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1 May 1979

MEMORANDUM FOR: Frederick P. Hitz
Legislative Counsel

STAT FROM:
Assistant Legislative Counsel

SUBJECT: Federal Tort Claims Act Amendments (FTCAA)

1. The undersigned, in a long conversation with attorneys at the FBI Office of Congressional Affairs, learned the following regarding developments with the FTCAA. (U/IUO)

2. Late last week a meeting was held with the following persons in attendance:

Patricia Wald, Assistant Attorney General
Representatives of the FBI
Keith Raffell, Senate Select Committee on Intelligence
Nells Atkerson, General Counsel, Senate Judiciary
Subcommittee on the Constitution
Jessica Josephson, Professional Staff Member,
Senate Judiciary Subcommittee on the Constitution

3. The general feeling that FBI officials gained from the meeting was that the FTCAA was in trouble and was, in effect, being held hostage to the Charters issue. That is, it was felt, that to get one all involved would have to accept the other. This was particularly relevant in light of the recent statement of Attorney General Griffin Bell which demonstrated less than strong support for an FBI Charter. (U/IUO)

4. Not surprisingly, those present from the Congressional side stated that the bill was still not entirely to their liking. In that regard they made the following points:

-- The review to be conducted by the Merit System Protection Board (in the case of CIA it would presumably be the IOB) ought to be a de novo review rather than one based on the record utilizing a reasonableness standard

DOJ Review Completed

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-- The Agency disciplinary proceeding ought to be automatic upon judgment or settlement of a claim.

-- Agencies conducting disciplinary proceedings ought to be required, by the terms of the bill, to invite citizen participation (aggrieved parties) in any disciplinary proceedings held. At present the invitation or lack thereof is at the sole and unreviewable discretion of the Agency head.

-- The structure of Agency disciplinary proceedings should be strictly specified in the terms of the bill, rather than leaving it up to individual agencies' internal regulations, as is the case in the current rendition of the FTCAA.

-- Sanctions available against former employees and Presidential appointees (1/12 of highest yearly salary) is arbitrary and insufficient.

-- In the case of issuance of public reports regarding the outcome of disciplinary proceedings, the same should be automatically referred to the Chairman of the Senate Judiciary Committee for investigation of possible impeachment proceedings (Presidential appointees).

-- The bill's current damage limitations of \$15,000 and one million dollars for continuing and class action Constitutional torts respectively is unrealistically low.

5. As to the foregoing issues the FBI has initially, pending further examination, taken the following positions:

-- The review ought not be de novo. To make it so would unnecessarily take away from the authority of the Agency head and would moreover encourage appeal from the Agency determination, whether reasonable or not.

-- FBI agreed that automatic disciplinary proceedings were acceptable as this is the case with current complaints.

-- FBI, for the same reasons that we argue, strongly disagrees with automatic citizen participation.

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-- FBI disagrees that the structure for the Agency disciplinary proceedings ought to be in the Act itself as this would be needless Congressional meddling in internal Agency affairs and that each Agency is different and it would be impossible to formulate a proceeding that would meet everyone's needs adequately.

-- The sanctions are not arbitrary but are instead sensible as they are tied to what measures are available against current employees.

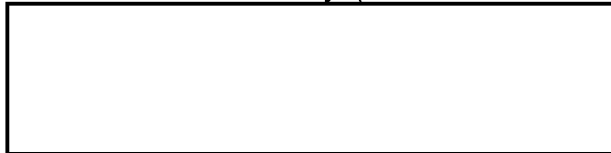
-- FBI does not care if the public reports are forwarded to the Chairman of the Judiciary Committee or not.

-- FBI argued that rather than being unrealistically low, the damages for continuing and class action torts are somewhat too high.

6. In sum, it appears that this long awaited (at least as far as FBI is concerned) bill is again in trouble on the Hill and that demands by Congress are reaching the point that the balance in favor of the bill, if it was ever so, is being tilted dangerously in the other direction. (U/IUO)

7. Other recent developments include the fact that the American Bar Association has reaffirmed its pledge to support the bill; the Office of Management and Finance within Justice is compiling a cost analysis and various Bar associations are undertaking studies regarding the affect of the bill on their membership. (U/IUO)

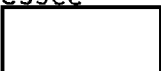

8. As regards the CIA position, attorneys of OGC and the undersigned will be meeting in the very near future to discuss the same. (U/IUO)



Assistant Legislative Counsel

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