

THE WHITE HOUSE

WASHINGTON

April 17, 1972

Dear Mr. Gross:

By letter of March 10 to Mr. William Timmons, you requested information on the progress during the past six months of the claims of the Tjernagel family, whose home was destroyed in the crash of an Iowa National Guard jet. We have now obtained the facts on this matter which I had promised to provide to you in my letter of March 22.

As you know, after submission of a claim to the Air Force on June 3, 1970, the Tjernagels' attorney also presented a claim on December 4, 1970 to the State of Iowa for the same damages. Under the procedures established in Chapter 25A. 5 of the Iowa code, a suit may not be brought until the appeal board makes final disposition of the claim. However, if the State Appeal Board does not make final disposition within six months after the claim is made in writing, the claimant may, by written notice, withdraw the claim and begin suit under that chapter.

The Iowa Appeal Board finally reached a decision on December 22, 1971 which stated that:

"...these claims were considered by this board when filed. Although it was the consensus of the board that the claims should be denied, this decision would be withheld until claimants were paid by the Air Force in order that they could not be compelled to bring an action against the State because of the six months Statute of Limitations. According to Mr. Brekken, attorney for claimants, the Air Force assumed responsibility for the damages stemming from the accident and the claims were filed with the State as a protective measure. Claimants never intended to pursue to action against the State. The claims were timely filed with the Air Force.

"Congressional leaders have introduced a private bill to compensate the claimants. State officials have been assured that the bill will be acted upon in the Spring of 1972.

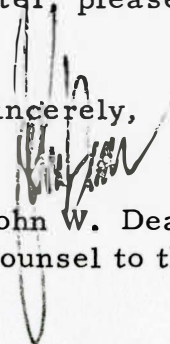
Inasmuch as Congress has now acted to compensate the claimants, the board denies the claims in order to eliminate any procedural requirements by Congress or the Air Force."

Though the State of Iowa Appeal Board has denied the claims, it has not taken the action required by Chapter 25A. 13, Iowa code, to commence the running of the State Statute of Limitations for the time to file a suit. That statute states that "the time to begin a suit under this chapter shall be extended for a period of six months from the date of mailing of notice to the claimant by the State Appeal Board as to the final disposition of the claim or from the date of withdrawal of the claim from the State Appeal Board..." The Air Force has been advised by the attorney for the claimants that written notice of denial of the claim has not been received.

The private bill referred to in the decision of the State Appeal Board involves private relief bills introduced by Senators Harold E. Hughes (S. 2697) and Jack R. Miller (S. 2757), and H. R. 10678, introduced by you. As you know, the Air Force has now presented their views to Congress on these bills by letters of April 6 to Chairmen Celler and Eastland. While the Air Force still maintains that an adequate remedy exists under Iowa state law which by Federal law and regulations precludes payment of the claim by the United States, it also recognizes that because the Tjernagels may not be able to receive timely and appropriate relief from the state, Congress may conclude that payment by the United States is warranted as a matter of equity. If this were the case, the Air Force would not object to enactment of this legislation. Copies of their letters are enclosed for your information.

If I can be of any further assistance on this matter, please do not hesitate to let me know.

Sincerely,


John W. Dean, III
Counsel to the President

Honorable H. R. Gross
House of Representatives
Washington, D. C. 20515

Enclosures

DEPARTMENT OF THE AIR FORCE
WASHINGTON 20330



OFFICE OF THE SECRETARY

APR 3 1972

Dear Mr. Chairman:

Reference is made to your request for the views of the Department of the Air Force with respect to H.R. 10678, 92d Congress, a bill "For the relief of Marie Tjernagel and others."

H.R. 10678 would authorize and direct the Secretary of the Treasury to pay \$133,000 jointly to Marie Tjernagel, Herman Tjernagel, the estate of Bertha Tjernagel and the estate of Jennie Tjernagel in full settlement of all their claims against the United States for their personal injury or property damage, or both, resulting from the crash on December 9, 1968, of an Iowa Air National Guard aircraft on the Tjernagel family farm.

A member of the Iowa Air National Guard, piloting an Iowa Air National Guard aircraft while engaged in training under chapter 5 of title 32, United States Code, crashed onto the Tjernagel property on December 9, 1968. The Iowa Air National Guard conducted a collateral investigation into all aspects of the crash, completing the investigation on February 14, 1969. The investigating board, as we interpret its report, concludes that the accident was caused by pilot error in attempting to engage in acrobatic flying at altitudes too low and at speeds too fast to permit the aircraft to recover. In view of this board's finding, it would appear that the pilot had engaged in activity prohibited by section 328.14, Iowa Code, which under the circumstances constituted a breach of the requirement of due care.

On June 3, 1970, claims were presented to the Air Force by the Tjernagels as follows:

Marie Tjernagel, individually and on behalf of the estate of Peter Tjernagel (deceased), and Sigrid, Martin, Michael and Ingeborg Tjernagel (minors)	\$ 45,784.26
Herman Tjernagel	8,050.88
Estate of Bertha Tjernagel (deceased)	3,532.26
Estate of Jennie Tjernagel	<u>44,128.29</u>
TOTAL	\$101,495.69

Both prior and subsequent to the presentation of these claims, the Air Force conducted its own investigation to fix responsibility for the accident and to determine the amount of the loss. Such investigations are regularly conducted pursuant to chapter 14, Air Force Manual 112-1, regardless of the person who may ultimately be held responsible for the payment of damages arising from the accident. In this case, following submission of these claims, the Air Force made emergency payments in the amount of \$5,000 under the provisions of 10 U.S.C. 2736, without any admission of liability for the accident, as that section provides. The Air Force evaluated the damages as follows:

Marie Tjernagel, individually and on behalf of the estate of Peter Tjernagel (deceased, and Sigrid, Martin, Michael and Ingeborg Tjernagel (minors)	\$ 24,936.24	
Less emergency payments	<u>- 5,000.00</u>	
		19,936.24
Herman Tjernagel		8,050.88
Bertha Tjernagel		2,380.14
Estate of Jennie Tjernagel		<u>35,522.06</u>
TOTAL		\$ 65,889.32

Payment by the Air Force of claims arising out of activities of the Air National Guard is governed by 32 U.S.C. 715 and regulations thereunder of the Secretary concerned. These regulations, contained in chapter 14, Air Force Manual 112-1, provide for payment in such cases where there is no remedy against the State or where that remedy is inadequate. Where a State has waived its sovereign immunity or provided insurance coverage, there is a State-provided primary source of recovery, which the claimant should exhaust before seeking administrative payment by the United States. The law authorizing administrative payment of National Guard claims is solely an act of grace and confers no legal right upon either the State or the claimants to payment of claims thereunder. The law gives the Secretary concerned the discretion to determine the circumstances under which claims will be paid and the decision not to make immediate payment where there is an adequate remedy under a State system is within that discretion.

The State of Iowa has a tort claims act, chapter 25A, Iowa Code, which provides for administrative consideration of claims and for litigation of claims in State courts to the extent that the State has waived sovereign immunity. Decisions of the Iowa courts, including the State Supreme Court, have held that members of the Iowa National Guard when engaged in training such as that involved in this case were in "active State service" within the meaning of the Iowa Tort Claims Act. Morrison v Iowa, 179 NW 2d 439 (Iowa 1970) and Walston Aviation of St. Paul, Inc. v Iowa, (Iowa Dist. Ct., Polk Cty., Law No. 91855, 26 February 1970) both so hold. On March 20, 1970, Iowa amended its tort claims act to exclude coverage of Air National Guard employees. However, as in the Morrison case, the accident involved here occurred prior to the amendment. Accordingly, the law of Iowa as interpreted by its courts appears to recognize a remedy for the Tjernagels against the State.

Since an adequate State remedy appeared to exist, the Air Force denied payment of the claims by the Tjernagels under 32 U.S.C. 715. Moreover, there appeared to be no other basis for payment of the Tjernagel claim. The pilot of the aircraft which crashed was not then a federal employee, since he had not been called into active federal service. As recognized in the case of Maryland v United States, 381 U.S. 41 (1965), Air National Guard pilots are not otherwise federal employees (with an exception not applicable in this case).

Simultaneously, with its denial of the claims, the Air Force delivered the claims files to the State of Iowa for its consideration in April 1971.

If the claimants are ultimately unable to obtain compensation from the State, the Air Force would then be in a position to adjudicate the claim administratively.

The Tjernagels and other claimants (with the possible exception of Central Iowa Mutual Insurance Company) filed claims against the State of Iowa on December 4, 1970.

The Board of Appeal of the State of Iowa is purported to have administratively denied payment of these claims on December 22, 1971. We are advised that the six months' statute of limitations for suit does not begin to run until the claimants have been formally notified of the administrative denial, an action which we are informed has not yet been taken. The claimants have not elected to withdraw their claims from administrative consideration and file suit in Iowa, as they could have done under Iowa law as early as six months after filing their claims administratively.

In connection with the purported administrative denial of the claims, the following is an extract from a document dated December 22, 1971 signed by the State Appeal Board:

"Re: Tjernagel claims (T-1916-64 through T-1921-64). These claims were considered by this Board when filed. Although it was the consensus of the Board that the claims should be denied, this decision would be withheld until claimants were paid by the Air Force in order that they could not be compelled to bring an action against the State because of the six months Statute of Limitations. According to Mr. Brekken, attorney for claimants, the Air Force assumed responsibility for the damages stemming from the accident and the claims were filed with the State as a protective measure. Claimants never intended to pursue the action against the State. The claims were timely filed with the Air Force.

Congressional leaders have introduced a private bill to compensate the claimants. State officials have been assured that the bill will be acted upon in the Spring of 1972. Inasmuch as Congress has now acted to compensate the claimants, the Board denies the claims in order to eliminate any procedural requirements by Congress or the Air Force."

The Air Force is unaware of the basis in Iowa law of this decision of the Appeal Board. Nor are we aware of the reasons for the unfortunate delay the claimants have encountered in obtaining adjudication of their claims by the State. Notwithstanding this action taken by the Board, the Air Force considers it premature to assume that the remedies under State law will finally prove inadequate. Rather, we assume that the State will honor its responsibility under its statutory law and judicial decisions. Accordingly, the Air Force believes it inappropriate to pay any portion of these claims at this time under 32 U.S.C. 715. On the other hand, the Air

Force recognizes that the Tjernagels have suffered as a result of the crash of the Iowa Air National Guard aircraft and have not obtained timely relief.

It has been asserted that Air Force representatives gave assurance that the claims would be settled by the Air Force. In this connection, in reference to the Tjernagel's claim filed against the Air Force on June 3, 1970, an Air Force representative, in a letter dated June 23, 1970 addressed to the Office of the Attorney General of Iowa, stated: "In view of the present unsettled condition of the law in your State, it is my recommendation that the Air Force go ahead and make settlement of these claims. Unless I hear from you to the contrary this is the procedure we will follow." This assumption of the unsettled condition of the law in Iowa was apparently based upon the case of Morrison v. Iowa which was pending in the courts at that time. The State of Iowa contended the state was not liable for ANG claims.

This uncertainty was not settled until that case (Morrison v. Iowa 179 N.W. 2d 439 (Iowa 1970)) was decided by the Iowa Supreme Court against the state in September 1970. With this clarification of the law under which Iowa was liable for damages due to Air National Guard activities such as the one affecting the Tjernagels, the Air Force was barred from settling the claim. This was subsequently explicitly confirmed with State authorities, resulting in the Air Force's delivery of the claims files to the State, as already noted above.

If the claimants did in fact rely on assurances of Air Force representatives that the Air Force would pay their claims, such reliance could have contributed to their delay in filing a claim with the State of Iowa until almost two years after the accident. However, such delay may well have been due to the uncertainty as to what Iowa law provided in terms of the State's liability, as well as to actions and attitudes of State officials.

In view of the foregoing, the Congress may conclude that the Tjernagels cannot expect to receive appropriate and timely relief from the State and that under all of the circumstances payment by the United States is warranted as a matter of equity. If this were the case, the Air Force would not object to the enactment of H.R. 10678, if amended to make awards to claimants other than insurance companies in the amounts set out earlier in this report. With respect to payments to insurance companies, the Air Force supports the traditional policy of the Congress refusing to make payments to such companies through private relief legislation. Finally, we note that enactment of the bill might not prevent the Tjernagels from obtaining a second payment of this claim from the State of Iowa, based on their apparent legal right under State law. Accordingly, if this bill is favorably considered, it is recommended that ", the State of Iowa, and their officers and employees" be inserted in line 9 of the first page, after "against the United States."

The Office of Management and Budget advises that, from the standpoint of the Administration's program, there is no objection to the presentation of this report for the consideration of the committee.

Sincerely,



RICHARD J. BORDA

Assistant Secretary of the Air Force
Manpower and Reserve Affairs

Honorable Emanuel Celler
Chairman, Committee on the
Judiciary
House of Representatives

DEPARTMENT OF THE AIR FORCE
WASHINGTON 20330



OFFICE OF THE SECRETARY

APR 6 1972

Dear Mr. Chairman:

Reference is made to your request for the views of the Department of the Air Force with respect to S. 2757 and S. 2697, 92d Congress, identical bills "For the relief of Marie Tjernagel and others."

S. 2757 and S. 2697 would authorize and direct the Secretary of the Treasury to pay the following amounts to the following persons:

Marie Tjernagel, Peter J. Tjernagel (deceased), Michael Tjernagel, Martin Tjernagel, Sigrid Tjernagel and Ingeborg Tjernagel	\$ 38,898.45
Jennie Tjernagel (deceased)	45,128.29
Herman Tjernagel	7,871.50
Bertha Tjernagel (deceased)	3,732.26
Joe Hall	8,450.00
Farmers Elevator Mutual Insurance Company	2,181.15
Central Iowa Mutual Insurance Company	5,600.00
Story City Community School District	<u>133.23</u>
TOTAL	\$111,994.88

in full settlement of their claims against the United States for losses incurred as a result of the crash of an Iowa Air National Guard aircraft on December 9, 1968, in Hamilton County, Iowa.

A member of the Iowa Air National Guard, piloting an Iowa Air National Guard aircraft while engaged in training under chapter 5 of title 32, United States Code, crashed

onto the Tjernagel property on December 9, 1968. The Iowa Air National Guard conducted a collateral investigation into all aspects of the crash, completing the investigation on February 14, 1969. The investigating board, as we interpret its report, concludes that the accident was caused by pilot error in attempting to engage in acrobatic flying at altitudes too low and at speeds too fast to permit the aircraft to recover. In view of this board's finding, it would appear that the pilot had engaged in activity prohibited by section 328.14, Iowa Code, which under the circumstances constituted a breach of the requirement of due care.

On June 3, 1970, claims were presented to the Air Force as follows:

Marie Tjernagel, individually and on behalf of the estate of Peter Tjernagel (deceased), and Sigrid, Martin, Michael and Ingeborg Tjernagel (minors)	\$ 45,784.26
Herman Tjernagel	8,050.88
Estate of Bertha Tjernagel (deceased)	3,532.26
Estate of Jennie Tjernagel (deceased)	44,128.29
Joe Hall	7,975.00
Farmers Elevator Mutual Insurance Company	2,181.15
Story City Community School District	133.23
TOTAL	<u>\$111,781.31</u>

Both prior and subsequent to the presentation of these claims, the Air Force conducted its own investigation to fix responsibility for the accident and to determine the amount of the loss. Such investigations are regularly conducted pursuant to chapter 14, Air Force Manual 112-1, regardless of the person who may ultimately be held responsible for the payment of damages arising from the accident. In this case, following submission of these claims, the Air Force made emergency payments in the amount

of \$5,000 under the provisions of 10 U.S.C. 2736, without any admission of liability for the accident, as that section provides. The Air Force also evaluated the damages as follows:

Marie Tjernagel, individually and on behalf of the estate of Peter Tjernagel (deceased), and Sigrid, Martin, Michael and Ingeborg Tjernagel (minors)	\$ 24,936.24	
Less emergency payments	- 5,000.00	
		19,936.24
Herman Tjernagel		8,050.88
Estate of Bertha Tjernagel		2,380.14
Estate of Jennie Tjernagel		35,522.06
Joe Hall		7,700.00
Farmers Elevator Mutual Insurance Company		2,181.15
Story City Community School District		81.69
TOTAL		<u>\$75,852.16</u>

The Central Iowa Mutual Insurance Company, listed in the bills as having a claim in the amount of \$5,600.00 did not present a claim to the Air Force and the Air Force has no independent knowledge of any basis for this claim. Presumably, this company claims to have paid for some of the damage sustained by the other claimants and perhaps included in their claims against the Air Force. However, in the absence of any independent knowledge or information supplied by the company, the Air Force has no basis upon which to comment upon the merits or value of this claim.

Payment by the Air Force of claims arising out of activities of the Air National Guard is governed by 32 U.S.C. 715 and regulations thereunder of the Secretary concerned. These regulations, contained in chapter 14, Air Force Manual 112-1, provide for payment in such cases where there is no remedy against the State or where that remedy is inadequate. Where a State has waived its sovereign immunity or provided insurance coverage, there is a State-provided primary source of recovery, which the claimant should exhaust before seeking administrative payment by the United States. The law

authorizing administrative payment of National Guard claims is solely an act of grace and confers no legal right upon either the State or the claimants to payment of claims thereunder. The law gives the Secretary concerned the discretion to determine the circumstances under which claims will be paid and the decision not to make immediate payment where there is an adequate remedy under a State system is within that discretion.

The State of Iowa has a tort claims act, chapter 25A, Iowa Code, which provides for administrative consideration of claims and for litigation of claims in State courts to the extent that the State has waived sovereign immunity. Decisions of the Iowa courts, including the State Supreme Court, have held that members of the Iowa National Guard when engaged in training such as that involved in this case were in "active State service" within the meaning of the Iowa Tort Claims Act. Morrison v Iowa, 179 NW 2d 439 (Iowa 1970) and Walston Aviation of St. Paul, Inc. v Iowa, (Iowa Dist. Ct., Polk Cty., Law No. 91855, 26 February 1970) both so hold. On March 20, 1970, Iowa amended its tort claims act to exclude coverage of Air National Guard employees. However, as in the Morrison case, the accident involved here occurred prior to the amendment. Accordingly, the law of Iowa as interpreted by its courts appears to recognize a remedy for these claimants against the State.

Since an adequate State remedy appeared to exist, the Air Force denied payment of these claims under 32 U.S.C. 715. Moreover, there appeared to be no other basis for payment of these claims. The pilot of the aircraft which crashed was not then a federal employee, since he had not been called into active federal service. As recognized in the case of Maryland v United States, 381 U.S. 41 (1965), Air National Guard pilots are not otherwise federal employees (with the exception not applicable in this case).

Simultaneously, with its denial of the claims, the Air Force delivered the claims files to the State of Iowa for its consideration in April 1971.

If the claimants are ultimately unable to obtain compensation from the State, the Air Force would then be in a position to adjudicate the claim administratively.

The Tjernagels and other claimants (with the possible exception of Central Iowa Mutual Insurance Company) filed claims against the State of Iowa on December 4, 1970.

The Board of Appeal of the State of Iowa is purported to have administratively denied payment of these claims on December 22, 1971. We are advised that the six months' statute of limitations for suit does not begin to run until the claimants have been formally notified of the administrative denial, an action which we are informed has not yet been taken. The claimants have not elected to withdraw their claims from administrative consideration and file suit in Iowa, as they could have done under Iowa law as early as six months after filing their claims administratively.

In connection with the purported administrative denial of the claims, the following is an extract from a document dated December 22, 1971 signed by the State Appeal Board:

"Re: Tjernagel claims (T-1916-64 through T-1921-64). These claims were considered by this Board when filed. Although it was the consensus of the Board that the claims should be denied, this decision would be withheld until claimants were paid by the Air Force in order that they could not be compelled to bring an action against the State because of the six months Statute of Limitations. According to Mr. Brekken, attorney for claimants, the Air Force assumed responsibility

for the damages stemming from the accident and the claims were filed with the State as a protective measure. Claimants never intended to pursue the action against the State. The claims were timely filed with the Air Force.

Congressional leaders have introduced a private bill to compensate the claimants. State officials have been assured that the bill will be acted upon in the Spring of 1972. Inasmuch as Congress has now acted to compensate the claimants, the Board denies the claims in order to eliminate any procedural requirements by Congress or the Air Force."

The Air Force is unaware of the basis in Iowa law of this decision of the Appeal Board. Nor are we aware of the reasons for the unfortunate delay the claimants have encountered in obtaining adjudication of their claims by the State. Notwithstanding this action taken by the Board, the Air Force considers it premature to assume that the remedies under State law will finally prove inadequate. Rather, we assume that the State will honor its responsibility under its statutory law and judicial decisions. Accordingly, the Air Force believes it inappropriate to pay any portion of these claims at this time under 32 U.S.C. 715. On the other hand, the Air Force recognizes that the Tjernagels have suffered as a result of the crash of the Iowa Air National Guard aircraft and have not obtained timely relief.

It has been asserted that Air Force representatives gave assurance that the claims would be settled by the Air Force. In this connection, in reference to the Tjernagel's claim filed against the Air Force on June 3, 1970, an Air Force representative, in a letter dated June 23, 1970 addressed to the Office of the Attorney General of Iowa, stated: "In view of the present

unsettled condition of the law in your State, it is my recommendation that the Air Force go ahead and make settlement of these claims. Unless I hear from you to the contrary this is the procedure we will follow." This assumption of the unsettled condition of the law in Iowa was apparently based upon the case of Morrison v. Iowa which was pending in the courts at that time. The State of Iowa contended the state was not liable for ANG claims.

This uncertainty was not settled until that case (Morrison v. Iowa 179 N.W. 2d 439 (Iowa 1970)) was decided by the Iowa Supreme Court against the state in September 1970. With this clarification of the law under which Iowa was liable for damages due to Air National Guard activities such as the one affecting the Tjernagels, the Air Force was barred from settling the claim. This was subsequently explicitly confirmed with State authorities, resulting in the Air Force's delivery of the claims files to the State, as already noted above.

If the claimants did in fact rely on assurances of Air Force representatives that the Air Force would pay their claims, such reliance could have contributed to their delay in filing a claim with the State of Iowa until almost two years after the accident. However, such delay may well have been due to the uncertainty as to what Iowa law provided in terms of the State's liability, as well as to actions and attitudes of State officials.

In view of the foregoing, the Congress may conclude that the Tjernagels cannot expect to receive appropriate and timely relief from the State and that under all of the circumstances payment by the United States is warranted as a matter of equity. If this were the case, the Air Force would not object to the enactment

of S. 2757 and S. 2697, if amended to make awards to claimants other than insurance companies in the amounts set out earlier in this report. With respect to payments to insurance companies, the Air Force supports the traditional policy of the Congress refusing to make payments to such companies through private relief legislation. Finally, we note that enactment of these bills might not prevent the Tjernagels from obtaining a second payment of this claim from the State of Iowa, based on their apparent legal right under State law. Accordingly, if these bills are favorably considered, it is recommended that ", the State of Iowa, and their officers and employees" be inserted in line 9 of the first page, after "against the United States."

The Office of Management and Budget advises that, from the standpoint of the Administration's program, there is no objection to the presentation of this report for the consideration of the committee.

Sincerely,



RICHARD J. BORDA
Assistant Secretary of the Air Force
Manpower and Reserve Affairs

Honorable James O. Eastland
Chairman, Committee on the
Judiciary
United States Senate