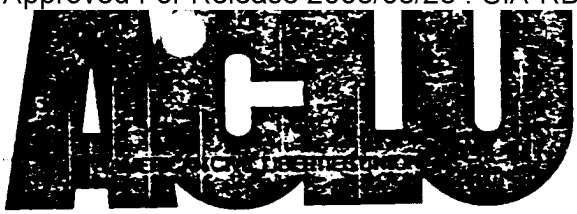

WASHINGTON OFFICE

600 Pennsylvania Ave., SE
Suite 301
Washington, DC 20003
(202) 544 1681

John Shattuck
DIRECTOR

Jerry J. Berman
David E. Landau
Wade J. Henderson
LEGISLATIVE COUNSEL

Laura Murphy
LEGISLATIVE
REPRESENTATIVE

Hilda Thomson
ADMINISTRATIVE DIRECTOR

National Headquarters
132 West 43 Street
New York, NY 10036
(212) 944 9800

Norman Dorsen
PRESIDENT

Ira Glasser
EXECUTIVE DIRECTOR

3 June 1982

Senator Charles E. Grassley
Chairman
Subcommittee on Agency Administration
Senate Judiciary Committee

Dear Senator Grassley:

We understand that the Subcommittee on Agency Administration will soon consider S. 1775 which would amend the Federal Tort Claims Act (28 U.S.C. §1346 (b), §§2671 et. seq.) to make the federal government exclusively liable for the commission of constitutional torts committed by federal officials acting within the scope of their "office or employment." When we testified in opposition to S. 1775 on November 13, 1981, you graciously extended us an offer to sit down with you or your staff as you proceeded to work on the legislation. We accept the offer and in anticipation of meeting with you take this opportunity to set forth our specific concerns regarding S. 1775.

Background

As you know legislation similar to S. 1775 was proposed by the Carter Administration (S. 2117) in the 95th Congress and also in the 96th Congress (S. 695 introduced by Senator Kennedy). Although we supported the goal of making the government liable for constitutional torts committed by federal officials, we vigorously opposed the legislation because of its failure to provide adequate compensation to victims of constitutional torts and a disciplinary mechanism to assure individual accountability and deterrence of constitutional wrongs as a substitute for individual liability. Despite our opposition, we, together with other public interest organizations such as Public Citizen, Common Cause, and the National Legal Aid and Defender Association, worked long and hard with senate staff and Justice Department officials to develop legislation that would accomplish the goals of the bill: (1) to provide adequate compensation to victims; (2) free individual officials from the burden of protracted litigation and the government from the cost of defending such suits, often with private counsel; and (3) main-

tain individual accountability through a substitute disciplinary mechanism. As S. 3314, a substitute bill offered by Senator Metzenbaum in the 95th Congress and a comparison between S. 2117 and S. 695 as introduced by Senator Kennedy in the 96th Congress make clear, the parties to the negotiations came close to achieving a balanced bill that would command wide support. Although there were still differences to be worked out when action on the bill came to a halt in the 96th Congress, there was general agreement over the following elements of the legislation: (1) the government would be exclusively liable for constitutional torts committed by federal officials acting within the scope of office or employment; (2) the government would waive the "good faith" defense of its employees asserted in individual damage actions; (3) attorneys fees would be recoverable by successful plaintiffs; (4) class actions could be maintained; (5) liquidated damages were provided for intangible harm— but with the expectation that the bill would be amended to increase the amounts over those provided in the legislation as introduced ($1,000 or $100 per day up to $15,000); (6) a disciplinary mechanism was in the process of being worked out that would allow the victim of a constitutional tort to participate in a proceeding to determine whether an employee's conduct warranted disciplinary action.

A Significant Retreat

We testified in total opposition to S. 1775 because it marks a significant retreat from previous proposals. While it makes the government exclusively liable for constitutional torts committed by federal officials acting within the scope of office or employment, S. 1775:

(1) allows the government to raise the "good faith" defense of its employees, with the result that the government will not pay damages in many cases where constitutional rights have been violated;

(2) eliminates attorneys fees, thus removing the means by which citizens can pursue redress for intangible harm to constitutional rights since damage awards will not pay the cost of litigation;

(3) eliminates class action suits, another incentive for seeking redress for constitutional violations;

(4) provides liquidated damages based on a formula worked out in 1968, without accounting for inflation;

(5) eliminates the disciplinary procedure, thus ignoring the need for an alternative deterrence and accountability mechanism to replace the threat of individual liability and punitive

These retreats together undermine the declared objectives of the bill. The promise of a "deep pocket" defendant for victims of constitutional torts is rendered illusory. The substitute remedy will not act as a deterrent to governmental misconduct. Finally, the legislation will not free individual officials from the burden of participating in protracted litigation or end governmental involvement in extensive, complex, and costly litigation. The reasons for this and the changes that must be made in the bill to achieve the declared purposes of the legislation are set forth in more detail below.

The Goal of Adequate Compensation

The Supreme Court in Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics 1/ held that individual government officials may be personally liable for violating the constitutional rights of citizens. The court established the Bivens remedy against individual officials because the plaintiff had no remedy against either the government or the official under the FTCA or other statutory or case law. Under Bivens, however, the plaintiff is often denied adequate recovery because the individual employee can assert a "good faith" defense. Even if he or she cannot, the employee may not have the funds to make the plaintiff whole.

However, simply making the government liable for constitutional torts under the Federal Tort Claims Act does not advance the cause of securing adequate compensation for victims of constitutional torts. First of all, in a growing number of recent cases, the courts have found the government subject to suit under the Federal Tort Claims Act for constitutional torts or common law torts in the nature of constitutional wrongs. See, e.g. Founding Church of Scientology v. Director, FBI, 459 F. Supp. 748 (D.D.C. 1978); Norton v. Turner, 581 F. 2d 390 (4th Cir. 1978); S.W.P. v. Levi, 47 L.W. 2427 (1/9/79); Birnbaum v. United States, 436 F. 2d 967 (2d Cir. 1978); Avery v. U.S., 434 F. Supp. 937 (D. Conn. 1977); Cruickshank v. U.S., 431 F. Supp. 1355 (D. Haw. 1977). Recently, the Supreme Court has held that a victim of a constitutional tort--therein a violation of the plaintiff decedent's rights under the Eighth Amendment--could proceed against the offending individual federal official in a Bivens action as well as against the United States under the present FTCA. Carlson v. Green, 446 U.S. 14 (1980).

While the provision of liquidated damages under S. 1775 ("1,000 or, in the case of a continuing tort, $100 a day for each day of violation up to a mazimum of $15,000") is a step in the right direction, standing alone, it does little to advance the cause of plaintiff recovery beyond what is available under current law. The Second Circuit, in Birnbaum, supra, recently upheld

1/ 403 U.S. 388 (1971)

a damage award of $1,000 per plaintiff for surreptitious mail opening by agents of the Central Intelligence Agency. See also, Black v. Sheraton Corp. of America, 564 F. 2d 531 (D.C. Cir. 1977). The low arbitrary limits on liquidated damages may act as a limitation of the courts' discretion to award larger amounts in future cases. At minimum, the liquidated damage amount, based on section 2520 of Title 18, the 1968 Wiretap Statute, should be adjusted upwards for inflation.

To insure adequate compensation for the victims of constitutional torts, it is essential for the government to waive the "good faith" defense. S. 1775, contrary to previous proposals, including the counterpart bill in the House, H.R. 24, does not waive this defense in a suit against the government. (see Sec. 3) This is contrary to the rationale for the good faith defense and will defeat recovery from the government in cases where constitutional rights have been violated. As the Supreme Court has recently articulated in a case denying the right of a municipality to raise the good faith defense of its employees in a §1983 suit under the Civil Rights Act, the good faith defense is permitted to an individual official because he or she is under an obligation to exercise discretion and it would be unjust to hold an individual liable in the absence of bad faith, particularly because of the public interest in encouraging decisive governmental action. Owen v. City of Independence, 445 U.S. 622 (1980) If the individual employee is not liable, as would be the case if S. 1775 were enacted, the rationale does not apply nor should it. The issue, when the government is the defendant, is whether or not government policy or actions have led to a violation of a citizen's constitutional rights. For example, if the government has a policy on national security searches which turns out to violate the constitution, an individual employee may escape liability for following that policy. But the government should not be able to assert that the employee was following a government policy in good faith in conducting a break-in and also escape liability. The search has been conducted. A right has been violated. The victim should be made whole.

It is also essential for the government to pay reasonable attorneys' fees in cases where citizens establish a violation of their constitutional rights. Although attorneys'fees are not available in FTCA cases, constitutional torts are different. The litigation is complex and damage awards for intangible harm small, particularly in the absence of punitive damages. Without the possibility of attorneys fees, citizens will be unlikely or unable to pursue redress. It should be noted that attorneys'fees are recoverable in §1983 actions and that previous proposals included such awards.

Finally, we believe it is necessary either to define the term constitutional tort in the bill or remove the distinctions between intentional and constitutional torts in the legislation to insure adequate compensation for constitutional violations. Under the proposed scheme, benefits accrue to a plaintiff who asserts a "tort claim arising under the Constitution of the United States, to the extent that liability for such claims is recognized or provided by appliable federal law" which do not apply in cases of common law or intentional torts. (Sec. 3(b)(1)) For example, under S. 1775, the plaintiff is entitled to liquidated damages. Under the House counterpart, H.R. 24, the plaintiff is also entitled to attorneys' fees and the government waives the "good faith" defense. However, it is not clear that constitutional torts is intended by the government to be an expanding doctrine. To date, the Supreme Court has only recognized three constitutional torts, based on the theory that no alternative remedy was available under federal law. Bivens v. Six Unknown Agents of the Bureau of Narcotics, 403 U.S. 288 (1971)(unlawful entry and search of a home in violation of the Fourth Amendment); Davis v. Passman, 442 U.S. 228 (1979)(sex discrimination); Carlson v. Green, 446 U.S. 14 (1980)(Eighth Amendment). Once an alternative remedy is available under the FTCA, it is not clear that common law intentional torts which sound in constitutional tort (e.g. privacy, assault, etc) and for which liability has been found in some cases under the FTCA will be treated as constitutional torts. For example, the government, in previous years has indicated that it would press for a limitation on constitutional tort development by arguing to the courts that certain violations were instead common law rather than constitutional torts:

> An award of such fees and costs in constitutional tort litigation would be governed by new section 2681(b), and would be separate from any damage award. Attorney's fees in non-constitutional tort cases would be payable by the client out of any judgment rendered in his favor subject to the restrctions of section 2678. As a result of this difference, skillful counsel may plead the existence of a constitutional tort when their case in reality sounds in a traditional, common law cause of action. It is intended that the courts be alert to such a possibility and rule on the attorney fees issue based upon the true gravamen of the tort as alleged and proven. Section-by-section Analysis of H.R. 2659, p. 15 (emphasis supplied) (1979)

In Birnbam v. United States, 436 F. 2d 967 (2nd Cir. 1978), the government was held liable for a common law invasion of privacy for opening the mail of citizens under the FTCA. Will the government be able toargue that a similar case is an intentional or common law tort and not a constitutional tort after enactment of S. 1775? Will law enforcement agency torts, similar to those brought under the FTCA in 1974, be considered intentional torts by the government in future litigation even though their commission also violates constitutional rights? We believe the Congress should resove this issue in favor of an expansive development of constitutional tort doctrine.both to insure adequate compensation for citizens and to avoid protracted litigation over this jurisdictional issue. The Subcommittee can resolve this issue in favor of insuring adequate compensation for victims of constitutional torts by defining the scope of constitutional tort doctrine or by removing the remedial differences between torts which may sound in both common law and constitutional tort.

Admittedly, there have not been many cases of money judgments against officials for violating constitutional rights under Bivens, although the administration understates the number by failing to count settlements out of court. 1/ However, unless the changes outlined above are made in the bill, plaintiffs whose rights have been violated will be in no better position to recover damages, particularly if the government may assert the good faith defense, the principal barrier to recovery under current law. 2/ In many cases plaintiffs will be worse off in not being able to proceed against both the government and the employee. See Carlson, supra. This is particularly the case when the goal of accountability and deterrence is taken into account.

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1 / The Subcommittee should ask the Administration for the number and amount of settlements for constitutional tort violations both under FTCA and against individual officials and former officials.

2/ After Owen v. City of Independence, 445 U.S. 622 (1980), it is not clear the Court would sustain this substitute remedial scheme: "How'uniquely amiss'it would be,therefore, if the governemnt itself-the social organ to which all in our society look for the promotion of liberty, justice, fair and equal treatment and the setting of worthy norms and goals for social conduct,'were permitted to disavow liability for the injury it has begotten. (Citation Omitted)A damages remedy against the offending party is a vital component of any scheme for vindicating cherished constitutional guarantees, and the importance of assuring its efficacy is only accentuated when the wrongdoer is the insitutution that has been established to protect the very rights it has transgressed." 445 U.S. 622, at 651.

The Goal of Accountability and Deterrence

In Carlson v. Green, 446 U.S. 14 (1980), the Supreme Court held that deterrence of government actions which violate constitutional rights is a major reason why a Bivens remedy is more effective than that afforded under the FTCA:

> Because the Bivens remedy is recoverable against individuals, it is a more effective deterrent than the FTCA remedy against the United States. It is almost axiomatic that the threat of damages has a deterrent effect... particularly so when the individual official faces personal financial liability. 446 U.S. at 21.

The Court was bolstered in its reasoning by pointing to the availability of punitive damages under Bivens as well.

S. 1775 would eliminate Bivens suits against individuals acting within the scope of office or employment, thus even including cases in which employees act with malice or intent to violate constitutional rights. Yet S. 1775 provides no alternative deterrent except the possible threat of disciplinary action by the agency or department for whom the employee works. Under section 5(f):

> If a civil action or proceeding under section 1346(b) or 2672 of this title arising under the Constitution of the United States results in a judgment against the United States or an award, compromise, or settlement paid by the United States, the Attorney General shall forward the matter to the head of the department or agency which employed the employee at the time of the act or omission for such further administrative investigation or disciplinary action as may be appropriate.

This is wholly inadequate as a substitute deterrent. The record of agency discipline has been dismal, particularly in the area of intelligence and law enforcement abuses which gave rise to so many Bivens actions. Although hundreds of employees were involved in illegal mail opening, black bag job, wiretapping, and surveillance programs, few were disciplined. Agency "morale" was more important. Similarly, few were prosecuted, since the Justice Department was involved in a clear conflict of interest for having designed and carried out many of these programs. The few were pardoned.

At the same time Bivens actions have increased accountability and served as a deterrent. While agency officials may not state this publicly, the threat of Bivens actions has led employees to demand clear guidlines to know what "they can and cannot do." This has resulted in the FBI and CIA proposing agency charters, the development of executive orders on intelligence activities, and Attorney General guidelines for a range of investigative activities from domestic security inquiries to the conduct of undercover operations.

As an alternative to Bivens suits, we recommend that a disciplinary mechanism be spelled out in the legislation. The outlines of such a mechanism were included in previous proposals before this Committee in the last two congresses. We believe the mechanism must meet the following criteria. (1) The victim of a constitutional tort must have the right to initiate an investigation which cannot be terminated without a statement of reasons. The victim must have the right to present evidence to the investigating body. (2) If the evidence warrants, a disciplinary hearing must be held by an independent body , independent of the agency or department employing the individual. The victim must have the right to present evidence and call witnesses at the hearing. The employee must have all due process rights, including the specification of standards under which discipline may and /or must be meted out. For example mandatory discipline should be required when "bad faith" is shown 1/ A range of possible disciplinary actions from fines to dismissal must be specified. (3) Finally, the victim must have the right to agency and judicial review if no punishment is meted out, or if the punishment is wholly inadequate for the violation.

With respect to former employees, the legislation should specify that they must submit to the disciplinary mechanism in exchange for government substitution as the party defendant.

One other option is to provide for punitive damages and jury trials under the FTCA for constitutional tort violations. Exemplary damages against the government may have the effect of deterring constitutional violations (for example, promulgation of clear guidelines and policies to be followed in areas affecting constitutional rights) and insuring disciplinary action. The public may insist on discipliary action if large awards are paid for egregious violations.

While the system may be complicated, it should not be viewed as a procedure for routine use. Only in egregious cases would a citizen follow through a disciplinary proceeding. Only in egregious cases would the courts award punitive damages.

1/ Under section 5(f), a referral is made if an award of damages is made. Since the government may invoke the employee's good faith defense under S. 1775, it must be assumed that bad faith has been demonstrated in such cases. In our view, a hearing should be held and dis

The Goal of Freeing Individual Employees from the Burden of Litigation.

Contrary to administration claims, S. 1775 will not remove individual officials from participation in protracted litigation. Even assuming the government interprets scope of office or employment broadly enough to substitute itself as the party defendant in most cases, the individual employee will be forced to participate extensively in the litigation as both sides contest the assertion of a "good faith" defense. The government will call the employee as a witness to establish the defense. The plaintiff will employ discovery and cross examination to overcome the defense. Only if the government waives the good faith defense will the individual employee be spared extensive probing of his actions and state of mind.

The Goal of Reducing the Cost of Constitutional Tort Litigation

Similarly the cost of litigation---now involving payments to private counsel---will not be reduced but internalized under S. 1775. Protracted and expensive litigation is promised if the government contests (1) whether or not a violation is a constitutional tort, see page 5 supra and (2) whether or not the employee acted in "good faith." Since the government wants to do both, it is difficult to reconcile this posture with its insistence that it wants this legislation to facilitate settlements and bring litigation to a prompt resolution. Defining constitutional torts in the legislation, waiving the good faith defense, and providing for class actions would be three ways to reduce the cost of litigation. If the cost savings are passed on to victims of constitutional torts as compensation and remuneration for the cost of vindicating constitutional rights, the legislation would provide the basis for a substitute remedy for Bivens.

Other Concerns

Finally, we have other concerns about S. 1775 which we would like to take up with you or your staff. For example, we object to section 9 of the bill which attempts to limit individual liability for employees who violate the federal wiretap statute, 18 U.S.C. 2520. Congress, in enacting the wiretap statute, considered how to protect a specific constitutional right and devised a specific remedy for its violation. It should be reevaluated in just those terms and not in the context of a bill designed to estabish an overall scheme of governmental liability. The section should be deleted and a bill to amend the Safe Streets Act should be introduced by the Administration so that the ramifications of the change can be considered frontally.

Conclusion

In this letter, we have tried to set forth our major problems with S. 1775 as introduced.

We look forward to meeting with you or your staff at your convenience.

Respectfully,

Jerry J. Berman
Legislative Counsel