

INFORMATION PAPER

JALS-LTT
14 September 2017

SUBJECT: Litigation Division – Tort Litigation

1. **Purpose.** To provide SJAs and key leaders information on litigation of tort claims for the Army and its employees.
2. **Background.** The Torts Litigation Branch is responsible for Federal Tort Claims Act (FTCA) litigation against the Army and certain elements of DoD, related litigation against DA and DoD personnel in their official capacity, and tort litigation arising under other laws including the Medical Care Recovery Act. The Torts Branch also processes requests for representation by Army and certain DoD employees sued individually for acts which may have occurred in the scope of their federal employment, when the acts complained of sound in tort.
3. **Authorities.** AR 27-40, Chapter 4 discusses the policies and procedures for employees who want Westfall Act certification or Department of Justice (DOJ) representation for constitutional claims against the employee in their individual capacity, as well as requests for indemnification.
4. **References.** FTCA (28 U.S.C. § 1346, 2671-2680); 28 C.F.R. § 50.15.
5. **Issues.** The FTCA allows suit against the government for torts under circumstances where a private individual would be liable, with certain exceptions (28 U.S.C. § 2680). The FTCA does not allow suit by military members against the military for alleged injuries that occur “incident to service.” Although this is sometimes difficult to define, the courts interpret the phrase expansively. The only proper defendant in a FTCA claim is the United States, although many complaints name federal employees.
 - a. Employees named in their individual capacity for non-constitutional claims sounding in tort can request Westfall Certification from the DOJ. If DOJ finds that the employee was acting within the scope of their duties, the United States is substituted for the employee as the Defendant.
 - b. Employees named in their individual capacity for constitutional (“*Bivens*”) claims may request representation from DOJ. If DOJ finds that the employee was acting within the scope of their duties, DOJ may either represent the employee or provide private counsel at the government’s expense.
6. **SJA Takeway.** Federal employees, especially commanders and military doctors, are frequently sued in their individual capacity for actions taken within the scope of their duties. To ensure that they are expeditiously replaced as a defendant and/or adequately represented, the OSJA should have the individual request representation and their supervisor sign a scope of employment statement, samples of which are found in AR 27-40, Chapter 4. The documents should then be sent to Torts Litigation Branch for processing.

/703-693-

Approved By: BG Joseph B. Berger III