

the money, setting forth the basis for the request. There is no authority for repayment from appropriated funds.

(5) *Disposition of files.* After completing action on reconsideration, the SPCMCA will forward a copy of the reconsideration action to the Commander, USARCS, and retain one or more additional copies with the claim file.

§ 536.50 Claims based on negligence of military personnel or civilian employees under the Federal Tort Claims Act.

(a) *Authority.* The statutory authority for this chapter is the FTCA (60 Stat. 842, 28 U.S.C. 2671-2680), as amended by the Act of 18 July 1966 (Pub. L. 89-506; 80 Stat. 306), the Act of 16 March 1974 (Pub. L. 93-253; 88 Stat. 50), and the Act of 29 December 1981 (Pub. L. 97-124), and as implemented by the Attorney General's Regulations (28 CFR 14.1-14.11).

(b) *Scope.* This section prescribes the substantive basis and special procedural requirements for the administrative settlement of claims against the United States under the FTCA and the implementing Attorney General's Regulations based on death, personal injury, or damage to or loss of property which accrue on or after 18 January 1967. If a conflict exists between the provisions of this section and the provisions of the Attorney General's Regulations, the latter govern.

(c) *Claims payable.* Unless otherwise prescribed, claims for death, personal injury, or damage to or loss of property (real or personal) are payable under this section when the injury or damage is caused by negligent or wrongful acts or omissions of military personnel or civilian employees of the DA or the DoD while acting within the scope of their employment under circumstances in which the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred. The FTCA is a limited consent to liability without which the United States is immune. Similarly, there is no Federal cause of action created by the Constitution which would permit a damage recovery because of the Fifth Amendment or any other constitu-

tional provision. Immunity must be expressly waived, as by the FTCA.

(d) "Employee of the Government" (28 U.S.C. 2671) includes the following categories of tortfeasors for which the DA is responsible:

(1) Military personnel (members of the Army), including but not limited to:

(i) Members on full-time active duty in a pay status, including—

(A) Members assigned to units performing active service.

(B) Members serving as ROTC instructors. (Does not include Junior ROTC instructors unless on active duty.)

(C) Members serving as National Guard instructors or advisors.

(D) Members on duty or in training with other Federal agencies, for example, Nuclear Regulatory Commission, National Aeronautics and Space Administration, Departments of Defense, State, Navy, or Air Force.

(E) Members assigned as students or ordered into training at a non-Federal civilian educational institution, hospital, factory, or other industry. This does not include members on excess leave.

(F) Members on full-time duty at nonappropriated fund activities.

(G) Members of the ARNG of the United States on active duty.

(ii) Members of reserve units during periods of inactive duty training and active duty training, including ROTC cadets who are reservists while they are at summer camp.

(iii) Members of the ARNG while engaged in training or duty under 32 U.S.C. 316, 502, 503, 504, or 505 for claims arising on or after 29 December 1981.

(2) Civilian officials and employees of both the DOD and the DA (there is no practical significance to the distinction between the terms "official" and "employee") including but not limited to—

(i) Civil Service and other full-time employees of both DOD and DA paid from appropriated funds.

(ii) Contract surgeons (10 U.S.C. 1091, 4022) and consultants (10 U.S.C. 1091) where "control" is exercised over physician's day to day practice.

(iii) Employees of nonappropriated funds if the particular fund is an instrumentality of the United States and thus a Federal agency. In determining whether or not a particular fund is a "Federal agency," consider whether the fund is an integral part of the DA charged with an essential DA operational function and the degree of control and supervision exercised by DA personnel. Members or users, as distinguished from employees of nonappropriated funds, are not considered Government employees. The same is true of family child care providers. However, claims arising out of the use of certain nonappropriated fund property or the acts or omissions of family child care providers, may be payable from such funds under chapter 12, AR 27-20, as a matter of policy, even when the user is not within the scope of employment and the claim is not otherwise cognizable under any other claims authorization.

(iv) Prisoners of war and interned enemy aliens.

(v) Civilian employees of the District of Columbia National Guard, including those paid under "service contracts" from District of Columbia funds.

(vi) Civilians serving as ROTC instructors paid from Federal funds.

(vii) National Guard technicians employed under 32 U.S.C. 709(a) for claims accruing on or after 1 January 1969 (Pub. L. 90-486, 13 August 1968; 82 Stat. 755).

(3) Persons acting in an official capacity for the DOD or the DA whether temporarily or permanently in the service of the United States with or without compensation including but not limited to—

(i) "Dollar a year" personnel.

(ii) Members of advisory committees, commissions, boards or the like.

(iii) Volunteer workers in an official capacity acting in furtherance of the business of the United States. The general rule with respect to volunteers is set forth in 31 U.S.C. 665(b), which provides that, "No officer or employee of the United States shall accept voluntary service for the United States or employ personal service in excess of that authorized by law, except in cases of emergency involving the safety of human life or the protection of prop-

erty." (5 U.S.C. 3111(c) specifically provides that student volunteers employed thereunder shall be considered Federal employees for purposes of claims under the FTCA. The same classification is applied by 10 U.S.C. 1588 to museum and family support program volunteers.) The DA is permitted to accept and use certain volunteer services in Army family support programs. (10 U.S.C. 1588).

(iv) Loaned servants. Employees who are permitted to serve another employer may be considered "loaned servants," provided the borrowing employer has the power to discharge the employee, to control and direct the employee, and to decide how he will perform his tasks. Whoever has retained those powers is liable for the employee's torts under the principle of respondeat superior. Where those elements of direction and control have been found, the United States has been liable, for example, for the torts of Government employees loaned for medical training and emergency assistance, and county and state employees discharging Federal programs.

(e) "Scope of employment" means acting in "line of [military] duty" (28 U.S.C. 2671) and is determined in accordance with principles of respondeat superior under the law of the jurisdiction in which the act or omission occurred. Determination as to whether a person is within a category listed in paragraph (d)(3) of this section will usually be made together with the scope determination. Local law should always be researched, but the novel aspects of the military relationship should be kept in mind in making a scope determination.

(f) "Line of duty" determinations under AR 600-8-1 are not determinative of scope of employment. "Joint venture" situations are likely to be frequent where the Federal employee is performing federally assigned duties but is under actual direction and control of a non-Federal entity, for example, a Federal employee in training at a non-Federal entity or ROTC instructors at civilian institutions. This could also occur where the employee is working for another Federal agency. Furthermore, dual purpose situations are commonplace where benefits to the

Government and the member or employee may or may not be concurrent, for example, use of privately owned vehicles at or away from assigned duty station, or permanent change of station with delay en route. (See §§ 536.90 through 536.97 for the handling of certain claims arising out of nonscope activities of members of the Army.)

(g) *Law applicable.* The whole law of the place where the act or omission occurred, including choice of law rules, will be applied in the determination of liability and quantum. Where there is a conflict between the local law and an express provision of the FTCA, the latter governs.

(h) *Subrogation.* Claims involving subrogation will be processed as prescribed in § 536.5(b), except where inconsistent with the provisions of this section or the Attorney General's regulations.

(i) *Indemnity or contribution—* (1) *Sought by the United States.* If the claim arises under circumstances in which the Government is entitled to contribution or indemnity under a contract of insurance or the applicable law governing joint tortfeasors, the third party will be notified of the claim, and will be requested to honor its obligation to the United States or to accept its share of joint liability. If the issue of indemnity or contribution is not satisfactorily adjusted, the claim will be compromised or settled only after consultation with the Department of Justice as provided in 28 CFR 14.6.

(2) *Claims for indemnity or contribution.* Claims for indemnity or contribution from the United States will be compromised or settled under this section, if liability exists under the applicable law, provided the incident giving rise to such claim is otherwise cognizable under this section. As to such claims where the exclusivity of the FECA may be applicable, see 5 U.S.C. 8101-8150.

(3) *ARNG vehicular claims.* When a vehicle used by the ARNG, or a privately owned vehicle operated by a member or employee of the ARNG, is involved in an incident under circumstances which make this section applicable to the disposition of administrative claims against the United States and results in personal injury, death, or property damage, and a remedy against the

State or its insurer is indicated, the responsible area claims authority will monitor the action against the State or its insurer and encourage direct settlement between the claimant and the State or its insurer. Where the State is insured, direct contact with State or ARNG officials rather than the insurer is desirable. Regular procedures will be established and followed wherever possible. Such procedures should be agreed on by both local authorities and the appropriate claims authorities subject to concurrence by Commander, USARCS. Such procedures will be designed to ensure that local authorities and United States authorities do not issue conflicting instructions for processing claims and that whenever possible and in accordance with governing local and Federal law, a mutual arrangement for disposition of such claims as in paragraph (i)(4) of this section is worked out. Amounts recovered or recoverable by claimant from any insurer (other than claimant's insurer who has obtained no subrogated interest against the United States) will be deducted from the amount otherwise payable.

(4) *Claims arising out of training activities of ARNG personnel.* Contribution may be sought from the state involved where it has waived sovereign immunity or has private insurance which would cover the incident giving rise to the particular claim. Where the state involved rejects the request for contribution, the file will be forwarded to the Commander, USARCS. The Commander, USARCS, is authorized to enter into an agreement with a State, territory, or commonwealth to share settlement costs of claims generated by the ARNG personnel or activities of that political entity.

(j) *Claims not payable.* The exclusions contained in 28 U.S.C. 2680 are applicable to claims herein. Other types of claims are excluded by statute or court decisions, including, but not limited to, the following:

(1) Claims for the personal injury or death of a member of the Armed Forces of the United States incurred incident to service, or for damage to a member's property incurred incident to service. *Feres v. United States*, 340 U.S. 135 (1950).

Currently the most significant justification for the incident to service doctrine is the availability of alternative compensation systems, and the fear of disrupting the military command relationship. Other supportive factors often cited by the courts are the service member's duty status, location, and receipt of military benefits at the time of the incident.

(i) The exception applies to members of the Army, Navy, Air Force, Marine Corps, and Coast Guard, including the Reserve Components of the Armed Forces. (See 10 U.S.C. 261.) The exception also applies to service members on the Temporary Disability Retired List, and on convalescent leave, to service academy cadets, to members of visiting forces in the United States under the SOFA between the parties to the North Atlantic Treaty Organization or similar international agreements, and to service members on the extended enlistment program.

(ii) The incident to service doctrine has been extended to derivative claims where the directly injured party is a service member. Third party indemnity claims are barred.

(2) Claims for the personal injury or death of a Government employee for whom benefits are provided by the Federal Employees Compensation Act (5 U.S.C. 8101-8150). Who is a government employee under the Act is defined in the Act itself (5 U.S.C. 8101), but is not limited to Federal Civil Service employees. The term "government employee" can include certain ROTC cadets (5 U.S.C. 8140) and state or local law enforcement officers engaged in apprehending a person for committing a crime against the United States (5 U.S.C. 8191), certain nurses, interns or other health care personnel, e.g., student nurses, etc. (5 U.S.C. 5351, 8144) and certain Army Community Service Volunteers (10 U.S.C. 1588). This Act provides that benefits paid under the Act are exclusive and instead of all other liability of the United States, including that under a Federal tort liability statute (5 U.S.C. 8116(c)). It extends to derivative claims, to subsequent malpractice for treatment of a covered injury, to injuries for which there is no scheduled compensation, and to employee harassment claims for

which other remedies are available (42 U.S.C. 2000e). The exception does not bar third party indemnity claims. When there is doubt as to whether or not this exception applies, the claim should be forwarded through claims channels to the Commander, USARCS, for an opinion.

(3) Claims for the personal injury or death of an employee, including non-appropriated fund employees, for whom benefits are provided by the Longshoremen's and Harbor Workers' Compensation Act (33 U.S.C. 901-950). An employee of a nonappropriated fund instrumentality is covered by that Act (5 U.S.C. 8171). This is the exclusive remedy for covered employees, similar to the exclusivity of the FECA.

(4) Claims for the personal injury or death of any employee for whom benefits are provided under any workmen's compensation law, if the premiums of the workmen's compensation insurance are retrospectively rated and charged as an allowable, allocable expense to a cost-type contract. If, in the opinion of an approval or settlement authority, the claim should be considered payable, for example, the injuries did not result from a normal risk of employment or adequate compensation is not payable under workmen's compensation laws, the file will be forwarded with recommendations through claims channels to the Commander, USARCS, who may authorize payment of an appropriate award.

(5) Claims for damage from or by flood or flood waters at any place. 33 U.S.C. 702c. This exception is broadly construed and includes multi-purpose projects and all phases of construction and operation.

(6) Claims based solely upon a theory of absolute liability or liability without fault. Either a "negligent" or "wrongful" act is required by the FTCA, and some type of malfeasance or nonfeasance is required. *Dalehite v. United States*, 346 U.S. 15 (1953); *Laird v. Nelms*, 406 U.S. 797 (1972). Thus, liability does not arise by virtue either of United States ownership of an inherently dangerous commodity or of engaging in extra-hazardous activity.

(k) *Procedures*—(1) *General*. Unless inconsistent with the provisions of this

section, the procedures for the investigation and processing of claims set forth in §§ 536.1 through 536.13 will be followed.

(2) *Claims arising out of tortious conduct by ARNG personnel as defined in paragraph (d)(1)(iii) of this section—(i) Notification.* The procedures prescribed in § 536.75, will be followed in ARNG claims arising under the FTCA.

(ii) *Claims against the U.S. Government received by agencies of the State.* These claims will be expeditiously forwarded through the State adjutant general to the appropriate U.S. Army area claims office in whose geographic area the incident occurred.

(3) *Statute of Limitations.* (i) To be settled under this section, a claim against the United States must be presented in writing to the appropriate Federal agency within 2 years of its accrual.

(ii) For statute of limitations purposes, a claim will be deemed to have been presented when the appropriate Federal agency as defined in § 536.3(m) receives from a claimant, his or her duly authorized agent, or legal representative an executed SF 95 or written notification of an incident, together with a claim for money damages, in a sum certain, for damage to or loss of property or personal injury or death. For Federal tort claims arising out of activities of the ARNG, receipt of a written claim by any fulltime officer or employee of the ARNG will be considered proper receipt.

(iii) A claim received by an official of the DOD will be transmitted without delay to the nearest Army claims processing office or area claims office. Inquiries concerning applicability of the statute of limitations to claims filed with the wrong Federal agency will be referred to USARCS for resolution.

(4) *Claims within settlement authority of USARCS or the Attorney General.* A copy of each claim which must be brought to the attention of the Attorney General in accordance with his or her regulations (28 CFR 14.6), or one in which the demand exceeds \$15,000 or the total amount of all claims, actual or potential, from a single incident exceeds \$25,000, will be forwarded immediately to the Commander, USARCS. Subsequent documents should be for-

warded or added in accordance with § 536.5(h)(2). USARCS is responsible for the monitoring and settlement of such claims and will be kept informed of the status of the investigation and processing thereof. Direct liaison and correspondence between USARCS and the field claims authority or investigator is authorized on all claims matters, and assistance will be furnished as required.

(5) *Non-Army claims.* Claims based on acts or omissions of employees of the United States, other than military and civilian personnel of the DA, civilian personnel of the DOD, and employees of nonappropriated fund activities of the DA, will be transmitted forthwith to the nearest official of the employing agency, and the claimant will be advised of the referral.

(6) *Acknowledgment of claim.* (i) The claimant and his or her attorney will be kept informed by personal contact, telephonic contact, or mail of the receipt of his or her claim and the status of the claim. Formal acknowledgment of the claim in writing is required only where the claim is likely to result in litigation or is presented in an amount exceeding \$15,000. In this event, the letter of acknowledgment will state the date of receipt of the claim by the first agency of the Army receiving the claim.

(ii) If it is reasonably clear to the office acknowledging receipt that a claim filed under the FTCA is not cognizable thereunder; for example, it is a maritime claim under § 536.60, or it falls under §§ 536.20 through 536.35 or §§ 536.70 through 536.81, the acknowledgment will contain a statement advising the claimant of the statute under which his or her claim will be processed. If it is not clear which statute applies, a statement to that effect will be made, and the claimant will be promptly advised on his or her remedy when a decision is made. However, all potential maritime claims will be handled in accordance with § 536.5(h)(5).

(iii) When a claim has been amended as set forth in § 536.5(f)(4), the amendment will be acknowledged in all cases. Additionally, the claimant will be informed that the amendment constitutes a new claim insofar as concerns the 6 months in which the DA is

granted the authority to make a final disposition under 28 U.S.C. 2675(a) and the claimant's option thereunder will not accrue until 6 months after the filing of the amendment.

(iv) When a claim is improperly presented, is incomplete or otherwise does not meet the requirements set forth in § 536.5(d), the claimant or his or her representative will be promptly informed in writing of the deficiencies and advised that a proper claim must be filed within the 2 year statute of limitations.

(7) *Investigation.* Claims cognizable under this section will be investigated and processed on a priority basis in order that settlement if indicated may be accomplished within the 6 months prescribed by statute.

(8) *Advice to claimant.* (i) A full explanation of claims procedures and of the rights of the claimant will be made to the extent necessitated by the amount and nature of the claim.

(ii) In a case where litigation is likely, or where this course of action is preferred by the claimant, and it appears to be a proper case for administrative settlement, the claimant will be advised as to the advantages of administrative settlement. If the claim is within the jurisdiction of a higher settlement authority, the claim will be discussed with such authority prior to the furnishing of such advice. The claimant should be familiarized with all aspects of administrative settlement procedures including the administrative channels through which his claim must be processed for approval. He or she may be advised that administrative processing can result in more expeditious processing, whereas litigation may take considerable time, particularly in jurisdictions with crowded dockets.

(iii) If appropriate, he or she may be informed that a tentative settlement can be reached for any amount above \$25,000, subject to approval by the Attorney General. He or she should be advised that administrative filing of the claim protects him under the statute of limitations for purpose of litigation; suit can be filed within 6 months after the date of mailing of notice of final denial by the DA, thus potentially allowing negotiations to continue indefi-

nitely. An attorney representing a claimant should be advised of the limitations on fees for purposes of administrative settlement (20 percent) and litigation (25 percent). The attorney may also be advised that there is no jury trial under the FTCA.

(9) *Notification to claimant of action on claim.* (i) The filing of an administrative claim and its denial are prerequisite to filing suit. Any suit must be filed not later than 6 months after notification by certified or registered mail of the denial of the administrative claim. Failure of a settlement authority to take final action on a properly filed claim within 6 months may be treated by the claimant as a final denial for the purposes of filing suit. If the claimant has provided insufficient documentation to permit evaluation of the claim, written notice should be given to this effect. Since administrative settlements are a voluntary process, the preferred method of negotiating is to attempt to exchange information on an open basis.

(ii) Upon final denial of a claim, or upon rejection by the claimant of a partial allowance, and further efforts to reach a settlement are not considered feasible (§ 536.5(h)(1)), the settlement authority will inform the claimant of the action on his claim by certified or registered mail. Notification will be made as set forth in § 536.11(b).

(iii) If a claim has been presented to the DA and, also, to other Federal agencies, without any notification to the DA of this fact, final action taken by the DA prior to that of any other agency is conclusive on a claim presented to other agencies, unless another agency decides to take further action to settle the claim. Such agency may treat the matter as a reconsideration under 28 CFR 14.9(b), unless suit has been filed. The foregoing applies likewise to DA claims in which another Federal Agency has already taken final action.

(iv) If, after final denial by another agency, a claim is filed with the DA, the new submission will not toll the 6 months limitation for filing suit, unless the DA treats the second submission as a request for reconsideration under paragraph (k)(9)(iv)(A) of this section.

(A) *Reconsideration.* (1) While there is no appeal from the action of an approving or settlement authority under the FTCA and this section, an approving or settlement authority may reconsider a claim upon request of the claimant or someone acting in his behalf. Even in the absence of such a request, an approving or settlement authority may on his own initiative reconsider a claim. He may reconsider a claim which he previously disapproved in whole or in part (even where a settlement agreement has been executed) when it appears that his original action was incorrect in law or fact based on the evidence of record at the time of the action or subsequently received. If he determines that his original action was incorrect, he will modify the action and, if appropriate, make a supplemental payment. The basis for a change in action will be stated in a memorandum included in the file.

(2) A successor approving or settlement authority may also reconsider the original action on a claim but only on the basis of fraud, substantial new evidence, errors in calculation or mistake (misinterpretation) of law.

(3) A request for reconsideration must be submitted prior to the commencement of suit and prior to the expiration of the 6-month period provided in 28 U.S.C. 2401(b). Upon timely filing, the appropriate authority shall have 6 months from the date of filing in which to make a final disposition of the request, and the claimant's option under 28 U.S.C. 2675(a) shall not accrue until 6 months after the filing of the request.

(4) A request for reconsideration should indicate fully the legal or factual basis asserted as grounds for relief. Following completion of any investigation or other action deemed necessary for an informed disposition of the request, the approving or settlement authority will reconsider the claim and attempt to settle it by granting such relief as may appear warranted. When further settlement efforts appear unwarranted, the entire file with a memorandum of opinion will be referred through claims channels to the Commander, USARCS, and the claimant informed of such referral.

(B) [Reserved]

§ 536.60 Maritime claims.

(a) *Statutory authority.* Administrative settlement or compromise of admiralty and maritime claims in favor of and against the United States by the Secretary of the Army or his designee is authorized by the Army Maritime Claims Settlement Act (10 U.S.C. 4801-04, 4806, as amended).

(b) *Related statutes.* The Army Maritime Claims Settlement Act is supplemented by the following statutes under which suits in admiralty may be brought: the Suits in Admiralty Act of 1920 (41 Stat. 525, 46 U.S.C. 741-752); the Public Vessels Act of 1925 (43 Stat. 1112, 46 U.S.C. 781-790); the Act of 1948 Extending the Admiralty and Maritime Jurisdiction (62 Stat. 496, 46 U.S.C. 740). Similar maritime claims settlement authority is exercised by the Department of the Navy under 10 U.S.C. 7365, 7621-23 and by the Department of the Air Force under 10 U.S.C. 9801-9804, 9806.

(c) *Scope.* 10 U.S.C. 4802 provides for the settlement or compromise of claims for—

(1) Damage caused by a vessel of, or in the service of, the DA or by other property under the jurisdiction of the DA;

(2) Compensation for towage and salvage service, including contract salvage, rendered to a vessel of, or in the service of, the DA or to other property under the jurisdiction of the DA; or

(3) Damage caused by a maritime tort committed by any agent or employee of the DA or by property under the jurisdiction of the DA.

(d) *Claims exceeding \$500,000.* Claims against the United States settled or compromised in a net amount exceeding \$500,000 are not payable hereunder, but will be investigated and processed under this section, and, if approved by the Secretary of the Army, will be certified by him to Congress.

(e) *Claims not payable.* A claim is not allowable under this section which:

(1) Is for damage to, or loss or destruction of, property, or for personal injury or death, resulting directly or indirectly from action by the enemy, or by U.S. Armed Forces engaged in armed combat, or in immediate preparation for impending armed combat.