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CENTRAL INTELLIGENCE AGENCY

WASHINGTON, D.C. 20505

Telle Federal Tort
Claims Act

General Counsel

OGC 81-07894

15 September 1981

Mr. James M. Frey
Assistant Director for
Legislative Reference
Office of Management and Budget
Washington, D.C. 20503

Dear Mr. Frey:

This is in response to your Legislative Referral Memorandum dated 3 September 1981 requesting the views of the Central Intelligence Agency on a proposed Office of Personnel Management letter to House Judiciary Committee Chairman Peter W. Rodino, Jr., on H.R. 24, the Federal Tort Claims Act Amendments. Although the Central Intelligence Agency fully supports the goals of H.R. 24 as does OPM, we strongly object to portions of OPM's proposed letter.

OPM recommends modification of H.R. 24 to provide that, when a constitutional tort claim against the United States based on an employee's conduct arising in a personnel context results in a settlement or judgment against the United States, the Attorney General must forward the matter to the Merit Systems Protection Board's Special Counsel for investigative and disciplinary action with respect to the federal employee involved. OPM proposes to add this requirement regarding the MSPB Special Counsel to the requirement already contained in the Bill that, when a constitutional tort claim results in a settlement or judgment, the Attorney General must forward the matter to the head of the agency whose employee was involved for such further administrative or disciplinary action as may be appropriate. Since many potential constitutional tort claims arising in a personnel context, such as those which might arise from employee terminations by the Director of Central Intelligence in accordance with section 102(c) of the National Security Act of 1947, as amended, involve personnel actions falling wholly outside the MSPB Special Counsel's jurisdiction, the OPM modification might be misinterpreted to expand the Special Counsel's authority. Furthermore, the OPM modification strikes at the heart of the solution reached during the last Congress to the problems posed by the cumbersome disciplinary proceedings contained in previous versions of this legislation. The 96th Congress predecessor to H.R. 24 would have established investigative and disciplinary entities external to agencies to examine the conduct of their personnel involved in constitutional tort claims, and would have provided for judicial review of

such examinations. The cumbersome disciplinary arrangements prevented unified Executive Branch support for the legislation, which died in subcommittee at the end of the 96th Congress. As a result of extensive negotiation among Executive Branch representatives and the staffs of the House Judiciary Committee and the House Post Office and Civil Service Committee, H.R. 24 contains a streamlined disciplinary provision requiring the Attorney General to forward cases settled or adjudged against the United States to the head of the agency whose employee was involved for appropriate disciplinary action. The OPM suggested modification would reopen the issue of disciplinary provisions with very little, if any, potential benefit, at the quite possible cost of deferring enactment of this much needed legislation for yet another Congress. For these reasons, the Central Intelligence Agency must object strongly to OPM's proposal of the modification regarding the MSPB Special Counsel.

With respect to OPM's descriptions of the need for legislation due to the debilitating effects on personnel management of constitutional tort suits and OPM's recommendation that the United States be permitted to avail itself of its employee's good faith in defending a constitutional tort claim, the Central Intelligence Agency completely agrees with OPM. We note, however, that the Justice Department has prepared for the House Judiciary Committee a comprehensive report on H.R. 24, currently undergoing interagency coordination, to which OPM may wish to make some reference in its letter.

We appreciate the opportunity to provide our views on the OPM proposed letter.

Sincerely,

[Redacted Signature]

Stanley Sporkin

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