Agenda Item #5

Date of Meeting: May 16-17, 1958

Date of Memo: May 12, 1958

Memorandum No. 7

Subject: Study #52(L) - Sovereign Immunity - preliminary report

Professor Van Alstyne, who is going to attend the May meeting to discuss the further work which we would like to have him do on Study #37(L) (Claims Statutes), tells me that he would like to take a few minutes for a preliminary discussion of some of the problems which he has encountered in the work that he has thus far done on the sovereign immunity study. Attached is a copy of a memorandum which he has sent me to be distributed to the members of the Commission as background material for this discussion.

Respectfully submitted,

John R. McDonough, Jr.
Executive Secretary

JRM:imh

Date of Meeting: May 16-17, 1958

Date of Memo: May 9, 1958

MEMORANDUM

TO: California Law Revision Commission

FROM: Arvo Van Alstyne

Re: Preliminary Report on Study of Governmental Immunity.

1. Although the topic relates to "Governmental Immunity", I have concluded that it would be impracticable to attempt to analyze the rules governing immunity from tort liability without first making a survey of the existing constitutional and statutory treatment of the subject of governmental liability. Accordingly, it is my present intention in the report to discuss the following statutory topics:

(a.) Review of statutory provisions imposing liability for tortious conduct upon public entities; together with a review of the doctrine of inverse condemnation under Section 14 of Article I of the Constitution, and the availability of an inverse condemnation action as a remedy for torts. My research to date indicates that there are in excess of 50 separate statutory provisions which either expressly or by implication impose, and otherwise affect, governmental tort liability.

(b) Appraisal of the extent to which the existing statutes imposing liability might be improved in both

wording and substantive content, in order to more fully carry out the general legislative objective of such statutes. It is believed that some useful and relatively non-controversial encroachments upon the doctrine of governmental immunity could probably be accomplished, without significant deviations from existing expressions of legislative intent, through such a program of amendment and expansion of existing statutory law.

(c.) The existing statutory pattern with respect to tort liability of public entities lacks uniformity of application to the various levels and forms of governmental entities. For example, the Public Liability Act of 1923 is applicable only to cities, counties and school districts. Certain other statutes imposing liability apply only to specific entities and not to other entities which, in every relevant respect, would appear to be similarly situated from the viewpoint of sound policy. It is believed that significant improvements could be made in the way of bringing greater uniformity into the present statutory pattern. It is proposed that the report appraise the policy considerations involved and submit recommendations in connection with this problem.

(d.) A relatively small number of statutes either expressly declare certain public entities immune from tort liability under specific circumstances or are intended to accomplish the same result indirectly. It is proposed that the

report survey these provisions and the policy justification underlying them.

(e.) A substantial body of statutory law relates to the personal liability of public officers and employees for tortious conduct. Where the doctrine of governmental immunity is inapplicable (e.g. "proprietary" functions may be involved), statutes governing employee liability are relevant to the problem of employer responsibility under the doctrine of respondeat superior. In addition, public entities frequently are charged with the duty or authority to provide legal counsel in defense of actions against their personnel; and often are authorized to insure against personal liability of such personnel at public expense. The latter forms of statutory provisions are also relevant to the general subject of the report, since in effect they tend to shift part of the tort liability of government personnel upon the public treasury in the form of court costs, counsel fees, and insurance premiums. It is thus believed that statutes of this type should be explored and the relationship of such statutes to the general problems of governmental immunity and liability should be evaluated in the report.

(f.) Statutory authority for governmental agencies to insure themselves against tort liability, together with the possible legal consequences of such authorizations and of the securing of insurance thereunder, should be

considered. In view of the fact that one of the most frequently voiced objections to abolition of the doctrine of governmental immunity is based upon the potentially disastrous impact of general tort liability upon the public treasury, the relevance of such insurance provisions (or the lack thereof) is apparent.

2. The volume of case law and of legal periodical literature relating to the common law rules governing immunity and liability of governmental torts in the absence of statute is immense. It is felt that an exhaustive treatment of these materials is not essential to an adequate appraisal of the fundamental policy considerations involved in any proposed legislative alteration of the existing rules. Accordingly, I propose to handle this phase of the report in the following manner:

(a.) Briefly, but thoroughly, to survey the present judicially recognized rules covering immunity and liability of governmental entities at all levels; to collate and appraise the validity of criticisms of the existing rules as found in the judicial decisions and legal periodicals; and to consider various suggestions which have been offered for alternative rules of law.

(b.) To survey the relevant experience of the Federal government under the Federal Tort Claims Act and of governmental entities in states (e.g. New York) in which the doctrine of governmental immunity has been abolished by legislation.

(c.) To present and discuss the various policy considerations relevant to any legislative abolition of the doctrine of immunity together with such factual and legal data pertinent to the weighing of such considerations as may be available.

3. My over-all conclusions, upon the basis of extensive reading in the field and some (but by no means completed) specific research, are tending to take the following general shape:

(a.) I am inclined to believe that a number of specific amendments and modifications of existing statutes could feasibly be recommended for immediate legislation. In most cases I conceive that the legislative changes to which I refer would be relatively minor in the light of the total problem, but would represent a useful and fairly substantial starting point. Particularly in areas with respect to which the legislature has already imposed partial liability or liability upon a limited number of public entities, and in which the administrative experience of public entities operating thereunder has not disclosed any pressing need for a lessening of the burdens of liability, it would seem that arguments in favor of delay before taking legislative action are at a minimum.

(b.) I tend to be somewhat apprehensive as to the advisability of any proposal for general abolition of the doctrine of governmental immunity. The different types of activities of governmental agencies which might give rise to tort claims in the event the immunity were to be done away with often

present quite different problems and entail significantly different policy considerations. I am gradually being persuaded that specific areas of potential liability should be thoroughly examined and specific legislative changes to enlarge upon the liability of public agencies should be supported by adequate factual information and should be tailored to fit the needs of each specific situation. For example, the extent to which public agencies should be held liable for malpractice on the part of doctors in public hospitals may entail quite different policy considerations from the problem of the liability (if any) which should be attached to the failure of a governmental entity to maintain adequate water pressure to provide effective fire-fighting service. Similarly, policy considerations relating to public liability for intentional torts of public personnel in the course and scope of their employment would seem to be somewhat different from those which relate to negligent torts.

(c.) I am further inclined to believe that the available factual information as to the potential economic and administrative impact of a general abolition of immunity is wholly insufficient to support a well-considered judgment upon the over-all policy problems. Likewise, even with respect to specific and narrow phases of the problem, the available literature is seldom of a factual nature. Accordingly, it would seem that a thorough, adequately financed, and carefully prepared comprehensive, <u>factual</u>

and statistical study of current torts experience of California public entities should be conducted, perhaps by a legislative committee, before any major changes in the existing rule of immunity are recommended for legislative action. Such a study has been in progress in New York state for several years and although the final results have not yet been published, the preliminary experience in that state (upon which I propose to elaborate in my report) appears to justify the need for such a full-scale factual investigation here. As the results of such a study become available, a series of specific legislative proposals could be formulated upon a sound factual basis. A shift from broad scale immunity to broad scale liability (retaining only certain narrow and fully justifiable areas of immunity) would thus take place gradually.

Incidentally, it may well be that a gradual approach along these lines would be politically more acceptable and would, therefore, accomplish more in the way of general improvement in the law over the long run than would any inadequately documented crash program.