ONE PAGE SUMMARY OF TESTIMONY

Testimony before the
Subcommittee on Administrative Law and Governmental Relations
House Committee on the Judiciary
on H.R. 595 (amending the Federal Tort Claims Act)
by Richard K. Pelz, President-Elect
Federal Executive and Professional Association
April 28, 1983

The Federal Executive and Professional Association is a merger of the Federal Executives League, the Federal Professional Association, and FED-42. We are interested in improving the effectiveness of the Federal service through the attainment of high levels of professionalism.

We support H.R. 595 and urge its prompt enactment with two minor but important additions.

H.R. 595 has two main purposes. The first is to extend to all common law torts the principle, now applicable in motor vehicle accident and malpractice cases, that the remedy against the United States is exclusive. This is similar in effect to granting liability insurance to Federal employees, and will protect them and their families from the risk of financial catastrophe.

The second main purpose of H.R. 595 is to authorize suits against the United States for damages for constitutional torts and to provide that this shall be the exclusive remedy. This will eliminate the damage done by the Bivens rule to the effective functioning of the government. The bill authorizes the payment of actual or liquidated damages to compensate the victim. We enthusiastically endorse the further provision for additional damages up to $100,000 where the tortious conduct was undertaken with the malicious intention to cause a deprivation of constitutional rights or with reckless disregard for the plaintiff's constitutional rights. This will afford an opportunity for the public through the voice of the court to make a statement that the abuse of authority is unacceptable in a democratic society and should not be condoned or repeated.

The provision that the United States may assert the defense of the absolute or qualified immunity of the Federal employees involved is logically inconsistent where the immunity is based on the need to avoid exposure to personal liability, because the bill eliminates this exposure. We recommend that the reference to this defense be eliminated or qualified.

We recommend that the section requiring reference to the agency head for disciplinary proceedings be amended to require reference also to the Merit Systems Protection Board, because the agency head frequently must share responsibility for the wrongdoing.

TESTIMONY BEFORE THE

SUBCOMMITTEE ON ADMINISTRATIVE LAW AND GOVERNMENTAL RELATIONS

HOUSE COMMITTEE ON THE JUDICIARY

ON

H.R. 595

(A BILL AMENDING THE FEDERAL TORT CLAIMS ACT)

BY

RICHARD K. PELZ

PRESIDENT-ELECT

FEDERAL EXECUTIVE AND PROFESSIONAL ASSOCIATION

APRIL 28, 1983

Mr. Chairman and members of the subcommittee. I am Richard K. Pelz, President-Elect of the Federal Executive and Professional Association. Our Association is a merger of the Federal Executive League, the Federal Professional Association, and FED-42. We are interested in improving the effectiveness of the Federal service through the attainment of high levels of professionalism.

We appreciate the opportunity to appear at the hearing today and present our views on this legislation which touches on important aspects of the way in which Federal executives and professionals perform their duties. We strongly recommend the enactment of H.R. 595, although we suggest two minor but important additions.

H.R. 595 is the product of a great deal of public discussion and of considerable effort and thought by the subcommittee and staff over a period

of several years. It would amend the Federal Tort Claims Act for two principal purposes: First, the extend to all tort actions the principle now applicable to motor vehicle accident and medical malpractice cases that the suit against the United States is the exclusive remedy; and second, to provide for a new remedy against the United States, also exclusive, for the recovery of monetary damages for deprivations of constitutional rights.

The proposed extension of the exclusive remedy principle to all suits based on traditional common law torts is similar in effect to granting liability insurance to all Federal employees, but recognizes that the United States acts as a self-insurer. It will relieve the individual employee and his or her family from the threat of financial catastrophe as the result of an adverse judgment.

The proposed new chapters on constitutional torts is a legislative response to the forces set in motion by the Supreme Court in 1971 when it held, in the case of Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics, 403 U.S. 388, that Federal employees could be sued for the recovery of money damages by persons claiming that the employees had violated their constitutional rights. Bivens involved allegations that the defendant agents entered the complainant's apartment without a warrant and arrested him for alleged narcotics violation; manacled him in front of his wife and children, and threatened to arrest them as well; and searched the apartment from stem to stern. The Court held that a damage action against the agents was a proper remedy for the alleged violation of the Fourth Amendment protection against unreasonable searchers and seizures.

The doctrine subsequently was extended to violations of the First Amendment protection of free speech, Butz v. Economou, 438 U.S. 478 (1978)

(allegations that defendants instituted an investigation and administrative proceedings against complainant to revoke his registration as a commodity futures commission merchant because he had openly criticized them); the Fifth Amendment protection against the deprivation of the equal protection component of due process of law, Davis v. Passman, 442 U.S. 228 (1979) (allegation that complainant was fired by a United States Representative because of her sex); and the Eighth Amendment proscription against cruel and unusual punishment, Carlson v. Green, 446 U.S. 14 (1980) (allegation that complainant's son died in a Federal prison because he received improper medical attention).

We believe that the decision of the Supreme Court in the Bivens case was unfortunate in opening the door to suits against Federal employees for liability in damages to persons alleging that their constitutional rights have been violated. The flood of litigation which has ensued has harmed rather than advanced the cause of responsible government. This litigation has harassed Federal employees in carrying out their duties. As a result, the public has not been well served. The Supreme Court justified its action in the hope and expectation that the litigation would deter Federal employees from the abuse of their authority, but what has been deterred in most cases has been the forthright and proper exercise of Federal functions.

A second justification of the Court's rulings was that there should be a remedy for a violation of a constitutional guarantee, and damages is the traditional remedy. We agree with this reasoning. A third justification also was given that the Congress has provided, in 42 U.S.C. 1983, which originated with the Civil Rights Act of 1971, that State officials

acting under color of law shall be liable in damages for depriving persons of constitutional rights, and that to "create a system in which the Bill of Rights monitors more closely the conduct of state officials than it does that of federal officials is to stand the constitutional design on its head." Butz v. Economou, 438 U.S. 478, 504 (1978). This justification also have validity, but we understand that many States provide liability insurance for their employees in their cases, thus providing them greater individual protection than now prevails for Federal employees under the Bivens rule.

H.R. 595 would allow the injured party to recover compensation from the United States, thus satisfying a constitutional need and providing comparability with state action. It would immunize the Federal employee from personal liability in damages, which is similar to providing 100 percent liability insurance. It removes the chilling effect which the Bivens policy has on prompt and effective decision making.

Although H.R. 595 does not allow for punitive damages, it does provide, on page 11, in the new section 2693 of the Unites States Code, that "If the conduct giving rise to the tort claim was undertaken with the malicious intention to cause a deprivation of constitutional rights or with reckless disregard for the plaintiff's constitutional rights, the court shall award, in addition to actual damage, damages of not more than $100,000."

This is a new provision which was added by the subcommittee when it approved H.R. 7034 last August, and we enthusiastically endorse it. The lawsuit is not simply a device to recompense the injured party for the damages which he or she may have suffered at the hands of Federal employees

who have overstepped the bounds of their authority in certain cases. There is more involved than simple compensation. At issue are alleged deprivations of basic and precious individual rights guaranteed by our constitution, particularly in the Bill of Rights. The litigation becomes an opportunity for the public through the voice of the court to make a statement that the abuse of authority was so unjustified as to threaten the basic principles of a responsive and responsible government in a democratic society. The award of additional damages would make such a statement, whether the amount of damages is a nominal dollar or ten dollars, or is up to the maximum $100,000 allowable in the statute. We also assume that the Attorney General in settling a suit may allow additional damages, which would constitute a statement on his or her part that the action of the Federal employee or employees transcended the bound of acceptability and excuse.

The proposed new section 2693 of the Code also would provide that the United States may assert as a defense to a constitutional tort claim "the absolute or qualified immunity of the employee of the government whose act or omission gave rise to the claim,". This provision contains a logical inconsistency where the immunity is based upon the need to protect the employee from the possibility of personal liability. Compare Nixon v. Fitzgerald, ___ U.S. ____ (June 24, 1982). It makes no sense to prohibit a suit against the United States for the recovery of actual and additional damages because of the possible exposure of individual employees to liability for damages when the law eliminate that exposure. Accordingly, we recommend that H.R. 595 be amended by eliminating the reference to a defense based on the absolute or qualified immunity of the employee or by

inserting "except where the immunity is based on the need to eliminate exposure to personal liability for damages," on page 11, line 9 after "claim,".

We have some misgivings about the further provision in the proposed section 2693 that the United States may assert as a defense the reasonable good faith belief of the employee in the lawfulness of his or her conduct, because we would think that a citizen should be compensated for actual damages for deprivation of a constitutional right by the Government even if the individual employee or employees responsible for the deprivation believed they were acting in good faith. However, we recognize that the presence or absence of good faith may itself be an element in whether or not a constitutional tort has been committed. The resolution of the finer points of the legal principles such as this will of necessity have to be left for resolution by the courts through the judicial process.

On the subject of disciplinary proceedings H.R. 595 provides merely that upon the granting of a settlement or a judgment for a monetary award the Attorney General would refer the matter to the head of the agency for which the employee or employees worked at the time of the incident for appropriate investigative and disciplinary action. We believe that this is an inadequate provision because in many cases the responsibility for serious misconduct must be shared by the agency head. If the agency head were conducting the investigation, it would be difficult if not impossible for the employee to use as an excuse or justification of his or her conduct that he or she was following agency policy or the instructions of supervisors. Also, there would be an incentive for the agency head to use the employee as a scapegoat. The Australian movie "Breaker Morant" well illus-

trates this problem. Thus, we recommend that provision be made for the conduct of a disciplinary proceeding by someone other than the agency head. It would appear that the Merit Systems Protection Board might be the best agency to serve this function. We note that under the Civil Service Reform Act which established the Board there is provision for the Board, with the assistance of the Special Counsel, to investigate abuse of authority and impose disciplinary measures. (5 U.S.C. 1207). Accordingly, we recommend that H.R. 595 be amended by inserting "and to the Merit Systems Protection Board," on page 18, line 9, after "based,".

Of course, reference to the Board would be futile if the Board is not adequately staffed and funded to handle this special assignment in a timely manner along with its regular substantial workload.

Mr. Chairman, we recognize that earlier bills on this subject have been held up in the past because of an inability to resolve the apparent dilemma that on the one hand, most people agree that the Federal employee who has acted in good faith in the exercise of his or her responsibilities should not be exposed to liability for damages; whereas on the other hand, many believe that an employee who has acted in bad faith in committing a deliberate or gross abuse of authority should be confronted by his accusers and suffer the consequences of his or her actions.

We believe that these conflicting viewpoints can be reconciled through a proper understanding of the various private and public interests involved. We recognize that the victim of the alleged wrongdoing, and those supporters who desire that justice be done, seek five objectives--exposure of the wrong and the wrongdoer, confrontation of the wrongdoer by the victim, compensation of the victim for actual damages suffered, affir-

mation that the wrongful act is unacceptable in a democratic society, and retribution for the harm done. We believe that the first four objectives are legitimate and will be accomplished through H.R. 595 with the two amendments we are suggesting. Thus, the lawsuit against the United States will expose the alleged wrongdoers to public scrutiny and will afford the victim the opportunity to confront the accused even though the individual Federal employees who have committed or caused the deprivation of constitutional rights are not named as individual defendants and are not individually liable. The right of recovery against the United States will provide compensation. In addition to actual or liquidated damages, the award of additional damages by the court will serve as an affirmation that the abuse of authority was reprehensible and should not be condoned or repeated in a democratic society.

The desire for retribution, however, must give way to the greater public interest in effective government. The exposure of the individual employee to unlimited liability for damages is the defect in the Bivens doctrine which impairs the effective functioning of government. It inhibits necessary action and compromises sound decision-making. It is difficult to hire and retain competent, responsible employees when they might be exposing themselves and their families to bankruptcy. Employees of private organizations and most state governments are covered by insurance. The problem of correcting improper practices and disciplining miscreant employees is a management problem in which the public as a whole has a vital interest; it is not just a concern of the victims of the wrongdoing and should not be controlled by them. The nature of the penalty imposed should be dictated by management considerations, not the extent of the

damages caused. For example, the disciplinary actions which the Merit Systems Protection Board may impose for abuses of authority consist of "removal, reduction in grade, debarment from Federal employment for a period not to exceed five years, suspension, reprimand, or an assessment of a civil penalty not to exceed $1,000." (5 U.S.C. 1207(b)). We believe these are the appropriate sanctions to be considered.

Mr. Chairman, that completes my statement. I want to commend you and the subcommittee for moving on this important piece of legislation, and to urge its prompt enactment. I will be glad to answer any questions.

Thank you.