

TORT LIABILITY UNDER THE TEMPORARY EMERGENCY WILDFIRE SUPPRESSION ACT

HEARING BEFORE THE SUBCOMMITTEE ON IMMIGRATION, BORDER SECURITY, AND CLAIMS OF THE COMMITTEE ON THE JUDICIARY HOUSE OF REPRESENTATIVES

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FRIDAY, JUNE 28, 2002

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON IMMIGRATION,
BORDER SECURITY, AND CLAIMS,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The Subcommittee met, pursuant to call, at 11 a.m., in Room 2237, Rayburn House Office Building, Hon. George W. Gekas [Chairman of the Subcommittee] presiding.

Mr. GEKAS. The hour of 11 o'clock having arrived, the Committee will come to order.

Pursuant to our custom and usage as to this Committee, we have again for the umpteenth time started a meeting exactly on time. The rules of the House, though, and they seep down to the rules of the Committees, are such that a hearing cannot be held unless two Members are present and participating, and so although I am true to my own principle of starting on time, I must now declare a recess until the next Member appears. And we have solid indication that a Member will be appearing shortly, so we will recess until that time.

You have the choice, as I always give the audience the choice, of hearing a Shakespearean sonnet from me, or two verses of Amazing Grace. Take a poll and let me know which you prefer.

We will be in recess. The time of the recess has expired. And we acknowledge the presence of the lady from Pennsylvania Ms. Hart, who has helped the Chair constitute a quorum for today's hearing. It is an all-Pennsylvania panel thus far, and so you will have Pittsburgh and Philadelphia in mind as you proceed with your testimony, I am sure.

And the Ranking Member Sheila Jackson Lee has notified me that she will not be here. Without objection, we will enter her opening statement into the record, and we will proceed with the hearing as we have it set.

This, of course, comes about because of a series of things that have happened, including the phenomenon of welcoming to our country international firefighters, and then finding out that in some cases, although they are willing to come to our shores and willing to help in the mammoth job that firefighters do in such situations, there is a murky area remaining on the question of liability and propriety in who performs what duties and who would be subject to any claims, if any there be. Whether the Federal Tort

Claims Act would apply, or other features, we cannot finally determine.

The other phenomenon in this is that our comrade from Colorado, Scott McInnis, Congressman Scott McInnis, who, by the way, was on CNN just this morning, I saw him standing among a group of firefighters back in his home State talking about the very same thing that we are contemplating here, some accommodation for those who would come to help us, and, of course, on a counterpoint, have some kind of sense and standards for American firefighters when they go to a foreign country. So Mr. McInnis, using legislative innovativeness, shall we say, was able to get a line item in an appropriations bill to accomplish these purposes, but Congressman Jim Sensenbrenner, the Chairman of the Committee on the Judiciary, felt that we ought to create a record to substantiate the line item that Mr. McInnis was able to employ.

That is the basic purpose of the hearing, and, of course, the record will serve many other purposes, but it will serve as the foundation for the employment of the Government facilities and the agencies to make sure that everyone comes out right in this serious problem. Every day now we see a—we hear about a new fire, and we hear about new endangerment for our firefighters or the firefighters from wherever they come, so it is an appropriate time to spread our comments on the record and be up to snuff on the entire situation.

The witnesses are—yes, we have Paul Clinton Harris, Sr., the Deputy Associate Attorney General from the Justice Department who has provided a thorough resume: In the administration of President George W. Bush as a Presidential appointee; served as Deputy Assistant Attorney General, U.S. Department of Justice, July 2, 2001; Deputy Associate Attorney General, U.S. Department of Justice, May 28, 2002. Paul is married to Monica Lamont of Washington, D.C. They have three children. They live in Manassas, Virginia.

The second witness is Tim Hartzell, Director of the Office of Wildland Fire Coordination, Department of the Interior. And before moving to the Department, Tim worked for 28 years with the Bureau of Land Management with assignments in four States and the Washington office. He has served as a Peace Corps volunteer in central Africa, where he was a member of the government's land husbandry staff. During this time he assisted in the preparation of regional watershed plans, wildlife inventories, and development of a conservation education training for teacher training colleges. Tim and his wife Nancy, a middle school math teacher, also reside in Manassas, Virginia. Did you come in a car pool?

And with that we will begin directly with the testimony of Mr. Harris. As per custom, we will entertain your written statements for the record, and they will be reprinted in their entirety, and we ask you to try to confine your oral review to about 5 minutes.

With that, we will start with Mr. Harris.

STATEMENT OF PAUL CLINTON HARRIS, JR., ESQ., DEPUTY ASSOCIATE ATTORNEY GENERAL, UNITED STATES DEPARTMENT OF JUSTICE

Mr. HARRIS. Thank you. Good morning, Mr. Chairman. I am pleased to appear before you today to present the views of the Department of Justice on H.R. 5017, which would eliminate the risk of tort liability to foreign firefighters and their governments while foreign personnel are providing assistance to the United States. It requires that foreign countries or states extend a reciprocal benefit to United States firefighters in the event the United States provides assistance to them.

The proposed legislation would also deem foreign firefighters to be Federal employees for the limited purpose of securing them coverage under the Federal Tort Claims Act for their firefighting activities. It would also make the laws of the host country the only source of remedies available for acts and omissions in firefighting activities in the host country.

The proposed legislation further provides that neither the firefighter, the sending country, nor any organization associated with the firefighter shall be liable for any action resulting from fighting fires.

Two points bear special emphasis. First, this legislation meets a specific need: Protecting firefighters who go to a different country from being sued in that host country for any alleged errors in their firefighting activities, while providing a remedy for any firefighting negligence through suit against the host country under the laws and procedures of that host country. Thus, if a foreign firefighter were sued for firefighting negligence in the United States, under the procedures of the Federal Tort Claims Act the Justice Department would move to substitute the United States as a defendant and dismiss the firefighter from the case.

Second, the legislation is reciprocal. It will provide the same protection to American firefighters who go to other countries as is provided to foreign firefighters who come here to help us. In neither event will the visiting firefighters or their home governments be subject to suit for alleged firefighting negligence in a foreign country.

I appreciate the opportunity to present the Department's views on H.R. 5017 and would be happy to answer any questions.

Mr. GEKAS. Thank you.

[The prepared statement of Mr. Harris follows:]

PREPARED STATEMENT OF PAUL CLINTON HARRIS, SR.

Good morning, Mr. Chairman and Members of the Subcommittee, I am pleased to appear before you today to present the views of the Department of Justice on H.R. 5017 which would eliminate the risk of tort liability to foreign firefighters and their governments while foreign personnel are providing assistance to the United States. It requires that foreign countries or states extend a reciprocal benefit to United States firefighters in the event the United States provides assistance to them. The proposed legislation would also deem foreign firefighters to be federal employees for the limited purpose of securing them coverage under the Federal Tort Claims Act for their firefighting activities. It would make the laws of the host country the only source of remedies available for acts and omissions in firefighting activities in the host country. The proposed legislation further provides that neither the firefighter, the sending country, nor any organization associated with the firefighter shall be liable for any action resulting from fighting fires.

Two points bear special emphasis. First, this legislation meets a specific need; protecting firefighters who go to a different country from being sued in that host country for any alleged errors in their firefighting activities, while providing a remedy for any firefighting negligence through suit against the host country under the laws and procedures of that host country. Thus, if a foreign firefighter were sued for firefighting negligence in the United States, under the procedures of the Federal Tort Claims Act, the Department of Justice would move to substitute the United States as defendant and to dismiss the firefighter from the case.

Second, the legislation is reciprocal. It will provide the same protection to American firefighters who go to other countries as is provided to foreign firefighters who come here to help us. In neither event will the visiting firefighters or their home governments be subject to suit for alleged firefighting negligence in a foreign country.

I appreciate the opportunity to present the Department's views on H.R. 5017 and would be happy to answer any questions.

Mr. GEKAS. We will turn to Mr. Hartzell.

STATEMENT OF TIM HARTZELL, DIRECTOR FOR THE OFFICE OF WILDLAND FIRE POLICY, UNITED STATES DEPARTMENT OF THE INTERIOR, ACCOMPANIED BY DENNY TRUESDALE, USDA FOREST SERVICE

Mr. HARTZELL. Thank you, Mr. Chairman. Mr. Chairman, my name is Tim Hartzell. I am Director of the Office of Wildland Fire Coordination, and we thank you for this opportunity.

I would like to begin by saying that the Department of Interior and Agriculture work very closely together on firefighting issues. As a result, we are presenting one uniform testimony that expresses our strong desire to see this problem resolved. I have brought with me Mr. Denny Truesdale. Mr. Truesdale is assistant to the Deputy Chief for State and Private Forestry, and he has a longstanding relationship in working with the Australian and New Zealand firefighters and would be happy to answer any question should that arise.

I would like to set the stage by talking about increased severity of wild fires in the Western United States. We are presently at what is called preparedness level 5, which means we are at the greatest risk from wildfire. I would like to place this year in perspective quickly so that you understand the gravity or seriousness of this situation.

The 2000 fire season was kind of a benchmark. It was considered to be the worst fire season in 50 years. Two years ago we burnt nearly 8½ million acres from wildfire in this country. That is more than twice the 10-year annual average of acres that are destroyed by fire. But I would like the Committee and the Chair to be aware of the situation this year. This year to date, compared to 2000, we have burned twice as many acres as the prior worst fire season. In the year 2000, on June 27, we had 81 crews, 144 fire engines and 83 helicopters on the fire line. This year on June 27 we had 327 crews, 775 engines and 116 helicopters. The long-term outlook, because of drought and weather forecasts and heavy fuel load in our forests, does not bode well for the remainder of the fire season.

With that as the backdrop, there is clearly a pressing need for approximately 100 seasonal firefighters, senior firefighters with technical expertise in midlevel supervisory positions. The Australian States and New Zealand have these resources. They are available, and they are willing to help us.

By way of background, the Wildfire Suppression Assistance Act of 1989 affords the Secretary of Interior and Secretary of Agriculture the opportunity to enter into reciprocal agreements with foreign organizations for mutual aid and wildfire protection. So back in 2000, we used that authority. We brought 97 mid- or upper-level fire supervisors from Australia and New Zealand to assist us in the Western United States with our firefighting efforts. Because of these 97 increased—these 97 supervisory personnel, we were able to train and use an additional 1,000 front-line firefighters.

We have very strict safety standards in our fire program, and we are limited in our ability to put more people in harm's way on the front line if they cannot be adequately supervised. After the devastating fires from 2000, where Australia and New Zealand provided fire managers and significant assistance to us, longer-term agreements with Australia and New Zealand were negotiated. Agreements, however, have not been formally implemented due to concerns about liability that foreign firefighting personnel would face for alleged tort claims committed while their personnel were furnishing assistance to the United States while on the fire line.

We believe this proposed legislation would eliminate that risk of tort liability to foreign firefighters and their governments while these personnel were providing assistance to the United States. The legislation would not offer unique or special protection. Those firefighters would be afforded the same liability protection afforded firefighters from States, counties or local fire departments when used on Federal fires to assist the Federal agencies. The legislation would require that foreign countries or states extend the same reciprocal benefit to United States firefighters in the event that the United States provides assistance to them. It would make the laws of the host country the only source of remedies available for acts and omissions in firefighting activities in the host country.

Our National Interagency Fire Center in Boise, Idaho, is continuing to work to secure assistance from Australia and New Zealand to assist our firefighting organizations. The same conditions will apply to the—to Australian and New Zealand firefighters as would apply to any other countries or the military. We can only utilize these personnel when we have exhausted all sources of domestic resources. The proposed legislation would make it possible for the United States to receive very critical and needed mid- and senior-level fire management assistance from the Australian States and from New Zealand for what appears to be a long and arduous wildland fire season.

Mr. Chairman, that concludes my statement. I would be happy to answer questions.

Mr. GEKAS. Yes. Thank you.

[The prepared statement of Mr. Hartzell follows:]

PREPARED STATEMENT OF TIM HARTZELL

Mr. Chairman and Members of the Committee, I am Tim Hartzell, Director of the Office of Wildland Fire Coordination at the U.S. Department of the Interior. I thank you for providing me the opportunity to meet with you to discuss this very important issue.

Let me begin by saying that, because the Department of the Interior and the Department of Agriculture work closely together in wildland fire management, both

agencies believe it is appropriate to use one statement to express our strong desire to see this problem addressed as quickly as possible.

Due to the increasing severity of the wildfires in the Western United States, the National Interagency Fire Center (NIFC) has declared a state of "Preparedness Level 5"—indicating the highest level of risk and the need for the greatest degree of preparedness. With this in mind, there is a pressing need for approximately 100 seasonal firefighters with technical expertise in middle-level supervisory positions. The Australian states and New Zealand have these resources available and are willing to help.

By way of background, under the Wildfire Suppression Assistance Act of 1988, as amended, 42 U.S.C. § 1856m, the Secretary of the Interior and the Secretary of Agriculture are authorized to enter into reciprocal agreements with foreign fire organizations for mutual aid in wildfire protection. After the devastating wildfires of 2000, where Australia and New Zealand provided significant assistance to the United States, longer-term agreements were negotiated with those countries. These agreements have not been implemented, however, due to concerns that the foreign firefighting personnel and their governments would face liability for alleged torts committed while their personnel were furnishing assistance to the United States. The Wildfire Suppression Assistance Act currently provides, at 42 U.S.C. § 1856n(d), that foreign firefighting personnel are not considered employees of the United States when providing firefighting assistance. Thus, foreign firefighting personnel would not have the protections accorded by the Federal Tort Claims Act when providing assistance to the United States.

The proposed legislation would eliminate the risk of tort liability to foreign firefighters and their governments while foreign personnel are providing assistance to the United States by deeming foreign firefighters to be federal employees for the limited purpose of securing them coverage under the Federal Tort Claims Act. It would also require that foreign countries or states extend a reciprocal benefit to United States firefighters in the event the United States provides assistance to them, and it would make the laws of the host country the only source of remedies available for acts and omissions in firefighting activities in the host country. The proposed legislation further provides that neither the firefighter, the sending country, nor any organization associated with the firefighter shall be liable for any action resulting from fighting fires.

NIFC is continuing to work to secure assistance from the Australian and New Zealand government firefighting organizations. The proposed legislation will make it possible for the United States to receive the needed assistance from the Australian states and from New Zealand for the 2002 wildfire season, and beyond.

Mr. Chairman, this concludes my statement and I am happy to answer any questions you might have.

Mr. GEKAS. Mr. Harris, you mentioned that the Justice Department, in effect, substitutes under the aegis of this bill—substitutes the language of this bill for what? That wasn't clear to me.

Mr. HARRIS. When a Federal employee—

Mr. GEKAS. Yes.

Mr. HARRIS [continuing]. Is sued in his or her capacity as a Federal employee, for negligent acts, the Federal Government substitutes itself for the employee so that the suit is not against the individual, it is against the United States. Once that takes place, the provisions of the Federal Tort Claims Act kick into place. An administrative claim first has to be filed by the claimant, and pending the resolution of the administrative claim, then the individual can pursue perhaps suit against the United States. But then all of the exceptions to the FTCA also apply.

Mr. GEKAS. But this would apply whether or not there is a reciprocity agreement; is that correct?

Mr. HARRIS. As to foreign firefighters, this bill would ensure that FTCA coverage does apply to foreign firefighters. As it stands today, that is not the case.

Mr. GEKAS. Yes, that is what I mean. Right now that wouldn't occur under the—well, actually, there are no reciprocal agreements in place, are there? Mr. Hartzell? The agreements that you were

talking about, it seemed to me, were prospective. In other words, the New Zealand and Australian help came to us even before an agreement could have been reached; is that correct?

Mr. HARTZELL. We used the emergency provisions of the Wildfire Suppression Assistance Act of 1988. We have entered into what we call a wildfire arrangement with Australia and New Zealand where we have a document that lays out the responsibilities of the participants both from the United States should we assist Australia and New Zealand and Australian and New Zealand firefighters should they assist us. The importance of that agreement is to normalize a longstanding and formal arrangement that we have had with these countries for some time where we share expertise on training and equipment, and we have been able to train and learn from each other.

Now, the wildfire—that wildfire arrangement that formalizes our relationship cannot be signed by all of the Australian States until there is some arrangement made to protect them from tort liability.

Mr. GEKAS. Yes. So the passage of this bill will facilitate what you are describing as the long-term arrangement.

Mr. HARTZELL. Mr. Chairman, if this bill is passed, all of the Australian States will formally sign the agreement on how they would agree to operate, the rules of conduct when assisting the United States, and we would sign the agreement to reciprocate on the roles and responsibilities and conduct that we would act under in providing fire assistance should we be called on in Australia or New Zealand.

Mr. GEKAS. One thing that puzzles me, maybe I am missing a piece of logic here. The whole thrust of this is to consider our foreign friends who come into our country to help in these mammoth fires—to consider them as Federal employees for the time being of their service; is that correct?

Mr. HARRIS. Correct.

Mr. GEKAS. Question: If a volunteer fire company becomes involved, our own domestic fire companies become involved in a fire, and not one of them is a paid firefighter, we don't consider them or treat them as Federal employees, do we? Or do we? It seems to me that you should.

Mr. HARRIS. Actually, we, in certain circumstances, do extend coverage to firefighters under the scenario you just described, under the borrowed servant doctrine where we get volunteers from States to help in fighting or suppressing fires in Federal lands.

Mr. GEKAS. So what we are doing is extending that standard to the foreign firefighters that come in as we already do so in the domestic view of the firefighter on duty; is that correct?

Mr. HARRIS. That is roughly correct. When volunteers from a fire company in Pennsylvania, for example, would pitch in to help fight a fire, in some cases, any injuries to the person, the firefighter himself might be covered under the State's laws for Workers' Compensation. For example, where the firefighter is alleged to have caused some sort of negligence, the United States Government would be liable only to the extent that an individual in that particular State where the negligence occurs would also be held liable.

So this coverage—the advantages of this bill were it to pass would be to make sure that foreign firefighters get the same protec-

tions that firefighters get here in the United States in terms of processes and fairness that are extended under the Federal Tort Claims Act. So it is not any special grant of privileges that we are extending to foreign firefighters in this legislation.

Mr. GEKAS. Do our New Zealand and Australian friends know about this pending legislation or what we intend to try to do, or it doesn't matter at the moment?

Mr. HARTZELL. Mr. Chairman, I don't know if they are aware of the legislation. I mean, they know that we are trying to resolve the issue.

Mr. GEKAS. Mr. Truesdale is nodding his head. Either he was hit by a bug or—you may come up and answer, Mr. Truesdale.

Mr. TRUESDALE. Thank you, Mr. Chairman.

They do. They are aware of it. Their attorneys have looked at it for adequacy for Australian law. I don't know that New Zealand attorneys or solicitors have looked at it, but the attorney that negotiated the original arrangement with them that we used is aware of it and feels that it would be adequate coverage for Australian firefighters.

Mr. GEKAS. Would you state your name and title so that the stenographer can have a full description of Mr. Truesdale?

Mr. TRUESDALE. Sure. My apologies. I am Denny Truesdale. I am an assistant to the Deputy Chief for State and Private Forestry for the Forest Service.

Mr. GEKAS. Well, the Chair is satisfied that we have prepared and entered into the record a full description of what the bill intends, and we have taken full notice of the help that Australian and New Zealand in these circumstances have offered in the past. I want the record to show that the Members of this Committee, by virtue of acting on this bill, will also convey their gratitude to our foreign firefighters for participating in helping solve some of our forests problems.

With that, I wish to express my gratitude to the witnesses and to the staff of the Committee, and I bring this hearing to a close expressing that gratitude. The Committee stands adjourned.

[Whereupon, at 11:30 a.m., the Subcommittee was adjourned.]

