Federal Law Enforcement Officers Association

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STATEMENT BY FLEOA GENERAL COUNSEL
BEFORE THE
SUBCOMMITTEE ON ADMINISTRATIVE LAW AND GOVERNMENT RELATIONS
OF THE U.S. HOUSE OF REPRESENTATIVES
ON REVISIONS TO
THE FEDERAL TORT CLAIMS ACT AS STATED
IN H.R.595
ON
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On behalf of the Federal Law Enforcement Officers Association I would like to thank the Subcommittee on Administrative Law and Government Relations for the opportunity to comment on proposed ammendments to the Federal Tort Claims Act -- H.R.595. While official agencies of the government can provide ample testimony on unintended side-effects of Bivens-type suits, the Federal Law Enforcement Officers Association is in a most unique position to describe for you the personal and professional hardships that frivolous and malicious suits have had on the federal law enforcement officers and criminal investigators for whom we provide legal asistance.

The ill-effects of these cases cross all agency boundaries. We have handled these matters for FLEOA members from the Federal Bureau of Investigation, Internal Revenue Service, Immigration and Naturalization Service, Bureau of Alcohol, Tobacco and Firearms, Drug Enforcment Administration and Customs. The length of time and the dollars needed to fight these spurious suits are extensive, and the amounts at stake are immense. No doubt this alone has produced an air of excessive caution on the part of individual agents performing enforcement functions.

While no one in good conscience could argue for the "bad old days" pre-Bevins v. Six Unknown Narcotics Agents, fine tuning the Federal Tort Claims Act is a must or:

1. Personal liability will further hamstring the already declining number of federal enforcement officers and criminal investigators in the conduct of their sworn duties.

2. Budget and manpower cuts may continue to produce suits and/or damages whose costs exceed savings realized by manpower layoffs. For, overworked enforcement officers and other federal employees are inclined to make errors for which they find themselves held personally accountable -- e.g. State Marine Lines v. Shultz (498 F.2nd 1146, 4th Cir. 1974).

3. The public will continue to view the federal justice system as some stumbling giant unable to get out of its own way, unable to prevent its own victimization or the victimization of those who do its bidding.

We believe some of the answers to this dilemma lay in H.R. 595. We would like to suggest others. The "qualified immunity" for enforcement officers and criminal investigators who undertake "good faith acts" in the performance of their official duties should be provided. We feel existing sanctions, agency disciplinary procedures, and court sought injunctive relief all more than adequately permit the protection of individuals who suffer violations of their individual and constitutional rights. We also feel the government should be substituted for individual defendants in all common law and constitutional tort suits arising out of actions or omissions of federal officers "acting within the scope of their office or employment."

In the years since 1971, thousands upon thousands of Bivens-type suits have been brought. But, as of April, 1982, only 13 resulted in judgments against government employees. This point was brought out by the Society of Former Agents of the Federal Bureau of Investigations in materials they made public when Senate Bill 1775 was under study. The court designed Bivens-type suits to insure that individuals had a means to recover damages from federal employees who violated their constitutional rights. It was to serve as a deterrent to further unconstitutional actions. Neither now, nor when decided in 1971, was it intended to subject federal employees to the threat of financial ruin. But, reality and intent do not always run parallel. The law as it currently exists allows our federal law enforcement officers to be threatened with financial uncertainty for interminable periods of time. It cripples their ability to plan ahead for their families, for their children's education, for their retirement. Misuse of the provisions of the Federal Tort Claims Act inflicts on government employees the same massive damage as negligent, violent, or willful violations of constitutional rights inflicts on any citizen. If the damage balanced itself out there might be some justification for the psychic, professional and economic carnage caused, but they do not. The Bivens-type cases overwhelmingly have made government, federal employees and the U.S. judicial system the victim.

How can this victimization be brought to an end? FLEOA believes H.R. 595 with minor modification would go a long way toward achieving that goal. The modifications we suggest are these:

1. The Justice Department must make a rapid determination of "scope of office or employment" for individual enforcement officers and criminal investigators to benefit from the coverage offered by H.R. 595. For that reason, a 30 day period, maximum, should be allowed for certification. This 30-day period should begin the moment the employee's agency is notified that a suit has been brought. A failure to act within the specified time frame should result in automatic certification.

2. Individual enforcement agencies of the federal goverment should indemnify their enforcement employees under the Federal Tort Claims Act for intervention in state felony crimes committed in their presence. In essence, provide "Peace Officer" coverage in all states except those where they are specifically requested by the individal state not to provide such coverage.

3. And, the Attorney General and various agencies should be required to provide to the employee in any subsequent administrative inquiries or disciplinary actions all materials relied upon in making the settlement determination and used as a basis for such recommendations. The intent of this provision is to free federal enforcement officers from attempting to defend their actions in nuisance suits strictly on the basis of a "good faith" contention rather than specific facts.

I believe the cases and illustrations, which we will now provide, offer ample examples of the need for H.R. 595, of the need for our suggested changes, and indeed, of the problems federal enforcement officers and our justice system face.

FLEOA's first extensive contact with the problems of Bivens-type suits was encountered with lawsuits stemming from Clavir, et al v. U.S., et al, 76 Civ. 1071. This lawsuit began in March, 1976, and involved 10 named and various unnamed federal agents in addition to supervisory

personnel. The Department of Justice only authorized representation for Edward H. Levi, Clarence M. Kelly, Griffin B. Bell, and William H. Webster. Throughout the litigation, which finally ended on September 9, 1982, with a Stipulation of Dismissal, FLEOA represented the individual agents who were sued both as federal enforcement officers and as individuals. For six years our members were required to continue performing their duties with the "Sword of Democlese" hanging over their heads. Their focus on law enforcement, of necessity, had to be replaced by focusing on survival. Unlike senior Justice Department officials who had benefit of government counsel, our members had to defend themselves in a major lawsuit without the backing of their agency.

In yet a second case, a Drug Enforcement Administration special agent driving a government car was involved in an accident with a disabled vehicle. In this action, which began on or about July, 1981, the goverment alleged the agent was not acting within the scope of his employment. Although they eventually withdrew their contestation of the fact that the agent was acting within the scope of his official duty, they did so only in June, 1982, long after the agent was compelled to retain outside counsel and defend his lawsuit throughout the year.

These are not isolated incidents, either. At present, FLEOA represents enforcement officers and criminal investigators, either solely or on an amicus basis with the U.S. Attorneys offices, in the Immigration and Naturalization Service, Customs,the Federal Bureau of Investigation, the Internal Revenue Service and the Bureau of Alcohol, Tobacco and Firearms. These cases serve to illustrate another problem. The time between presentation of the complaint and a determination by the Justice Department on whether or not it will represent the officer is seemingly infinite. Nevertheless, the time in which the individual enforcement officer has to reply is quite finite, usually within 60 days. What makes these time constraints even worse is the fact that agents may not be served personally, but rather their agency is served. If an enforcement officer has been transferred, he has no way of insuring the processing of his request for defense is going through proper channels, nor of even responding himself within the 60-day time frame. Even assuming that he/she has an opportunity to make a request for representation at the outset, the administrative process frequently does not advise him if he is being represented until the eleventh hour. The trauma this causes does not

just effect the enforcement officer, but all other agents and enforcement officers who watch their colleague left to swing in the wind. We have had this problem recently in cases involving two agents in the U.S. Secret Service, six agents in Immigration and Naturalization Service, and an agent in the Bureau of Alcohol, Tobacco and Firearms.

Lets now examine the claims and damages demanded in a typical lawsuit. In one case involving six Immigration and Naturalization Service officers, the plaintiff and his wife demanded the following:

1.	false imprisonment and arrest	500,000.00
2.	punitive on (1)	500,000.00
3.	assault and battery	2,000,000.00
4.	punitive for (3)	1,000,000.00
5.	malicious and criminal prosecution	500,000.00
6	punitive on (5)	500,000.00
7.	negligence in hiring agents	2,000,000.00
8.	loss of consortium for wife	1,000,000.00
9.	theft of jewwlry	10,000.00
10.	libel, malicious prosecution and violation of civil rights	250,000.00
11.	punitive for (10)	250,000.00
		8,510,000.00

If you are staggered by these figures, can you imagine how the enforcement officers feels when served with such a lawsuit? Then, to add the further burden of not assuring them that they will be represented by counsel, is simply unconscionable.

As for coverage of federal enforcement officers who intervene in state felony crimes committed in their presence, we strongly support certification for these individuals also. Almost every agency, whose personnel carry firearms, have arrest powers, and are sworn officers of the federal government, places upon its enforcement officers the burden of responding in such situations. However, many states have not yet conferred "Peace Officer" status on these people. This places the federal law enforcement officer in a "Catch 22." He or she is both mandated to respond, and bound to do so at their own personal risk. In this time of spurious and baseless

lawsuits against law enforcement officials such situations ask officers not only to jeopardize themselves and their jobs, but their families as well.

Moreover, when the enforcement officer responds in such a situation, they are required to appear before state investigatory bodies such as the police department, the district attorney's office, or grand juries. During this time, they not only have no representation from the Department of Justice, but no consultation rights so that they may be advised of the very basic constitutional protections to which they are entitled.

We are encouraged by the language of the proposed amendment which we feel affords to the enforcement officer the protection they deserve. To this we would only suggest two additions:

1. That the proposed amendment be further modified to include the following language under 28 U.S.C 2679 D3, Page 3 Line 19 and 28 U.S.C. 2699 D3, Page 16, Line 16. "... The certification of the Attorney General shall conclusively establish scope of office or employment for purposes of such removal and shall be made within 30 days of the time the employee's agency is notified of the action. Failure to so notify shall result in automatic certification."

2. The second modification we would propose is to add to 28 U.S.C. 2700 a provision entitling the employee in any subsequent administrative inquiry or disciplinary action access to all of the material relied upon by the Attorney General or the agency in making a settlement and the basis on which such settlement was recommended. The reason for this is to afford the employee sufficient information to defend himself on all of the facts and circumstances rather than limiting him only to a defense based on "his reasonable good faith belief in the lawfulness of his conduct."

We in FLEOA have taken up the gauntlet and initiated countersuits in the nature of malicious prosecutions hoping to achieve a financial remedy for our enforcement officers and a sizeable deterrent effect as well. In

fact, an FBI agent we represent was recently awarded a substantial sum in damages plus treble damages as a punitive damage award. It will be years, however, until this case comes to a conclusion since we must enforce the judgement. It will also be years before the life of that agent and his family can hope to move back towards normalcy.

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