



U.S. Department of Justice

88-01868

Civil Division

Office of the Assistant Attorney General

Washington, D.C. 20530

MAY 9 1988

Mr. Russell J. Bremmer
General Counsel
Central Intelligence Agency
Washington, D.C. 20505

Dear Mr. Bremmer:

Earlier this year, the Supreme Court issued its decision in Westfall v. Erwin, 56 U.S.L.W. 4087 (U.S. Jan. 13, 1988) (No. 86-714), which dramatically changed the law concerning the extent to which federal employees may be personally liable for common law torts arising from the performance of their official duties. For the past three decades, since the Court's ruling in Barr v. Matteo, 360 U.S. 564 (1959), federal employees largely had been immune from such liability.

Unfortunately, the Supreme Court's opinion in Westfall has fundamentally changed the law as to common law tort liability. Westfall requires that in order for a federal employee acting within the scope of his employment to be immune from common law liability, the alleged tortious act must have involved the exercise of governmental discretion.

The Court offered little guidance as to what constitutes such governmental discretion, other than to note that "minimal discretion" is insufficient. It seems likely, however, that few federal employees can be assured categorically that their official conduct will not expose them to personal liability. As a result, we now are faced with a potentially serious crisis in individual capacity lawsuits against federal employees.

The Court apparently appreciated the difficulties its opinion would generate for federal rank-and-file employees, in that it invited Congress to consider the issue and provide an appropriate legislative solution. Enclosed for your information is H.R. 4358, the "Federal Employees Liability Reform and Tort Compensation Act of 1988" which has been introduced in the House of Representatives by Representatives Frank, Fish, Shaw and Wolf. I believe it is a fair and equitable response both to the Court's invitation for congressional review and to the underlying question of who should bear responsibility for common law torts committed by federal employees within the scope of their employment.

In brief, H.R. 4358 would make a suit against the United States under the Federal Tort Claims Act (FTCA) the exclusive remedy for persons injured by official conduct that would otherwise constitute a common law tort. This would reimpose what effectively had been the state of the law prior to Westfall as to common law tort allegations. The Act simply would ensure that persons injured by governmental negligence would receive compensation from the Judgment Fund, and not from the personal assets of federal employees.

This is as it should be. First, it reflects the fact that the alleged tortious conduct ultimately is official conduct. As such, if anyone is to be liable, it should be the federal government -- not the individual employee tortfeasor. Equally important is the fact that only the rare civil servant will have the financial wherewithal to satisfy a substantial civil judgment or settlement. And, as you know, exclusive remedy provisions protecting federal drivers (28 U.S.C. § 2679(b)), and physicians (10 U.S.C. § 1089; 22 U.S.C. § 2702; 38 U.S.C. § 4116; 42 U.S.C. §§ 233, 2458a), have been in place and operating smoothly and without controversy for years. H.R. 4358 would extend the protection afforded by these provisions to all federal employees.

Although an explanation of H.R. 4358 is enclosed, several points require emphasis. The exclusive remedy provided by H.R. 4358 would apply to all traditional common law torts, regardless that they may have been codified in state statutes. In other words, the bill covers all causes of action that permit recovery for acts of negligence, whether they are predicated upon case law or state statutes. An example of the latter is a cause of action for wrongful death, which predominantly is established by state statute.

H.R. 4358 does not, however, apply to causes of action which are based upon alleged violations of constitutional rights, the so-called Bivens torts. We continue to believe that Bivens cases should be pursued against the United States under the FTCA, and not against the involved employees. Nevertheless, when this proposal has been pursued in the past, it has met with substantial resistance. While we continue to believe that Bivens remedial legislation is essential, given the controversial nature of such legislation, we specifically have excluded constitutional torts from the coverage of H.R. 4358.

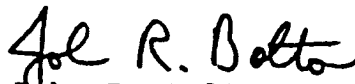
H.R. 4358 will have the highest priority in the remaining months of the Administration. It is a "good government" bill that carefully balances the need to compensate those injured by negligent conduct with the need to protect rank-and-file federal employees so as to allow them to go about their business concerned only with the public's best interest, and not preoccupied with fear for their own financial well-being.

On April 14, a hearing was held before the House Subcommittee on Administrative Law and Governmental Relations. The hearing went very well, and I am somewhat optimistic about passage.

Because Members of Congress are likely to request your agency's views on the merits for this legislation, and the impact of Westfall upon your employees, you may wish to alert your legislative office and other appropriate officials within your agency to the existence of H.R. 4358, and the urgent need for its enactment. We certainly encourage you to take any opportunity to explain the advantages of such legislation for rank-and-file federal employees, including those of your agency. I am sure that your views will carry great weight.

Please feel free to contact me if you have any questions or comments concerning the proposal.

Sincerely yours,



John R. Bolton
Assistant Attorney General

Enclosures