Volume 54 | Number 4 Article 1

4-1-1976

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THE FEDERAL TORT CLAIMS ACT INTENTIONAL TORTS AMENDMENT: AN INTERPRETATIVE ANALYSIS

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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-

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-

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

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

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

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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

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,

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).

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—
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> (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]
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> . . . .
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> 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.*

> 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.
>
> . . . .
>
> 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-

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

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

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.