

104TH CONGRESS
2D SESSION

H. R. 3946

To amend title 28 of the United States Code to provide for a remedy against the United States for claims based upon conduct involving human experimentation, to provide a remedy against the United States with respect to constitutional and human rights violations, and for other purposes.

IN THE HOUSE OF REPRESENTATIVES

AUGUST 1, 1996

Mr. TORRICELLI (for himself, Mr. EVANS, Mr. LAFALCE, and Mr. MOAKLEY) introduced the following bill; which was referred to the Committee on the Judiciary

A BILL

To amend title 28 of the United States Code to provide for a remedy against the United States for claims based upon conduct involving human experimentation, to provide a remedy against the United States with respect to constitutional and human rights violations, and for other purposes.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*

1 **TITLE I—FEDERAL TORT CLAIMS**
2 **AMENDMENTS**

3 **SEC. 101. REMEDY FOR UNLAWFUL HUMAN EXPERIMEN-**
4 **TATION.**

5 Chapter 171 of title 28, United States Code, is
6 amended by inserting after section 2680 the following:

7 **“§ 2681. Human Experimentation**

8 “Section 2680 shall not apply to—

9 “(1) any claim arising out of conduct or re-
10 search involving a human being as an experimental
11 subject without the informed consent of the subject
12 or a legal representative of the subject; or

13 “(2) any claim arising out of the subjection of
14 a human being to any experimental chemical, radio-
15 logical, or biological agent, drug, or other test article
16 without the informed consent of the human subject
17 or a legal representative of the subject.

18 **“§ 2682. Nuclear Weapons Facility Operations.**

19 “Section 2680 shall not apply to any claim arising
20 out of operations of any federally owned nuclear weapons
21 facility involved in the production of nuclear weapons
22 under the authority of the Secretary of Energy or any
23 predecessor which had such authority.”.

1 **SEC. 102. CONFORMING AMENDMENT.**

2 The table of contents for such chapter 171 is amend-
3 ed by adding after the item relating to section 2680 the
4 following:

“2681. Human experimentation.

“2682. Nuclear weapons facility operations.”.

5 **TITLE II—CONSTITUTIONAL AND**
6 **HUMAN RIGHTS VIOLATIONS**

7 **SEC. 201. JURISDICTION OF DISTRICT COURTS.**

8 Section 1346(b) of title 28, United States Code, is
9 amended—

10 (1) by inserting “(1)” after “(b)”;

11 (2) by adding at the end thereof the following
12 new paragraph:

13 “(2) Subject to the provisions of chapter 172, the dis-
14 trict courts shall have exclusive jurisdiction of civil actions
15 on claims for money damages based on constitutional
16 torts.”.

17 **SEC. 202. CONSTITUTIONAL TORTS PROCEDURE.**

18 Title 28 of the United States Code is amended by
19 inserting after chapter 171 the following new chapter:

20 **“CHAPTER 172—CONSTITUTIONAL TORTS**

21 **“§ 2691. Definitions**

22 “As used in this chapter and sections 1346(b)(2) and
23 2401(b)(2)—

1 “(1) the term ‘Federal agency’ includes any ex-
2 ecutive department, military department, independ-
3 ent establishment of the United States, any person
4 or entity acting as an instrumentality or agent of
5 the United States, any contractor with the United
6 States, any other establishment of the United States
7 (including the Executive Office of the President),
8 and any party acting in concert with the United
9 States;

10 “(2) the term ‘employee of the Government’ in-
11 cludes officers and employees in the executive branch
12 of the Federal Government, members of the military
13 or naval forces of the United States, members of the
14 National Guard while engaged in training or duty
15 under section 316, 502, 503, 504, or 505 of title 32,
16 and any person acting on behalf of or in concert
17 with a Federal agency, temporarily or permanently
18 in the service of the United States, whether with or
19 without compensation, and whose acts or omissions
20 are done with the knowledge or consent of the Unit-
21 ed States; and

22 “(3) the term ‘constitutional tort’ means a vio-
23 lation of the Constitution of the United States or
24 violation of human rights resulting from or caused
25 by the act or omission of a Federal agency or an

1 employee of the Government while acting within the
2 scope of the employee's office, employment, or ap-
3 parent authority, or which results from the negligent
4 supervision of an employee of the Government.

5 **“§ 2692. Administrative adjustment of claims**

6 “(a) The head of each Federal agency may, in accord-
7 ance with regulations prescribed by the Attorney General,
8 compromise and settle any claim for money damages based
9 on a constitutional tort, except that any award, com-
10 promise, or settlement in excess of \$25,000 shall be ef-
11 fected only with the prior written approval of the Attorney
12 General.

13 “(b) Any award, compromise, settlement, or deter-
14 mination made under this section shall be final and con-
15 clusive on the United States, except when procured by
16 means of fraud.

17 “(c) Payment of any award, compromise, or settle-
18 ment made under this section or made by the Attorney
19 General in any amount under section 2697 shall be paid
20 in a manner similar to judgments and compromises in like
21 causes. Appropriations or funds available for the payment
22 of such judgments and compromises shall be available for
23 the payment of awards, compromises, or settlements under
24 this chapter.

1 “(d) The acceptance by a claimant of any award,
2 compromise, or settlement made under this section or sec-
3 tion 2697 shall be final and conclusive on the claimant,
4 and shall constitute a complete release of any claim
5 against the United States and against the employee of the
6 Government whose act or omission gave rise to the claim,
7 by reason of the same subject matter.

8 **“§ 2693. Liability of the United States**

9 “(a) The United States shall be liable for compen-
10 satory damages for any constitutional tort, but shall not
11 be liable for interest prior to judgment or for punitive
12 damages except as herein provided. With respect to any
13 claim for money damages based on a constitutional tort,
14 the United States shall be liable for an amount not greater
15 than either—

16 (1) actual damages, or

17 (2) nominal damages in an amount which is the
18 greater of—

19 (A) \$25,000, or

20 (B) in the case of a continuing violation,
21 \$500 per day for each violation.

22 If the conduct giving rise to the constitutional tort claim
23 was undertaken willfully or recklessly, the court shall
24 award, in addition, exemplary damages as are just and

1 reasonable under the circumstances, as determined by the
2 trier of fact.

3 “(b) A class action in conformity with the require-
4 ments of the Federal Rules of Civil Procedure may be in-
5 stituted on a constitutional tort claim if it satisfies the
6 provisions of rule 23 thereof, and shall be maintained
7 where certified by the court before which the action is
8 filed.

9 **“§ 2694. Disposition by Federal agency as pre-**
10 **requisite; evidence**

11 “(a) An action shall not be instituted upon a claim
12 against the United States for money damages based on
13 a constitutional tort unless the claimant shall have first
14 presented the claim to the appropriate Federal agency and
15 that claim shall have been finally denied by the agency
16 in writing and sent to the claimant by certified or reg-
17 istered mail. The failure of an agency to make final dis-
18 position of a claim within 6 months after it is filed shall,
19 at the option of the claimant any time thereafter, be
20 deemed a final denial of the claim for purposes of this
21 section. This subsection shall not apply to such claims as
22 may be asserted under the Federal Rules of Civil Proce-
23 dure by third-party complaint, cross-claim, or counter-
24 claim.

1 “(b) Except as to a class action claim or if damages
2 are not fully ascertainable at the time of presentation pur-
3 suant to subsection (a), an action under this section shall
4 not be instituted for any sum in excess of the amount of
5 the claim presented to the Federal agency, except where
6 the increased amount is based upon newly discovered evi-
7 dence not reasonably discoverable at the time of present-
8 ing the claim to the Federal agency or upon allegation
9 and proof of intervening facts, relating to the amount of
10 the claim.

11 **“§ 2695. Jury trial**

12 “Any action brought pursuant to this chapter upon
13 a claim for money damages based on a constitutional tort
14 shall, at the request of any party to such action, be tried
15 by the court with a jury.

16 **“§ 2696. Judgment as bar**

17 “The judgment in an action under section 1346(b)(2)
18 shall constitute a complete bar to any action by the claim-
19 ant involved, by reason of the same constitutional violation
20 against the employee of the Government whose act or
21 omission gave rise to the claim, but shall not act as a re-
22 lease on any claim for violation of any other law.

1 **“§ 2697. Compromise**

2 “The Attorney General may arbitrate, compromise,
3 or settle any claim cognizable under section 1346(b)(2),
4 after the commencement of an action on that claim.

5 **“§ 2698. Attorney fees; penalty**

6 “(a) Any claimant to whom a judgment is awarded
7 under section 1346(b)(2), or to whom an award, com-
8 promise, or settlement is made under section 2697 or
9 2692 shall, in addition to such judgment, award, com-
10 promise, or settlement, be entitled to receive a reasonable
11 attorney’s fee and other litigation costs reasonably in-
12 curred, including attorney fees and costs attributable to
13 processing an administrative claim under section 2692.
14 The amount of such attorney’s fee may not exceed 25 per
15 cent of any judgment rendered under section 1346(b)(2)
16 or any award, compromise, or settlement made under sec-
17 tion 2697, except as otherwise approved by the court be-
18 fore whom the action is filed, or 20 per cent of any award,
19 compromise, or settlement made under section 2692.

20 “(b) Any attorney who charges, demands, receives,
21 or collects for services rendered in connection with a judg-
22 ment, award, compromise, or settlement described in sub-
23 section (a) any amount in excess of that allowed under
24 subsection (a) shall, if recovery be had, be fined not more
25 than \$2,000 or imprisoned not more than one year, or
26 both.

1 **“§ 2699. Exclusiveness of remedy**

2 “(a) The authority of any Federal agency to sue and
3 be sued in its own name shall not be construed to author-
4 ize suits against such Federal agency on constitutional
5 tort claims arising under this chapter which are cognizable
6 under section 1346(b)(2), and the remedies provided by
7 this title in such case shall be exclusive.

8 “(b)(1) Upon filing a claim with the district court
9 under section 1346(b)(2), the remedy against the United
10 States provided by section 2693 for claims for money dam-
11 ages based on constitutional torts shall be exclusive of any
12 other Federal civil action or proceeding for money dam-
13 ages by reason of the same subject matter against the em-
14 ployee whose act or omission gave rise to the claim or
15 against the estate of such employee.

16 “(2) Paragraph (1) does not extend or apply to a civil
17 action against an employee of the Government—

18 “(A) which is brought against the employee for
19 acting outside the scope of the employee’s office or
20 employment in violation of the Constitution of the
21 United States, or

22 “(B) which is brought for a violation of a stat-
23 ute of the United States or a statute of any State
24 under which such action against an individual is oth-
25 erwise authorized.

1 “(c) The provisions of this chapter shall be limited
2 to constitutional tort claims against Federal agencies or
3 employees of the Government. Nothing in this chapter
4 shall preclude or preempt suit against any person or entity
5 on any other claim, whether based on international, Fed-
6 eral, State, or common law, and no provision of this chap-
7 ter shall act as a release, waiver, or bar to such claim.

8 “(d) Upon certification by the Attorney General pur-
9 suant to subsection (e), the Attorney General shall defend
10 any civil action or proceeding brought in any court against
11 any employee of the Government or against the estate of
12 such employee for money damages based on any constitu-
13 tional tort. The employee against whom such civil action
14 or proceeding is brought shall deliver within such time
15 after date of service or knowledge of service as determined
16 by the Attorney General, all process served upon the em-
17 ployee or an attested true copy thereof to the employee’s
18 immediate superior or to whomever was designated by the
19 head of the employee’s department to receive such papers
20 and such person shall promptly furnish copies of the
21 pleadings and process therein to the United States attor-
22 ney for the district embracing the place wherein the pro-
23 ceeding is brought, to the Attorney General, and to the
24 head of the employee’s employing Federal agency.

1 “(e)(1) Upon certification by the Attorney General
2 that the defendant was acting within the scope of the de-
3 fendant’s office or employment at the time of the incident
4 out of which the claim arose, any civil action or proceeding
5 commenced upon such claim in a United States district
6 court shall be deemed an action against the United States
7 under the provisions of this title and all references thereto,
8 and the United States shall be substituted as the party
9 defendant.

10 “(2) Upon certification by the Attorney General that
11 the defendant was acting within the scope of the defend-
12 ant’s office or employment at the time of the incident out
13 of which the claim arose, any civil action or proceeding
14 commenced upon such claim in a State court shall be re-
15 moved without bond at any time before trial by the Attor-
16 ney General to the district court of the United States for
17 the district and division embracing the place in which the
18 action or proceeding is pending. Such action or proceeding
19 shall be deemed to be an action or proceeding brought
20 against the United States under the provisions of this title
21 and all references thereto, and the United States shall be
22 substituted as the party defendant. This certification of
23 the Attorney General shall conclusively establish scope of
24 office or employment for purposes of removal.

1 “(3) In the event that the Attorney General has re-
2 fused to certify scope of office or employment under this
3 section, the employee may at any time before trial, petition
4 the court to find and certify that the employee was acting
5 within the scope of the employee’s office or employment.
6 Upon such certification by the court, such action or pro-
7 ceeding shall be deemed to be an action or proceeding
8 brought against the United States under the provisions
9 of this title and all references thereto, and the United
10 States shall be substituted as the party defendant. A copy
11 of the petition shall be served upon the United States in
12 accordance with the provisions of rule 4(d)(4) of the Fed-
13 eral Rules of Civil Procedure. In the event the petition
14 is filed in a civil action or proceeding pending in a State
15 court, the action or proceeding may be removed without
16 bond by the Attorney General to the district court of the
17 United States for the district and division embracing the
18 place in which it is pending. If, in considering the petition,
19 the district court determines that the employee was not
20 acting within the scope of the employee’s office or employ-
21 ment, the action or proceeding shall be remanded to the
22 State court.

23 “(4) Upon certification, any action or proceeding sub-
24 ject to paragraph (1), (2), or (3) shall proceed in the same
25 manner as any action against the United States filed pur-

1 suant to section 1346(b)(2) and shall be subject to the
2 limitations and exceptions applicable to those actions.

3 “(5) Whenever an action or proceeding in which the
4 United States is substituted as the party defendant under
5 this subsection is dismissed for failure to first present a
6 claim pursuant to section 2694(a), such a claim shall be
7 deemed to be timely presented under section 2401(b)(2)
8 if—

9 “(A) the claim would have been timely had it
10 been filed on the date the underlying civil action was
11 commenced, and

12 “(B) the claim is presented to the appropriate
13 Federal agency within 60 days after dismissal of the
14 civil action.

15 “(f) The Attorney General may compromise or settle
16 any claim asserted in any civil action or proceeding de-
17 scribed in this section in the manner provided in section
18 2697, and with the same effect.

19 **“§ 2700. Administrative action concerning employee**

20 “Where an action or proceeding under section
21 1346(b)(2) or 2692 on a constitutional tort results in a
22 judgment against the United States or an award, com-
23 promise, or settlement paid by the United States, the At-
24 torney General shall forward the matter to the head of
25 the Federal agency which employed the employee at the

1 time of the employee’s alleged act or omission giving rise
2 to the claim upon which the action or proceeding was
3 based, for such further administrative investigation or dis-
4 ciplinary action as may be appropriate. In any administra-
5 tive proceeding relating to such investigation or discipli-
6 nary action, the employee may assert as a defense the em-
7 ployee’s reasonable good-faith belief in the lawfulness of
8 the employee’s conduct.”.

9 **SEC. 203. STATUTE OF LIMITATION, TECHNICAL AND CON-**
10 **FORMING AMENDMENTS.**

11 (a) SECTION 2401.—Section 2401(b) of title 28,
12 United States Code, concerning the statute of limitations,
13 is amended—

14 (1) by inserting “(1)” immediately after “(b)”;

15 (2) by inserting “cognizable under section
16 1346(b)(1) of chapter 171” after “United States”;

17 (3) by adding at the end the following: “any
18 claim arising out of unlawful human experimentation
19 within the meaning of section 2681 shall not be
20 barred if presented in writing to the appropriate
21 Federal agency within 3 years from the date of the
22 enactment of section 2681.”; and

23 (4) by adding after paragraph (1) the following:

24 “(2) A claim for money damages based on a constitu-
25 tional tort against the United States cognizable under sec-

1 tion 1346(b)(2) of chapter 172 shall be forever barred un-
2 less it is presented in writing to the appropriate Federal
3 agency within 2 years after such claim accrues or unless
4 action is begun within 6 months after the date of mailing,
5 by certified or registered mail, of notice of final denial of
6 the claim by the agency to which it was presented, except
7 that any claim accruing prior to enactment of chapter 172
8 shall not be barred if presented in writing to the appro-
9 priate Federal agency within 3 years from the date of en-
10 actment of chapter 172.”.

11 (b) SECTION 2402.—Section 2402 of title 28, United
12 States Code, is amended by inserting “or 1346(b)(2)”
13 after “1346(a)(1)”.

14 (c) SECTION 2674.—Section 2674 of title 28, United
15 States Code, is amended by inserting immediately after
16 “claims” the following: “to which section 1346(b)(1) of
17 this title applies”.

18 (d) MULTIPLE SECTIONS.—Sections 2676, 2677,
19 2678, and 2679 of title 28, United States Code, are
20 amended by striking out “1346(b)” each place it appears
21 and inserting in lieu thereof “1346(b)(1)”.

22 (e) SECTION 2680.—Section 2680 of title 28, United
23 States Code, is amended by striking out “1346(b)” and
24 inserting in lieu thereof “1346(b)(1)”.

1 (f) SECTION 1402.—Section 1402(b) of title 28,
 2 United States Code, is amended by striking out “sub-
 3 section (b)” and inserting in lieu thereof “subsections
 4 (b)(1) and (b)(2)”.

5 (g) TABLE OF CHAPTERS.—The table of chapters for
 6 part VI of title 28, United States Code, is amended by
 7 inserting after the item relating to chapter 171 the follow-
 8 ing new item:

“172. Constitutional Torts 2691”.

