



Washington, D.C. 20530

August 11, 1992

Ms. Mary Hook
Advisory Commission on
Assignment of Women
In the Military
1001 Pennsylvania Ave., N.W.
Suite 2751
Washington, D.C. 20004

Dear Ms. Hook:

Enclosed please find a rough memorandum prepared approximately two years ago on the issue of immunity of advisory commission members. I hope this is helpful to you. If you have questions after reading the memorandum, please give me a call.

Sincerely,

A handwritten signature in cursive script that reads "Helene M. Goldberg".

HELENE M. GOLDBERG
Director
Torts Branch

SUBJECT: Potential Liability of Federal Advisory Commissioners

This memorandum addresses the potential liability of members of advisory commissions established pursuant to the Federal Advisory Committee Act (FACA), 5 U.S.C. App. 2, as well as a brief history of the Division's experience with asserting immunity for private actors.

1. The person who accepts appointment to a federal advisory commission engages in duties that potentially expose him to liability. The extent to which a federal advisory commissioner is protected against personal liability for carrying out his advisory duties, in large measure, turns on whether they are deemed private or governmental actors.

a. Federal advisory commissioners, first, must be concerned with *Bivens* liability for constitutional deprivations. The fact that an advisory committee member is a private citizen (*i.e.*, he is not a full time federal employee) does not mean that he cannot be sued on a *Bivens*, or constitutional tort, theory.¹ The *Bivens* remedy will apply as long as there is state action.¹ An argument that state action is missing in the work of a federal advisory commission faces substantial obstacles, considering the fact that an advisory commission such as the Pornography Commission is:

- 1) established pursuant to federal statute;
- 2) reports to a federal official;
- 3) must announce its meetings in the Federal Register and, with exceptions established by federal statute, must meet in public;
- 4) can only be convened and adjourned by a federal employee;
- 5) cannot meet or take action until a formal charter is filed with appropriate executive and legislative officials and bodies; and
- 6) has members whose pay is limited by federal

¹ "State action" is used here in a generic sense to reflect governmental action -- in the *Bivens* context, federal action.

- 4) can only be convened and adjourned by a federal employee;
- 5) cannot meet or take action until a formal charter is filed with appropriate executive and legislative officials and bodies; and
- 6) has members whose pay is limited by federal statute and who receive per diem under the statute for intermittent federal employees.

In FACA, then, a court could easily find sufficient indicia of government involvement in the work of a federal advisory committee to establish the state action requisite for *Bivens* liability.

A conclusion that persons serving on federal advisory committees act in a purely private capacity, moreover, would not alter the conclusion that such persons are exposed to *Bivens* liability. Even if advisory commissioners act in their private capacities, a plaintiff could meet the state action requisite of *Bivens* simply by alleging that the commissioners "conspired" with a federal employee -- for example, the federal employee who, under FACA, sets the agenda and convenes meetings. Courts have long recognized that private persons who conspire with state actors can be sued under the civil rights statutes. *Dennis v. Sparks*, 449 U.S. 24 (1980) (conspiracy with state judge). Courts similarly have recognized that private persons who conspire with federal actors may be sued on a *Bivens* theory. *F.E. Trotter, Inc. v. Watkins*, 869 F.2d 1312 (9th Cir. 1989); *Reuber v. United States*, 750 F.2d 1039 (D.C.Cir. 1987).

Thus, a private person's appointment to a federal advisory commission member exposes the member to *Bivens* liability. The key question is what protection can he receive. A federal employee sued on a *Bivens* theory, of course, is protected by absolute and qualified immunity doctrines. *Harlow v. Fitzgerald*, 457 U.S. 800 (1982).

The private person's protection is more problematic, however. The Ninth Circuit in *Trotter* squarely held that private persons who conspire with federal actors may be sued in *Bivens* but do not receive the protection of immunity. A contrary conclusion was reached in the D.C. Circuit's decision in *Reuber*, but the absence of a single opinion for the Court in that case leaves the issue open in that circuit.² See *Wyatt v. Cole*, 112 S.Ct. 1827 (1992).

² In *Reuber*, the two judges forming the majority on the issue disagreed on the approach that should be taken when private parties are sued on a state action theory.

b. The federal advisory commissioner also is exposed to liability under state law. As a purely private person, the commissioner is no different than any other person sued for defamation, interference with contractual rights or other tort theory.

As a federal actor, however, the advisory commissioner who is sued for tortious conduct in the course of his duties is protected by the Reform Act, the 1988 amendments to the Federal Tort Claims Act (FTCA). If applicable, any traditional tort suit against a federal advisory commissioner for acts that fall within the scope of his duties would fail, because the exclusive remedy would be against the United States.

c. Whether the suit sounds in *Bivens* or tort, the member of a federal advisory commission is best served if he is deemed to be a federal, rather than private, actor.

Whether it is in the United States' interest to extend the federal actor's protection to private persons who serve on federal advisory commissions, of course, is a policy issue that remains unresolved. Assuming *arguendo* that we wanted to provide commissioners as much protection as possible, both FACA and the FTCA are amenable to that result.

As noted above, FACA provided that members of federal advisory commissions "while engaged in the performance of their duties away from their homes or regular places of business, may be allowed travel expenses, including per diem ***, as authorized by section 5703 of title 5 *** for persons employed intermittently in the Government service ***" -- which expressly applies to government consultants. 5 U.S.C. App. 2 § 7(d)(1)(B). From this alone, one could read FACA as providing that federal advisory commissioners shall be deemed intermittent government employees.

Even if commissioners are not deemed intermittent federal employees for purposes of Title 5, they still may be deemed "employees" under the FTCA. In addition to traditional employees, Congress extends the FTCA's application to conduct of

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.

Almost by definition, a member of a federal advisory commission is "acting on behalf of a federal agency in an official capacity." The fact that often he acts without compensation is immaterial to whether he is deemed a federal employee for purposes of the FTCA.

Consequently, in the event a policy decision were made that the United States should take the position that federal advisory commission members are employees in order to receive the benefit of the immunity doctrines and the Reform Act, that position would clearly be supportable under FACA and the FTCA.