



COMPTROLLER GENERAL OF THE UNITED STATES
WASHINGTON, D.C. 20548

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B-199413

August 11, 1980

SEN.
The Honorable Claiborne Pell
Chairman, Committee on Rules
and Administration
United States Senate

Dear Mr. Chairman:

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You requested our [views on Senate Resolution 463], 96th Congress. The Resolution sets forth a procedure for disposing of damage claims brought against the United States under the Federal Tort Claims Act which arise as a result of the actions of Members, officers or employees of the Senate.

The resolution, if agreed to, would authorize the Sergeant at Arms of the Senate to "determine, compromise, adjust, and settle" tort claims with the approval of the Committee on Rules and Administration. The Committee could delegate all or part of its authority to the Chairman. Settlements on claims not exceeding \$2,500 would be paid from the Senate's contingent fund on a voucher approved by the Chairman. You state that agreement to the Resolution would constitute the first official action taken by your Committee and by the Senate predicated upon the proposition that the Federal Tort Claims Act is applicable to the legislative branch of the Federal government and therefore you would like our comments.

The Federal Tort Claims Act applies to the legislative branch, in our view. We have held for some time that the Act's legislative history indicates that Congress intended to include all Federal employees within its operation except as enumerated in 28 U.S.C. § 2680. 35 Comp. Gen. 511 (1956). In 26 Comp. Gen. 891 (1947) we held that the Library of Congress, a legislative establishment, was subject to the Act. In B-127343, December 15, 1976, we held that legislative branch employees are covered by the Act. We therefore concluded that Senate employees operating Senate-owned vehicles in the course of employment are protected against claims under the Act. Also two Federal district court cases support the view that the Federal Tort Claims Act applies to the legislative branch. McNamara v. United States, 199 F. Supp. 879 (D.D.C. 1961); see also McCrary v. United States 235 F. Supp. 33 (E.D. Tenn. 1964). We are not aware of any cases which hold otherwise.

Neither the courts nor this Office has determined whether a Member of Congress is covered by the Federal Tort Claims Act. The provisions of 28 U.S.C. § 2671 (1976) define an "employee of the government" to include "officers or employees of any federal agency, * * * and persons

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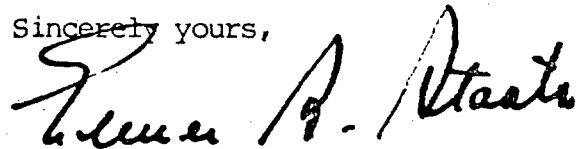
acting on behalf of a federal agency in an official capacity, temporarily or permanently in the service of the United States, whether with or without compensation." Good arguments may be made for either position.

At least in two cases, Federal judges, their clerks, and the clerk of the court have been held not to come within the coverage of this Act, meaning that they may not be sued within their official capacities at least within the specific factual contexts of those cases. Foster v. MacBride, 521 F.2d 1304 (9th Cir. 1975) and Foster v. Bork, 425 F. Supp. 1318 (D.D.C. 1977). But see United States v. Le Patosrel, 571 F.2d 405 (8th Cir. 1978). The MacBride case held that "judges are immune from liability for damages for acts committed within their judicial discretion," while the Bork case held that the definition of federal agency in the § 2671 of the Federal Tort Claims Act does not include the Judicial branch. The Le Patosrel case, on the other hand, pointed out that the Administrative Office of the United States Courts routinely adjudicates claims against judicial branch employees and held that judicial branch employees (including judges) are covered by the Act when performing official but non-judicial functions. We cannot say whether the courts will find a failure to waive the sovereign immunity of the United States as in the MacBride and Bork cases in claims against Senators. If sovereign immunity has not been waived, then it would be improper to make any payments to persons injured by the tortious acts of Members of Congress.

Since the Department of Justice would defend cases challenging your administrative settlement of tort claims, you may wish to seek the Department's views on the question of whether the Department would contend that Senators are not covered by the Act, if it is not addressed in the Department's response to your request for comments on the pending resolution.

We believe that the resolution should include a provision requiring legal review of all proposed compromises, settlements, and awards which exceed \$2,500. This would be in accord with 28 C.F.R. § 14.5, one of the regulations prescribed by the Department of Justice implementing the Federal Tort Claims Act. For example, the Office of Senate Legal Counsel might be able to provide legal review. To accomplish this objective, the first line of S. Res. 463 could be amended by placing a comma after the word "Senate" and adding the phrase "in consultation with the Office of Senate Legal Counsel,".

Sincerely yours,



Comptroller General
of the United States

DIGEST

1. Letter to Chairman of Senate Committee on Rules and Administration commenting on Senate Resolution 463, 96th Congress, authorizing Sergeant at Arms to settle tort claims involving Members, officers, and employees of the Senate. Resolution is predicated upon proposition that Federal Tort Claims Act (Act) is applicable to the legislative branch. GAO view is that Act's legislative history indicates that Congress intended to include all Federal employees, including those in legislative branch, within Act's operation, except as enumerated in 28 U.S.C. 2680.