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OLC 78-836/4
26 July 1978

MEMORANDUM FOR THE RECORD

SUBJECT: Federal Tort Claims Act Amendments

The Metzenbaum version (S. 3314) of the Federal Tort Claims Act which supplants S. 2117 calls for the substitution of the U.S. Government as defendant for employees of the Government who commit torts within the scope of their duties or under the color of Federal law.

The bill is not, in total, reprehensible; and it is my opinion that we can, if necessary, live with it. The following comments outline the bill's most significant provisions which may have an effect on the Agency.

SUBSTITUTION OF GOVERNMENT FOR EMPLOYEE

1. Attorney's fees plus "other litigation costs reasonably incurred" are both provided for in S. 3314 (Sec. 3(b)).

2. Liquidated damages are provided for when violation (of Constitutional rights) complained of is greater than one day in duration (Sec. 3(b)).

3. Class actions are provided for in the bill (Sec. 4(b)).

4. The remedy against the Government is exclusive (Sec. 6(b)(1)). Presidential appointees and former employees are omitted from foregoing--i.e., they can be sued. FSO's are not, for purposes of this bill, defined as Presidential appointees.

5. The Attorney General certifies (or denies) that charged employee was acting within the scope of employment or under color of the law. Certification is conclusive (Sec. 6(d)(2)).

6. Foreign Constitutional Torts are included as those for which the Government will be substituted as defendant vice offending employee (Sec. 9(a)).

7. Bill is applicable not only to suits instituted after enactment, but also to those pending on date of enactment. (Decision to substitute Government for employee on those suits already pending is in discretion of plaintiff) (Sec. 12).

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AGENCY DISCIPLINARY MEASURES

1. Successful plaintiff may request an administrative inquiry within 60 days after obtaining a monetary recovery (either through litigation or settlement) (Sec. 7802(a)).

2. If action is brought under 28 U.S.C. 1346(b) and it is an alleged Constitutional Tort, plaintiff may request an inquiry merely after filing suit (i.e., unlike 1 supra no prior judgment required where Constitutional Tort is involved) (Sec. 7802(b)).

3. Inquiry, to be conducted by head of agency or designee, is mandatory. Agency head may terminate inquiry if he finds allegation(s) unsubstantiated (Sec. 7803(b)).

4. If evidence required to make a determination re validity of accusation, a hearing will be held. Need: genuine, material and substantial dispute of fact (Sec. 7803(b)).

a. Person requesting inquiry may appear and give testimony.

b. Right of plaintiff to cross-examine, call witnesses or request documents is in sole and unreviewable discretion of agency head.

c. Head of agency or designee determines need or lack thereof for disciplinary action against charged employee.

5. Review of Administrative Hearing (Sec. 7803(c))

a. Plaintiff may request review of agency decision by appropriate body (IOB for CIA).

b. Reviewing body may substitute its judgment for that of the Agency Head.

c. Body may give individual the right to examine and cross-examine witnesses. This discretion of the body is sole and unreviewable.

6. District Court (Federal) Review (Sec. 7803(d)).

a. Person may petition for District Court Review within 60 days of the decision of the Administrative Review board.

b. Court may deny petition; affirm decision; or remand for further proceedings.

c. Review must be held in camera for matters protected from disclosure by statute or Executive Order relating to national security, national defense or foreign affairs, or in the court's own discretion if it determines in camera review is necessary.

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7. a. Administrative Review to be conducted for CIA by body designated by President (presumably IOB) (Sec. 7805(e)).

b. Body shall propose regulations for review to which head of Agency shall comply.

c. Regulations shall be submitted for public comment and be subject to judicial review (per the Admin. Proc. Act).

I will be happy to discuss with you the foregoing at your leisure either this afternoon or tomorrow. We should move quickly, if we are to move, as the bill may go before the full Committee tomorrow morning.

Assistant Legislative Counsel

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