OFFIC OF MANAGEMENT AND BUDGET
WASHINGTON, D.C. 20503

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September 3, 1981

LEGISLATIVE REFERRAL MEMORANDUM

TO: Legislative Liaison Officer

Department of Justice
Central Intelligence Agency
Department of Health and Human Services
Department of Education
Department of State

SUBJECT: Proposed OPM report on H.R. 24, a bill to amend title 28 of the United States Code with respect to tort actions filed against the United States and federal employees

The Office of Management and Budget requests the views of your agency on the above subject before advising on its relationship to the program of the President, in accordance with OMB Circular A-19.

A response to this request for your views is needed no later than Friday, September 18, 1981. ORAL COMMENTS ACCEPTABLE

Questions should be referred to Maurice White (395-3856), the legislative analyst in this office.

Robert E. Carlstrom for
Assistant Director for
Legislative Reference

Enclosures

cc: Mullinix Horowitz Schrieber

DRAFT

United States
Office of Personnel Management

Washington, D.C. 20415

In Reply Refer To

Your Reference

Honorable Peter W. Rodino, Jr.
Chairman
Committee on the Judiciary
U.S. House of Representatives
Washington, D.C. 20515

Dear Mr. Rodino:

Thank you for the opportunity to express the United States Office of Personnel Management's (OPM's) views on H.R. 24, a bill to amend title 28 of the United States Code with respect to tort actions filed against the United States and federal employees.

We strongly support the purpose of H.R. 24, i.e., to resolve the serious problems caused by lawsuits seeking financial recovery directly from federal employees rather than from the United States. We also strongly support the method adopted for resolving these problems, i.e., to authorize the substitution of the United States as defendant when a federal employee is sued personally for the alleged commission of a tort while performing his or her duties. We do, however, believe that a couple of modifications to H.R. 24 are warranted. Our reasons for supporting this kind of legislation as well as our suggested changes are set out below.

Although H.R. 24 would apply to all federal employees who are sued in their personal capacities for actions that are taken within the scope of their office or employment, this legislation is particularly important to those of us who are concerned with personnel management in the federal government. Recently, there has been a significant increase in the number of individual liability lawsuits against supervisors and managers based on employment decisions affecting their subordinates. Court decisions indicate that federal supervisors may be personally liable for damages for recommending the removal of a subordinate if it is alleged that the recommendation to remove was motivated by employee statements that are protected by the First Amendment. Harper v. Blumenthal, 478 F. Supp. 176 (D.D.C. 1979). Supervisors and managers also may be sued if they are alleged to have taken personnel actions without complying with necessary due process

CON 114-24-3
January 1980

protections. Sonntag v. Dooley , 650 F.2d 904 (7th Cir. 1981); Doe v. Civil Service Commission, 483 F. Supp. 539 (S.D. N.Y. 1980).

If these allegations are made, an official may face not only the threat of a judgment payable out of his own personal funds, but also the possibility of legal fees and even the loss of credit. We believe that federal supervisors and managers who are faced with these threats merely for making personnel decisions in the course of performing their daily functions may simply refuse to make these necessary decisions.

It is difficult enough for managers to take appropriate personnel actions against employees without the threat of personal liability suits. When a federal manager takes an adverse action against an employee, he or she may have to defend that action in an Equal Employment Opportunity proceeding, a negotiated grievance proceeding, or a proceeding before the Special Counsel or the Merit Systems Protection Board. The additional pressure of a personal liability lawsuit without any strong countervailing pressure to take personnel actions (like a bottom-line profit measure) diminishes the likelihood of managers making hard personnel choices. Consequently, employees who are inefficient, incompetent, or who engage in misconduct are more likely to remain on the federal payroll, and achieving the goal of a more efficient, less costly government becomes more difficult. Legislation such as H.R. 24, which would limit personal liability suits against federal officials, would help to alleviate this problem. At the same time, the constitutional rights of federal employees would still be protected either by a proceeding under the Civil Service Reform Act of 1978 against the responsible agency or under the Federal Tort Claims Act against the United States.

We do, however, propose two changes to H.R. 24. First, H.R. 24 waives, for the United States, the qualified immunity ("good faith") defense currently available to federal employees personally sued for constitutional torts. We strongly believe that this defense should be retained for the United States.

It is our position that the elimination of the "good faith" defense would simply be unfair to the employee whose actions are questioned and, consequently, that it would be counterproductive to sound management principles. Although the individual employee would not be the named defendant in these lawsuits, it is still his or her actions which are being challenged. No one wishes to be found guilty of unconstitutional acts and suffer the resultant stigma. Yet, if the "good faith" defense is waived, even those employees who

acted innocently could appear guilty of wrongdoing. Thus, we believe that the United States should be able to assert the "good faith" defense on behalf of an employee who in good faith performs his or her duties in order to protect the employee's name and reputation.

Payment upon a constitutional tort claim under H.R. 24 also carries with it the possibility of disciplinary action against the federal employee who was the subject of the claim. The "good faith" defense should be retained as a necessary protection for an employee who acted in good faith upon reasonable grounds.

We also believe that the "good faith" defense should be retained from a fiscal point of view. This is because, without the defense, it would be easier for a claimant to prevail. Of course, this would result in more of the government's dollars being paid to satisfy these claims.

Finally, we oppose the elimination of the "good faith" defense as a matter of public policy. Without this defense, the likelihood that plaintiffs would succeed and the government found liable would increase. As a result, the government would increasingly appear in the wrong. This could further erode the government's already tarnished image in the public's eye.

Second, as noted above, payment upon a constitutional tort claim under H.R. 24 carries with it the possibility of disciplinary action against the federal employee who was the subject of the claim. More specifically, if a judgment is entered against the United States or if a settlement agreement is entered, the Attorney General must forward the matter to the employing agency for administrative investigation or disciplinary action, as may be appropriate. These disciplinary provisions are an important part of the H.R. 24. Potential disciplinary action will serve as an effective deterrent of unconstitutional acts. However, we propose that when a constitutional tort action arises in the personnel context, the Attorney General should be required to refer the matter to the Office of the Special Counsel of the Merit Systems Protection Board as well as to the head of the agency.

We believe it appropriate that the Special Counsel's office investigate matters of this type. The Office of the Special Counsel was established by the Civil Service Reform Act of 1978 to protect the merit system. It has the power to investigate allegations of prohibited personnel practices

including any violation of an employee's constitutional rights. The Special Counsel may request that the Merit Systems Protection Board order corrective action, which may include reinstatement and back pay, as well as other measures required to make the employee whole. Moreover, the Special Counsel has the authority to initiate disciplinary proceedings against any supervisor or manager who is responsible for taking a prohibited personnel action. Thus, if abuses occur, that office should have the opportunity to investigate and seek corrective action.

Therefore, as previously stated, the Office of Personnel Management strongly supports the goals of H.R. 24. As applied in the federal personnel area, this type of legislation will enhance the government's ability to function efficiently. Additionally, such legislation will not dilute the constitutional rights of federal employees. If amended as suggested above, the Office of Personnel Management would strongly recommend the enactment of H.R. 24.

The Office of Management and Budget has advised us that, from the standpoint of the Administration's program, there is no objection to the submission of this report.

Sincerely,

Donald J. Devine
Director