



## Recommendation 82-6

### **Federal Officials' Liability for Constitutional Violations**

(Adopted December 16, 1982)

This recommendation focuses on the increasing risk to federal executive branch officials of civil liability for monetary damages for alleged violations of federal constitutional rights. This vulnerability has expanded dramatically in recent years, as a result of judicially-discovered rights enunciated in *Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971), and subsequent court cases involving allegations of official misconduct. Under the present system of officials' liability, as developed piecemeal by the courts, an individual federal employee (except certain categories of officials, including the President, who have been ruled to have absolute immunity) may be held personally liable for acts that, though committed while the employee was acting within the scope of office or employment, may subsequently be found to violate a constitutional provision. Juries may hold officials liable for actual damages where they cannot show that their actions were taken in good faith—that is, in the belief that their conduct was lawful—and for punitive damages where they are shown to have acted maliciously or with reckless disregard of the plaintiff's constitutional rights. At present, damages may not be recovered against the United States for violations of constitutional rights as such, although claims arising out of the same conduct may or may not be stated against the Government under the Federal Tort Claims Act, 28 U.S.C. 2671-2680.

The existing system of civil sanctions for constitutional violations by federal officials does not provide adequate assurance of compensation for victims of such violations and discourages proper conduct by Government officials. In addition, the federal government often has interests at stake in constitutional tort litigation involving its officials which may not be represented adequately when individual officials themselves are the defendants on trial.

In *Carlson v. Green*, 446 U.S. 14 (1980), the Supreme Court suggested that the courts may properly refuse to entertain monetary damage actions against federal officials if Congress has expressly substituted a different remedy or made available an alternative to the *Bivens* remedy. In the Conference's view, such an alternative system is likely to improve the effectiveness with which federal programs and laws are administered.



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To serve the primary goals of compensation, deterrence, and fairness in dealing with constitutional violations assertedly committed by federal officials, and to afford a solution to the problems perceived to flow from the current system of individual liability, Congress should replace the existing system by accepting public liability for wrongs done in the public's name and by strengthening the means of dealing with the wrongdoers. When defending against constitutional tort claims, the Government should be able to assert any immunity or good faith defense available to the officials.

Since the Conference's mandate extends only to matters affecting the administration of federal agencies' programs, this recommendation addresses only actions against executive agency officials. We do not intend to suggest that the same considerations do not apply to officials of the legislative and judicial branches.

### **Recommendation**

1. Congress should enact legislation providing that the United States shall be substituted as the exclusive party defendant in all actions for damages for violations of rights secured by the Constitution of the United States committed by federal executive branch officers and employees while acting within the scope of their office or employment. The legislation should provide adequate procedures to ensure that, where a damage action for violation of such rights is brought against an executive branch officer or employee, such action should be deemed to have been brought against the United States upon certification by the Attorney General that the defendant officer or employee was acting within the scope of his office or employment at the time of the incident out of which the suit arose. The Attorney General's failure to make such certification should be judicially reviewable.

2. Such legislation should provide that, in actions alleging constitutional violations, the United States may assert as a defense any qualified immunity or good faith defense available to the executive branch officer or employee whose conduct gave rise to the claim, or his reasonable good faith belief in the lawfulness of his conduct. The United States should also be free to assert such other defenses as may be available, including the absolute immunity of those officers entitled to such immunity.

3. The agency that employed the offending official should be responsible for investigation and, where appropriate, for disciplining the official and implementing any other appropriate corrective measures. The Office of Personnel Management should assure, via guidance



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promulgated through the Federal Personnel Manual and other devices, that agencies are authorized to employ existing mechanisms to impose sanctions on officers and employees who have violated the constitutional rights of any person. Employees should be permitted to assert as a defense in any disciplinary proceeding their good faith in taking the action in question, as well as such other defenses as may be available.

4. Congressional legislation should preserve the opportunity for jury trial only with respect to claims that arose prior to the effective date of the legislation implementing this recommendation.

### **Citations:**

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