

H14358

5 May 1988
OCA 88-1432

MEMORANDUM FOR THE RECORD

SUBJECT: Federal Employees Liability Reform and Tort
Compensation Act of 1988, H.R. 4358

1. On 5 May 1988, I spoke with Janet Potts, counsel on the Administrative Law Subcommittee of the House Judiciary Committee, with respect to changing the language "common law tort" to "state law tort" in the findings and purposes section of the above-captioned bill. I had informed her previously that the Agency believed this change would bring the bill more in line with the Westfall v. Erwin decision and clarify the scope of the law. I also told her that I thought the Department of Justice (DOJ) was on board with such a change in general, but perhaps had not placed it in the bill because of time constraints. She stated that she had been trying to reach DOJ to discuss the change, but had been unsuccessful.

2. I then telephoned Faith Burton of DOJ to discuss the proposed change with her. She said that DOJ would not agree to it because it may broaden the scope of the law to cover strange statutory torts. She also expressed her dissatisfaction with our having dealt directly with the Judiciary subcommittee without first clearing it with them. I told her I thought they had said they would agree to this change at a previous meeting and, because of time constraints, I had dealt directly with Ms. Potts after the subcommittee markup. I further explained that the Agency was not trying to get ahead of DOJ on this issue and that if we were I would not have telephoned her to check on DOJ's agreement with the change. I apologized if this caused a problem and said I would tell Ms. Potts that we were no longer pursuing the change. Ms. Burton continued to show concern that this may become a matter that would place the Administration in a bad light. I told her I did not think that was the case at all.

3. I then spoke with Ms. Potts to tell her that, since this was not an intelligence issue per se, although the Agency may in all likelihood have more employees sued than most other agencies because of the nature of its work and because of public perceptions, we were not going to pursue this change. I explained that there was some misunderstanding with DOJ about this. She seemed satisfied with the explanation of DOJ's fear of broadening the scope of liability and said she would speak with Ms. Burton.

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Legislation Division
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100TH CONGRESS
2D SESSION

H. R. 4358

To amend title 28, United States Code, to provide for an exclusive remedy against the United States for suits based upon certain negligent or wrongful acts or omissions of United States employees committed within the scope of their employment, and for other purposes.

IN THE HOUSE OF REPRESENTATIVES

APRIL 12, 1988

Mr. FRANK (for himself, Mr. FISH, Mr. SHAW, and Mr. WOLF) introduced the following bill; which was referred to the Committee on the Judiciary

A BILL

To amend title 28, United States Code, to provide for an exclusive remedy against the United States for suits based upon certain negligent or wrongful acts or omissions of United States employees committed within the scope of their employment, and for other purposes.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*

3 SECTION 1. SHORT TITLE.

4 This Act may be cited as the "Federal Employees
5 Liability Reform and Tort Compensation Act of 1988".

1 SEC. 2. FINDINGS AND PURPOSES.

2 (a) FINDINGS.—The Congress finds and declares the
3 following:

4 (1) For more than 40 years the Federal Tort
5 Claims Act has been the legal mechanism for compen-
6 sating persons injured by negligent or wrongful acts of
7 Federal employees committed within the scope of their
8 employment.

9 (2) The United States, through the Federal Tort
10 Claims Act, is responsible to injured persons for the
11 common law torts of its employees in the same manner
12 in which the common law historically has recognized
13 the responsibility of an employer for torts committed
14 by its employees within the scope of their employment.

15 (3) Because Federal employees for many years
16 have been protected from personal common law tort li-
17 ability by a broad based immunity, the Federal Tort
18 Claims Act has served as the sole means for compen-
19 sating persons injured by the tortious conduct of
20 Federal employees.

21 (4) The Federal Tort Claims Act has worked well
22 over the past four decades in providing fair and expedi-
23 tious compensation to persons injured by the common
24 law torts of Federal employees.

25 (5) Recent judicial decisions, and particularly the
26 decision of the United States Supreme Court in West-

1 fall v. Erwin, have seriously eroded the common
2 law tort immunity previously available to Federal
3 employees.

4 (6) This erosion of immunity of Federal employees
5 from common law tort liability has created an immedi-
6 ate crisis involving the prospect of personal liability
7 and the threat of protracted personal tort litigation for
8 the entire Federal workforce.

9 (7) The prospect of such liability will seriously un-
10 dermine the morale and wellbeing of Federal employ-
11 ees, impede the ability of agencies to carry out their
12 missions, and diminish the vitality of the Federal Tort
13 Claims Act as the proper remedy for Federal employee
14 torts.

15 (8) In its opinion in Westfall v. Erwin, the Su-
16 preme Court indicated that the Congress is in the best
17 position to determine the extent to which Federal em-
18 ployees should be personally liable for common law
19 torts, and that legislative consideration of this matter
20 would be useful.

21 (9) The Congress, as a result of specific pressing
22 liability concerns, already has made the Federal Tort
23 Claims Act the exclusive remedy for drivers, medical
24 personnel, and military attorneys employed by the
25 United States. These provisions have operated fairly

1 and protected the interests of the Federal Government
2 while providing compensation to persons injured by
3 such employees.

4 (b) PURPOSE.—It is the purpose of this Act to protect
5 Federal employees from personal liability for common law
6 torts committed within the scope of their employment, while
7 providing persons injured by the common law torts of Federal
8 employees with an appropriate remedy against the United
9 States.

10 **SEC. 3. JUDICIAL AND LEGISLATIVE BRANCH EMPLOYEES.**

11 Section 2671 of title 28, United States Code, is amend-
12 ed in the first full paragraph by inserting after “executive
13 departments,” the following: “the judicial and legislative
14 branches,”.

15 **SEC. 4. RETENTION OF DEFENSES.**

16 Section 2674 of title 28, United States Code, is amend-
17 ed by adding at the end of the section the following new
18 paragraph:

19 “The United States shall be entitled to all defenses oth-
20 erwise available to an employee of the United States, includ-
21 ing but not limited to Presidential, judicial, prosecutorial, and
22 legislative immunity and any other immunity recognized by
23 State or Federal laws as well as defenses to which the
24 United States independently is entitled.”.

1 **SEC. 5. EXCLUSIVENESS OF REMEDY.**

2 Section 2679(b) of title 28, United States Code, is
3 amended to read as follows:

4 “(b)(1) The remedy against the United States provided
5 by sections 1346(b) and 2672 of this title for injury or loss of
6 property, or personal injury or death arising or resulting from
7 the negligent or wrongful act or omission of any employee of
8 the Government while acting within the scope of his office or
9 employment is exclusive of any other civil action or proceed-
10 ing by reason of the same subject matter against the
11 employee or his estate whose act or omission gave rise to the
12 claim. Any other civil action or proceeding arising out of or
13 relating to the same subject matter against the employee or
14 his estate is precluded without regard to when the act or
15 omission occurred.

16 “(2) Paragraph (1) does not extend or apply to a cogni-
17 zable action against an employee of the Government for
18 money damages for a violation of the Constitution of the
19 United States.”.

20 **SEC. 6. REPRESENTATION AND REMOVAL.**

21 Section 2679(d) of title 28, United States Code, is
22 amended to read as follows:

23 “(d)(1) Upon certification by the Attorney General that
24 the defendant employee was acting within the scope of his
25 office or employment at the time of the incident out of which
26 the claim arose, any civil action or proceeding heretofore or

1 hereafter commenced upon such claim in a United States dis-
2 trict court shall be deemed an action against the United
3 States under the provisions of this title and all references
4 thereto, and the United States shall be substituted as the
5 party defendant.

6 “(2) Upon certification by the Attorney General that the
7 defendant employee was acting within the scope of his office
8 or employment at the time of the incident out of which the
9 claim arose, any civil action or proceeding commenced upon
10 such claim in a State court shall be removed without bond at
11 any time before trial by the Attorney General to the district
12 court of the United States for the district and division em-
13 bracing the place wherein it is pending. Such action shall be
14 deemed an action brought against the United States under
15 the provisions of this title and all references thereto, and the
16 United States shall be substituted as the party defendant.
17 This certification of the Attorney General shall conclusively
18 establish scope of office or employment for purposes of
19 removal.

20 “(3) Upon certification, any actions subject to paragraph
21 (1) or (2) shall proceed in the same manner as any action
22 against the United States filed pursuant to section 1346(b) of
23 this title and shall be subject to the limitations and exceptions
24 applicable to those actions.

1 “(4) Whenever an action in which the United States is
2 substituted as the party defendant under this subsection is
3 dismissed for failure first to present a claim pursuant to sec-
4 tion 2675(a) of this title, such a claim shall be deemed to be
5 timely presented under section 2401(b) of this title if (A) the
6 claim would have been timely had it been filed on the date
7 the underlying civil action was commenced, and (B) the claim
8 is presented to the appropriate Federal agency within 60
9 days after dismissal of the civil action.”.

10 **SEC. 7. SEVERABILITY.**

11 If any provision of this Act or the amendments made by
12 this Act or the application of the provision to any person or
13 circumstance is held invalid, the remainder of this Act and
14 such amendments and the application of the provision to any
15 other person or circumstance shall not be affected by that
16 invalidation.

17 **SEC. 8. EFFECTIVE DATE.**

18 (a) **GENERAL RULE.**—This Act shall be effective on the
19 date of the enactment of this Act.

20 (b) **APPLICABILITY TO PROCEEDINGS.**—The amend-
21 ments made by this Act shall apply to all claims, civil ac-
22 tions, and proceedings pending on, or filed on or after, the
23 date of the enactment of this Act.

24 (c) **PENDING STATE PROCEEDINGS.**—With respect to
25 any civil action or proceeding pending in a State court to

1 which the amendments made by this Act apply, and as to
2 which the period for removal under section 2679(d) of title
3 28, United States Code, has expired, the Attorney General
4 shall have 60 days after the date of the enactment of this Act
5 during which to seek removal under section 2679(d) of title
6 28, United States Code, as amended by section 6 of this Act.

7 (d) CLAIMS ACCRUING BEFORE ENACTMENT.—With
8 respect to any civil action or proceeding to which the amend-
9 ments made by this Act apply in which the claim accrued
10 before the date of the enactment of this Act, the period
11 during which the claim shall be deemed to be timely present-
12 ed pursuant to section 2679(d)(4) of title 28, United States
13 Code (as amended by section 6 of this Act) shall be that
14 period within which the claim could have been timely filed
15 under applicable State law, but in no event shall such period
16 exceed two years from the date of the enactment of this Act.

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