Senior Executives Association

STATEMENT OF

G. JERRY SHAW

GENERAL COUNSEL

Before the

ADMINISTRATIVE LAW AND GOVERNMENTAL

RELATIONS SUBCOMMITTEE

OF THE

HOUSE JUDICIARY COMMITTEE

on

HR-595

APRIL 28, 1983

P.O. BOX 7610 • BEN FRANKLIN STATION • WASHINGTON, D.C. 20044
(202) 376-1555

Approved For Release 2008/08/28 : CIA-RDP86B00338R000300420011-3

MR. CHAIRMAN and MEMBERS OF THE SUBCOMMITTEE:

Good morning. My name is Jerry Shaw. I am General Counsel of the Senior Executives Association (SEA), a voluntary, professional organization that speaks on behalf of career members of the Senior Executive Service (SES) and supergrade executives.

I appreciate the opportunity to appear before this subcommittee to support HR-595. Such legislation would be advantageous for all. A deserving plaintiff would have a liberalized basis for recovery from the United States The Federal Government would benefit financially by no longer having to spend money to retain private counsel to represent federal employees in certain suits, and by substantially reducing the amount of administrative and legal staff time utilized to assist employees and the Government in these cases. And federal employees acting within the scope of their employment would no longer be subjected to the intimidation or harassment by lawsuits which could ruin them financially. It is this last part upon which we shall concentrate.

The federal executive today is beset by numerous obstacles in performing effectively the work of the public service. We have appeared before several other committees of both Houses on a host of issues that impinge on the daily management of the Government's programs. Yet, we know of no issue which strikes more viciously at the morale of federal managers and executives than the knowledge that they may be personally sued for actiosn performed within the scope of their employment. Those suits may be as serious as violations alleged in areas where the law is unclear, or they may be

as trivial as allegations solely for the purpose of harassing a public manager. The fact that many thousands of government employees have been defendants in constitutional tort actions since 1971 and only a handful have ended in money judgments against the individual employee defendant suggests that most cases are marked by such trivial qualities. The knowledge that your employer, the Government, may have to disassociate itself from assisting you can considerably alter the enthusiasm one has for management.

There are those who argue that such threats are necessary to produce a chilling effect on the arbitrariness of otherwise unchecked government administrators. We suggest that the evidence of such arbitrariness is extremely rare, that other administrative procedures exist to correct and punish such caprice and that the present laws result not in prudent management but in supine federal administration whenever the law is unclear or subject to interpretation. As you are aware, Congress expects that agencies be ruled by its intent as well as by its laws. Such opportunity for interpretation produces ares of uncertainty that still require executives to act.

We reject any suggestion that the possibility of suit against individual federal employees personally is necessary or desirable as a guard against improper action by federal employees. We know, for example, of no evidence that drivers of federal vehicles have become more accident-prone since they received statutory immunity in 1961, or that various categories of federally employed medical personnel

became less dedicated or less able after various statutes passed in 1965, 1970, and 1976 provided immunity to them.

There are adequate existing controls on the acts of federal employees, without needing the threat of a personal lawsuit. We believe that to almost all federal employees the accountability to supervisors which governs assignments, evaluation and promotion is the most direct type of control. In addition, we cannot over-emphasize the fact that the activity of the many federal employees for whom we speak is governed by their respective codes of professional conduct and their general professionalism and ethics. It must also be remembered that although the proposed legislation would immunize the individual, a lawsuit against the U.S. based upon an employee's conduct would nevertheles directly bring into question the activity of that individual. Such a lawsuit would thus involve the reputation of the employee whose conduct was questioned.

The necessity for this legislation cannot be played down by rhetoric. The proposal is not in any way an over-reaction. At present, approximately 2,200 lawsuits are pending against federal officials in their individual capacities, 75% of these lawsuits involve multiple defendants, some as many as 30 or 40. Between 7,500-10,000 government employees are involved. The issue that should be addressed is whether thousands of federal employees and their families should be put through the ordeal of suit, the accompanying worry and the possibility of financial ruin so that

the rare federal employee who, in the minds of some, may deserve to pay personally will not escape. We submit that this is far too high a price to pay. We have been informally advised that in some agencies there has been a 20% increase in such suits within the past year.

We are aware of the differences of opinion between some citizen groups and the United States on what the proposed liability of the United States should be under § 2693 of the Act. The very recent Supreme Court decision concerning the imposition of punitive damages on a prison guard has again heightened the concern of many federal employees about their individual exposure to lawsuits. We seriously wonder if a compromise position on § 2693 would not be in the best interests of the Government and the citizen groups.

We request that consideration be given to establishing a class of de minimus violations for which no monetary damages would be available a plaintiff. An example of this type of case might be on a motion to suppress in a criminal matter wherein because of a technical violation the motion was granted. Few citizens of this country would wish to see the government paying an individual for a technical violation of his or her constitutional rights while they are on their way to jail for criminal activity.

The other extreme is when an employee or the government might be liable for punitive or compensatory as well as actual damages. Obviously in that kind of situation the government would have to raise as a defense the good faith of the employee

and the good faith of the government in seeking to defend its actions. So it is absolutely necessary that the good faith defense be available in those cases.

The middle ground then concerns violations of an individual's constitutional rights which are of a serious nature, and which cause actual damage. One manner of dealing with this might be by allowing a plaintiff to prove that negligence of the government through its employees was the cause of his or her actual damages, and thus collect the actual damages which the individual incurred. This would rule out the liquidated damages provision presently in § 2693, and would minimize the number of suits brought. It might be possible, however, to establish a guideline for the courts in determining what the actual damages might be for a violation of a constitutional right which actually damaged a citizen's physical and mental well being, or reputation in the community, etc.

We make these recommendations not in the belief that the government or citizen organizations' positions are either right or wrong, but merely in the hope that a compromise can be reached which would allow passage of this legislation and provide protection to government employees. We recognize that some are concerned that the failure of the government to assert the "good faith" defense would prejudice an employee's rights in subsequent disciplinary proceedings. We share that fear. We would, therefore, request that unless the good faith defense is retained in all cases by the government, that a specific provision be added in § 2700 of the bill which would clearly state that any finding in a constitutional tort

case against the government could not be used for the purpose of determining what action should or should not be taken against a government employee, nor would there be any presumption that a finding on behalf of a plaintiff against the government meant that an employee had in any way done anything wrong or failed to properly perform his or her duties.

We oppose § 2695 which would provide for a jury trial. This is especially true if our proposals on § 2693 are adopted, since the same standard would be applied in most constitutional tort cases as in other tort cases involving the federal government. We believe that ordinary tort concepts of negligence in state laws should prevail on determining whether or not negligence was present in constitutional tort cases, the same as in other tort cases under the Federal Tort Claims Act. We believe that these cases should be tried before federal district court judges, not before juries.

As we have previously testified, we oppose the awarding of attorney's fees in these cases.

We also favor the elimination of most of § 2680 exceptions in constitutional tort cases. The suggested amendment protects federal employees from the possibility that a court would permit a suit against an individual employee if the suit against the U.S. were barred by one of those exceptions.

In closing, the career senior executives of the U.S. Government have, in our estimation, provided the American people a calibre of administration that is and should be the envy of any government in

the world. They take seriously the charge of administering the laws of this land as equitably and efficiently as possible. They bring to those jobs enormous training and experience and the reputations of a lifetime of public service. They entered the profession of senior executive in part in hope that at long last they would be accorded the visibility and respect that their performance merited. But they live each day with the denigration of their worth -- whether it be in limitations on pay, or in exposure to possible suits for actions performed within the scope of their employment. One does not have to look far to find evidence that even the most dedicated public employees are finding such conditions intolerable. This bill is really one very essential piece of a larger set of legislation needed to restore the effectiveness and morale of the public employees on which you depend to implement the laws you pass.

I shall be pleased to answer any questions the Subcommittee may have.