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Federal Tort Claims Act: Liability of United States for Torts Committed in Good Faith by Federal Law Enforcement Officers

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Federal Tort Claims Act: Liability of United States for Torts Committed in Good Faith by Federal Law Enforcement Officers

On March 15, 1975, the Alexandria, Virginia, Police Department was informed by an anonymous telephone caller that Patricia Hearst and another fugitive might be living in a local apartment.[1] The police contacted the Federal Bureau of Investigation,[2] which assigned four agents to investigate the tip.[3] Without securing a search warrant,[4] the law enforcement officers sought admittance to the apartment. The occupant, Elizabeth Ann Norton, refused to open the door and the agents attempted to enter by force. Fearing that the door would be destroyed, Norton unlatched the lock. The four agents entered with weapons drawn and searched the apartment, but no evidence of the fugitives was discovered.[5] Norton, alleging a violation of the fourth amendment to the United States Constitution,[6] brought suit against

1. Patricia Campbell Hearst, twenty-year-old heiress of the Hearst publishing empire, was kidnapped by a radical group called the Symbionese Liberation Army in February 1974. Two months after her abduction, she apparently became a member of the group and was sought for her participation in two robberies. She was captured in September 1975, was convicted of armed bank robbery and illegal use of a firearm, and served a two-year prison term. *See generally* THE TRIAL OF PATTY HEARST (1976) (trial transcript of United States v. Hearst, 412 F. Supp. 873 (N.D. Cal. 1976)).

2. The anonymous call was received by the Alexandria Police dispatcher at 8:13 p.m. on Saturday evening and was immediately relayed to the local office of the FBI, where it was recorded as follows:

> You know Patty Hearst is supposed to be in Pennsylvania but she's not. She's currently at 649 Notabene Drive, Apartment #10, in Alexandria and she's been there for the last week or ten days. She's cut her hair and she's with one of the people who left with her from California.

Stipulation of Uncontested Facts, Joint Appendix, at 26, Norton v. United States, 581 F.2d 390 (4th Cir.), *cert. denied*, 439 U.S. 1003 (1978) [hereinafter cited as Joint Appendix].

3. The federal agents arrived at the Alexandria Police Department about an hour after the tip had been received. Using the telephone company locator, they incorrectly identified the occupant of the apartment as Victor Harry Evol. The four federal agents, two local detectives, and two uniformed policemen then met near the building, where the FBI agents furnished the officers with photographs, physical descriptions, and information describing the fugitives. The agents were equipped with revolvers, shotguns, and tear gas. The building was observed for 30 minutes prior to the forced entry at 10:00 p.m. Joint Appendix, *supra* note 2, at 27-32.

4. No attempt was made to obtain a search warrant for the apartment. A federal warrant for the arrest of Patricia Hearst was in effect at the time. *Id.* at 29.

5. It was later discovered that the tip was a hoax, and the tipster was identified as a disgruntled neighbor in the building. *Id.* at 33.

6. The fourth amendment to the Constitution reads as follows:

> The right of the people to be secure in their persons, houses, papers, and

the individual law enforcement officers[7] and against the United States under the Federal Tort Claims Act (FTCA).[8] On cross motions for summary judgment, the district court held that there had been a violation of plaintiff's fourth amendment rights, but that the individual officers and agents were entitled to prove their good faith as a defense to personal monetary liability.[9] The court granted summary judgment against the United States, however, holding that the United States was not entitled to assert the good faith of its agents as a defense to federal liability.[10] The United States Court of Appeals for the Fourth Circuit, one judge dissenting, reversed on the issue of the availability of the good faith defense to the United States, *holding* that the liability of the United States under the FTCA is coterminous with that of its agents. *Norton v. United States,* 581 F.2d 390 (4th Cir.), *cert. denied,* 439 U.S. 1003 (1978).

Liability of state and federal governments for the acts of their agents has traditionally been avoided by the doctrine of sovereign immunity, under which a person may not sue the sovereign without its consent.[11] In 1946, however, Congress enacted the Federal Tort

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effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. CONST. amend. IV.

7. Plaintiff brought suit against the federal agents under the rule of Bivens v. Six Unknown Named Agents, 403 U.S. 388 (1971). *See* text accompanying note 19 *infra.*

Plaintiff also brought suit against the local police officers under 42 U.S.C. § 1983 (1976) for violation of her civil rights. Norton also asserted pendant state common law claims of assault, trespass, and false imprisonment. Norton v. Turner, 427 F. Supp. 138, 149 (E.D. Va. 1977), *rev'd,* 581 F.2d 390 (4th Cir.), *cert. denied,* 439 U.S. 1003 (1978).

8. 28 U.S.C. § 2680(h) (1976).

9. Norton v. Turner, 427 F. Supp. 138, 152 (E.D. Va. 1977), *rev'd,* 581 F.2d 390 (4th Cir.), *cert. denied,* 439 U.S. 1003 (1978). *See* Bivens v. Six Unknown Named Agents, 456 F.2d 1339 (2d Cir. 1972); text accompanying note 20 *infra.* The good faith defense is available in suits alleging constitutional tort injury against local police officers under § 1983 as well as in suits against federal officers brought under the rule of *Bivens. See* Butz v. Economu, 438 U.S. 478, 484 (1978).

10. Norton v. Turner, 427 F. Supp. 138, 152 (E.D. Va. 1977), *rev'd,* 581 F.2d 390 (4th Cir.), *cert. denied,* 439 U.S. 1003 (1978). After a separate hearing on the extent of damages, the court entered judgment against the United States in the amount of $12,500. Plaintiff then dismissed her claims against the individual defendants. Joint Appendix, *supra* note 2, at 87, 89.

11. The common law doctrine of sovereign immunity was based on the premise that "the King can do no wrong." 3 W. BLACKSTONE, COMMENTARIES 254. "Just how an immunity which had its roots in feudalism and in a political philosophy associated with the divine rights of kings was transplanted to the new republic in America remains something of a mystery." F. JAMES & F. HARPER, THE LAW OF TORTS § 29.2, at

Claims Act,[12] which made the federal government liable for damages "for injury or loss of property, or personal injury or death caused by the negligent or wrongful" conduct of a federal employee "acting within the scope of his office or employment."[13] The doctrine of sover-

1609 (1956). Indeed, the doctrine of sovereign immunity finds no basis in the United States Constitution. Chisholm v. Georgia, 2 U.S. (2 Dall.) 419 (1793). Commentators have suggested that the origin and development of sovereign immunity in American law was based on judicial misunderstanding of English law and on the precarious economic situation in the new union of states. *See generally* Boger, Gitenstein & Verkuil, *The Federal Tort Claims Act Intentional Torts Amendment: An Interpretative Analysis*, 54 N.C. L. REV. 497, 508 (1976). 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 (1926-1927); Borchard, *Government Liability in Tort*, 34 YALE L.J. 1, 129, 229 (1924-1925); 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).

Whatever its origin, the American judiciary has traditionally supported the notion that "there can be no legal right as against the authority that makes the law on which the right depends." Kawananakoa v. Polybank, 205 U.S. 349, 353 (1907). *See* Davis, *supra*, at 753. *See also* Scheuer v. Rhodes, 416 U.S. 232, 239 (1974); Hill v. United States, 50 U.S. (9 How.) 386, 389 (1850); United States v. McLemore, 45 U.S. (4 How.) 286, 288 (1846); Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 411-18 (1821).

12. The Federal Tort Claims Act (FTCA) was enacted as title IV of the Legislative Reorganization Act of 1946, Pub. L. No. 79-601, 60 Stat. 842, and codified by the Act of June 25, 1948, Pub. L. No. 80-773, 62 Stat. 869 (current version at 28 U.S.C. §§ 1291, 1346(b), 1402, 1504, 2110, 2401-2402, 2411-2412, 2671-2680 (1976)).

Prior to passage of the FTCA, Congress had twice acted to limit the reach of the sovereign immunity doctrine. The passage of the Court of Claims Act in 1855 was the first concession made against the doctrine of sovereign immunity. *See* Act of Feb. 24, 1855, ch. 122, § 1, 10 Stat. 612, *as amended by* Act of March 3, 1863, ch. 92, § 7, 12 Stat. 765 (current version at 28 U.S.C. §§ 171-174, 2519 (1976)). The Tucker Act of March 3, 1887, ch. 359, § 1, 24 Stat. 505 (current version at 28 U.S.C. §§ 1346(a), 1491 (1976)), provided a remedy in contractual areas. Beyond these two pieces of legislation, an individual could seek redress for a harm suffered as a result of federal action only through the passage of a private bill through Congress. This remedy eventually proved to be too costly. "The volume of these private bills, the inadequacy of congressional machinery for determination of facts, the importunities to which claimants subjected members of Congress, and the capricious results, led to a strong demand that claims for tort wrongs be submitted to adjudication." Feres v. United States, 340 U.S. 135, 140 (1950). The FTCA, which became law after nearly thirty years of legislative consideration, was a result of both the crush of private bills and the "feeling that the Government should assume the obligation to pay damages for the misfeasance of employees in carrying out its work." Dalehite v. United States, 346 U.S. 15, 24 (1953).

13. 28 U.S.C. § 1346(b) (1976). The existence and scope of federal liability was to be determined in "accordance with the law of the place where the act or omission occurred." *Id.* The statute was originally written with the intent not to create new substantive law, but to incorporate the rules of liability of the place where the accident occurred. H.R. REP. No. 2245, 77th Cong., 2d Sess. 11 (1942).

eign immunity was retained, however, as a defense to intentional-tort claims.[14]

In 1974, the FTCA was amended to extend coverage to claims arising out of "assault, battery, false imprisonment, false arrest, abuse of process, or malicious prosecution" by "investigative or law enforcement officers of the United States Government."[15] The Senate Report accompanying the 1974 amendment stated that Congress also intended to waive sovereign immunity with respect to claims[16] such as those in *Bivens v. Six Unknown Named Agents.*[17] The plaintiff in *Bivens* brought an action against six federal narcotics agents, alleging that the agents violated his fourth amendment rights when they conducted a warrantless search of his apartment.[18] In reversing the lower

14. 28 U.S.C. § 2680(h) (1970) (amended 1974) excluded "[a]ny claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights." There are a number of other exceptions to the coverage generally provided by the act. These include claims arising from negligent transmission of letters, *id.* § 2680(b), claims arising from quarantine, *id.* § 2680(f), claims arising from combatant activities of military forces during war, *id.* § 2680(j), and claims based on an act or omission by a government employee exercising due care in performing a discretionary function. *Id.* § 2680(a).

15. Act of Mar. 16, 1974, Pub. L. No. 93-253, § 2, 88 Stat. 50 (codified at 28 U.S.C. § 2680(h) (1976)). As amended, 28 U.S.C. § 2680(h) reads:

> The provisions of this chapter and section 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 date of 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 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.

16. S. REP. No. 588, 93d Cong., 2d Sess. (1973) [hereinafter cited as S. REP. No. 588], *reprinted in* [1974] U.S. CODE CONG. & AD. NEWS 2789, 2791 states that

> 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 so as to make the Government independently liable in damages for the same type of conduct that is alleged to have occurred in *Bivens* (and for which that case imposes liability upon the individual Government officials involved).

S. REP. No. 588, *supra, reprinted in* [1974] U.S. CODE CONG. & AD. NEWS, at 2791.

17. 403 U.S. 388 (1971).

18. The facts of the *Bivens* case were summarized by Justice Brennan as follows:

> This case has its origin in an arrest and search carried out on the morning of November 26, 1965. Petitioner's complaint alleged that on that day respondents, agents of the Federal Bureau of Narcotics acting under claim

court's dismissal of the plaintiff's complaint, the Supreme Court held that the Constitution created an implied right to damages against individual federal officers found to have conducted an illegal search.[19]

The Supreme Court in *Bivens* did not consider the issue of whether the federal officers might plead their good faith as a defense to Bivens' charges. On remand, however, the Second Circuit Court of Appeals held that an officer violating a person's constitutional rights is not liable in damages if he can demonstrate "not only that he believed, in good faith, that his conduct was lawful, but also that his belief was reasonable."[20] This good faith defense still has not been explicitly approved by the Supreme Court. The defense, however, has been uniformly accepted by other courts[21] despite widespread criticism of the doctrine.[22]

Neither the 1974 amendment to the FTCA[23] nor the Senate Report accompanying the amendment explicitly addressed the issue of whether the good faith defense defeats claims made under the FTCA.

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of federal authority, entered his apartment and arrested him for alleged narcotics violations. The agents manacled petitioner in front of his wife and children, and threatened to arrest the entire family. They searched the apartment from stem to stern. Thereafter, petitioner was taken to the federal courthouse in Brooklyn, where he was interrogated, booked, and subjected to a visual strip search.

Id. at 389.

19. The cause of action for damages against federal officers has been broadened in subsequent cases to include not only violations of fourth amendment rights, but also rights under the first amendment, Paton v. La Prade, 524 F.2d 862 (3d Cir. 1975); Farber v. Rizzo, 363 F. Supp. 386 (E.D. Pa. 1973), and the sixth amendment. Johnston v. National Broadcasting Co., 356 F. Supp. 904 (E.D.N.Y. 1973).

20. Bivens v. Six Unknown Named Agents, 456 F.2d 1339, 1348 (2d Cir. 1972).

21. *See, e.g.*, G.M. Leasing v. United States, 560 F.2d 1011, 1015 (10th Cir. 1977), *cert. denied*, 435 U.S. 923 (1978); Ervin v. Ciccone, 557 F.2d 1260, 1262 (8th Cir. 1977); Rodriguez v. Ritchey, 539 F.2d 394, 400-01 (5th Cir. 1976); Mark v. Groff, 521 F.2d 1376, 1379-80 (9th Cir. 1975); Apton v. Wilson, 506 F.2d 83, 93 (D.C. Cir. 1974); Tritsis v. Backer, 501 F.2d 1021, 1022-23 (7th Cir. 1974); Hill v. Rowland, 474 F.2d 1374, 1376 (4th Cir. 1973); Rodriguez v. Jones, 473 F.2d 599, 604-05 (5th Cir.), *cert. denied*, 412 U.S. 953 (1973); Lykken v. Vavreck, 366 F. Supp. 585, 593 (D. Minn. 1973).

22. *See* Newman, *Suing the Lawbreakers: Proposals to Strengthen the Section 1983 Damage Remedy for Law Enforcers' Misconduct*, 87 YALE L.J. 447, 460-62 (1978); Theis, *"Good Faith" as a Defense to Suits for Police Deprivations of Individual Rights*, 59 MINN. L. REV. 991, 1008-09 (1975); Note, *Accountability for Government Misconduct: Limiting Qualified Immunity and the Good Faith Defense*, 49 TEMP. L.Q. 938, 951-55 (1976).

23. "The plain language of the amendment offers no clue as to congressional intent with regard to the scope of the government's liability. Indeed, reading only the amendment itself, one might even question its applicability to the federal tort created by *Bivens*." Norton v. United States, 581 F.2d 390, 395 (4th Cir.), *cert. denied*, 439 U.S. 1003 (1978).

In *Norton*, however, the Fourth Circuit Court of Appeals found controlling a passage in the Senate Report that stated that the amendment was intended to make "the Government independently liable in damages for the same type of conduct that is alleged to have occurred in *Bivens* (and for which that case imposes liability upon the individual Government officials involved)."[24] This statement, the court reasoned, suggests an intent to limit governmental liability to "only . . . those cases where individual liability would lie under *Bivens*."[25] The conclusion that the amendment was intended to apply only in situations strictly analogous to *Bivens*, the court stated, was further supported by the Senate Report's focus on creating a remedy for intentional, outrageous, and abusive conduct.[26] Thus, the court concluded, a fair reading of the Senate Report mandates that federal liability is "inextricably tied" to individual liability.[27]

Other parts of the legislative history, however, support a conclusion contrary to that reached by the court. For example, Senator Percy, a sponsor of the 1974 amendment, expressed his concern that the *Bivens* remedy is "severely limited by the ease with which agents can usually establish the defense of having acted in good faith."[28] In addition, the staff of the Senate committee responsible for the 1974 amendment[29] explicitly stated in a memorandum, "Congress does not oppose . . . 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 govern-

24. 581 F.2d at 395. *See* note 16 *supra.*

25. 581 F.2d at 395.

26. *Id.* at 396. The Senate Report's focus on clearly illegal conduct is demonstrated by its reference to the *Bivens* case. S. REP. No. 588, *supra* note 16, *reprinted in* [1974] U.S. CODE CONG. & AD. NEWS, at 2791. In addition, the 1974 amendment appears to be a direct consequence of hearings conducted by Senator Percy, a sponsor of the amendment. These hearings investigated several ill-advised and highly publicized drug raids in Collinsville, Illinois, conducted by Drug Abuse Law Enforcement (DALE), during which armed agents subjected two innocent families to nighttime invasions. *See* Boger, Gitenstein & Verkuil, *supra* note 11, at 500-01.

27. 581 F.2d at 396.

28. S. REP. No. 469, 93d Cong., 1st Sess. 36 (1973) (individual views of Senator Percy). This comment appears borne out by the Collinsville example. In none of the civil actions arising from the DALE drug raids, *see* note 26 *supra,* has a plaintiff received a damage award. Askew v. Bloemker, 548 F.2d 673 (7th Cir. 1976). Reply Brief for the Appellant at 7, 8, Norton v. United States, 581 F.2d 390 (4th Cir.), *cert. denied,* 439 U.S. 1003 (1978). In one case, a directed verdict was awarded defendant agents. Meiners v. Moriarity, 563 F.2d 343 (7th Cir. 1977).

29. The Senate Committee on Governmental Operations was considering a drug law enforcement agency bill when Senator Sam Ervin, Chairman of the committee, added the amendment to the FTCA. *See* Boger, Gitenstein & Verkuil, *supra* note 11, at 516-17.

ment's liability is not coterminous with that of the individual defendants."[30]

The *Norton* court discounted the countervailing legislative history with the statement that "[w]hat must guide us is not Senator Percy's intent nor the intent of the committee staff, but rather the intent of the Congress."[31] Since the intent of Congress is nowhere made explicit, however, the court's treatment of this aspect of the legislative history is unsatisfactory. Moreover, still other passages in the Senate Report can be construed to support a broader definition of liability.[32] In light of the inconsistencies in the legislative history of the 1974 amendment, the *Norton* court's decision on the basis of congressional intent is unsatisfying.

In the absence of an explicit statement of policy in the 1974 amendments, the *Norton* court would also have been justified in adopting a broader, policy-oriented analysis. Indeed, the *Norton* court appeared to take an initial step toward a more comprehensive analysis by invoking the general policy that statutes waiving sovereign immunity and imposing a potentially burdensome impact on the federal treasury are to be strictly construed.[33] The court, however,

30. Senate Committee on Governmental Operations, Memorandum on "No-Knock" Legislation, August 28, 1973, *reprinted in* Joint Appendix, *supra* note 2, at 86. One commentator has stated that the memorandum was the definitive statement of legislative intent:

> 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* or section 1983 . . . . 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.

Boger, Gitenstein & Verkuil, *supra* note 11, at 515 (footnotes omitted).

31. 581 F.2d at 396.

32. For example, the Senate Report states that the United States should be subject to liability "*whenever* its agents act under color of law so as to injure the public through search and seizures that are conducted without warrants or with warrants issued without probable cause." S. REP. No. 588, *supra* note 16, *reprinted in* [1974] U.S. CODE CONG. & AD. NEWS, at 2791 (emphasis added). *See also* Norton v. Turner, 427 F. Supp. 138, 149-50 (E.D. Va. 1977), *rev'd*, 581 F.2d 390 (4th Cir.), *cert. denied*, 439 U.S. 1003 (1978).

33. 581 F.2d at 396-97 (citing McMahon v. United States, 342 U.S. 25 (1951)). That case, involving the statute of limitations in the Suits in Admiralty Act, stated in dicta that "[w]hile . . . legislation for the benefit of seamen is to be construed liberally in their favor, it is equally true that statutes which waive immunity of the United States from suit are to be construed strictly in favor of the sovereign." *Id.* at 27 (footnotes omitted). Clearly *McMahon* might also be read to support liberal construction to effectuate the statutory remedy. Interestingly, the *Norton* court also quoted Justice Frankfurter's admonition to the judiciary *not* to view its role as a "self-constituted guardian of the Treasury [importing] immunity back into a statute de-

neglected to weigh the policy in favor of protection of the federal fisc against the magnitude of the injury Congress intended to remedy. As the *Bivens* court commented:

> The mere invocation of federal power by a federal law enforcement official will normally render futile any attempt to resist an unlawful entry or arrest by resort to the local police; and a claim of authority to enter is likely to unlock the door as well . . . . "In such cases there is no safety for the citizen, except in the protection of the judicial tribunals, for rights which have been invaded by the officers of the government, professing to act in its name. There remains to him but the alternative of resistance, which may amount to crime."[34]

Norton illustrates the type of harm the 1974 FTCA amendment seeks to redress: a violation of a fundamental fourth amendment right, committed by a federal agent,[35] to which the individual, as a practical matter, must submit. A citizen who has suffered from illegal police action gains little solace from the knowledge that the offending officer was acting in good faith and with a reasonable but mistaken belief in the legality of the action. When analysis is focused on the plight of the injured citizen, it becomes reasonable to subject the federal government to liability for proven constitutional injury caused by its agents, without regard to the subtleties of the officer's state of mind.[36]

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signed to limit it." 581 F.2d at 397 (quoting Indian Towing Co. v. United States, 350 U.S. 61, 69 (1955)).

34. 403 U.S. at 394-95 (quoting United States v. Lee, 106 U.S. 196, 219 (1882)).

35. *See, e.g.*, Birnbaum v. United States, 436 F. Supp. 967 (E.D.N.Y. 1977), *modified on other grounds*, 588 F.2d 319 (2d Cir. 1978) (the fact that it is a government agent who violates a citizen's constitutional rights is an aggravating, not a mitigating, factor).

36. In discussing an action against state police for violation of constitutional rights, Judge Newman commented as follows:

> This is not to suggest that either the Constitution or section 1983 establishes strict liability, in the sense of an entitlement to compensation whenever injury is sustained. The standards of the Constitution, notably those of the Fourth Amendment, already contain a sufficient element of reasonableness to avoid any possibility that law enforcement officers will become guarantors of the liberty or well-being of those they apprehend. But these standards, however flexible, should be enforced on their own terms, without further dilution by common law defenses that evolved under a jurisprudence primarily concerned with adjusting disputes between private individuals. Constitutional standards, designed to limit governmental authority over citizens, serve a more important function. If imposition of personal liability upon the wrongdoer is thought to have consequences adverse to the proper discharge of his public functions, society can either reimburse the wrongdoer or shift liability to his employer, rather than deny a remedy to the victim. His constitutional rights are just as impaired and the injury he suffers just as serious regardless of the good faith of the wrongdoer.

Newman, *supra* note 22, at 462.

A second policy consideration in favor of an expansive interpretation of the FTCA amendment stems from the rationale underlying the good faith defense. A functional analysis of the good faith defense suggests that it serves two purposes. First, the defense protects the individual officer from civil liability for honest and reasonable mistakes made in an effort to carry out the often difficult responsibilities of public service.[37] Law officers may be required to make on-the-spot decisions that present difficult constitutional questions even for lawyers and courts.[38] The good faith defense apportions the risk of mistakes in that situation by comparing the individual officer's conduct with that of a reasonable person.[39] A second and related purpose of the good faith defense is founded on the assumption that the threat of a damage suit and the attendant risk of monetary loss may dissuade a federal officer from executing his duties "with the decisiveness and the judgment required by the public good."[40] The good faith defense thus promotes smooth governmental operations by affording the well-meaning public servant a measure of protection.[41]

Extending the good faith defense to the United States, however, is not justified by the policy considerations that justify applying it to an individual officer. The greater financial resources of the federal government protect it from judgments that might prove devastating to an individual. In addition, since the threat of a damage suit against the United States is not likely to have a chilling effect on the willingness of an individual officer to act decisively, denying the de-

37. Typically, law enforcement officers have no personal insurance against damage judgments. Project, *Suing the Police in Federal Court,* 88 YALE L.J. 781, 810-12 (1979). Police unions and municipalities, however, may provide insurance coverage, *id.,* and some jurisdictions provide indemnification. Newman, *supra* note 22, at 456.

38. *See* Roberts v. Williams, 456 F.2d 819, 830 (5th Cir. 1972), *cert. denied,* 404 U.S. 866 (1971); Note, *supra* note 22, at 972, which states:

> It happens to be the officer on the street or the prison guard or official who has the greatest contact, under the most difficult circumstances and conditions, with private citizens. These officials are enforcing mandated policy; regardless of whether they go beyond the limits of their mandate, it is unfair to force them to take the entire brunt of a sizeable judgment.

39. *See* Bivens v. Six Unknown Named Agents, 456 F.2d 1339, 1348-49 (2d Cir. 1972) (Lumbard, J., concurring).

40. Scheuer v. Rhodes, 416 U.S. 232, 240 (1974). *See generally* Wood v. Strickland, 420 U.S. 308, 319 (1975); Rowley v. McMillan, 502 F.2d 1326, 1332 (4th Cir. 1974).

41. The good faith defense may go beyond the proper measure of protection necessary to facilitate effective law enforcement. A field research study of § 1983 suits concludes that "the good faith defense should be eliminated from police misconduct suits. To the extent that the doctrine affects jury verdicts, it is an added protection for the police officer who already benefits from the biases of jurors." Project, *supra* note 37, at 815-16 (footnotes omitted). *See also* text accompanying note 28 *supra.*

fense to the United States would not impair vigorous law enforcement.[42] Extension of the good faith defense to the United States is not, therefore, supported by the rationales of the defense.

By contrast, reasons similar to those used to justify strict products liability justify holding the United States liable even though the good faith defense would absolve the individual officer from liability.[43] The risk that an individual will suffer a tortious injury at the hands of federal agents is an inevitable and foreseeable consequence of federal law enforcement activity. The costs of such injuries should, therefore, be spread among all those sharing the benefits of an effective system of law enforcement.[44] Large governmental units are, indeed,

> the best of all possible loss spreaders . . . . This basic fact, which so far has been given too little heed, will in time lead us to see that the basis for government liability should not be fault but should be equitable loss spreading. The ultimate principle may be that the taxpaying public should usually bear the fortuitous and heavy losses that result from governmental activity. The key idea will be neither comparison with private liability in the same circumstances . . . nor fault on the part of the governmental unit or its agents; the key idea will be simply that a beneficent governmental unit ought not to allow exceptional losses to be borne by those upon whom the governmental activity has happened to inflict them.[45]

The capacity of the federal government to meet the costs of an injury caused by an exercise of governmental power and to spread these costs among all those receiving the benefits of a system of law enforcement justifies the view that federal liability provides a more equitable way to apportion the costs of law enforcement activity.

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42. Downs v. United States, 522 F.2d 990, 998 (6th Cir. 1975).

43. *See* Project, *supra* note 37, at 816-17 n.195, which states:

> The goals of a strict liability standard in products liability cases are (1) to minimize danger to consumers, (2) to place the burden of loss on the manufacturer, who can best minimize the danger, and (3) to distribute the losses equitably among the consuming public, as a cost of doing business. 2 F. HARPER & F. JAMES, THE LAW OF TORTS § 28.16, at 1571 (1956). The goals of a strict liability standard in police misconduct cases are comparable: (1) to minimize unconstitutional acts, (2) to place costs on the municipality, which can deter unconstitutional acts, and (3) to distribute the losses equitably among the citizens of the municipality, who are the beneficiaries of police protection.

44. *See* Carter v. Carlson, 447 F.2d 358, 367 (D.C. Cir. 1971), *rev'd on other grounds sub nom.* District of Columbia v. Carter, 409 U.S. 418 (1973); F. HARPER & F. JAMES, *supra* note 11, § 29.1, at 1607-08; W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 131, at 978 (4th ed. 1971); Davis, *Administrative Officers' Tort Liability*, 55 MICH. L. REV. 201, 207 (1956); Jaffe, *supra* note 11, at 229-30.

45. Davis, *supra* note 11, at 811-12.

Nevertheless, the *Norton* court adopted an overly restrictive view of federal liability for violations of constitutional rights committed by federal law enforcement agents. The court relied on a narrow interpretation of legislative history and did not give sufficient weight to countervailing policy arguments. The rationale of the good faith defense, the nature of the harm Congress sought to remedy, and the risk-spreading capacity of the federal government suggest a result contrary to that reached in *Norton.* By declining to consider these policy arguments, the court failed to effectuate fully the remedial purposes of the Federal Tort Claims Act.