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STATE OF ALASKA
THE LEGISLATURE

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May, 1988

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Mary Van Nimwegen

House Judiciary:

1987 - April 28

1 IN THE SENATE

BY THE RULES COMMITTEE BY
REQUEST OF THE GOVERNOR

2

SENATE BILL NO. 91

3

IN THE LEGISLATURE OF THE STATE OF ALASKA

4

FOURTEENTH LEGISLATURE - SECOND SESSION

5

A BILL

6 For an Act entitled: "An Act limiting liability for activities of the
7 Alaska National Guard."

8 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:

9 * Section 1. AS 26.05 is amended by adding a new section to read:

10 Sec. 26.05.145. IMMUNITY FROM TORT LIABILITY. The state, its
11 employees and representatives, and individual members of the Alaska
12 National Guard, acting in an official capacity, are not civilly liable
13 in tort actions for injuries to persons or property arising from
14 National Guard activities occurring during training or duty under 32
15 U.S.C. secs. 316, 502, 503, 504, or 505.

FISCAL NOTE

REQUEST:

Revision Date: January 11, 1988
Title: An Act limiting liability for activities of the Alaska National Guard
Sponsor: Rules Committee
Requestor: Governor

Agency Affected: Military & Veterans Affairs
BRU: Alaska National Guard
Components: _____

EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING	FY 88	FY 89	FY 90	FY 91	FY 92	FY 93
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	0	0	0	0	0	0
CAPITAL	0	0	0	0	0	0
REVENUE	0	0	0	0	0	0

FUNDING: (Thousands of Dollars)

GENERAL FUND						
FEDERAL FUNDS						
OTHER						
TOTAL						

POSITIONS:

FULL-TIME						
PART-TIME						
TEMPORARY						

ANALYSIS : (Attach a separate page if necessary) Passage of this bill will have no effect on the operating budget of the Alaska National Guard BRU. The fiscal benefit expected due to the passage of this bill will be the reduced exposure of the state to future liabilities, future claims, and future claims defense costs in the risk management program of the Department of Administration.

Prepared by: Jeff Morrison Phone: 465-4600
Division: Administrative & Support Services, DMVA Date: 1/19/88

Approved by Commissioner: MG John Schaeffer Date: 1/19/88
Agency: Department of Military & Veterans Affairs

Distribution (by preparer):
Legislative Finance
Legislative Sponsor
Requestor
Office of Management and Budget
Impacted Agency(ies)

FISCAL NOTE

REQUEST:

Revision Date: _____ Agency Affected: Dept. of Military & Veterans Affairs
 Title: An act limiting liabilities for BRU: Alaska National Guard
 activities of the Alaska National Guard
 Sponsor: Rules Committee Components: _____
 Requestor: Governor Cowper

EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING	FY 88	FY 89	FY 90	FY 91	FY 92	FY 93
PERSONAL SERVICES	0	0	0	0	0	0
TRAVEL	0	0	0	0	0	0
CONTRACTUAL	0	0	0	0	0	0
SUPPLIES	0	0	0	0	0	0
EQUIPMENT	0	0	0	0	0	0
LAND & STRUCTURES	0	0	0	0	0	0
GRANTS, CLAIMS	0	(50.0)	(50.0)	(50.0)	(50.0)	(50.0)
MISCELLANEOUS	0	0	0	0	0	0
TOTAL OPERATING	0	(50.0)	(50.0)	(50.0)	(50.0)	(50.0)
CAPITAL	0	0	0	0	0	0
REVENUE	0	0	0	0	0	0

FUNDING: (Thousands of Dollars)

GENERAL FUND	0	0	0	0	0	0
FEDERAL FUNDS	0	0	0	0	0	0
OTHER	0	(50.0)	(50.0)	(50.0)	(50.0)	(50.0)
TOTAL	0	(50.0)	(50.0)	(50.0)	(50.0)	(50.0)

POSITIONS:

FULL-TIME	0	0	0	0	0	0
PART-TIME	0	0	0	0	0	0
TEMPORARY	0	0	0	0	0	0

ANALYSIS: (Attach a separate page if necessary)

The fiscal benefit is difficult to project because the State insurance deductible has varied, also this bill will only affect future claims. There could, however, be substantial savings in claims defense costs.

Prepared By: Donald J. Hitchcock *[Signature]* Phone: 465-2180
 Division: Risk Management Date: January 18, 1988

Approved by Commissioner: John M. Andrews *[Signature]* Date: 1/20/88
 Agency: Department of Administration

Distribution (by preparer):
 Legislative Finance
 Legislative Sponsor
 Requestor
 Office of Management and Budget
 Impacted Agency(ies)

John H.

Re: SB91

Gary Bowen suggested we
try copying virtually the same
language of the Washington bill
as a CS. Here it is. Please
call me.

Jeff Morrison
DMVA

465-4600

Proposed HCS for SB91, for consideration by the House Judiciary Committee:

1. Delete section 1 of SB91.
2. Add a new section 1 and 2, to read as follows:

*Section 1. PURPOSE. The legislature recognizes that Congress in 1981 amended the federal tort claims act to permit persons injured or damaged as a result of national guard training activities to sue the United States, and recognizes that Congress has established comprehensive administrative programs to compensate members of the military forces for injuries they may incur while performing training for national defense.

The legislature finds that Congress has recognized that the nation as a whole derives benefit from the training conducted by the Alaska National Guard, and that the training is conducted in accordance with the federal military directives and programs.

In view of this congressional action, it is the intent of the legislature that the State of Alaska and its officers, employees, and agents have no risk of legal liability for injuries or damages arising from Alaska National Guard training or duty when that training or duty is done in furtherance of the national defense.

*Section 2. AS 26.05 is amended by adding a new section to read:
Section 26.05.145. IMMUNITY FROM TORT LIABILITY. Neither the State of Alaska, its officers, employees, or agents, nor any member of the militia may be held liable in any civil action for damages arising out of any of the activities of the military forces of the State of Alaska while engaged in activities during which the officers, employees, agents, or members are considered employees of the federal government under the federal tort claims act, 26 U.S.C. Sec 2671 et seq.



DEPARTMENTS OF THE ARMY AND THE AIR FORCE

HEADQUARTERS, ALASKA NATIONAL GUARD
OFFICE OF THE STAFF JUDGE ADVOCATE
3601 "C" STREET, SUITE 626
ANCHORAGE, ALASKA 99503-5989
(907) 249-1375 • (AV) 317-626-1375

18 March 1988

John Sund
House of Representatives
Post Office Box V
Juneau, Alaska 98111

Subject: Senate Bill 91

Dear Representative Sund:

On behalf of the Adjutant General, the Alaska National Guard, and the Department of Military and Veterans Affairs I write to express interest in seeing Senate Bill 91 positively endorsed by the House Judiciary Committee. The bill is the product of the cumulative experience of many states. Alaska is one of the few states that to date has not enacted protective legislation to insure that the state is not held liable in tort for federally mandated training of the National Guard.

In order to appreciate the National Guard perspective on this matter, some background may be in order. In the early 1970s the President and Congress of the United States determined that the National Guard should become a more integral and functioning part of our national defense forces. Therefore, in the last decade, Alaska National Guard units have intensified the complexity and frequency of their military training with active duty units of the Army, the Air Force, as well as the other services.

Then in 1981 Congress amended the Federal Tort Claims Act to permit suits against the United States for injuries or damage resulting from National Guard training. Until that time, persons who were injured because of National Guard activities had no recourse against the federal government and could seek redress only against the state military department concerned or against the individual Guardsperson. Congress so acted because nearly all of the training conducted by National Guard units today is done in accordance with procedures, programs, and direction issued by the United States Department of Defense through both Army and Air Force operational commands. Since the United States funds approximately 95% of all National Guard activities, it is appropriate that the United States should assume financial responsibility for this often hazardous training.

After the 1981 amendment to the Federal Tort Claims Act, a number of states amended their laws to provide that the state would not be liable for National Guard training accidents when the training or duty is being conducted pursuant to federal statutory requirements or authorization. As noted above, Alaska has not responded to this change in federal law.

Often the impetus for such remedial legislation is not provided until a law suit demonstrates the need to respond. A case in point is the recent experience of the State of Washington.

In 1983, while conducting weekend training at Fort Lewis, a Washington National Guard unit was involved in an accident which resulted in the death of 2 soldiers, and the injury of 4 others who were assigned at Fort Lewis. Those individuals or their estates sued the state of Washington alleging negligence. The state moved to dismiss the suit on grounds that the state of Washington ought not to bear the cost and trauma of defending suits arising out of national defense training (Emsley v. State, 106Wn.2d 474).

Ultimately, the Washington Supreme Court rejected the appeal and held there was no bar in Washington to the suit. The concurring judges noted that this legislative omission "should be corrected by the Legislature." The Washington legislature at the urging of the Washington National Guard and with the consent of the Washington Trial Lawyers Association followed the judicial suggestion and adopted the following statutory language:

"Neither the state of Washington, its officers, employees, or agents nor any member of the militia may be held liable in any civil action for damages arising out of any of the activities of the military forces of the state of Washington while engaged in activities during which the officers, employees, agents, or members are considered employees of the federal government under the federal tort claims act, 26 U.S.C. Sec. 2671 et seq."

California has also recently addresses this issue. Section 816 of the California Government Code states:

"A public entity is not liable for injury arising out of any activity conducted by a member of the California National Guard pursuant to Section 316, 502, 503, 504, or 505 of Title 32 of the United States Code and compensated pursuant to the Federal Tort Claims Act.

It is the intent of the Legislature, in enacting this section, to conform state law regarding liability for activities of the National Guard to federal law as expressed in Pub'ic Law 97-124.

(Added by Stats.1982, c.616,p. 2600, s 1.)"

Idaho has recently adopted a statute similar in language to Senate Bill 91. Although worded somewhat differently, these statutory enactments from sister states reflect their public policy, to wit, to immunize the State in cases where the federal government has agreed to be responsive in damages under the Federal Tort Claims Act (FTCA). By adopting Senate Bill 91 Alaska would be following the lead of other western/northwestern states in asserting immunity from federally mandated training of the National Guard.

The National Guard operates in one of three duty statuses. It may be called to active federal service by the President in which case the Guard is merged with the active forces. The torts committed by active duty soldiers incident to their employment as soldiers of the United States is compensated under the FTCA. Another status is that of state active duty where the Governor calls members of the National Guard to state active duty under AS 26.05.070. Torts which occur incident to this duty status subject the state to tort liability. SB 91 would not affect the liability of the State of Alaska during periods of state active duty. AS 26.05.140 immunizes officers and enlisted members of the militia for acts done in an official capacity. AS 26.05.150 immunizes commander of the militia for exercises in judgement. The most common status of the National Guard is that in which the National Guard participates in reserve component training under Title 32 United States Code (USC). Although this is a federally paid and federally mandated training function, it is often referred to as "state status". The state status refers to the fact that the Adjutant General who is appointed by the Governor, is in command of the National Guard during training under Title 32 USC. It is this concept of state status that potentially exposes the State of Alaska to liability for training mandated by federal authorities. Under the Federal Constitutional scheme the discretionary power to determine the training necessary for the militias of the various states is vested in the Congress. The operational authority has been vested in the states. Article 1, Section 8 of the U.S. Constitution provides that the Congress shall have power...

To provide for organizing, arming, and disciplining the militia and for governing such part of them as may be employed in the service of the United States, reserving to the states respectively the appointment of the officers and the authority of training the militia according to the discipline prescribed by Congress...

Congress has mandated that the discipline, including training of the National Guard conform to that of the active components of the Army and Air Force. 32 USC 501 (a). Although the Governor is the commander and chief during these periods of training, the failure to conduct the training as prescribed by federal authorities could result in the loss of federal recognition and the federal funding which goes with that recognition. Since it is unlikely that the Governor would ever refuse to conduct the federally mandated National Guard training during service under Title 32 USC, the potential for exposure is great notwithstanding that the Governor has virtually no discretion over the type and manner of training. Under these circumstances it seems inappropriate that the State of Alaska should be responsible for any personal injury or property damage which occurs incident to this training.

In the 1981 Amendments to the FTCA Congress determined that federal government responsibility for personal injury or property damage incident to National Guard training should be coextensive with that for the Army and the Air Force Reserve. Since there is no state responsibility for Army or Air Force Reserve training, it seems appropriate that the state should assert immunity. The United States has waived sovereign immunity under the FTCA and has consented to be responsible in damages just as

though it were a private citizen. The law to be applied is the law of the situs of the injury. In other words, an Alaskan injured incident to National Guard training would have a remedy against the United States and the applicable tort law is that of Alaska. I understand that there is some apprehension in the House Judiciary Committee that Senate Bill 91 would leave Alaskans without a remedy in the event of personal injury or property damage which incurred incident to National Guard training. This is not so. Alaskans injured incident to National Guard training do have a remedy and that remedy is against the federal authority who has directed the training.

One final matter which should be mentioned. The question has been raised concerning why someone would sue the State of Alaska if the federal government will respond in damages. The answer may be found in Alaska's collateral source rule. As an attorney you understand that the collateral source rule means that settlement by one tortfeasor is not a set off against other tortfeasors. Therefore, assuming that someone were to obtain a settlement from the United States under FTCA or even achieve judgement, there would be no prohibition against then re-litigating those issues vis a vis the State of Alaska. Without passage of Senate Bill 91 it would be possible for anyone injured by National Guard Training to pursue both a federal and state remedy and achieve a double recovery!

Alaska Air National Guard deployments outside the State of Alaska are not unusual. Often these deployments are overseas. As this letter was being composed, elements of the Alaska Air National Guard were in Panama. Personal injury and property damage incident to military operation overseas (outside the United States) are subject to the Military Claims Act. Damage incident to military operations inside the United States or its' territories are subject to the FTCA.

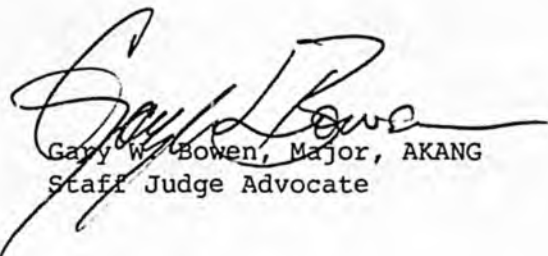
Notwithstanding these federal remedies, without Senate Bill 91, claims could be prosecuted against the U.S. under the FTCA and against the State of Alaska. It is not clear that the public policy of Alaska should be that the whole world has a cause of action against the state for damages occurring incident to training ordered by federal authorities.

I hope the foregoing explains why the National Guard and the Department of Military and Veterans Affairs believes that this bill is in the best interest of the state and in the best interest of the whole body politic of the State of Alaska. The bill would not leave residents of the State of Alaska remediless in the event of torts perpetrated by the Alaska National Guard. The FTCA give them a remedy under the laws of the State of Alaska.

If this letter raises additional questions or if you would like further explanation about the matters contained herein, please do not hesitate to ask. I would be happy to arrange a meeting with National Guard attorneys if such would be of assistance to you. Additionally, I can arrange for a meeting with the active Army and Air Force Judge Advocates who can explain how the FTCA works to remedy personal injury or

property damage incident to training and operation of the armed forces of the United States. On behalf of the Department of Military and Veterans Affairs I earnestly solicit your support for this bill and request that it be favorably endorsed by the House Judiciary Committee.

FOR THE ADJUTANT GENERAL

A handwritten signature in cursive script, appearing to read "Gary W. Bowen".

Gary W. Bowen, Major, AKANG
Staff Judge Advocate

PUBLIC LAW 97-124 [H.R. 3799]; December 29, 1981

FEDERAL TORT CLAIMS—
NATIONAL GUARD

For Legislative History of Act, see p. 2692

Act to extend the Federal tort claims provisions of title 28, United States Code, to acts or omissions of members of the National Guard, and to provide that the remedy under those provisions shall be exclusive in medical malpractice actions involving members of the National Guard.

Federal tort
claim provisions
for National
Guard members.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section 2671 of title 28, United States Code, is amended—

(1) in the second paragraph, by inserting "members of the National Guard while engaged in training or duty under section 816, 502, 503, 504, or 505 of title 32," after "naval forces of the United States,"; and

(2) in the third paragraph, by inserting "or a member of the National Guard as defined in section 101(3) of title 32" immediately after "United States".

Sec. 2. Section 1089(a) of title 10, United States Code, is amended by inserting "the National Guard while engaged in training or duty under section 816, 502, 503, 504, or 505 of title 32," after "armed forces,".

Repeal.

Sec. 3. Section 834 of title 32, United States Code, and the item relating to such section in the section analysis of chapter 3 of such title, are repealed.

10 USC 1089
note.

Sec. 4. The amendments made by this Act and the repeal made by section 3 of this Act shall apply only with respect to claims arising on or after the date of the enactment of this Act.

Approved December 29, 1981.

LEGISLATIVE HISTORY—H.R. 3799 (S. 267):

HOUSE REPORT No. 97-384, Pt. 1 (Comm. on the Judiciary).

SENATE REPORT No. 97-297 accompanying S. 267 (Comm. on the Judiciary).

CONGRESSIONAL RECORD, Vol. 127 (1981):

Dec. 15, considered and passed House.

Dec. 16, considered and passed Senate, in lieu of S. 267.

LEGISLATIVE HISTORY
P.L. 97-124

FEDERAL TORT CLAIMS—NATIONAL GUARD

P.L. 97-124, see page 95 Stat. 1666

House Report (Judiciary Committee) No. 97-384,
Dec. 10, 1981 [To accompany H.R. 3799]
Cong. Record Vol. 127 (1981)

DATES OF CONSIDERATION AND PASSAGE

House December 15, 1981

Senate December 16, 1981

No Senate Report was submitted with this legislation.

HOUSE REPORT NO. 97-384

[page 1]

The Commission on the Judiciary, to whom was referred the bill (H.R. 3799) to amend title 28, United States Code, to provide that the Federal tort claims provisions of that title are the exclusive remedy in medical malpractice actions and proceedings resulting from federally authorized National Guard training activities, and for other purposes, having considered the same, report favorably thereon with amendments and recommend that the bill as amended do pass.

[page 2]

STATEMENT

The National Guard is a reserve component of the Armed Forces. As such it has been assigned important responsibilities as a reserve force in the event it is called upon in an emergency. To assure our national defense it must continuously engage in federally prescribed training and demonstrate a high degree of readiness. To assure this, the Federal Government provides the funds to pay for training of Guard personnel and the equipment necessary for Guard operation and training. Except when federalized, the Guard is under the direct order of State Governments. For this reason, its activities have not been covered by the Tort Claims Act even though the Army and Air National Guard have similar roles in Defense planning and training as do the Army Reserve and the Air Force Reserve. This bill amends the tort claims provisions of title 28 to provide the National Guard the same coverage under the Tort Claims Act as now exists for the Armed Forces and its other reserve components.

The bill, with the subcommittee amendments, provides for the necessary amendments to title 28 to accomplish this purpose and makes the necessary amendments to the provisions concerning medical personnel in title 10. This includes the repeal of section 334 of title 32 which presently indemnifies National Guard medical personnel for liability incident to federal training activity.

FEDERAL TORT CLAIMS

P.L. 97-126

HISTORY

In the 86th Congress, the committee considered the bill H.R. 5435 which would have similarly amended the Federal tort claims provisions of title 28 to include the acts or omissions of National Guard personnel. Ultimately however, the committee adopted an amendment suggested by the Department of the Army which established administrative authority in the Department of the Army and the Air Force for the payment of claims against the National Guard arising out of Federal training. That amendment became Public Law 86-740 and is popularly known as the National Guard Claims Act, 32 U.S.C. 715. The National Guard Claims Act satisfied the major concerns raised at the time. It authorized the Federal government to assume liability for damages caused by modern military weapons in use by National Guard during federal training, and avoided treating National Guard employees as Federal employees for purposes of Federal liability. As the Committee noted, "a member of the National Guard performing training or duty authorized by title 32, United States Code, who allegedly commits a tort, is not, as a matter of law, under the command of Federal military authorities". *see* H.R. Report No. 1928, 86th Congress 2d Session at 4 (National Guard Claims Act, H.R. 5435).

In the 96th Congress, the Senate held hearings on S. 1858, a bill to extend the Federal tort claims provisions to the acts or omissions of National Guard personnel. *see*, Senate Judiciary Committee Hearings No. 96-86, 96th Congress 2d Session. The Senate subsequently passed S. 1858 on May 30, 1980. Mr. Kastenmeier introduced a bill identical to S. 1858 in the 96th Congress. That bill, H.R. 7475, was not considered by the Committee.

In the 97th Congress, the Senate Armed Services Committee adopted an amendment to S. 815, the Department of Defense Authorization for

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Fiscal 1982, which established Federal liability for damages arising out of the acts or omissions of National Guard personnel during Federal training in the same manner and to the same extent that the United States would be liable in any other action brought against the United States under the Federal tort claims provisions of title 28. The Senate passed S. 815 as amended on May 14, 1981. *see*, Senate Report 97-58, 97th Congress, 1st Session at 181 and 182 (Department of Defense Authorization for Fiscal Year 1982, S. 815). The House passed bill (H.R. 3519) did not include similar provisions, and the Senate receded to the House on the issue in conference. *see*, House Conference Report No. 97-311, 97th Congress, 1st Session at 132 (Department of Defense Authorization for Fiscal Year 1982, S. 815). On July 23, 1981 the Senate Judiciary Subcommittee on Agency Administration held hearings on the National Guard tort provisions of S. 815, and on S. 267, a bill identical to S. 1858.

On June 4, 1981, Mr. Kastenmeier introduced H.R. 3799 for himself and Mr. Montgomery. The bill was referred jointly to the Committees on the Judiciary and Armed Services. On October 13, 1981 and October 29, 1981 the Subcommittee on Administrative Law and Governmental Relations of the House Judiciary Committee held hearings on H.R. 3799. On October 29, the Subcommittee considered and adopted an

LEGISLATIVE HISTORY

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amendment in the nature of a substitute for H.R. 3799, and favorably recommended the bill, as amended to the Full Judiciary Committee. The Judiciary Committee reported H.R. 3799 as amended to the House by unanimous voice vote on December 8, 1981.

By letter dated November 8, 1981 to Honorable Peter W. Rodino, Jr., Chairman of the House Judiciary Committee, the Honorable Melvin Price, Chairman of the House Armed Services Committee indicated the support of the Armed Services Committee for the action of the subcommittee. The letter further expressed the intent of the Armed Services Committee not to hold hearings on the subject, and to support the bill as reported by the Judiciary Committee on the floor. The complete text of the letter is reprinted in the appendix.

FINDINGS AND CONCLUSIONS

Testimony and materials supplied to the subcommittee in the course of the hearings indicate that there is substantial risk of personal liability by National Guard personnel engaged in Federal training activity. National Guard representatives from every state except Arkansas and West Virginia reported to the National Guard Association on litigation against National Guard personnel in their states since 1960. The information supplied to the subcommittee by the National Guard Association indicates that there are 956 known instances of claims against National Guard personnel since 1960. Of those, less than 10 percent or 94 claims were actionable against the Federal Government under the current Federal tort claims provisions of title 28. In only 339, or 35 percent of the cases, were claimants reported to have filed a claim under the National Guard Claims Act. A total of 859 or 89.85 percent of reported claims involved motor vehicles. While information is not complete for the entire reporting period, all 48 reporting states included data for 1975 to present. During that period, 360 claims were reported to have been settled for an aggregate sum of

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\$914,536.02. Available information from those states reporting indicates that since 1960, a total of 431 claims have been settled for an aggregated amount of \$1,165,961.25.

Information supplied by the Army Claims Service indicates that between 1977 and October 1981, approximately 1,689 claims involving Army National Guard personnel have been filed under the National Guard Claims Act, and have been settled for the approximate aggregate amount of \$2,807,239. Motor vehicle claims accounted for 89 percent of Army National Guard claims reported by the Army Claims Service from 1977 to October 1981. The Air Force Claims Service reports a total of 851 claims involving Air National Guard personnel from 1973 to October 1981. Of those 462 have been settled for an aggregated \$3,397,535. The Air Force does not have a category for motor vehicle claims.

Though incomplete, the statistical information before the committee indicates that a substantial number of claims arise every year as a result of Federally prescribed National Guard training and that the preponderance of these claims involve motor vehicles. Moreover, as the information from the National Guard Association indicates, the individual National Guard member is subject to personal liability for damages arising out of Federal training activity.

FEDERAL TORT CLAIMS

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The subcommittee also received testimony on the organizational structure and the role of the National Guard. The Department of Justice pointed out in its testimony in opposition to H.R. 3799 that Article I, Section 8, Clause 16 of the Constitution reserves to states the power to appoint officers of the militia and the authority to train the militia according to the discipline prescribed by Congress. Because the Federal government does not command the National Guard during Federal training, the Department of Justice points out that there is no basis for the vicarious liability of the Federal Government for the acts or omissions of National Guard personnel during that training. However, as was pointed out in testimony before the Subcommittee, the primary role of the modern National Guard is to provide a well trained and integral reserve force for our nation's defense, and the Federal Government does exercise a great deal of control over the Federal training activities of the National Guard.

The same Department of Defense regulations that govern Army and Air Force Reserve training activities govern the Federal training activities of the National Guard. Army and Air Force officers are assigned to each state National Guard organization. They conduct inspections, monitor and assist in training activities and approve promotion of National Guard personnel. In addition, they coordinate National Guard training with the needs of the Army and Air Force. The Federal government not only prescribes the duration and type of National Guard training, it pays National Guard personnel for Federal training, it provides workman's compensation to National Guard personnel for injuries sustained during Federal training and it provides the equipment used by National Guard personnel during training. Thus, while actual command during Federal training activities is maintained by the states as a matter of law, as a matter of policy, it is appropriate that the Federal liability for damages arising out of the acts or omissions of National Guard personnel during Federal

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training be equivalent to Federal liability for the acts or omissions of Air Force and Army Reserve personnel which arise out of their identical training.

The bill, as amended by the subcommittee, merely amends the definition of the phrases "employee of the government" and "acting within the scope of his office or employment" as they are used in the tort claims provisions of title 28 to include National Guard personnel engaged in Federal training. It is the interest of the committee that coverage under these provisions be the same for National Guard personnel as it is for members of the Army and Air Force Reserves, *see*, 43 Comp. Gen. 412, B-148324 (1963) (inactive duty training extends from the time of first muster until the end of scheduled inactive duty training for the day and does not include travel to and from home and headquarters). This decision of the Comptroller General is reprinted in the appendix below. It is well settled that claims for injuries to servicemen that "arise out of or are in the course of activity incident to service" may not be brought under the Federal Tort Claims provision of title 28, *see*, *Feres v. United States*, 340 U.S. 135, 71 S.Ct. 153, 95 L.Ed. 152 (1950). It is the intent of the Committee that the rule of the *Feres* case apply to the acts or omissions of National Guard personnel.

LEGISLATIVE HISTORY

P.L. 97-124

The amendments made by this bill to the Tort claims provisions of title 28, and specifically to the definitions contained in section 2671 of that title, only concern the application of the Federal tort claims provisions of that title. They do not change or modify the application of any other laws governing federal employees such as the Ethics in Government Act of 1978, as amended.¹

SECTION-BY-SECTION ANALYSIS

Section 1 amends the definition of "Employees of the Government" and the definition of "Acting within the scope of his office or employment" in section 2671 of title 28, United States Code, to extend the scope of the Federal tort claims provisions of that title to members of the National Guard while engaged in Federal training or duty.

Section 2 amends section 1089 of title 10, United States Code, which creates an exclusive remedy against the United States in civil actions arising out of medical malpractice by certain federal employees to include actions arising out of medical malpractice by National Guard medical personnel while engaged in Federal training.

Section 3 repeals section 334 of title 32, United States Code, relating to payment of malpractice liability of National Guard medical personnel.

Section 4 provides that the amendments and the repeal made by the bill shall apply prospectively.

CONCLUSION

In light of the consideration and circumstances discussed in this report, it is recommended that the bill, as amended, be considered favorably.

¹ Public Law 95-521, 92 Stat. 1624, as amended by Public Law 96-19, 93 Stat. 37-44 and Public Law 96-28, 93 Stat. 76.

* * * * *

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STATEMENTS UNDER CLAUSE 2(1)(3)(A), CLAUSE 2(1)(3)(B), CLAUSE 2(1)(2)(B), CLAUSE 2(1)(3)(D), CLAUSE 2(1)(4), AND CLAUSE 2(1)(3)(C) OF RULE XI AND CLAUSE 7(a)(1) OF RULE XIII OF THE HOUSE OF REPRESENTATIVES

COST (RULE XIII (7)(a)(1))

The Congressional Budget Office in its letter of December 10, 1981 advised the Committee that it is expected that passage of this legislation will result in additional outlays of \$681,000 in Fiscal Year 82, \$721,000 in Fiscal Year 83, \$757,000 in Fiscal Year 84, \$792,000 in Fiscal Year 85, and \$823,000 in Fiscal Year 86. This estimate is based on figures provided by the United States Army and Air Force claims service as well as information from the states of New York and California.

FEDERAL TORT CLAIMS
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OVERSIGHT STATEMENT (RULE XI 2(1)(3)(A))

The Subcommittee on Administrative Law and Governmental Relations of this committee exercises the committee's oversight responsibility in accordance with rule VI(b) of the Rules of the Committee on the Judiciary with reference to the subject of tort claims. That subcommittee has recommended the amendments provided in this bill, and the Committee joins in recommending the changes made.

(RULE XI 2(1)(3)(B))

Enactment of the bill would not create any additional cost for the Government pursuant to rule XIII(7)(a)(1). The bill does not involve new budget authority nor does it require new or increased tax expenditures as contemplated by clause 2(1)(3)(B) of rule XI.

COMMITTEE VOTE (RULE XI 2(1)(2)(B))

On December 8, 1981, the full Committee on the Judiciary approved the bill, H.R. 3799, by voice vote.

OVERSIGHT FINDINGS AND RECOMMENDATIONS OF THE COMMITTEE ON GOVERNMENT OPERATIONS (RULE XI 2(1)(3)(D))

No findings or recommendations of the Committee on Government Operations were received as referred to in subdivision (D) of clause 2(1)(3) of House Rule XI.

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INFLATIONARY IMPACT (RULE XI 2(1)(4))

In compliance with clause 2(1)(4) of House rule XI, it is stated that this legislation will have no inflationary impact on prices and costs on the operation of the national economy.

ESTIMATE OF THE CONGRESSIONAL BUDGET OFFICE

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, D.C., December 10, 1981.

HON. PETER W. RODINO, JR.,
Chairman, Committee on the Judiciary, U.S. House of Representatives,
Washington, D.C.

DEAR MR. CHAIRMAN: Pursuant to Section 403 of the Congressional Budget Act of 1974, the Congressional Budget Office has prepared the attached cost estimate for H.R. 3799, a bill to amend title 28, United States Code, to provide that the Federal tort claims provisions of that title are the exclusive remedy in medical malpractice actions and proceedings resulting from federally authorized National Guard training activities, and for other purposes, as ordered reported on December 8, 1981.

Should the Committee so desire, we would be pleased to provide further detail on the attached cost estimate.

Sincerely,

RAYMOND C. SCHEPPACH,
(For Alice M. Rivlin, Director).

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CONGRESSIONAL BUDGET OFFICE—COST ESTIMATE

DECEMBER 10, 1981.

1. Bill number: H.R. 3799.
2. Bill title: A bill to amend title 28, United States Code, to provide that the Federal tort claims provisions of that title are the exclusive remedy in medical malpractice actions and proceedings resulting from federally authorized National Guard training activities, and for other purposes.
3. Bill status: As ordered reported by the Senate Committee on the Judiciary on December 8, 1981.
4. Bill purpose: The bill establishes that the United States shall have exclusive jurisdiction on claims resulting from National Guard training activities including injury or loss of property, or personal injury or death.
The United States shall also be exclusive in providing remedy to claims for damages for personal injury and death caused by any medical personnel of the armed forces and the National Guard while acting within the scope of his duties or employment.
5. Cost estimate:

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Estimated authorization levels:

Fiscal year:	Amount
1982	\$481,000
1983	721,000
1984	757,000
1985	792,000
1986	823,000

Estimated outlays:

Fiscal year:	Amount
1982	681,000
1983	721,000
1984	757,000
1985	792,000
1986	823,000

The costs of this bill fall within function 050.

6. Basis of estimate: Neither the Department of Defense, the National Guard Bureau, nor the states themselves have extensive data on National Guard related claims which would be affected by this bill. The major contributing factors to this problem are the various state remedies and procedures available to investigate and process National Guard claims. Because of these limitations, CBO is basing this estimate on the weighted average of total claims paid for three years to National Guard personnel in data provided by California and New York, two states with large National Guard forces.

Four states currently have an arrangement with the United States Army to share the amounts of claims paid equally. Approximately 11.7 percent of all National Guardsmen live in states with such an arrangement. For these states it is assumed that one half of the claims to be paid would be an additional cost to the U.S. government.

The remaining 88.3 percent of National Guardsmen live in states where the federal government has no liability for National Guard claims. For these states the adoption of this bill would shift the costs of all awarded claims applicable under the Federal tort claims provision from the states to the federal government.

FEDERAL TORT CLAIMS

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7. Estimate comparison: None.
8. Previous CBO estimate: CBO provided an estimate on S. 267, ordered reported on December 8, 1981. H.R. 3799 is similar to S. 267, and the cost estimates are identical.
9. Estimate prepared by: Thomas D. Phillips.
10. Estimate approved by:

JAMES L. BLUM,
Assistant Director for Budget Analysis.

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APPENDIX I

U.S. HOUSE OF REPRESENTATIVES,
COMMITTEE ON ARMED SERVICES,
Washington, D.C., November 3, 1981.

Hon. PETER W. RODINO, Jr.,
*Chairman, Committee on the Judiciary,
U.S. House of Representatives,
Washington, D.C.*

DEAR MR. CHAIRMAN: Reference is made to H.R. 3799, a bill to amend title 28, United States Code, to provide that the Federal tort claims provisions of that title are the exclusive remedy in medical malpractice actions and proceedings resulting from federally authorized National Guard training activities. I understand that the Subcommittee on Administrative Law and Governmental Relations, chaired by Mr. Danielson, has favorably reported that bill to the full committee, and I wish to offer my support and that of the committee for its enactment.

As you will recall, the provisions of H.R. 3799 were included in S. 815, the Senate version of the fiscal year 1982 Defense authorization legislation, but not in the House amendment. We recognized immediately the jurisdictional problem involved and were successful in having the Senate recede to the House during the conference on S. 815. In that conference we noted that your committee would take early action on H.R. 3799 as indicated by Chairman Danielson, and we sincerely appreciate your leadership and that of Mr. Danielson in bringing the bill before the Judiciary Committee.

Because of the obviously thorough manner in which the Subcommittee on Administrative Law and Governmental Relations has acted on H.R. 3799, we do not plan to hold hearings on the subject although the bill was referred to this committee as well. Accordingly, I would appreciate it if you would include this letter in your record as an endorsement of the legislation and an indication of our support when the bill reaches the floor.

Mr. Chairman, may we again express our appreciation to you and Chairman Danielson for the expeditious handling of H.R. 3799 and for your cooperation with us in our successful efforts concerning the tort claims provisions in the conference on S. 815.

With best regards,
Sincerely,

MELVIN PRICE, *Chairman.*

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APPENDIX II

48 Comp. Gen. 412 (1963)

[B-148924]

Military Personnel—Reservists—Death or Injury—Inactive Duty Training—Injury Within Scope of Duties

In view of the fact that the court refrained from formulating a rule for general application in *Meister v. United States*, Ct. Cl. No. 54-82, decided July 12, 1963, in which it held that a reservist ordered to perform inactive duty at a training center who while proceeding to the drill hall to report for inspection and duty slipped and fractured his ankle was "within the scope of his assigned duties when he slipped" and, therefore, within the purview of 10 U.S.C. 6148(a), and entitled to the disability benefits prescribed by that section, the *Meister* case should not be used as a precedent for favorable administrative action in similar cases, and any claim involving facts which might be viewed as coming within the purview of the *Meister* case should be forwarded to the United States General Accounting Office for direct settlement.

Military Personnel—Reservists—Death or Injury—Inactive Duty Training—Injury Within Scope of Duties

When a reservist ordered to inactive duty training suffers a physical injury during a scheduled lunch break, or while during a lull in his duties he engages in some independent activity, he is deemed to have received the injury while engaged in the inactive duty training drill within the purview of 10 U.S.C. 6148(a), and therefore, is entitled to the disability benefits prescribed by that section, the reservist having been ordered to perform inactive duty training is employed from the time he first musters in for that duty until the end of the ordered period of such duty for that day.

Military Personnel—Reservists—Death or Injury—Inactive Duty Training—Injured While Traveling

Where for the mutual convenience of a naval reservist and the Government, he is permitted to utilize Government transportation as a permissive traveler to and from a training center before or after a period of inactive duty training, the reservist while so traveling is not "employed" in inactive duty training within the meaning of 10 U.S.C. 6148(a), prescribing disability and death benefits, the travel pursuant to paragraph 6002(2) of the Joint Travel Regulations, whether accomplished by private or Government conveyance, not being part of the inactive duty training is outside the contempla-

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tion of 10 U.S.C. 6148, and the reservist, therefore, is not entitled to the disability benefits provided by section 6148(a), and permission to travel by Government transportation to the drill station during a part of the period assigned for the

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performance of the drill would not increase the rights of the reservist.

To the Secretary of the Navy, October 25, 1963:

By letter dated September 4, 1963, the Under Secretary of the Navy requested decision on various questions concerning the effect of the decision of the Court of Claims in the case of *Meister v. United States*, Ct. Cl. No. 54-62, decided July 12, 1963, on the application of 10 U.S.C. 6148(a) to certain cases involving injuries suffered by members of the United States Naval Reserve who have been ordered to perform inactive duty training. The request for decision was assigned No. SS-N-190 by the Military Pay and Allowance Committee, Department of Defense.

Meister had been ordered by his executive officer to be at the training center no later than 7:20 p.m., on March 8, 1961. After he had parked his car at the curb, entered the training center compound and while proceeding toward the drill hall to report for inspection and duty, he slipped and fractured his ankle. The court held that the plaintiff was "within the scope of his assigned duties when he slipped" and therefore he was held to be within the purview of 10 U.S.C. 6148(a). Doubt is expressed as to the scope of the rule announced in the *Meister* case and it is stated that guidelines as to the authorized application of the *Meister* rule would be extremely helpful. The following facts of two cases are recited as illustrative of the types of cases in which question has arisen as to the applicability of 10 U.S.C. 6148(a).

In the first case, Joseph Patrick Volpe, SA, USNR-R, was ordered to perform inactive duty training at the United States Naval Reserve Training Center, McKeesport, Pennsylvania, during the week end of April 20-21, 1963. On April 21, 1963, he participated in the scheduled morning drill which was from 8 a.m. to 12 noon. A lunch break was scheduled from 12 to 1:15 p.m., and the afternoon drill session was scheduled to extend from 1:15 p.m., until 4:30 p.m. At approximately 12:50 p.m., during the scheduled lunch break, he fell while playing basketball on the grounds of the training center and sprained his hand.

In the second case, Charles A. Scott, AME3, USNR-R, was ordered to perform 2 days of inactive duty training on February 16 and 17, 1963, at the United States Naval Air Station, Alameda, California. On February 16, 1963, he reported for training at 8 a.m. From approximately 1:30 p.m., until 2 p.m., he participated with his squadron in launching a scheduled anti-submarine warfare helicopter flight. Upon completion of the launching, Scott and three other men from his squadron proceeded to the station's gymnasium to play handball while awaiting the return of the flight squadron. At approximately 2:30 p.m., while playing handball, Scott sustained a fracture of his right thumb.

The submission poses for decision the following questions:

(a) May a reservist who has been ordered to perform inactive duty training and who sustains an injury after he has reached his training center but before he has actually

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mustered for duty, as illustrated by the *Meister* case, be deemed to have received his injury while engaged in an in-

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active duty training drill within the purview of 10 USC 6148(a) ?

(b) May a reservist who has reported to his training center for inactive duty (and has actually mustered) and incurs an injury during a scheduled break in training drills, as illustrated by the Volpe case, be deemed to have received his injury while engaged in an inactive duty training drill within the purview of 10 USC 6148(a) ?

(c) May a reservist who has reported to his training center for inactive duty and sustains an injury during the period of a scheduled training drill but as the direct result of some independent activity that is not part of his training duties, as illustrated by the Scott case, be deemed to have received his injury while engaged in an inactive duty training drill within purview of 10 USC 6148(a) ?

(d) If the answer to question (a), above, is in the affirmative, would the answer be the same in a case containing factual elements such as those in the case of the U.S. Marine Corps Sergeant discussed in 38 Comp. Gen. 841 ?

(e) May a reservist who suffers a disabling injury while being transported (no reimbursement involved) by Government air, land or water transportation incident to the performance of ordered or authorized inactive duty training, to or from such duty, prior to muster or following the termination of such period of duty, be deemed to have received his injury while engaged in an inactive duty training drill within the purview of 10 USC 6148(a) ?

(f) If the answer to question (e), above, is in the negative, would the answer be the same if the travel was authorized to be performed and was performed during the period of time assigned for the performance of the drill ?

(g) If the answer to question (e), above, is in the affirmative, would the answer be the same if the reservist were to incur a disabling injury while performing travel to or from the place of performance of inactive duty training by a means other than Government air, land or water transportation, with the express authorization of his commanding officer ?

Before answering the specific questions, we consider it necessary to say that we do not agree with the court's conclusion in the *Meister* case. The decision in that case is inconsistent with our view of section 1 of the act of June 20, 1949, Ch. 225, 53 Stat. 201 (now 10 U.S.C. 6148(a)) as expressed in 38 Comp. Gen. 841, that Congress intended to provide coverage for injuries suffered by inactive duty trainees only while actually performing inactive duty training. The court stated that it would not attempt to "lay down a rule of general application" and it is clear that the court limited its decision to the particular facts involved in that case. The court did not indicate the degree of physical proximity "between the employee and employer" required in such cases and it is not clear from the court's opinion what action it might take in a similar case in which some of the facts present in the *Meister*

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case are missing. While we did not recommend further action in the *Meister* case to the Department of Justice since, as a practical matter,

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we doubted that any useful purpose would be served by further proceedings, it is our view that a similar case based on facts a little more favorable to the Government should be vigorously defended.

In view of the fact that the court refrained from formulating a rule for general application in the *Meister* case, it should not be used as a precedent for favorable administrative action in any similar case. Any claim involving facts which might be viewed as coming within the purview of that case should be forwarded to this Office for direct settlement. Question (a) is answered accordingly and question (d) requires no answer.

When a reservist is ordered to inactive duty training in situations similar to the *Volpe* and *Scott* cases, the period of training extends from the time the man is first mustered in until the end of his scheduled inactive duty training on that day. It cannot be said that during a scheduled lunch break (*Volpe* case) or a time when no actual duty is being performed during a drill (*Scott* case) the man reverts to his normal civilian status so as to be outside the protection of 10 U.S.C. 6148(a) during those times. In neither of the cases described had the men been released from military control at the time the injuries were sustained. While it may not be concluded that a reservist is employed on inactive duty for the entire day on which a drill or drills are performed, it is our view that, when a reservist is ordered to perform inactive training, he is so employed from the time he first musters in for that duty until the end of the ordered period of such duty for that day. Questions (b) and (c) are answered in the affirmative.

It is assumed that questions (e) through (g) are limited to situations which may raise in connection with drills or other scheduled inactive duty training at the member's Reserve component unit headquarters. Paragraph 6002(2) of the Joint Travel Regulations provides that a member is not entitled to travel or transportation allowances for any inactive duty training at the city or town in which the headquarters of his Reserve component unit is located, including travel between his home and the headquarters of his Reserve unit. Tours of inactive duty training are for scheduled periods of time and, where such duty is to be performed at the headquarters of the member's Reserve unit, do not include travel to and from his home and headquarters. Such travel, no matter whether it is accomplished by private or Government conveyance, is not a part of the inactive duty training and is outside the contemplation of 10 U.S.C. 6148. See in this connection 38 U.S.C. 106(d). It is our view that if Congress had intended to extend the benefits of 10 U.S.C. 6148 to cover a reservist while traveling in connection with inactive duty training at the location of his Reserve component unit headquarters, it doubtless would have used appropriate language to make that intention clear. Thus, where a reservist was injured while proceeding to his home 65 miles away as the driver of a Government truck after completion of a period of inactive duty training, we concluded that in the absence of a showing that such truck driving activity was a prescribed part of his inactive duty training as a reservist, he was not entitled to the benefits

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of 10 U.S.C. 3687 and 3721 which contain language similar to that found in 10 U.S.C. 6148. Accordingly, where for the mutual con-

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venience of the member and the Government, a member is permitted to utilize Government transportation as a permissive passenger in traveling to or from his training center before or after a period of inactive duty training, he is not "employed" in inactive duty training within the meaning of 10 U.S.C. 6148(a) while so traveling. Question (e) is answered in the negative and question (g) requires no answer.

It is our view that the granting of permission to travel by Government transportation to the drill station during a part of the period assigned for the performance of such drill would not increase the rights of the reservist in question (e) in any way. See 82 Comp. Gen. 554, answer to question 1. Accordingly, question (f) is answered in the affirmative.

STEVE COWPER
GOVERNOR



SB91

STATE OF ALASKA
OFFICE OF THE GOVERNOR
JUNEAU

The Honorable Jan Faiks
President of the Senate
Alaska State Legislature
P.O. Box V
Juneau, AK 99811

Dear Senator Faiks:

Under the authority of art. III, sec. 18, of the Alaska Constitution, I am transmitting a bill relating to liability immunity of the state, its employees and agents, and members of the Alaska National Guard.

While training or on duty under federal mandate, the state national guards are performing a United States Government activity. Nevertheless, there have been occasions in which states, rather than the United States, have been exposed to tort liability for injuries or damage resulting from federally mandated guard activities.

In 1981, Congress amended 28 U.S.C. sec. 2671 by adding to the definition of "employees of the government" members of the National Guard training or on duty pursuant to federal order under 32 U.S.C. The effect of this amendment was to clarify that the United States considers the Guard as a federal function during 32 U.S.C. activities and that claims for injuries resulting from such activities could be pursued under the Federal Tort Claims Act, 28 U.S.C. sec. 2671 et seq. In spite of this change in the law, there are rare occasions when the state remedy is preferred by an injured third party who consequently will file a claim for damages in state court on the basis of state law. This bill will prevent suits of this nature, and assure that persons injured or property damaged as a result of federally mandated and controlled Guard activities will be required to seek damages from the United States Government. Existing worker's compensation coverage of guardsmen will not be affected by this bill.

Sincerely,

A handwritten signature in cursive script, appearing to read "Steve Cowper".

Steve Cowper
Governor

No 196

A/B

STATE OF ALASKA 1987 LEGISLATIVE SESSION
FISCAL NOTE

Bill Version: SB 91
Publish Date: 1/29/87

REQUEST _____

Revision Date: _____
Title: An act limiting liabilities for activities of the Alaska National Guard
SPONSOR: Rules Committee
Requestor: Governor Cowder

Agency Affected: Dept. of Military & Veterans Affairs
BRU: Alaska National Guard
Components: _____

EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING	FY 87	FY 88	FY 89	FY 90	FY 91	FY 92
PERSONAL SERVICES	0	0	0	0	0	0
TRAVEL	0	0	0	0	0	0
CONTRACTUAL	0	0	0	0	0	0
SUPPLIES	0	0	0	0	0	0
EQUIPMENT	0	0	0	0	0	0
LAND & STRUCTURES	0	0	0	0	0	0
GRANTS, CLAIMS	0	(50.0)	(50.0)	(50.0)	(50.0)	(50.0)
MISCELLANEOUS	0	0	0	0	0	0
TOTAL OPERATING	0	(50.0)	(50.0)	(50.0)	(50.0)	(50.0)
CAPITAL	0	0	0	0	0	0
REVENUE	0	0	0	0	0	0

FUNDING: (Thousands of Dollars)

GENERAL FUND	0	0	0	0	0	0
FEDERAL FUNDS	0	0	0	0	0	0
OTHER	0	(50.0)	(50.0)	(50.0)	(50.0)	(50.0)
TOTAL	0	(50.0)	(50.0)	(50.0)	(50.0)	(50.0)

POSITIONS:

FULL-TIME	0	0	0	0	0	0
PART-TIME	0	0	0	0	0	0
TEMPORARY	0	0	0	0	0	0

ANALYSIS: Attach a separate page if necessary

The fiscal benefit is difficult to project because the State insurance deductible varies, also this bill will only affect future claims. There will, however, be savings in claims defense costs.

Prepared By: Donald J. Hitchcock Phone: 465-2180
Division: Risk Management Date: February 26, 1987

Approved by Commissioner: Garrey Peska Date: 3/2/87
Agency: Department of Administration

Distribution (by preparer):
Legislative Finance
Legislative Sponsor
Requestor
Office of Management and Budget
Impacted Agency(ies)
Senate Secretary

MAR 05 1987

LEGISLATIVE FINANCE

No 12

STATE OF ALASKA 1987 LEGISLATIVE SESSION FISCAL NOTE

REQUEST SB 91
 Bill/Resolution No. : LL#773-87-0016
 Title: Civil Liability for National Guard activities.
 Sponsor: Rules Committee
 Requestor: Governor
 Date of Request: _____

FISCAL DETAIL
 Agency Affected: Military & Veterans Affairs
 BRU: Alaska National Guard
 Components: _____

EXPENDITURES/REVENUES : (Thousands of Dollars)

OPERATING	FY 87	FY 88	FY 89	FY 90	FY 91	FY 92
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	-0-	-0-	-0-	-0-	-0-	-0-

CAPITAL	-0-	-0-	-0-	-0-	-0-	-0-
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REVENUE	-0-	-0-	-0-	-0-	-0-	-0-
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FUNDING : (Thousands of Dollars)

GENERAL FUND						
FEDERAL FUNDS						
OTHER						
TOTAL						

POSITIONS :

FULL-TIME						
PART-TIME						
TEMPORARY						

ANALYSIS : Attach a separate page if necessary

This bill would have no known fiscal impact.

Prepared by: Richard K. Rountree Phone: 465-4600
 Division: Administrative & Support Services Division Date: 10/07/86
 Approved by Commissioner MG Edward G. Pagano Date: 10/07/86
 Agency: Dept. of Military & Veterans Affairs

Distribution (by Agency preparing fiscal note):

- Legislative Finance
- Legislative Sponsor
- Requestor
- Office of Management and Budget
- Impacted Agency(ies)

Claims Report

United States Army Claims Service

Tort Claims Arising from Federally Supported National Guard Training

Joseph H. Rouse
Chief, General Claims Division

A recent federal court ruling in Hawaii has highlighted issues surrounding claims arising from the performance of duties by members of the National Guard under title 32, United States Code, sections 316, 502, 503, 504 and 505, herein referred to as "training duty claims."

For a state National Guard unit to receive federal support, all members of the unit must enlist in or be members of both the State National Guard and the National Guard of the United States (NGUS), *i.e.*, be "Federally" recognized. Unless such a member is on active duty under federal orders, however, he or she remains under state control. Thus, members on training duty that is merely federally supported remain under State control and are not employees of the United States in the absence of federal legislation that expressly provides that the government is

responsible for the torts of such members.¹ Where the state has waived its sovereign immunity in a manner that includes the National Guard on training duty, state courts have ruled that suits for National Guard torts can lie against the state.²

In 1960, the National Guard Claims Act³ was passed to ensure that potential claimants who lacked a remedy under the Federal Tort Claims Act (FTCA)⁴ when harmed by a National Guardsman would be provided a federal remedy. The catalyst for this Act was explosions at NIKE sites manned by state National Guard units.⁵ One major omission of the Act was that it did not provide any individual immunity for National Guard drivers while on training duty, *e.g.*, while on weekend drill⁶ or at two-week training duty;⁷ the Federal Drivers Act⁸ applied only to Federal

¹ Levin v. United States, 381 U.S. 41 (1965).

² Florida v. Crawford, Case No. 81-694 (Fla. 5th Dist. Ct. App.) *jurisdiction declined by* Fla. Sup. Ct., Case No. 62,097 (1982); Morrison v. State, 179 N.W.2d 439 (Iowa 1970); Berk v. Ohio National Guard, Civil #77-0287 (Ct. Claims Ohio 1978).

³ Act of Sept. 13, 1960, 74 Stat. 878, 32 U.S.C. § 715.

⁴ 28 U.S.C. §§ 1346(b); 2671-2680 (1982).

⁵ The impetus for passage arose following an explosion at Middletown, New Jersey NIKE site in 1959 which coincidentally was manned by active Army units. At that time, however, one-half of all NIKE sites, a purely federal activity, were maintained by units of the Active Army and one-half by personnel from various State National Guard units (not activated into federal service), nominally called "National Guard technicians."

⁶ 32 U.S.C. § 502 (1982).

⁷ 32 U.S.C. § 503 (1982).

employees and extended only to Guardsmen in the active Federal service.

To resolve this problem, the FTCA was amended in 1981 to include members of the National Guard while on training duty for claims arising on or after 29 December 1981.⁹ The National Guard Claims Act was not repealed, however, and its present use is largely limited to claims arising out of noncombat activities, inasmuch as the FTCA is the preemptive negligence remedy in the United States. Finally, when the FTCA was amended, there was no effort to immunize states from suits arising from the training activities listed above.¹⁰

The case of *Lee v. Yee*¹¹ was an individual suit against Sergeant Yee, a supply technician for the Hawaii National Guard engaged in recruiting duties under 32 U.S.C. § 503. On 21 April 1982, while driving a National Guard jeep, he rear-ended the Lee vehicle. The state suit against Yee was removed and dismissed pursuant to the Federal Driver's Act. The complaint was then amended to include the state and the United States, but Lee later agreed to dismiss the state. He also had filed an administrative claim under the FTCA that was not settled. In June 1984, the United States answered the complaint and also filed a third party complaint against the state. In August 1986, a settlement in the sum of \$40,000 to be paid by the United States was agreed upon in exchange for the releases of all parties, including the state, but preserved the right of the United States to seek contribution from the state.

In this final phase of the suit, Judge Fong ruled that the United States could sue a state in federal court under a valid cause of action even if a state attempts to limit the cause of action to suits in a state court.¹² In this case, the state waiver of sovereign immunity statute expressly included members of the Hawaii National Guard as employees of the state. Additionally, Hawaii has adopted the Uniform Contribution Among Tortfeasors Act. The state argued that the 1981 amendments to the FTCA mandated that Yee could not have been a state employee pursuing his duties at the time of the accident; Judge Fong saw no reason why Yee could not have been an employee of both the United States and the state. He based his determination of state employee status on a detailed analysis of Yee's duties as an administrative supply technician and the fact that the Governor, not the President, was in control. He pointed out that nothing in the 1981 amendment and its legislative history indicated that Congress intended to immunize a state, but rather that the purpose was to immunize National Guard drivers. Because Yee was under the control of the Governor

and, according to Judge Fong, not performing a federal function, he awarded the United States contribution in the amount of \$36,000, or ninety percent of the settlement.¹³

Prior to the 1981 amendment to the FTCA, the United States Army Claims Service (USARCS) had an arrangement with the State of Hawaii whereunder the payments in "training duty claims" would be shared equally. Such sharing arrangements had been and still are authorized by Army regulations.¹⁴

It has been the policy of USARCS to not actively seek contribution, however, but to ensure that equitable claims are paid without the delay that attempts to obtain state contribution would entail.¹⁵ Sharing costs of administrative claims is practical only when a state has an existing, funded mechanism for paying claims generated by National Guard personnel on training duty.

Sharing arrangements still continue with several states despite the 1981 amendments and are still encouraged by USARCS as being in the best interests of both parties. The legislative history of the National Guard Claims Act reflects that such sharing was originally considered and then abandoned by the Administration. While Judge Fong awarded ninety percent contribution in *Lee*, a share and share alike arrangement is more equitable in most cases. Exceptions more likely would be in the opposite manner, that is, where actual control is vested in the United States, as in the case with National Guard fighter planes.

The use of federally titled but state controlled vehicles or aircraft for state purposes is not considered to be training duties and has created problems in the past. In *Rhodes v. United States*,¹⁶ a National Guard officer was permitted to use a federally titled National Guard vehicle to leave summer camp to register for civilian college courses; this was not considered to arise from duty under 32 U.S.C. § 503. While this determination was made under the National Guard Claims Act, a similar decision could be made under FTCA. "Official use" of a National Guard vehicle is controlled by state, not federal regulations, and such use for recreational activities or community action projects is frequently more liberal under state regulation and serves no training purpose. Not infrequently, a trip is made in a Federally titled vehicle or plane ostensibly for both federal and state purposes. In such cases, the determination as to whether the claim is cognizable under the FTCA or the National Guard Claims Act turns on whether the destination of the vehicle or plane at the time of the incident was for the federal purpose. The status of the operator is not the key determining factor.

⁸ 28 U.S.C. § 2679(b) (1)(2).

⁹ Pub. Law No. 97-124. Such claims are now routinely processed under the FTCA. See Dep't of Army, Reg. No. 27-20, Legal Services—Claims, chap. 4 (18 Sept. 1970 [hereinafter AR 27-20]).

¹⁰ It is doubtful that such an amendment is constitutionally valid as National Guardsmen remain employees of the state while on training duty. In other words, it is up to a state to provide such immunity to its National Guard while on training duty.

¹¹ 643 F. Supp. 593 (D. Haw. 1986).

¹² *Id.* at 596 (citing *United States v. California*, 655 F.2d 914 (9th Cir. 1980); *Lee v. Brooks*, 315 F. Supp. 729 (D. Haw. 1970)).

¹³ Because a legislative appropriation is necessary in order for the state to pay its share, an extension until 31 July 1987 was granted before interest would be charged against the state.

¹⁴ See AR 27-20, para. 4-7d and 6-14.

¹⁵ It has also been the policy of USARCS to not enter a sharing arrangement "after the fact" unless such an arrangement will apply to all future cases. Thus, if a state is successfully sued in a matter that could properly fall under the FTCA or the NGCA, any arrangement to share costs would apply not only to the case at hand, but to future cases as well.

¹⁶ 760 F.2d 1180 (11th Cir. 1985).

Sharing arrangements may be considered even though a state has waived immunity only to the extent of purchasing insurance. For example, where a state insures all its vehicles under a fleet policy, the premium costs are usually prorated among state agencies possessing vehicles. The National Guard must bear its share of such costs for both state titled vehicles (usually few in number) and federally titled vehicles when used on state duty. The additional costs, if any, of insuring the use of such vehicles on training duty should be balanced against the risk of a successful suit against the state when FTCA coverage is ruled inapplicable. If a sharing arrangement is entered into, the premium increase would be reduced to the extent of the contribution made under the arrangement.

This article has addressed the FTCA remedy for training duty claims which immunizes the National Guard driver.

The FTCA, however, provides no immunity for states and in certain instances may provide no coverage. A sharing arrangement will not broaden FTCA coverage to cases for which a state may be responsible; coverage under FTCA is based on scope of employment while insurance coverage is based on use of a vehicle, which can be broader than scope of employment. Claims officers dealing directly with State National Guard agencies should develop a close working relationship with the designated state office to insure the expeditious disposition of claims. Utilization of a sharing arrangement in appropriate cases may expedite such disposition as the state may process the claim where agreed upon. The actual payment of the Army's share must be to the claimant, however, and not to the state. Questions concerning the foregoing should be directed to the General Claims Division, USARCS.

of discretion at an executive and policymaking, rather than an operational, level.

CALLOW, DORE, ANDERSON, and DURHAM, JJ., concur by separate opinion.

Nature of Action: United States Army soldiers injured and killed by artillery negligently fired by members of the Washington National Guard sought damages from the State.

Superior Court: The Superior Court for Pierce County, No. 83-2-04016-2, Thomas A. Swayze, Jr., J., on May 31, 1985, refused to dismiss the action.

Supreme Court: Holding that the members of the National Guard were in state service when the artillery was fired and that the shelling did not constitute a discretionary act for which the State was immune from tort liability, the court affirms the trial court.

Kenneth O. Eikenberry, Attorney General, and Virginia O. B. ins and Jon P. Ferguson, Assistants, for petitioner.

Edwards & Barbieri, by Malcolm L. Edwards and Catherine W. Smith; Douglas B. Ehlke and James Beard (Fred G. Scott, Jr., of counsel), for respondents.

Gene S. Anderson, United States Attorney, amicus curiae for petitioner.

BRACHTENBACH, J.—This case presents the question whether the State of Washington may be sued for torts committed against United States Army personnel by members of the Washington National Guard. We hold that the State is not immune from suit, and in so holding, we affirm the trial court denial of the State's motion for dismissal.

On August 20, 1983, five United States Army soldiers on active duty were marching along a public road at Fort Lewis. A howitzer shell, fired moments earlier by members of the Washington National Guard as part of a training exercise exploded next to the road. The explosion severely injured three and killed two of the United States Army sol-

[No. 51821-1. En Banc. July 31, 1986.]

THOMAS L. EMSLEY, SR., as *Personal Representative*,
ET AL, *Respondents*, v. THE ARMY NATIONAL
GUARD, *Petitioner*.

- [1] **Armed Services — National Guard — Training — State or Federal Service.** The National Guard is in the service of the State during training exercises unless it has been called into active federal service pursuant to 10 U.S.C. §§ 3495, 3500.
- [2] **Government — Torts — Sovereign Immunity — Discretionary Acts — What Constitutes.** A governmental body is not immune from tort liability for the act of one of its employees unless the act is discretionary, i.e., unless the act results from an exercise

diers. The record contains substantial evidence that the National Guard gunnery team was negligent. It is alleged that the point of impact was three-fourths of a mile off target.

The three injured servicemen and representatives of the estate of the two deceased soldiers filed separate actions against the National Guard and the State of Washington. After the actions were consolidated by the trial court, the State moved for dismissal under CR 12(b)(6), or, in the alternative, CR 56. The trial court denied the State's motion and set a trial date. In the interim, this court granted the State's motion for discretionary review of the trial court's denial of dismissal.

Despite lack of clarity in the motion for dismissal and subsequent order, we treat the trial court order denying the State's motion for dismissal as one based on summary judgment. The trial judge, in reaching his decision, considered numerous affidavits and depositions offered by both parties. Consideration of these materials was necessary, because they presented the factual question whether the National Guard was in state or federal status at the time of the incident. Such status is crucial to a determination of the presence or absence of state immunity, with which this appeal is solely concerned. Thus, the trial court properly treated the State's motion as one for summary judgment.

The State maintains that it is immune to suit on either of two theories: (1) the National Guard was in active federal service at the time of the firing incident; thus, the State is immune through application of the *Feres* doctrine (see *Feres v. United States*, 340 U.S. 135, 95 L. Ed. 152, 71 S. Ct. 153 (1950)); or (2) the National Guard was in state status at the time of the incident, but, notwithstanding the blanket waiver of tort immunity of RCW 4.92.090, the State is immune through fulfillment of the criteria announced in *Evangelical United Brethren Church v. State*, 67 Wn.2d 246, 407 P.2d 440 (1965). We hold that the State cannot prevail under either theory.

The State first contends that it is immune to suit under

the rule announced in *Feres v. United States, supra*. The *Feres* doctrine prevents service personnel injured in activities incident to military service from bringing suit against the federal government or fellow members of the federal armed services. Thus, for *Feres* to be applicable to this case, the National Guard must have been in active federal service rather than state service when the gunnery team fired the howitzer. Whether the National Guard is in federal or state status at a given time is determined by the United States Constitution, the Washington Constitution, and federal laws.

The foundation of each state's militia, forerunner of the modern National Guard, is U.S. Const. art. 1, § 8, cl. 16. Clause 16 empowers the United States Congress to organize, arm and discipline the militia, but it specifically reserves to the states the responsibility for training the militia.

[1] The Washington Constitution also provides for maintenance of a militia. Const. art. 10, § 2 dictates that Washington shall maintain a state militia in a manner not incompatible with the United States Constitution and United States laws. Since the United States Constitution specifically reserves training of the National Guard to the states, and the Washington Constitution mandates compatibility with the United States Constitution and with federal laws, the Washington Constitution impliedly vests responsibility for National Guard training in the state. Moreover, we have specifically recognized this training responsibility. In *Hupe v. Coates*, 95 Wn.2d 56, 60, 621 P.2d 726 (1980), we said: "the Governor, as commander-in-chief, is in direct control of and responsible for the training, condition and performance of the Washington National Guard."

The incident in this case occurred during a National Guard training exercise. National Guard training, under both the United States and Washington Constitutions, is a state function. Thus, the National Guard was in state status during the subject training maneuvers unless federal law dictated otherwise. Federal law regulating states'

National Guard units is included in Titles 32 and 10 of the United States Code. Of these laws, 10 U.S.C. § 3495 and 10 U.S.C. § 3500 are relevant for purposes of establishing whether a National Guard unit is in federal or state status at a given time. Section 3495 states:

Members of the Army National Guard of the United States are not in active Federal service except when ordered thereto under law.

The National Guard may be ordered into active federal service pursuant to 10 U.S.C. § 3500, which establishes the grounds and procedures for such an order. This section provides, in pertinent part:

[T]he President may call into Federal service members and units of the Army National Guard of any State . . . in such numbers as he considers necessary to repel [sic] the invasion [of a foreign nation], suppress . . . rebellion, or execute those laws [which the President is unable with the regular forces to execute].

10 U.S.C. § 3500.

The record in this case is clear that no state of emergency existed at Fort Lewis on August 20, 1983 such as that contemplated by 10 U.S.C. § 3500, and no "call" by the President had placed the National Guard in active federal service on that date. The National Guard was therefore in state status on the day in question. The case law is in accord: *Maryland ex rel. Levin v. United States*, 381 U.S. 41, 14 L. Ed. 2d 205, 85 S. Ct. 1293 (1965) (the state governor is in charge of the National Guard in each state except when the Guard is called into active federal service); *Greenwood v. Department of Military Affairs*, 78 Pa. Commw. 480, 468 A.2d 866 (1983) (National Guard is in state status unless called into active federal service pursuant to 10 U.S.C. §§ 3495 and 3500). Because we have determined that the National Guard was in state status, rather than federal service, at the time of the training incident, we find the *Feres* doctrine inapplicable to this case.

The State next contends that it cannot be sued, notwithstanding state status of the National Guard, because it

meets the criteria announced in *Evangelical United Brethren Church v. State*, *supra*, for reinstating tort immunity which would otherwise be waived by RCW 4.92.090. This contention also fails.

The State, through its National Guard, is accused of tortious conduct. Based on concepts of sovereign immunity, the State cannot be sued for such conduct unless it has waived its immunity to suit. *O'Donoghue v. State*, 66 Wn.2d 787, 789, 405 P.2d 258 (1965).

This State has waived such immunity. In 1961 the Legislature adopted RCW 4.92.090, which provides (as amended in 1963):

The state of Washington, whether acting in its governmental or proprietary capacity, shall be liable for damages arising out of its tortious conduct to the same extent as if it were a private person or corporation.

RCW 4.92.090.

[2] Although the Legislature, through RCW 4.92.090, created a blanket waiver of sovereign immunity for tortious conduct, we have carved out a narrow exception to the waiver. In *Evangelical United Brethren Church v. State*, *supra*, we recognized governmental immunity from tort liability for discretionary acts. We reasoned that organized society requires room for basic governmental policy decisions and implementation of those decisions, without threat of sovereign tort liability. *Evangelical*, at 254.

In order that a decision of a governmental official or agency qualify for immunity under the *Evangelical* exception, four questions must be affirmatively answered:

(1) Does the challenged act . . . necessarily involve a basic governmental policy, program, or objective? (2) Is the questioned act . . . essential to the realization . . . of that policy, program, or objective as opposed to one which would not change the course or direction of the policy, program, or objective? (3) Does the act . . . require the exercise of basic policy evaluation, judgment, and expertise on the part of the governmental agency involved? (4) Does the governmental agency involved possess the requisite . . . authority and duty to to . . .

the challenged act . . . ?

Evangelical, at 255.

The *Evangelical* inquiry focuses on the nature of the acts of a governmental agency. The governmental agency in this case is the National Guard gunnery team, which was directed to fire artillery on training maneuvers, pursuant to order of the Governor of Washington as commander-in-chief of the National Guard. Unless the actions of this gunnery team satisfy all four *Evangelical* criteria, the *Evangelical* exception will not immunize the State from suit for the torts of the gunnery team.

The first, second, and fourth prongs of *Evangelical* are met. The challenged act (firing the howitzer) involved the basic governmental objective of training the National Guard. Furthermore, firing artillery is essential to realization of the goal of a National Guard which is trained to fire artillery. Finally, there has been no challenge to the gunnery team's authority to engage in this firing as part of its training maneuvers.

It is the third question of the *Evangelical* test which cannot be answered affirmatively. That question asks whether the act performed by the government agency required a policy evaluation. As we stated most recently in *Miotke v. Spokane*, 101 Wn.2d 307, 678 P.2d 803 (1984), the discretionary activity protected by the *Evangelical* exception includes only basic policy discretion. *Miotke*, at 336 (citing *Mason v. Bitton*, 85 Wn.2d 321, 534 P.2d 1360 (1975)). The act performed by the gunnery team in this case required no policy evaluation. The team's job was to safely and effectively fire a piece of artillery. Such a job required that the gunnery team make decisions; however, the decisions were of the type requiring experience, care, and knowledge of proper procedures. As such, any decisions to be made by the team were operational, not policy decisions.

The gunnery team's operational decisions are closely analogous to those of the city and state police officers in

Mason v. Bitton, supra. In *Mason*, we distinguished the type of discretion "exercised at a truly executive level, to which immunity was granted, from that discretion exercised at an operational level, which, if done in a negligent fashion, would subject the government to liability." *Mason*, at 328. In making such a distinction, we held that the decision of state and city police officers to engage in a high speed chase which resulted in two deaths involved discretion at an operational, rather than executive level. Such operational decision could not immunize the city and state governments from suit. Similarly, the decision of the gunnery team in this case regarding setting, safety-checking, and firing the howitzer involved an operational rather than executive level decision. Thus, under *Mason*, the State of Washington is not immune from suit for the torts of its National Guard gunnery team.

Since the National Guard was acting in its state capacity at the time of the deaths and injuries suffered by United States Army personnel, and the State is not entitled to immunity under *Evangelical* and its progeny, the State of Washington is not immune to suit in this instance. Accordingly, the trial court refusal to grant dismissal in favor of the State is affirmed.

DOLLIVER, C.J., and UTTER, PEARSON, and GOODLOE, JJ., concur.

CALLOW, J.—I concur in the result. The plaintiffs seek \$14,575,000 from the State of Washington in addition to their federal benefits.

FIRST: If an active member of the armed services of the United States is injured or killed by another active member of the armed services of the United States while both are on duty, recovery for that injury or death is limited by *Feres v. United States*, 340 U.S. 135, 95 L. Ed. 152, 71 S. Ct. 153 (1950). The *Feres* doctrine provides that United States Army personnel may recover against the United States for injuries suffered in the service only through the

federal compensation system defined by statute.

As stated in *Feres* on page 146:

We conclude that the Government is not liable under the Federal Tort Claims Act for injuries to servicemen where the injuries arise out of or are in the course of activity incident to service. Without exception, the relationship of military personnel to the Government has been governed exclusively by federal law.

SECOND: If a member of the Washington State National Guard is injured or killed while on duty by another member of the Washington State National Guard also on duty, the recovery for injury or death is limited by *Wark v. Washington Nat'l Guard*, 87 Wn.2d 864, 865, 557 P.2d 844 (1976), which held:

RCW 38.40.030 . . . provides the exclusive remedy for militiamen injured in the course of duty. That section provides that any officer or enlisted man of the organized militia, who is wounded or otherwise disabled (or his dependents if he dies) while in active service, shall receive from the State "just and reasonable relief" in an amount to conform as nearly as possible to the general schedule of payments and awards provided under the workmen's compensation law in effect in the state at the time of the disability or death.

This formula for recovery may be expanded by 32 U.S.C. § 318 if federal funds supported the activity. *Chapman v. Balden Corp.*, 414 So. 2d 1283 (La. Ct. App. 1982).

THIRD: If a member of the Washington State National Guard, while on active or training duty, is injured or killed by an active duty member of the armed services of the United States, recovery for the death or injury is also limited by *Wark v. Washington Nat'l Guard, supra*; RCW 38.40.030. See also *Layne v. United States*, 295 F.2d 433 (7th Cir. 1961), cert. denied, 368 U.S. 990 (1962). *Edgar v. State*, 92 Wn.2d 217, 595 P.2d 534 (1979), cert. denied, 444 U.S. 1077 (1980), states at page 223:

In *Wark*, we held that RCW 38.40.010-.030 provides the exclusive remedy for National Guardsmen wounded, killed or disabled in the line of duty. In interpreting our statutes, we noted the similarity of RCW 4.92.090 to the

federal tort claims procedure act, 28 U.S.C. §§ 2671-2680 (1970), and the fact that the federal government provides a compensation system for members of the military similar to that which is provided in this state for guardsmen. We cited *Feres v. United States, supra*, wherein the United States Supreme Court had held that it was not the intent of Congress to provide an additional remedy for those whose claims were already expressly provided for in another statute.

The high court in *Feres* had also said that the military activities of government are so unique that there is no comparable function in the private sector and thus no common-law action in which a private person would be liable under similar circumstances.

(But see 10 U.S.C. § 2733 permitting limited claims against the United States for personal injuries or death caused by a member of the armed services incident to noncombat activities.)

Under the foregoing three illustrations (1) Army injures Army, (2) Guardsman injures Guardsman, and (3) Army injures Guardsman, the general rule is limited recovery under a statutory scheme of compensation.

The narrow opening through which this action is allowed to pass is the absence of statutory directive and the chink in governmental immunity discussed in *Evangelical United Brethren Church v. State*, 67 Wn.2d 246, 407 P.2d 440 (1965). In that case a 14-year-old boy in the juvenile correctional facility at Green Hill escaped and set fire to a church. The plaintiffs alleged that the State was negligent and that the school had applied only minimal security measures to the boy when it knew, or should have known, that he had a propensity for setting fires. The opinion sets forth the four questions which must be answered in the affirmative if the challenged act is to be classified as a discretionary governmental action for which the State is immune from liability. The opinion states in part:

(1) Does the challenged act, omission, or decision necessarily involve a basic governmental policy, program, or objective? (2) Is the questioned act, omission, or decision essential to the realization or accomplishment of that

policy, program, or objective as opposed to one which would not change the course or direction of the policy, program, or objective? (3) Does the act, omission, or decision require the exercise of basic policy evaluation, judgment, and expertise on the part of the governmental agency involved? (4) Does the governmental agency involved possess the requisite constitutional, statutory, or lawful authority and duty to do or make the challenged act, omission, or decision?

Evangelical Church, at 255. The opinion found that each of the four questions was to be answered in the affirmative and that there was no State liability.

The decision of the majority holds that the State does not have immunity from suit in the case before us since the act of firing the 155 mm. howitzer did not require the exercise of a basic policy judgment (interrogatory 3 of *Evangelical Church*), but was merely a negligent operational action by the Guardsmen who fired the piece. See *Barnum v. State*, 72 Wn.2d 928, 435 P.2d 678 (1967). I acknowledge that the negligent aiming of the artillery and its firing did not involve a high level discretionary act exercised at a truly executive level. *Chambers-Castanes v. King Cy.*, 100 Wn.2d 275, 669 P.2d 451 (1983). I agree that when RCW 4.92.090 opened the door to suits against the State, the State Legislature restricted recovery by the militia as noted, but did not preclude actions for injury to United States military personnel caused by National Guardsmen.

In any event, in the situation before us where members of the armed services of the United States have been injured or killed by the negligence of a member of the Washington State National Guard while on training duty, the limitations do not apply and the State of Washington is held liable under a direct civil suit against the State. There is no logical justification for treating this fourth circumstance, Guardsman injures Army, differently than the injured service person in the other three situations.

The injured Army personnel involved in the case before us have full military death, treatment, disability and dependent benefits available for their injuries through

Titles 10 and 38 of the United States Code, the statutory military and veterans' administration entitlements which have been and are being provided. There is no question but that the plaintiffs in this action are entitled to compensation as well as sympathy and compassion for their loss. However, the circumstances in this case apparently were not contemplated by the Legislature of the State of Washington or by the Congress of the United States. Where, under the three circumstances recited a person injured in the service of his country would be entitled only to a sum set by statute, in this situation, simply by virtue of his status or insignia on his blouse, the State is required to pay, in addition to the federal benefits, as if the injured party had been a civilian. Two compensations will result. Compare *Lundeen v. Department of Labor & Indus.*, 78 Wn.2d 66, 469 P.2d 886 (1970).

A soldier in the field serves his country at great risk. He can never be fully compensated for the risks to life and limb that he undertakes. Nor can his country or state fully compensate him other than by honors and gratitude. The risks a soldier takes in the field are part of the price he must pay for living in a free society.

It would be a perfect world if the plaintiffs in this case could be properly compensated. However, it is not proper to compensate them on a different basis or more generously than others who are serving in a different status would be compensated in a like situation. I concur with the majority because the law does not preclude the recovery it allows and makes this recovery possible. However, it appears that this is a matter which has dropped between the cracks and should be corrected by the Legislature.

DORE, ANDERSEN, and DURHAM, JJ., concur with CALLOW, J.