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21 July 1978

NOTE FOR THE FILE

Senator Howard M. Metzenbaum (D., Ohio) has introduced a new draft of S. 3314 to the Judiciary Subcommittee on Citizens and Shareholders Rights. The Subcommittee will hold hearings on S. 3314 during this session.

[redacted] STAT

Assistant Legislative Counsel

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20 July 1978

NOTE FOR THE FILE

H. R. 9219 was introduced in House Judiciary Subcommittee on Adminstrative Law as a companion bill to S. 2117 (now S. 3314) the Federal Tort Claims Act.

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It is to be marked up at 10:00 a.m., 20 July 1978 in H 122.

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keting year or periods thereof as the Secretary determines will give producers the support price level as herein provided. Payments to any producer need not be made if the Secretary determines that the amount of the payment to the producer or all producers is too small to justify the cost of making such payments. The Secretary may make the payment to producers through the marketing agency to or through whom the producer marketed his honey if such marketing agency agrees to receive the payments on behalf of such producers and to promptly distribute the payments to such producers. In case any person who is entitled to any such payment dies, becomes incompetent, or disappears before receiving such payment, or is succeeded by another who renders or completes the required performance, the payment shall, without regard to any other provision of law, be made as the Secretary may determine to be fair and reasonable in all the circumstances and provided by regulation.

SEC. 5. For the purpose of reimbursing the Commodity Credit Corporation for expenditures made by it in connection with payments to producers under this Act, there is hereby appropriated for each fiscal year beginning with the fiscal year ending September 30, 1978, an amount equal to the total of expenditures made by the Corporation during the preceding fiscal year and to any amounts expended in prior fiscal years not previously reimbursed.

SEC. 6. Except as otherwise provided in this Act, the amounts, terms, and conditions of the price-support operations and the extent to which such operations are carried out shall be determined or approved by the Secretary of Agriculture. The Secretary may, in determining support prices and rates of payment, make adjustments in such prices or rates for differences in grade, quality, type, location, and other factors to the extent he deems practicable and desirable. Determinations by the Secretary under this Act shall be final and conclusive. The facts constituting the basis for any operation, payment, or amount thereof when officially determined in conformity with applicable regulations prescribed by the Secretary shall be final and conclusive and shall not be reviewable by any other officer or agency of the Federal Government.

SEC. 7. The term "marketing year" as used in this Act means the twelve-month period beginning January 1 of each calendar year or, such other period, or periods for prescribed areas, as the Secretary may determine to be desirable to effectuate the purpose of this Act.

SEC. 8. The Secretary of Agriculture is authorized to enter into agreements with, or to approve agreements entered into between marketing cooperatives, trade associations, or others engaged or whose members are engaged in the production or handling of honey or the products thereof for the purpose of developing and conducting on a national, State, or regional basis advertising and sales promotion programs and programs for the development and dissemination of information on product quality, pollination, and marketing improvement, for honey or the products thereof. Provision may be made in such agreement to obtain the funds necessary to defray the expenses incurred through pro rata deductions from the payments made under section 4 of this title to producers within the production area he determines will be benefited by the agreement and for the assignment and transfer of the amounts so deducted to the person or agency designated in the agreement to receive such amounts for expenditure in accordance with the terms and conditions of the agreement. No agreement containing such a provision for defraying expenses deductions shall become effective until the Secretary determines that at least two-thirds of the producers who, during a representative period determined by the Secretary, have been engaged, within the production area he determines will be benefited by the agreement, in the production for market of the commodity specified therein approve or favor such agreement, or that producers who, during such representative period have produced at least two-thirds of the volume of such commodity produced within the area which will be benefited by such agreement, approve or favor such agreement. The Secretary may conduct a referendum among producers to ascertain their approval or favor. The requirements of approval or favor shall be held to be complied with if two-thirds of the total number of producers, or two-thirds of the total volume of production, as the case may be, represented in such referendum, indicate their approval or favor.

By Mr. METZENBAUM:

S. 3314. 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 U.S. employees, and for other purposes, and to amend title 5 of the United States Code to permit a person aggrived by a constitutional injury to initiate and participate in a disciplinary inquiry of the offending act or omission; to the Committee on the Judiciary.

FEDERAL TORT CLAIMS ACT AMENDMENT

● Mr. METZENBAUM. Today I introduce a bill to amend the Federal Tort Claims Act. This legislation represents the fruits of intensive negotiations between myself, the staff of the subcommittee on Citizens and Shareholders Rights and Remedies of the Senate Judiciary Committee, which I chair, the staff of the subcommittee on Administrative Practice and Procedure, chaired by the distinguished Senator from South Dakota, JAMES ABOUREZK, and the Department of Justice. This bill succeeds S. 2117, introduced September 21, 1977, and currently before my subcommittee, which represented the Department of Justice's initial attempt to amend the Federal Tort Claims Act.

The legislation I introduce today, and its predecessor, S. 2117, are both designed to immunize some Federal employees from private damage actions for tortious misconduct and to substitute the United States as the defendant in such suits. Hearings on S. 2117 revealed that the bill failed to provide mechanisms for holding Federal employees accountable for their misconduct absent their personal liability. Attorney General Griffin B. Bell acknowledged this deficiency in hearings on January 26, 1978.

In succeeding months the Department of Justice has held extensive negotiations with Members of the House and the Senate, and their staffs, as well as with a substantial number of outside groups. On May 3, 1978, Patricia M. Wald, Assistant Attorney General for Legislative Affairs, submitted a disciplinary amendment to S. 2117 to the Subcommittee on Citizens and Shareholders Rights and Remedies. That amendment was designed to provide for administrative procedures for holding Federal employees accountable for misconduct in place of the private damage actions permitted against such employees under current law.

In hearings on June 15, 1978, Barbara Allen Babcock, Assistant Attorney General for the Civil Division, Deparment of Justice, expressed the Department's willingness to continue refining the legislation in order to respond to criticisms of the workability of the disciplinary amendment. Negotiations have continued. Last week the Department supplied the Subcommittee on Citizens and Shareholders Rights and Remedies with a complete draft of the legislation, comprised of the text of S. 2117, as refined, and the "disciplinary amendment," as modified in recent negotiations.

The legislation I introduced today, with a few exceptions, is identical to the draft submitted by the Department last week. The major difference centers on how Presidential appointees and former employees should be treated under the bill when they are accused of committing constitutional torts. The Department of Justice has rightly concluded that for constitutional and jurisdictional reasons Presidential employees, defined as employees whose appointments are subject to Senate confirmation, and former employees cannot be subjected to the administrative disciplinary proceedings applicable to other Federal employees under this legislation. The only means for holdnig Presidential appointees and former employees accountable for unconstitutional actions under the Department's draft is a report on their conduct. In addition, such report may be enjoined from public release under the Department's version.

Thus, the department's proposal would replace the personal liability of Presidential appointees, as recently affirmed by the Supreme Court in Butz against Economou—June 29, 1978, and former employees with a simple report. Lawlessnes at the highest levels of the Federal Government only a few years ago makes me fearful of immunizing senior Federal officials from personal liability, especially when a mere rap on their knuckles is the alternative.

Federal employees at all levels should be accountable for their misconduct. The most powerful Federal officials are in positions to cause the greatest abuses of constitutional rights. They least of all should be freed from answering for their misconduct. The legislation I introduce today permits American citizens injured by constitutional torts to sue either the United States or the Presidential appointee or former employee accused of the illegal conduct. This approach underscores my belief that senior Federal officials should be personally liable for wanton disregard of the constitutional rights of their fellow Americans.

I ask unanimous consent that the text of the bill I am introducing today be printed in the RECORD.

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

S. 3314

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 Constitu-

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(3) by adding after and below paragraph (5) the following new paragraph:

"(6) an amount equal to 100 per centum of the sums expended during such quarter, which are attributable to the proper and efficient administration of so much of the State plan as relates to the provision of medical assistance in Indian Health Service facilities which are eligible for reimbursement under the State plan pursuant to the provisions of Section 1911; plus,"

(b) The amendments made by subsection (a) shall be effective with respect to expenditures made, under State plans approved under Title XIX of the Social Security Act, beginning with Fiscal Year 1979.●

● Mr. PAUL G. HATFIELD. Mr. President, today I am cosponsoring S. 3311, amending the Indian Health Care Improvement Act (Public Law 94-437) to raise the medicaid reimbursement rate for State administrative costs from 50 to 100 percent.

The last Congress found that current Indian Health Service facilities were inadequate, inefficient, and undermanned. Rather than directly authorizing funds for needed improvements, Congress passed the Indian Health Care Improvement Act. This put IHS units under each State's medicaid plan, requiring State standards to be met before reimbursement for services could be made. The reimbursement money goes into a special fund to finance further improvements of facilities, thus acting as an incentive to raise existing standards.

However, a problem arises. The Indian Health Care Improvement Act places the States in the middle of a Federal scheme. They are forced to pay 50 percent of the administrative costs incurred in transferring money from one Federal agency to another—from medicaid to the Indian Health Service special fund. In my State of Montana, this situation causes a grave hardship, which results in the direct loss of medical services to needy citizens. Montana is required to divert $25,000 of its medicaid matching funds—funds that could be used to purchase direct medical services—to cover the cost of processing medicaid claims for the Indian Health Service.

It is unconscionable to ask a State to pick up additional administrative costs, when its State medicaid program is $7 million short in funds to meet current medical needs. At this time, Montana has refused to sign the agreement with the Indian Health Service facilities as required by the act.

Mr. President, the Indian Health Care Improvement Act requires States to pay half the cost of administering a program that is a Federal responsibility, while at the same time causing States to lose critically needed medicaid services.

The Senate considered and passed a similar measure last October to the one being introduced today. This legislation is needed to prevent the loss of medical services to needy citizens while relieving the States completely of the administrative costs involved in assisting the implementation of the Indian Health Care Improvement Act.●

By Mr. DOMENICI:

S. 3312. A bill entitled the Blind Veterans Disability Housing Act of 1978, to the Committee on Veterans' Affairs.

BLIND VETERANS DISABILITY HOUSING ACT OF 1978

● Mr. DOMENICI. Mr. President, I introduce this bill to correct the discrimination being suffered by blind veterans. Under present law, to be eligible for special housing for disabled veterans, a blind veteran must, in addition to blindness in both eyes, also be unable to use one of his legs. This is mixing apples and oranges. The needs of the blind are different from those who have lost their ability to use their legs.

Accordingly, men who have lost their sight in the service of their country are denied special design features in their housing simply because they did not also lose the use of one of their legs. This is almost too cruel to contemplate.

Among the special features needed by the blind, but not those with vision, include: safety rails on all steps, push-button ovens, formica tops on ranges for cleaning up spills, smoke alarms, brail on medicine bottles and spice jars, door locks fitted to one key, and brail washers and dryers. In short, a host of safety features that those with sight take for granted is needed by the blind.

Mr. President, I consider my bill to be no more than what a compassionate society owes those who have served it well. I hope that my bill receives rapid consideration and becomes the law of the land. I ask unanimous consent that the text of the bill be printed in the RECORD.

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

S. 3312

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SEC. 1. This Act may be called the Blind Veterans Disability Housing Act of 1978.

SEC. 2. Subsection 801(2) of Title 38 of the United States Code is amended to read as follows: "(2) which includes blindness in both eyes, having only light perception, or (3) . . ."●

By Mr. ANDERSON:

S. 3313. A bill to direct the Secretary of Agriculture to establish a price support program for honey; to the Committee on Agriculture, Nutrition, and Forestry.

NATIONAL HONEY ACT OF 1978

● Mr. ANDERSON. Mr. President, today I am introducing the National Honey Act of 1978. Although honey production does not represent a major industry in the United States, the maintenance of an adequate number of honeybee colonies is essential to the pollination of a large number of crops throughout the country.

Due to a decrease in the number of honeybee colonies, domestic honey production has declined steadily since 1963. As a result, the United States is now a net importer of honey. I do not believe it would be wise to allow this trend to continue.

The National Honey Act of 1978 is designed to promote domestic production of honey and maintain the needed number of honeybee colonies for pollination purposes within the United States. The act directs the Secretary of Agriculture, through the Commodity Credit Corporation, to establish a price support program for domestic honey for the 1979 through 1982 production years. It also authorizes the Secretary to approve agreements between producers, cooperatives, and associations to conduct needed advertising and sales programs. These promotion programs will be paid for by the producers who benefit from them.

I hope my colleagues will recognize the real need to maintain a stable number of honeybee colonies within the United States. The size of our Nation's honey industry is in no way representative of its importance to American agriculture.

Mr. President, I ask unanimous consent that the National Honey Act of 1978 be printed in the RECORD.

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

S. 3313

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "National Honey Act of 1978".

SEC. 2. It is hereby recognized that honey bees are essential in the production of many agricultural crops and that it is imperative that the small, but important, honeybee industry be maintained at a level sufficient to enable it to make the maximum contribution to agriculture and food production through crop pollination. Maintenance of the desired number of honeybee colonies is impaired by the wide fluctuations in the prices of honey and the depressing effects of the large volume of imports of foreign produced honey. It is hereby declared to be the policy of Congress, as a measure of national interest and in promotion of the quality of life and the general economic welfare, to encourage the domestic production of honey in a manner that will have the least adverse effect on foreign trade, and at prices fair to both producers and consumers.

SEC. 3. (a) The Secretary of Agriculture shall, through the Commodity Credit Corporation, support the price of honey to producers thereof by means of loans, purchases, payments, or other operations. Such price support shall be limited to honey marketed during the period beginning January 1, 1979, and ending December 31, 1982.

(b) The support price for honey for the 1978 and each subsequent marketing year shall be determined by multiplying 36 cents by the ratio of (i) the average of the parity index (the index of prices paid by farmers, including commodities and services, interest, taxes, and farm wage rates, as defined in section 301(a)(1)(C) of the Agricultural Adjustment Act of 1938) for the three calendar years immediately preceding the calendar year in which such price support is determined and announced to (ii) the average parity index for the three calendar years 1972, 1973, and 1974 and rounding the result to the nearest full cent.

(c) The Secretary shall, to the extent practicable, announce the support price levels for honey sufficiently in advance of each marketing year as will permit producers to plan their production for such marketing year.

SEC. 4. If payments are utilized as a means of price support, the payments shall be such as the Secretary of Agriculture determines to be sufficient, when added to the national average price received by producers, to give producers a national average return for honey equal to the support price level therefor. The payments shall be made upon honey marketed by the producers thereof, but any honey produced prior to January 1, 1979, shall not be the subject of payments. The payments shall be at such rates for the mar-

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tion 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(a) 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. 2(b). Section 2672 of title 28, United States Code, is further amended by inserting in the first paragraph the following language after the amount "$25,000" and before the word "shall", "or any award, compromise, or settlement based on a claim arising under the Constitution of the United States".

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

SEC. 3(b). Section 2674 of title 28, is further amended 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 complained of 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 when the violation complained of continues for more than one day, liquidated damages shall be the higher of $1,000 or $100 a day for each day the violation continues, up to a maximum of $25,000 plus a reasonable attorney's fee and other litigation costs reasonably incurred: *Provided further, however,* That the United States shall not assert as a defense to a tort claim arising under the Constitution of the United States, the absolute or qualified immunity of the employee whose violation is complained of or or his reasonable good faith belief in the lawfulness of his conduct, except that the United States may assert such a defense if the violation complained of is that of a member of Congress, a judge, a prosecutor, or a person performing the function of such a person.

SEC. 4(a). Section 2675(a) of title 28, United States Code, is amended by inserting the following language after "employment,": "or upon a tort 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. 4(b) Section 2675(a) of title 28, is further amended by changing the period at the end thereof to a semicolon and adding thereafter the following language:

"*Provided, however,* That class actions in conformity with the requirements of the Rules of Civil Procedure may be instituted for money damages for a tort arising under the Constitution of the United States if the claim presented to the appropriate Federal agency under section 2675(a) of title 28 expressly asserts the representative nature of the claim and specifically describes the class, the common interests of the claimant and such class, 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 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".

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

"(b)(1) The remedy against the United States provided by section 1346(b) and 2672 of this title for tort 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 tort claims arising from the violation of the Constitution of the United States by an employee of the Government, other than an individual who is no longer an employee of the Government at the time a claim is presented to a federal agency under this chapter and other than an appointee of the President as defined in chapter 78 of title 5, United States Code, while acting within the scope of his authority or with a reasonable good faith belief in the lawfulness of his conduct is exclusive of any other civil action or proceeding arising out of or relating to the safe subject matter against the employee whose act or omission or violation gave rise to the claim, or against the estate of such employee.

"(b)(2) In no event shall a tort claim arising under the Constitution of the United States by an employee of the Government while not acting within the scope of his authority or with a reasonable good faith belief in the lawfulness of his conduct and by an individual who is no longer an employee of the Government at the time a claim is presented to a federal agency under this chapter and by an appointee of the President as defined in chapter 78 of title 5, United States Code, lie against both the employee in his individual capacity and against the United States under sections 2675 and 1346(b) of title 28, United States Code."

SEC. 7. Section 2679(d) of title 28, United States Code, is amended to read as follows:

"(d)(1) Upon certification by the Attorney General at any time before trial 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, other than an individual who is no longer an employee of the Government at the time a claim is presented to a federal agency under this chapter and other than an appointee of the President as defined in chapter 78 of title 5, United States Code, was acting within the scope of his authority or with a reasonable good faith belief in the lawfulness of his conduct, 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, other than an individual who is no longer an employee of the Government at the time a claim is presented to a federal agency under this chapter and other than an appointee of the President as defined in chapter 78 of title 5, United States Code, was acting within the scope of his authority or with a reasonable good faith belief in the lawfulness of his conduct 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 that an employee was acting within the scope of his office or employment and in claims arising under the Constitution of the United States within the scope of his authority or with a reasonable good faith belief in the lawfulness of his conduct 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 within the scope of his authority or with a reasonable good faith belief in the lawfulness of his conduct 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.".

SEC. 8. Section 2679 of title 28, United States Code, is further 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, including action under chapter 78 of title 5, United States Code, 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 claim was employed.".

"SEC. 9(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 ———".

SEC. 9(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."

SEC. 10. (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".

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SEC. 10(b). Subsections (a) through (c) of section 224 of the Public Health Service Act, as added by section 4 of the Act of December 31, and renumbered (42 U.S.C. 233(a) through (e)), are repealed, and subsection (f) is amended by deletion of the designation "(f)".

SEC. 10(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.

SEC. 10(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.".

SEC. 10(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. 2458(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. 11. 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. 12. The provisions of this Act shall apply to all claims and suits filed after the date of enactment hereof, and to all claims and suits pending on the date of enactment, *Provided however*, that as to such pending claims and suits, or as to any causes of action known to an aggrieved party on or before the date of enactment, such claimant, plaintiff or aggrieved party may elect to retain his right to demand a trial by jury or to request punitive damages if demanded or requested prior to the date of enactment in the case of a plaintiff who has filed suit or if such right has not expired by the date of enactment in the case of such plaintiff, claimant or aggrieved party. In a case in which a plaintiff elects to retain his right to jury demand or to request punitive damages, the provisions of Section 3 of this Act relating to liquidated damages, waiver of absolute or qualified immunity, and attorneys fees shall not apply.

SEC. 13. Title 5, United States Code, is amended by adding immediately after Chapter 77 a new chapter 78 containing a table of contents and new sections 7801, 7802, 7803, and 7804, 7805, 7806 and 7807 as follows:

"Chapter 78—EMPLOYEE DISCIPLINE

Sec.

"7801. Definitions
"7802. Administrative Inquiries Generally.
"7803. Conduct of Employees of the United States.
"7804. Conduct of Former Employees and Presidential Appointees.
"7805. Individuals and Bodies Conducting Inquiries and Review.
"7806. Regulations.
"7807. Miscellaneous.

SEC. 7801. DEFINITIONS

For the purposes of this chapter:

(a) "Person" means any person with rights recognized under the Constitution of the United States;

(b) "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 (c) of this section;

(c) "Employee" unless otherwise described, means a present "employee of the Government" as defined in section 2671 of title 28, United States Code; and "an employee paid from the appropriation for the office of the President" as defined in section 7324(d)(1)(a) of title 5, United States Code;

(d) "Appointee of the President" means an employee of the Government, other than a uniformed member of the Armed Forces or Coast Guard, a Public Health Service officer, or a Foreign Service officer, appointed by the President with the advice and consent of the Senate; and

(e) "Disciplinary action" means removal, suspension without pay, reduction in rank or pay, admonishment or reprimand, or transfer, for such cause as will promote the efficiency of the service.

Sec. 7802. ADMINISTRATIVE INQUIRIES GENERALLY

(a) A person who obtains a monetary recovery from the United States on a tort claim under section 2675 or section 1346(b) of title 28, United States Code, arising under the Constitution of the United States, may within 60 days thereafter request, as provided herein, an administrative inquiry of the conduct alleged or found to have given rise to the claim.

(b) A person who brings an action under section 1346(b) on a tort claim arising under the Constitution of the United States may, not earlier than 60 days nor more than 120 days thereafter, request, as provided herein, an administrative inquiry of the conduct alleged to have given rise to the claim.

(c) A federal agency that undertakes to conduct an administrative inquiry of the conduct of one of its employees may in its discretion invite a person believed to have been adversely affected by the conduct to participate in the administrative inquiry to the extent provided by sections 7803(b) and (e).

(d) A person who has requested an administrative inquiry under subsection (b), or who has been invited to participate in an administrative inquiry under subsection (c), may not subsequently request an administrative inquiry into the same conduct under subsections (a) or (b).

SEC. 7803. CONDUCT OF EMPLOYEES OF THE UNITED STATES

(a) A request under section 7802 (a) or (b) for an administrative inquiry with respect to the conduct of an employee of the United States shall be made to the head of the federal agency, or his designee, by which the employee is employed. The request shall be accompanied by a written statement, certified and subscribed as permitted by section 1746 of title 28, of such facts as are known to the person making the request regarding the conduct of the employee which is alleged to have violated such person's rights under the Constitution, and a request may be made with respect to the conduct of an employee whose identity is unknown if the request sets forth other information sufficient to permit the commencement of an inquiry.

(b) The inquiry shall be conducted without delay by the head of the agency or his designee. If after preliminary inquiry, the head of the agency or his designee finds that the matter is so unsubstantiated as not to warrant further inquiry, he may, upon notice to the person under this subsection, terminate such inquiry. A hearing shall be held with respect to the conduct of the employee if there is a genuine, material and substantial dispute of fact which can be resolved with sufficient accuracy only by the introduction of reliable evidence in a hearing and the decision of the agency in the matter is likely to depend on the resolution of such dispute. The person requesting the inquiry may appear and give testimony at any such hearing. In his sole and unreviewable discretion, the head of the agency or his designee may in the event of a hearing give to such person a reasonable opportunity to examine and cross-examine witnesses and to suggest witnesses to be called and documents to be produced. The head of the agency or his designee shall determine whether disciplinary action is warranted, issue a statement of findings and state the nature and degree of any disciplinary action taken, and notify the person of the action taken by the agency and the reasons therefor.

(c) Except as provided by subsection (e), within 60 days after notification of the action taken by the agency, or if no final agency action has been taken within one year after the inquiry was requested, the person may request an administrative review by the appropriate individual or body described in section 7805. The individual or body conducting the administrative review shall conduct such review without delay and may substitute its judgment as to the appropriate nature and degree of disciplinary action. If no final agency action has been taken, or if it is unable to conduct such review because it finds the record inadequate, it may remand to the agency for further proceedings or it may, in its discretion, supplement the record by taking additional evidence. In the sole and unreviewable discretion, the individual or body conducting the administrative review may in any proceeding to supplement the record give the person requesting administrative review a reasonable opportunity to examine and cross-examine witnesses. The final decision shall be transmitted to the agency, the employee and the person requesting the review, and shall include a statement of findings and a recommendation which except as provided by section 7807(d), shall be binding on the agency with respect to disciplinary action against the employee.

(d) Except as provided by subsection (e), within 60 days after the issuance of a final decision on an administrative review, the person requesting the inquiry may petition for review of the final decision by a district court of the United States, unless the conduct involved is that of a uniformed member of the Armed Forces as described in section 101(4) of title 10, United States Code, in which event he may petition for review by the United States Court of Military Appeals. The Court may deny the petition, affirm the decision, or set aside the decision and remand for further proceedings if it finds the decision to be arbitrary or capricious, or finds material factual determinations to be unsupported by substantial evidence, on the basis of its review of the decision, the reasons therefore, and the recommendation with respect to disciplinary action. The court's review shall be held *in camera* for matters specifically protected from disclosure by statute, by executive order relating to the national security, national defense, or foreign affairs, or in the court's own discretion if it determines that *in camera* review is necessary.

(e) A person shall have the right to request an administrative review under subsection (c) of this section and to petition for judicial review under subsection (d) of this section only when such person has obtained a monetary recovery from the United States on a tort claim under section 2675 or in a suit under section 1346 (b) of title 28, United States Code, alleged to have arisen under the Constitution of the United States, or when the agency or a court of the United States has found that the claim arises under the Constitution of the United States, unless the agency which conducted this inquiry under section 7803 (b) has in its discretion permitted a person to participate in such inquiry and consents to such person's making a request or filing a petition for such administrative and judicial review.

SEC. 7804. CONDUCT OF FORMER EMPLOYEES AND PRESIDENTIAL APPOINTEES

(a) A request under section 7802 for an administrative inquiry with respect to the

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conduct of a former employee of the United States or a present or former appointee of the President shall be made to the appropriate individual or body described in section 7805.

(b) The individual or body conducting an administrative inquiry under this section shall conduct such inquiry without delay and may in its discretion hold a hearing. Such individual or body shall prepare a written report of the results of the inquiry which shall include a statement of findings. Such report promptly shall be served on the former employee or present or former appointee of the President whose conduct has been the subject of the administrative inquiry and not less than twenty days nor more than thirty days thereafter shall be transmitted to the person requesting such inquiry, to any other person whose rights under the Constitution of the United States are found to have been violated, and shall be made public. If, prior to the public release of the report, the former employee or present or former appointee of the President submits to the head of the agency or his designee a brief statement commenting on the substance of the report, such statement shall accompany the report when it is transmitted to any person and when it is made public.

(c) A person requesting such inquiry and a person whose conduct is the subject of an administrative inquiry under this section may, within 60 days after service upon him of the report of the inquiry, petition a district court of the United States to review the report. The court may deny the petition or set aside the report and remand it for further consideration if it finds the report to be arbitrary and capricious or finds material factual determinations to be unsupported by substantial evidence on the basis of its review of the report and the statement of findings.

SEC. 7805. INDIVIDUALS AND BODIES CONDUCTING INQUIRIES AND REVIEW

An administrative inquiry under section 7804 or an administrative review under section 7803(c) shall be conducted by:

(a) The Secretary of Defense, or his designee, with respect to a uniformed member of the Armed Forces as described in Section 101(4) of title 10, United States Code;

(b) The Secretary of the Department in which the United States Coast Guard is operating, or his designee, with respect to 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.), or his designee, with respect to an officer or employee of the Foreign service;

(d) The head of an agency with a personnel system under the Public Health Service Acts, as amended (42 U.S.C. 201 et seq.), or designee, with respect to an officer or employee of the Public Health Service;

(e) A body designated by the President within sixty days of enactment of this Act, other than the Central Intelligence Agency, the Federal Bureau of Investigation, the National Security Agency, the national intelligence components of the Defense Department or the National Security Council and its component parts, with respect to the conduct of an officer or employee while engaged in intelligence activities; or

(f) The Civil Service Commission, or its designee, in any other case.

(g) A designee of a Secretary, agency head or entity described in this section, who conducts an administrative review shall not be responsible to or subject to the supervision or direction of any person who conducted the administrative inquiry under review.

(h) No person who has been an employee of the Central Intelligence Agency, the Federal Bureau of Investigation, the National Security Agency, the national intelligence components of the Defense Department or the National Security Council or its component parts during the preceeding two years may be appointed to serve on the body designated to conduct an administrative review under subsection (e) of this section.

SEC. 7806. REGULATIONS

(a) Within 90 days after enactment of this chapter, the individuals and bodies described in section 7805 shall propose such regulations as are necessary and appropriate for the implementation of this chapter.

(b) The head of each federal agency subject to the administrative review provisions of section 7803(c) shall comply with the regulations issued by the particular administrative body designated by section 7805 to review administrative inquiries conducted by that federal agency, and shall 60 days after the effective date of such regulations, issue rules, regulations and instructions not inconsistent therewith.

(c) For purposes of promulgating regulations pursuant to this section, the body designated under subsection (e) of section 7805 shall be an "agency" of the government within the meaning of 5 U.S.C. (The Administrative Procedure Act).

(d) All regulations issued under this section shall be published for public comment and subject to judicial review under chapters 5 and 7 of this title.

SEC. 7807. 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. To the extent that an employee has exercised rights to administrative or judicial review which are greater than those provided in subsections (c) or (d) of section 7803 to a person requesting an administrative inquiry, such person shall have the same rights as such employee. *Provided, however,* that an employee, who is the subject of a disciplinary action recommended by the Civil Service Commission, pursuant to subsection 7803(c), shall not be required by any other provision of law to take an appeal to the Commission prior to seeking judicial review of that action.

(b) An employee who is not entitled under other provisions of law to seek administrative or judicial review of disciplinary action taken against him may, if an administrative review is conducted under section 7803(c), participate in such review and give evidence or testimony if a hearing is held, and, to the extent provided by section 7803(d), may petition for judicial review of a final decision if any disciplinary action recommended under subsection 7803(c) is greater than that proposed by the employing federal agency.

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

(d) Nothing in this chapter shall require a federal agency to delay taking disciplinary action against an employee or empower the Civil Service Commission to reduce the severity of disciplinary action taken 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.

(e) Nothing in this chapter shall authorize a federal agency to delay or refrain from taking disciplinary action against an employee in the absence of a request filed under section 7802 (a) or (b).

(f) On or before June 30 of each calendar year, the President shall submit to the Speaker of the House and the President of the Senate a report for the preceding calendar year separately listing for each Federal agency the number of administrative inquiries undertaken pursuant to this chapter, a brief description of the nature of the inquiries, any administrative or judicial review thereof, and the ultimate disposition thereof.

(g) Notwithstanding any provision of law to the contrary, any party in an action for judicial review of agency action under section 7803(d) and 7804(c) shall be entitled to recover from the United States reasonable attorneys' fees, fees and costs of experts, and other reasonable costs of litigation, including taxable costs, incurred during judicial review if the court affords such person the relief sought in substantial measure. Reasonable attorneys' fees and other costs of litigation awarded under this section shall be based upon prevailing market rates for the kind and quality of the services furnished.●

By Mr. MATHIAS:

S. 3315. A bill to amend the Juvenile Justice and Delinquency Prevention Act of 1974 to provide for assistance to State educational agencies for counseling and related services; to the Committee on Human Resources.

JUVENILE DELINQUENCY PREVENTION COUNSELING ACT

● Mr. MATHIAS. Mr. President, today I am introducing the Juvenile Delinquency Prevention Counseling Act, to amend the Juvenile Justice and Delinquency Prevention Act of 1974 to provide for assistance to State educational agencies for counseling and related services.

Young people today live in a world in which standards are not only changing but are changing at a faster rate than ever before. In the last 25 years, home and family life have, for better or worse, become much less important to young and old alike. I personally regret the fact that many children no longer learn moral values either at home or at church. These trends in American life have made youth uneasy and unsure of what good conduct is.

Children reflect this loss of standards. They sense the insecurity of their parents and other adults and they reflect it themselves. It is not easy to say just why some children become problems while others grow up in spite of these facts to become productive members of society. But nearly every problem case can be traced to a lack of adjustment between the child and society. Sometimes there is a basic weakness in the child himself which surfaces because of trouble in the child's environment, including the home, the family, the neighborhood and the local school.

Nearly two-thirds of a child's formative years are spent within the school system. The school's primary duty is to teach, but teaching is useful only if it gives the guidance that enables a child to lead a happy, healthy and productive life.

The bill I am introducing today would provide assistance to State educational agencies for counseling and related services to address such problems. These counseling grants would be authorized for developing educational programs and alternative schooling practices and for providing counseling to both child and family, in an effort to prevent, identify and treat incipient learning and discipline problems. Appropriations for these grants are authorized at $50 million for

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fiscal year 1979, $75 million for fiscal year 1980 and $100 million for fiscal year 1981.

This bill would direct greater emphasis to the question of how to identify problem children before they get in trouble and land in court. Prejudicial counseling through training and education could help the child with problems before he reaches the point of judicial notice but when he is clearly headed in that direction.

One of the tragedies of the present situation is the complete dichotomy between the Justice Department's programs for juveniles and those at HEW. In 1973, the former Secretary of HEW and then Attorney General, Elliott Richardson, and I discussed formulating a bill to create an early-warning system on juvenile delinquency. We were extremely interested in improving the links between law enforcement and social services and Mr. Richardson's experience in both areas was unique. I am now reviving this concept with some optimism that we might still be able to merge these two streams in a way that would benefit young people in trouble. It is not my intention to fracture the programs between the Justice Department and HEW. But, I would like to see the educational community retain a vital relationship to this whole process. The current arrangements for coordination are not working.

As of September 1976, the Office for Alcohol and Drug Abuse Education Programs within the Office of Education became the Administrator of the School Violence Act within the Juvenile Justice Amendments. Since September 1976 to the present, OE was guaranteed $4.7 million to implement it. To date, they have received $1.3 million. This money comes from LEAA discretionary funds and appears to be the only program tangentially related to juvenile delinquency programs administered by OE.

The Federal Coordinating Council on Juvenile Justice and Delinquency Prevention has not met since December 1976. I understand that a second meeting has finally been scheduled for June 21, 1978. The Attorney General, the Secretary of Labor, and the Secretary of HEW all sit on that council, but it does not do much good if meetings are once every 3 years.

We must know more about the kind of aberrant behavior which is visible and detectable and which usually leads to serious problems with the young person, identifying the kind of treatment or assistance necessary and who should be involved in rendering this assistance. I urge Congress to begin to strengthen the relationship between HEW and the Law Enforcement Assistance Administration because HEW, in cooperation with the educational agencies, could devise programs in schools to detect the problem kids before they come to the courts. Several programs across this country are operating on temporary and sporadic funds. However, these programs have produced results such that if these services could be provided on a continuing and more permanent basis, schools could go far in serving the needs of their students. I hope Senators will supoprt this effort which is so very important and long overdue.

Mr. President, I ask unanimous consent that the text of the bill be printed in the RECORD.

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

S. 3315

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Juvenile Delinquency Prevention Counseling Act".

SEC. 2. Title II of the Juvenile Justice Delinquency Prevention Act of 1974 is amended by redesignating part D as part E and by adding after part C the following new part:

"PART D—COUNSELING AND RELATED SERVICES FOR STATE EDUCATIONAL AGENCIES

"COUNSELING GRANTS AUTHORIZED

"SEC. 256. (a) For the pyurpose of assisting State educational agencies in developing (1) educational programs and alternative schooling practices and (2) providing counseling, including family counseling, and related services in the context of a State effort of prevention and treatment of delinquent behavior, the Administrator is authorized to make grants to State educational agencies in accordance with the provisions of this part.

"(b) No grant may be made under this part unless the State educational agency submits an application at such time and in such manner as the Administrator may prescribe. Each such application shall contain a description of the purposes for which the grant is sought, and assurances satisfactory to the Administrator that the State educational agency will use the grant for the purposes for which application is made, and will comply with such other requirements relating to the submission of reports, methods of fiscal accounting, the inspection and audit of records and other materials, and such other rules, regulations standards, and procedures, as the Administrator may reasonably require.

"(c) For the purposes of this part the term 'State educational agency' has the same meaning as set forth in section 801(k) of the Elementary and Secondary Education Act of 1965.

USE OF FUNDS

"SEC. 257. Grants made under this part may be used solely for meeting the cost of services or providing services designed to carry out the purposes set forth in section 256(a).".

SEC. 3. Section 261(a) of the Juvenile Justice Delinquency Prevention Act of 1974 is amended—

(1) by inserting "(1)" after "(a)";

(2) by inserting after "title" the following: ", other than part D,"; and

(3) by adding at the end thereof the following new subsection:

"(b) To carry out the purposes of part D of this title there are authorized to be appropriated $50,000,000 for the fiscal year 1979, $75,000,000 for the fiscal year 1980, and $100,000,000 for the fiscal year 1981. Funds appropriated for any fiscal year may remain available for obligation until expended.".●

By Mr. ANDERSON:

S. 3316. A bill to clarify the application of Revenue Ruling 69–502 and 76–259 to profit-sharing plans and defined benefit plans; to the Committee on Finance and the Committee on Human Resources, jointly, by unanimous consent.

● Mr. ANDERSON. Mr. President, I am introducing today S. 3316, a bill to clarify the application of the Employee Retirement Income Security Act of 1974. ERISA was a giant step forward in improving our private pension system. But, as with any new law dealing with a complex subject, problems of interpretation appear and the law requires clarification.

The legislation I am introducing is prompted by the problems that were created when the Onan Corp. of Minnesota established an ERISA-qualified benefit plan. In establishing this plan the corporation chose to convert its long-established profit-sharing program into a qualified benefit plan by inserting a minimum benefit provision, a floor, into the plan and using the accumulated reserves of the profit-sharing plan to aid the financial viability of the new qualified plan.

A number of older Onan employees objected to the plan because the method of computing benefits under the new plan appear to discriminate against those of high seniority under the already established profit-sharing plan. The Department of Labor in commenting on the complaints of these Onan employees agreed with their contention that discrimination existed and argued that the plan should not be qualified because of the standards set forth in IRS Revenue Ruling 69–502. However, the Department of Labor noted that the law was ambiguous and that if Revenue Ruling 76–259 was found to be applicable, then the plan was legally qualified and could be established. The Internal Revenue Service subsequently so found and the plan will likely be qualified.

Mr. President, I believe there is considerable merit to the claims of Onan employees who have objected to the new plan. S. 3316, which I am introducing today, clarifies ERISA as it has been applied in this instance. S. 3316 provides that the standards of Revenue Ruling 69–502 will apply when a company profit sharing plan, where the company also maintains a defined benefit plan, established before the defined benefit plan and operated separately over an extensive period of time during which substantial amounts of nonforfeitable benefits have accrued to participants and these benefits are used to offset benefits provided to such participants under the defined benefit plan.

I request unanimous consent that the Department of Labor letter commenting on the Onan case be printed in the RECORD as well as the text of S. 3316.

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

S. 3316

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That, notwithstanding any other provision or rule of law to the contrary—

(1) Revenue Ruling 69–502 (and any other regulation, ruling, or decision reaching the same result as, or a result similar to, the result set forth in such Revenue Ruling) shall apply when a profit-sharing plan established and maintained by an employer who also maintains a defined benefit plan is established prior to the defined benefit plan and operated separately over an extensive period of time during which substantial amounts of nonforfeitable benefits have been accrued to participants and are used to offset benefits provided to such participants under the defined benefit plan, and shall not apply in a case described in paragraph (2), and

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