.[148] It would be unconscionable for a court to permit recovery against an FBI agent for tortious acts committed on his own in a citizen's apartment, while denying recovery if such improper conduct is outlined in a government manual. In short, recovery of damages, at least for constitutional violations, should not be precluded by the language of section 2680(a). Any legitimate legislative concern that litigants not be permitted to use the FTCA to challenge the legality of statutes can be preserved by reading section 2680(a) merely to restrict a litigant's ability to obtain declaratory or injuctive relief under the statute.[149] Recovery of damages by an injured citizen, on the other hand, should be permitted, since damages may place an objective measure on the constitutional injuries resulting from such regulations and statutes.

Unlike the "due care" clause, the "discretionary function" clause has been extensively litigated,[150] and has probably spawned more litera-

147. *Id.* at 181.

148. An example of a government program with ominous overtones for constitutional rights is the FBI's COINTELPRO program. Since the late 1930's, the FBI has collected and disseminated personal information about the private lives of thousands of law-abiding American citizens in an effort to discredit or "neutralize" alleged "subversives" or "extremists." Letter from Senator Walter Mondale to Paul Verkuil, Jan. 6, 1976, enclosure 1 [hereinafter cited as Mondale Letter].

149. *See* text accompanying notes 190-91 *infra.*

150. *See* Hatahley v. United States, 351 U.S. 173 (1956); United States v. Union Trust Co., 350 U.S. 907 (1955) (per curiam); Indian Towing Co. v. United States, 350 U.S. 61 (1955); Dalehite v. United States, 346 U.S. 15 (1953); Feres v. United States, 340 U.S. 135 (1950); Griffin v. United States, 500 F.2d 1059 (3d Cir. 1974); Pigott

ture than any other single provision in the FTCA.[151] The discretionary function exception can best be seen as a legislative effort to protect necessary (but necessarily imperfect) governmental decisions from unreasonable attack. While Congress was content to accept financial liability for a mailman's negligent inattention to a traffic light, it did not intend to recompense a rural resident for a decision to cease daily R.F.D. delivery. It is the latter kind of decision that the exception attempts to protect.

One of the first and most significant interpretations of the clause by the Supreme Court came in *Dalehite v. United States*.[152] In that case, over three hundred plaintiffs sought damages for a devastating explosion that occurred in Texas City, Texas in 1947. After World War II, the United States realized there was an export market for certain potentially explosive chemicals manufactured during the war that could be used as fertilizers. The United States government contracted with private firms to operate certain former armaments plants under government supervision. Fertilizer destined for France was being loaded, under government supervision, by stevedores onto French ships in the Texas City harbor.[153] A small fire that developed in the hold of one ship was not put out quickly, and the ensuing explosions levelled a sizable portion of the town. "Since no individual acts of negligence [were] shown, the [suit] . . . necessarily predicated government liability on the participation of the United States in the manufacture and the transportion of [fertilizer]."[154]

The Supreme Court analyzed section 2680 in terms of "planning" versus "operational" decisions:

> The "discretion" protected by the section . . . is the discretion of the executive or the administrator to act according to one's judgment of the best course, a concept of substantial historical ancestry in American law.[155]
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> . . . .

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v. United States, 451 F.2d 574 (5th Cir. 1971); Hendry v. United States, 418 F.2d 774 (2d Cir. 1969).

151. *See, e.g.*, James, *The Federal Tort Claims Act and the "Discretionary Function" Exception: The Sluggish Retreat of an Ancient Immunity*, 10 U. FLA. L. REV. 184 (1957); Peck, *The Federal Tort Claims Act: A Proposed Construction of the Discretionary Function Exception*, 31 WASH. L. REV. 207 (1956); Reynolds, *Discretionary Function Exception of the Federal Tort Claims Act*, 57 GEO. L.J. 81 (1968); Note, 41 WASH. L. REV. 340 (1966). *See generally* Annot., 99 A.L.R.2d 1016 (1965); Annot., 19 A.L.R.2d 845 (1951).

152. 346 U.S. 15 (1953).

153. *Id.* at 17-24.

154. *Id.* at 23.

155. *Id.* at 34 (footnote omitted).

> It is enough to hold, as we do, that the "discretionary function or duty" that cannot form a basis for suit under the Tort Claims Act includes more than the initiation of programs and activities. It also includes determinations made by executives or administrators in establishing plans, specifications or schedules of operations. Where there is room for policy judgment and decision there is discretion. It necessarily follows that acts of subordinates in carrying out the operations of government in accordance with official directions cannot be actionable.[156]
>
> . . . .
>
> In short, the alleged "negligence" does not subject the Government to liability. The decisions held culpable were all responsibly made at a planning rather than operational level . . . .[157]

The recognition that certain governmental decisions must be protected against litigation was not new; it had earlier met with general judicial recognition.[158] Almost any official act is taken pursuant to some sort of plan, however, and government lawyers subsequently used *Dalehite* to urge courts to reject liability for many acts that clearly involved negligent execution of a plan or idea. Although some courts drew a distinction "between acts or omissions arising from the exercise or performance of a discretionary function and those occurring within the scope or area of the discretionary function but which themselves do not involve any proper element of discretion,"[159] other courts took *Dalehite* as a license to strike down arguably valid claims.[160]

More reflective courts came to realize that a "planning-operational" distinction, based exclusively on the level of the public official involved, was not conclusive of the issue. One influential discussion of

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156. *Id.* at 35-36 (footnote omitted).

157. *Id.* at 42.

158. *E.g.*, Sickman v. United States, 184 F.2d 616 (7th Cir. 1950), *cert. denied*, 341 U.S. 939 (1951); Coates v. United States, 181 F.2d 816 (8th Cir. 1950).

159. Bulloch v. United States, 133 F. Supp. 885, 888 (D. Utah 1955). *See also* Somerset Seafood Co. v. United States, 193 F.2d 631, 635 (4th Cir. 1951).

160. For example, in Fahey v. United States, 153 F. Supp. 878 (S.D.N.Y. 1957), executors sued the government on behalf of a deceased woman who had been shot by a demented military veteran. The United States was alleged to have been negligent in permitting the veteran to remain at large, given psychiatric difficulties known to public medical officials. *Id.* at 886. In determining liability, the court reasoned: "In this case the acts of the psychiatrists involved come within the scope of the term 'discretionary function.' They were retained to make professional diagnoses and if any error was committed it was an error in the exercise of their authorized discretion resulting from an improper diagnosis. Such conduct is clearly within the scope of the exception and clearly not actionable." *Id.* at 886. *See also* Williams v. United States, 115 F. Supp. 386 (N.D. Fla. 1953), *aff'd*, 218 F.2d 473 (5th Cir. 1955); Thomas v. United States, 81 F. Supp. 881 (W.D. Mo. 1949).

the question occurred in *Bulloch v. United States*.[161] Certain sheep owners had sued the United States for injuries arising out of nuclear testing in Nevada. In assessing judicial precedent, the court noted:

> Where the acts or omissions relied upon are those directly involving the exercise of discretion, the Courts have not hesitated to deny recovery . . . . Where it is clear, as here, that the major, or overall, activity involved the exercise of a discretionary function or duty . . . but where the acts or omissions relied upon may be substantially independent of, or merely incidental to, any authorized discretionary performance, difficulty and conflict are indicated in the decisions.[162]

The court then noted that one line of cases, which arguably included *Dalehite*, appeared to deny liability for all acts taken within the scope and in the course of performance of a discretionary function. After discussion the court stated, "I conclude that negligent performance, after discretion has been exercised, and not involving any discretionary power, is not contemplated by the cited exception concerning discretionary functions."[163]

If determination of the proper scope of the discretionary function exception is difficult in the context of good faith plans and their negligent execution, the question obviously becomes much cloudier when one considers treatment of intentional torts. The discretionary function exception protects the executive branch from too close scrutiny of policy decisions. But the permissible scope of executive decision-making as to actions or policies that may prove deliberately tortious presents a different issue. Several points should be stressed. First, the brief legislative history of the amendment makes clear that, at the very least, Congress did not intend to create a blanket exemption from liability for all decisions calling for discretion. The overzealous decisions and actions of St. Louis DALE officers resulted in property damage and infringement of the privacy of the Askews and Giglottos. The legislation drafted in response to those raids was meant to provide financial compensation both for property loss and psychological injury.[164] A broad reading of the exception so as to exclude recovery by

161. 133 F. Supp. 885 (D. Utah 1955). *But cf.* Bartholomae Corp. v. United States, 135 F. Supp. 651 (S.D. Cal. 1955).

162. 133 F. Supp. at 887-88.

163. *Id.* at 889. *See also* Downs v. United States, 522 F.2d 990 (6th Cir. 1975); Griffin v. United States, 500 F.2d 1059 (3d Cir. 1974); United Air Lines, Inc. v. Wiener, 335 F.2d 379 (9th Cir.), *cert. dismissed*, 379 U.S. 951 (1964); White v. United States, 317 F.2d 13, 16-17 (4th Cir. 1963); *cf.* United States v. Faneca, 332 F.2d 872 (5th Cir. 1964), *cert. denied*, 380 U.S. 971 (1965).

164. S. REP. No. 588, 93d Cong., 1st Sess. 2 (1973), stresses the reasons for the

those wronged by the Collinsville raids would deny the impetus for the amendment itself.

One possibility would be to preserve liability only for those discretionary actions that violate a citizen's constitutional rights, as opposed to the general class of intentional torts that may not rise to that level.[165] Since the Collinsville raids were conducted without a search or arrest warrant, in violation of the fourth amendment, recovery in that case would be permitted. This restrictive interpretation finds some support in the Senate report on the amendment:

> As a general principle under present law, if a Federal agent violates someone's constitutional rights—for instance, Fourth Amendment rights against illegal search and seizure—there is no remedy against the Federal Government. This ancient doctrine—sovereign immunity—stands as a bar.
>
> Only recently was there even a right of action against the offending officers themselves. In the case of *Bivens v. Six Unknown Federal Narcotics Agents*, 403 U.S. 388 (1971), the Supreme Court held that the Fourth Amendment and elementary justice require that there be a right of action against the Federal agents for *illegal searches conducted in bad faith or without probable cause*. . . .
>
> . . . .
>
> . . . This provision should be viewed as a counterpart to the *Bivens* case and its progenty [*sic*], in that it waives the defense of sovereign immunity . . . *for the same type of conduct* that is alleged to have occurred in *Bivens* . . . .[166]

However, later in the Senate report this narrow reading is rejected: "[T]he Committee's amendment should not be viewed as limited to constitutional tort situations but would apply to any case in which a Federal law enforcement agent committed the tort while acting within the scope of his employment or under color of Federal law."[167]

A better reading would make the government responsible whenever overzealous officers act tortiously against a citizen, and whenever an official at any level deliberately plans, authorizes or approves actions that amount to "constitutional torts"—violations of guarantees afforded

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amendment: "There is no effective legal remedy against the Federal Government for the actual physical damage, much less the pain, suffering and humiliation to which the Collinsville families have been subjected."

165. What is or is not sufficient to make an intentional tort rise to the level of constitutional tort has no easy answer. See Jenkins v. Averett, 424 F.2d 1228, 1232 (4th Cir. 1970) (requiring "raw abuse of power by a police officer").

166. S. REP. No. 588, 93d Cong., 1st Sess. 2-3 (1973).

167. *Id.* at 4.

by the Constitution. This use of the discretionary function defense for intentional torts does not do violence to the legislative purpose behind the exception. As the Eighth Circuit once observed in defense of the doctrine:

> The Congress had a sound basis for the use of the words in the Exceptions of the Act and used them in recognition of the separation of powers . . . and the considerations of public policy which have moved the courts to refuse to interfere with the actions of officials at all levels of the executive branch who, acting within the scope of their authority, were required to exercise discretion or judgment.[168]

The invocation of the separation of powers doctrine is proper insofar as it seeks merely to maintain essential flexibility of executive decisionmaking, free from financial liability for every error in judgment. No comparable freedom exists, or should exist, for the government to plan or to approve deliberate torts or attacks on private freedoms.[169] Insofar as the discretionary function exception is advanced as a shield against deliberate wrongdoing of this kind, the claim should be rejected even if it involves the Chief Executive.[170] The intent of the amendment[171] is to provide recovery for injuries caused by government even in instances in which the government believed such actions necessary to meet some misguided notions of internal security.

(4) Other Exceptions to Liability

Certain narrow restrictions on FTCA liability are built into section 2680, including a specific exception for claims "arising in respect of the assessment or collection of any tax or customs duty, or the detention of any goods or merchandise by any officer of customs or excise or any other law enforcement officer;"[172] for any claim involving administration of the Trading with the Enemy Act;[173] for combatant activities dur-

168. Coates v. United States, 181 F.2d 816, 818 (8th Cir. 1950). The court then cited a number of cases, beginning with Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803), in which the Supreme Court has dealt with the discretionary function issue in its constitutional aspects.

169. What immediately comes to mind in this context is the short-lived and ill-fated "Huston Plan" of Watergate fame and similar government programs by the FBI recently uncovered. *See* Mondale Letter, *supra* note 148; *cf.* Kiiskila v. United States, 466 F.2d 626 (7th Cir. 1972).

170. Compare United States v. Nixon, 418 U.S. 683 (1974); United States v. United States District Court, 407 U.S. 297 (1972).

171. *See* text accompanying notes 84-86 *supra*.

172. 28 U.S.C. § 2680(c) (1970).

173. *Id.* § 2680(e).

ing time of war;[174] or for any claim arising in a foreign country.[175] Careful attention obviously should be paid to the rather obscure provisions of this section by potential litigants, even though they may be inapplicable to the vast run of cases.

IV. Practice Under The Amendment

As should be clear by now, the FTCA is a statute of unique complexity. Some of the basic conceptual problems that arise from the use of the FTCA as a vehicle for intentional torts liability have already been addressed. But it seems advisable to provide a brief roadmap to the special practice and procedural requirements to which an attorney unfamiliar with FTCA practice, but now placed within its ambit, should devote close attention. It is the understanding of the authors that to date no judgments or settlements have been concluded under the amendment. Since the amendment offers new sources of liability for governmental conduct, this inactivity may reflect a lack of awareness on the part of the practicing bar of its availability.

A. *Jurisdiction and Venue*

Jurisdiction of an FTCA suit is vested in the United States district courts.[176] The court in which a litigant sues also has jurisdiction of related counterclaims or setoffs by the federal government.[177] Any appeal from a district court judgment may be taken to the Court of Claims with the consent of all appellees.[178] Otherwise, appeal to the United States Court of Appeals is available as a matter of right.[179] Venue can be laid only in the district in which plaintiff resides or in which the offensive act or omission occurred.[180]

B. *Administrative Claim and Statute of Limitations*

Before any action may be brought in a federal court, the FTCA requires that a claimant first present his claim to an appropriate federal

174. *Id.* § 2680(j).
175. *Id.* § 2680(k).
176. *Id.* § 1346(b). Suits by inhabitants of foreign countries against the United States, as well as suits by United States citizens dwelling abroad, for tortious activity outside the United States are not covered by the FTCA.
177. *Id.* § 1346(c).
178. *Id.* § 1504.
179. *Id.* §§ 1291-94.
180. *Id.* § 1402(b).

agency for administrative settlement.[181] The agency then has up to six months to make final disposition of the claim. If there is no disposition after six months, the claimant may deem the claim finally denied and pursue his court remedy. Framing the claim to the federal agency should be done only after careful consideration, since the FTCA prohibits an action for an amount greater than that presented to the federal agency, "except where the increased amount is based upon newly discovered evidence not reasonably discoverable at the time of presenting the claim to the federal agency, or upon allegation and proof of intervening facts, relating to the amount of the claim."[182] Under the FTCA, each federal agency head has the power to compromise tort claims up to $25,000. A settlement over that amount requires written approval of the Attorney General.[183]

The statute of limitations on tort claims under the FTCA is governed by federal law, not by the applicable state statutory period.[184] Federal law bars any claim that is not presented, in writing, to the appropriate federal agency within two years after the claim accrues or that is not "begun within six months after the date of mailing . . . of notice of final denial of the claim by the agency to which it was presented." [185] Thus a claimant must present his claim to any agency within two years after it accrues. He may begin an action six months after this claim has been presented. Unless he sues within six months after the mailing of a final denial, the claim is barred.

C. *Parties*

An FTCA suit is properly brought against the United States, not against the offending individuals or the agency of which they are employees. Federal employees who may desire to sue federal law en-

181. *Id.* § 2675; see 28 C.F.R. § 14.1 *et seq.* (1975) for the rules promulgated by the Attorney General respecting presentation of administrative claims. If a suit is filed prior to submission of an administrative claim, dismissal is appropriate. Commonwealth of Pennsylvania v. National Ass'n of Flood Insurers, 520 F.2d 11 (3d Cir. 1975); Altman v. Connally, 456 F.2d 1114 (2d Cir. 1972) (per curiam); Bialowas v. United States, 443 F.2d 1047 (3d Cir. 1971). Counsel for plaintiff should be careful to comply fully with whatever procedural requirements an agency might have established for filing a formal claim. Merely sending a letter seeking relief may well be inadequate and constitute ground for dismissal of a subsequent suit. *See, e.g.*, Melo v. United States, 505 F.2d 1026 (8th Cir. 1974). *See generally* Annot., 13 A.L.R. FED. 762 (1972).

182. 28 U.S.C. § 2675(b) (1970).

183. *Id.* §§ 2672, 2677; 28 C.F.R. § 14.6 (1975).

184. 28 U.S.C.A. § 2401(b) (Supp. 1976); Young v. United States, 184 F.2d 587, 589 (D.C. Cir. 1950). *See generally* Annot., 7 A.L.R.3d 732 (1966); Annot., 21 A.L.R.2d 1464 (1952).

185. 28 U.S.C.A. § 2401(b) (Supp. 1976).

forcement officers under the FTCA, but cannot, should check closely the provisions of the Federal Employees' Compensation Act, which is the exclusive remedy of a federal employee suing for death or personal injury caused by the actions of another federal employee.[186] Certain other classes of plaintiffs are restricted from bringing tort actions against the government and recourse must be had to the myriad of statutes involved.[187] If a federal employee (or, in the intentional tort case, a federal officer) is sued individually, it is clear he may implead the United States.[188]

D. *Jury Trial*

An FTCA claim against the government is triable only without a jury, notwithstanding any right to jury trial that may exist under the equivalent local statute governing tort liability. This is a restriction not present in actions under *Bivens* or section 1983 and it may in the appropriate situation suggest the advisability of actions against the individual agents as well.

E. *Damages and Declaratory Relief*

As we have seen, the FTCA precludes any recovery for punitive damages, except that, in a state whose law permits only punitive damages for the death of a claimant, the Act allows the successful estate to recover actual or pecuniary damages "measured by the pecuniary injuries resulting from such death to the persons respectively, for whose benefit the action was brought, in lieu thereof."[189] The effect of the quoted language is to ignore any state law attempts to restrict recovery in such instances, and to permit compensatory damages whether designated as "compensatory" or "punitive."

Some question exists as to the availability of declaratory relief under the FTCA. Some courts apparently would allow it, following the rationale sketched by Jayson:

> The rationale is that, although the Declaratory Judgment Act is not itself a consent of the United States to be sued, it is an addi-

186. 5 *id.* §§ 8101 *et seq.* *See generally* Annot., 17 L. Ed. 2d 929 (1967); Annot., 84 A.L.R.2d 1059 (1962).

187. *See generally* JAYSON, *supra* note 57, §§ 150-67.

188. United States v. Yellow Cab Co., 340 U.S. 543 (1951). However, the United States may not indemnify itself against a recovery by bringing suit against the federal employee responsible for the tort—a right any private employer would have against its employee. United States v. Gilman, 347 U.S. 507 (1954).

189. 28 U.S.C. § 2674 (1970).

> tional remedy in cases where jurisdiction already exists; accordingly, if the basic claim is within the coverage of the Tort Claims Act, a suit for declaratory judgment is simply a procedural step toward the ultimate determination of a claim for money damages.[190]

The argument against use of the declaratory judgment is twofold. Section 1346(b) vests jurisdiction in district courts only to hear claims "for money damages." Furthermore, as mentioned earlier, the legislative rationale behind section 2680(h) seems to evince a desire to prevent the FTCA from becoming a vehicle to challenge generally the legality of a government procedure. Nevertheless, if federal courts read the statute to permit declaratory actions involving intentional torts, the amendment could prove a helpful weapon with which to attack unconstitutional law enforcement procedures. Rather than simply suing a federal agency for a money judgment in the wake of an agency burglary "for national security," a litigant could urge the district court to declare such conduct tortious.[191]

F. *Interest, Costs and Attorneys' Fees*

A successful litigant can recover four percent interest from the date of judgment until "thirty days after the approval of any appropriation Act."[192] Prejudgment interest, in other words, is not permitted.

The FTCA permits, but does not mandate, a court to award costs to the successful litigant, or to the government if it prevails. The costs shall "be limited to reimbursing in whole or in part the prevailing party for the costs incurred by him in the litigation."[193]

One of the strangest provisions of the FTCA relates to attorneys' fees. The Act limits an attorney to twenty-five percent of any judgment recovered or any settlement made after litigation has commenced. If the claim has been administratively compromised prior to suit, the maximum recovery is twenty percent. "Any attorney who charges, demands, receives, or collects for services rendered in connection with such claim any amount in excess of that allowed under this section, if recovery be had, *shall be fined not more than $2,000 or imprisoned not more than one year or both.*"[194] One can only urge due care in billing to avoid this stringent penalty.

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190. JAYSON, *supra* note 57, § 211.02, at 9-8 (footnote omitted). *See* Luckenbach S.S. Co. v. United States, 292 F.2d 913, 916 n.5 (Ct. Cl. 1961); *cf.* Raydist Navigation Corp. v. United States, 144 F. Supp. 503 (E.D. Va. 1956).

191. *See* text accompanying notes 169 & 187 *supra.*

192. 28 U.S.C. § 2411(b) (1970).

193. *Id.* § 2412.

194. *Id.* § 2678 (emphasis added).

G. *Judgment as Bar*

Although the FTCA does not explicitly insist that suit against the government—as opposed to suit against the offending agent—be an injured party's exclusive remedy, another section makes judgment in an FTCA action a complete bar to an action against the individual government employee.[195] In most instances, the preferred course will be to pursue one's remedy against the government alone, in order to ensure a source of recovery. However, section 2676 does not prevent a litigant from first suing a government employee and thereafter, if execution of a judgment leaves the plaintiff unsatisfied, suing the federal government for the unsatisfied portion of the judgment.[196] If personal vindication against an offending federal law enforcement officer were a prime motive, and if a jury trial were seen as indispensable, plaintiff could still proceed on a *Bivens* theory or under state law before invoking the FTCA.[197]

V. The Amendment And The Exclusionary Rule

One serious question raised by the passage of the amendment concerns the continuing application by the Supreme Court of the exclusionary rule to suppress evidence seized by law enforcement officials in violation of the fourth amendment.[198] In his dissenting opinion in *Bivens* Chief Justice Burger commenced a full scale attack on the exclusionary rule, calling it "conceptually sterile and practically ineffective."[199] Nevertheless, the Chief Justice conceded the continuing necessity of the rule "until some meaningful substitute is developed."[200]

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195. *Id.* § 2676.

196. Consider also *id.* § 2679(b), which makes suit against the government the exclusive remedy "for injury or loss of property or personal injury or death, resulting from the operation by any employee of the Government of any motor vehicle while acting within the scope of his office or employment", and *id.* § 2679(d), which provides for removal to the federal court of suits commenced in the state court against federal employees in the event that the United States acknowledges FTCA scope of employment liability.

197. He would, of course, keep a close eye on the FTCA statute of limitations. *See* note 184 *supra*. There does not appear to be any impediment to commencing a *Bivens* suit against the individual officer while at the same time pursuing settlement with the United States.

198. *See* text accompanying note 110 *supra*. For a thoroughly researched analysis of the fourth amendment and the exclusionary rule see Harris, *Annals of Law: The Liberty of Every Man* (pts. 1-2), The New Yorker, Nov. 3, 1975, at 50; Nov. 10, 1975, at 54.

199. 403 U.S. at 415.

200. *Id.*

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> Reasonable and effective substitutes can be formulated if Congress would take the lead, as it did for example in 1946 in the Federal Tort Claims Act. I see no insuperable obstacle to the elimination of the suppression doctrine if Congress would provide some meaningful and effective remedy against unlawful conduct by government officials.
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> . . . .
>
> I conclude, therefore, that an entirely different remedy is necessary . . . . Congress should develop an administrative or quasi-judicial remedy against the government itself to afford compensation and restitution for persons whose Fourth Amendment rights have been violated.[201]

Chief Justice Burger went on to sketch a statute that would waive sovereign immunity "as to the illegal acts of law enforcement officials committed in the performance of assigned duties," and would create a forum in which to adjudicate such claims.[202] Significantly, this "proposal" would have tied such a provision to a statute that explicitly abolished the exclusionary rule. "Any such legislation should emphasize the interdependence between the waiver of sovereign immunity and the elimination of the judicially created exclusionary rule so that if the legislative determination to repudiate the exclusionary rule falls, the entire statutory scheme would fall."[203]

The similarity between the Chief Justice's proposal and the amendment is obvious, as was recognized during the debate in the House on the amendment. Congressman Butler of Virginia specifically inquired on March 5, 1974, whether the amendment's sponsors were clear as to the effect of the legislation on the exclusionary rule. In response, Congressman Wiggins of California said:

> 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 exploration. However, under this legislation the remedy is created without the benefits of that exploration and without modifying this exclusionary rule.[204]

In light both of this disclaimer and of Congress' failure to draft an explicit abolition of the exclusionary rule, it seems clear that no modification of the fourth amendment exclusionary rule was intended. Fur-

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201. *Id.* at 421-22.
202. *Id.* at 422-23.
203. *Id.* at 423 n.7.
204. 120 CONG. REC. H 1400 (daily ed. Mar. 5, 1974).

thermore, since Chief Justice Burger's dissenting opinion did not receive support from any other member of the Court, the argument that somehow the amendment was Congress' response to a judicial invitation is unconvincing. As a practical matter, one would not expect Congress impliedly to exchange the exclusionary rule for a tort remedy that poses as many obstacles to effective implementation as does the FTCA amendment.[205]

VI. The Amendment As Spur To Further Reform

As is clear from the foregoing analysis, the amendment is only a partial step toward proper financial accountability by the federal government for the injuries occasioned by its employees. It does provide a much-needed legal remedy for the victims of federal law enforcement abuse. However, the momentary public outrage over the Collinsville raids, pragmatically channelled by congressional aides into a legislative amendment acceptable to an impatient Congress, succeeded in producing a remedy that—as we have seen—is quite idiosyncratic. A recovery scheme for intentional governmental torts needs more careful attention. The amendment and subsequent events[206] may provide the impetus for a thorough review of the entire field. For one thing, the need for a federal statutory remedy against federal officials other than law enforcement officials who violate constitutional rights seems undiminished by the availability of relief under *Bivens*. Difficulties inherent in a case by case extension of *Bivens* suggest that the amendment of section 1983 to provide for coverage of federal as well as state officials would overcome a long ignored anomaly in federal responsibility.[207]

At least four further changes to the FTCA should be explored. First, the elements of a federal cause of action should not depend on

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205. A separate issue is whether Congress could by statute actually abolish the exclusionary rule. *See generally* Dellinger, *Of Rights and Remedies: The Constitution as a Sword*, 85 Harv. L. Rev. 1532, 1559-63 (1972). That issue is beyond the scope of this article.

206. The Senate Select Committee on Intelligence Activities is currently wrestling with the problem of recovery against FBI and CIA officials who violate constitutional and statutory rights. S. Res. 21, 94th Cong.

207. Professor Davis has proposed language amending section 1983 that provides a useful beginning. *See* Davis, *An Approach to Legal Control of the Police*, 52 Texas L. Rev. 703, 720 n.47 (1974). Davis also provides in his proposed amendment of section 1983 for recovery against federal and local governments, thereby rendering redundant the FTCA amendment. Whether or not it is better to include entity liability within section 1983 (one argument against that solution is that intentional torts not reaching the constitutional tort level are not covered by section 1983), that section should certainly be amended to reach federal as well as state and local officials.

differences of state law. A federal statutory or common law of intentional torts would avoid the "law of the place" and the "private person" problems inherent in the FTCA as presently structured. It would insure that tortious behavior by the FBI in California would receive similar treatment to such behavior in Maine. The justification for a local standard of behavior in the negligence area does not carry over to the realm of intentional torts.

Secondly, liability should not be restricted merely to "law enforcement officers." A deliberate battery is no less outrageous if inflicted by a mailman or a welfare official than if inflicted by an FBI agent. Although law enforcement officers more often have occasion for unfettered abuse of the public trust, the modern social welfare state offers so many potential conflicts between officials and individuals that there is little justification for denying citizens redress for any governmental wrongs. Anxiety about the number of claims can be met with several responses. Any "flood of litigation" would presumably mean that the new law would have uncovered grave and intolerable flaws in the operation of our federal government. The fear of spurious claims should be overcome by the realization that the judicial process has available to it means for detecting such false claims.[208] And any fear that citizens might be awarded excessive damages should be overcome by the FTCA practice of non-jury trials. Additional safeguards, such as placing a ceiling on recovery, should be disfavored.[209]

Thirdly, more careful treatment must be given the question whether governmental liability should supersede individual liability in its entirety. While the Justice Department intended through its proposed bill to place all federal officers beyond the threat of personal liability,[210] some provision for personal liability seems a healthy tonic to encourage respect for constitutional rights. Since the protection intended by the Justice Department proposal has to some degree already been extended to federal employees judicially by the rapid case law development of the

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208. In the section 1983 area, for example, the federal courts, while faced with a staggering caseload, have utilized various preclusion doctrines and summary decision mechanisms to keep the cases under control. *See generally* McCormack, *Federalism and Section 1983: Limitations on Judicial Enforcement of Constitutional Protections* (pts. I & II), 60 VA. L. REV. 1, 250 (1974).

209. This is the solution in 18 U.S.C. § 2520 (1970), which provides for $1000 damages for each illegal wiretap. The danger of this approach is that federal officials may see these amounts as merely the cost of doing business and effectively buy up an individual's constitutional rights. Even the fear of an occasional large judgment may not provide admirable official caution in this respect.

210. *See* text accompanying notes 73-75 *supra*.

"official immunity doctrine,"[211] there may be little need to go beyond that defense. And since the rationale behind official immunity is similar to that expressed in the discretionary function exception, the FTCA currently reflects a form of immunity for government officials that, without discharging them from all responsibility, protects the independence and flexibility necessary for proper government decision-making. There are important competing values to be considered. Senator Charles Percy has warned, "we must not lose sight of the important deterrent value served by the threat of civil suits being brought against offending agents. Federal narcotics officers must realize that they will be held personally responsible for their intentional violation of constitutional rights . . . ."[212] After the incident at Collinsville, Illinois, it was learned that several of the agents had been involved in other unpalatable and illegal incidents;[213] attempts to exempt those individual officers from liability for assaults and batteries on private citizens seem an excessive means to guarantee flexibility for proper police functioning. The balance between these competing values is difficult but not impossible to strike. The development of legislatively specified defenses along the lines of those that have been developed judicially under section 1983 could be employed, or the government could be given the right of subrogation against individual officials in extreme cases involving fraud, corruption, or malice.[214] Either solution would offer some further assurance that federal officials will find it in their interest to learn about and respect the individual rights of citizens.

Another effective method of deterrence might be employed by having Congress specify the sources from which government funds to pay an FTCA judgment should come. Professor Kenneth Culp Davis has expressed the belief that "[w]hat is needed is a deterrent that operates not only against the agents but also against the superiors. The superiors will respond to big money judgments, because the superiors have the responsibility for protecting their budgets."[215] It would indeed

211. *See, e.g.*, Doe v. McMillan, 412 U.S. 306 (1973); Barr v. Matteo, 360 U.S. 564 (1959); Berberian v. Gibney, 514 F.2d 790 (1st Cir. 1975); Bivens v. Six Unknown Named Agents, 456 F.2d 1339 (2d Cir. 1972); Scherer v. Brennan, 379 F.2d 609 (7th Cir.), *cert. denied*, 389 U.S. 1021 (1967).

212. S. REP. No. 469, 93d Cong., 1st Sess. 36 (1973).

213. *See* text accompanying notes 22-23 *supra*.

214. This is the approach taken under California law, CAL. GOV'T CODE § 825.6 (West Supp. 1976). There is currently no right of subrogation under the FTCA. United States v. Gilman, 347 U.S. 507 (1954). *See generally* B. SCHWARTZ, ADMINISTRATIVE LAW § 201 (1976).

215. Letter from Kenneth Culp Davis to Robert Sloan, Committee on Government Operation, Nov. 26, 1973, copy on file in the University of North Carolina Law Library.

seem helpful in curbing abuses in the future if the agencies themselves were required to have charged against their operating budgets judgments against the United States that were due to the fraudulent, corrupt, or malicious actions of their employees.[216]

A fourth reform of the present law that should be considered is the inclusion within the FTCA of those torts that are still exempt from coverage under the amendment. This extension would reach certain torts that seem almost accidentally to have been excluded from the Act,[217] as well as others, such as libel and slander, that may be necessary to keep other equally egregious activities of government officials from going unchallenged.[218]

VII. Conclusion

In a statement made to the Senate Government Operations Committee, Senator Sam Ervin recognized that the amendment was only "a minimal first step in providing a remedy against the federal government for innocent victims of federal law enforcement abuses."[219] While the step was a big one, there are clearly others to take. The amendment provides a useful means for obtaining financial compensation in the wake of certain grievous abuses by law enforcement officials, but Congress should not be led by this action to believe that it has dealt with the

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216. While it may be difficult to plan an agency budget with contingencies like tort judgments unaccounted for, it would seem desirable to set up a method of calculating payments made because of tortious activity in prior years against an operating budget in future years.

217. Negligent misrepresentation, for example, has been held not to permit recovery under the FTCA. United States v. Neustadt, 366 U.S. 696 (1961); Fitch v. United States, 513 F.2d 1013 (6th Cir. 1975). Even if Congress were to determine that such an exception were necessary, it should modify or clarify the exception to make it clear that recovery remains proper for negligent acts and deeds by federal officials that have a verbal aspect. *Compare* DeLange v. United States, 372 F.2d 134 (9th Cir. 1967), *with* Rey v. United States, 484 F.2d 45 (5th Cir. 1973).

The consequences, both personal and financial, of negligent misrepresentation or deliberate deceit are often tragic, and the need to "protect" the government in all such activities is questionable. *See generally* Davis, *Sovereign Immunity Must Go*, 22 Ad. L. Rev. 383 (1970); Note, *Federal Compensation for Victims of the "Homeownership for the Poor" Program*, 84 Yale L.J. 294 (1974).

218. The discovery by the Church Committee of FBI dirty tricks, such as mailing letters to employers with false information about so-called subversive employees in efforts to discredit them, would seem to make plain the need for libel and slander recovery. *See* Mondale Letter, *supra* note 148, enclosure 1. Moreover, the inclusion of these torts within the FTCA at this stage need not necessarily work a dramatic change in federal liability. In the years since 1946 the common law rules of absolute liability have given way to recoveries limited to situations of malice and aggravated intent, exactly those situations that the FTCA should reach.

219. S. Rep. No. 588, 93d Cong., 1st Sess. 4 (1973).

inequities of sovereign immunity, and the question of a citizen's right to redress for constitutional wrongs, in any final or comprehensive way. The time is ripe broadly to reassess government liability for the tortious and unconstitutional conduct of its officials;[220] it should not pass without the much-needed and long-sought reforms outlined in this article.

220. Recently, Attorney General Levi has announced he will order the FBI to notify individuals who for 17 years were unwitting targets of COINTELPRO. This mass notification program will involve thousands of individuals, and could bring forth a "barrage of civil lawsuits." Raleigh News & Observer, March 31, 1976, at 1, cols. 2-5.

Tort Claims Provisions of Swine Flu Bill, 42 U.S.C. 2476

42 § 247b PUBLIC HEALTH AND WELFARE

Protection of agencies, organizations and individuals against non-negligent liability arising from administration of swine flu immunization program; exclusive remedy; procedure for claims for personal injury or death; report to Congress on conduct of settlement and litigation activities

(k)(1)(A) The Congress finds that—

(i) in order to achieve the participation in the program of the agencies, organizations, and individuals who will manufacture, distribute, and administer the swine flu vaccine purchased and used in the swine flu program and to assure the availability of such vaccine in interstate commerce, it is necessary to protect such agencies, organizations, and individuals against liability for other than their own negligence to persons alleging personal injury or death arising out of the administration of such vaccine;

(ii) to provide such protection and to establish an orderly procedure for the prompt and equitable handling of claims by persons alleging such injury or death, it is necessary that an exclusive remedy for such claimants be provided against the United States because of its unique role in the initiation, planning, and administration of the swine flu program; and

(iii) in order to be prepared to meet the potential emergency of a swine flu epidemic, it is necessary that a procedure be instituted for the handling of claims by persons alleging such injury or death until Congress develops a permanent approach for handling claims arising under programs of this chapter.

(B) To—

(i) assure an orderly procedure for the prompt and equitable handling of any claim for personal injury or death arising out of the administration of such vaccine; and

(ii) achieve the participation in the swine flu program of (I) the manufacturers and distributors of the swine flu vaccine, (II) public and private agencies or organizations that provide inoculations without charge for such vaccine or its administration and in compliance with the informed consent form and procedures requirements prescribed pursuant to subparagraph (F) of paragraph (1) of this subsection, and (III) medical and other health personnel who provide against or assist in providing inoculations without charge for such vaccine or its administration and in compliance with such informed consent form and procedures requirements,

it is the purpose of this subsection to establish a procedure under which all such claims will be asserted directly against the United States under section 1346(b) of Title 28, and chapter 171 of such title (relating to tort claims procedure) except as otherwise specifically provided in this subsection.

(2)(A) The United States shall be liable with respect to claims submitted after September 30, 1976 for personal injury or death arising out of the administration of swine flu vaccine under the swine flu program and based upon the act or omission of a program participant in the same manner and to the same extent as the United States would be liable in any other action brought against it under such section 1346(b) and chapter 171, except that—

(i) the liability of the United States arising out of the act or omission of a program participant may be based on any theory of liability that would govern an action against such program participant under the law of the place where the act or omission occurred, including negligence, strict liability in tort, and breach of warranty;

(ii) the exceptions specified in section 2680(a) of Title 28 shall not apply in an action based upon the act or omission of a program participant; and

(iii) notwithstanding section 2401(b) of Title 28, if a civil action or proceeding for personal injury or death arising out of the administration of swine flu vaccine under the swine flu program is brought within two years of the date of the administration of such vaccine and is dismissed because the plaintiff in such action or proceeding did not file an administrative claim with respect to such injury or death as required by

such chapter 171, the plaintiff in such action or proceeding shall have 30 days from the date of such dismissal or two years from the date the claim arose, whichever is later, in which to file such administrative claim.

(B) For purposes of this subsection, the term "program participant" as to any particular claim means the manufacturer or distributor of the swine flu vaccine used in an inoculation under the swine flu program, the public or private agency or organization that provided an inoculation under the swine flu program without charge for such vaccine or its administration and in compliance with the informed consent form and procedures requirements prescribed pursuant to subparagraph (F) of paragraph (1) of this subsection, and the medical and other health personnel who provided or assisted in providing an inoculation under the swine flu program without charge for such vaccine or its administration and in compliance with such informed consent form and procedures requirements.

(3) The remedy against the United States prescribed by paragraph (2) of this subsection for personal injury or death arising out of the administration of the swine flu vaccine under the swine flu program shall be exclusive of any other civil action or proceeding for such personal injury or death against any employee of the Government (as defined in section 2671 of Title 28,) or program participant whose act or omission gave arise to the claim.

(4) The Attorney General shall defend any civil action or proceeding brought in any court against any employee of the Government (as defined in such section 2671) or program participant (or any liability insurer thereof) based upon a claim alleging personal injury or death arising out of the administration of vaccine under the swine flu program. Any such person against whom such civil action or proceeding is brought shall deliver all process served upon him (or an attested true copy thereof) to whoever is designated by the Secretary to receive such papers, and such person shall promptly furnish copies of the pleadings and process therein to the United States attorney for the district embracing the place wherein the civil action or proceeding is brought, to the Attorney General, and to the Secretary.

(5)(A) Upon certification by the Attorney General that a civil action or proceeding brought in any court against any employee of the Government (as defined in such section 2671) or program participant is based upon a claim alleging personal injury or death arising out of the administration of vaccine under the swine flu program, such action or proceeding shall be deemed an action against the United States under the provisions of Title 28, and all references thereto. If such action or proceeding is brought in a district court of the United States, then upon such certification the United States shall be substituted as the party defendant.

(B) Upon a certification by the Attorney General under subparagraph (A) of this paragraph with respect to a civil action or proceeding commenced in a State court, such action or proceeding shall be removed, without bond at any time before trial, by the Attorney General to the district court of the United States of the district and division embracing the place wherein it is pending and be deemed an action brought against the United States under the provisions of Title 28, and all references thereto; and the United States shall be substituted as the party defendant. The certification of the Attorney General with respect to program participant status shall conclusively establish such status for purposes of such initial removal. Should a district court of the United States determine on a hearing on a motion to remand held before a trial on the merits that an action or proceeding is not one to which this subsection applies, the case shall be remanded to the State court.

(C) Where an action or proceeding under this subsection 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 action or proceeding shall be dismissed, but in that event the running of any limitation of time for commencing, or filing an application or claim in, such proceedings for compensation or other benefits shall be deemed to have been suspended during the pendency of the civil action or proceeding under this subsection.

(6) A program participant shall cooperate with the United States in the processing or defense of a claim or suit under such section 1346(b) and chapter 171 based upon alleged acts or omissions of the program participant. Upon the motion of the United States or any other party, the status as a

program participant shall be revoked by the district court of the United States upon finding that the program participant has failed to so cooperate, and the court shall substitute such former participant as the party defendant in place of the United States and, upon motion, remand any such suit to the court in which it was instituted.

(7) Should payment be made by the United States to any claimant bringing a claim under this subsection, either by way of administrative settlement or court judgment, the United States shall have, notwithstanding any provision of State law, the right to recover for that portion of the damages so awarded or paid, as well as any costs of litigation, resulting from the failure of any program participant to carry out any obligation or responsibility assumed by it under a contract with the United States in connection with the program or from any negligent conduct on the part of any program participant in carrying out any obligation or responsibility in connection with the swine flu program. The United States may maintain such action against such program participant in the district court of the United States in which such program participant resides or has its principal place of business.

(8) Within one year of August 12, 1976, and semiannually thereafter, the Secretary shall submit to the Congress a report on the conduct of settlement and litigation activities under this subsection, specifying the number, value, nature, and status of all claims made thereunder, including the status of claims for recovery made under paragraph (7) of this subsection and a detailed statement of the reasons for not seeking such recovery.

Definitions relating to the swine flu immunization program

(*l*) For the purpose of subsections (j) and (k) of this section—

(1) the phrase "arising out of the administration" with reference to a claim for personal injury or death under the swine flu program includes a claim with respect to the manufacture or distribution of such vaccine in connection with the provision of an inoculation using such vaccine under the swine flu program;

(2) the term "State" includes the District of Columbia, Puerto Rico, the Virgin Islands, Guam, American Samoa, and the Trust Territory of the Pacific Islands; and

(3) the term "swine flu vaccine" means the vaccine against the strain of influenza virus known as influenza A/New Jersey/76 (Hsw 1N1), or a combination of such vaccine and the vaccine against the strain of influenza virus known as influenza A/Victoria/75.

As amended July 29, 1975, Pub.L. 94–63, Title VI, § 601, 89 Stat. 346; June 23, 1976, Pub.L. 94–317, Title II, § 202(a), 90 Stat. 700; Aug. 12, 1976, Pub.L. 94–380, § 2, 90 Stat. 1113.

H.R. 10439, AMENDMENTS TO THE FEDERAL TORT CLAIMS ACT (93d CONGRESS)

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 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.

BIVENS *v.* SIX UNKNOWN NAMED AGENTS OF FEDERAL BUREAU OF NARCOTICS

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

No. 301. Argued January 12, 1971—Decided June 21, 1971

Petitioner's complaint alleged that respondent agents of the Federal Bureau of Narcotics, acting under 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 have been done without probable cause. Petitioner's suit to recover damages from the agents was dismissed by the District Court on the alternative grounds (1) that it failed to state a federal cause of action and (2) that respondents were immune from suit by virtue of their official position. The Court of Appeals affirmed on the first ground alone. *Held:*

1. Petitioner's complaint states a federal cause of action under the Fourth Amendment for which damages are recoverable upon proof of injuries resulting from the federal agents' violation of that Amendment. Pp. 390–397.

2. The Court does not reach the immunity question, which was not passed on by the Court of Appeals. Pp. 397–398.

409 F. 2d 718, reversed and remanded.

BRENNAN, J., delivered the opinion of the Court, in which DOUGLAS, STEWART, WHITE, and MARSHALL, JJ., joined. HARLAN, J., filed an opinion concurring in the judgment, *post*, p. 398. BURGER, C. J., *post*, p. 411, BLACK, J., *post*, p. 427, and BLACKMUN, J., *post*, p. 430, filed dissenting opinions.

Stephen A. Grant argued the cause and filed a brief for petitioner.

Jerome Feit argued the cause for respondents. On the brief were *Solicitor General Griswold, Assistant Attorney General Ruckelshaus,* and *Robert V. Zener.*

Melvin L. Wulf filed a brief for the American Civil Liberties Union as *amicus curiae* urging reversal.

MR. JUSTICE BRENNAN delivered the opinion of the Court.

The Fourth Amendment provides that:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . . ."

In *Bell* v. *Hood*, 327 U. S. 678 (1946), we reserved the question whether violation of that command 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.

This case has its origin in an arrest and search carried out on the morning of November 26, 1965. Petitioner's complaint alleged that on that day respondents, agents of the Federal Bureau of Narcotics acting under claim of federal authority, entered his apartment and arrested him for alleged narcotics violations. The agents manacled petitioner in front of his wife and children, and threatened to arrest the entire family. They searched the apartment from stem to stern. Thereafter, petitioner was taken to the federal courthouse in Brooklyn, where he was interrogated, booked, and subjected to a visual strip search.

On July 7, 1967, petitioner brought suit in Federal District Court. In addition to the allegations above, his complaint asserted that the arrest and search were effected without a warrant, and that unreasonable force was employed in making the arrest; fairly read, it alleges as well that the arrest was made without probable cause.[1] Petitioner claimed to have suffered great humili-

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[1] Petitioner's complaint does not explicitly state that the agents had no probable cause for his arrest, but it does allege that the arrest was "done unlawfully, unreasonably and contrary to law." App. 2. Petitioner's affidavit in support of his motion for summary

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ation, embarrassment, and mental suffering as a result of the agents' unlawful conduct, and sought $15,000 damages from each of them. The District Court, on respondents' motion, dismissed the complaint on the ground, *inter alia*, that it failed to state a cause of action.[2] 276 F. Supp. 12 (EDNY 1967). The Court of Appeals, one judge concurring specially,[3] affirmed on that basis. 409 F. 2d 718 (CA2 1969). We granted certiorari. 399 U. S. 905 (1970). We reverse.

I

Respondents do not argue that petitioner should be entirely without remedy for an unconstitutional invasion of his rights by federal agents. In respondents' view, however, the rights that petitioner asserts—primarily rights of privacy—are creations of state and not of federal law. Accordingly, they argue, petitioner may obtain money damages to redress invasion of these rights only by an action in tort, under state law, in the state courts. In this scheme the Fourth Amendment would serve merely to limit the extent to which the agents could de-

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judgment swears that the search was "without cause, consent or warrant," and that the arrest was "without cause, reason or warrant." App. 28.

[2] The agents were not named in petitioner's complaint, and the District Court ordered that the complaint be served upon "those federal agents who it is indicated by the records of the United States Attorney participated in the November 25, 1965, arrest of the [petitioner]." App. 3. Five agents were ultimately served.

[3] Judge Waterman, concurring, expressed the thought that "the federal courts can . . . entertain this cause of action irrespective of whether a statute exists specifically authorizing a federal suit against federal officers for damages" for acts such as those alleged. In his view, however, the critical point was recognition that some cause of action existed, albeit a state-created one, and in consequence he was willing "*as of now*" to concur in the holding of the Court of Appeals. 409 F. 2d, at 726 (emphasis in original).

fend the state law tort suit by asserting that their actions were a valid exercise of federal power: if the agents were shown to have violated the Fourth Amendment, such a defense would be lost to them and they would stand before the state law merely as private individuals. Candidly admitting that it is the policy of the Department of Justice to remove all such suits from the state to the federal courts for decision,[4] respondents nevertheless urge that we uphold dismissal of petitioner's complaint in federal court, and remit him to filing an action in the state courts in order that the case may properly be removed to the federal court for decision on the basis of state law.

We think that respondents' thesis rests upon an unduly restrictive view of the Fourth Amendment's protection against unreasonable searches and seizures by federal agents, a view that has consistently been rejected by this Court. Respondents seek to treat the relationship between a citizen and a federal agent unconstitutionally exercising his authority as no different from the relation-

[4] "[S]ince it is the present policy of the Department of Justice to remove to the federal courts all suits in state courts against federal officers for trespass or false imprisonment, a claim for relief, whether based on state common law or directly on the Fourth Amendment, will ultimately be heard in a federal court." Brief for Respondents 13 (citations omitted); see 28 U. S. C. § 1442 (a); *Willingham* v. *Morgan*, 395 U. S. 402 (1969). In light of this, it is difficult to understand our Brother BLACKMUN'S complaint that our holding today "opens the door for another avalanche of new federal cases." *Post*, at 430. In estimating the magnitude of any such "avalanche," it is worth noting that a survey of comparable actions against state officers under 42 U. S. C. § 1983 found only 53 reported cases in 17 years (1951–1967) that survived a motion to dismiss. Ginger & Bell, Police Misconduct Litigation—Plaintiff's Remedies, 15 Am. Jur. Trials 555, 580–590 (1968). Increasing this figure by 900% to allow for increases in rate and unreported cases, every federal district judge could expect to try one such case every 13 years.

ship between two private citizens. In so doing, they ignore the fact that power, once granted, does not disappear like a magic gift when it is wrongfully used. An agent acting—albeit unconstitutionally—in the name of the United States possesses a far greater capacity for harm than an individual trespasser exercising no authority other than his own. Cf. *Amos* v. *United States,* 255 U. S. 313, 317 (1921); *United States* v. *Classic,* 313 U. S. 299, 326 (1941). Accordingly, as our cases make clear, the Fourth Amendment operates as a limitation upon the exercise of federal power regardless of whether the State in whose jurisdiction that power is exercised would prohibit or penalize the identical act if engaged in by a private citizen. It guarantees to citizens of the United States the absolute right to be free from unreasonable searches and seizures carried out by virtue of federal authority. And "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." *Bell* v. *Hood,* 327 U. S., at 684 (footnote omitted); see *Bemis Bros. Bag Co.* v. *United States,* 289 U. S. 28, 36 (1933) (Cardozo, J.); *The Western Maid,* 257 U. S. 419, 433 (1922) (Holmes, J.).

First. Our cases have long since rejected the notion that the Fourth Amendment proscribes only such conduct as would, if engaged in by private persons, be condemned by state law. Thus in *Gambino* v. *United States,* 275 U. S. 310 (1927), petitioners were convicted of conspiracy to violate the National Prohibition Act on the basis of evidence seized by state police officers incident to petitioners' arrest by those officers solely for the purpose of enforcing federal law. *Id.,* at 314. Notwithstanding the lack of probable cause for the arrest, *id.,* at 313, it would have been permissible under state law if effected

by private individuals.[5] It appears, moreover, that the officers were under direction from the Governor to aid in the enforcement of federal law. *Id.*, at 315–317. Accordingly, if the Fourth Amendment reached only to conduct impermissible under the law of the State, the Amendment would have had no application to the case. Yet this Court held the Fourth Amendment applicable and reversed petitioners' convictions as having been based upon evidence obtained through an unconstitutional search and seizure. Similarly, in *Byars* v. *United States*, 273 U. S. 28 (1927), the petitioner was convicted on the basis of evidence seized under a warrant issued, without probable cause under the Fourth Amendment, by a state court judge for a state law offense. At the invitation of state law enforcement officers, a federal prohibition agent participated in the search. This Court explicitly refused to inquire whether the warrant was "good under the state law . . . since in no event could it constitute the basis for a *federal* search and seizure." *Id.*, at 29 (emphasis added).[6] And our recent decisions regarding electronic surveillance have made it clear beyond peradventure that the Fourth Amendment is not tied to the

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[5] New York at that time followed the common-law rule that a private person may arrest another if the latter has in fact committed a felony, and that if such is the case the presence or absence of probable cause is irrelevant to the legality of the arrest. See *McLoughlin* v. *New York Edison Co.*, 252 N. Y. 202, 169 N. E. 277 (1929); cf. N. Y. Code Crim. Proc. § 183 (1958) for codification of the rule. Conspiracy to commit a federal crime was at the time a felony. Act of March 4, 1909, § 37, 35 Stat. 1096.

[6] Conversely, we have in some instances rejected Fourth Amendment claims despite facts demonstrating that federal agents were acting in violation of local law. *McGuire* v. *United States*, 273 U. S. 95 (1927) (trespass *ab initio*); *Hester* v. *United States*, 265 U. S. 57 (1924) ("open fields" doctrine); cf. *Burdeau* v. *McDowell*, 256 U. S. 465 (1921) (possession of stolen property).

niceties of local trespass laws. *Katz* v. *United States*, 389 U. S. 347 (1967); *Berger* v. *New York*, 388 U. S. 41 (1967); *Silverman* v. *United States*, 365 U. S. 505, 511 (1961). In light of these cases, respondents' argument that the Fourth Amendment serves only as a limitation on federal defenses to a state law claim, and not as an independent limitation upon the exercise of federal power, must be rejected.

Second. The interests 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 or even hostile. Thus, we may bar the door against an unwelcome private intruder, or call the police if he persists in seeking entrance. The availability of such alternative means for the protection of privacy may lead the State to restrict imposition of liability for any consequent trespass. A private citizen, asserting no authority other than his own, will not normally be liable in trespass if he demands, and is granted, admission to another's house. See W. Prosser, The Law of Torts § 18, pp. 109–110 (3d ed. 1964); 1 F. Harper & F. James, The Law of Torts § 1.11 (1956). But one who demands admission under a claim of federal authority stands in a far different position. Cf. *Amos* v. *United States*, 255 U. S. 313, 317 (1921). The mere invocation of federal power by a federal law enforcement official will normally render futile any attempt to resist an unlawful entry or arrest by resort to the local police; and a claim of authority to enter is likely to unlock the door as well. See *Weeks* v. *United States*, 232 U. S. 383, 386 (1914); *Amos* v. *United States*, *supra*.[7] "In such cases there is no safety for the citizen,

[7] Similarly, although the Fourth Amendment confines an officer executing a search warrant strictly within the bounds set by the warrant, *Marron* v. *United States*, 275 U. S. 192, 196 (1927); see *Stanley* v. *Georgia*, 394 U. S. 557, 570–572 (1969) (STEWART, J.,

except in the protection of the judicial tribunals, for rights which have been invaded by the officers of the government, professing to act in its name. There remains to him but the alternative of resistance, which may amount to crime." *United States* v. *Lee,* 106 U. S. 196, 219 (1882).[8] Nor is it adequate to answer that state law may take into account the different status of one clothed with the authority of the Federal Government. For just as state law may not authorize federal agents to violate the Fourth Amendment, *Byars* v. *United States, supra; Weeks* v. *United States, supra; In re Ayers,* 123 U. S. 443, 507 (1887), neither may state law undertake to limit the extent to which federal authority can be exercised. *In re Neagle,* 135 U. S. 1 (1890). The inevitable consequence of this dual limitation on state power is that the federal question becomes not merely a possible defense to the state law action, but an independent claim both necessary and sufficient to make out the plaintiff's cause of action. Cf. *Boilermakers* v. *Hardeman,* 401 U. S. 233, 241 (1971).

Third. That damages may be obtained for injuries consequent upon a violation of the Fourth Amendment by federal officials should hardly seem a surprising proposition. Historically, damages have been regarded as the ordinary remedy for an invasion of personal interests in liberty. See *Nixon* v. *Condon,* 286 U. S. 73 (1932);

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concurring in result), a private individual lawfully in the home of another will not normally be liable for trespass beyond the bounds of his invitation absent clear notice to that effect. See 1 F. Harper & F. James, The Law of Torts § 1.11 (1956).

[8] Although no State has undertaken to limit the common-law doctrine that one may use reasonable force to resist an unlawful arrest by a private person, at least two States have outlawed resistance to an unlawful arrest sought to be made by a person known to be an officer of the law. R. I. Gen. Laws § 12–7–10 (1969); *State* v. *Koonce,* 89 N. J. Super. 169, 180–184, 214 A. 2d 428, 433–436 (1965).

Nixon v. *Herndon,* 273 U. S. 536, 540 (1927); *Swafford* v. *Templeton,* 185 U. S. 487 (1902); *Wiley* v. *Sinkler,* 179 U. S. 58 (1900); J. Landynski, Search and Seizure and the Supreme Court 28 *et seq.* (1966); N. Lasson, History and Development of the Fourth Amendment to the United States Constitution 43 *et seq.* (1937); Katz, The Jurisprudence of Remedies: Constitutional Legality and the Law of Torts in *Bell* v. *Hood,* 117 U. Pa. L. Rev. 1, 8–33 (1968); cf. *West* v. *Cabell,* 153 U. S. 78 (1894); *Lammon* v. *Feusier,* 111 U. S. 17 (1884). Of course, the Fourth Amendment does not in so many words provide for its enforcement by an award of money damages for the consequences of its violation. But "it is . . . well settled that where legal rights have been invaded, and a federal statute provides for a general right to sue for such invasion, federal courts may use any available remedy to make good the wrong done." *Bell* v. *Hood,* 327 U. S., at 684 (footnote omitted). The present case involves no special factors counselling hesitation in the absence of affirmative action by Congress. We are not dealing with a question of "federal fiscal policy," as in *United States* v. *Standard Oil Co.,* 332 U. S. 301, 311 (1947). In that case we refused to infer from the Government-soldier relationship that the United States could recover damages from one who negligently injured a soldier and thereby caused the Government to pay his medical expenses and lose his services during the course of his hospitalization. Noting that Congress was normally quite solicitous where the federal purse was involved, we pointed out that "the United States [was] the party plaintiff to the suit. And the United States has power at any time to create the liability." *Id.,* at 316; see *United States* v. *Gilman,* 347 U. S. 507 (1954). Nor are we asked in this case to impose liability upon a congressional employee for actions contrary to no constitu-

tional prohibition, but merely said to be in excess of the authority delegated to him by the Congress. *Wheeldin* v. *Wheeler,* 373 U. S. 647 (1963). Finally, we cannot accept respondents' formulation of the question as whether the availability of money damages is necessary to enforce the Fourth Amendment. For we have here no explicit congressional declaration that persons injured by a federal officer's violation of the Fourth Amendment may not recover money damages from the agents, but must instead be remitted to another remedy, equally effective in the view of Congress. 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. Cf. *J. I. Case Co.* v. *Borak,* 377 U. S. 426, 433 (1964); *Jacobs* v. *United States,* 290 U. S. 13, 16 (1933). "The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury." *Marbury* v. *Madison,* 1 Cranch 137, 163 (1803). Having concluded that petitioner's complaint states a cause of action under the Fourth Amendment, *supra,* at 390–395, we hold that petitioner is entitled to recover money damages for any injuries he has suffered as a result of the agents' violation of the Amendment.

II

In addition to holding that petitioner's complaint had failed to state facts making out a cause of action, the District Court ruled that in any event respondents were immune from liability by virtue of their official position. 276 F. Supp., at 15. This question was not passed upon by the Court of Appeals, and accordingly we do not con-

sider it here. The judgment of the Court of Appeals is reversed and the case is remanded for further proceedings consistent with this opinion.

So ordered.

MR. JUSTICE HARLAN, concurring in the judgment.

My initial view of this case was that the Court of Appeals was correct in dismissing the complaint, but for reasons stated in this opinion I am now persuaded to the contrary. Accordingly, I join in the judgment of reversal.

Petitioner alleged, in his suit in the District Court for the Eastern District of New York, that the defendants, federal agents acting under color of federal law, subjected him to a search and seizure contravening the requirements of the Fourth Amendment. He sought damages in the amount of $15,000 from each of the agents. Federal jurisdiction was claimed, *inter alia*,[1] under 28 U. S. C. § 1331 (a) which provides:

> "The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000 exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States."

The District Court dismissed the complaint for lack of federal jurisdiction under 28 U. S. C. § 1331 (a) and failure to state a claim for which relief may be granted. 276 F. Supp 12 (EDNY 1967). On appeal, the Court of Appeals concluded, on the basis of this Court's decision in *Bell* v. *Hood*, 327 U. S. 678 (1946), that petitioner's claim for damages did "[arise] under the Constitution"

[1] Petitioner also asserted federal jurisdiction under 42 U. S. C. § 1983 and 28 U. S. C. § 1343 (3), and 28 U. S. C. § 1343 (4). Neither will support federal jurisdiction over the claim. See *Bivens* v. *Six Unknown Named Agents*, 409 F. 2d 718, 720 n. 1 (CA2 1969).

within the meaning of 28 U. S. C. § 1331 (a); but the District Court's judgment was affirmed on the ground that the complaint failed to state a claim for which relief can be granted. 409 F. 2d 718 (CA2 1969).

In so concluding, Chief Judge Lumbard's opinion reasoned, in essence, that: (1) the framers of the Fourth Amendment did not appear to contemplate a "wholly new federal cause of action founded directly on the Fourth Amendment," *id.*, at 721, and (2) while the federal courts had power under a general grant of jurisdiction to imply a federal remedy for the enforcement of a constitutional right, they should do so only when the absence of alternative remedies renders the constitutional command a "mere 'form of words.'" *Id.*, at 723. The Government takes essentially the same position here. Brief for Respondents 4–5. And two members of the Court add the contention that we lack the constitutional power to accord Bivens a remedy for damages in the absence of congressional action creating "a federal cause of action for damages for an unreasonable search in violation of the Fourth Amendment." Opinion of MR. JUSTICE BLACK, *post*, at 427; see also opinion of THE CHIEF JUSTICE, *post*, at 418, 422.

For the reasons set forth below, I am of the opinion that federal courts do have the power to award damages for violation of "constitutionally protected interests" and I agree with the Court that a traditional judicial remedy such as damages is appropriate to the vindication of the personal interests protected by the Fourth Amendment.

I

I turn first to the contention that the constitutional power of federal courts to accord Bivens damages for his claim depends on the passage of a statute creating a "federal cause of action." Although the point is not

entirely free of ambiguity,[2] I do not understand either the Government or my dissenting Brothers to maintain that Bivens' contention that he is entitled to be free from the type of official conduct prohibited by the Fourth Amendment depends on a decision by the State in which he resides to accord him a remedy. Such a position would be incompatible with the presumed availability of federal equitable relief, if a proper showing can be made in terms of the ordinary principles governing equitable remedies. See *Bell* v. *Hood,* 327 U. S. 678, 684 (1946). However broad a federal court's discretion concerning equitable remedies, it is absolutely clear—at least after *Erie R. Co.* v. *Tompkins,* 304 U. S. 64 (1938)—that in a nondiversity suit a federal court's power to grant even equitable relief depends on the presence of a substantive right derived from federal law. Compare *Guaranty Trust Co.* v. *York,* 326 U. S. 99, 105–107 (1945), with *Holmberg* v. *Armbrecht,* 327 U. S. 392, 395 (1946). See also H. Hart & H. Wechsler, The Federal Courts and the Federal System 818–819 (1953).

Thus the interest which Bivens claims—to be free from official conduct in contravention of the Fourth Amendment—is a federally protected interest. See generally Katz, The Jurisprudence of Remedies: Constitutional Legality and the Law of Torts in *Bell* v. *Hood,* 117 U. Pa. L. Rev. 1, 33–34 (1968).[3] Therefore, the question

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[2] See n. 3, *infra.*

[3] The Government appears not quite ready to concede this point. Certain points in the Government's argument seem to suggest that the "state-created right—federal defense" model reaches not only the question of the power to accord a federal damages remedy, but also the claim to any judicial remedy in any court. Thus, we are pointed to Lasson's observation concerning Madison's version of the Fourth Amendment as introduced into the House:

"The observation may be made that the language of the proposal did not purport to *create* the right to be secure from unreasonable

of judicial *power* to grant Bivens damages is not a problem of the "source" of the "right"; instead, the question is whether the power to authorize damages as a judicial

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search and seizures but merely stated it as a right which already existed."

N. Lasson, History and Development of the Fourth Amendment to the United States Constitution 100 n. 77 (1937), quoted in Brief for Respondents 11 n. 7. And, on the problem of federal equitable vindication of constitutional rights without regard to the presence of a "state-created right," see Hart, The Relations Between State and Federal Law, 54 Col. L. Rev. 489, 523–524 (1954), quoted in Brief for Respondents 17.

On this point, the choice of phraseology in the Fourth Amendment itself is singularly unpersuasive. The leading argument against a "Bill of Rights" was the fear that individual liberties not specified expressly would be taken as excluded. See generally, Lasson, *supra,* at 79–105. This circumstance alone might well explain why the authors of the Bill of Rights would opt for language which presumes the existence of a fundamental interest in liberty, albeit originally derived from the common law. See *Entick* v. *Carrington,* 19 How. St. Tr. 1029, 95 Eng. Rep. 807 (1765).

In truth, the legislative record as a whole behind the Bill of Rights is silent on the rather refined doctrinal question whether the framers considered the rights therein enumerated as dependent in the first instance on the decision of a State to accord legal status to the personal interests at stake. That is understandable since the Government itself points out that general federal-question jurisdiction was not extended to the federal district courts until 1875. Act of March 3, 1875, § 1, 18 Stat. 470. The most that can be drawn from this historical fact is that the authors of the Bill of Rights assumed the adequacy of common-law remedies to vindicate the federally protected interest. One must first combine this assumption with contemporary modes of jurisprudential thought which appeared to link "rights" and "remedies" in a 1:1 correlation, cf. *Marbury* v. *Madison,* 1 Cranch 137, 163 (1803), before reaching the conclusion that the framers are to be understood today as having created no federally protected interests. And, of course, that would simply require the conclusion that federal equitable relief would not lie to protect those interests guarded by the Fourth Amendment.

Professor Hart's observations concerning the "imperceptible steps"

remedy for the vindication of a federal constitutional right is placed by the Constitution itself exclusively in Congress' hands.

II

The contention that the federal courts are powerless to accord a litigant damages for a claimed invasion of his federal constitutional rights until Congress explicitly authorizes the remedy cannot rest on the notion that the decision to grant compensatory relief involves a resolution of policy considerations not susceptible of judicial discernment. Thus, in suits for damages based on violations of federal statutes lacking any express authorization of a damage remedy, this Court has authorized such relief where, in its view, damages are necessary to effectuate the congressional policy underpinning the substantive provisions of the statute. *J. I. Case Co.* v. *Borak*, 377 U. S. 426 (1964); *Tunstall* v. *Brotherhood of Locomotive Firemen & Enginemen*, 323 U. S. 210, 213 (1944). Cf. *Wyandotte Transportation Co.* v. *United States*, 389 U. S. 191, 201–204 (1967).[4]

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between *In re Ayers*, 123 U. S. 443 (1887), and *Ex parte Young*, 209 U. S. 123 (1908), see Hart, *supra*, fail to persuade me that the source of the legal interest asserted here is other than the Federal Constitution itself. *In re Ayers* concerned the precise question whether the Eleventh Amendment barred suit in a federal court for an injunction compelling a state officer to perform a contract to which the State was a party. Having concluded that the suit was inescapably a suit against the State under the Eleventh Amendment, the Court spoke of the presence of state-created rights as a distinguishing factor supporting the exercise of federal jurisdiction in other contract clause cases. The absence of a state-created right in *In re Ayers* served to distinguish that case from the perspective of the State's immunity to suit; *Ayers* simply does not speak to the analytically distinct question whether the Constitution is in the relevant sense a source of legal protection for the "rights" enumerated therein.

[4] The *Borak* case is an especially clear example of the exercise of federal judicial power to accord damages as an appropriate remedy in the absence of any express statutory authorization of a federal

If it is not the nature of the remedy which is thought to render a judgment as to the appropriateness of damages inherently "legislative," then it must be the nature of the legal interest offered as an occasion for invoking otherwise appropriate judicial relief. But I do not think that the fact that the interest is protected by the Constitution rather than statute or common law justifies the assertion that federal courts are powerless to grant damages in the absence of explicit congressional action authorizing the remedy. Initially, I note that it would be at least anomalous to conclude that the federal judiciary—while competent to choose among the range of traditional judicial remedies to implement statutory and common-law policies, and even to generate substantive rules governing primary behavior in furtherance of broadly formulated policies articulated by statute or Constitution, see *Textile Workers* v. *Lincoln Mills,* 353 U. S. 448 (1957); *United States* v. *Standard Oil Co.,* 332 U. S. 301, 304–311 (1947); *Clearfield Trust Co.* v. *United States,* 318 U. S. 363 (1943)—is powerless to accord a damages

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cause of action. There we "implied"—from what can only be characterized as an "exclusively procedural provision" affording access to a federal forum, cf. *Textile Workers* v. *Lincoln Mills,* 353 U. S. 448, 462–463 (1957) (Frankfurter, J., dissenting)—a private cause of action for damages for violation of § 14 (a) of the Securities Exchange Act of 1934, 48 Stat. 895, 15 U. S. C. § 78n (a). See § 27, 48 Stat. 902, 15 U. S. C. § 78aa. We did so in an area where federal regulation has been singularly comprehensive and elaborate administrative enforcement machinery had been provided. The exercise of judicial power involved in *Borak* simply cannot be justified in terms of statutory construction, see Hill, Constitutional Remedies, 69 Col. L. Rev. 1109, 1120–1121 (1969); nor did the *Borak* Court purport to do so. See *Borak, supra,* at 432–434. The notion of "implying" a remedy, therefore, as applied to cases like *Borak,* can only refer to a process whereby the federal judiciary exercises a choice among *traditionally available* judicial remedies according to reasons related to the substantive social policy embodied in an act of positive law. See *ibid.,* and *Bell* v. *Hood, supra,* at 684.

remedy to vindicate social policies which, by virtue of their inclusion in the Constitution, are aimed predominantly at restraining the Government as an instrument of the popular will.

More importantly, the presumed availability of federal equitable relief against threatened invasions of constitutional interests appears entirely to negate the contention that the status of an interest as constitutionally protected divests federal courts of the power to grant damages absent express congressional authorization. Congress provided specially for the exercise of equitable remedial powers by federal courts, see Act of May 8, 1792, § 2, 1 Stat. 276; C. Wright, Law of Federal Courts 257 (2d ed., 1970), in part because of the limited availability of equitable remedies in state courts in the early days of the Republic. See *Guaranty Trust Co.* v. *York*, 326 U. S. 99, 104–105 (1945). And this Court's decisions make clear that, at least absent congressional restrictions, the scope of equitable remedial discretion is to be determined according to the distinctive historical traditions of equity as an institution, *Holmberg* v. *Armbrecht*, 327 U. S. 392, 395–396 (1946); *Sprague* v. *Ticonic National Bank*, 307 U. S. 161, 165–166 (1939). The reach of a federal district court's "inherent equitable powers," *Textile Workers* v. *Lincoln Mills*, 353 U. S. 448, 460 (Burton, J., concurring in result), is broad indeed, *e. g.*, *Swann* v. *Charlotte-Mecklenburg Board of Education*, 401 U. S. 1 (1971); nonetheless, the federal judiciary is not empowered to grant equitable relief in the absence of congressional action extending jurisdiction over the subject matter of the suit. See *Textile Workers* v. *Lincoln Mills*, *supra*, at 460 (Burton, J., concurring in result); Katz, 117 U. Pa. L. Rev., at 43.[5]

[5] With regard to a court's authority to grant an equitable remedy, the line between "subject matter" jurisdiction and remedial powers has undoubtedly been obscured by the fact that historically the

If explicit congressional authorization is an absolute prerequisite to the power of a federal court to accord compensatory relief regardless of the necessity or appropriateness of damages as a remedy simply because of the status of a legal interest as constitutionally protected, then it seems to me that explicit congressional authorization is similarly prerequisite to the exercise of equitable remedial discretion in favor of constitutionally protected interests. Conversely, if a general grant of jurisdiction to the federal courts by Congress is thought adequate to empower a federal court to grant equitable relief for all areas of subject-matter jurisdiction enumerated therein, see 28 U. S. C. § 1331 (a), then it seems to me that the same statute is sufficient to empower a federal court to grant a traditional remedy at law.[6] Of course, the special historical traditions governing the federal equity system, see *Sprague* v. *Ticonic National Bank*, 307 U. S. 161

"system of equity 'derived its doctrines, as well as its powers, from its mode of giving relief.'" See *Guaranty Trust Co.* v. *York*, *supra*, at 105, quoting C. Langdell, Summary of Equity Pleading xxvii (1877). Perhaps this fact alone accounts for the suggestion sometimes made that a court's power to enjoin invasion of constitutionally protected interests derives directly from the Constitution. See *Bell* v. *Hood*, 71 F. Supp. 813, 819 (SD Cal. 1947).

[6] Chief Judge Lumbard's opinion for the Court of Appeals in the instant case is, as I have noted, in accord with this conclusion:

"Thus, even if the Constitution itself does not give rise to an inherent injunctive power to prevent its violation by governmental officials there are strong reasons for inferring the existence of this power under any general grant of jurisdiction to the federal courts by Congress." 409 F. 2d, at 723.

The description of the remedy as "inferred" cannot, of course, be intended to assimilate the judicial decision to accord such a remedy to any process of statutory construction. Rather, as with the cases concerning remedies, implied from statutory schemes, see n. 4, *supra*, the description of the remedy as "inferred" can only bear on the reasons offered to explain a judicial decision to accord or not to accord a particular remedy.

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(1939), might still bear on the comparative appropriateness of granting equitable relief as opposed to money damages. That possibility, however, relates, not to whether the federal courts have the power to afford one type of remedy as opposed to the other, but rather to the criteria which should govern the exercise of our power. To that question, I now pass.

III

The major thrust of the Government's position is that, where Congress has not expressly authorized a particular remedy, a federal court should exercise its power to accord a traditional form of judicial relief at the behest of a litigant, who claims a constitutionally protected interest has been invaded, only where the remedy is "essential," or "indispensable for vindicating constitutional rights." Brief for Respondents 19, 24. While this "essentiality" test is most clearly articulated with respect to damages remedies, apparently the Government believes the same test explains the exercise of equitable remedial powers. *Id.*, at 17–18. It is argued that historically the Court has rarely exercised the power to accord such relief in the absence of an express congressional authorization and that "[i]f Congress had thought that federal officers should be subject to a law different than state law, it would have had no difficulty in saying so, as it did with respect to state officers . . . ." *Id.*, at 20–21; see 42 U. S. C. § 1983. Although conceding that the standard of determining whether a damage remedy should be utilized to effectuate statutory policies is one of "necessity" or "appropriateness," see *J. I. Case Co.* v. *Borak*, 377 U. S. 426, 432 (1964); *United States* v. *Standard Oil Co.*, 332 U. S. 301, 307 (1947), the Government contends that questions concerning congressional discretion to modify judicial remedies relating to constitutionally protected interests warrant a more stringent constraint on

the exercise of judicial power with respect to this class of legally protected interests. Brief for Respondents 21–22.

These arguments for a more stringent test to govern the grant of damages in constitutional cases [7] seem to be adequately answered by the point that the judiciary has a particular responsibility to assure the vindication of constitutional interests such as those embraced by the Fourth Amendment. To be sure, "it must be remembered that legislatures are ultimate guardians of the liberties and welfare of the people in quite as great a degree as the courts." *Missouri, Kansas & Texas R. Co.* v. *May*, 194 U. S. 267, 270 (1904). But it must also be recognized that the Bill of Rights is particularly intended to vindicate the interests of the individual in the face of the popular will as expressed in legislative majorities; at the very least, it strikes me as no more appropriate to await express congressional authorization of traditional judicial relief with regard to these legal interests than with respect to interests protected by federal statutes.

The question then, is, as I see it, whether compensatory relief is "necessary" or "appropriate" to the vindication of the interest asserted. Cf. *J. I. Case Co.* v. *Borak*, *supra*, at 432; *United States* v. *Standard Oil Co.*, *supra*, at 307; Hill, Constitutional Remedies, 69 Col. L. Rev. 1109, 1155 (1969); Katz, 117 U. Pa. L. Rev., at 72. In resolving that question, it seems to me that the range of policy considerations we may take into account is at least as broad as the range of those a legislature would consider with respect to an express statutory authorization of a traditional remedy. In this regard I agree with the Court that the appropriateness of according Bivens

[7] I express no view on the Government's suggestion that congressional authority to simply discard the remedy the Court today authorizes might be in doubt; nor do I understand the Court's opinion today to express any view on that particular question.

compensatory relief does not turn simply on the deterrent effect liability will have on federal official conduct.[8] Damages as a traditional form of compensation for invasion of a legally protected interest may be entirely appropriate even if no substantial deterrent effects on future official lawlessness might be thought to result. Bivens, after all, has invoked judicial processes claiming entitlement to compensation for injuries resulting from allegedly lawless official behavior, if those injuries are properly compensable in money damages. I do not think a court of law—vested with the power to accord a remedy—should deny him his relief simply because he cannot show that future lawless conduct will thereby be deterred.

And I think it is clear that Bivens advances a claim of the sort that, if proved, would be properly compensable in damages. The personal interests protected by the Fourth Amendment are those we attempt to capture by the notion of "privacy"; while the Court today properly points out that the type of harm which officials can inflict when they invade protected zones of an individual's life

[8] And I think it follows from this point that today's decision has little, if indeed any, bearing on the question whether a federal court may properly devise remedies—other than traditionally available forms of judicial relief—for the purpose of enforcing substantive social policies embodied in constitutional or statutory policies. Compare today's decision with *Mapp* v. *Ohio*, 367 U. S. 643 (1961), and *Weeks* v. *United States*, 232 U. S. 383 (1914). The Court today simply recognizes what has long been implicit in our decisions concerning equitable relief and remedies implied from statutory schemes; *i. e.*, that a court of law vested with jurisdiction over the subject matter of a suit has the power—and therefore the duty—to make principled choices among traditional judicial remedies. Whether special prophylactic measures—which at least arguably the exclusionary rule exemplifies, see Hill, The Bill of Rights and the Supervisory Power, 69 Col. L. Rev. 181, 182–185 (1969)—are supportable on grounds other than a court's competence to select among traditional judicial remedies to make good the wrong done, cf. *Bell* v. *Hood*, *supra*, at 684, is a separate question.

are different from the types of harm private citizens inflict on one another, the experience of judges in dealing with private trespass and false imprisonment claims supports the conclusion that courts of law are capable of making the types of judgment concerning causation and magnitude of injury necessary to accord meaningful compensation for invasion of Fourth Amendment rights.[9]

On the other hand, the limitations on state remedies for violation of common-law rights by private citizens argue in favor of a federal damages remedy. The injuries inflicted by officials acting under color of law, while no less compensable in damages than those inflicted by private parties, are substantially different in kind, as the Court's opinion today discusses in detail. See *Monroe* v. *Pape*, 365 U. S. 167, 195 (1961) (HARLAN, J., concurring). It seems to me entirely proper that these injuries be compensable according to uniform rules of federal law, especially in light of the very large element of federal law which must in any event control the scope of official defenses to liability. See *Wheeldin* v. *Wheeler*, 373 U. S. 647, 652 (1963); *Monroe* v. *Pape*, *supra*, at 194–195 (HARLAN, J., concurring); *Howard* v. *Lyons*, 360 U. S. 593 (1959). Certainly, there is very little to be gained from the standpoint of federalism by preserving different rules of liability for federal officers dependent on the State where the injury occurs. Cf. *United States* v. *Standard Oil Co.*, 332 U. S. 301, 305–311 (1947).

Putting aside the desirability of leaving the problem of federal official liability to the vagaries of common-law actions, it is apparent that some form of damages is the only possible remedy for someone in Bivens' alleged

[9] The same, of course, may not be true with respect to other types of constitutionally protected interests, and therefore the appropriateness of money damages may well vary with the nature of the personal interest asserted. See *Monroe* v. *Pape*, 365 U. S. 167, 196 n. 5 (HARLAN, J., concurring).

position. It will be a rare case indeed in which an individual in Bivens' position will be able to obviate the harm by securing injunctive relief from any court. However desirable a direct remedy against the Government might be as a substitute for individual official liability, the sovereign still remains immune to suit. Finally, assuming Bivens' innocence of the crime charged, the "exclusionary rule" is simply irrelevant. For people in Bivens' shoes, it is damages or nothing.

The only substantial policy consideration advanced against recognition of a federal cause of action for violation of Fourth Amendment rights by federal officials is the incremental expenditure of judicial resources that will be necessitated by this class of litigation. There is, however, something ultimately self-defeating about this argument. For if, as the Government contends, damages will rarely be realized by plaintiffs in these cases because of jury hostility, the limited resources of the official concerned, etc., then I am not ready to assume that there will be a significant increase in the expenditure of judicial resources on these claims. Few responsible lawyers and plaintiffs are likely to choose the course of litigation if the statistical chances of success are truly *de minimis*. And I simply cannot agree with my Brother BLACK that the possibility of "frivolous" claims—if defined simply as claims with no legal merit—warrants closing the courthouse doors to people in Bivens' situation. There are other ways, short of that, of coping with frivolous lawsuits.

On the other hand, if—as I believe is the case with respect, at least, to the most flagrant abuses of official power—damages to some degree will be available when the option of litigation is chosen, then the question appears to be how Fourth Amendment interests rank on a scale of social values compared with, for example, the interests of stockholders defrauded by misleading proxies.

See *J. I. Case Co.* v. *Borak, supra.* Judicial resources, I am well aware, are increasingly scarce these days. Nonetheless, when we automatically close the courthouse door solely on this basis, we implicitly express a value judgment on the comparative importance of classes of legally protected interests. And current limitations upon the effective functioning of the courts arising from budgetary inadequacies should not be permitted to stand in the way of the recognition of otherwise sound constitutional principles.

Of course, for a variety of reasons, the remedy may not often be sought. See generally Foote, Tort Remedies for Police Violations of Individual Rights, 39 Minn. L. Rev. 493 (1955). And the countervailing interests in efficient law enforcement of course argue for a protective zone with respect to many types of Fourth Amendment violations. Cf. *Barr* v. *Matteo,* 360 U. S. 564 (1959) (opinion of HARLAN, J.). But, while I express no view on the immunity defense offered in the instant case, I deem it proper to venture the thought that at the very least such a remedy would be available for the most flagrant and patently unjustified sorts of police conduct. Although litigants may not often choose to seek relief, it is important, in a civilized society, that the judicial branch of the Nation's government stand ready to afford a remedy in these circumstances. It goes without saying that I intimate no view on the merits of petitioner's underlying claim.

For these reasons, I concur in the judgment of the Court.

MR. CHIEF JUSTICE BURGER, dissenting.

I dissent from today's holding which judicially creates a damage remedy not provided for by the Constitution and not enacted by Congress. We would more surely preserve the important values of the doctrine of separa-

tion of powers—and perhaps get a better result—by recommending a solution to the Congress as the branch of government in which the Constitution has vested the legislative power. Legislation is the business of the Congress, and it has the facilities and competence for that task—as we do not. Professor Thayer, speaking of the limits on judicial power, albeit in another context, had this to say: [1]

> "And if it be true that the holders of legislative power are careless or evil, yet the constitutional duty of the court remains untouched; it cannot rightly attempt to protect the people, by undertaking a function not its own. On the other hand, by adhering rigidly to its own duty, the court will help, as nothing else can, to fix the spot where responsibility lies, and to bring down on that precise locality the thunderbolt of popular condemnation. . . . For that course—the true course of judicial duty always—will powerfully help to bring the people and their representatives to a sense of their own responsibility."

This case has significance far beyond its facts and its holding. For more than 55 years this Court has enforced a rule under which evidence of undoubted reliability and probative value has been suppressed and excluded from criminal cases whenever it was obtained in violation of the Fourth Amendment. *Weeks* v. *United States,* 232 U. S. 383 (1914); *Boyd* v. *United States,* 116 U. S. 616, 633 (1886) (dictum). This rule was extended to the States in *Mapp* v. *Ohio,* 367 U. S. 643 (1961).[2]

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[1] J. Thayer, O. Holmes, & F. Frankfurter, John Marshall 88 (Phoenix ed. 1967).

[2] The Court reached the issue of applying the *Weeks* doctrine to the States *sua sponte.*

The rule has rested on a theory that suppression of evidence in these circumstances was imperative to deter law enforcement authorities from using improper methods to obtain evidence.

The deterrence theory underlying the suppression doctrine, or exclusionary rule, has a certain appeal in spite of the high price society pays for such a drastic remedy. Notwithstanding its plausibility, many judges and lawyers and some of our most distinguished legal scholars have never quite been able to escape the force of Cardozo's statement of the doctrine's anomalous result:

> "The criminal is to go free because the constable has blundered. . . . A room is searched against the law, and the body of a murdered man is found. . . . The privacy of the home has been infringed, and the murderer goes free." *People* v. *Defore,* 242 N. Y. 13, 21, 23–24, 150 N. E. 585, 587, 588 (1926).[3]

The plurality opinion in *Irvine* v. *California,* 347 U. S. 128, 136 (1954), catalogued the doctrine's defects:

> "Rejection of the evidence does nothing to punish the wrong-doing official, while it may, and likely will, release the wrong-doing defendant. It deprives society of its remedy against one lawbreaker because he has been pursued by another. It protects one against whom incriminating evidence is discovered, but does nothing to protect innocent persons who are the victims of illegal but fruitless searches."

From time to time members of the Court, recognizing the validity of these protests, have articulated varying

[3] What Cardozo suggested as an example of the potentially far-reaching consequences of the suppression doctrine was almost realized in *Killough* v. *United States,* 114 U. S. App. D. C. 305, 315 F. 2d 241 (1962).

alternative justifications for the suppression of important evidence in a criminal trial. Under one of these alternative theories the rule's foundation is shifted to the "sporting contest" thesis that the government must "play the game fairly" and cannot be allowed to profit from its own illegal acts. *Olmstead* v. *United States,* 277 U. S. 438, 469, 471 (1928) (dissenting opinions); see *Terry* v. *Ohio,* 392 U. S. 1, 13 (1968). But the exclusionary rule does not ineluctably flow from a desire to ensure that government plays the "game" according to the rules. If an effective alternative remedy is available, concern for official observance of the law does not require adherence to the exclusionary rule. Nor is it easy to understand how a court can be thought to endorse a violation of the Fourth Amendment by allowing illegally seized evidence to be introduced against a defendant if an effective remedy is provided against the government.

The exclusionary rule has also been justified on the theory that the relationship between the Self-Incrimination Clause of the Fifth Amendment and the Fourth Amendment requires the suppression of evidence seized in violation of the latter. *Boyd* v. *United States, supra,* at 633 (dictum); *Wolf* v. *Colorado,* 338 U. S. 25, 47, 48 (1949) (Rutledge, J., dissenting); *Mapp* v. *Ohio, supra,* at 661–666 (BLACK, J., concurring).

Even ignoring, however, the decisions of this Court that have held that the Fifth Amendment applies only to "testimonial" disclosures, *United States* v. *Wade,* 388 U. S. 218, 221–223 (1967); *Schmerber* v. *California,* 384 U. S. 757, 764 and n. 8 (1966), it seems clear that the Self-Incrimination Clause does not protect a person from the seizure of evidence that is incriminating. It protects a person only from being the conduit by which the police acquire evidence. Mr. Justice Holmes once put it succinctly, "A party is privileged from producing the

evidence but not from its production." *Johnson* v. *United States*, 228 U. S. 457, 458 (1913).

It is clear, however, that neither of these theories undergirds the decided cases in this Court. Rather the exclusionary rule has rested on the deterrent rationale—the hope that law enforcement officials would be deterred from unlawful searches and seizures if the illegally seized, albeit trustworthy, evidence was suppressed often enough and the courts persistently enough deprived them of any benefits they might have gained from their illegal conduct.

This evidentiary rule is unique to American jurisprudence. Although the English and Canadian legal systems are highly regarded, neither has adopted our rule. See Martin, The Exclusionary Rule Under Foreign Law—Canada, 52 J. Crim. L. C. & P. S. 271, 272 (1961); Williams, The Exclusionary Rule Under Foreign Law—England, 52 J. Crim. L. C. & P. S. 272 (1961).

I do not question the need for some remedy to give meaning and teeth to the constitutional guarantees against unlawful conduct by government officials. Without some effective sanction, these protections would constitute little more than rhetoric. Beyond doubt the conduct of some officials requires sanctions as cases like *Irvine* indicate. But the hope that this objective could be accomplished by the exclusion of reliable evidence from criminal trials was hardly more than a wistful dream. Although I would hesitate to abandon it until some meaningful substitute is developed, the history of the suppression doctrine demonstrates that it is both conceptually sterile and practically ineffective in accomplishing its stated objective. This is illustrated by the paradox that an unlawful act against a totally innocent person—such as petitioner claims to be—has been left without an effective remedy, and hence the Court finds

it necessary now—55 years later—to construct a remedy of its own.

Some clear demonstration of the benefits and effectiveness of the exclusionary rule is required to justify it in view of the high price it extracts from society—the release of countless guilty criminals. See Allen, Federalism and the Fourth Amendment: A Requiem for Wolf, 1961 Sup. Ct. Rev. 1, 33 n. 172. But there is no empirical evidence to support the claim that the rule actually deters illegal conduct of law enforcement officials. Oaks, Studying the Exclusionary Rule in Search and Seizure, 37 U. Chi. L. Rev. 665, 667 (1970).

There are several reasons for this failure. The rule does not apply any direct sanction to the individual official whose illegal conduct results in the exclusion of evidence in a criminal trial. With rare exceptions law enforcement agencies do not impose direct sanctions on the individual officer responsible for a particular judicial application of the suppression doctrine. *Id.*, at 710. Thus there is virtually nothing done to bring about a change in his practices. The immediate sanction triggered by the application of the rule is visited upon the prosecutor whose case against a criminal is either weakened or destroyed. The doctrine deprives the police in no real sense; except that apprehending wrongdoers is their business, police have no more stake in successful prosecutions than prosecutors or the public.

The suppression doctrine vaguely assumes that law enforcement is a monolithic governmental enterprise. For example, the dissenters in *Wolf* v. *Colorado, supra,* at 44, argued that:

> "Only by exclusion can we impress upon the zealous *prosecutor* that violation of the Constitution will do him no good. And only when that point is driven home can the *prosecutor* be expected to emphasize

> the importance of observing the constitutional demands in *his instructions to the police.*" (Emphasis added.)

But the prosecutor who loses his case because of police misconduct is not an official in the police department; he can rarely set in motion any corrective action or administrative penalties. Moreover, he does not have control or direction over police procedures or police actions that lead to the exclusion of evidence. It is the rare exception when a prosecutor takes part in arrests, searches, or seizures so that he can guide police action.

Whatever educational effect the rule conceivably might have in theory is greatly diminished in fact by the realities of law enforcement work. Policemen do not have the time, inclination, or training to read and grasp the nuances of the appellate opinions that ultimately define the standards of conduct they are to follow. The issues that these decisions resolve often admit of neither easy nor obvious answers, as sharply divided courts on what is or is not "reasonable" amply demonstrate.[4] Nor can judges, in all candor, forget that opinions sometimes lack helpful clarity.

The presumed educational effect of judicial opinions is also reduced by the long time lapse—often several years—between the original police action and its final judicial evaluation. Given a policeman's pressing responsibilities, it would be surprising if he ever becomes aware of the final result after such a delay. Finally, the exclu-

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[4] For example, in a case arising under *Mapp, supra,* state judges at every level of the state judiciary may find the police conduct proper. On federal habeas corpus a district judge and a court of appeals might agree. Yet, in these circumstances, this Court, reviewing the case as much as 10 years later, might reverse by a narrow margin. In these circumstances it is difficult to conclude that the policeman has violated some rule that he should have known was a restriction on his authority.

sionary rule's deterrent impact is diluted by the fact that there are large areas of police activity that do not result in criminal prosecutions—hence the rule has virtually no applicability and no effect in such situations. Oaks, *supra,* at 720–724.

Today's holding seeks to fill one of the gaps of the suppression doctrine—at the price of impinging on the legislative and policy functions that the Constitution vests in Congress. Nevertheless, the holding serves the useful purpose of exposing the fundamental weaknesses of the suppression doctrine. Suppressing unchallenged truth has set guilty criminals free but demonstrably has neither deterred deliberate violations of the Fourth Amendment nor decreased those errors in judgment that will inevitably occur given the pressures inherent in police work having to do with serious crimes.

Although unfortunately ineffective, the exclusionary rule has increasingly been characterized by a single, monolithic, and drastic judicial response to all official violations of legal norms. Inadvertent errors of judgment that do not work any grave injustice will inevitably occur under the pressure of police work. These honest mistakes have been treated in the same way as deliberate and flagrant *Irvine*-type violations of the Fourth Amendment. For example, in *Miller* v. *United States,* 357 U. S. 301, 309–310 (1958), reliable evidence was suppressed because of a police officer's failure to say a "few more words" during the arrest and search of a known narcotics peddler.

This Court's decision announced today in *Coolidge* v. *New Hampshire, post,* p. 443, dramatically illustrates the extent to which the doctrine represents a mechanically inflexible response to widely varying degrees of police error and the resulting high price that society pays. I dissented in *Coolidge* primarily because I do not believe the Fourth Amendment had been violated. Even on the Court's contrary premise, however, whatever violation

occurred was surely insufficient in nature and extent to justify the drastic result dictated by the suppression doctrine. A fair trial by jury has resolved doubts as to Coolidge's guilt. But now his conviction on retrial is placed in serious question by the remand for a new trial—years after the crime—in which evidence that the New Hampshire courts found relevant and reliable will be withheld from the jury's consideration. It is hardly surprising that such results are viewed with incomprehension by nonlawyers in this country and lawyers, judges, and legal scholars the world over.

Freeing either a tiger or a mouse in a schoolroom is an illegal act, but no rational person would suggest that these two acts should be punished in the same way. From time to time judges have occasion to pass on regulations governing police procedures. I wonder what would be the judicial response to a police order authorizing "shoot to kill" with respect to every fugitive. It is easy to predict our collective wrath and outrage. We, in common with all rational minds, would say that the police response must relate to the gravity and need; that a "shoot" order might conceivably be tolerable to prevent the escape of a convicted killer but surely not for a car thief, a pickpocket or a shoplifter.

I submit that society has at least as much right to expect rationally graded responses from judges in place of the universal "capital punishment" we inflict on all evidence when police error is shown in its acquisition. See ALI, Model Code of Pre-Arraignment Procedure § SS 8.02 (2), p. 23 (Tent. Draft No. 4, 1971), reprinted in the Appendix to this opinion. Yet for over 55 years, and with increasing scope and intensity as today's *Coolidge* holding shows, our legal system has treated vastly dissimilar cases as if they were the same. Our adherence to the exclusionary rule, our resistance to change, and our refusal even to acknowledge the need

for effective enforcement mechanisms bring to mind Holmes' well-known statement:

> "It is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past." Holmes, The Path of the Law, 10 Harv. L. Rev. 457, 469 (1897).

In characterizing the suppression doctrine as an anomalous and ineffective mechanism with which to regulate law enforcement, I intend no reflection on the motivation of those members of this Court who hoped it would be a means of enforcing the Fourth Amendment. Judges cannot be faulted for being offended by arrests, searches, and seizures that violate the Bill of Rights or statutes intended to regulate public officials. But we can and should be faulted for clinging to an unworkable and irrational concept of law. My criticism is that we have taken so long to find better ways to accomplish these desired objectives. And there are better ways.

Instead of continuing to enforce the suppression doctrine inflexibly, rigidly, and mechanically, we should view it as one of the experimental steps in the great tradition of the common law and acknowledge its shortcomings. But in the same spirit we should be prepared to discontinue what the experience of over half a century has shown neither deters errant officers nor affords a remedy to the totally innocent victims of official misconduct.

I do not propose, however, that we abandon the suppression doctrine until some meaningful alternative can be developed. In a sense our legal system has become the captive of its own creation. To overrule *Weeks* and *Mapp,* even assuming the Court was now prepared to

take that step, could raise yet new problems. Obviously the public interest would be poorly served if law enforcement officials were suddenly to gain the impression, however erroneous, that all constitutional restraints on police had somehow been removed—that an open season on "criminals" had been declared. I am concerned lest some such mistaken impression might be fostered by a flat overruling of the suppression doctrine cases. For years we have relied upon it as the exclusive remedy for unlawful official conduct; in a sense we are in a situation akin to the narcotics addict whose dependence on drugs precludes any drastic or immediate withdrawal of the supposed prop, regardless of how futile its continued use may be.

Reasonable and effective substitutes can be formulated if Congress would take the lead, as it did for example in 1946 in the Federal Tort Claims Act. I see no insuperable obstacle to the elimination of the suppression doctrine if Congress would provide some meaningful and effective remedy against unlawful conduct by government officials.

The problems of both error and deliberate misconduct by law enforcement officials call for a workable remedy. Private damage actions against individual police officers concededly have not adequately met this requirement, and it would be fallacious to assume today's work of the Court in creating a remedy will really accomplish its stated objective. There is some validity to the claims that juries will not return verdicts against individual officers except in those unusual cases where the violation has been flagrant or where the error has been complete, as in the arrest of the wrong person or the search of the wrong house. There is surely serious doubt, for example, that a drug peddler caught packaging his wares will be able to arouse much sympathy in a jury on the ground that the police officer did not announce his identity and

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purpose fully or because he failed to utter a "few more words." See *Miller* v. *United States, supra.* Jurors may well refuse to penalize a police officer at the behest of a person they believe to be a "criminal" and probably will not punish an officer for honest errors of judgment. In any event an actual recovery depends on finding non-exempt assets of the police officer from which a judgment can be satisfied.

I conclude, therefore, that an entirely different remedy is necessary but it is one that in my view is as much beyond judicial power as the step the Court takes today. Congress should develop an administrative or quasi-judicial remedy against the government itself to afford compensation and restitution for persons whose Fourth Amendment rights have been violated. The venerable doctrine of *respondeat superior* in our tort law provides an entirely appropriate conceptual basis for this remedy. If, for example, a security guard privately employed by a department store commits an assault or other tort on a customer such as an improper search, the victim has a simple and obvious remedy—an action for money damages against the guard's employer, the department store. W. Prosser, The Law of Torts § 68, pp. 470–480 (3d ed. 1964).[5] Such a statutory scheme would have the added advantage of providing some remedy to the completely innocent persons who are sometimes the victims of illegal police conduct—something that the suppression doctrine, of course, can never accomplish.

A simple structure would suffice.[6] For example, Congress could enact a statute along the following lines:

(a) a waiver of sovereign immunity as to the illegal

[5] Damage verdicts for such acts are often sufficient in size to provide an effective deterrent and stimulate employers to corrective action.

[6] Electronic eavesdropping presents special problems. See 18 U. S. C. §§ 2510–2520 (1964 ed., Supp. V).

acts of law enforcement officials committed in the performance of assigned duties;

(b) the creation of a cause of action for damages sustained by any person aggrieved by conduct of governmental agents in violation of the Fourth Amendment or statutes regulating official conduct;

(c) the creation of a tribunal, quasi-judicial in nature or perhaps patterned after the United States Court of Claims, to adjudicate all claims under the statute;

(d) a provision that this statutory remedy is in lieu of the exclusion of evidence secured for use in criminal cases in violation of the Fourth Amendment; and

(e) a provision directing that no evidence, otherwise admissible, shall be excluded from any criminal proceeding because of violation of the Fourth Amendment.

I doubt that lawyers serving on such a tribunal would be swayed either by undue sympathy for officers or by the prejudice against "criminals" that has sometimes moved lay jurors to deny claims. In addition to awarding damages, the record of the police conduct that is condemned would undoubtedly become a relevant part of an officer's personnel file so that the need for additional training or disciplinary action could be identified or his future usefulness as a public official evaluated. Finally, appellate judicial review could be made available on much the same basis that it is now provided as to district courts and regulatory agencies. This would leave to the courts the ultimate responsibility for determining and articulating standards.

Once the constitutional validity of such a statute is established,[7] it can reasonably be assumed that the States

[7] Any such legislation should emphasize the interdependence between the waiver of sovereign immunity and the elimination of the judicially created exclusionary rule so that if the legislative determination to repudiate the exclusionary rule falls, the entire statutory scheme would fall.

would develop their own remedial systems on the federal model. Indeed there is nothing to prevent a State from enacting a comparable statutory scheme without waiting for the Congress. Steps along these lines would move our system toward more responsible law enforcement on the one hand and away from the irrational and drastic results of the suppression doctrine on the other. Independent of the alternative embraced in this dissenting opinion, I believe the time has come to re-examine the scope of the exclusionary rule and consider at least some narrowing of its thrust so as to eliminate the anomalies it has produced.

In a country that prides itself on innovation, inventive genius, and willingness to experiment, it is a paradox that we should cling for more than a half century to a legal mechanism that was poorly designed and never really worked. I can only hope now that the Congress will manifest a willingness to view realistically the hard evidence of the half-century history of the suppression doctrine revealing thousands of cases in which the criminal was set free because the constable blundered and virtually no evidence that innocent victims of police error—such as petitioner claims to be—have been afforded meaningful redress.

APPENDIX TO OPINION OF BURGER, C. J., DISSENTING

It is interesting to note that studies over a period of years led the American Law Institute to propose the following in its tentative draft of a model pre-arraignment code:

"(2) *Determination.* Unless otherwise required by the Constitution of the United States or of this State, a motion to suppress evidence based upon a

violation of any of the provisions of this code shall be granted *only if the court finds that such violation was substantial.* In determining whether a violation is substantial the court shall consider all the circumstances, including:

"(a) the importance of the particular interest violated;

"(b) the extent of deviation from lawful conduct;

"(c) the extent to which the violation was willful;

"(d) the extent to which privacy was invaded;

"(e) the extent to which exclusion will tend to prevent violations of this Code;

"(f) whether, but for the violation, the things seized would have been discovered; and

"(g) the extent to which the violation prejudiced the moving party's ability to support his motion, or to defend himself in the proceeding in which the things seized are sought to be offered in evidence against him.

"(3) *Fruits of Prior Unlawful Search.* If a search or seizure is carried out in such a manner that things seized in the course of the search would be subject to a motion to suppress under subsection (1), and if as a result of such search or seizure other evidence is discovered subsequently and offered against a defendant, such evidence shall be subject to a motion to suppress unless the prosecution establishes that such evidence would probably have been discovered by law enforcement authorities irrespective of such search or seizure, and the court finds that exclusion of such evidence is not necessary to deter violations of this Code."

ALI, Model Code of Pre-Arraignment Procedure §§ SS 8.02 (2), (3), pp. 23–24 (Tent. Draft No. 4, 1971) (emphasis supplied).

The Reporters' views on the exclusionary rule are also reflected in their comment on the proposed section:

> "The Reporters wish to emphasize that they are not, as a matter of policy, wedded to the exclusionary rule as the sole or best means of enforcing the Fourth Amendment. See Oaks, *Studying the Exclusionary Rule in Search and Seizure*, 37 U. of Chi. L. Rev. 665 (1970). Paragraph (2) embodies what the Reporters hope is a more flexible approach to the problem, subject of course to constitutional requirements." *Id.*, comment, at 26–27.

This is but one of many expressions of disenchantment with the exclusionary rule; see also:

1. Barrett, Exclusion of Evidence Obtained by Illegal Searches—A Comment on People vs. Cahan, 43 Calif. L. Rev. 565 (1955).

2. Burns, *Mapp* v. *Ohio:* An All-American Mistake, 19 DePaul L. Rev. 80 (1969).

3. Friendly, The Bill of Rights as a Code of Criminal Procedure, 53 Calif. L. Rev. 929, 951–954 (1965).

4. F. Inbau, J. Thompson, & C. Sowle, Cases and Comments on Criminal Justice: Criminal Law Administration 1–84 (3d ed. 1968).

5. LaFave, Improving Police Performance Through the Exclusionary Rule (pts. 1 & 2), 30 Mo. L. Rev. 391, 566 (1965).

6. LaFave & Remington, Controlling the Police: The Judge's Role in Making and Reviewing Law Enforcement Decisions, 63 Mich. L. Rev. 987 (1965).

7. N. Morris & G. Hawkins, The Honest Politician's Guide to Crime Control 101 (1970).

8. Oaks, Studying the Exclusionary Rule in Search and Seizure, 37 U. Chi. L. Rev. 665 (1970).

9. Plumb, Illegal Enforcement of the Law, 24 Cornell L. Q. 337 (1939).

10. Schaefer, The Fourteenth Amendment and Sanctity of the Person, 64 Nw. U. L. Rev. 1 (1969).

11. Waite, Judges and the Crime Burden, 54 Mich. L. Rev. 169 (1955).

12. Waite, Evidence—Police Regulation by Rules of Evidence, 42 Mich. L. Rev. 679 (1944).

13. Wigmore, Using Evidence Obtained by Illegal Search and Seizure, 8 A. B. A. J. 479 (1922).

14. 8 J. Wigmore, Evidence § 2184a (McNaughton rev. 1961).

MR. JUSTICE BLACK, dissenting.

In my opinion for the Court in *Bell* v. *Hood*, 327 U. S. 678 (1946), we did as the Court states, reserve the question whether an unreasonable search made by a federal officer in violation of the Fourth Amendment gives the subject of the search a federal cause of action for damages against the officers making the search. There can be no doubt that Congress could create a federal cause of action for damages for an unreasonable search in violation of the Fourth Amendment. Although Congress has created such a federal cause of action against *state* officials acting under color of state law,* it has never created such a cause of action against federal officials. If it wanted to do so, Congress could, of course, create a remedy against

* "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress." Rev. Stat. § 1979, 42 U. S. C. § 1983.

federal officials who violate the Fourth Amendment in the performance of their duties. But the point of this case and the fatal weakness in the Court's judgment is that neither Congress nor the State of New York has enacted legislation creating such a right of action. For us to do so is, in my judgment, an exercise of power that the Constitution does not give us.

Even if we had the legislative power to create a remedy, there are many reasons why we should decline to create a cause of action where none has existed since the formation of our Government. The courts of the United States as well as those of the States are choked with lawsuits. The number of cases on the docket of this Court have reached an unprecedented volume in recent years. A majority of these cases are brought by citizens with substantial complaints—persons who are physically or economically injured by torts or frauds or governmental infringement of their rights; persons who have been unjustly deprived of their liberty or their property; and persons who have not yet received the equal opportunity in education, employment, and pursuit of happiness that was the dream of our forefathers. Unfortunately, there have also been a growing number of frivolous lawsuits, particularly actions for damages against law enforcement officers whose conduct has been judicially sanctioned by state trial and appellate courts and in many instances even by this Court. My fellow Justices on this Court and our brethren throughout the federal judiciary know only too well the time-consuming task of conscientiously poring over hundreds of thousands of pages of factual allegations of misconduct by police, judicial, and corrections officials. Of course, there are instances of legitimate grievances, but legislators might well desire to devote judicial resources to other problems of a more serious nature.

We sit at the top of a judicial system accused by some of nearing the point of collapse. Many criminal defendants do not receive speedy trials and neither society nor the accused are assured of justice when inordinate delays occur. Citizens must wait years to litigate their private civil suits. Substantial changes in correctional and parole systems demand the attention of the lawmakers and the judiciary. If I were a legislator I might well find these and other needs so pressing as to make me believe that the resources of lawyers and judges should be devoted to them rather than to civil damage actions against officers who generally strive to perform within constitutional bounds. There is also a real danger that such suits might deter officials from the *proper* and honest performance of their duties.

All of these considerations make imperative careful study and weighing of the arguments both for and against the creation of such a remedy under the Fourth Amendment. I would have great difficulty for myself in resolving the competing policies, goals, and priorities in the use of resources, if I thought it were my job to resolve those questions. But that is not my task. The task of evaluating the pros and cons of creating judicial remedies for particular wrongs is a matter for Congress and the legislatures of the States. Congress has not provided that any federal court can entertain a suit against a federal officer for violations of Fourth Amendment rights occurring in the performance of his duties. A strong inference can be drawn from creation of such actions against state officials that Congress does not desire to permit such suits against federal officials. Should the time come when Congress desires such lawsuits, it has before it a model of valid legislation, 42 U. S. C. § 1983, to create a damage remedy against federal officers. Cases could be cited to support the legal proposition which

I assert, but it seems to me to be a matter of common understanding that the business of the judiciary is to interpret the laws and not to make them.

I dissent.

MR. JUSTICE BLACKMUN, dissenting.

I, too, dissent. I do so largely for the reasons expressed in Chief Judge Lumbard's thoughtful and scholarly opinion for the Court of Appeals. But I also feel that the judicial legislation, which the Court by its opinion today concededly is effectuating, opens the door for another avalanche of new federal cases. Whenever a suspect imagines, or chooses to assert, that a Fourth Amendment right has been violated, he will now immediately sue the federal officer in federal court. This will tend to stultify proper law enforcement and to make the day's labor for the honest and conscientious officer even more onerous and more critical. Why the Court moves in this direction at this time of our history, I do not know. The Fourth Amendment was adopted in 1791, and in all the intervening years neither the Congress nor the Court has seen fit to take this step. I had thought that for the truly aggrieved person other quite adequate remedies have always been available. If not, it is the Congress and not this Court that should act.

Webster BIVENS, Plaintiff-Appellant,

v.

SIX UNKNOWN NAMED AGENTS OF the FEDERAL BUREAU OF NARCOTICS, Defendants-Appellees.

No. 422, Docket 32537.

United States Court of Appeals,
Second Circuit.

Argued Dec. 3, 1971.

Decided March 8, 1972.

Damage action based on unconstitutional search and seizure of petitioner's premises by defendant federal narcotics agents. The United States District Court for the Eastern District of New York, 276 F.Supp. 12, dismissed action. The Court of Appeals, 409 F.2d 718, affirmed, and certiorari was granted. The Supreme Court, 403 U.S. 388, 91 S. Ct. 1999, 29 L.Ed.2d 619, reversed and remanded. On remand, the Court of Appeals, Medina, Circuit Judge, held that agents of the Federal Bureau of Narcotics and other federal police officers such as agents of the FBI performing similar functions, while in the act of pursuing

alleged violators of the narcotics laws or other criminal statutes, have no immunity to protect them from damage suits charging violations of constitutional rights; however, it is a valid defense to such charges to allege and prove that the federal agent or other federal police officer acted in the matter complained of in good faith and with a reasonable belief in the validity of the arrest and search and in the necessity for carrying out the arrest and search in the way the arrest was made and the search conducted. In addition, the Court held that complaint stated cause of action.

Reversed and remanded.

Lumbard, Circuit Judge, concurred in result and filed opinion.

1. False Imprisonment ⇐11, 15(1)
Searches and Seizures ⇐8
United States ⇐50

Agents of the Federal Bureau of Narcotics and other federal police officers such as agents of the FBI performing similar functions, while in the act of pursuing alleged violators of the narcotics laws or other criminal statutes, have no immunity to protect them from damage suits charging violations of constitutional rights; however, it is a valid defense to such charges to allege and prove that the federal agent or other federal police officer acted in the matter complained of in good faith and with a reasonable belief in the validity of the arrest and search and in the necessity for carrying out the arrest and search in the way the arrest was made and the search conducted. U.S.C.A.Const. Amend. 4.

2. Judges ⇐36
United States ⇐50

Federal judges and officers of the executive branch enjoy absolute immunity from law suits. U.S.C.A.Const. art. 1, § 6.

3. Searches and Seizures ⇐8

In determining whether complaint stated cause of action against federal bureau of narcotics agents for damages caused by violation of Fourth Amendment guarantee against unreasonable searches and seizures, court was required to resolve, from face of allegations, whether there was showing that agents had been acting within the outer perimeter of their line of duty and, if so, whether the agents, who were not alleged to have acted in malice, were performing the type of discretionary function that entitled them to immunity from suit. U.S.C.A.Const. Amend. 4.

4. United States ⇐50

Despite allegations of illegality because of lack of a warrant and probable cause and use of unnecessary force, federal bureau of narcotics agents from whom arrestee sought damages because of violation of his constitutional rights, were doing precisely what narcotics agents are supposed to do, namely, make arrests in narcotics cases; thus, agents were acting "within outer perimeter of their line of duty" for purpose of determining immunity from suit. U.S.C.A. Const. Amend. 4.

5. United States ⇐50

In order for a federal officer to have been acting within the outer perimeter of his line of duty for purpose of determining whether officer is immune from damage suits charging a violation of constitutional rights, officer must have been acting in his role as a government officer. U.S.C.A.Const. Amend. 4.

6. Civil Rights ⇐13.8(1)

Civil Rights Act does not apply to federal officers. 42 U.S.C.A. § 1983.

7. United States ⇐50

Federal bureau of narcotics agents, who allegedly had no cause to enter plaintiff's apartment and arrest him for narcotics violation and who manacled plaintiff in front of his wife and children and threatened to arrest entire family and who allegedly caused plaintiff great humiliation, embarrassment and mental suffering and from whom plaintiff sought monetary damages for violation of his constitutional rights against unreasonable searches and seizures, were not immune from suit; al-

though arrest was within outer perimeter of agents' line of duty, agents were not performing a discretionary function. U.S.C.A.Const. Amend. 4.

8. Searches and Seizures ⊂=8

Proof by federal bureau of narcotics agents of good faith and reasonable belief in validity of warrantless arrest and search and in necessity for carrying out arrest and search in way the arrest was made and search was conducted would constitute a defense to suit seeking to recover damages from agents for alleged violation of arrestee's constitutional guarantee against unreasonable searches and seizures, in that agents lacked probable cause; agents were not required to allege and prove probable cause in the constitutional sense, however. U.S.C.A.Const. Amend. 4.

Stephen A. Grant, New York City, for plaintiff-appellant.

Walter H. Fleischer, Dept. of Justice, Washington, D. C. (L. Patrick Gray, III, Asst. Atty. Gen., Thomas J. Press, Dept. of Justice, Washington, D. C., and Robert A. Morse, U. S. Atty., for the E. D. N. Y., Brooklyn, N. Y. on the brief), for defendants-appellees.

Before MEDINA, LUMBARD and WATERMAN, Circuit Judges.

MEDINA, Circuit Judge:

The decision of the Supreme Court (403 U.S. 388, 91 S.Ct. 1999, 29 L.Ed.2d 619 (1971)) establishes for the first time since the founding of the Republic the federal common law right of an aggrieved person to sue for damages caused by a violation of the Fourth Amendment guarantee against unreasonable searches and seizures. Obeying the mandate of the remand we must now decide the important and highly controversial question whether the acts of these Federal Bureau of Narcotics Agents are clothed with immunity, and, if not, to formulate the standard which judges and juries are to apply in deciding the issue of the liability of such officers to pay damages to an allegedly wronged plaintiff.

The decisional background against which we must answer these questions is extensive, conflicting and complex. We must take into consideration: (1) the theoretical basis for immunity of federal officials generally; (2) the impact of the Civil Rights Act, Section 1983, 42 U.S.C. Section 1983 (1970), which does not apply to federal but only to state officers, and the desirability of formulating a federal rule that applies on the same terms to both state and federal police officers; and (3) the rule of liability of a police officer at common law.

[1] We have concluded and now decide and hold that it is a principle of federal law that Agents of the Federal Bureau of Narcotics, and other federal police officers such as Agents of the FBI performing similar functions, while in the act of pursuing alleged violators of the narcotics laws or other criminal statutes, have no immunity to protect them from damage suits charging violations of constitutional rights. We further hold, however, that it is a valid defense to such charges to allege and prove that the federal agent or other federal police officer acted in the matter complained of in good faith and with a reasonable belief in the validity of the arrest and search and in the necessity for carrying out the arrest and search in the way the arrest was made and the search was conducted.

The following is Mr. Justice Brennan's summary of the case, 403 U.S. at 389-390, 91 S.Ct. at 2001:

> This case has its origin in an arrest and search carried out on the morning of November 26, 1965. Petitioner's complaint alleged that on that day respondents, agents of the Federal Bureau of Narcotics acting under claim of federal authority, entered his apartment and arrested him for alleged narcotics violations. The agents manacled petitioner in front of his wife and children, and threatened to arrest the entire family. They

searched the apartment from stem to stern. Thereafter, petitioner was taken to the federal courthouse in Brooklyn, where he was interrogated, booked, and subjected to a visual strip search.

On July 7, 1967, petitioner brought suit in Federal District Court. In addition to the allegations above, his complaint asserted that the arrest and search were effected without a warrant, and that unreasonable force was employed in making the arrest; fairly read, it alleges as well that the arrest was made without probable cause. Petitioner claimed to have suffered great humiliation, embarrassment, and mental suffering as a result of the agents' unlawful conduct, and sought $15,000 damages from each of them. The District Court dismissed the complaint, holding that: (1) there is no right of action under the Fourth Amendment; and (2) even if there is such a right of action, defendants, being federal agents, are immune from suit. 276 F.Supp. 12 (E.D.N.Y.1967). We affirmed on the basis of the first ground and, therefore, did not pass on the immunity question. 409 F.2d 718 (2d Cir. 1969). The Supreme Court reversed, holding that a valid claim for relief had been stated, and remanded the case to us for a determination of the immunity question. 403 U.S. 388, 91 S.Ct. 1999, 29 L.Ed.2d 619 (1971).

I

Immunity

[2] It has long been the rule in this country that certain officers of the federal government, acting in their official capacities, are absolutely immune from lawsuits. Thus, Bradley v. Fisher, 80 U.S. 335, 13 Wall. 335, 20 L.Ed. 646 (1871), held that judges enjoy an absolute immunity. This protection was extended to officers of the executive branch[1] in Spalding v. Vilas, 161 U.S. 483, 16 S.Ct. 631, 40 L.Ed. 780 (1896).

The classic modern case on the subject is Gregoire v. Biddle, 177 F.2d 579 (2d Cir. 1949), cert. denied, 339 U.S. 949, 70 S.Ct. 803, 94 L.Ed. 1363 (1950), where Judge Learned Hand held that two successive Attorneys General of the United States, two successive Directors of the Enemy Alien Control Unit of the Department of Justice, and the District Director of Immigration at Ellis Island had immunity from civil suits brought against them for acts done in their official capacities. Noting that it was intolerable not to compensate wrongs done by public officials, Judge Hand nevertheless found that this consideration was outweighed by the public interest in having government officials perform their duties fearlessly. Few public officials, Judge Hand reasoned, would perform their functions vigorously if they knew they might have to bear the burden of standing trial and defending their actions. This immunity was absolute, moreover, and was upheld even if malice was alleged.

In Barr v. Matteo, 360 U.S. 564, 79 S.Ct. 1335, 3 L.Ed.2d 1434 (1959) the Supreme Court adopted the reasoning of Judge Hand and held that the Acting Director of the Office of Rent Stabilization could not be sued for issuing an allegedly libelous press release. The plurality opinion, written by Mr. Justice Harlan,[2] first focused on the nature of the defendant. Stating that one must look to the duties performed by the officer, not to his title or place in the hierarchy, Mr. Justice Harlan held that an official is immune if he performs "discretionary acts at those levels of govern-

1. Legislative immunity was provided for in Art. I, § 6 of the Constitution.

2. Significantly, perhaps, Mr. Justice Harlan said in his concurring opinion in *Bivens*:

> But, while I express no view on the immunity defense offered in the instant case, I deem it proper to venture the thought that at the very least such a remedy would be available for the most flagrant and patently unjustified sorts of police conduct. 403 U.S. at 411, 91 S.Ct. at 2012.

ment where the concept of duty encompasses the sound exercise of discretionary authority." 360 U.S. at 575, 79 S. Ct. at 1341. Once an official is found to be exercising this kind of discretion, the act complained of must be "within the outer perimeter of [the official's] line of duty" before the official will be granted immunity. 360 U.S. at 575, 79 S.Ct. at 1341. Other cases dealing with this subject have proceeded on one or both of these grounds.

[3] Thus we have two issues to resolve, both on the face of the allegations of the complaint: (1) taking these allegations to be true, as we must, is there a showing that the Narcotics Agents were acting "within the outer perimeter of [their] line of duty"; and, if so, (2) were they alleged to be performing the type of "discretionary" function that entitles them to immunity from suit. There is no allegation of malice in this complaint.

[4] We hold that what these Narcotics Agents are charged with, despite the allegations of illegality because of lack of a warrant and probable cause, and the use of unnecessary force, is precisely what Narcotics Agents are supposed to do, namely, make arrests in narcotics cases. So we hold they were alleged to be acting "within the outer perimeter of [their] line of duty." But we reject the claim of immunity because we do not agree that the Agents were alleged to be engaged in the performance of the sort of "discretionary" acts that require the protection of immunity. In the latter part of this opinion we discuss and support the defense of good faith and reasonable belief that the arrest and search were lawful and reasonable.

A

Scope of Authority

In Spalding v. Vilas, *supra*, 161 U.S. 483, 498, 16 S.Ct. 631, 637 (1896) the Supreme Court said that an official is within the scope of his authority if his "action[s] [have] more or less connection with the general matters committed by law to his control or supervision." Judge Hand, in Gregoire v. Biddle, *supra*, 177 F.2d 579, 581 (2d Cir. 1949), cert. denied, 339 U.S. 949, 70 S.Ct. 803, 94 L.Ed. 1363 (1950), phrased it this way:

> What is meant by saying that the officer must be acting within his power cannot be more than that the occasion must be such as would have justified the act, if he had been using his power for any of the purposes on whose account it was vested in him.

In Bradley v. Fisher, *supra*, 80 U.S. 335, 351, 13 Wall. 335, 351 (1871), the Court defined the scope of a judge's immunity by noting that "[a] distinction must be here observed between excess of jurisdiction and the clear absence of all jurisdiction over the subject-matter."

Finally, in Barr v. Matteo, *supra*, 360 U.S. 564, 575, 79 S.Ct. 1335, 1341 (1959), the Court said an act is within the scope of an official's authority if such act is "within the outer perimeter of [his] line of duty." [3]

It is not surprising that subsequent courts have had trouble grappling with this concept. Depending on whether the court takes a broad view or a narrow one concerning scope of authority, the same act by the same kind of official may be characterized as within the scope of his authority by one court, and without the scope of his authority by another.

In Hughes v. Johnson, 305 F.2d 67 (9th Cir. 1962), a federal game warden, accused of conducting a search without a warrant and unsupported by an arrest, was denied immunity because such acts are beyond the scope of his official duties. Similarly, in Kelley v. Dunne, 344 F.2d 129 (1st Cir. 1965), a Postal Inspector was held liable for entering a

3. Interestingly, Mr. Justice Stewart dissented because he did not believe that the issuing of a libelous press release was "'action in the line of duty.'" 360 U.S. at 592, 79 S.Ct. at 1347.

house without a warrant, restraining plaintiff's wife, and taking certain property, because such acts were deemed to be beyond the scope of his authority. Kozlowski v. Ferrara, 117 F.Supp. 650 (S.D.N.Y.1954), held that an FBI agent was liable for false arrest and malicious prosecution because such acts exceeded his authority, and because it was held that the immunity doctrine only applies to higher officials.

Using similar reasoning, other courts have come to opposite results. Norton v. McShane, 332 F.2d 855 (5th Cir. 1964), involved an action against several federal officers, including a U.S. Marshal, for unlawful arrest and detention without probable cause. Holding that all of the defendants were immune, the court said:

> [W]e must assume that to the extent the defendants allegedly acted overzealously or maliciously, they were nevertheless acting within the outer perimeter of their line of duty, and the alleged acts had more or less connection with the general matters committed by law to their control and supervision. 332 F.2d at 861–862.

The dissenting judge believed that the acts complained of could not be within the defendants' scope of authority.[4]

Cooper v. O'Connor, 69 App.D.C. 100, 99 F.2d 135, cert. denied, 305 U.S. 643, 59 S.Ct. 146, 83 L.Ed. 414 (1938), involved an action against several federal officials, including a Special Agent of the FBI, for malicious prosecution. All defendants were held to be immune from suit because they were acting within the scope of their authority. Scope of authority was said to mean actions having more or less connection with the general matters committed by law to the control or supervision of the officer.[5] This definition and reasoning have been followed by other courts. See Swanson v. Willis, 114 F.Supp. 434 (D.Alaska 1953), aff'd, 220 F.2d 440 (9th Cir. 1955) (U.S. Marshal accused of false arrest and battery); Hartline v. Clary, 141 F.Supp. 151 (E.D.S.C.1956) (Internal Revenue Agents accused of false arrest and assault); Bershad v. Wood, 290 F.2d 714 (9th Cir. 1961) (Internal Revenue Agents accused of wrongfully levying on plaintiff's bank account); Scherer v. Brennan, 379 F.2d 609 (7th Cir.), cert. denied, 389 U.S. 1021, 88 S.Ct. 592, 19 L.Ed.2d 666 (1967) (Treasury Agents, assigned to protect the President, accused of trespass and unlawful interference with plaintiff's right to have access to and to occupy his place of residence).

Easy solutions of complex legal problems are not only inadequate but they are likely to impinge upon fundamental principles, and this would inevitably fog up the consideration later of other as yet undecided questions of the applicability of the immunity doctrine to a variety of other federal officials. If we were to hold in this case that the mere allegation of lack of probable cause for the search and for the arrest was sufficient, as a matter of pleading, to charge the defendants with acting beyond "the outer perimeter of [their] line of duty," we would completely subvert Judge Hand's statement in Gregoire v. Biddle, *supra*, 177 F.2d 579, 581 (2d Cir. 1949), cert. denied, 339 U.S. 949, 70 S.Ct. 803, 94 L.Ed. 1363 (1950), that the policy behind the immunity doctrine is to protect an official who "may later find himself hard put to it to satisfy a jury of his good faith." Such a holding would throw all cases of this description into the trial courts, without any consideration of the much more vital question of whether the official duty in the performance of which the defendant was engaged was or was not deemed to be worthy of the protection of immunity.

4. There is doubt as to the continuing vitality of the case in the Fifth Circuit. See Anderson v. Nosser, 438 F.2d 183, 205 (5th Cir. 1971) (Bell, J., concurring specially), rehearing en banc granted, 438 F.2d 205.

5. This is the way the Supreme Court defined the term in Spalding v. Vilas, *supra*, 161 U.S. 483, 498, 16 S.Ct. 631 (1896).

The critical question of the character of the official duties of the defendants would be eliminated from the cases. We cannot agree that such a holding would be a proper interpretation of the Supreme Court holdings and *Gregoire*, that we have discussed, or that it would be wise policy as a matter of good jurisprudence. It is better, we think, to come to grips with every phase of the problem, as a matter of legal reasoning, rather than to rely upon an unsupported *ipse dixit* as many courts seem to have done.

Thus we return to the old case of Spalding v. Vilas, *supra*, 161 U.S. 483, 498, 16 S.Ct. 631, 637 (1896), where the Supreme Court said:

> [W]e recognize a distinction between action taken by the head of a Department in reference to matters which are manifestly or palpably beyond his authority, and action having more or less connection with the general matters committed by law to his control or supervision.

[5] Clearly, in the present case, the allegations in the complaint could not support a finding that the officers acted "manifestly or palpably beyond [their] authority." We believe that what is meant by the phrase "within the outer perimeter of [an officer's] line of duty" is that the officer must have been acting in his role as a government officer. Here, the duties of these defendants include making arrests in cases involving narcotics. They were doing just that. We hold that this is sufficient to satisfy the requirement that they be acting within "the outer perimeter of [their] line of duty."

B

Discretionary Functions

Once it has been established that the officers were acting within the scope of their authority, in order to be immune they must show that they perform "discretionary acts at those levels of government where the concept of duty encompasses the sound exercise of discretionary authority." Barr v. Matteo, *supra*, 360 U.S. 564, 575, 79 S.Ct. 1335, 1341 (1959).

In trying to apply this test to facts similar to those in the present case, some courts have simply said that the immunity doctrine only applies to high officials, not to officials performing police functions. See *e. g.*, Kozlowski v. Ferrara, *supra*, 117 F.Supp. 650 (S.D. N.Y.1954). This solution is, however, unsatisfactory. As Mr. Justice Harlan pointed out in *Barr*:

> The privilege is not a badge or emolument of exalted office, but an expression of a policy designed to aid in the effective functioning of government. The complexities and magnitude of governmental activitity have become so great that there must of necessity be a delegation and redelegation of authority as to many functions, and we cannot say that these functions become less important simply because they are exercised by officers of lower rank in the executive hierarchy.
>
> * * * It is not the title of his office but the duties with which the particular officer sought to be made to respond in damages is entrusted—the relation of the act complained of to "matters committed by law to his control or supervision," * * * which must provide the guide in delineating the scope of the rule which clothes the official acts of the executive officer with immunity from civil defamation suits. 360 U.S. at 572–574, 79 S.Ct. at 1340–1341.

The question to which we must address ourselves now is, therefore, do the defendants in this case perform duties that may be termed discretionary?

In deciding this question, however, words such as "discretion" are not particularly helpful. As we said in Ove Gustavsson Contracting Co. v. Floete, 299 F.2d 655, 659 (2d Cir. 1962), cert.

denied, 374 U.S. 827, 83 S.Ct. 1862, 10 L.Ed.2d 1050 (1963):

> There is no litmus paper test to distinguish acts of discretion, * * * and to require a finding of "discretion" would merely postpone, for one step in the process of reasoning, the determination of the real question—is the act complained of the result of a judgment or decision which it is necessary that the Government official be free to make without fear or threat of vexatious or fictitious suits and alleged personal liability?

Thus, the real question to be asked is whether or not federal officers performing police duties warrant the protection of the immunity defense. We hold that they do not.

This policy decision has been expressed by courts in terms of "discretion"—making an arrest is not deemed to be a discretionary function. See *e. g.*, Carter v. Carlson, 144 U.S.App.D.C. 388, 447 F.2d 358 (1971), cert. granted sub nom. District of Columbia v. Carter, 404 U.S. 1014, 92 S.Ct. 683, 30 L.Ed. 2d 661 (Jan. 10, 1972); Sherbutte v. Marine City, 374 Mich. 48, 130 N.W.2d 920 (1964); Jaffe, Suits Against Governments and Officers: Damage Actions, 77 Harv.L.Rev. 209, 218–19 (1963). "The tendency to hold a public official accountable appears to increase as the discretionary scope of his duties decrease. Hence, police officials, whose job is to enforce the law, are not given immunity." Note, Immunity of Prosecuting Officials From Suit for Alleged Deprivation of Civil Rights, 40 Temp.L. Q. 244, 250 (1967). Mr. Justice Harlan used similar reasoning in *Barr*, where he said that "the broader the range of responsibilities and duties, * * * the wider the scope of discretion * * *." 360 U.S. at 573, 79 S.Ct. at 1340. Whereas it is true that a police officer must exercise some discretion in making an arrest, the fiction that this act is not discretionary is maintained because of the belief that the benefit to society derived from the protection of personal liberties outweighs the detriment of perhaps deterring vigorous police action. See Developments in the Law—Remedies Against the United States and its Officials, 70 Harv.L.Rev. 827, 835 (1957). Consequently, "[t]he common law has never granted police officers an absolute and unqualified immunity * * *." Pierson v. Ray, 386 U.S. 547, 555, 87 S.Ct. 1213, 1218, 18 L. Ed.2d 288 (1967). See also K. Davis, Administrative Law Treatise § 26.03 at 874–5 (Supp.1970).

The policy underlying this common law rule is equally applicable to federal police officers. We believe the long line of cases culminating in Weeks v. United States, 232 U.S. 383, 34 S.Ct. 341, 58 L. Ed. 652 (1914), and Mapp v. Ohio, 367 U.S. 643, 81 S.Ct. 1684, 6 L.Ed.2d 1081 (1961), indicates a woeful laxity on the part of some police officers, state and federal, in complying with constitutional standards, and this laxity would only be encouraged by a grant of immunity. We do not agree with the reasoning of cases that support a contrary conclusion. It would be a sorry state of affairs if an officer had the "discretion" to enter a dwelling at 6:30 A.M., without a warrant or probable cause, and make an arrest by employing unreasonable force.

[6] There is another reason for not granting immunity here. In suits brought under the Civil Rights Act, Section 1983, 42 U.S.C. Section 1983 (1970), police officers enjoy no immunity. Pierson v. Ray, *supra*, 386 U.S. 547, 87 S.Ct. 1213 (1967). The Civil Rights Act does not, however, apply to federal officers. Norton v. McShane, *supra*, 332 F.2d 855 (5th Cir. 1964).

In its decision in this case, the Supreme Court recognized a right of action against federal officers that is roughly analogous to the right of action against state officers that was provided when Congress enacted the Civil Rights Act. It would, we think, be incongruous and confusing, to say the least, if we should rule that under one phase of federal law a police officer had immunity and that

under another phase of federal law he had no immunity. This incongruity has been commented upon by Judge Gibbons in the Third Circuit, when considering "the liability of State prosecutors under the Civil Rights Act and the liability of federal prosecutors under the federal common law created by the *Bivens* decision." Judge Gibbons said he perceived "no reason for such a distinction." Bethea v. Reid, 445 F.2d 1163, 1166 (3d Cir. 1971), cert. denied, 404 U.S. 1061, 92 S.Ct. 747, 30 L.Ed.2d 749 (Jan. 24, 1972).

The absurdity we refer to is highlighted by the interesting situation that arose in Carter v. Carlson, *supra*, 144 U.S.App.D.C. 388, 447 F.2d 358 (1971), cert. granted sub nom. District of Columbia v. Carter, 404 U.S. 1014, 92 S.Ct. 683, 30 L.Ed. 661 (Jan. 10, 1972), which involved the immunity *vel non* of District of Columbia police officers in a Section 1983 suit. Whereas federal officials do not come under Section 1983, District of Columbia officials do. Fortunately, the incongruity of conflicting rulings was avoided when the District of Columbia Circuit ruled that there was no immunity. As Judge Nichols commented in his concurring opinion (447 F.2d at 371, 144 U.S.App.D.C. at 401):

> I do not think that a Federal officer not subject to § 1983 by its terms, and sued in tort at common law, should be held to enjoy an immunity denied his state or territorial brother similarly situated.

This same anomaly is noted in Judge Bell's concurrence in Anderson v. Nosser, *supra*, 438 F.2d 183, 205 (5th Cir. 1971), rehearing en banc granted, 438 F.2d 205.

[7] Accordingly, we hold that the Agents in this case are not immune from damage suits based upon allegations of violations of constitutional rights.

II

It is a Defense to Allege and Prove Good Faith and Reasonable Belief that the Arrest and Search Were Lawful and Reasonable

Having ruled against immunity, we must not be unmindful of the fact that these FBI and Narcotics Agents, whose lives are in constant danger (see concurring opinion in United States v. Steward, 451 F.2d 1203, 1208 (2d Cir. 1971)) perform functions indispensable to the preservation of our American way of life. They must not be left defenseless against the demands of every person who manages to escape from the toils of the criminal law. We must, however, balance this consideration against the right of citizens to be free from unlawful arrests and searches, and arrests and searches carried out in an unreasonable manner.

At common law the police officer always had available to him the defense of good faith and probable cause, and this has been consistently read as meaning good faith and "reasonable belief" in the validity of the arrest or search. Restatement (Second) of Torts § 121(b) (1965); 1 Harper & James, The Law of Torts § 3.18 at 277 (1956). Similarly, the use of force is not privileged if in excess of that which the actor "reasonably believes to be necessary." Restatement (Second) of Torts § 132 (1965).

It is of special interest in this case that the authority of agents of the Federal Bureau of Narcotics is spelled out by statute. According to 26 U.S.C. Section 7607, agents of the Federal Bureau of Narcotics may:

> (2) make arrests without warrant for violations of any law of the United States relating to narcotic drugs * * * or marihuana * * * where the violation is committed in the presence of the person making the arrest or where such person has reasonable grounds to believe that the person to be arrested has committed or is committing such violation.

We believe this to be the same defense held applicable to cases arising under Section 1983. Pierson v. Ray, *supra*, 386 U.S. 547, 87 S.Ct. 1213 (1967).

The numerous dissents, concurrences and reversals, especially in the last decade, indicate that even learned and experienced jurists have had difficulty in defining the rules that govern a determination of probable cause, with or without a warrant. See e. g., Vale v. Louisiana, 399 U.S. 30, 90 S.Ct. 1969, 26 L.Ed.2d 409 (1970); Chimel v. California, 395 U.S. 752, 89 S.Ct. 2034, 23 L.Ed.2d 685 (1969); Sibron v. New York, 392 U.S. 40, 88 S.Ct. 1889, 20 L.Ed.2d 917 (1968); Bumper v. North Carolina, 391 U.S. 543, 88 S.Ct. 1788, 20 L.Ed.2d 797 (1968); Wong Sun v. United States, 371 U.S. 471, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963). As he tries to find his way in this thicket, the police officer must not be held to act at his peril.

[8] Therefore, to prevail the police officer need not allege and prove probable cause in the constitutional sense. The standard governing police conduct is composed of two elements, the first is subjective and the second is objective. Thus the officer must allege and prove not only that he believed, in good faith, that his conduct was lawful, but also that his belief was reasonable. And so we hold that it is a defense to allege and prove good faith and reasonable belief in the validity of the arrest and search and in the necessity for carrying out the arrest and search in the way the arrest was made and the search was conducted. We think, as a matter of constitutional law and as a matter of common sense, a law enforcement officer is entitled to this protection.

III

No Remand for Further Fact Finding

Having been satisfied with the present record when the case came before Judge Bruchhausen in the District Court, also when it was before us on the prior appeal and before the Supreme Court, the Government now seems to think we should remand the case for some vague form of fact finding. We disagree. Any such unorthodox procedure would introduce a new and quite unnecessary form of pretrial and it could not fail to becloud the issues. What we now do is pass upon the sufficiency of the complaint. We find it states a claim for relief and the judgment dismissing the complaint is reversed and the case is remanded to the District Court for further proceedings not inconsistent with this opinion.

We are grateful to Stephen A. Grant, Esq., who, as assigned counsel, has admirably and with great professional skill represented appellant both in the Supreme Court and in this Court.

LUMBARD, Circuit Judge (concurring):

I concur in the result, but wish to set out my understanding of what the court does today.

In future cases of this sort the issue of scope of authority will not be relevant inasmuch as we now hold that federal law enforcement agents are not immune even if acting within their powers. The trial judge will pass on the sufficiency of the complaint just as he would in a section 1983 action against a state police officer. If the complaint states a cause of action and the plaintiff adduces substantiating proof, the defendant will have to disprove the allegation that he acted without probable cause, or show that, in any event, he acted in good faith and with a reasonable belief in the validity of the arrest and search.

Ordinarily when a suit of this type is brought a court will already have determined that there was no probable cause for the arrest and search complained of. Nevertheless the agent has a complete defense if he can convince the trier of the fact that he acted in good faith and that it was reasonable for him to have believed that the arrest and search were lawful. Thus there are two standards to be considered. The first is what constitutes reasonableness for purposes of defining probable cause under the fourth amendment for the protection of citizens against governmental overreaching. The other standard is the less stringent

reasonable man standard of the tort action against government agents. This second and lesser standard is appropriate because, in many cases, federal officers cannot be expected to predict what federal judges frequently have considerable difficulty in deciding and about which they frequently differ among themselves. It would be contrary to the public interest if federal officers were held to a probable cause standard as in many cases they would fail to act for fear of guessing wrong. Consequently the law ought to, and does, protect government agents if they act in good faith and with a reasonable belief in the validity of the arrest and search.

Norman BIRNBAUM, Plaintiff,
v.
UNITED [illegible] of America et al., [illegible]s.

B. Leonard AVERY, Plaintiff,
v.
UNITED STATES of America et al., Defendants.

Mary Rule MacMILLEN, Plaintiff,
v.
UNITED STATES of America, Defendant.

Civ. A. Nos. 76-1837, 77-C-234, 77-C-597.

United States District Court, E. D. New York.

Aug. 17, 1977.

Plaintiffs, individually and as a class, brought action against United States to recover damages under Federal Tort Claims Act as result of action of Central Intelligence Agency in intercepting, opening and copying certain first-class mail which was sent or received by plaintiffs. The District Court, Weinstein, J., held that: (1) action of CIA in opening, reading and copying first-class mail without warrant and without probable cause for warrantless search was illegal under First and Fourth Amendments as well as applicable federal statutes; (2) Federal Tort Claims Act exceptions for discretionary acts, claims arising out of miscarriage of letters, and certain specified intentional torts were not applicable to plaintiffs' claims; (3) New York would recognize common-law right of privacy sufficiently to compensate plaintiffs for CIA's action; (4) doctrine of common-law copyright protected plaintiffs; (5) violation of plaintiffs' constitutional rights was ground of liability under New York law; (6) plaintiffs' suit was not certifiable as class action, and (7) plaintiffs were each entitled to award of $1,000 provided that Government furnished each plaintiff with suitable letter of regret and assurance of nonrecurrence; 25% of such award would be paid to plaintiffs' counsel as attorney fees.

Order accordingly.

1. Constitutional Law ⇐82
Post Office ⇐43
Searches and Seizures ⇐7(10)

Action of Central Intelligence Agency in opening, reading and copying first-class mail without a warrant and without probable cause for warrantless search was illegal under First and Fourth Amendments as well as applicable federal statutes. 18 U.S.C.A. §§ 241, 371, 1702; U.S.C.A.Const. Amends. 1, 4.

2. United States ⇐78(12)

There is no discretion under our system to conceive, plan and execute an illegal program; federal official cannot have discretion to behave unconstitutionally.

3. United States ⇐78(12)

Federal Tort Claims Act exception for discretionary acts did not defeat district

court's jurisdiction over plaintiffs' claims against the United States arising out of illegal action of Central Intelligence Agency in opening, reading and copying first-class mail without a warrant and without probable cause for warrantless search. 28 U.S.C.A. §§ 1346(b), 2680, 2680(a).

4. United States ⇐78(5)

Federal Tort Claims Act exception for claims arising out of "loss, miscarriage, or negligent transmission of letters" had no application to plaintiffs' claims against United States arising out of illegal action of Central Intelligence Agency in opening, reading and copying first-class mail without a warrant and without probable cause for warrantless search. 28 U.S.C.A. §§ 1346(b), 2680(b).

5. United States ⇐78(5)

Invasion of privacy, common-law or constitutional, is not mentioned in provision of Federal Tort Claims Act exempting Government from suit for specified intentional torts, and for that reason is not excluded. 28 U.S.C.A. § 2680(h).

6. United States ⇐78(5)

Parties may sue under Federal Tort Claims Act for intentional wrong. 28 U.S.C.A. §§ 1346(b), 2680(h).

7. United States ⇐78(5)

Provision of Federal Tort Claims Act exempting Government from suit for specified intentional torts did not bar plaintiffs' claims against United States arising out of illegal action of Central Intelligence Agency in opening, reading and copying first-class mail without a warrant and without probable cause for warrantless search, in view of fact that suits for invasions of constitutional right of privacy were not mentioned in list of intentional torts contained in such provision. 28 U.S.C.A. § 2680(h).

8. United States ⇐78(3)

Congressional policy underlying Federal Tort Claims Act is to hold the United States liable under state law principles to the same extent as similarly situated private individuals. 28 U.S.C.A. § 1346(b).

9. United States ⇐78(14)

Trial court hearing action brought under Federal Tort Claims Act must look to whole law of state where tort occurred, including that state's law of conflicts. 28 U.S.C.A. § 1346(b).

10. Torts ⇐8.5(1)

In context of actionable torts, the general rubric "right of privacy" encompasses four concepts: (1) intrusion upon seclusion of another; (2) appropriation of other's name or likeness; (3) publicity given to other's private life of a sort which is offensive and not of legitimate public concern; and (4) publicity which places other in a false light before public.

11. Torts ⇐8.5(4)

Tort of invasion of privacy is committed whenever intrusive act is committed, even if tort-feasor never reveals either the fact of invasion or any information about plaintiff to third persons.

12. Torts ⇐8.5(4)

Common-law right of privacy extends beyond plaintiff's immediate physical environment and is infringed by examinations of bank accounts or of personal records under false pretenses, or by opening of mail.

13. Federal Courts ⇐384

Federal court, determining law of the state, cannot blindly follow outmoded case law, but must make reasoned attempt to determine how state courts would now decide the issue before it.

14. Torts ⇐8.5(4)

Evidence of recent statutory enactments in New York, as well as developments in case law, established that New York would recognize common-law right of privacy sufficiently to compensate plaintiffs for Central Intelligence Agency's action in opening, reading and copying first-class mail without a warrant and without probable cause for warrantless search.

15. Literary Property ⇐4

Common-law copyright reserves to authors the right to control time and circum-

stances of first publication of their work; the doctrine has been utilized to shield writers of ordinary, nonliterary letters against misappropriation and nonconsensual publication of their correspondence.

16. Literary Property ⇐3

Doctrine of common-law copyright, as accepted in New York, protected plaintiffs who wrote letters which were opened by Central Intelligence Agency, read, copied, and incorporated into files of CIA without warrant and without probable cause for warrantless search.

17. Literary Property ⇐3

Doctrine of common-law copyright, as accepted in New York, protected plaintiff who was recipient of a letter which was opened by Central Intelligence Agency, read, copied, and incorporated into files of CIA, without warrant and without probable cause for warrantless search.

18. Literary Property ⇐3

Under doctrine of common-law copyrights, recipient of personal letter has definite property interest in the writing which is also protectible by courts.

19. Torts ⇐6

Under New York law, tortious conduct by government agents in violation of constitution is ground for recovery of damages.

20. Constitutional Law ⇐90.1(1)
Searches and Seizures ⇐7(10)

Freedom of speech and right to be free from unreasonable searches and seizures extends not merely to person and immediate surroundings of individuals, but to their correspondence as well. U.S.C.A.Const. Amends. 1, 4.

21. Damages ⇐59

In assessing damages for tortious conduct in violation of constitutional rights, fact that it is a government official who violates Constitution is an aggravating, not a mitigating, factor.

22. Torts ⇐5

Under New York law, plaintiffs who were personally harmed by Central Intelligence Agency's action in opening, reading and copying first-class mail without a warrant and without probable cause for warrantless search were entitled to damages.

23. Federal Civil Procedure ⇐161

In order to certify suit as a class action, court must find that class action is superior to other means for a fair and efficient adjudication of controversy. Fed.Rules Civ. Proc. rule 23(b)(3), 28 U.S.C.A.

24. Federal Civil Procedure ⇐181

Suit brought to recover damages under Federal Tort Claims Act as result of Central Intelligence Agency's action in intercepting, opening and copying certain first-class mail sent or received by plaintiffs was not certifiable as class action, in view of fact that injured parties could not be easily identified, little practical advantage would accrue to individual members of class, since facts upon which liability rested were undisputed, and class action would present inordinate management problems, since amount of injury could vary widely from individual to individual. Fed.Rules Civ. Proc. rule 23(b)(3), 28 U.S.C.A.; 28 U.S.C.A. §§ 1346, 2671 et seq.

25. United States ⇐142

Recovery under Federal Tort Claims Act is limited to compensatory damages. 28 U.S.C.A. §§ 1346(b), 2674.

26. United States ⇐142

Award of damages under Federal Tort Claims Act may not take into account injuries inflicted upon structure of American democracy. 28 U.S.C.A. §§ 1346(b), 2674.

27. Damages ⇐5

Where person suffers invasion of right to privacy, awards are appropriate for general damages covering injury of invasion itself, as well as for resulting mental distress; lack of objective harm is no bar to recovery.

28. Damages ⇐49

Mental distress is element of damages in civil suits for constitutional violations.

29. Literary Property ⇐9
Searches and Seizures ⇐8
Torts ⇐8.5(4)

Plaintiffs whose mail was intercepted by Central Intelligence Agency, read and copied, without a warrant and without probable cause for warrantless search, were entitled to recover damages under any of three tort theories of violation of common-law right to privacy, violation of common-law copyright, and tortious conduct violating constitutional rights.

30. United States ⇐142

In suit brought under Federal Tort Claims Act, verdict of advisory panel is only part of data taken into consideration in arriving at court's independent conclusion as to damages. 28 U.S.C.A. §§ 1346(b), 2402.

31. Damages ⇐130(1)
United States ⇐147

Plaintiffs whose mail was intercepted by Central Intelligence Agency, read and copied, without a warrant and without probable cause for warrantless search, who suffered mental distress as result of such interference with their civil liberties, but who suffered no objective, observable injury, were each entitled to award of $1,000 provided that Government furnished each plaintiff with suitable letter of regret and assurance of nonrecurrence; 25% of such award would be paid to plaintiffs' counsel as attorney fees. 28 U.S.C.A. §§ 1346(b), 2412, 2678.

Rabinowitz, Boudin & Standard, New York City, for plaintiff Birnbaum; Herbert Jordan, K. Randlett Walster, New York City, of counsel.

Melvin L. Wulf, Burt Neuborne, New York City, for plaintiffs Avery and MacMillen.

Barbara Allen Babcock, Asst. Atty. Gen., Washington, D. C., David G. Trager, U. S. Atty., Edward S. Rudofsky, Rodger C. Field, Asst. U. S. Attys., Brooklyn, N. Y., Dennis G. Linder, John T. Boese, Alphonse M. Alfano, Lawrence J. Jensen, Attys., Dept. of Justice, Washington, D. C., for defendants.

WEINSTEIN, District Judge.

In each of these three cases consolidated for trial the plaintiff complains that first-class mail was intercepted by the Central Intelligence Agency (CIA), opened without warrant and copied. Birnbaum and MacMillen each sent a letter abroad; Avery received one here. All the letters were resealed after copying and promptly returned to the mails. Plaintiffs, individually and as a class, seek to recover damages under the Federal Tort Claims Act. 28 U.S.C. § 1346(b) (the Act).

As explained in detail below:

(1) The court has jurisdiction to entertain these suits.

(2) A class action is not appropriate.

(3) The CIA acted tortiously under New York law in violating the plaintiffs' rights, both common law and constitutional, to privacy in their personal papers and correspondence.

(4) The court had the power to empanel an advisory jury and to rely upon its expression of community consensus that individual rights of privacy are valuable in this nation; that people do suffer psychic damage when United States agents fail to obey the law and violate individual rights; and that plaintiffs should be awarded substantial money damages.

(5) A letter from the government to each plaintiff expressing regret for the violation of his or her rights and indicating that steps will be taken to prevent a recurrence will ameliorate the harm by helping to restore plaintiffs' faith in their government.

(6) Recovery is granted to each individual plaintiff in the amount of $1,000 plus costs.

(7) In this country we do not pay lip service to the value of human rights and individual dignity—we mean to live by our ideals. A primary role of the courts is to translate these noble sentiments into palpable reality.

I. FACTUAL BACKGROUND

From approximately 1953 until 1973, in violation of federal statutes and the Fourth Amendment of the United States Constitution, the Central Intelligence Agency conducted an extensive program of opening first-class mail passing in and out of the country through Hawaii, San Francisco, New Orleans, and New York.

Most of the correspondence opened, photographed and circulated within the CIA and the Federal Bureau of Investigation (FBI) was intercepted by the New York project, known within the CIA by either of the two code names HTLINGUAL or SRPOINTER. Various criteria were employed in selecting letters for inspection. Sometimes the name of either the intended recipient or sender appeared on a "watch list" of "suspect" persons and institutions compiled by CIA and FBI agents. In other instances envelopes were opened because of the country of origin or destination; any letter to or from the Soviet Union, for example, was subject to inspection. In still other situations mail was examined at random. When HTLINGUAL was at its peak, New York agents investigated some 13,000 letters a year; over the life of the project, at least 215,000 pieces of mail were copied. *See generally* Commission on CIA Activities Within the United States, The CIA's Mail Intercepts, in Report to the President 101–15 (1975); Senate Select Committee to Study Governmental Operations with Respect to Intelligence Activities, Domestic CIA and FBI Mail Opening Programs, in III Final Report: Supplementary Detailed Staff Reports on Intelligence Activities and the Rights of Americans, Sen.Rep. No. 94–755, 94th Cong., 2d Sess. 559–677 (1976).

Ultimately, the CIA collected and placed in computers a list of some 1.5 million names gleaned from its various mail-opening projects. Among those whose mail was read and photographed were author John Steinbeck and Senator Frank Church. Schwarz, Intelligence Activities and the Rights of Americans, 32 The Record of the Association of the Bar of the City of New York 43, 48 (1977). These operations were only part of a general pattern of post-World War II lawlessness and abuse of power exemplifying "contempt for the law and the Constitution" by government. Schwarz at 46. Breaking this pernicious pattern and preventing its recurrence is the task of Congress and the President. The limited question before this court is whether and how reparations can be made to individuals who were personally affected by this partial breakdown in official respect for individual liberties.

Plaintiff Norman Birnbaum is a professor of sociology at Amherst College in Massachusetts. In 1970, he wrote letters to two academic colleagues—one in Canada, and the other in Rumania—about an upcoming meeting of specialists in the sociology of religion. He sent copies of those letters to a third colleague at Moscow State University. HTLINGUAL agents copied the contents of this third letter while it was in transit through the foreign mail depot at Kennedy International Airport, and later distributed four copies to various units of the CIA. According to testimony by a member of the staff of the Inspector General of the CIA, this was done solely because intelligence agencies had an "interest" in correspondence to and from Moscow University.

Plaintiff Mary Rule MacMillen wrote a personal letter in 1973 to a Soviet dissident she had met on a trip to Russia. Her letter was intercepted at Kennedy, opened and photographed, and a copy filed by the agency. But, apparently because project HTLINGUAL was terminated two weeks later, no other reproductions were disseminated.

In the final case, that of B. Leonard Avery, a letter was written to him by his son, who was then an exchange student studying at Moscow State University. Ironically, Avery, concerned that his own letters to his son might be tampered with by Soviet authorities, attempted to avoid that possibility by sending them to the American Embassy in Vienna, where they were passed on to Moscow via diplomatic pouch. His son's replies, however, arrived

by regular mail, and one of them, personal in nature, was opened here in 1968. Three copies of that letter were made, and one of these was sent to the FBI, which was described by a government witness as having "an interest in U.S. exchange students in Russia."

None of the plaintiffs were aware that their mail had been interfered with until the government responded to general requests made under the Freedom of Information Act. 5 U.S.C. § 552. They were then notified that CIA files contained copies of the letters at issue.

[1] These facts are not in dispute. The government concedes that the plaintiffs' mail was opened, read and copied. It does not contend that the actions were lawful. No judicial warrants were obtained, and no evidence was submitted to suggest the existence of probable cause for a warrantless search. Both the First and Fourth Amendments of the Constitution as well as applicable statutes and regulations support the conclusion that the opening and reading of these letters under these circumstances was illegal. *United States v. Ramsey*, —— U.S. ——, ——, 97 S.Ct. 1972, 1982, 52 L.Ed.2d 617, 631 (1977) ("Applicable postal regulations flatly prohibit, under all circumstances, the reading of correspondence absent a search warrant"); *Procunier v. Martinez*, 416 U.S. 396, 408–09, 94 S.Ct. 1800, 1809, 40 L.Ed.2d 224 (1974). *Cf. United States v. Van Leeuwen*, 397 U.S. 249, 251, 90 S.Ct. 1029, 1031, 25 L.Ed.2d 282 (1970).

In addition, HTLINGUAL and other mail-opening projects probably violated several criminal statutes. Included are 18 U.S.C. § 1702 (prohibiting the unauthorized opening or obstruction of mail within postal channels), 18 U.S.C. § 241 (prohibiting conspiracies to deprive citizens of their constitutional rights), and 18 U.S.C. § 371 (the general conspiracy statute). *See generally* Department of Justice, Report of the Department of Justice Concerning Its Investigation and Prosecutorial Decisions with Respect to Central Intelligence Agency Mail Opening Activities in the United States (1977).

The criminal liability—or lack of it—of government agents for the acts complained of is not an issue in this case. Plaintiffs seek a civil remedy: damages for injury suffered as a result of the operation of HTLINGUAL. They seek relief, not against the particular agents who opened their mail or who directed the program, but against the government, relying on the provisions of the Federal Tort Claims Act.

Because the agents were acting within the scope of their employment in carrying out the mail project, *Hatahley v. United States*, 351 U.S. 173, 76 S.Ct. 745, 100 L.Ed. 1065 (1956); *Avery v. United States*, 434 F.Supp. 937 (D.Conn. 1977), only two substantial questions must be answered. First, has the government consented to such suits under the provisions of the Act? Second, under the relevant state law—that of New York—was the behavior of the government agents tortious and, therefore, compensable?

II. JURISDICTION

A. Not Defeated By Exception To The Federal Tort Claims Act.

The United States has given its consent to be sued for torts in the District Courts whenever the government, if a private person, would be liable under the law of the place where the wrong was done. The Federal Tort Claims Act provides in part:

> [T]he district courts, together with the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and 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.

28 U.S.C. § 1346(b). This general consent to suit for tortious acts of government officials and employees is qualified by a number of exceptions. 28 U.S.C. § 2680. The government argues that three exceptions—for discretionary acts, for postal matter, and for intentional torts—apply.

1. Discretionary Function Exception Does Not Apply.

Under section 2680(a) of title 28 of the United States Code the government is not liable in tort for the performance or failure to perform a discretionary act:

§ 2680. Exceptions

The provisions of this [Act] shall not apply to—

(a) Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.

Any attempt to define "discretionary" in this context presents difficulties. The government relies primarily on *Dalehite v. United States*, 346 U.S. 15, 35–36, 73 S.Ct. 956, 968, 97 L.Ed. 1427 (1953), holding that discretionary acts include not only "the initiation of programs and activities", 346 U.S. at 35, 73 S.Ct. at 968, but also

> determinations made by executives or administrators in establishing plans, specifications or schedules of operations. Where there is room for policy judgment and decision there is discretion.

Id. (Footnotes omitted.) While this language seems broad enough to encompass the acts complained of here, the underlying facts of the case suggest the contrary. *Dalehite* concerned explosions aboard ships loaded with ammonium nitrate fertilizer. Following World War II, the United States had sponsored the production of the highly explosive chemical product by American manufacturers in part to help alleviate acute food shortages in the occupied nations of Germany, Korea and Japan. While the wisdom of producing so dangerous a form of fertilizer was questionable, the thrust of the suit was against the *judgment* of government officials in approving the program. No negligence or illegality in carrying it out was averred.

Dalehite was followed in *Laird v. Nelms*, 406 U.S. 797, 92 S.Ct. 1899, 32 L.Ed.2d 499 (1972), a suit to recover for damage caused by sonic booms resulting from high-altitude military training flights. There, too, the government, as a matter of policy, had decided to engage in a hazardous, but legal, activity. The Court quoted, in its decision, that portion of the House Judiciary Committee report emphasizing that the purpose of the discretionary acts exemption in the Tort Claims Act was to exclude suits for

> damages . . . growing out of a *legally authorized activity*, such as a flood-control or irrigation project, *where no wrongful act or omission on the part of any Government agent is shown*, and the only ground for suit is the contention that the same conduct by a private individual would be tortious.

406 U.S. at 801, 92 S.Ct. at 1902 (emphasis added).

The decision to conduct an intelligence operation by methods which violate the Constitution of the United States and which also probably violate several federal statutes is not discretionary in the same sense that the decision to fly a supersonic plane over land or to produce potentially explosive fertilizer might be. There is no evidence that Congress intended this exception to do more than free the operations of government from excessive concern over the untoward, and often unexpected, results of legitimate activity conducted in the public interest.

[2, 3] There is no discretion under our system to conceive, plan and execute an

illegal program. *See Hutahley v. United States*, 351 U.S. 173, 191, 76 S.Ct. 745, 100 L.Ed. 1065 (1956); *Myers & Myers, Inc. v. United States Postal Service*, 527 F.2d 1252, 1261 (2d Cir. 1975); *Avery v. United States*, 434 F.Supp. 937 (D.Conn. 1977). As the Second Circuit succinctly put the matter: "a federal official cannot have discretion to behave unconstitutionally." *Myers & Myers, Inc. v. United States Postal Service*, 527 F.2d at 1261. In this circuit, following *Myers* and *Avery*, the discretionary defense must be rejected. Cases from other circuits to the contrary are not persuasive. *See Murphy v. United States*, 76-C-12 (N.D. Iowa May 28, 1976) (dictum); *Hardy v. United States*, 76-C-1427 (D.C.D.C. Feb. 14, 1977) (relies on *Murphy*); *Siebel v. United States*, 76-C-1737 (N.D.Cal. Dec. 17, 1976) (relies on *Dalehite*).

2. Postal Matter Exception Does Not Apply.

[4] The United States also argues that these suits for damages against the government are barred by the postal matter exception to the Federal Tort Claims Act because the opening of the letters represents a mere "miscarriage" of the mail. 28 U.S.C. § 2680(b). This portion of the statute maintains sovereign immunity with regard to:

> (b) Any claim arising out of the loss, miscarriage, or negligent transmission of letters or postal matter.

None of the available sources for the interpretation of this subsection support such a restrictive reading. Rather, Congress was concerned with shielding the courts from the potential landslide of lawsuits that might be generated by the unavoidable mishaps incident to the ordinary, accepted operation of delivering millions of packages and letters each year. The kind of problem that was anticipated under the heading of "loss, miscarriage or negligent transmission" was suggested by a representative of the Department of Justice during hearings on the Act:

> Every person who sends a piece of postal matter can protect himself by registering it, as provided by the postal laws and regulations. It would be intolerable, of course, if in any case of loss or delay, the Government could be sued for damages. Consequently, this provision was inserted.

Hearings before Senate Committee on the Judiciary on S. 2690, 76th Cong., 3d Sess. 38 (1940) (testimony of A. Holtzoff, Special Assistant to Attorney General of the United States.) Neither registration nor insurance of the letters in question in these cases would have protected the correspondents from the risk that CIA agents would procure, open and copy their mail. *See also*, Note, *The Federal Tort Claims Act*, 56 Yale L.J. 534, 545-46 (1947); II L. Jayson, Handling Federal Tort Claims § 255 at 13-2—13-3 (1975).

The postal exception has no application in cases such as those before us. *Cruikshank v. United States*, 76-C-362, 431 F.Supp. 1355 (D.Haw. May 9, 1977); *Avery v. United States*, 434 F.Supp. 937 (D.Conn. 1977).

3. The Intentional Tort Exception Does Not Apply.

The final statutory defense of the United States is based on subdivision (h) of 28 U.S.C. § 2680. This provision, exempting the federal government from suits for specified intentional torts, reads as follows:

> The provisions of [the Act] 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: *Provided*, That, with regard to acts or omissions of investigative or law enforcement officers of the United States Government, the provisions of this chapter and section 1346(b) of this title shall apply to any claim arising, on or after the date of the enactment of this proviso, out of assault, battery, false imprisonment, false arrest, abuse of process, or malicious prosecution. For the purpose of this subsection, "investigative or law enforcement officer" means any officer of the

United States who is empowered by law to execute searches, to seize evidence, or to make arrests for violations of Federal law.

Prior to 1974, when the subsection was revised, it merely provided that no suit could be brought for:

> (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.

28 U.S.C.A. § 2680 (1965). Congress amended the exception to broaden its consent to suit following some particularly egregious violations of the Fourth Amendment by federal narcotics agents who engaged in a series of illegal "no-knock" raids on private homes. One such raid generated a civil suit in which the Supreme Court—barred by section 2680(h), as it was then written, from holding the government itself liable—granted plaintiff the right to recover damages from the individual agents. *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388, 91 S.Ct. 1999, 29 L.Ed.2d 619 (1971). Congress altered section 2680(h) so that, from the date of amendment forward, such Fourth Amendment violations would be actionable against the government, providing aggrieved persons actual relief, rather than worthless awards against "judgment-proof" individual agents. S.Rep. No. 93-588, 93d Cong., 2d Sess., 2-3, reprinted in [1974] U.S.Code & Cong.Ad. News 2789, 2790-91.

The government argues that, based on this history of subsection (h), a court cannot assume that any case arising from a Fourth Amendment violation was intended, prior to 1974, to be included in the Act. The government's position apparently is that the list of exempted torts in subsection (h) was and is not exclusive, and that additional exclusions must be implied, where necessary, to protect the government against liability for types of torts Congress may not have contemplated when it drafted the law. Invasion of the constitutional right to privacy is one such uncontemplated intentional tort, runs the argument, and should be excluded—at least if it occurred before 1974.

[5] Implied exceptions, derived in this wholesale fashion, subvert the structure of the statute itself. Congress, in writing the Act, chose to enumerate very specific exemptions. No vague terms or general words are used. This problem was treated in *Ira S. Bushey & Sons, Inc. v. United States*, 276 F.Supp. 518 (E.D.N.Y.1967), *aff'd*, 398 F.2d 167 (2d Cir. 1968). The court concluded that:

> The detailed listing and the absence of general terms suggests that only the torts mentioned are to be excluded.

276 F.Supp. at 526. Invasion of privacy, common law or constitutional, is not mentioned in the list either before or after 1974, and for that reason is not excluded. *See Avery v. United States*, 434 F.Supp. 937 (D.Conn., 1977) (same conclusion with respect to the HTLINGUAL program); *contra, Murphy v. Central Intelligence Agency*, 76-C-12 (N.D.Iowa, May 28, 1976) (dictum). As the court in *Cruikshank v. United States*, 76-C-362, 431 F.Supp. 1355 (D.Haw., May 9, 1977), put it when faced with a case similar to those of Birnbaum, Avery and MacMillen:

> [W]e are dealing with the commission of a series of illegal acts by agents of the Government. Justice would certainly not countenance a court straining the language of a statute in order to deny the victim of such illegality at least some measure of compensation.

431 F.Supp. at 1361.

In at least one unrelated case, *Black v. United States*, 389 F.Supp. 529 (D.C.D.C. 1975), a plaintiff did recover for an invasion of common law and constitutional rights of privacy, through illegal electronic surveillance, which occurred in 1963, eleven years before the subsection was revised to take *Bivens* and similar cases into account. The court never suggested that an implied exclusion of such claims might exist. It noted that its judgment rested "on theories of trespass, invasion of privacy by intrusion, invasion of privacy by publication, and vio-

lation of Constitutional rights", characterized by the court as "intentional torts." 389 F.Supp. at 531.

[6, 7] The straightforward reading of the statute in *Black* is consistent with the general treatment of intentional torts by federal courts in suits against the government. The principle is well-established that parties may sue under the Act for intentional wrongs. The Supreme Court in *Laird v. Nelms*, 406 U.S. 797, 92 S.Ct. 1899, 32 L.Ed.2d 499 (1972), for example, stated that:

> The legislative history [of the Federal Tort Claims Act] indicates that Congress intended to permit liability essentially based on the *intentionally wrongful* . . . conduct of Government employees . . . .

406 U.S. at 801, 92 S.Ct. at 1901 (emphasis added). *See also, e. g., Hatahley v. United States*, 351 U.S. 173, 76 S.Ct. 745, 100 L.Ed. 1065 (1956) (trespass and conversion); *Myers & Myers, Inc. v. United States Postal Service*, 527 F.2d 1252 (2d Cir. 1975) (denial of due process and interference with business opportunity through blacklisting); *Aleutco Corp. v. United States*, 244 F.2d 674 (3d Cir. 1957) (conversion); *Ira S. Bushey & Sons, Inc. v. United States*, 276 F.Supp. 518 (E.D.N.Y.1967), *aff'd*, 398 F.2d 167 (2d Cir. 1968) (trespass); *Palomo v. United States*, 188 F.Supp. 633, 637 (D.Guam 1960) (waste); *United States v. Ein Chemical Corp.*, 161 F.Supp. 238, 246-47 (S.D.N.Y. 1958) (conversion by duress). The government's suggestion that suits for invasions of constitutional rights of privacy are exempt by implication must be rejected.

B. LIABILITY UNDER NEW YORK TORT LAW

[8] Section 1346(b) of the Federal Tort Claims Act, 28 U.S.C. § 1346(b) provides that the United States may be sued for money damages caused by the wrongful act of any employee of the Government "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 . . . occurred." The "congressional policy underlying the Act . . . is to hold the United States liable under state law principles to the same extent as a similarly situated private individual." *Stencel Aero Engineering Corp. v. United States*, —— U.S. ——, 97 S.Ct. 2054, 2057, 52 L.Ed.2d 665, 669 (1977).

[9] Since the opening of mail complained of in these cases occurred at the international mail facility at John F. Kennedy International Airport in New York, the "law of the place where the act or omission occurred" is that of New York. Under the Supreme Court's interpretation of this language, a trial court hearing a federal tort action must look to the whole law of the state where the tort occurred, including that state's law of conflicts. *Richards v. United States*, 369 U.S. 1, 82 S.Ct. 585, 7 L.Ed.2d 492 (1962). Ordinarily, therefore, the court would first need to decide whether a New York court would apply its own law since the letters were neither mailed from or to a New York address. This issue need not be decided because the parties have stipulated that the substantive tort law of New York is applicable.

1. Common Law Right To Privacy.

Most states recognize invasions of privacy as actionable torts. W. Prosser, Law of Torts § 117 at 804 (4th ed. 1971); 1 F. V. Harper & F. James, The Law of Torts § 9.6 at 682 (1956).

[10] In this context, the general rubric "right of privacy" encompasses four concepts. As described by the Restatement (Second) of Torts, they are:

> (a) Intrusion upon the seclusion of another . . ., or
>
> (b) Appropriation of the other's name or likeness, . . . or
>
> (c) Publicity given to the other's private life [of a sort which is offensive and not of legitimate public concern], . . . or
>
> (d) Publicity which places the other in a false light before the public. . . . , . . .

. . . . .

3 Restatement (Second) of Torts, § 625A (1977).

[11, 12] Intrusion upon the seclusion of these plaintiffs is the branch of privacy involved in these cases. Comments to the Restatement make it plain that the tort is committed whenever an intrusive act is committed, even if the tortfeasor never reveals either the fact of the invasion or any information about the plaintiff to third persons.

> The form of invasion of privacy covered by this Section *does not depend upon any publicity given to the person whose interest is invaded*, or to his affairs. It *consists solely of an intentional interference* with his interest in solitude or seclusion, either as to his person or as to his private affairs or concerns, of a kind that would be highly offensive to a reasonable man.

3 Restatement (Second) of Torts, § 652B, Comment a at 378 (1977) (emphasis added). This common law right extends beyond the plaintiff's immediate physical environment and is infringed by examinations of bank accounts or of personal records under false pretenses, or by opening of mail.

> The invasion may be by physical intrusion into a place in which the plaintiff has secluded himself, as where the defendant forces his way into the plaintiff's room in a hotel, or insists over the plaintiff's objection in entering his home. It may also be by the use of the defendant's senses, with or without mechanical aids, to oversee or overhear the plaintiff's private affairs, as by looking into his upstairs windows with binoculars, or tapping his telephone wires. It may be by some other form of investigation or examination into his private concerns, *as by opening his private and personal mail*, searching his safe or his wallet, examining his private bank account, or compelling him by a forged court order to permit an inspection of his personal documents.

3 Restatement (Second) of Torts, § 652B, Comment b at 378–79 (1977) (emphasis added). The comment emphasizes that "The intrusion itself makes the defendant subject to liability, even though there is no publication or other use of any kind of the . . information. . . ." *Id.* at 379. It is apparent, therefore, that, in the majority of states, case law would provide a right to recovery on the facts of these cases.

The law of New York is less clear. This state was the first to consider a case sounding in common law privacy following the publication of a leading article on the subject by Samuel Warren and Louis Brandeis, Warren & Brandeis, The Right To Privacy, 4 Harv.L.Rev. 193 (1890), and its lower courts quickly recognized the doctrine. W. Prosser, Law of Torts § 117 n. 10 at 803 (4th ed. 1971). The New York Court of Appeals at the turn of the century was, however, not yet prepared to accept the doctrine. In *Roberson v. Rochester Folding-Box Company*, 171 N.Y. 538, 64 N.E. 442 (1902)—a case of commercial appropriation where defendant used the photograph of a woman in its advertisements without her permission—the Court by a four to three decision rejected the right to privacy as a distinct and independent tort. It stated that "The so-called right of privacy has not as yet found an abiding place in our jurisprudence". 171 N.Y. at 556, 64 N.E. at 447. The court was careful to note, however, that it was speaking of the developments up to that point—"the doctrine cannot *now* be incorporated" (*id.*) (emphasis supplied)—and not predicting future development. *Roberson's* refusal to recognize commercial appropriations of names, faces and the like as torts was legislatively overruled by sections 50 and 51 of New York's Civil Rights Law, but the general right to privacy has not yet been recognized explicitly by the New York Court of Appeals. Were the question to be placed once more squarely before the Court of Appeals, strong evidence suggests that the court would follow the American "tide . . . in favor of recognition." W. L. Prosser, The Law of Torts § 117 at 804 (4th ed. 1971).

Lower courts in the state have generally continued to acknowledge *Roberson* while

finding ways to avoid it and grant recovery. *See, e. g., Association for Preservation of Freedom of Choice, Inc. v. Emergency Civil Liberties Committee*, 37 Misc.2d 599, 236 N.Y.S.2d 216 (Sup.Ct.1962) (avoiding *Roberson* by applying law of privacy of sister states where some events occurred); *Blair v. Union Free School District No. 6, Hauppauge, Suffolk County*, 67 Misc.2d 248, 324 N.Y.S.2d 222 (Dist.Ct.1971) (avoiding *Roberson* by finding "outrageous" breach of confidence); *Galella v. Onassis*, 487 F.2d 986, 995 n. 12 (2d Cir. 1973) (collecting cases). Addressing the question of the right to privacy in New York, the Second Circuit in *Galella* noted:

> [I]f we were required to reach the question, we would be inclined to agree . . that when again faced with the issue the Court of Appeals may well modify or distinguish its 1902 holding [in *Roberson*] . . . . . There is substantive support today for the proposition that privacy is a "basic right" entitled to legal protection . . . . . Privacy essential to individual dignity and personal liberty underlies the fundamental rights guaranteed in the Bill of Rights.

Id. (extensive citations omitted).

Numerous statutory enactments in New York support the Second Circuit's view. The provisions which overruled the specific holding of *Roberson* and prohibited commercial appropriations of name or identity have already been mentioned. Article 250 of the New York Penal Law, entitled "Offenses Against The Right To Privacy", includes among the listed crimes illegitimate eavesdropping, wiretapping, unlawful obtaining of communications from telegraph or telephone companies, and—most significantly from the viewpoint of the instant cases—tampering with letters or other "sealed private communication." New York Penal Law § 250.25 illustrates the strength of New York's policy against interference with private communications. It provides in part:

> A person is guilty of tampering with private communications when:
>
> 1. Knowing that he does not have the consent of the sender or receiver, he opens or reads a sealed letter or other sealed private communication; or
>
> 2. Knowing that a sealed letter or other sealed private communication has been opened or read in violation of subdivision one of this section, he divulges without the consent of the sender or receiver, the contents of such letter or communication, in whole or in part, or a resume of any portion of the contents thereof;
>
> . . . . . .
>
> Tampering with private communications is a class B misdemeanor.

[13] A federal court, determining the law of the state, cannot blindly follow outmoded case law, but must make a reasoned attempt to determine how the state courts would now decide the issue before it. "Law does change with times and circumstances . . . [L]aw is not restricted to what is found in Law Reports . . . ." *Bernhardt v. Polygraphic Company of America*, 350 U.S. 198, 209–10, 76 S.Ct. 273, 279–80, 100 L.Ed. 199 (1956) (Frankfurter, J., dissenting).

[14] The evidence is overwhelming that New York would recognize the common law right of privacy sufficiently to compensate for the kind of intrusion by the government into private mails represented by the instant case.

2. Common Law Copyright and Property Interest in Private Papers.

The New York courts, so far as we have been able to determine, have not had a case directly on point. Nevertheless, the facts before us fit comfortably within the New York common law copyright framework. To understand why this is so, it is necessary to describe at some length the history of legal developments in this esoteric field.

[15] Common law copyright reserves to authors the right to control the time and circumstances of the first publication of their works. The right has been important

to artists, professional writers, scholars and others whose intellectual productions have some commercial value. But the doctrine also has been utilized to shield writers of ordinary, nonliterary letters against the misappropriation and nonconsensual publication of their correspondence. *See* Warren & Brandeis, The Right to Privacy, 4 Harv.L. Rev. 193, 198–206 (1890); Hill, Defamation and Privacy Under the First Amendment, 76 Colum.L.Rev. 1205, 1293 n. 416 (1976). In drafting the Copyright Act of 1976, Pub. L.No.94–553, 90 Stat. 2541, Congress explicitly recognized that common law copyright was relied upon by the states to protect a broad range of interests beyond those of the individual in the marketplace value of his work product. Federal law did not preempt state law in those other areas, but acknowledged its continued vitality and capacity for growth. As a relevant congressional report indicated:

> The evolving common law rights of "privacy," "publicity," and trade secrets, and the general laws of defamation and fraud, would remain unaffected [by the codification of common law copyright] as long as the causes of action contain elements, such as invasion of personal rights or a breach of trust or confidentiality, that are different in kind from copyright infringement.

H.R.Rep.No.94–1476, 94th Cong., 1st Sess., 132, reprinted in [1976] U.S.Code Cong. & Ad.News, pp. 5659, 5748.

No one is quite sure when or where the concept of copyright originated. That some legally recognized right to control the publication of books and to protect them from piracy pre-dated the invention of the printing press is suggested by rumors of an Irish case decided in 567 A.D. R. Bowker, Copyright, Its History and Its Law 9 (1912); A. Birrell, The Law and History of Copyright in Books 42 (1899).

When the printing press appeared, the economic interests of book publishers coincided with the political needs of the crown; the Stationers' Company, chartered by Mary Tudor in 1557, assured both that publishers would have the exclusive right to produce and sell the works they published, and that the Crown could censor them. R. Bowker, Copyright, Its History and Its Law 15 (1912). The first statute specifically addressing copyright was not passed, however, until 1709 during the reign of Anne, and it, too, was designed to control the processes of publishing and bookselling rather than to protect authors' rights in unpublished works.

Common law protection of authors who had not published seems to have sprung full grown from the English courts in 1741 to close the gap left by the narrow focus of the copyright statute. In *Pope v. Curl*, 26 Eng.Rep. 608 (Ch.1741), Alexander Pope sued a bookseller who proposed to market a volume of letters written by Pope and other eighteenth century luminaries. The Chancellor enjoined publication on the ground that an author of any letter—be it "learned" or "familiar"—had a common law right to control first publication in the same way that the author of a poem or a treatise could control first publication of those works. Two other early cases (one pre-dating *Pope*) also recognized a protectible property interest in private papers but neither of those opinions are extant. *Webb v. Rose* (1732) (publication of dead person's drafts enjoined) and *Forrester v. Waller* (1741) (publication of surreptitiously-obtained notes enjoined) survive only in the discussion in *Millar v. Taylor*, 98 Eng.Rep. 201, 216 (K.B.1769).

Only one other case involving letters appeared in English case law prior to adoption of the American Constitution. *Thompson v. Stanhope*, 27 Eng.Rep. 476 (Ch.1744) (wife of illegitimate son of Lord Chesterfield cannot publish father's letters to son). Nevertheless, post-Revolutionary American courts continued to refer to contemporaneous English precedents in their effort to define this author's right of common law copyright.

A review of the most important nineteenth and twentieth century case law demonstrates that while common law copyright

may have developed primarily to supplement the economic protections of statutory copyright, it was never solely concerned with the financial interests of authors. Despite some early hesitation, *see, e. g., Perceval v. Phipps*, 35 Eng.Rep. 225 (Ch.1813) (suggestion that publication of private letters with no economic value to author cannot be enjoined), *Wetmore v. Scovell*, 6 N.Y.Ch.Rep. 745 (1842) (applies *Perceval*); *Hoyt v. MacKenzie*, 5 N.Y.Ch.Rep. 917 (1848) (same), courts ultimately and explicitly expanded the theory of common law copyright to encompass a nonpecuniary interest in the privacy of letters.

The landmark English decision was *Gee v. Pritchard*, 36 Eng.Rep. 670 (Ch.1818)—a case cited with approval by the New York Court of Appeals in *Roberson*, 171 N.Y. at 549, 64 N.E. at 445, when rejecting the modern right of privacy but affirming equivalent older concepts based upon property rights. It involved a threat by Pritchard, the illegitimate son of the late Mr. Gee, to publish personal letters Mrs. Gee had written to him. The case distinguished away the seemingly contradictory holding of *Perceval* as one dealing with "consent" of the author to publish, and reaffirmed the conclusion in *Pope* that familiar letters were fully protected by common law copyright. The Chancellor went on to add:

> I do not say I am to interfere because the letters are written in confidence, or because publication of them may wound the feelings of the Plaintiff; but if mischievous effects of that kind can be apprehended in cases in which this Court has been accustomed, on the ground of property, to forbid publication, it would not become me to abandon the jurisdiction which my predecessors have exercised, and refuse to forbid it.

36 Eng.Rep. at 678.

The Chancellor's view was adopted by Justice Story in *Folsom v. Marsh*, 9 Fed. Cas. 342 (1st Cir. 1841)—one of the earliest and fullest discussions in American case law of the rights of the author in personal correspondence. No meaningful distinction, Story felt, could be drawn between personal letters and literary works; common law copyright, therefore, must be said to protect both.

Story expounded further on this theme in his treatise on equity jurisprudence, where he eloquently urged that the true value preserved in many instances by the application of common law copyright was not dollars and cents but privacy. His thesis greatly influenced American courts and was explicitly adopted in New York in *Woolsey v. Judd*, 11 Super.Ct. (4 Duer) 379, 11 How.Pr. 49 (N.Y.1855). The court placed its decision squarely on the need of society for a "free interchange," writing:

> Our own views and feelings, we do not hesitate to declare, correspond entirely with those which Mr. Justice Story, in the most elaborate and useful of his works, has very forcibly expressed. We agree with him, that the unauthorized publication of [personal] letters, "unless in cases where necessary to the vindication of the rights or conduct of the party against unjust claims or imputations, is perhaps, one of the most odious breaches of private confidence, of social duty, and of honorable feelings which can well be imagined. It strikes at the root of that free interchange of advice, opinions and sentiments, which seems essential to the well-being of society . . . ." (2 Story's Equity Jur. § 946.)

11 Super.Ct. (4 Duer) at 383, 11 How.Pr. at 53–54.

To drive the point home even more sharply that common law copyright is a device by which New York courts protect the privacy interest in the property of a letter, the opinion concluded:

> [I]t is with no ordinary satisfaction that, in closing this discussion, we find ourselves in a condition to affirm that the rules of law relative to the publication of private letters, are in perfect harmony with those of social duty and sound morality, and, in the protection which they afford to individuals, consult and promote the highest interests of society.

11 Super.Ct. (4 Duer) at 407, 11 How.Pr. at 79.

The few subsequent New York cases to consider the issue have reaffirmed the theme that common law copyright protects an author's privacy as well as his pocketbook. *In re Ryan's Estate*, 115 Misc. 472, 188 N.Y.S. 387 (Sur.Ct.1921); *Estate of Hemingway v. Random House, Inc.*, 53 Misc.2d 462, 297 N.Y.S.2d 51 (Sup.Ct.), *aff'd*, 29 A.D.2d 633, 285 N.Y.S.2d 568 (1967), *aff'd*, 23 N.Y.2d 341, 296 N.Y.S.2d 771, 244 N.E.2d 250 (1968). *See also Rice v. Williams*, 32 F. 437, 439 (7th Cir. 1887) ("traffic in the letters of third parties, without their knowledge or consent" is "disreputable business" and an abuse of confidentiality); *Dock v. Dock*, 180 Pa.St. 14, 36 A. 411 (Sup.Ct.1897) (in suit for alienation of affections defendant entitled to return of letters stolen by plaintiff); *King v. King*, 25 Wyo. 275, 168 P. 730 (1917) (defendant barred from using letters against author and addressee to disgrace them in a social organization).

[16] The doctrine of common law copyright, as accepted in New York and elsewhere, protects plaintiffs Birnbaum and MacMillen. They each wrote a letter which was opened and read, without their permission and without the protections of a particularized warrant, by a third person. The letters were then copied, read by other government agents, and incorporated into the files of the CIA. Although the agency did not publish the letters in the ordinary sense of including them in a book, magazine, pamphlet, or newspaper for public distribution, they did publish them within the meaning of that term for common law copyright purposes. In *In re Ryan's Estate*, 115 Misc. 472, 475, 188 N.Y.S. 387, 389 (Sur. Ct.1921), for example, the court termed the simple act of delivery of letters to the temporary administrator of an estate a "publication." In *Dock*, the Supreme Court of Pennsylvania speaks of an author's right to prevent the "communication [of personal letters] to other persons . . . by the party wrongfully in possession of them." 180 Pa.St. at 22, 36 A. at 412. Similarly, in *King* the offense which concerned the court was not the threat of printing the letters but the threat of showing them to unauthorized persons.

[17] The same conclusion follows with respect to Avery, despite the fact that he was the recipient of, rather than the author of, the illicitly opened mail. The law has recognized, for practical reasons, that the recipient, too, has an interest in the letter and certain rights pertaining to it. Were this not so, the addressee of a letter would be unable to exercise the normal kinds of control over his or her mail, including the power to discard a letter once it has been read, or the right to show the letter (except where a breach of confidence might occur) to an interested friend or member of the household. *See, e. g., Baker v. Libbie*, 210 Mass. 599, 97 N.E. 109 (1912); *Folsom v. Marsh*, 9 Fed.Cas. 342 (1st Cir. 1841).

Under some circumstances, the recipient has even been deemed to have a right superior to the author's, enabling him to publish a given letter over the author's objections. As Justice Story recognized in *Folsom*:

> [T]he persons to whom [letters] are addressed, may have, nay, must, by implication, possess, the right to publish any letter or letters addressed to them, upon such occasions, as require, or justify, the publication or public use of them . . . Thus, a person may justifiably use and publish, in a suit at law or in equity, such letter or letters as are necessary and proper, to establish his right to maintain the suit, or defend the same. So, if he be aspersed or misrepresented by the writer, or accused of improper conduct, in a public manner, he may publish such parts of such letter or letters . . . as may be necessary to vindicate his character and reputation, or free him from unjust obloquy and reproach. . . . In short, the person, to whom letters are addressed, has but a limited right, or special property, (if I may so call it), in such letters, as a trustee, or bailee, for particular purposes, either of information or of protection, or of support of his own rights and character.

9 Fed.Cas. at 346. *Accord, Baker v. Libbie*, 210 Mass. at 605–06, 97 N.E. at 111.

[18] The clear import of common law copyright cases dealing with personal letters, taken as a whole, is that a recipient has a definite property interest in the writing which is also protectable by the courts. The "sound morality" language used by the court in *Woolsey v. Judd*, 11 Super.Ct. (4 Duer) 379, 11 How.Pr. 49 (N.Y.1855), for example, is broad enough to encompass a party in Avery's position. *See also Gee v. Pritchard*, 36 Eng.Rep. 670, 678 (Ch.1818), which calls "the ground of property" a firm enough one on which to support the protection of personal rights.

While one court did refuse to recognize, for lack of any precedent, the right of an addressee of a letter to enjoin publication of the correspondence, it specifically noted that no issue of invasion of privacy had been raised by the plaintiff at trial. *Knights of the Ku Klux Klan v. International Magazine Co.*, 294 F. 661 (2d Cir. 1923). In contrast, the Wyoming state Supreme Court has declined to distinguish between the author and the recipient of personal letters. It found that both had an interest in enjoining a third person from using those letters "willfully, and maliciously, to injure, defame, and humiliate." *King v. King*, 25 Wyo. 275, 281, 168 P. 730, 731 (1917). *Cf. Dock v. Dock*, 180 Pa.St. 14, 36 A. 411 (1897).

The courts' rationale for finding "property" in nonliterary letters has been their concern with preventing violations of confidence and privacy. It is unreasonable to suppose that they would hold that it was only the writer of a letter who could be embarrassed or whose confidence could be breached by its unwarranted exposure.

Particularly in a continuing correspondence between father and son, the child's letter to the parent is likely to refer to, and reveal, the elder's prior remarks. To protect the recipient's rights is, therefore, indirectly to protect him as a writer. The law recognizes this necessary interaction of communicator and communicant, refusing to exclude from its protection one of two actors. It is, for example, this reason that underlies the shielding of advice given by a lawyer to his client as part of a privilege designed to protect the client's communications. *See, e. g.*, McCormick, Evidence § 89 at 182–83 (2d ed. E. W. Cleary, 1972).

This principle of mutuality, recognizing that both writer and recipient have a stake in freedom from interference with their correspondence, was articulated in a recent Supreme Court decision involving censorship of the mails in prisons. The Court pointed out:

> Communication by letter is not accomplished by the act of writing words on paper. Rather, it is effected only when the letter is read by the addressee. Both parties to the correspondence have an interest in securing that result, and censorship of the communication between them necessarily impinges on the interest of each. Whatever the status of a prisoner's claim to uncensored correspondence with an outsider, it is plain that the latter's interest is grounded in the First Amendment's guarantee of freedom of speech. And this does not depend on whether the nonprisoner correspondent is the author or intended recipient of a particular letter, for the addressee as well as the sender of direct personal correspondence derives from the First and Fourteenth Amendments a protection against unjustified governmental interference with the intended communication. . . . We do not deal here with difficult questions of the so-called "right to hear" and third-party standing but with a particular means of communication in which the interests of both parties are inextricably meshed.

Procunier v. Martinez, 416 U.S. 396, 408–09, 94 S.Ct. 1800, 1809, 40 L.Ed.2d 224 (1974) (citations omitted).

It is not significant that Avery technically had no property interest in the letter at the time it was opened. While, for most purposes, letters do remain the physical property of the author until they are delivered by the Post Office, the addressee in these circumstances has, at the very least, an inchoate property interest sufficient to render his right of privacy protectible.

Any other result would create the anomolous situation where a plaintiff such as Avery could obtain redress if his mail were purloined from his home mailbox by the CIA, photographed, and returned, but could not recover if the very same acts were committed minutes before the post was delivered to his address.

3. Violation of Constitutional Rights as Tortious Conduct.

[19] Violation of plaintiffs' federal constitutional rights is yet a third ground of liability under New York law. New York treats tortious conduct, in violation of the Constitution, by government agents as grounds for recovery of damages.

The illicit mail openings in these cases directly contravene the letter and spirit of the Bill of Rights. The Constitution and the first ten amendments to it created a central government whose powers to encroach upon the personal and political lives of its citizens were carefully limited. Of particular concern to the drafters was protection of ideas—including their tangible embodiment in books and private papers—from interference by public officials.

In England and the Colonies, citizens had been aggrieved by such abusive practices as the use of general warrants to search homes and businesses of British subjects for politically suspect documents. W. Ringel, Searches & Seizures, Arrests and Confessions § 2 at 2–3 (1972). In 1765, one English court proclaimed that if general warrants to search for seditious papers were held valid,

> the secret cabinets and bureaus of every subject in this kingdom will be thrown open to the search and inspection of a messenger, whenever the secretary of state shall think fit to charge, or even to suspect a person to be the author, printer, or publisher of a seditious libel.

Entick v. Carrington, 19 State Tr. 1029, 1063 (C.P.1765). The opinion in *Entick* leaves little doubt that the right to protect private papers was recognized as part of the complex of liberties that would be infringed were the government permitted unchecked power to rifle at will through letters, books and other communications:

> Papers are the owner's goods and chattels: they are his dearest property; and are so far from enduring a seizure, that they will hardly bear an inspection; and though the eye cannot by the laws of England be guilty of a trespass, yet where private papers are removed and carried away, the secret nature of those goods will be an aggravation of the trespass, and demand more considerable damages in that respect. Where is the written law that gives any magistrate such a power? I can safely answer, there is none; and therefore it is too much for us without such authority to pronounce a practice legal, which would be subversive of all the comforts of society.

19 State Tr. at 1066.

[20] The Supreme Court has long recognized that freedom of speech and the right to be free from unreasonable searches and seizures extends not merely to the person and immediate surroundings of individuals, but to their correspondence as well. In 1878, the Court first applied the Fourth Amendment to letters and sealed packages:

> [They] are as fully guarded from examination and inspection, except as to their outward form and weight, as if they were retained by the parties forwarding them in their own domiciles. . . . Whilst in the mail, they can only be opened and examined under . . . warrant . . as is required when papers are subjected to search in one's own household. No law of Congress can place in the hands of officials connected with the postal service any authority to invade the secrecy of letters and . . . sealed packages in the mail. . . .

Ex Parte Jackson, 96 U.S. 727, 733, 24 L.Ed. 877 (1878). *See also* Bloustein, Group Privacy: The Right to Huddle, 8 Rutgers-Camden L.J. 219, 225 (1977). Later cases recognized that First Amendment values were also infringed by "unjustified governmental interference" with personal letters and other mail. *Procunier v. Martinez*, 416 U.S.

396, 409, 94 S.Ct. 1800, 1809, 40 L.Ed.2d 224 (1974). *Cf. Lamont v. Postmaster General of United States*, 381 U.S. 301, 85 S.Ct. 1493, 14 L.Ed.2d 398 (1965) (refusal to deliver mail deemed by Post Office to be communist propaganda unless addressee formally requests it violates First Amendment); *United States v. Ramsey*, —— U.S. ——, ——, 97 S.Ct. 1972, 1982, 52 L.Ed.2d 617 (1977) (first class mail may not be opened). Given this background, plaintiffs' expectations of privacy in their mail were fully justified.

[21] That damages would be available in New York's courts to plaintiffs whose constitutional rights have been violated by public agents is not surprising, but is, rather, implicit in the whole tenor of American jurisprudence. As early as 1803, Chief Justice Marshall wrote in *Marbury v. Madison*, 5 U.S. (1 Cr.) 137, 163, 2 L.Ed. 60:

> The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury.

The Supreme Court, in deciding that plaintiffs could recover damages from individual FBI agents for violations of their Fourth Amendment rights, relied upon this language from *Marbury* to support its holding that a "petitioner, if he can demonstrate an injury . . ., is entitled to redress his injury through a . . . remedial mechanism normally available in the federal courts." *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388, 397, 91 S.Ct. 1999, 2005, 29 L.Ed.2d 619 (1971). *See also Dellums v. Powell*, 561 F.2d 242 (D.C.Cir.1977) (violation of First Amendment rights). The fact that it is a government official who violates the Constitution is an aggravating, not a mitigating, factor. In *Bivens* the Court wrote:

> Respondents seek to treat the relationship between a citizen and a federal agent unconstitutionally exercising his authority as no different from the relationship between two private citizens. In so doing, they ignore the fact that power, once granted, does not disappear like a magic gift when it is wrongfully used. An agent acting—albeit unconstitutionally—in the name of the United States possesses a far greater capacity for harm than an individual trespasser exercising no authority other than his own. Accordingly, as our cases make clear, the Fourth Amendment operates as a limitation upon the exercise of federal power regardless of whether the State in whose jurisdiction that power is exercised would prohibit or penalize the identical act if engaged in by a private citizen. It guarantees to citizens of the United States the absolute right to be free from unreasonable searches and seizures carried out by virtue of federal authority. And "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."

403 U.S. at 391–92, 91 S.Ct. at 2002 (citations omitted). *Cf.* relying on *Bivens*: *People v. Feinlowitz*, 29 N.Y.2d 176, 187, 324 N.Y.S.2d 62, 71, 272 N.E.2d 561, 567 (1971) (Burke, J., dissenting), *cert. denied*, 405 U.S. 963, 92 S.Ct. 1175, 31 L.Ed.2d 239 (1972); *Newell v. City of Elgin*, 34 Ill.App.3d 719, 340 N.E.2d 344 (1976); *Cashon v. Spann*, 125 N.J.Super. 386, 311 A.2d 192 (App.Div. 1973), *modified*, 66 N.J. 541, 334 A.2d 8, *cert. denied*, 423 U.S. 829, 96 S.Ct. 48, 46 L.Ed.2d 46 (1975).

[22] The New York Court of Appeals shares the general view that plaintiffs are entitled to damages when they are personally harmed by violation of their constitutional rights. In *People v. Defore*, 242 N.Y. 13, 150 N.E. 585 (1926), for example, then-Judge Benjamin Cardozo rejected the exclusionary rule in cases of Fourth Amendment violations by state officials in favor of such alternative remedies available in New York as civil money damages. More recently, in *People v. DeBour*, 40 N.Y.2d 210, 386 N.Y.S.2d 375, 352 N.E.2d 562 (1976), the Court of Appeals reiterated its assumption that damages were available in such cases. In discussing limits on the right of police to

approach and question citizens on the streets, the Court wrote:

> The basic purpose of the constitutional protections against unlawful searches and seizures is to safeguard the privacy and security of each and every person against all arbitrary intrusions by government. Therefore, any time an intrusion on the security and privacy of the individual is undertaken with intent to harass or is based upon mere whim, caprice or idle curiosity, the spirit of the Constitution has been violated and the aggrieved party may invoke the exclusionary rule or *appropriate forms of civil redress.* It is in this vein that the defendant urges that his right as a citizen to walk the streets unimpeded by the State has been trammelled.

40 N.Y.2d at 217, 386 N.Y.S.2d at 380–81, 352 N.E.2d at 567–68 (emphasis supplied). *See also* granting damages in situations where constitutional violations occurred: *Frady v. State,* 19 A.D.2d 783, 242 N.Y.S.2d 95 (3d Dep't 1963) (money damages when a state trooper entered home without a warrant); *Herman v. State,* 78 Misc.2d 1025, 357 N.Y.S.2d 811 (Ct.Cl.1974) (money damages when police executed a no-knock warrant for the wrong house); *Casler v. State,* 33 A.D.2d 305, 307 N.Y.S.2d 695 (4th Dep't 1970) (damages awarded for arrest based on search of car without probable cause); *Baisch v. State,* 76 Misc.2d 1006, 351 N.Y.S.2d 617 (Ct.Cl.1974) (damages to plaintiff who had been arrested for "desecrating" the American flag); *Brenon v. State,* 31 A.D.2d 776, 297 N.Y.S.2d 88 (4th Dep't 1969) (damages not awarded because plaintiff had consented to search); *Nader v. General Motors Corp.,* 57 Misc.2d 301, 292 N.Y.S.2d 514 (Sup.Ct.1968) (violation of constitutional right to privacy could be remedied by an award of damages), *aff'd on other grounds,* 31 A.D.2d 392, 298 N.Y.S.2d 137 (1969), *aff'd,* 25 N.Y.2d 560, 307 N.Y.S.2d 647, 255 N.E.2d 765 (1970).

III. CLASS ACTION INAPPROPRIATE

[23] One of the plaintiffs, Mary Rule MacMillen, moved to certify her suit as a class action under Rule 23(b)(3) of the Federal Rules of Civil Procedure. The proposed class consisted of all United States residents and citizens whose first-class mail was opened by government agents as part of the HTLINGUAL program and it included both writers and recipients of letters sent into and out of the United States.

The court must find that a class action is superior to other means for a fair and efficient adjudication of the controversy. Specifically it must determine that:

> the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

Rule 23(b)(3). Justice would not be served by such certification.

[24] First, the injured here are not easily identified. Although the opening and copying of correspondence without warrant is an undoubted intrusion involving important civil liberties, not all citizens will consider themselves harmed by those acts, or desire any recompense. Some may believe for personal or political reasons that the government—even if it violated the law—should not be sued for actions taken in the name of an arguably legitimate concern for national security. Others may feel that the CIA and the FBI have an absolute right to conduct such security operations and suffer no subjective sense of injury. Still others whose mail was opened may simply feel indifferent about the fact and not, therefore, be damaged in a compensable way.

The issue of class identification is further complicated by the fact that many, if not most, of those affected by HTLINGUAL remain unaware of the fact. Since this is a tort where the individual—as opposed to the public or social—damage flows primarily from the knowledge of the wrong, the bulk of potential class members probably have not been substantially injured.

Second, were this case to be treated as a class action, little practical advantage would accrue to the individual members of the class. All potential plaintiffs share only one question in common: is the United States liable under the applicable federal and state law for harm which may have resulted to any individual from these unauthorized interferences with the mail? Since the facts on which liability—as opposed to damages—rests are undisputed, extensive testimony is not required in each successive case to establish the factual underpinnings of the tort claim. The only question regarding liability will be legal. Future litigants will not be forced to spend large sums to reduplicate complex testimony from numerous witnesses. They will not even bear the burden of preparing extensive, expensive and repetitive briefs since the ultimate determination of the law in this case, assuming that it is followed, will bind future litigants in actions relating to HTLINGUAL. *Cf.* Developments in the Law—Class Actions, 89 Harv.L.Rev. 1318, 1394–1402 (1976).

Third, a class action would present inordinate management problems. Since punitive damages are prohibited by the Tort Claims Act, 28 U.S.C. § 2674, the court could compensate only for actual injuries. The amount of injury could conceivably vary widely from individual to individual, depending on the sensitivity of the letter, the amount of distress experienced, and whether or not any tangible damage could be shown. Since the facts on damages in each case would still have to be determined separately, the court would be enmeshed in a lengthy series of separate trials even if it granted class certification. *Cf. Dellums v. Powell*, 561 F.2d 242 (D.C.Cir. 1977) (difficulties at trial based on theory of false arrest and imprisonment and violation of First Amendment rights compounded by nature of class).

We need not consider the administrative exhaustion issue requiring the plaintiff in a Federal Tort Claims Act case to attempt first to have his or her claim satisfied by the appropriate administrative agency. 28 U.S.C. § 2675. *Compare McKart v. United States*, 395 U.S. 185, 197, 89 S.Ct. 1657, 1664, 23 L.Ed.2d 194 (1969) (balancing test in Selective Service case); *Wetzel v. Liberty Mutual Insurance Co.*, 508 F.2d 239, 246 (3d Cir.), *cert. denied*, 421 U.S. 1011, 95 S.Ct. 2415, 44 L.Ed.2d 679 (1975) (Title VII of the 1964 Civil Rights Act, 42 U.S.C. § 2000e *et seq.*; class may include those who have not filed administrative complaints) *with Commonwealth of Pennsylvania v. National Association of Flood Insurers*, 520 F.2d 11, 24 (3d Cir. 1975) (exhaustion required in class actions brought under Federal Tort Claims Act). If the decision in these cases is upheld on appeal, the CIA may want to reconsider its refusal to grant relief administratively to other HTLINGUAL complainants. Should that be the case, no further cases in this court on the mail openings would be anticipated. If, however, the agency continues to deny claims, a new set of facts will be presented in subsequent actions which may, on appropriate motion, cause the court to reconsider the issue of class certification. *Cf.* Chayes, The Role of the Judge in Public Law Litigation, 89 Harv.L.Rev. 1281, 1294 n. 65 (1976).

IV. MEASURE OF DAMAGES

A. Elements Generally

[25] Recovery under the Federal Tort Claims Act is limited to compensatory damages. "The United States shall not be liable for . . . punitive damages." 28 U.S.C. § 2674.

[26] Neither may the award take into account injuries inflicted upon the structure of American democracy. Any theory which would allow private litigants to seek relief on behalf of the entire injured segment of

the public as private attorneys general has no application in this case for two reasons. First, the effect would be punitive, and hence would contravene the limitation in section 2674. Second, it would make little sense to ask the citizenry as a whole to pay damages to these plaintiffs out of the public purse for injuries which the American population itself has suffered en masse. The remedy for the wrong against the nation, therefore, must be supplied by other branches of government.

The plaintiffs in these cases suffered none of the tangible indicia of harm for which a dollar value may easily be assigned. They experienced no financial losses. Their jobs, their reputations and prestige in their communities did not suffer. They were not subjected to intrusive or humiliating investigations by the government. Their homes were not broken into, They were not assaulted or detained. They lost no time from work and incurred no medical expenses. Plaintiff MacMillen did testify that she broke out in hives and suffered some respiratory difficulties shortly after she learned of the CIA action, but even she did not claim damages for physical injury or medical bills.

[27] The lack of objective harm is, however, no bar to recovery. The law generally recognizes that where a person suffers an invasion of the right to privacy, awards are appropriate for general damages covering the injury of invasion itself, as well as for the resulting mental distress. The Restatement (Second) of Torts, § 652H, summarizes the rule in privacy cases:

> One who has established a cause of action for unreasonable invasion of his privacy is entitled to recover damages for
>
> (a) the harm to his interest in privacy resulting from the invasion;
>
> (b) his mental distress proved to have been suffered if it is of a kind which normally results from such an invasion; and
>
> (c) special damage of which the invasion is a legal cause.

3 Restatement (Second), Section 652H at 401 (1977).

[28] New York has been extremely liberal in granting recovery for mental distress, both as an interest protectible in itself, *see, e. g., Long v. Beneficial Finance Co. of New York*, 39 A.D.2d 11, 330 N.Y.S.2d 664 (4th Dep't 1972), and as an element of damages for other torts such as defamation or false imprisonment. *See, e. g., Bishop v. New York Times Co.*, 233 N.Y. 446, 135 N.E. 845 (1922) (defamation); *Hoffner v. State*, 207 Misc. 1070, 142 N.Y.S.2d 630 (Ct.Cl.1955) (false imprisonment). It is also an element of damages in civil suits for constitutional violations. *See Herman v. State*, 78 Misc.2d 1025, 357 N.Y.S.2d 811 (Ct.Cl.1974). Although appropriate damages for common law copyright are rarely discussed, because most litigants have sought injunctive relief, there is no reason to suppose that allowance would not be made for mental anguish since New York courts grant this remedy in other cases where privacy-related interests are at stake.

[29] The court credits the testimony of the plaintiffs in these cases that they suffered actual mental pain, outrage and shock when they learned that government agents had interfered with their privacy by opening and reading their mail. They are entitled, therefore, to recovery for that injury under any of the three tort theories supporting liability.

The parties are entitled to recover for the invasion of their rights, without respect to the consequences. The Restatement (Second) of Torts suggests that a deprivation of common law privacy is an independent injury for which damages are appropriate. The comment to the damages section of the Restatement notes:

> A cause of action for invasion of privacy, in any of its four forms, entitles the plaintiff to recover damages for the harm to the particular element of his privacy which is invaded. Thus one who suffers an intrusion upon his solitude or seclusion . . . may recover damages for the deprivation of his seclusion. One to whose private life publicity is given . . may recover for the harm resulting to his

> reputation from such publicity. One who is publicly placed in a false light . . . may recover damages for the harm to his reputation from the position in which he is so placed. One whose name, likeness or identity is appropriated to the use of another . . . may recover for the loss of the exclusive use of the value so appropriated.

3 Restatement (Second) of Torts, § 652H, Comment at 401–02 (1977). A similar rule applies also to damages for constitutional torts. *See, e. g., Piphus v. Carey*, 545 F.2d 30, 31-32 (7th Cir. 1976) (appeal pending).

Valuation of intangibles is difficult, but not impossible. In ordinary tort suits, judges and juries commonly draw upon the evidence and their shared experience to assess the dollar worth of such imponderables as future pain and suffering. Over time, a range of awards appropriate for certain kinds of losses is established, enabling courts to decide whether a given recovery is reasonable. In this case, however, no precedents are available. For this reason the court decided to seek the assistance of an advisory jury.

B. Advisory Jury Recommendations

[30] While trial by jury is specifically prohibited in Federal Tort Claims Act cases, 28 U.S.C. § 2402, use of an advisory jury is permitted. *Cofflund v. United States*, 57 F.R.D. 209 (N.D.W.Va.1972); *Poston v. United States*, 262 F.Supp. 22 (D.Haw. 1966), *aff'd*, 396 F.2d 103 (9th Cir.), *cert. denied*, 393 U.S. 946, 89 S.Ct. 322, 21 L.Ed.2d 285 (1968), *rehearing denied*, 393 U.S. 1072, 89 S.Ct. 724, 21 L.Ed.2d 717 (1969); *Schetter v. Housing Authority of City of Erie*, 132 F.Supp. 149 (W.D.Pa.1955). *Contra, Honeycutt v. United States*, 19 F.R.D. 229 (W.D.La.1956). The verdict of such an advisory panel is only part of the data taken into consideration in arriving at the court's independent conclusion.

It was, nevertheless, instructive that this panel of average citizens—representing a broad range of economic, educational, social and political experience—uniformly found that the damages suffered by the plaintiffs in this case were substantial. Although the jurors were instructed that they could recommend nominal damages of one dollar if they found that the wrong done resulted only in slight harm, none chose this alternative. Three suggested that plaintiffs be awarded $10,000 each for their mental distress and for the encroachment upon their personal liberty; one suggested $2500; and the other eight jurors all agreed that $5000 was the compensation needed to make these plaintiffs whole.

In addition, the verdict of the advisory panel served to affirm the opinion of the court that the emotional distress these plaintiffs suffered was the sort that would be experienced by reasonable people under the almost unprecedented circumstances of these cases. Since normal principles of tort recovery in privacy do not permit compensation for unusual sensitivity, the consensus of the jurors on this point was particularly useful. The Restatement (Second) of Torts provides that:

> The plaintiff [who has established a cause of action for invasion of his privacy] may also recover damages for emotional distress . . . if it is of a kind that *normally* results from such an invasion and . . . is normal and reasonable in its extent.

3 Restatement (Second) of Torts, § 652H, Comment b at 402 (1977) (emphasis added). It should also be noted that the jury did not find any difference in the degree of damage sustained by any of the three plaintiffs.

C. Court Findings

[31] The court's findings on the damages issue agree substantially with those of the jury. The injuries suffered were substantial. It is entirely reasonable and normal for any citizen whose privacy has been invaded by the government, as it was in these cases, to experience comparable emotional distress. All three plaintiffs should be treated similarly in the absence of substantial proof that any one suffered perceptibly more than the others. Although plaintiff MacMillen's letter was more personal than those of the other plaintiffs, there was insufficient evidence that she suffered enough incremental embarrassment to justify a higher award.

The jurors' damage recommendations were somewhat high. Awards of the magnitude suggested by the advisory verdict have been found only where plaintiffs have suffered objective, observable injuries as a result of interferences with their civil liberties. *See, e. g., Donovan v. Reinbold*, 433 F.2d 738 (9th Cir. 1970) ($5000 for loss of job because of the exercise of First Amendment rights); *Manfredonia v. Barry*, 401 F.Supp. 762 (E.D.N.Y.1975) ($3500 damages upon a finding that rights under the Fourth and First Amendments had been violated; plaintiff spent the night in jail, and was exposed to extensive notoriety in the press and her community); *Zarcone v. Perry*, 75–C–1619 (E.D.N.Y.July 20, 1977) (damage award of $141,000 for false arrest and imprisonment with handcuffing of the plaintiff, public humiliation and proof of substantial medical expenses and economic loss and substantial punitive damages). *Cf. Dellums v. Powell*, 561 F.2d 242 (D.C.Cir. 1977) ($7500 excessive for First Amendment violations).

In the instant case it is possible to ameliorate the harm by the government's writing a letter of apology, a possibility raised by the jury. Assurance by the government that it regrets the injury to plaintiffs will serve to soothe their wounded faith in our democratic institutions, give assurances of non-recurrence in the future, and restore some confidence in our government. In analogous defamation cases, New York law recognizes that an apology will mitigate damages, or at least that a failure to apologize will enhance them. *See, e. g., Stefania v. McNiff*, 49 Misc.2d 480, 267 N.Y.S.2d 854 (Sup.Ct.1966); *O'Connor v. Field*, 266 App. Div. 121, 41 N.Y.S.2d 492 (1st Dep't 1943); *O'Leary v. Hearst Magazines, Inc.*, 167 Misc. 481, 4 N.Y.S.2d 79 (Sup.Ct.1937), *aff'd*, 254 A.D. 806, 5 N.Y.S.2d 538, *aff'd*, 280 N.Y. 502, 19 N.E.2d 917 (1938). *See also* W. Prosser, Law of Torts § 116 at 800 (4th ed. 1971); 1 F. V. Harper & F. James, The Law of Torts 408–09 (1956). It is appropriate to apply these precedents to the special facts of this case.

In arriving at an appropriate figure some guidance is found in the amount declared by Congress as proper compensation in a similar context. Under the Omnibus Crime Control and Safe Streets Act of 1968, P.L. 90-351, Congress created a right to civil recovery for individuals whose telephone or oral conversations were intercepted without legal sanction by wiretaps or eavesdropping. The basic damage figure was set at $100 a day, or $1000, whichever is larger; special damages, punitive damages and attorney's fees are also recoverable. 18 U.S.C. § 2520. Since the interests sought to be vindicated in these CIA cases and by the Omnibus Crime Control Act provisions are similar, comparability in the size of the non-punitive awards seems reasonable, even though it is the state rather than the federal law of damages that is being applied.

These considerations, as well as the documentary and testimonial evidence, lead to a conclusion that plaintiffs should recover for the violations they suffered, and for the mental distress which followed, in the sum of $1000 each, provided the government furnishes a suitable letter of regret and assurance of non-recurrence. Of the $1000, twenty-five per cent is to be paid to the counsel for these plaintiffs as attorney's fees. While this legal fee clearly does not compensate the plaintiffs' talented lawyers for the time devoted to these cases, it is the maximum permitted by statute. 28 U.S.C. § 2678. In addition to the $1000 in compensatory damages, plaintiffs are also entitled to recover costs. 28 U.S.C. § 2412.

V. CONCLUSION

The American people have already paid a considerable price for the CIA's illegal mail search activities. In addition to the large out-of-pocket expenditures in operating the program, there has been a perceptible widespread loss of confidence in the integrity of the mails and in the right of individuals to be free from surreptitious intrusions into their privacy by government officials. Adding to the taxpayers' burdens by awarding damages in these cases may seem like a regrettable additional disbursement for this ill-starred program. But the law requires that plaintiffs be compensated for their special loss. Moreover, knowledge by

government officials that individuals have effective legal remedies to enforce their rights may deter future illegality. The existence of a court system capable of protecting the right to privacy by granting money damages and other relief against the government and its agents makes our Constitution and laws consequential to our citizens rather than pretentious, empty promises.

The court finds that the United States government, through its agents, committed torts against plaintiffs, causing compensable injury. Each plaintiff shall have judgment for $1000 plus costs.

So ordered.

Michael AVERY

v.

UNITED STATES of America.

Civ. No. H-76-286.

United States District Court,
D. Connecticut.

June 15, 1977.

Plaintiff brought action against United States seeking to recover for injuries sustained as result of allegedly wrongful acts of government agents in illegally opening his mail, and Government moved to dismiss for lack of subject matter jurisdiction and for failure to state a claim upon which relief could be granted. The District Court, Clarie, Chief Judge, held that: (1) statute providing that for Government to be vicariously liable for torts of an employee such employee must have acted within scope of his employment did not bar plaintiffs' action to recover for injuries arising out of Government's surveillance program, in view of fact that government agents' conduct at issue was motivated by a desire to serve Government's needs, and not by any personal or nongovernmental purposes; (2) Cen-

tral Intelligence Agency's surveillance program involving extensive opening and reading of mail passing between United States and Soviet Union was in violation of its subjects' rights and in excess of its progenitors' discretion, and therefore, action brought against United States to recover for injuries sustained as result of such surveillance program was not barred by statute prohibiting Federal Tort Claims Act suits where government agents have performed a discretionary function; (3) plaintiff's action was not barred by statute prohibiting Federal Tort Claims Act suits arising out of the "loss, miscarriage, or negligent transmission of letters or postal matter," and (4) plaintiff's action was not barred by statute prohibiting suit against United States for specified intentional torts of its employees, in view of fact that constitutional tort of invasion of privacy was not among specific intentional torts excepted by such statute.

Defendant's motion to dismiss denied.

1. United States ⇐125(1)

Under doctrine of sovereign immunity, Government is immune from suits by its citizens, except by its own consent.

2. Master and Servant ⇐302(1)

Under doctrine of respondeat superior, employers are held vicariously liable for torts of their employees, but such vicarious liability is limited to torts committed by employees acting within scope of their employment; however, this limitation does not mean that employer cannot be liable for acts not specifically authorized by him.

3. Master and Servant ⇐302(1)

Central question in deciding whether or not employee tort-feasor acted within scope of his employment is not whether he acted pursuant to an explicit or implicit authorization from his employer; rather, the relevant question is whether employee acted from a personal motive or with a motivation to serve his employer's interests.

4. United States ⇐78(13)

In cases decided under the Federal Torts Claim Act, statute providing that for Government to be vicariously liable for torts of an employee such employee must have acted within scope of his employment has barred government liability for intentional and legally unauthorized wrongs committed by government agents. 28 U.S.C.A. §§ 1346(b), 2671 et seq.

5. Master and Servant ⇐300

Applicable law as to breadth of scope of employer's vicarious liability for torts of an employee is nominally that of state where tort occurred.

6. United States ⇐78(13)

Statute providing that for government to be vicariously liable for torts of an employee such employee must have acted within scope of his employment did not bar action brought against United States to recover for injuries allegedly sustained as result of Central Intelligence Agency's surveillance program involving extensive opening and reading of mail passing between United States and Soviet Union, in view of fact that government agents' conduct was motivated by a desire to serve Government's needs, and not by any personal or nongovernmental purposes. 28 U.S.C.A. §§ 1346(b), 2671 et seq.

7. United States ⇐50

A governmental official who abused his discretion, by acting arbitrarily or discriminatorily, for example, will be protected from claim brought under Federal Tort Claims Act; but official with no discretion in particular area has no discretion to abuse and he can only act in excess of his authority. 28 U.S.C.A. §§ 2671 et seq., 2680(a).

8. United States ⇐78(12)

If trespasses committed by government agents in violation of government regulations are not discretionary functions, then, a fortiori, trespasses by government agents in violation of constitutional guarantees are not discretionary functions. 28 U.S.C.A. §§ 2671 et seq., 2680(a).

9. United States ⇐78(12)

Central Intelligence Agency's surveillance program involving extensive opening

and reading of mail passing between United States and Soviet Union was in violation of its subjects' rights and in excess of its progenitors' discretion, and therefore, action brought against United States to recover for injuries sustained as result of such surveillance program was not barred by statute prohibiting Federal Tort Claims Act suits where government agents have performed a discretionary function. 28 U.S.C.A. §§ 2671 et seq., 2680(a).

10. United States ⇐78(5)

Action brought to recover for injuries sustained as result of Central Intelligence Agency's surveillance program involving extensive opening and reading of mail passing between United States and Soviet Union was not barred by statute prohibiting Federal Tort Claims Act suits arising out of the "loss, miscarriage, or negligent transmission of letters or postal matter." 28 U.S.C.A. §§ 2671 et seq., 2680(b).

11. United States ⇐78(5)

Action brought to recover for injuries sustained as the result of Central Intelligence Agency's surveillance program involving extensive opening and reading of mail passing between United States and Soviet Union was not barred by statute prohibiting suit against United States for specified intentional torts of its employees, in view of fact that constitutional tort of invasion of privacy was not among specific intentional torts excepted by such statute. 28 U.S.C.A. §§ 2671 et seq., 2680(h).

Frank Cochran, Conn. Civil Liberties Union, Hartford, Conn., Donald R. Holtman, Connolly, Holtman & Losee, West Hartford, Conn., for plaintiff.

Frank H. Santoro, Asst. U. S. Atty., Peter C. Dorsey, U. S. Atty., New Haven, Conn., for defendant.

RULING ON MOTION TO DISMISS

CLARIE, Chief Judge.

The plaintiff, Michael Avery, has brought this action against the United States of America, seeking money damages for injuries allegedly sustained by him as a result of the wrongful acts of government intelligence agents. The plaintiff claims that the Central Intelligence Agency (CIA) invaded his rights by illegally opening his mail, and asserts that damages for such an invasion are cognizable under the government's general waiver of sovereign immunity, the Federal Tort Claims Act (FTCA), 28 U.S.C. §§ 1346(b), 2671–2680.

The defendant has moved to dismiss the complaint pursuant to Rule 12(b) of the F.R.Civ.P., for lack of subject matter jurisdiction and for failure to state a claim upon which relief might be granted. The Court finds that the government has waived sovereign immunity under the FTCA [1] so as to encompass the acts complained of, and the Court accordingly denies the defendant's motion to dismiss.

FACTS

The circumstances underlying plaintiff's complaint are as follows: [2] The CIA is an agency of the United States, charged with correlating, evaluating and disseminating intelligence data relating to the national security. 50 U.S.C. § 403(d). During the period from 1953 to 1973 the CIA engaged

1. In *Rayonier, Inc. v. United States*, 352 U.S. 315, 77 S.Ct. 374, 1 L.Ed.2d 354 (1957) the Supreme Court held that negligent firefighting could be a valid basis for suit under the FTCA, stating that

> "[i]t may be that it is 'novel and unprecedented' to hold the United States accountable for the negligence of its firefighters, but the very purpose of the Tort Claims Act was to waive the Government's traditional all-encompassing immunity from tort actions and to establish novel and unprecedented governmental liability." 352 U.S. at 319, 77 S.Ct. at 377.

2. The CIA activities here at issue are detailed in the *Report to the President by the Commission on CIA Activities Within the United States* [the Rockefeller Commission Report], at 101–115 (1975); and in the *Supplementary Detailed Staff Reports on Intelligence Activities and the Rights of Americans, Book III, Final Report of the Select Committee to Study Governmental Operations with Respect to Intelligence Activities, United States Senate*, at 559–636.

in a comprehensive surveillance program, code-named HTLINGUAL, which concerned mail passing between the United States and the U.S.S.R.[3]

At its inception in 1953, HTLINGUAL was limited in scope to simple mail-cover surveillance, but it gradually expanded into an extensive mail opening and mail reading operation. By 1959 the following developments had occurred: at least partial approval of the operation had been secured from the Postmaster General; a formal counterintelligence project had been approved within the CIA; a liaison with the Federal Bureau of Investigation had been established; a laboratory for technical study of opened mail was operating at the project's New York City facility; all mail covers passing through the facility were being photographed; and HTLINGUAL was opening more than 13,000 letters per year.

The project continued through the 1960's, but encountered increasing resistance from officials of the Post Office Department and others. These pressures ultimately brought about the termination of the project in 1973, at the direction of Director of Central Intelligence James R. Schlesinger.

Over its twenty year lifespan, HTLINGUAL had access to over 28,000,000 pieces of mail. More than 215,000 letters were opened, read and photographed. Copies of these letters were kept on file, in a computerized record system, and many of the letters were made available to the FBI as intelligence information to evaluate with regard to possible anti-American activities.

The CIA never sought or obtained judicial approval of HTLINGUAL's mail openings, either by warrant or otherwise, although tampering with the mails has long constituted a criminal violation under federal statute.[4] Lawful means with judicial supervision could conceivably have been made available to the CIA, to serve its legitimate intelligence purposes, but no such means were sought.

The plaintiff has been informed by the government under the Freedom of Information Act that six letters written or received by him were intercepted and opened as part of HTLINGUAL. He has fulfilled the procedural prerequisites of an FTCA suit, *see* 28 U.S.C. § 2675, before bringing the instant action.[5]

3. For shorter periods during this time the CIA conducted surveillance involving other international mail, but those projects are not the subject of this litigation.

4. *See* 18 U.S.C. §§ 1692, 1701, 1702, 1708, 1709; *Id.* §§ 241, 371 (conspiracy). The Justice Department has decided not to criminally prosecute individuals for their involvement with HTLINGUAL. *Report of the Department of Justice Concerning Its Investigation and Prosecutorial Decisions with Respect to Central Intelligence Agency Mail Opening Activities in the United States.* (Jan. 14, 1977). Such a decision is one of prosecutorial discretion and does not affect the Court's consideration of the civil issues before it.

Pursuant to statute, and for strictly limited purposes (esp. customs searches), first class mail of foreign origin may be opened without a warrant, provided there exists "reasonable cause to suspect" a customs violation. *See* 19 U.S.C. § 482 (1970); *United States v. Ramsey*, — U.S. —, 97 S.Ct. 1972, 52 L.Ed.2d 617 (1977). The actions alleged here do not fall within the customs exception, however. Indeed, even if they did, the following regulation, which accompanies the postal status, would prohibit an operation such as HTLINGUAL:

> "No customs officer or employee shall read or authorize or allow any other person to read any correspondence contained in sealed letter mail of foreign origin unless a search warrant has been obtained in advance from an appropriate judge or U.S. magistrate which authorizes such action." 19 C.F.R. § 145.3 (1976).

5. To the knowledge of the Court, eight other actions have been brought under the FTCA in connection with the CIA mail openings. Those cases are: *Avery v. United States*, D.Minn., No. 4–76–347 (defendant's motion to dismiss denied, transferred to E.D.N.Y.); *Birnbaum v. United States*, E.D.N.Y., No. 76C–1837 (defendant's motion to dismiss denied); *Cruikshank v. United States*, D.Hawaii, 431 F.Supp. 1355 (defendant's motion to dismiss denied); *Driver v. United States*, D.R.I., No. CA76–0297 (no disposition); *Hardy v. United States*, D.D.C., No. 76–1423 (defendant's motion to dismiss granted); *Murphy v. United States*, N.D.Iowa, No. C76–12 (defendant's motion to dismiss granted); *Siebel v. United States*, N.D.Cal., No. C76–1737 SC (defendant's motion to dismiss granted); and *Wilson v. United States*, S.D.N.Y., No. 76 Civ. 3373 (defendant's motion to dismiss denied, transferred to E.D.N.Y.). In addition,

ISSUE

The question presented by the defendant's motion to dismiss is whether the Congress has authorized suits against the United States based upon acts of the kind herein alleged.

DISCUSSION OF THE LAW

[1] Under the doctrine of sovereign immunity, the government is immune from suits by its citizens, except by its own consent. *See generally* 2 F. Harper & F. James, *The Law of Torts* 1607–1613 (1956) (Harper & James). Until 1946, the United States, as a sovereign body, was not generally liable for the wrongful or negligent acts of its agents or employees. This was changed radically in 1946 by the enactment of the Federal Tort Claims Act, as Title IV of the Legislative Reorganization Act, 60 Stat. 842, 28 U.S.C. § 2671 *et seq.*

The FTCA eliminated, in broad terms, the United States' previous immunity from liability in tort. It designated the federal courts as the forum for determining government liability

> "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." 28 U.S.C. § 1346(b).

The terms of the FTCA, however, placed limits on potential governmental tort liability. Some of these limitations are inherent in § 1346(b) itself, particularly the requirement that, for the government to be vicariously liable for the torts of an employee, such employee must act "within the scope of his office or employment". Other limitations on FTCA liability are expressed in specific statutory exceptions. *See* 28 U.S.C. § 2680.

Subsection (a) of Section 2680 generally excepts from action under the FTCA, claims based upon non-negligent acts of employees of the government in the execution of a statute or regulation, as well as claims

> "based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused." 28 U.S.C. § 2680(a).

The remainder of § 2680, subsections (b) through (n), makes more specific exceptions to FTCA liability, for particular kinds of government activities or torts. Two of those exceptions, subsections (b) and (h), are significant in the instant case. Section 2680(b) provides that FTCA actions shall not lie for "[a]ny claim arising out of the loss, miscarriage, or negligent transmission of letters or postal matter." Section 2680(h) similarly retains government immunity from

> "[a]ny claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights. . . ." 28 U.S.C. § 2680(h).

The government argues that, between these four limitations on its liability under the FTCA—"the scope of employment," "discretionary function", "postal matter" and "intentional tort" exceptions—the United States has withheld permission to sue, and has retained its traditional sovereign immunity, as to the torts alleged.

(a) *Scope of Employment*

Under § 1346(b), government liability for the torts of its employees is limited to acts committed "within the scope of [their] office or employment". The government ar-

CIA mail openings have been challenged under the Tucker Act, 28 U.S.C. § 1346(a)(2), and the Administrative Procedure Act, 5 U.S.C. §§ 701–706, in *Kipperman v. McCone*, N.D.Cal., 422 F.Supp. 860 (action dismissed). Finally, a class action is pending against government agents in their individual capacities, entitled *Driver et al. v. Helms et al.*, D.R.I., 74 F.R.D. 382 (no disposition).

gues that if, as alleged, the CIA agents involved here were knowingly committing criminal violations in the formulation and implementation of HTLINGUAL, then they were not acting within the scope of employment of any government employee. Illegal activities, they argue, could not possibly be within any employee's authority. Thus, the government cannot be held liable under § 1346(b) for these acts.

[2, 3] The thrust of this argument rests upon a misinterpretation of the term "scope of employment," the purpose of which is to incorporate a limit upon the doctrine of *respondeat superior* under the FTCA. Under the latter doctrine employers are held vicariously liable for the torts of their employees, but such vicarious liability is limited to torts committed by employees acting within the scope of their employment. This is so because it would be inequitable to hold the employer liable for torts not committed in the furtherance of his own interests. However, this limitation does not mean that the employer cannot be liable for acts not specifically authorized by him; otherwise, there would be no vicarious liability for even negligent wrongs of the employee, which were not directly commanded. *See generally* 2 Harper & James, *supra*, at 1374–1382 (1956); *Ira S. Bushey & Sons v. United States*, 276 F.Supp. 518 (S.D.N.Y. 1967), *aff'd*, 398 F.2d 167 (2d Cir. 1968). Moreover, it has come to be accepted that even willful torts are not necessarily outside the employee's scope of employment, even though malicious or criminal in nature. *See* 2 Harper & James, *supra*, at 1389–1392 (1956). The central question, however, in deciding whether or not an employee-tortfeasor acted within the scope of his employment is not whether he acted pursuant to an explicit or implicit authorization from his employer. Rather, the relevant question is whether the employee acted from a personal motive or with a motivation to serve his employer's interests. *See, e. g.*, 2 Harper & James, *supra*, at 1374–1375; W. Prosser, *Law of Torts*, 460–461, 464–466 (4th ed. 1971).

[4, 5] In cases decided under the FTCA, the "scope of employment" limitation has barred government liability for intentional and legally unauthorized wrongs committed by government agents. *Hatahley v. United States*, 351 U.S. 173, 76 S.Ct. 745, 100 L.Ed. 1065 (1956), concerned the actions of federal range managers who wrongfully and discriminatorily removed and destroyed horses belonging to the plaintiff Navaho Indians, which horses the plaintiffs had allowed to graze freely on the range. The federal agents had acted in violation of regulations which limited their authority to remove grazing livestock from the range. In opposition to government liability under the FTCA, it was argued that the federal agents had not acted within the scope of their employment, and hence that § 1346(b) did not authorize the suit. The Supreme Court rejected this argument, relying on law to the effect that "an employer is liable to third persons for the willful torts of his employees if the acts are committed in furtherance of the employer's interests or if the use of force could have been contemplated in the employment." 351 U.S. at 180, 76 S.Ct. at 751. Although they had exceeded their legal authority, the government agents still were within the scope of their employment.[6]

[6] Thus, even though the CIA agents in the present case may have acted illegally in opening plaintiff's mail, that fact is not determinative of whether they were within the scope of their employment in so doing. Their program was of a general type which might be contemplated for such a government agency, and they were clearly motivated by a desire to serve the government's

6. The applicable law as to the breadth of the scope of employment limitation is nominally that of the state where the tort occurred. *Williams v. United States*, 350 U.S. 857, 76 S.Ct. 100, 100 L.Ed. 761 (1955). Here, the situs of the alleged tortious activity was the State of New York, which has adopted a rule of *respondeat superior* under which the employer is liable for his employee's tort, where committed in furtherance of the employer's interests, whether done negligently, wantonly, or even willfully. *Osipoff v. City of New York*, 286 N.Y. 422, 432, 36 N.E.2d 646 (1941).

needs, however misguided this desire may have been. There was no apparent personal or nongovernmental motivation behind the CIA's conduct, as is characteristically the case where employees act outside the scope of their employment. Hence, the "scope of employment" limitation in § 1346(b) is not a bar to plaintiff's action under the facts herein described.

(b) *Discretionary Function*

The most comprehensive of the exceptions to FTCA liability is made by § 2680(a). The first prong of this provision bars the use of the FTCA to attack the validity of legislation or regulations; no such attack is made here. The second prong of § 2680(a) prohibits FTCA claims wherein government agents have performed a "discretionary function" leading to the injury complained of.[7] The government argues that this exception relieves the government of liability for the CIA operation here in question.

By its nature, the "discretionary function" exception is necessarily vague. Considerable litigation has centered upon what its proper meaning and interpretation should be. Little of the available precedent concerning this exception, however, bears directly on the question of whether or not allegedly unconstitutional and illegal acts can be discretionary within the meaning of § 2680(a). Instead of dealing with the scope of the discretion protected by this exception, the cases generally examine whether the torts alleged resulted from decisions made at a policy making level of government.

The focus of the case law on the "discretionary function" question is illustrated by the leading decision, *Dalehite v. United States*, 346 U.S. 15, 73 S.Ct. 956, 97 L.Ed. 1427 (1953). *Dalehite* involved claims against the government arising from a disaster in the port of Texas City, Texas, in which hundreds of people were killed in an explosion of fertilizer-grade ammonium nitrate which had been loaded onto a ship for export. The victims brought suit under the FTCA. In a decision which explored the legislative history and policy of the "discretionary function" exception, the Supreme Court found that the exception did apply to the facts of the case before them. The governmental determinations which brought about the catastrophe were basic policy decisions concerning the program for manufacturing and exporting the fertilizer, made at a level where the "discretionary function" exception was intended to operate. The Court loosely defined the discretion protected by § 2680(a) as "the discretion of the executive or the administrator to act according to one's judgment of the best course, a concept of substantial historical ancestry in American law."[8] 346 U.S. at 34, 73 S.Ct. at 967. The Court refrained from stating precisely where discretion under § 2680(a) should end. *Id.* at 35, 73 S.Ct. 956. Its holding was limited to a determination that the particular governments acts in question occurred at the planning rather than at the operational level, and thus were within the "discretionary function" exception. 346 U.S. at 42, 73 S.Ct. 956.

It is generally recognized that there is discretion involved in decisions made at any level of government, as to how best to accomplish the job at hand. *Dalehite* offers guidance on the question of when discretion is of the particular type meant to be excepted from the FTCA under § 2680(a). This is the issue commonly pursued in "discretionary function" cases. *See, e. g., Downs v.*

7. In providing the "discretionary function" exception, Congress felt a need to insulate the policy decisions which are necessarily the constant business of government from unwarranted and potentially disruptive judicial scrutiny. *See* H.Rep.No.2245, 77th Cong., 2d Sess., p. 10; S.Rep.No.1196, 77th Cong., 2d Sess., p. 7; H.Rep.No.1287, 79th Cong., 1st Sess., pp. 5–6; Hearings before House Com. on Judiciary on H.R. 5373 and H.R. 6463, 77th Cong., 2d Sess., p. 33. *See also Dalehite v. United States*, 346 U.S. 15, 27–28, 73 S.Ct. 956, 97 L.Ed. 1427 (1953).

8. The Court's citation at this point includes a reference to *Marbury v. Madison*, 1 Cranch 137, 170, 2 L.Ed. 60 (1803). It is interesting to note that *Marbury*, at 170–171, provides authority for the general proposition that a government official cannot have discretion to commit unconstitutional or illegal acts.

United States, 522 F.2d 990 (6th Cir. 1975); *Griffin v. United States*, 500 F.2d 1059 (3d Cir. 1974); *Smith v. United States*, 375 F.2d 243 (5th Cir.), *cert. denied* 389 U.S. 841, 88 S.Ct. 76, 19 L.Ed.2d 106 (1967); *Dahlstrom v. United States*, 228 F.2d 819 (8th Cir. 1956); *Monarch Insurance Co. v. District of Columbia*, 353 F.Supp. 1249 (D.D.C.1973).

[7] Such cases do not bear directly on the question at hand. The decision to engage HTLINGUAL seems clearly to have been made at a high enough policy level so as to ordinarily come within the ambit of § 2680(a). Regardless of the level or context of a particular government act, however, the official involved must act in accordance with certain limits upon his discretion. It is true that § 2680(a) excepts the government from liability for officials performing discretionary functions, "whether or not the discretion involved be abused." But there is a difference between abuse of discretion and lack of discretion. An official who abuses his discretion, by acting arbitrarily or discriminatorily, for example, will be protected by § 2680(a). But an official with no discretion in a particular area has no discretion to abuse; he can only act in excess of his authority.

[8] *Hatahley v. United States, supra*, exemplifies the operation of this principle in the present context. In that case, as noted above, government agents wrongfully took property of the plaintiffs, in violation of their own regulations. The issue of whether the agents' actions were "discretionary functions" under § 2680(a) was raised, and the United States Supreme Court had little difficulty with it:

> "We are here not concerned with any problem of 'discretionary function' under the Act . . . These acts were wrongful trespasses not involving discretion on the part of the agents, and they do give rise to a claim compensable under the Federal Tort Claims Act." 351 U.S. at 181, 76 S.Ct. at 752 (citation omitted).

If trespasses in violation of government regulations are not "discretionary functions," then, *a fortiori*, trespasses in violation of constitutional guarantees are not "discretionary functions." *See Simons v. United States*, 413 F.2d 531 (5th Cir. 1969); *DeBonis v. United States*, 103 F.Supp. 123 (W.D.Pa.1952) (dictum); *but cf. Kiiskila v. United States*, 466 F.2d 626 (7th Cir. 1972).

[9] The question of whether the "discretionary function" exception extends to acts committed in excess of a government agent's authority was treated by the Second Circuit in *Myers & Myers, Inc. v. United States Postal Service*, 527 F.2d 1252 (2d Cir. 1975). In that case, the government argued that the granting or denial of certain contracts by the Postal Service was a "discretionary function," excepted from the FTCA by § 2680(a). The court was not persuaded by the argument, and reasoned that

> "The Government renews its argument that the 'discretionary function' exception applies. But here the appellants' argument is that the Postal Service has acted in contravention of its own regulations, if not unconstitutionally, in denying appellants a hearing prior to debarment from government contracting. *It is, of course, a tautology that a federal official cannot have discretion to behave unconstitutionally or outside the scope of his delegated authority.* . . . This distinguishes cases . . . which hold that even though discretion is abused, its exercise cannot give rise to a federal tort claim. . . . For here the appellants' claim is that the Postal Service lacked discretion to act in disregard of its own applicable regulations and of the Constitution." 527 F.2d at 1261 (emphasis supplied) (citations omitted).

Similarly, operation HTLINGUAL was in violation of its subjects' rights and in excess of its progenitors' discretion, and therefore was not excepted from the FTCA by § 2680(a).

(c) *Postal Matter*

[10] Section 2680(b) excepts from suit under the FTCA claims arising from the "loss, miscarriage, or negligent transmission of letters or postal matter." Since the plaintiff's claim in this case involves letters,

the government argues that it is barred by the exception. However, the language of the exception refers to "loss, miscarriage, or negligent transmission," and plaintiff alleges none of these. The plaintiff's letters were neither lost, miscarried, nor negligently transmitted; they were intentionally taken out of the mail, to become the subject of HTLINGUAL, with all that that entailed. The rationale of the "postal matter" exception, that the government should not be liable for the mishandling of mail by the post office,[9] does not support its application here. Finally, the cases cited by the government to support the application of the exception are inapposite.[10] The CIA activities alleged here do not fit the "postal matter" exception of the FTCA.

(d) *Section 2680(h)*

[11] Section 2680(h), which can be loosely characterized as the "intentional torts" exception, bars suit against the United States for specified intentional torts of its employees. The torts enumerated in the provision are "assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, [and] interference with contract rights." Plaintiff's legal claim, which basically sounds in the constitutional tort of invasion of privacy, is not among the specific intentional torts excepted by § 2680(h). The government argues, however, that this enumeration of intentional torts is not exclusive, and that the Court should find an "implied exception" for the tort here alleged.[11]

There is no legislative history which speaks directly to the question of the exclusiveness of the list of intentional torts in § 2680(h). However, the terms of the FTCA itself suggest that the exception was not meant to apply to all intentional torts. Section 1346(b) refers to "wrongful" as well as "negligent" acts as constituting grounds for government liability. To accept the government's argument for implied § 2680(h) inclusions, however, would suggest an FTCA exception for *all* intentional torts, a result which would render the inclusion of "wrongful" acts in § 1346(b) meaningless. The government suggests no limiting principle which might prevent this anomaly.

None of the cases cited by the government on this issue found implied exceptions beyond those intentional torts specifically enumerated in § 2680(h). *United States v. Muniz*, 374 U.S. 150, 83 S.Ct. 1850, 10 L.Ed.2d 805 (1963) involved a claim by a federal prisoner for injuries due to the negligence of a federal employee and the passing reference to § 2680(h)[12] does not even purport to delineate the scope of that ex-

9. *See* Jayson, *Handling Federal Tort Claims* § 255 (1977).

10. *Marine Insurance Co. v. United States*, 378 F.2d 812 (2d Cir.), *cert. denied*, 389 U.S. 953, 88 S.Ct. 335, 19 L.Ed.2d 361 (1967), involved loss of mail in connection with an investigation of certain mail thefts. In *Goodman v. United States*, 324 F.Supp. 167 (M.D.Fla.), *aff'd*, 455 F.2d 607 (5th Cir. 1971), the court referred only peripherally to the "postal matter" exception, in dismissing broad allegations of a government conspiracy.

11. A conceivable argument for excepting the conduct in the instant case, though not pressed here, runs along the following lines: The Congress enacted a proviso to Section 2680(h) in 1974, P.L. 93-253, 88 Stat. 50, which retracted the exception for certain intentional torts of "investigative and law enforcement officers." This "exception-to-the-exception" does not, by its terms, apply to CIA agents. Thus it is arguable that, since the CIA is not covered by the proviso, there is indicated an affirmative congressional intention to afford government immunity for the activities of the CIA. Such an argument is quite attenuated, however, and is not supported by the legislative history which indicates congressional recognition that government liability for intentional torts is sustainable independent of the new proviso. *See* S.Rep.No.588, 93d Cong., 2d Sess. (1973), *reprinted in* 1974 U.S.Code Cong. & Admin. News, pp. 2789, 2791. *See also* J. Boger, M. Gitenstein & P. R. Vercuil, "The Federal Tort Claims Act Intentional Torts Amendment: An Interpretative Analysis" 54 N.C.L.Rev. 497, 518 (1976).

12. "Also, the Government is not liable for the intentional torts of its employees, 28 U.S.C. § 2680(h), for which prisoners might be especially tempted to initiate retributive litigation." 374 U.S. at 163, 83 S.Ct. at 1858.

ception. Other cases have involved intentional torts which were among those specifically enumerated in the exception. *Kessler v. General Services Administration*, 341 F.2d 275 (2d Cir. 1964) (libel); *Dupree v. United States*, 264 F.2d 140 (3d Cir. 1959) (interference with contract rights); *Small v. United States*, 333 F.2d 702 (3d Cir. 1964) (interference with contract rights). *Feres v. United States*, 340 U.S. 135, 71 S.Ct. 153, 95 L.Ed. 152 (1950), did not concern a claim for an exception under § 2680(h), and *Bell v. Hood*, 71 F.Supp. 813 (S.D.Cal.1947) (on remand from the Supreme Court) did not involve a federal tort claim. *Rayonier, Inc. v. United States*, 352 U.S. 315, 77 S.Ct. 374, 1 L.Ed.2d 354 (1957), which the government cites for comparison, states the proper approach on this question: "There is no justification for this Court to read exemptions into the Act beyond those provided by Congress. If the Act is to be altered that is a function for the same body that adopted it." 352 U.S. at 320, 77 S.Ct. at 377 (footnote omitted).

In several cases cited by the plaintiff, FTCA liability has been imposed for intentional torts not enumerated in § 2680(h). *See Hatahley v. United States, supra* (trespass); *Ira S. Bushey v. United States*, 276 F.Supp. 518, 526 (S.D.N.Y.1967), *aff'd*, 398 F.2d 167 (2d Cir. 1968) (trespass); *United States v. Ein Chemical Corp.*, 161 F.Supp. 238, 246 (S.D.N.Y.1958) (conversion); *Black v. United States*, 389 F.Supp. 529, 531 (D.D.C.1975) (invasion of privacy). The government makes no attempt to explain or distinguish these cases.

Having reviewed the relevant exceptions to governmental liability under the FTCA, the Court finds that none of the grounds for dismissal urged by the government is sufficient to defeat the plaintiff's stated cause of action. The CIA activities which the plaintiff alleges were not beyond the scope of the agents' employment, nor were said actions a "discretionary function" within the meaning of the Act, since a government agent is not authorized to exercise his discretion through illegal means. The Court finds further that the postal matter and intentional tort exceptions are inapplicable.

Although the performance of the intelligence functions entrusted to government agencies such as the CIA and FBI are of the highest importance to the well-being and security of the nation, the principles of constitutional liberty must not be abandoned; especially where—as here—alternate lawful, constitutional means could be used, incorporating judicial supervision of proposed activities, to substantially accomplish the essential responsibilities of the agency. Accordingly, the defendant's motion to dismiss is denied.

SO ORDERED.

Dale Paul CRUIKSHANK, Plaintiff,

v.

The UNITED STATES of America, Defendant.

Civ. No. 76-0362.

United States District Court, D. Hawaii.

May 9, 1977.

Plaintiff, invoking provisions of Federal Tort Claims Act, brought suit against United States seeking damages for intentional invasion of his privacy allegedly occurring when agents of Central Intelligence Agency opened and photographed sealed, first-class letters mailed by plaintiff to colleagues in the Soviet Union. The United States moved for dismissal. The District Court, Samuel P. King, Chief Judge, held that: (1) alleged activities of agents fell within purview of general waiver of sovereign immunity statute, despite claim that CIA agents involved could not have been legally authorized to carry out such activities and consequently, as matter of law, were not "acting within the scope of their office or employment," as that phrase is used in statute; (2) the discretionary function exception to general waiver of sovereign immunity could not be construed so broadly so that it would protect a governmental decision to commit an illegal act; (3) postal exception to general waiver of sovereign immunity by United States could not operate to bar plaintiff's claim for invasion of privacy, and (4) claim by plaintiff was not barred as a claim for damages within intentional tort exception to general waiver of sovereign immunity by United States.

Motion to dismiss denied.

1. United States ⇐78(13)

Alleged activities of agents of Central Intelligence Agency in opening and photographing sealed, first-class letters mailed by plaintiff to colleagues in the Soviet Union fell within purview of general waiver of sovereign immunity statute, despite claim that CIA agents involved could not have been legally authorized to carry out such activities and consequently, as matter of law, were not "acting within the scope of their office or employment," as that phrase is used in statute. 28 U.S.C.A. § 1346(b).

2. Master and Servant ⇐302(1)

The modern and expanding view is to hold an employer liable for the intentional torts of his employee if the employee was motivated by desire to help his employer, or if it is fair to shift the loss from the victim to the employer.

3. United States ⇐78(12)

Discretionary function exception to general waiver of sovereign immunity does not extend to every decision which contains an element of judgment; only when there is room for policy judgment and decision is there a discretionary function which deserves protection from being tested through the vehicle of tort suits. 28 U.S.C.A. § 2680(a).

4. United States ⇐78(12)

The discretionary function exception to general waiver of sovereign immunity could not be construed so broadly so that it would protect a governmental decision to commit an illegal act; thus, suit for damage against the United States for acts of agents of Central Intelligence Agency in opening and photographing sealed, first-class letters mailed by plaintiff to colleagues in Soviet Union was not precluded on asserted theory that decision to open plaintiff's mail illegally stemmed from a discretionary function of the CIA so that United States could not be held liable for damages caused by the nonnegligent execution of that decision. 28 U.S.C.A. § 2680(a).

5. War and National Emergency ⇐48

Although Congress has given the Central Intelligence Agency a broad mandate to do whatever is necessary to gather intelligence around the world, court would not accept proposition that it could do anything. 28 U.S.C.A. § 2680(a); National Security

Act of 1947, § 102(d)(3), 50 U.S.C.A. § 403(d)(3).

6. United States ⇨78(12)

Discretionary function exception to general waiver of sovereign immunity by United States does not preclude suits for damages caused by illegal acts committed by government officials, and there is no exception to this rule for acts of Central Intelligence Agency. 28 U.S.C.A. § 2680(a).

7. United States ⇦78(5)

Postal exception to general waiver of sovereign immunity by United States could not operate to bar plaintiff's claim for invasion of privacy caused by fact that agents of Central Intelligence Agency had deliberately opened and photographed his mail. 28 U.S.C.A. § 2680(b).

8. United States ⇦78(5)

Claim by plaintiff for invasion of privacy caused by fact that agents of Central Intelligence Agency had deliberately opened and photographed his mail was not barred as a claim for damages within intentional tort exception to general waiver of sovereign immunity by United States, since an invasion of privacy was not an enumerated intentional tort in statutory exception and case was not proper for an implied exception. 28 U.S.C.A. § 2680(h).

David L. Turk, Turk & Kuniyuki, Honolulu, Hawaii, Melvin Wolf, American Civil Liberties Union, New York City, for plaintiff.

T. David Woo, Jr., Asst. U. S. Atty., Harold M. Fong, U. S. Atty., Honolulu, Hawaii, Barbara Allen Babcock, Asst. Atty. Gen., Alphonse M. Alfano, Dept. of Justice, Washington, D. C., for defendant.

1. Oral argument of this motion was heard by Thomas P. Young, the United States Magistrate for the District of Hawaii. Pursuant to Rule 5 of the District of Hawaii Local Magistrate Rules, Judge Young recommended that the motion be denied and suggested a written opinion. After receiving and considering the objections of the parties to Judge Young's recommendations, I will substitute this decision for the opinion suggested by Judge Young and the government's motion will be denied. This decision is in large part based upon the opinion originally prepared by Judge Young.

DECISION

SAMUEL P. KING, Chief Judge.

I. STATEMENT OF THE CASE[1]

On nineteen separate occasions between 1968 and 1971, agents of the Central Intelligence Agency (CIA) opened and photographed sealed, first class letters mailed by plaintiff to colleagues in the Soviet Union. The opening of plaintiff's mail was done as part of Operation HTLINGUAL,[2] a program of covert mail opening conducted by the CIA in New York from 1953 until 1973. Plaintiff alleges that the opening of his mail was conducted without a warrant, was illegal,[3] and was done by employees of the United States acting within the scope of their employment.

Invoking the provisions of the Federal Tort Claims Act, 28 U.S.C. §§ 1346(b), 2671–2680 (1970), plaintiff brought suit against the United States in this Court seeking damages for intentional invasion of his privacy.[4] The Government has moved for dismissal of the complaint on the grounds that the Court lacks subject matter jurisdiction and that the complaint fails to state a claim upon which relief can be granted. For a number of reasons, the United States argues that it has not waived its sovereign immunity from suit in the case of massive illegal conduct by its employees. This Court disagrees with all four of the arguments advanced by the Government to sustain this premise.

II. DISCUSSION

A. THE SCOPE OF SECTION 1346(b)

The Government's first argument is that 28 U.S.C. § 1346(b), the general waiver of

2. An overview of the HTLINGUAL program can be found in the Commission on CIA Activities Within the United States, Report to the President 101–115 (1975).

3. *See, e. g.*, 18 U.S.C. § 1702 (1970).

4. Plaintiff chose not to join the individual agents who actually opened his mail.

sovereign immunity, does not extend far enough to cover the activities of which the plaintiff complains. Section 1346(b) reads as follows:

> Subject to the provisions of chapter 171 of this title, the district courts . . . shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and 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.

The thrust of the Government's argument is that because the covert mail opening program was illegal,[5] the CIA agents involved could not have been legally authorized to carry out these activities. Consequently, as a matter of law, the agents were not "acting within the scope of [their] office or employment", as that phrase is used in Section 1346(b), and, thus, the complaint must be dismissed.

One's immediate response to this argument is that it misconceives the obvious purpose of the phrase in Section 1346(b). The dichotomy between an act within and without the scope of an officer's employment was set up to prevent the United States from being liable for acts committed by its employees when they were not on duty; not to prevent liability for acts, albeit illegal ones, directly committed as a part of the employee's job. *See generally United States v. Romitti*, 363 F.2d 662 (9th Cir. 1966). Obviously, the agents who opened plaintiff's mail were not doing so on their own time; they were paid by the United States for that purpose.

In order to sustain its argument, the Government relies heavily on *Hatahley v. United States*, 351 U.S. 173, 76 S.Ct. 745, 100 L.Ed. 1065 (1956). However, such reliance is misplaced. If anything, the holding in *Hatahley* supports the plaintiff's position here. In *Hatahley*, agents of the Interior Department rounded up and destroyed horses which belonged to a group of Indians. At the time, the agents were purportedly acting pursuant to a state abandoned horse statute but they failed to give the Indians notice of their intended actions, as required by federal law. 351 U.S. 177–80, 76 S.Ct. 745. Thus, the intentional acts of the government agents were illegal. Nevertheless, the Court held that they were acting within the scope of their employment under federal law. *Id.* at 180, 76 S.Ct. 745. The Court explained that:

> The fact that the agents did not have actual authority for the procedure they employed does not affect liability. There is an area, albeit a narrow one, in which a government agent, like a private agent, can act beyond his actual authority and yet within the scope of his employment. We note that § 1346(b) provides for liability for 'wrongful' as well as 'negligent' acts. *Id.* at 180–81, 76 S.Ct. at 751.

[1] Although the Government baldly asserts that the activities at issue here should fall outside *Hatahley's* "narrow" range, it offers no principled way to distinguish the illegal intentional acts here from the illegal intentional acts for which the United States

5. For purposes of this motion to dismiss, the government concedes that the complaint, which alleges illegal acts by government employees, must "be taken as true." Points and Authorities in Support of Defendant's Motion to Dismiss at 3. Although I am aware that the Justice Department has declined to prosecute those CIA agents involved, *see* Department of Justice, Report of the Department of Justice Concerning Its Investigation and Prosecutorial Decisions with Respect to Central Intelligence Agency Mail Opening Activities in the United States (January 14, 1977), the plaintiff is, of course, not bound by that decision and is entitled to present evidence which he maintains leads to the conclusion that the CIA's activities were illegal at the time that they occurred. Whether or not the government should be liable for illegal acts carried out by employees acting in good faith is not an issue before the court at this time. *See generally Hatahley v. United States*, 351 U.S. 173, 176, 76 S.Ct. 745, 100 L.Ed. 1065 (1956).

incurred liability in *Hatahley*. Therefore, this Court holds that the alleged activities set forth in the complaint fall within the purview of the waiver of sovereign immunity in Section 1346(b).

[2] The Court's conclusion is reinforced by the jurisdictional trend in determining what acts fall within the scope of a person's employment. Although in the past some courts found that an illegal act could not be within the scope of an agent's employment because the employer could not authorize his employees to break the law, the modern and expanding view is to hold an employer liable for the intentional torts of his employees if the employee was motivated by a desire to help his employer, *see* Prosser, *Law of Torts* § 70 at 464–65 (4th ed. 1971), or if it is fair to shift the loss from the victim to the employer. *See, e. g., Ira S. Bushey & Sons, Inc. v. United States*, 276 F.Supp. 518 (E.D.N.Y.1967), *aff'd*, 398 F.2d 167 (2d Cir. 1968). *But see Wrynn v. United States*, 200 F.Supp. 457, 465 (E.D.N.Y. 1961).[6] Under either theory, this Court finds that the alleged acts, if proved, would be within the scope of the agents' employment in this case.

B. SECTION 2680(a): THE DISCRETIONARY FUNCTION EXCEPTION

The Government's second argument is that the decision to open plaintiff's mail illegally stemmed from a discretionary function of the CIA and, thus, the United States cannot be held liable for damages caused by the non-negligent execution of that decision. 28 U.S.C. § 2680(a) provides an exception to the general waiver of sovereign immunity contained in 28 U.S.C. § 1346(b). It states that Section 1346(b) does not apply to:

> Any claim . . . based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.

The Government notes that the CIA's function is counter-intelligence. Since the HTLINGUAL program was an outgrowth of that function, the Government maintains that Section 2680(a) bars any claim for damages.

[3] Since the enactment of Section 2680(a), courts have had a great deal of difficulty in deciding what acts can be termed discretionary functions, and thus protected, and which acts cannot be so denominated. *See, e. g., Brown v. United States*, 374 F.Supp. 723, 728 (E.D.Ark.1974). The scope of the "discretionary function" has been broadly interpreted and the Government relies heavily on this line of cases. *See, e. g., Dalehite v. United States*, 346 U.S. 15, 73 S.Ct. 956, 97 L.Ed. 1427 (1953). In *Dalehite*, the Supreme Court construed Section 2680(a) to preclude a suit to recover damages caused by the decision to use a highly explosive ammonium nitrate base in the government production of fertilizer. The Court explained that the purpose of Section 2680(a) is to protect "the discretion of the executive or the administrator to act according to one's judgment of the best course . . . ." 346 U.S. at 34, 73 S.Ct. at 967. Nevertheless, even in *Dalehite*, the Court recognized that the discretionary function exception does not extend to every decision which contains an element of judgment. *Id.* at 35–36, 73 S.Ct. 956. Otherwise, this exception would swallow up the rule of waiver of sovereign immunity since

6. According to *Williams v. United States*, 350 U.S. 857, 76 S.Ct. 100, 100 L.Ed. 761 (1955), the law of the place where the act occurred determines the scope of an officer's employment. In this case, that place is apparently New York. This Court has not been able to discover any New York cases directly on point, a fact which is not surprising considering that it is only recently that the public has become aware of the extent of the CIA's domestic activities. Each case must necessarily turn upon its own facts and the specific tort alleged. Due to the lack of explicitly controlling New York law, I have referred to more general common law. Nevertheless, the practice in New York seems to be in line with the modern trend. *See, e. g., De Wald v. Seidenberg*, 297 N.Y. 335, 79 N.E.2d 430 (1948). *Cf. Osipoff v. City of New York*, 286 N.Y. 422, 36 N.E.2d 646 (1941).

any act can in some way be called "discretionary". Only when "there is room for policy judgment and decision" is there a discretionary function which deserves protection from being tested through the vehicle of tort suits. *Id.* at 36, 73 S.Ct. 956. *See also Griffin v. United States*, 500 F.2d 1059, 1064 (3d Cir. 1974); *Simons v. United States*, 418 F.2d 531, 534 (5th Cir. 1969); *Brown v. United States*, 374 F.Supp. 723, 728–29 (E.D.Ark.1974).

[4] The precise issue presented in this motion to dismiss is whether or not Section 2680(a) should be construed so broadly that it protects a governmental decision to commit an illegal act. In the words of the *Dalehite* court, was there "room for policy judgment and decision" when the CIA determined that it would engage in the opening of citizens' mail? This Court would conclude that there was not.

To begin with, this conclusion seems indicated by the Supreme Court's decision in *Hatahley* In *Hatahley*, the Court noted that the Interior Department agents had not complied with the notice provisions of federal law when they rounded up and destroyed the plaintiffs' horses. The Court found that the failure to follow federal law, a fact which made the agents' subsequent actions illegal, took the decision outside the ambit of the discretionary function exception of Section 2680(a). In effect, the Court held that government agents do not have the discretion to break the law. 351 U.S. 181, 76 S.Ct. 745.[7]

[5, 6] More importantly, if this country has learned nothing else in the past decade, it has learned that no man, nor any man acting on behalf of our government, is above the law. The Government should not have the "discretion" to commit illegal acts whenever it pleases. In this area, there should be no policy option. Nevertheless, if the Government's argument were accepted in this case, that would be the effect of this Court's decision. Although Congress has certainly given the CIA a broad mandate to do whatever is necessary to gather intelligence around the world, this Court refuses to accept the proposition that it can do anything.[8] This Court therefore holds that Section 2680(a) does not preclude suits for damages caused by illegal acts committed by government officials. The Court further holds that there is no exception to this rule for the acts of the CIA.

C. SECTION 2680(b)

[7] The Government also argues that Section 2680(b), which excepts from the waiver of sovereign immunity "[a]ny claim arising out of the loss, miscarriage, or negligent transmission of letters or postal matter. . . . " would operate to bar the claim in this case. Such an interpretation of Section 2680(b), however, ignores the plain language of the statute. The section reads "loss, miscarriage, or negligent transmission." Plaintiff is not suing for a delay in transmission, the misplacing, or the loss

7. This Court's research has only disclosed one published opinion which held that § 2680(a) barred a suit for damages caused by the illegal decision of a government official. In *Kiiskila v. United States*, 466 F.2d 626 (7th Cir. 1972), a military base commander had unconstitutionally excluded the plaintiff from her job on a military base. The court held that a commander has wide discretion to exclude people from his base. It thus felt that § 2680(a) precluded a claim for damages based on the unconstitutional exercise of that discretion. The *Kiiskila* court did not make reference to *Hatahley, supra*. *Kiiskila* is not controlling in this Circuit and I decline to follow it.

I am also aware of three other opinions dealing with facts similar to this case. *Norman Hardy v. United States of America*, Civ. No.76-1423 (D.D.C. February 14, 1977), and *Norman Murphy v. Central Intelligence Agency*, No. C. 76-12 (N.D.Iowa May 28, 1976) both held that § 2680(a) barred claims for illegal mail opening, but those cases did not focus on the issue of illegality. In addition, in the *Murphy* case, upon which the *Hardy* decision relied, the plaintiff appeared *pro se* and did not resist the motion to dismiss. In *Julia Siebel v. United States*, No. C-76-1737 SC (N.D.Cal. December 17, 1976), Judge Conti also held that § 2680(a) barred a claim for damages for similar allegedly illegal acts. Although Judge Conti did discuss the possible illegality of the government's act, he did not consider the impact of *Hatahley, supra*. I respectfully disagree with his decision.

8. *See also* 50 U.S.C. § 403(d)(3) (1970).

of his letters. Rather, he is suing for the invasion of his privacy caused by the fact that the agents deliberately opened and photographed his mail. The instant situation is not covered by this section. Neither *Marine Insurance Co., Ltd. v. United States*, 378 F.2d 812 (2d Cir.), *cert. denied*, 389 U.S. 953, 88 S.Ct. 335, 19 L.Ed.2d 361 (1967), nor *Goodman v. United States*, 324 F.Supp. 167, 171–72 (M.D.Fla.), *aff'd*, 455 F.2d 607 (5th Cir. 1971), cited by the Government to support its argument, persuade this Court to rule to the contrary. *Marine Insurance* simply held that Section 2680(b) applied to prevent a claim for loss when a package was removed from the course of the mails, and then returned and subsequently lost in the ordinary course of events. Similarly, *Goodman* did not extend the meaning of Section 2680(b) beyond its plain language. That case simply dismissed a number of claims, including misdelivery of the mail, on several grounds, including Section 2680(b). Therefore, this Court holds that the instant claim for invasion of privacy is not barred by the postal exception contained in Section 2680(b).

D. SECTION 2680(h) AND INTENTIONAL TORTS

[8] The Government's final argument is that 28 U.S.C. § 2680(h) (Supp.1975) bars claims for damages caused by intentional torts. That section provides an exception to the waiver of sovereign immunity for:

> 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: *Provided*, That, with regard to acts or omissions of investigative or law enforcement officers of the United States Government, the provisions of this chapter and section 1346(b) of this title shall apply to any claim arising, on or after the date of the enactment of this proviso, out of assault, battery, false imprisonment, false arrest, abuse of process, or malicious prosecution. For the purpose of this subsection, "investigative or law enforcement officer" means any officer of the United States who is empowered by law to execute searches, to seize evidence, or to make arrests for violations of Federal law.

Although invasion of privacy is not one of the torts listed as being excluded in Section 2680(h), the United States argues that the Court should construe an implied exception for the CIA's intentional (and allegedly illegal) invasion of privacy in this case.

This Court is not persuaded that such an exception can or should be implied in Section 2680(h). If Congress had wished to bar claims for all intentional torts instead of just those claims enumerated, it could easily have said so. A number of courts have held that those intentional torts not enumerated are not excluded and thus must be allowed. *Black v. United States*, 389 F.Supp. 529, 531 (D.D.C.1975) (trespass and invasion of privacy); *Ira S. Bushey & Sons, Inc. v. United States*, 276 F.Supp. 518, 526 (E.D.N.Y.1967), *aff'd*, 398 F.2d 167 (2d Cir. 1968) (trespass); *United States v. Ein Chemical Corp.*, 161 F.Supp. 238, 245–47 (S.D.N.Y.1958) (conversion). *See also Hatahley, supra*, 351 U.S. at 181, 76 S.Ct. 745; *Laird v. Nelms*, 406 U.S. 797, 801–02, 92 S.Ct. 1899, 32 L.Ed.2d 499 (1972) (dictum).[9] *But cf. Anderson v. United States*, 548 F.2d 249, 252 (8th Cir. 1977), *petition for cert. filed*, 45 U.S.L.W. 3720 (U.S. April 27, 1977). If Congress had intended to include invasion of privacy among the other enumerated intentional torts in Section 2680(h), it could have done so three years ago when it amended the statute. *See* Act of March 16, 1974, Pub.L. 93–253, § 2, 88 Stat. 50, *now codified* in 28 U.S.C. § 2680(h) (Supp.1975). Invasion of privacy is not such a new cause of action, as the Government implies, that it can now be presumed to catch Congress by surprise. Moreover, even if this were a case of first

9. The cases cited by the Government are not on point. They deal with torts explicitly enumerated in § 2680(h). *See, e. g., Kessler v. General Services Administration*, 341 F.2d 275 (2d Cir. 1964); *Dupree v. United States*, 264 F.2d 140, 142–43 (3d Cir. 1959), *reh. denied*, 266 F.2d 373 (3d Cir.), *cert. denied*, 361 U.S. 823, 80 S.Ct. 69, 4 L.Ed.2d 67 (1959).

impression and there was no history concerning implied exceptions to the waiver of sovereign immunity, this Court does not feel that this is a proper case for such an exception here. Accepting the allegations of the complaint, we are dealing with the commission of a series of illegal acts by agents of the Government.[10] Justice would certainly not countenance a court straining the language of a statute in order to deny the victim of such illegality at least some measure of compensation. This Court therefore holds that the claim in this case is not barred by the provisions of Section 2680(h).

III. CONCLUSION

For all of the reasons given above, the defendant's motion to dismiss is without merit and therefore should be denied. An appropriate order will issue.

Elizabeth Ann NORTON, Plaintiff,

v.

John TURNER et al., Defendants.

Civ. A. No. 76-3-A.

United States District Court,
E. D. Virginia,
Alexandria Division.

Jan. 26, 1977.

Action was brought against certain federal and local law enforcement officers and the United States to redress allegedly wrongful entry and search of plaintiff's apartment. Cross motions for summary judgment as to liability were filed. The District Court, Merhige, J., held that forcible nighttime entry into the apartment was in violation of plaintiff's right to be free from unreasonable searches and seizures, that individual officers would not be subjected to monetary liability under the constitutional tort claims if they acted under a reasonable good faith belief in the legality of their actions and that under 1974 amendment to Federal Tort Claims Act the United States was not entitled to avail itself of the immunity defense of the individual officers.

Order accordingly.

1. Searches and Seizures ⇐3.3(2)

If the police intend to conduct a search of one's home for a suspect, they must at least have probable cause to believe that the suspect is on the premises. U.S.C.A. Const. Amend. 4.

2. Searches and Seizures ⇐3.3(3)

If police officers had probable cause to believe that nationally renowned fugitive was in another's apartment their warrantless search of the apartment would have been justified since the fugitive and her traveling companion had demonstrated capacity for both violence and elusive flight. U.S.C.A.Const. Amend. 4.

3. Searches and Seizures ⇐3.3(3)

Whether police officers had probable cause for a warrantless entry and search of apartment was determined by reference to whether at moment of entry the facts and circumstances within the officers' knowledge and of which they had reasonably trustworthy information were sufficient to warrant a prudent man in believing that nationally renowned fugitive was inside the apartment; such assessment was made in view of the cumulative effect of the facts then existing and the totality of the circumstances. U.S.C.A.Const. Amend. 4.

4. Searches and Seizures ⇐3.3(1)

Standing alone, anonymous tip that nationally renowned fugitive, who had fled California, was in apartment in Alexandria, Virginia, was not sufficient to justify warrantless entry and search of the apartment, especially since informant chose to remain

anonymous, underlying circumstances detailing the manner in which the information was gathered were unknown and informant had not previously provided any, much less accurate, information to the police and did not supply information against her penal interest. U.S.C.A.Const. Amend. 4.

5. Searches and Seizures ⇐3.3(1)

Although factual assertions contained in tip from unproven informant that nationally renowned fugitive had come to Alexandria, Virginia from Pennsylvania and had cut her hair were consistent with information contained in the FBI investigation file, such information did not display the indicia of reliability necessary to justify warrantless, forced entry into apartment in which the fugitive allegedly was staying. U.S.C.A.Const. Amend. 4.

6. Searches and Seizures ⇐3.3(1)

Anonymous tip that nationally renowned female fugitive was staying in Alexandria, Virginia apartment, that she had come to Virginia from Pennsylvania and had cut her hair, which information was consistent with that found in FBI files, did not, even when coupled with fact that van bearing Pennsylvania license plates was in proximity of the apartment and that investigation revealed, albeit erroneously, that a black male previously questioned in connection with weapons violation was occupying the apartment and that young female voice responded from officers' knock and refused to open without display of identification did not justify warrantless nighttime entry into and search of the apartment. U.S.C.A. Const. Amend. 4.

7. Assault and Battery ⇐2
False Imprisonment ⇐5
Trespass ⇐10

Illegal, warrantless entry into apartment made out prima facie case of assault, trespass and false imprisonment under Virginia law. U.S.C.A.Const. Amend. 4.

8. Searches and Seizures ⇐8

Federal and state law enforcement officials who participated in unreasonable, warrantless search of plaintiff's apartment would not be subject to monetary liability under constitutional tort claims if they acted under a reasonable good faith belief in the legality of their actions; such qualified immunity was applicable to claim seeking recovery under Virginia law for assault, trespass and false imprisonment. U.S.C.A. Const. Amend. 4; 42 U.S.C.A. § 1983.

9. Civil Rights ⇐13.8(4)

Term "probable cause" when used in context of the qualified immunity of police officers from monetary liability where officers acted under a reasonable good faith belief in legality of their actions is not identical with the term "probable cause" in the constitutional sense; in the context of immunity, probable cause translates into a reasonable good faith belief in the legality of the conduct and such is a less stringent standard than that used in determining whether sufficient "probable cause" exists to justify issuance of an arrest or search warrant. U.S.C.A.Const. Amend. 4; 42 U.S.C.A. § 1983.

10. Civil Rights ⇐13.8(4)

To successfully assert qualified immunity defense a police officer must show that he acted in good faith belief that his conduct was lawful and that his belief was reasonable; the former standard is subjective while the latter is objective. U.S.C.A. Const. Amend. 4; 42 U.S.C.A. § 1983.

11. Civil Rights ⇐13.8(2)

For purpose of qualified immunity of a police officer from monetary liability for actions taken under a reasonable good faith belief and the legality thereof there is no distinction between action brought against state officials under Civil Rights Act or one brought against federal agents under the Constitution. U.S.C.A.Const. Amend. 4; 42 U.S.C.A. § 1983.

12. Federal Civil Procedure ⇐2515

Material fact issue existed whether law enforcement officers acted under a reasonable good faith belief in legality of their warrantless entry into and search of plaintiff's apartment, which search was found to be unreasonable, precluding summary judgment on officers' claim for qualified immu-

nity from monetary liability. U.S.C.A. Const. Amend. 4.

13. United States ⇐129

Liability of the United States for actions of federal officers in undertaking what was found to be an unreasonable warrantless, nighttime entry into and search of plaintiff's apartment was not coterminous with that of its officers and, hence, the federal government was not entitled to assert the defenses of its agents, specifically qualified immunity, to defeat plaintiff's claims under 1974 amendments to the Federal Tort Claims Act; immunity available to individual agents in a Bivens-type action is not a defense available to the government to a claim brought under the FTCA. 28 U.S.C.A. §§ 1346(b), 2671 et seq.

14. Civil Rights ⇐13.8(1)

Immunity of individual federal officers to liability and damages for actions within the scope of their official duties and taken under reasonable good faith belief in their legality does not serve to defeat the existence of a tort but merely provides a defense for monetary liability; qualified immunity does not eliminate the wrongfulness of the conduct. 42 U.S.C.A. § 1983.

15. Injunction ⇐96

Courts will grant injunctive relief to remedy Fourth Amendment violations under appropriate circumstances. U.S.C.A. Const. Amend. 4.

16. Searches and Seizures ⇐3.3(8)

An otherwise illegal search does not attain legality merely because the offending officer is immune from monetary liability. U.S.C.A.Const. Amend. 4; 42 U.S.C.A. § 1983.

17. Master and Servant ⇐327

Under doctrine of respondeat superior employers are generally entitled to assert defenses available to their employees.

18. United States ⇐78(2)

The 1974 amendments to Federal Tort Claims Act creating a civil cause of action for intentional tort were remedially oriented. 28 U.S.C.A. §§ 1346(b), 2671 et seq.

Phil J. Hirschkop, Alexandria, Va., for plaintiff.

James R. Hubbard, Asst. U.S. Atty., Alexandria, Va., Joseph P. Dyer, Arlington, Va., Plato C. Cacheris, Alexandria, Va., Brian P. Gettings, Arlington, Va., for defendants.

MEMORANDUM

MERHIGE, District Judge.

Plaintiff, Elizabeth Ann Norton, brings this action against certain federal and local law enforcement officers and the United States of America to redress an alleged wrongful entry and search of her apartment. The plaintiff seeks both monetary and declaratory relief. The action is brought pursuant to the Constitution of the United States, 42 U.S.C. § 1983 and state law. Jurisdiction is attained pursuant to 28 U.S.C. §§ 1331, 1332, 1343 and 1346(b). The matter comes before the Court on cross-motions for summary judgment as to liability.

The gravaman of the plaintiff's complaint is the contention that her apartment was illegally entered by the individual defendants in violation of her rights under the Fourth Amendment to the Constitution. Her constitutional claims are premised upon *Bivens v. Six Unknown, etc., Agents*, 403 U.S. 388, 91 S.Ct. 1999, 29 L.Ed.2d 619 (1971), and the provisions of 42 U.S.C. § 1983. Pendent state common law claims of assault, trespass, and false imprisonment are also asserted. The United States of America is sued under the Federal Tort Claims Act (FTCA), 28 U.S.C. §§ 1346(b), 2674, and 2680(h).[1] The defendants contend

1. 28 U.S.C. § 1346(b) confers exclusive jurisdiction upon district courts

of civil actions on claims against the United States, for money damages, accruing on and 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

that their actions were legal under the Fourth Amendment and the common law. Secondarily, they maintain that they acted under a reasonable good faith belief in the legality of their actions and, therefore, are immune from suit. *See Pierson v. Ray*, 386 U.S. 547, 557, 87 S.Ct. 1213, 18 L.Ed.2d 288 (1967); *Bivens v. Six Unknown, etc., Agents*, 456 F.2d 1339 (2d Cir. 1972); *Hill v. Rowland*, 474 F.2d 1374, 1377 (4th Cir. 1973). Plaintiff's contentions are that the alleged entry was illegal, that the claims of immunity of the individual agents are not ripe for decision under the instant motions, and that the immunity defense, if any, is not available to the United States.

I. *The Facts*

The parties have stipulated many of the material facts. At approximately 8:13 p. m. on Saturday, March 15, 1975, Officer Donald C. Green of the Alexandria, Virginia Police Department received an anonymous telephone call regarding the whereabouts of Patricia Campbell Hearst, then a nationally renowned fugitive. William and Emily Harris were also being sought on related matters. Officer Green immediately advised Agent Mackey of the Federal Bureau of Investigation's Alexandria field office of the call and relayed the conversation as follows:

> "You know Patty Hearst is supposed to be in Pennsylvania but she's not. She's currently at 649 Notabene Drive, Apartment 10, in Alexandria and she's been there for the last week or ten days. She has cut her hair and she's with one of the people who left with her from California."

Agent Mackey thereupon advised Special Agent-in-Charge, Robert Kunkel, who directed that the investigation of the anonymous tip be headed by Special Agent Robert O'Brien. Special Agent O'Brien was the Coordinator for the Alexandria Division for the nationwide search for Miss Hearst and other allegedly connected fugitives. The Hearst investigation was code named HEARNAP by the FBI. Upon being contacted and advised of the tip, Special Agent O'Brien took charge of the investigation. He and three other FBI agents proceeded to the Alexandria Police Department headquarters. It should be noted that the HEARNAP file contained at that time, in part, the following information: (1) the fugitives generally resided in low income areas; (2) their genèral mode of transportation was either rental cars or used vans; and (3) Ms. Hearst had reportedly cut her hair in September of 1974.

Upon arriving at the Alexandria Police Department, it was determined through the

> law of the place where the act or omission occurred.
>
> The liability of the United States is predicated upon 28 U.S.C. § 2674 which provides
>
> 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. June 25, 1948, c. 646, 62 Stat. 983.
>
> An action of this nature is authorized by 28 U.S.C.A. § 2680(h)
>
> 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: *Provides*, That, with regard to acts or omissions of investigative or law enforcement officers of the United States Government, the provisions of this chapter and section 1346(b) of this title shall apply to any claim arising, on or after the date of the enactment of this proviso, out of assault, battery, false imprisonment, false arrest, abuse of process, or malicious prosecution. For the purpose of this subsection, "investigative or law enforcement officer" means any officer of the United States who is empowered by law to execute searches, to seize evidence, or to make arrests for violations of Federal law.

use of locator crisscross indexes published by the telephone company, that the referred to apartment was occupied by one Victor Henry Evol, but no telephone number could be located. A check of police department records revealed that Mr. Evol was a black male who had been interviewed on July 23, 1974 by Alexandria police officers in connection with a complaint involving a concealed weapon. The information attained revealed that no charges had been brought against Mr. Evol.

Stipulated facts reveal that on March 15, 1975, Evol was not the tenant of the apartment. Plaintiff had leased the apartment on November 1, 1974 shortly after Mr. Evol had vacated the premises. On March 12, 1975, three days prior to the incident in issue, Ms. Norton, the plaintiff, was interviewed at her apartment by a local FBI agent, Larry Bartlett, in connection with an investigation of a stolen automobile. Agent Bartlett's report concerning this interview was neither dictated nor transcribed until subsequent to the incident involved herein. Accordingly, the FBI's then recent contact with and identification of the occupant of 649 Notabene Drive, Apartment 10, was not contained in the briefing preparatory to the investigation of the Hearst tip.

At approximately 9:30 p. m., March 15, 1975, the four FBI agents and two Alexandria detectives drove to a site close to the apartment in question. They were there joined by two uniformed police officers. Agent O'Brien furnished all the agents and officers with photographs and physical descriptions of the fugitives and advised them that each fugitive had been designated by the FBI as armed and dangerous. One of the Alexandria detectives, Mr. Turner, was then dispatched to survey the building. The apartment building, located in a well lighted low income area, is a separate brick structure containing ten units. The front entrance is the only method of ingress or egress save the windows. Apartment 10 is located on the third floor of the building and has only a rear view. On the night in question, there was no resident manager at the apartments and the name of the occupant of Apartment 10 was not contained on the vestibule mailbox. Parked outside the apartment units was a white van with Pennsylvania license plates.

Upon Detective Turner's return from his survey, the agents and officers proceeded to the apartment. Agent O'Brien at the parking lot briefing advised the officers of three possibilities: (1) the HEARNAP fugitives Hearst, Harris and Harris were in the apartment; (2) the tip was an attempt to set up an ambush; or (3) the tip was an attempt to harass an innocent party. At approximately 10:07 p. m., Agents O'Brien and McLaughlin and Detectives Turner and Bland proceeded to Apartment 10. The light was on and music was being played when the agents arrived. Two minutes later, Agent O'Brien knocked on the door of the apartment. At this time Ms. Norton was at home alone. She was fully dressed. The door to Apartment 10 did not contain a peephole.

Ms. Norton responded to the knock by asking "Who's there" or "Who is it"? Agent O'Brien indicated that it was the FBI. Ms. Norton requested identification. While the details of the ensuing conversation are disputed, the parties agree that the plaintiff never was shown the agents' credentials. The plaintiff turned to call FBI offices in an effort to secure some verification that the men at the door were, in fact, agents. The agents and detectives then attempted to forcibly open the door by striking it. Ms. Norton, fearing that the door would be destroyed, unlatched the lock and the door sprang inwardly open. The law enforcement officers entered the apartment with weapons drawn. A search of the apartment revealed no traces of the sought after fugitives.

Agent O'Brien then advised the plaintiff of the call which prompted the intrusion. It has subsequently been determined that the "tip" was probably made by a neighbor of the plaintiff with whom Ms. Norton frequently quarreled. No attempt was made by the defendants to obtain a search warrant prior to the forced entry.

II. *The Legality of the Defendants' Conduct*

[1–3] With respect to the alleged constitutional torts, the threshold issue presented is whether or not the defendants' actions were violative of the Fourth Amendment's prohibition against unreasonable searches and seizures. In the context of the instant controversy, the issue is framed in terms of the standards applicable to the execution of an arrest warrant at the residence of a third party not named in the warrant. The Supreme Court, to date, has not directly confronted the issue. *See United States v. Watson,* 423 U.S. 411, 418 n.6, 96 S.Ct. 820, 46 L.Ed.2d 598 (1976); *Gernstein v. Pugh,* 420 U.S. 103, 113 n.13, 95 S.Ct. 854, 43 L.Ed.2d 54 (1975); *Coolidge v. New Hampshire,* 403 U.S. 443, 480–481, 91 S.Ct. 2022, 29 L.Ed.2d 564 (1971); *Jones v. United States,* 357 U.S. 493, 499–500, 78 S.Ct. 1253, 2 L.Ed.2d 1514 (1958). It is clear, however, that "if the police intended to conduct a search of a man's home for a suspect, they must *at least* have probable cause to believe that he is on the premises." *Lankford v. Gelston,* 364 F.2d 197, 202–203 (4th Cir. 1966) (emphasis added). *See also United States v. James,* 528 F.2d 999, 1017 (5th Cir. 1976); *United States v. Brown,* 151 U.S. App.D.C. 365, 467 F.2d 419, 423 (1972); *United States v. McKinney,* 379 F.2d 259, 262–263 (6th Cir. 1967).[2] Accordingly, the pivotal inquiry is the existence of probable cause that Ms. Hearst occupied Apartment 10 at the time the agents forcibly entered the apartment. To paraphrase an oft quoted definition of probable cause, this Court must determine whether, at the moment of the entry, the facts and circumstances within the officers' knowledge and of which they had reasonably trustworthy information were sufficient to warrant a prudent man in believing that Ms. Hearst was inside the apartment. *Berger v. New York,* 388 U.S. 41, 55, 87 S.Ct. 1873, 18 L.Ed.2d 1040 (1967); *Beck v. Ohio,* 379 U.S. 89, 91, 85 S.Ct. 223, 13 L.Ed.2d 142 (1965); *Draper v. United States,* 358 U.S. 307, 313, 79 S.Ct. 329, 3 L.Ed.2d 327 (1959); *Husty v. United States,* 282 U.S. 694, 700–701, 51 S.Ct. 240, 75 L.Ed. 629 (1931); *Carroll v. United States,* 267 U.S. 132, 162, 45 S.Ct. 280, 69 L.Ed. 543 (1925). This assessment must be made in view of the cumulative effect of the facts then existing and the totality of the circumstances.

[4, 5] The Court has little difficulty in concluding that the anonymous tip,[3] standing alone, is not sufficient to justify the challenged police action. The informant chose to remain anonymous. The underlying circumstance detailing the manner in which the information was gathered is also unknown. *See Spinelli v. United States,* 393 U.S. 410, 416, 89 S.Ct. 584, 21 L.Ed.2d 637 (1969). The informant had not previously provided any, much less accurate, information to the police. *Jones v. United States,* 362 U.S. 257, 267–272, 80 S.Ct. 725, 4 L.Ed.2d 697 (1960); *United States v. Fuller,* 441 F.2d 755 (4th Cir. 1971). Nor did the informant supply information against her penal interest. *United States v. Harris,* 403 U.S. 573, 91 S.Ct. 2075, 29 L.Ed.2d 723 (1971). Aside from the conclusory statement that Ms. Hearst was occupying Apartment 10, the only factual assertions contained in the tip were that (1) Ms. Hearst had come to Alexandria from Pennsylvania and (2) she had cut her hair. Both of these facts were consistent with information con-

2. The plaintiff contends that the police are required to obtain a search warrant in order to lawfully execute an arrest warrant in the dwelling of a third party. Only exigent circumstances, it is submitted, can relieve the officers of this obligation. *Cf. Virgin Islands v. Gereau,* 502 F.2d 914, 928 (3d Cir. 1974). The Court is satisfied that *if* the officers had probable cause to believe that Ms. Hearst was in the apartment, their subsequent conduct was justified. The fugitives in question had demonstrated a capacity for both violence and elusive flight. *See United States v. Cravero,* 545 F.2d 406, 416 at n.30 and text (5th Cir. 1976).

3. To the extent that there is any material difference, the Court is concerned with the tip as conveyed to the defendants rather than as later transcribed by the Alexandria Police Department. The parties agree that the statement quoted in the main text hereof represents the information available to these defendants at the time of their actions.

tained in the FBI HEARNAP investigation file. It was public knowledge, however, that Ms. Hearst was last known to be taking refuge in Pennsylvania. The statement concerning Ms. Hearst's appearance applies with equal accuracy to literally millions of women. In short, neither the tip itself nor the informant display the indicia of reliability necessary to warrant the forcible entry into the dwelling of a citizen of the United States in the dead of night. *Cf. Ker v. California*, 374 U.S. 23, 83 S.Ct. 1623, 10 L.Ed.2d 726 (1963). Indeed, the Court would be hard pressed to imagine a less trustworthy basis for the drastic action taken. As noted by Judge Sobeloff, information from an "anonymous and unverifiable source is [not] probable cause for the search of a home." *Lankford v. Gelston, supra*, 364 F.2d at 202. The Court must also, however, consider any additional information obtained during the investigation which may fortify the otherwise deficient tip and, hence, support a finding of probable cause. *Whiteley v. Warden*, 401 U.S. 560, 567, 91 S.Ct. 1031, 28 L.Ed.2d 306 (1971); *Spinelli v. United States*, 393 U.S. 410, 416, 89 S.Ct. 584, 21 L.Ed.2d 637 (1969); *Draper v. United States*, 358 U.S. 307, 313, 79 S.Ct. 329, 3 L.Ed.2d 327 (1969).

[6, 7] The defendants assert that several facts independently verified the accuracy of the anonymous tip. First, the defendants point to their police station-house investigation which erroneously revealed that a black male, who had previously been questioned but not charged in connection with a weapons violations, was the occupant of the apartment. The correlation between the inaccurate fact and the location of Ms. Hearst can only, generously, be described as tenuous. The Court similarly finds little probative value in the fact that the apartment is located in a lower income area of the City of Alexandria, Virginia. The strongest evidence the defendants have presented on this issue is the presence of a van with Pennsylvania license plates in the proximity of the plaintiff's apartment.[4] This fact conformed with the then current information contained in the HEARNAP file as to the fugitive's former location and general mode of transportation. No attempt was made to ascertain who was the owner of the vehicle and whether it had any connection with the Hearst investigation. Even with the benefit of this information, however, Agent O'Brien cautioned the other law enforcement officials that the tip could be a prank. The only additional facts that the defendants submit support a finding of probable cause are that (1) a young female voice, as opposed to that of a black male, responded to their knock on the door; and (2) that the plaintiff refused to open the door without verifying the identity of the intruders.

A finding of probable cause in this case would give unprecedented weight to a conclusory tip from an anonymous source whose accuracy is purportedly verified only by the proximity of a vehicle bearing Pennsylvania license plates to the apartment in question. Fortunately, the Constitution requires a firmer basis of justification before sanctioning a forcible intrusion into one's home. *Lankford v. Gelston, supra.* The so-called corroboration offered by the defendants was, at best, merely consistent with a belief that Ms. Hearst occupied Apartment 10. The evidence was not affirmatively probative of that fact. In short, the Court concludes that, at the moment of entry, the facts and circumstances within the defendants' knowledge and of which they had reasonably trustworthy information were not sufficient to warrant a prudent man into believing that Ms. Hearst was inside the apartment. Accordingly, the plaintiff has established that the defendants have violated her rights under the Fourth Amendment to be secure from unreasonable searches and seizures.[5]

4. The van, as it turns out, belongs to the plaintiff. The defendants, however, were unaware of this fact.

5. The Court's conclusion that the entry was illegal results in the establishment of a prima facie case of assault, trespass and false imprisonment under Virginia law. *See Montgomery*

III. *Immunity Defenses*

A. *Individual defendants*

[8–11] The individual defendants have moved for summary judgment on the basis of their alleged entitlement to a qualified immunity from monetary liability. Each of the individual defendants are law enforcement officers who, at the time of the incident in question, were acting within the scope of their official duties. Accordingly, these defendants will not be subjected to monetary liability under the constitutional tort claims if they acted under a reasonable good faith belief in the legality of their actions.[6] *Pierson v. Ray*, 386 U.S. 547, 557, 87 S.Ct. 1213, 18 L.Ed.2d 288 (1967); *Hill v. Rowland*, 474 F.2d 1374, 1377 (4th Cir. 1973); *Bivens v. Six Unknown, etc., Agents*, 456 F.2d 1339, 1347 (2d Cir. 1972). *Cf. G. M. Leasing Corp. v. United States*, —— U.S. ——, ——, 97 S.Ct. 619, 50 L.Ed.2d 530 (1977). The Court is of the further opinion that this qualified immunity is applicable to actions brought under Virginia law. *Yeatts v. Minton*, 211 Va. 402, 177 S.E.2d 646 (1970); *Davidson v. Allam*, 143 Va. 367, 130 S.E. 245 (1925). The cases cited by the plaintiff to the contra involve defendants who were private citizens as opposed to police officers acting within the scope of their official duties, and hence, are inapposite. *See, e. g., Zayre of Virginia, Inc. v. Gowdy*, 207 Va. 47, 147 S.E.2d 710 (1966); *Montgomery Ward & Co. v. Wickline*, 188 Va. 485, 50 S.E.2d 387 (1948).

[12] The Court is not satisfied, however, that the defendants' entitlement to the qualified immunity in the instant case can summarily be established. The applicability of this immunity is dependent upon factual findings. Where these factual matters are undisputed, *i. e.*, in the face of uncontroverted affidavits, summary judgment may be appropriate. *Midwest Growers Co-op. Corp. v. Kirkemo*, 533 F.2d 455 (9th Cir. 1976); *Burgwin v. Mattson*, 522 F.2d 1213 (9th Cir. 1975); *Brubaker v. King*, 505 F.2d 534 (7th Cir. 1974); *Tritsis v. Backer*, 501 F.2d 1021 (7th Cir. 1974). In the instant case, however, despite the stipulation of many facts, there remains an unresolved factual issue concerning the number of false anonymous tips that the defendants had received. The plaintiff represents that the defendants, prior to this incident, had received approximately 50 false tips. Dis-

Ward & Co. v. Wickline, 188 Va. 485, 50 S.E.2d 387 (1948); *Burgess v. Commonwealth*, 136 Va. 697, 118 S.E. 273 (1923). The defendants, of course, remain free to assert any available defenses.

6. The immunity afforded a police officer at common law and under 42 U.S.C. § 1983 was articulated by the Supreme Court in terms of "good faith and probable cause." *Pierson v. Ray, supra*, 386 U.S. at 555 and 557, 87 S.Ct. 1213. *See also Scheuer v. Rhodes*, 416 U.S. 232, 245, 94 S.Ct. 1683, 40 L.Ed.2d 90 (1974). The Court of Appeals in *Bivens v. Six Unknown, etc., Agents*, 456 F.2d 1339, 1347 (2d Cir. 1972) clarifies that the term "probable cause" when used in the context of immunity is not identical with the term "probable cause" in the constitutional sense. In the context of immunity probable cause translates into a reasonable good faith belief in the legality of the conduct. *Bivens v. Six Unknown, etc., Agents, supra*, 456 F.2d at 1347. This is a less stringent standard than that used in determining whether sufficient "probable cause" exists to justify the issuance of an arrest or search warrant. *See Bivens v. Six Unknown, etc., Agents, supra*, at 1348–49 (concurring opinion). In order to successfully assert the immunity defense, an officer must show (1) he acted in a good faith belief that his conduct was lawful; and (2) his belief was reasonable. The former standard is subjective while the latter is objective. *Bivens v. Six Unknown, etc., Agents, supra* at 1348.

This analysis appears to be the prevailing standard throughout the nation. *See G. M. Leasing Corp. v. United States*, —— U.S. ——, ——, 97 S.Ct. 619, 50 L.Ed.2d 530 (1977); *Hill v. Rowland*, 474 F.2d 1374, 1377 (4th Cir. 1973); *Jones v. Perrigan*, 459 F.2d 81, 83 (6th Cir. 1972); *Rodriguez v. Jones*, 473 F.2d 559, 605 (5th Cir. 1973); *Tritsis v. Backer*, 501 F.2d 1021 (7th Cir. 1974); *Apton v. Wilson*, 165 U.S.App.D.C. 22, 506 F.2d 83, 92–93 (1974); *Mark v. Groff*, 521 F.2d 1376 (9th Cir. 1975). Moreover, there is no distinction in this regard between an action brought against state officials under 42 U.S.C. § 1983 or one brought against a federal agent under a *Bivens*-type claim. *See, e. g., Rodriguez v. Jones*, 473 F.2d 559 (5th Cir. 1973); *Mark v. Groff*, 521 F.2d 1376 (9th Cir. 1975); *Bivens v. Six Unknown, etc., Agents, supra*, 456 F.2d 1339 (2d Cir. 1972); *Paton v. La Prade*, 524 F.2d 862 (3d Cir. 1975).

covery relating to these tips had not been completed by the time the motions now under consideration were filed. The reasonableness of the defendants' belief in the whereabouts of Ms. Hearst—an objective standard—may be questioned in light of numerous and allegedly equally nonmeritorious "tips". Accordingly, the Court will deny the individual defendants' motion for summary judgment at this time. *See Jaroslawicz v. Seedman*, 528 F.2d 727, 737 (2d Cir. 1975); *Laverne v. Corning*, 522 F.2d 1144, 1147 (2d Cir. 1975). *Cf. Pierson v. Ray*, 386 U.S. 547, 557, 87 S.Ct. 1213, 18 L.Ed.2d 288 (1967).

B. *Immunity of the United States*

[13] The liability of the United States arises, if at all, under the 1974 amendments to the Federal Tort Claims Act (FTCA), 28 U.S.C. § 2671 *et seq.*[7] The United States submits that it is entitled to assert the defenses of its agents to defeat the plaintiff's claim under that Act. In other words, the United States views its own liability as being coterminous with that of its officers. For the reasons that follow, the Court concludes otherwise.

[14-16] The United States advances two arguments in support of its position. First, the government maintains that illegal searches and seizures conducted in a reasonable good faith belief in their legality are not "wrongful" within the meaning of the FTCA. *See* 28 U.S.C. § 1346(b). The imposition of liability for conduct which is not wrongful, it is submitted, would contravene Supreme Court decisions which prohibit the application of strict liability theories under the FTCA. *See, e. g., Dalehite v. United States*, 346 U.S. 15, 73 S.Ct. 956, 97 L.Ed. 1427 (1953); *Laird v. Nelms*, 406 U.S. 797, 92 S.Ct. 1899, 32 L.Ed.2d 499 (1972).

This argument suffers the defect of a false premise. The immunity of individual officers does not serve to defeat the existence of a tort—it merely provides a defense to monetary liability.

> "Such immunity does not mean that conduct which would amount to a tort on the part of other defendants is not still equally tortious in character, but merely that for the protection of a particular defendant, or interests which he represents, he is given absolution from liability."

W. Prosser, The Law of Torts, ch. 26 at 970 (4th ed. 1971). Indeed, it has been recognized that the "good faith defense in a suit for damages brought against any federal official . . . is not assertable in the face of a quest limited to injunctive, declaratory or mandamus relief." *National Treasury Employees Union v. Nixon*, 160 U.S. App.D.C. 321, 492 F.2d 587, 609 (1974). *See also Timmerman v. Brown*, 528 F.2d 811, 814 (4th Cir. 1975). The courts will grant injunctive relief to remedy Fourth Amendment violations under appropriate circumstances. *Lankford v. Gelston*, 364 F.2d 197 (4th Cir. 1966); *Illinois Migrant Council v. Pilliod*, 398 F.Supp. 882 (N.D.Ill.1975). In short, the qualified immunity of a law enforcement officer does not eliminate the wrongfulness of his conduct. An otherwise illegal search does not attain legality merely because the offending officer is not subject to monetary liability. Accordingly, the plaintiff herein is not attempting to impose liability without fault. On the contra, the Court has already concluded that fault exists. The pertinent issue is whether the plaintiff's injuries are compensable under the FTCA regardless of the potential immunity of the individual defendants.

[17] The second argument advanced by the United States is of more substance. As the government's liability under the FTCA is in the nature of *respondeat superior*, the United States asserts that it is entitled to the defenses of its employees. There is no disputing that both the structure of the

7. The parties have not raised, at least at this juncture, any questions relating to the difficulties in pursuing a claim stemming from a constitutional violation within the statutory framework primarily designed to deal with negligence actions. *See* Boger, Gitenstein and Verkuil, The Federal Tort Claims Act Intentional Torts Amendment: An Interpretative Analysis, 54 U.N.C. L.Rev. 497, 517-543 (1976).

FTCA [8] and the case law arising thereunder establish that "the Government was to be made liable according to state law under the doctrine of *respondeat superior* . . ." *Laird v. Nelms, supra*, 406 U.S. at 801, 92 S.Ct. at 1901. *See also Feres v. United States*, 340 U.S. 135, 71 S.Ct. 153, 95 L.Ed. 152 (1950). Employers, moreover, are generally entitled to assert defenses available to their employees. Restatement (Second) of Agency § 219 (1957).

A colorable argument can be fashioned that an agent's immunity from civil liability is not a defense which can be asserted by a principal.[9] This Court is not satisfied, however, that the resolution of the important legal issue presented in the instant case should be dictated by the conceptual niceties which constitute the basis for this contention. A more concrete foundation for the Court's conclusion lies in the intent of Congress in enacting the legislation creating a cause of action against the United States.

Prior to 1974, the doctrine of sovereign immunity and the explicit exclusion of intentional torts from the coverage of the FTCA precluded a victim of an illegal search and seizure from obtaining a remedy against the United States. An aggrieved citizen's sole source for monetary compensation lay in an action against the individually offending officer brought under *Bivens v. Six Unknown, etc., Agents*, 403 U.S. 388, 91 S.Ct. 1999, 29 L.Ed.2d 619 (1971). In 1974, however, the FTCA was amended to include the following:

> *Provided*, That, with regard to acts or omissions of investigative or law enforcement officers of the United States Government, the provisions of this chapter and section 1346(b) of this title shall apply to any claim arising, on or after the date of the enactment of this proviso, out of assault, battery, false imprisonment, false arrest, abuse of process, or malicious prosecution. For the purpose of this subsection, "investigative or law enforcement officer" means any officer of the United States who is empowered by law to execute searches, to seize evidence, or to make arrests for violations of Federal law. 28 U.S.C. § 2680(h) (as amended).

As expressed in the Senate Report accompanying the amendment, "[t]he effect of this provision is to deprive the Federal Government of the defense of sovereign immunity in cases . . . [involving] the same kind of conduct that is alleged to have occurred in *Bivens* (and for which that case imposes liability upon the individual

8. *See* 28 U.S.C. § 2674 which provides in part:
> 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.* (emphasis supplied)

28 U.S.C. § 1346(b) provides in part:
> (b) Subject to the provisions of chapter 171 of this title, the district courts, together with the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and 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.* (emphasis supplied)

9. Commentators have made a distinction between privileges and immunities describing a principal's ability to assert the defenses of his agent under vicarious liability theory. *See* Restatement (Second) of Agency § 217 (1957); *Cf.* W. Prosser, The Law of Torts, ch. 26, p. 970 (4th ed. 1971). A principal is said to be able to avail himself of his agent's privileges, but not his immunities. A law enforcement officer's defense to monetary liability has been termed an immunity by some, *see, e. g., Pierson v. Ray, supra*, 386 U.S. at 555, 87 S.Ct. 1213; *Bivens v. Six Unknown, etc., Agents, supra*, 403 U.S. at 397, 91 S.Ct. 1999; W. Prosser, The Law of Torts § 132 (4th ed. 1971); 2 F. Harper and F. James, The Law of Torts § 29.8 (1956); but as a privilege by others, *see, e. g.*, Restatement (Second) of Torts §§ 10, 121(b), and a simple defense as opposed to either an immunity or privilege by at least one court. *See Bivens v. Six Unknown, etc., Agents, supra*, 456 F.2d at 1347. Faithful adherence by the courts to these distinctions in discussing the shielding of officers from monetary liability is absent.

Government officials involved.)" [10] S.Rep. No. 93–588, 93d Cong., 2d Sess., 1974 U.S. Code Cong. & Ad.News pp. 2789, 2791 (1974).

The 1974 amendment to the FTCA [11] had its genesis in a series of ill-conceived and highly publicized narcotic raids which took place in the spring of 1973. The most widely publicized incidents involved the unannounced forcible nighttime entry into the homes of two families by federal narcotic agents. These raids occurred in Collinsville, Illinois. Senator Percy of Illinois was scheduled to conduct hearings concerning the reorganization of the various drug law enforcement agencies. These hearings were expanded to include testimony concerning the Collinsville incidents. In the report stemming from these hearings, Senator Percy proposed to limit the abuses done by federal officers, in part, by amending the FTCA so as to allow actions by aggrieved citizens against the United States.[12] The Senator gave two reasons why an action must lie against the United States as opposed to one solely against the agents.

> While this [an action against an individual agent] gives victims of abusive tactics some opportunity for relief, their remedy is *severely limited by the ease with which agents can usually establish the defense of having acted in good faith and with probable cause.* Moreover, causes of action against officials as individuals will, on occasion, be virtually worthless since government employees may be so lacking in funds as to be judgment proof.

S.Rep. No. 93–469, 93d Cong., 1st Sess. 36 (1973) (Individual views of Senator Percy) (emphasis supplied). Senator Percy concluded his statement with an expressed intention to introduce legislation implementing his views. It is clear from the above quoted passage that Senator Percy's view of an effective tort remedy did not include the invocation by the United States of the immunity defenses of its agents.

Shortly thereafter Senator Percy introduced the promised legislation.[13] The Sen-

10. The above-quoted passage and the entire Senate Report amply refute the defendants' contention that the 1974 amendment does not apply to the so-called constitutional torts.

11. Pub.L. 93–253, § 2, 88 Stat. 50 (March 16, 1974). The legislative history of this provision is somewhat less developed than one might have anticipated. The amendment was attached by the Senate to legislation initiated in the House of Representatives which pertained to the reorganization of certain drug law enforcement agencies. The only apparent association between the amendment to the FTCA and the House bill is the fact that the Collinsville raid was carried out by narcotics agents. The only source of legislative intent of the FTCA amendment in the House of Representatives is to be found in the debates occurring after the Senate had passed the amendment. The debate in the House focuses on the germaneness of the provision to the proposed reorganization of drug law enforcement agencies and the desirability of a more comprehensive approach to the problem of remedying illegal searches and seizures. *See* 120 Cong.Rec. 5285–5290 (1974). The only substantive analysis of the legislation was provided by Representative Wiggins who stated:

> "[t]he 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 the entry." 120 Cong.Rec. 5286–5287 (1974) (Remark by Rep. Wiggins).

These comments support the Court's view discussed *infra*, to the effect that the legislation was remedially oriented.

A more detailed account of the political considerations surrounding the passage of the amendment can be found in Boger, Gitenstein and Verkuil, The Federal Tort Claims Act Intentional Torts Amendment: An Interpretative Analysis, 54 U.N.C. L.Rev. 497, 500–517 (1976).

12. S.Rep. No. 93–469, 93d Cong., 1st Sess. The second prong of Senator Percy's attack on law enforcement abuses was the repeal of the "no-knock" authority granted under 21 U.S.C. § 879(b). This was eventually accomplished in Pub.L. No. 93–481, 88 Stat. 1455.

13. A similar piece of legislation drafted by the Justice Department and introduced by Senator Hruska of Nebraska was also being considered at that time. S. Bill 2558, 93d Cong., 1st Sess., 119 Cong.Rec. 33499 (1973). While there were differences between Senator Hruska's proposed bill and the ultimately enacted legisla-

ate Report accompanying the bill states that

> this provision should be viewed as a counterpart to the *Bivens* case and its progeny, in that it waives the defense of sovereign immunity so as to make the Government independently liable in damages for the same type of conduct that is alleged to have occurred in *Bivens* (and for which that case imposes liability upon the individual Government officials involved).

S.Rep. No. 93–588, 93d Cong., 2d Sess., 1974 U.S.Code Cong. & Ad.News pp. 2789, 2791 (1974). The Senate Report had earlier characterized the Supreme Court's decision in *Bivens* as creating "a right of action against Federal agents for illegal searches and seizures conducted in bad faith *or* without probable cause." 1974 U.S.Code Cong. & Ad.News at p. 2790 (1974) (emphasis supplied). The Report continues to note that the amendment "would submit the Government to liability whenever its agents act under color of law so as to injure the public through search and seizures that are conducted without warrants *or with warrants issued without probable cause.*" 1974 U.S. Code Cong. & Ad.News at p. 2791 (1974) (emphasis supplied).

Both the United States and the plaintiff point to the Senate Report in support of their respective positions. The United States contends that the repeated references to *Bivens* reflect an intent to make the government's liability coterminous with that of its agents. In other words, Congress intended to incorporate *Bivens* in its entirety, including the immunity doctrines arising thereunder.

While the Court cannot conclude the government's argument to be unreasonable, it is the Court's view that the more logical interpretation is that the Senate Report illustrates the congressional intention of providing a remedy to victims of illegal searches and seizures regardless of the motivation of the offending governmental agent. The Senate repeatedly utilized disjunctive language in describing the circumstances under which liability would attach. By using phrases such as "bad faith *or* without probable cause", and "without warrants *or* with warrants issued without probable cause" Congress seemingly intended to provide for monetary recovery in instances where the offending federal agent would enjoy immunity.[14] The defendant attributes this language to a mistakingly broad reading of *Bivens* by the Senate. While this may or may not be accurate, the relevant inquiry is into what the Senate *thought Bivens* stood for.

[18] The Senate Report outlined the reasons behind the considered need to amend the FTCA as follows:

> For years scholars and commentators have contended that the Federal Government should be liable for the tortious acts of its law enforcement officers when they act in bad faith or without legal justification. However, the Federal Tort Claims Act (28 U.S.C. 2671–2680 the embodiment of sovereign immunity in the United States Code, protects the Federal Government from liability where its agents commit intentional torts such as assault and battery. The injustice of this provision should be manifest—for under the Federal Tort Claims Act a Federal mail truck driver creates direct federal liability if he negligently runs down a citizen on the street but the Federal Government is held harmless if a federal narcotics agent intentionally assaults that same citizen in the course of an illegal "no-knock" raid.

tion, those differences do not bear on the issue before the Court. *See* Boger, Gitenstein and Verkuil, The Federal Tort Claims Act Intentional Torts Amendment: An Interpretative Analysis, 54 U.N.C.L. Rev. 497, 510–517 (1976). For a discussion of other proposals concerning illegal searches and seizures, *see* Geller, Enforcing the Fourth Amendment: The Exclusionary Rule and its Alternatives, 1975 Wash. U.L.J. 621 (1975).

14. It is difficult to conjure a situation not involving actual malice where an agent acting under a warrant later found to have been improvidently issued could be found liable for monetary damages in an action under 42 U.S.C. § 1983 or under *Bivens*. It must be pointed out, however, that it is not clear whether Congress was using the term "probable cause" in the constitutional sense, or in the context of immunity. *See* note 6, *supra*.

1974 U.S.Code Cong. & Ad.News at p. 2791 (1974). The foregoing passage is revealing in two respects. First, it once again states the need to impose liability against the government in terms of "bad faith or without legal justification." Secondly, the Senate compares the victim of an illegal search to the victim of an automobile accident—the latter being entitled to compensation regardless of the good faith of the government's driver. These statements reflect a concern with providing a remedy. The remedial orientation of the legislation is made explicit in the closing sentence of the Report which states: "The Committee urges speedy adoption of this measure as a minimal first step in providing a remedy against the Federal Government for innocent victims of Federal law enforcement abuses." An innocent victim is no less in need of a remedy where the injurious conduct, though illegal, is motivated by a reasonable good faith belief in its legality.

There is more direct support for the Court's conclusion that Congress did not intend to permit the United States, as one commentator put it, "to escape liability under the new statute by retreating behind various defenses that had been created under *Bivens* or Section 1983." Boger, Gitenstein and Verkuil, The Federal Tort Claims Act Intentional Torts Amendment: An Interpretative Analysis, 54 U.N.C. L.Rev. 497, 515 (1976). The specific issue before the Court had been raised by the authors of the legislation and discussed in a memorandum explaining the proposed amendment. The Senate memorandum succinctly states:

> "It is not the intention of this amendment to allow any other defenses [besides those in section 2680(h)] that may be available to individual defendants by state or federal law, custom, or practice to be asserted [by] the government. Congress does not oppose, however, the assertion of defenses of good faith and reasonable belief in the validity of the search and arrest on behalf of individual government defendants, so long as it is understood that the government's liability is not coterminous with that of the individual defendants."

Senate Comm. on Gov't Operations, Memorandum No-Knock Legislation, August 28, 1973, at 5.[15] This memorandum, the views of the amendment's author and the remedial orientation of the Senate Report all lead to the conclusion that the immunity available to an individual agent in a *Bivens*-type action is not a defense available to the United States to a claim brought under the FTCA.

The congressional decision to remove the shield of official immunity from the government is founded on solid policy considerations. The doctrine of sovereign immunity curiously[16] impregnated American jurisprudence at an early age. *See, e. g., Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 411–412, 5 L.Ed. 257 (1821). This doctrine precluded an aggrieved citizen from moving directly against the government to redress injuries suffered at the hands of government officials. In order to provide some relief to the victim of governmental illegalities, the Supreme Court fashioned a concept which has been described as "purest fiction."[17] In *Ex Parte Young*, 209 U.S. 123, 28 S.Ct. 441, 52 L.Ed. 714 (1908), the Court ruled that "when a state official acts under state law in a manner violative of the Federal Constitution, he 'comes into conflict with the superior authority of that Constitution, and he is in that case stripped of his

15. The Court, regretfully, has been unable to secure an exact copy of this memorandum. The portion quoted herein is found in Boger, Gitenstein and Verkuil, The Federal Tort Claims Act Intentional Torts Amendment: An Interpretative Analysis, 54 U.N.C. L.Rev. 497, 515 (1976).

16. "Just how an immunity which had its roots in feudalism and in a political philosophy associated with the divine right of kings was transplanted to the new republic in America remains something of a mystery." F. James and F. Harper, The Law of Torts, § 29.2, p. 1609 (1956). For a thorough discussion of the topic, *see* Jaffe, Suits Against Governments and Officers; Sovereign Immunity, 77 Harv.L.Rev. 1 (1963); Borchard, Government Liability in Tort, 34 Yale L.J. 1, 129, 229 (1924–1925).

17. C. Wright, Law of Federal Courts § 48, p. 209 (3d ed. 1976).

official or representative character and is subjected *in his person* to the consequences of his individual conduct. The State has no power to impart to him any immunity from responsibility to the supreme authority of the United States.'" *Scheuer v. Rhodes*, 416 U.S. 232, 237, 94 S.Ct. 1683, 1687, 40 L.Ed.2d 90 (1974) quoting *Ex Parte Young*, *supra*, 209 U.S. at 159–160, 28 S.Ct. 441. The fictional basis of *Ex Parte Young* also limits the relief that can be granted. Monetary recovery must come from the pocket of the individual officer and not the sovereign. *Edelman v. Jordon*, 415 U.S. 651, 94 S.Ct. 1347, 39 L.Ed.2d 662 (1974). *See generally* C. Wright, Law of Federal Courts, § 48 (3d ed. 1976).

The possibility of being subjected to personal liability for money damages as a result of the performance of official duties necessitated the creation of a doctrine which would provide some degree of protection to the well-meaning public servant. The resulting doctrine of official immunity is premised upon

> two mutually dependent rationales: (1) the injustice, particularly in the absence of bad faith, of subjecting to liability an officer who is required, by the legal obligations of his position, to exercise discretion; (2) the danger that the threat of such liability would deter his willingness to execute his office with the decisiveness and the judgment required by the public good.

Scheuer v. Rhodes, *supra*, 416 U.S. at 240, 94 S.Ct. at 1688. (footnote omitted). *Accord, Wood v. Strickland*, 420 U.S. 308, 319, 95 S.Ct. 992, 43 L.Ed.2d 214 (1975); *Rowley v. McMillan*, 502 F.2d 1326, 1332 (4th Cir. 1974). *Cf. Barr v. Matteo*, 360 U.S. 564, 571, 79 S.Ct. 1335, 3 L.Ed.2d 1434 (1959).

The need to provide a remedy to the victim of governmental illegality thus comes in conflict with the considerations giving rise to the doctrine of official immunity. As Mr. Justice Harlan pointedly observed, there are

> "two considerations of high importance which now and again come into sharp conflict—on the one hand, the protection of the individual citizen against pecuniary damage caused by oppressive or malicious action on the part of officials of the Federal Government; and on the other, the protection of the public interest by shielding responsible governmental officers against the harassment and inevitable hazards of vindictive or ill-founded damage suits brought on account of action taken in the exercise of their official responsibilities."

Barr v. Matteo, *supra*, 360 U.S. at 564–565, 79 S.Ct. at 1336. The doctrine of official immunity represents the judicial resolution of those competing interests. Law enforcement agents do not enjoy an absolute immunity from suit despite the discretionary nature of their duties "because of the belief that the benefit to society derived from the protection of personal liberties outweighs the detriment of perhaps deterring vigorous police action." *Bivens v. Six Unknown, etc., Agents*, *supra*, 456 F.2d at 1346.

The injustices occasioned by the doctrine of sovereign immunity gave rise to *Ex Parte Young* and the imposition on government officials of personal liability for monetary damages. The fear that this personal liability would unduly inhibit public servants from executing their official responsibilities gave rise to the doctrine of official immunity.[18] In the context of law enforcement, this immunity is articulated in terms of a reasonable good faith belief in the legality of the conduct. Thus, "[t]he concept of the immunity of government officers from personal liability springs from the same root considerations that generated the doctrine of sovereign immunity." *Scheuer v. Rhodes*, *supra*, 416 U.S. at 239, 94 S.Ct. at 1688. Where, as is the case with the FTCA, the sovereign has waived its immunity, the policy considerations which justify immu-

18. This is not to say that the law in this area originated with *Ex Parte Young*, *supra*. *See Scheuer v. Rhodes*, *supra*, 416 U.S. at 239 n. 4, 94 S.Ct. 1683. The development of the public servants' defenses to monetary liability, however, has escalated with the increase in actions brought against government officials.

nizing individual law enforcement officers are no longer applicable. *See* 2 F. Harper and F. James, The Law of Torts § 29.14 at pp. 1656–1657 (1956).

This has been recognized by other courts as well. The United States sought to raise the defense of immunity in an action brought under the negligence provisions of the FTCA by a person injured in the course of an FBI agent's efforts to foil an attempted act of air piracy. The district court ruled that the United States was not entitled to assert the immunity defenses of its agents. *Downs v. United States*, 382 F.Supp. 713, 749–751 (M.D.Tenn.1974). In reversing the trial court on other grounds, the Court of Appeals stated "[t]he prospect of governmental liability for the actions of law enforcement officers should not cause those officers less vigorously to enforce the law. The need for compensation to citizens injured by the torts of government employees outweigh whatever slight effect vicarious liability might have on law enforcement efforts." *Downs v. United States*, 522 F.2d 990, 998 (6th Cir. 1975).

To allow the government to benefit from a doctrine born of sovereign immunity would pervert the clear congressional directive to eliminate sovereign immunity from actions of this nature. As noted by the author of the 1974 amendment to the FTCA, Senator Percy, the effectiveness of a *Bivens*-type remedy is "severely limited" by the doctrine of official immunity. S.Rep. No. 93–469, 93d Cong., 1st Sess. 36. The promise of an effective remedy contained in the 1974 amendment to the FTCA would be largely illusory if the government could assert the immunity defense of its agents. *Cf. Downs v. United States, supra*, 382 F.Supp. at 750.

Concluding therefore that (1) the forcible nighttime entry into the plaintiff's apartment was in violation of her rights secured to her by the Fourth Amendment to the Constitution of the United States; and (2) the United States is not entitled, as a matter of law, to assert the immunity defense available to the individual defendants in an action brought under the Federal Tort Claims Act, the plaintiff is entitled to judgment against the United States on the issue of liability.

An appropriate order will follow.

PLAINTIFF'S APPEALS BRIEF IN NORTON V. TURNER

No. 77-1919

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

ELIZABETH ANN NORTON,

Plaintiff-Appellee,

v.

UNITED STATES OF AMERICA,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE EASTERN DISTRICT OF
VIRGINIA

REPLY BRIEF FOR THE APPELLANT

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IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 77-1919

ELIZABETH ANN NORTON,

Plaintiff-Appellee,

v.

UNITED STATES OF AMERICA,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE EASTERN DISTRICT OF
VIRGINIA

REPLY BRIEF FOR THE APPELLANT

In March, 1974 Congress amended the Federal Tort Claims Act [1] (FTCA) so as to make the United States directly liable for certain previously excepted torts in the same manner as the Act had since its inception created federal liability for the negligent conduct of Government employees. [2] This is one of the first cases brought under the 1974 Amendment to reach the courts of appeals.

1/ Pub. L. 93-253, §2, 88 Stat. 50 (March 16, 1974).

2/ See S. Rep. No. 93-588, 93d Cong., 1st Sess. 2-3 (1973).

The sole question presented by the Government's appeal is whether in a suit brought under the FTCA the United States can raise as a defense to liability the "good faith and reasonable belief" of its agents in the legality of the conduct which provides the basis of the action. That the FBI agents, whose conduct provides the basis of plaintiff's tort claims, could raise the defense, if sued personally, is without question. 3/

In our opening brief, we demonstrated that the ruling of the district court here that the defense is inavailable to the United States was plainly wrong, and that, if allowed to stand, the decision below would constitute a radical alteration of the nature of Government liability under the FTCA. In particular, we showed: (1) that the liability of the United States under the FTCA is based on principles of respondeat superior, (2) that the modern "good faith and reasonable belief" defense available to law enforcement officers derives from the common law defense of privilege -- a defense, which if proven, defeats the existence of any tortious conduct, and that such a defense is always available to an employer, whose liability for the alleged tortious acts of his employees is based on the doctrine of respondeat superior; and (3) that contrary to the district court's understanding, neither the language nor the legislative history of the 1974 Amendment indicates that Congress intended to deprive the United States of the defense.

3/ This is true not only under federal law, Bivens v. Six Unknown Agents, 456 F.2d 1339 (C.A. 2, 1972); Hill v. Roland, 474 F. 2d 1374 (C.A. 4, 1973), but also under the law of Virginia (the place the conduct complained of occurred). See, e.g., Yeatts v. Minton, 211 Va. 402, 177 S.E. 2d 646 (1970).

In her answering brief, plaintiff accepts (Appellee's Br., p. 16), as she must, that under the FTCA the liability of the United States for the "wrongful or negligent" acts of its employees is premised on the doctrine of respondeat superior. She challenges, however, our explication of the nature of the "good faith and reasonable belief" defense (Appellee's Br., pp. 16-21), and maintains that, in any event, the 1974 Amendment demonstrates a congressional intent to preclude the United States from availing itself of the defense (Appellee's Br., pp. 5-11). As we demonstrate below, plaintiff's arguments on these points are without merit.

I

THE NATURE OF THE "GOOD FAITH AND REASONABLE BELIEF" DEFENSE.

Plaintiff maintains (Appellee's Br., pp. 16-17) that the successful assertion of the common law defense of immunity "'does not mean that conduct which would amount to a tort on the part of other defendants is still not equally tortious in character * * *'" even though the particular defendant before the court is immunized from suit. Building upon that general principle plaintiff argues (Appellee's Br., pp. 17-20) that under the doctrine of respondeat superior the immunity of an employee from monetary liability does not affect the employer's potential liability since the principal cannot raise the "immunity" defense of its agent. Therefore, according to plaintiff (Appellee's Br., pp. 20-21) since the "good faith and reasonable belief" defense available to the FBI agents here is an "immunity" it cannot be

raised by the United States as a defense to her FTCA suit.

Whether or not the United States when sued under the FTCA may raise an "immunity" defense of its employees is not relevant in this case. As we documented in our opening brief (pp. 19-29), the "good faith and reasonable belief" defense available to the FBI agents whose actions form the basis of plaintiff's suit is not an "immunity" personal to the agents. On the contrary, it is a "privilege", which if successfully asserted provides a complete defense to the merits of any tort claim. That showing stands virtually unrefuted. Plaintiff's response (Appellee's Br., pp. 20-21) is that the differences between the defenses of "privilege" and "immunity" are hardly significant under the FTCA. However, since the FTCA was patterned to operate in conjunction with the principles of law developed in the common law and refined by statute and judicial decision, the crucial conceptual differences between the defenses of "privilege" and "immunity" as developed over the last two hundred years cannot be dismissed so lightly.

a. In our opening brief (pp. 24-28), we demonstrated that examination of the relevant authorities, including the Supreme Court's decision in Pierson v. Ray, 386 U.S. 547 (1967), and the Second Circuit's in Bivens v. Six Unknown Agents, (Bivens II) 456 F.2d 1339 (1972), made plain that the "good faith and reasonable belief" defense, at least as it applies to law enforcement officers, is grounded in the common law doctrine of privilege, and not, as plaintiff would have it, on the theory of official immunity.

While the courts have sometimes referred to the defense as a "qualified immunity," the labelling has not obscurred the true nature of the defense. Thus, as the District of Columbia had recently stated in this regard:

> [T]here can be no doubt that state and federal police officers sued under Section 1983 and Bivens, respectively, have available to them a qualifed immunity defense, a privilege based on good faith and reasonableness, but that the burden is on the defendant officers to prove it. See Pierson v. Ray, supra, 386 U.S. at 555-557; Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics, supra 456 F.2d at 1347-1348; Hill v. Rowland, supra, 474 F.2d at 1377-1378; Jones v. Perrigan, 459 F.2d 81, 83 (6th Cir. 1972); Shifrin v. Wilson, 412 F.Supp. 1282, 1294-1295 (D. D.C. 1976); cf. Scheuer v. Rhodes, 416 U.S. 232 (1974); McSurely v. McClellan, 553 F.2d 1277, 1291 n.50 (1976) (en banc); Zweibon v. Mitchell, 516 F.2d 594, 670-671 (D.C. Cir. 1975) (en banc), cert. denied, 425 U.S. 944 (1976); Apton v. Wilson, 506 F.2d 83, 90-94 (D.C. Cir. 1974).

Dellums v. Powell, _____ F.2d _____, _____ (C.A.D.C., No. 75-1979, decided August 4, 1977 (Slip. op., at pp. 6-7)) (Emphasis added and footnote omitted).

b. Plaintiff attempts (Appellee's Br., pp. 16-18) to transform the "good faith and reasonable belief" defense into an "immunity" by claiming that it operates only as a shield to monetary liability, not "an acquittal of wrong doing." According to plaintiff (Appellee's Br., p. 17), the good faith defense "of a law enforcement officer does not eliminate the wrongfulness of his conduct. An otherwise illegal search does not attain legality merely because the offending

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officer is not subject to monetary liability."

In short, in plaintiff's view, the standard of liability is that the complained of search or arrest is without probable cause. But that view is not supported by the cases. As demonstrated in our opening brief (pp. 20-24), the widely, if not universally, followed decision in Bivens II established two complementary principles: (1) that the standard of liability in actions seeking damages against police officers based on an alleged unconstitutional arrest or search is not that they acted without "probable cause" in the constitutional sense but rather the "less stringent" reasonable man standard common to tort actions, and (2) that the "complete defense" available to federal law enforcement officials, like that available to state police officers, is rooted in the tort rules developed at common law. 4/ 456 F.2d at 1347-49.

4/ Plaintiff argues (Appellee's Br., pp. 13-15) that the provision of 28 U.S.C. 2680(a) barring any FTCA claim "based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, * * *," mandates that the United States be precluded from raising the "good faith and reasonable belief" defense. Although plaintiff claims that the provision "will have serious implications in the area of intentional torts by law enforcement agents * * *," we fail to see the connection.

The provision was intended to assure that "the legality of a rule or regulation should [not] be tested through the medium of a damage suite for tort." H.R. Rep. No. 1287, 79th Cong., 1st Sess. 6 (1945). See also Dalehite v. United States, 346 U.S. 15, 33 (1953). Its purpose was to "preclude any possibility that the bill [FTCA] might be construed to authorize suit for damages against the Government growing out of authorized activity, such as a flood-control or irrigation project, where no negligence on the part of any Government agent is shown, and the only ground for suit is the contention that the same conduct by a private individual would be tortious, or that the statute or regulation authorizing the project was invalid." H.R. Rep. No. 1287, supra, at 5-6. Cf. Hatahley v. United States, 351 U.S. 173 (1956).

(Fn. continued on next page)

Thus while an arrest or search supported by less than "probable cause" may be "wrongful" in the sense that it may result in the dismissal of criminal charges against a potential defendant, or may bar the Government from introducing evidence obtained during the search, it is nevertheless not necessarily "wrongful" as a tort. Plaintiff and the court below have confused the "wrong" in a criminal proceeding occasioned by a Fourth Amendment violation with the "wrong" that results in tortious liability. 5/ As this Court recognized in Hill v. Rowland, 474 F.2d 1374, 1377-80 (1973), it is not the constitutional "probable cause" standard that governs but the traditional "reasonable man" standard applicable to tort suits.

4/ (Continued):

Thus, despite plaintiff's labored arguments, the first portion of 28 U.S.C. 2680(a) has no application here since the validity of a federal statute or regulation is not being tested through the "medium" of a tort suit. Moreover, to the extent it has applicability, section 2860(a) suggests that the United States must be allowed to raise the "good faith and reasonable belief" defense. Plaintiff argues (Appellee's Br., p. 14) that "Section 2680(a) unequivocally states that the United States is excepted from liability where its officers exercise due care." The concept of "due care" does not equate with the constitutional "probable cause" standard of liability that plaintiff seeks to apply here. It more closely resembles the "reasonable man" standard of Bivens II. Thus, if the FBI agents here acted in good faith and with a reasonable belief in the legality of their conduct, they were acting with "due care", and the United States cannot be held liable under the FTCA.

5/ Similarly, and contrary to plaintiff's contention (Appellee's Br., p. 17) whether or not the courts will grant injunctive relief to remedy Fourth Amendment violations has no bearing in a damage action. As the District of Columbia Circuit noted in National Treasury Employees Union v. Nixon, 492 F.2d 587, 609 (1974):

(Fn. continued on next page)

Indeed, in Hill v. Rowland, this Court quoted with approval from the decision in Richardson v. Snow, 340 F.Supp. 1261 (D. Md. 1972), which underscores the inapplicability of the "probable cause" test as the standard of liability for cases of this type. 474 F.2d at 1378. The district court in Richardson observed that:

> [T]he reasoning of the Second Circuit in Bivens, supra, is as valid and as applicable in actions under §1983 involving state or local law enforcement officials as it is to federal law enforcement officers. * * * "An arrest is often a stressful and unstable situation calling for discretion, speed, and on-the-spot evaluation." To require the police officer, under penalty of personal liability for damages if he is in error, to make on-the-spot complex and intricate legal determinations of the existence or absence of probable cause under the Fourth and Fourteenth Amendments when the courts, acting in a more leisurely and relaxed atmosphere, have difficulty in making these decisions is to place the policeman in just such a position of acting at his peril as

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5/ (Continued):

> A good faith defense in a suit for damages brought against any federal official as an individual is seemingly established by Bivens v. Six Unknown Agents, 456 F.2d 1339 (2d Cir. 1972), on remand from the Supreme Court, 403 U.S. 388, 91 S. Ct. 1999, 29 L. Ed. 2d 619 (1971), but that defense is not assertable in the face of a request limited to injunctive, declaratory or madamus relief.

[Emphasis added.]

> was declared to be intolerable in Pierson v. Ray, supra, 386 U.S. at 555, 87 S. Ct. at 1218. It is no answer to this intolerable burden to cite cases such as Beck v. Ohio, 379 U.S. 89, at 97, 85 S. Ct. 223, 13 L. Ed. 2d 142 (1964); where a subjective good-faith test for actions of the policemen in an arrest was rejected since those cases deal with constitutional standards applicable to the admission of evidence in the trial of a criminal case rather than to the question of civil liability of a policeman who, in good faith and with a reasonable belief in the legality of his acts, has attempted to perform his duty to protect society. Such a distinction in this court's view is entirely compatible with the ballancing of the interest of society in attempting to protect itself from the effects of criminal behavior and of the interests of the individual in the enjoyment of his constitutional rights."

340 F.Supp. at 1266. [Emphasis added.]

II

THE 1974 AMENDMENT TO THE FTCA.

As shown supra. pp.4-9 , and in our opening brief (pp. 19-29), the "good faith and reasonable belief" defense is not simply an "immunity" from trial but an affirmative defense to liability, which if established negates the existence of any tortious conduct. The holding of the court below and plaintiff's arguments in support thereof, if accepted by this Court, would constitute a radical alteration of government liability under the FTCA. No longer would the liability of the United States be based on the traditional principles of respondeat superior embodied in the FTCA; principles which provide the guide for determining the Government's liability. See United States v. Williams, 350 U.S. 857 (1955). Instead, by depriving the United States of a defense that defeats the existence of any tortious conduct, liability would be imposed where no Government employee committed a "wrongful" act.

Such "strict" or per se liability is incompatible with the Act's fundamental design. Laird v. Nelms, 406 U.S. 797, 799 (1972); Dalehite v. United States, supra, 346 U.S. at 45.

Plaintiff, however, maintains (Appellee's Br., pp. 5-11) that the language of the 1974 Amendment and its legislative history indicate that Congress did, in fact, intend to radically alter the FTCA by legislatively precluding the United States from interposing a "complete defense" to the merits of a claim that its employees committed a tortious "wrong." Plaintiff is quite mistaken. Neither the language or legislative history of the 1974 Amendment sustains such a construction.

1. The circumstances under which the FTCA imposes liability upon the United States are set forth in 28 U.S.C. 1346(b) and 28 U.S.C. 2674. Section 1346(b) provides that the United States is subject to suit for "money damages, * * *, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act of ommission 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." [Emphasis added.] Similarly, section 2674 declares that, "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, * * *."

Based on those provisions, the courts have concluded that the FTCA does not permit the United States to be held liable on any "strict" or per se theory of liability. E.g., Laird v. Nelms,

supra; Dalehite v. United States, supra. Had Congress intended to alter the basic understanding of the nature of Government liability under the FTCA, it would have amended sections 1346(b) and 2674 to reflect the new view of liability. Neither of the provisions was in any way changed by the 1974 Amendment.

The 1974 Amendment only affected section 2680(h) of the Act, which had previously denied the courts jurisdiction over any tort suit arising out of claim of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights. 28 U.S.C. 2680(h) (1970). As amended, section 2680(h) now provides that:

> 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 right: Provided, that with regard to acts of omissions of investigative or law enforcement officers of the United States Government, the provisions of this chapter and section 1346(b) of this title shall apply to any claim arising, on or after the date of the enactment of this provision, out of assault, battery, false imprisonment, false arrest, abuse of process, or malicious prosecution. For the purpose of this subsection, "investigative or law enforcement officer" means any officer of the United States who is empowered by law to execute searches, to seize evidence or to make arrests for violations of Federal law.

Thus the 1974 Amendment merely applies the well-established any by now familair concepts of respondeat superior liability to claims arising out of the previously excepted torts or "assault, battery, false imprisonment, false arrest, abuse of process." 6/ Nothing in the language of the amended provision even hints that Congress intended to deprive the United States of any "privilege" defense to liability.

6/ The Government is liable for those torts only if they arise from "acts or omission of investigative of law enforcement officers of the United States." 28 U.S.C. 2680(h).

2. Nor does the legislative history support plaintiff's claims (Appellee's Br., pp. 7-11) that Congress intended to deprive the United States of the "good faith and reasonable belief" defense available to its employees. Indeed, the speed with which the 1974 Amendment was passed, and the scanty, if not non-existent, congressional debates 7/ strongly suggest that Congress did not believe it was fundamentally altering the FTCA. Surely, had Congress intended the amendment to result in per se liability being imposed on the United States (the natural consequences of precluding the Government from asserting a "good faith and reasonable belief" defense), the legislative history would have been more fully developed, and a clear statement of legislative purpose forthcoming. As detailed in our opening brief (pp. 29-41), the 1974 Amendment had a limited purpose. It was designed to

> deprive the Federal Government of the defense of sovereign immunity in cases in which Federal law enforcement agents, acting within the scope of their employment, or under color of Federal law, commit any of the following torts: Assault, battery, false imprisonment, false arrest, malicious prosecution, or abuse of process. * * * [T]his provision should be viewed as a counterpart to the Bivens case and its progenty [sic] in that it waives the defense of sovereign immunity so as to make the Government independently liable in damages for the same type of conduct that is alleged to have occured in Bivens (and for which that case imposes liability upon the individual Government officials involved).

S. Rep. No. 93-588, 93d Cong., 1st Sess. 3 (1973).

7/ As discussed in our opening brief (pp. 33-34 n. 20), the legislative history of the 1974 Amendment is not extensive, and what there is principally appears in the Senate Report, S. Rep. No. 93-588, 93d Cong., 1st Sess. (1973).

In short, the congressional design was to make the United States liable for the same type of conduct that the Supreme Court's decision in Bivens v. Six Unknown Agents, 403 U.S. 388 (1971) and its progeny (including the Second Circuit's decision on remand, 456 F. 2d 1339 (1972)), imposed liability upon individual Government officials. As we have demonstrated, in those cases liability does not turn on the lack of "probable cause" in the constitutional sense, but rather liability is imposed where the conduct complained did not satisfy the less stringent "reasonable man" tort law standard.

3. Plaintiff argues (Appellee's Br. pp. 7-11), however, that Congress had a much broader aim. She begins by noting that "[t]he impetus for the 1974 Amendment to the FTCA was a series of highly publicized narcotics raids, illegally conducted, which took place in Collinsville, Illinois, in the spring of 1973," and that Senator Percy, one of the amendment's sponsors, "was understandably outraged."[8/] (Appellee's Br., p. 7 (footnotes omitted)).

At the time it began investigating these incidents, Congress was considering a proposal to consolidate the various federal drug enforcement units under one umbrella organization.[9/] Attached to

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8/ Newspaper and other accounts of the behavior of the federal narcotics agents during what has become collectively known as the "Collinsville raids" has been exaggerated. In none of the civil damage actions arising from those incidents has any plaintiff yet obtained a money judgment. Indeed, in one of the cases the Seventh Circuit has recently affirmed a directed verdict in favor of the agents. Meiners v. Moriarity, ___ F. 2d ___ (Nos. 76-1730, 76-1731, decided October 6, 1977).

9/ Reorganization Plan No. 2 of 1973, 87 Stat. 1091.

the Senate report on the proposed reorganization, Senator Percy set forth his individual views on the advisability of amending the FTCA so as to make the United States liable for the intentional torts of its law enforcement agents. S. Rep. No. 93-469, 93d Cong., 1st Sess. 35-37 (1973). In outlining his individual views, Senator Percy offered two reasons in support of his proposed amendment to the FTCA: (1) that while the Supreme Court's decision in Bivens establishing a damage cause of action against federal law enforcement official "gave victims of abusive tactics some opportunity for relief, their remedy is severly limited by the ease with which agents can usually establish the defense of having acted in good faith and with probable cause," and (2) that "causes of action against officials as individuals will, on occasion, be virtually worthless since government employees may be so lacking in funds as to be judgment proof." Id. at 36. It was Senator Percy's view that, "it is now time to amend the [FTCA] so that victims of deliberate violence and terrorism at the hands of Federal agents can be better compensated, * * *." Id.

Although recognizing that Senator Percy was expressing his personal views in a statement attached to a committee report on a wholly unrelated bill,[10] plaintiff maintains (Appellee's Br., pp. 9-10) that the Senate Committee report on the 1974 Amendment[11]

10/ See note 9, supra.

11/ Plaintiff, echoing the district court, relies on a memorandum prepared by the Senate Committee staff (Senate Committee on Government Operations, Memorandum of No-Knock Legislation, August 28, 1973 (JA 82-86)). Although stating that "this memo, [was] published shortly before the Senate report announcing H.R. 8245 [the 1974

(footnote continued next page)

reflects Senator Percy's "intention to make the good faith defense unavailable to the United States in claims arising under § 2680(h)." According to plaintiff (Appellee's Br., p. 10) since the committee report discusses federal liability as arising "whenever" federal law enforcement agents commit "any" of the listed intentional torts, "[t]he application of the words * * * to these torts without reference to specific defenses suggests unconditional liability on the part of the United States."

By attempting to read the collective Congressional mind as adopting Senator Percy's preliminary views in the absence of any language in the statute or legislative history indicating such an identity of position, plaintiff has engaged in a degree of clairvoyance that we are unable to match. We can only read the Senate report as it is written.

As we noted in our opening brief (pp. 34-35 n. 21), while Senator Percy offered two reasons in support of his proposal, the Senate upon subsequent plenary consideration made no mention of the purported ease by which liability could be averted through the "good faith and reasonable belief" defense. In creating a remedy against the United States paralleling that already available against federal law enforcement agency personally, the Senate report notes that such an additional remedy was needed because "Federal agents are usually judgment proof * * *." S. Rep. No. 93-588, supra, at 3. It was the greater financial responsibility of the Government that concerned Congress.

11/ (continued) Amendment]" (Appellee's Br., p. 10), plaintiff does not state where it was "published." In our opening brief (pp. 38-39) we showed that the "memo" never became part of the legislative record, and that there is no evidence that the document represented the view of a single Senator or Representative, much less the full Congress.

The failure of Congress to direct its attention to the "good faith and reasonable belief" defense does not bespeak a negative implication that the defense should not be available to the United States. Indeed, if forced to specualte, we believe that the most reasonable interpretation is that after further consideration Congress as a whole determined that the Government should be liable only when federal agents engaged in willful or abusive conduct.[12/] Congress most probably, and we submit rightly, believed that the United States should not be held liable because a law enforcement officer makes an honest error in assessing "probable cause;" an area of the law that taxes the wisdom of the most able of courts and jurists. The existence of a "good faith and reasonable belief" defense is compatible with that goal.[13/]

12/ Although Senator Percy did comment disfavorably about the "good faith and reasonable belief" defense, the thrust of his statement concerns the need to provide an FTCA remedy for individuals who suffer harm from "deliberate violence and terrorism at the hands of Federal agents * * *." S. Rep. No. 93-469, supra, at 36. Allowing the United States to raise the "good faith and reasonable belief" defense would obviously not preclude victims of "deliberate violence or terrorism" from recovering since such abusive conduct would not be undertaken in "good faith" or with a "reasonable belief in its legality."

13/ Plaintiff speculates (Appellee's Br., pp. 11-13) that precluding the United States from raising the defense will: (1) have the "effects of improving federal employee morale" and will increase "governmental effectiveness by freeing federal employees from worry of personal liability * * *;" and (2) since the United States alone is likely to be held liable, its agents "undoubtedly * * * will be advised to exercise the "due care" necessary to protect individual rights."

First, it is not the practice of the United States to encourage its law enforcement officers to act with less than "due care" for the rights of individuals. But honest mistakes as to the sufficiency of "probable cause," or the need for a warrant will from time to time occur. Many times these "honest mistakes" do not result from less than "due care" taken by federal peace officers,

(footnote continued next page)

Moreover, the language relied upon by plaintiff, i.e., that liability would arise whenever Federal agents commit any of the listed intentional torts, does not support her position that the "good faith and reasonable belief" defense is unavailable to the United States. As we have repeatedly emphasized, the defense is a "privilege", which, if successfully established, denies the existence of any tortious conduct.

All that we seek here is the opportunity to prove that the FBI agents whose conduct forms the basis of plaintiff's suit, did not engage in tortious conduct because they acted with a "good faith and reasonable belief" in the legality of their conduct.

13/ (continued) but reflects shifting judicial views as to whether in any particular case there was "probable cause" to make an arrest or search.

Second, plaintiff presupposes that by precluding the United States from raising the defense, potential plaintiffs will take the easier course and sue under the FTCA rather than bring an action against the agents individually. For all practical purposes, this would result in making the action against the United States exclusive. That, however, would not comport with the congressional design.

At the same time the bill that eventually was adopted to amend the FTCA was introduced, the Department of Justice, in cooperation with Senator Hruska, introduced a competing measure. S. Bill 2558, 93d Cong., 1st Sess., 119 Cong. Rec. 33494 (1973). The Administration bill sought to make the liability of the United States exclusive. The enacted bill, however, does not address the exclusibility question. In this regard, the Attorney General has recently proposed legislation that would expand the basis upon which the United States can be held liable for the conduct of its employees, and, among other things, would make the remedy against the United States exclusive of any other civil action or proceeding against the employee. See H.R. 9219, 95th Cong., 1st Sess. (1977); S. 2117, 95th Cong., 1st Sess. (1977).

CONCLUSION

For the foregoing reasons and those stated in our opening brief, the judgment of the district court should be reversed.

Respectfully submitted,

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NOVEMBER, 1977.

CERTIFICATE OF SERVICE

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