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Views on Several Issues Concerning the John C. Stennis Center for Public Service Training and Development

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Fred Slabach, Esq. Deputy Director/General Counsel John C. Stennis Center for Public Service Training and Development P.O. Box 6190 Mississippi State, Mississippi 39762-6190

Dear Mr. Slabach:

In your letter of June 23, 1989, you requested our position on several legal questions concerning the John C. Stennis Center for Public Service Training and Development. Our views are discussed in detail below. First, you inquired whether the Federal Tort Claims Act applies to the Center's trustees, officers, and employees. In our opinion the Federal Tort Claims Act does apply. Secondly, you sought our opinion on whether the Center could obtain insurance to protect against loss or damage to its office furnishings and contents. Our position is that the government's self- insurance policy precludes the purchase of such insurance. Thirdly, you asked the permissibility of the Center obtaining surety or performance bonds for the Center's trustees, officers, and employees. We conclude that such bonds may not be obtained. Finally, you requested our opinion on whether the Center may expend funds on meals during training sessions. Recent legislation has now given the Center the required specific authority to pay for trainees' meals.

BACKGROUND

On October 1, 1988, Congress established the John C. Stennis Center for Public Service Training and Development as an entity within the legislative branch of the United States Government. 2 U.S.C. Sec. 1103(a) (1988). The purposes of the Center are to heighten awareness of the importance of public service, to encourage individuals to enter public service, and to provide training for government officials and employees at the local, state and federal level. 2 U.S.C. Sec. 1104(a). The Center is authorized to hire employees, 2 U.S.C. Sec. 1108(1), and a seven member board of trustees supervises the activities of the Center. Six trustees are appointed by the leadership of Congress, and the executive director of the Center serves as an ex officio member of the Board. 2 U.S.C. Sec. 1103(b). Members of the board (except the executive director) serve in their official capacity without pay, but are entitled to reimbursement for travel, subsistence, and other necessary expenses incurred in the performance of their duties. 2 U.S.C. Sec. 1103(d). The executive director and the remainder of the Center staff are compensated from interest on funds appropriated by Congress to the Center's trust fund at the U.S. Treasury. 2 U.S.C. Sec. 1106.

I. WHETHER THE FEDERAL TORT CLAIMS ACT APPLIES TO THE CENTER'S BOARD OF TRUSTEES, OFFICERS, AND EMPLOYEES?

The Federal Tort Claims Act (Act), codified at 28 U.S.C. Sec.(s) 1346, 2671-80 (1988), waives the sovereign immunity of the United States Government, with some exceptions, for damages resulting from the tortious conduct of federal employees acting within the scope of their employment. Under the Act, individuals allegedly harmed by the actions of federal employees can sue the United States for damages, but the suit will be exclusively against the United States, rather than against the employee personally.

The amended section 2671 of the statute defines an "[e]mployee of the government" as including "officers or employees of any federal agency . . . and persons 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." In November 1988, Congress specifically added the "judicial and legislative branches" to the Act's definition of "federal agency" to make explicit that employees of the judicial and legislative branches are included within the coverage of the Act in the same way as employees of the executive branch. H.R. Rep. No. 700, 100th Cong., 1st Sess. 5, reprinted in 1988 U.S. Code Cong. & Ad. News 5945, 5948-9.

Even before passage of the 1988 amendment, this Office as well as several federal courts had held that legislative branch employees fell within the coverage of the Act. "It has been our view that this definition [of employee in section 2671], in light of its legislative history, should be broadly construed as covering all agencies not specifically excluded." 67 Comp.Gen. 142, 144 (1987), citing 35 Comp.Gen. 511 (1956). See also, McNamara v. United States, 199 F. Supp. 879, 880 (D.D.C. 1961).

Since the Center is an entity within the legislative branch, the Act does apply to the Center's officers and employees.

Board members will also be covered since the Act defines "employee of the government" as including "persons 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." Thus, the Center's board members, officers, and employees will be immune from most common law tort actions arising from activities within the scope of their employment. See H.R. Rep. No. 700, 100th Cong., 1st Sess. 5, reprinted in 1988 U.S. Code Cong. & Ad. News 5945, 5948-9. /1/

II. WHETHER THE CENTER MAY OBTAIN INSURANCE TO PROTECT AGAINST LOSS OR DAMAGE TO ITS OFFICE FURNISHINGS AND CONTENTS?

The United States Government has maintained a long-standing policy of self-insuring its own risks of loss. Although not required by law, this policy rests upon the principle that "the magnitude of the Government's resources and the wide dispersion of the types and geographical location of the risks [make] a self-insurance policy generally more advantageous to the Government. . . ." 55 Comp.Gen. 1321, 1323 (1976).

We have recognized exceptions to the self-insurance rule in certain situations. The standards for exception are:

1. the economy sought by self-insurance is defeated,

2. sound business practice indicates that a savings can be effected, or

3. services or benefits not otherwise available can be obtained by purchasing insurance.

B-151876, Apr. 24, 1964. Thus the government's self-insurance policy need not be applied where the reasons for the policy would not be carried out. 55 Comp.Gen. 1321, 1323 (1976). You also point out that the self- insurance policy has not been strictly applied to government corporations. See 55 Comp.Gen. at 1323.

However, none of these exceptions apply to the Center because funding for the Center to cover losses is not limited. /2/ Moreover, we disagree that because it has finite resources, the Center's status is analogous to a government corporation for insurance purposes. Although the initial appropriation to the Center was placed into a trust fund, the interest of which is available for necessary expenditures, Congress may provide additional funds at any time should the need arise. In the Center's authorizing legislation Congress provided that "[t]here are authorized to be appropriated such sums as may be necessary to carry out this chapter." 2 U.S.C. Sec. 1109. Since the government's resources are in fact available to the Center for self-insurance purposes just as they for other agencies and instrumentalities of the government, the Center does not meet the requisite standards to permit it to purchase insurance from private companies. The Center may not obtain insurance to protect against loss or damage to its office furnishings and contents. /3/

III. WHETHER THE CENTER MAY OBTAIN SURETY BONDS FOR ITS BOARD MEMBERS, OFFICERS AND EMPLOYEES?

Section 9302 of title 31, United States Code, bars an agency from requiring or obtaining surety bonds for an officer or employee of the United States Government in carrying out his or her official duties. /4/ For purposes of Title 31, "agency means a department, agency, or instrumentality of the United States Government." 31 U.S.C. Sec. 101 (1988). /5/ Since the Center was created as an entity within the legislative branch of the federal government, the Center is precluded from obtaining surety or performance bonds for its employees, officers, and trustees.

You asked specifically whether members of the board of trustees who also serve as officers of the Center are "employees" for purposes of 31 U.S.C. Sec. 9302, and thus fall within the prohibition. Although 31 U.S.C. Sec. 9301 does not define "employee" or "officer", title 5 of the U.S. Code, "Government Organization and Employees" can be looked to for guidance. Section 2104(a)(2) of title 5 (1988) defines an "officer" as including "an individual who is . . . engaged in the performance of a Federal function under authority of law . . . ." Since members of the board of trustees engage in the performance of a federal function under authority of law, they are considered "officers" of the federal government. Consequently, surety bonds cannot be obtained for the Center's officers and trustees under 31 U.S.C. Sec. 9302.

IV. WHETHER THE CENTER MAY EXPEND APPROPRIATED FUNDS FOR MEALS AND ENTERTAINMENT?

Section 1104 of title 2 authorizes the Center to develop and implement: (1)

educational programs for secondary and postsecondary schools and colleges designed to promote public service as a career choice; (2) training and development programs for state and local government officials; and (3) training and development opportunities for Congressional staff. Under the authority of 2 U.S.C. Sec. 1106(a), the Center's Board has determined that it is necessary to serve meals at no expense to participants at these training seminars and meetings. You ask whether this authority and language in section 1108(a)(7) allowing the Center "[t]o make other necessary expenditures including official reception and representation expenses" is sufficient to authorize expenditures on meals for the Center's trainees.

Subsequent to your inquiry 2 U.S.C. 1108(a)(7) was amended to allow the Center to "make expenditures for official reception and representation expenses as well as expenditures for meals, entertainment and refreshments in connection with official training sessions or other authorized programs or activities." 1991 Legislative Branch Appropriations Act, Pub. L. No. 101520, Sec. 313, 104 Stat. 2254, 2282 (1990). Thus, the Center now has specific authority to make such expenditures.

I trust the above opinions are responsive to your inquiry.

Sincerely yours,

James F. Hinchman General Counsel

1. Board members, officers, and employees continue to be personally liable for so-called constitutional (as opposed to common law) torts. See H.R. Rep. No. 700, 100th Cong., 1st Sess. 6, reprinted in 1988 U.S. Code Cong. & Ad. News 5945, 5949-5950, citing Bivens v. Six Unknown Agents of the Federal Bureau of Narcotics, 403 U.S. 388 (1971).

2. In 1976, the Comptroller General agreed to permit the Federal Home Loan Bank Board to purchase insurance covering risk of loss on a new office building. 55 Comp.Gen. 1321 (1976). That decision noted that the Federal Home Loan Banks were providing the funds for construction and that "any loss or damage would be payable from Federal Home Loan Bank System Funds and not from appropriated funds." Id. at 1322. Although funds to cover any loss would have to be appropriated, these funds would come from additional assessments on member banks and not from the general fund of the Treasury. 55 Comp.Gen. at 1322. There was "no authority for concluding that general funds of the Treasury would be available for the benefit of the Board in the event of loss." Id. In contrast, the source of the money available to the Stennis Center to cover loss arises from the resources of the federal government.

3. However, if the Center is using private property or furnishings, the government's self-insurance rule "can have no application in a case where, as a condition to the government's use of privately owned property, the owner thereof requires that the government take out insurance covering tort liability and loss or damage to the property." 42 Comp.Gen. 392, 393 (1963). In such a situation, obtaining insurance would be considered a necessary expenditure under 2 U.S.C. Sec. 1108(a)(7). But if the Center is permitted to use privately owned property without any requirement by the owner that the Center carry insurance, then the payment of insurance premiums cannot be considered a necessary expense, and consequently, appropriated funds may not be used to obtain such insurance, 42 Comp.Gen. at 393.

4. In your submission you use the term "surety" bond interchangeably with "performance" bond, but since you refer to the statute expressly prohibiting federal agencies from requiring or obtaining surety bonds for their employees in carrying out their official duties, 31 U.S.C. Sec. 9302, "surety" and "performance" bonds will be treated synonymously in this discussion.

5. When first enacted, what is now 31 U.S.C. Sec. 9301 included a definition of the term "agency of the Federal Government" as "any agency, department, or other entity of the legislative, executive, or judicial branch of the Government ...." P.L. 92-310, 86 Stat. 201, Sec. 101(c) (1972). When Title 31 was recodified in 1982, this definition was removed from the statute and instead a definition of "agency" was included in 31 U.S.C. Sec. 101 to apply to all of Title 31, including 31 U.S.C. Sec. 9302. No substantive change is to be inferred from the change in terminology effected by the recodification of title 31, United States Code. See H.R. Rep. No. 97-651 at 3-4 (1982) and citation of authority contained therein.