

INDEMNIFICATION POLICY FOR REGENTS, ADVISORY BOARD MEMBERS, AND BOARD COMMITTEE MEMBERS (ADOPTED APRIL 6, 2009)

Introduction

Section 2.12 of the Bylaws of the Board of Regents provides:

Members of the Board of Regents, Regents' Committees, Regents Emeriti, Smithsonian advisory bodies, officers, or employees of the Smithsonian may be indemnified for any and all liabilities and reasonable expenses incurred in connection with any claim, action, suit, or proceeding arising from present or past service for the Smithsonian Institution, in accordance with resolutions adopted by the Board.

The purpose of this policy is to describe the circumstances in which members of the Smithsonian Board of Regents, advisory boards, and board committees may be eligible indemnification as provided for in the Bylaws. In the non-profit sector, board members are entitled to indemnification in certain circumstances because of the potential liability they face not only for the actions they take, but simply by virtue of their positions. This policy establishes similar protections for members of the Smithsonian's boards and board committees in recognition of their distinct role as volunteers in the oversight of the Smithsonian's affairs.

Background

Smithsonian personnel are entitled to significant protections from liability under Federal law. Most significantly, the United States Court of Appeals for the District of Columbia Circuit has ruled that the Smithsonian Institution is an "independent establishment of the United States" for purposes of the Federal Tort Claims Act, 28 U.S.C. 1346, 2671 *et seq.* See *Expeditions Unlimited Aquatic Enterprises, Inc. v. Smithsonian Institution*, 566 F.2d 289, 296 (D.C. Cir. 1977) (en banc). Consequently, Smithsonian personnel are entitled to the benefits of the Federal Employees Liability Reform and Tort Compensation Act of 1988, Pub. L. No. 100-694, 102 Stat. 4564. That Act, commonly known as the Westfall Act, grants Smithsonian personnel absolute immunity from common-law tort claims arising out of acts that they undertake in the course of their official duties. See 28 U.S.C. 2679(b)(1).

The Westfall Act provides Smithsonian personnel with their primary safeguard from civil liability suits. If an eligible individual is sued for wrongful or negligent conduct, the Act empowers the Attorney General to certify that the individual was acting within the scope of his office or employment at the time of the incident out of which the claim arose. 28 U.S.C.

2679(d)(1),(2). Upon certification, the individual is dismissed from the action, and the United States is substituted as the defendant in the place of the employee. The litigation is thereafter governed by the Federal Tort Claims Act. See *Osborn v. Haley*, 549 U.S. 225, ___ (2007).

The Westfall Act provides Smithsonian personnel with substantial protections from civil liability, and the Smithsonian Institution invokes its protections on behalf of its personnel when the Act applies. Smithsonian personnel nevertheless may be subject to liabilities that fall outside of the coverage of that Act. The Smithsonian recognizes that its personnel, like others who exercise a public trust, cannot be expected to act forthrightly in the best interests of the Institution if their actions may result in personal liability. See *Harlow v. Fitzgerald*, 457 U.S. 800, 814 (1982) (recognizing “the danger that fear of being sued will dampen the ardor of all but the most resolute, or the most irresponsible public officials, in the unflinching discharge of their duties” (internal quotation marks and brackets omitted)).

In addition to the protections provided by Federal law, the Board of Regents intends to provide members of Smithsonian boards and board committees with indemnification in accordance with guidance set out in this policy. This policy expresses the general principle that Smithsonian personnel are entitled to protection from personal financial liability when they take actions on behalf of the Smithsonian Institution with an objectively reasonable and good-faith belief that those actions are in the best interests of the Institution.

Legal Defense and Payment of Liabilities of Smithsonian Board and Committee Members

I. Indemnification

A. Eligible Persons and Scope

The Smithsonian Institution may furnish the members of its Board of Regents, advisory boards, and board committees (“Eligible Persons”) with legal defense and pay financial liabilities, including expenses, incurred in connection with any proceeding initiated against any Eligible Person or requiring an Eligible Person’s participation as a witness by reason of serving on a Smithsonian board or committee, or serving at the Smithsonian’s request as a member of or representative to an entity outside the Smithsonian.

B. Proceedings Covered

“Proceeding” for the purposes of this policy means an actual or threatened criminal, civil, or other proceeding, whether administrative, arbitrative, or investigative.

C. Advances

If an advance is timely requested as provided for in Section IV. A. (below), the Board of Regents shall pay an Eligible Person's reasonable legal expenses in advance of a final judgment or disposition of a proceeding if the Board determines that the Eligible Person is likely to satisfy the standards for indemnification. The Board shall require the Eligible Person to provide satisfactory assurances of repayment in the event that the Board determines at a later date that the Eligible Person is not entitled to indemnification.

D. Success on the Merits

Provided that the Board of Regents has determined that the standards for indemnification below have been met, the Board shall indemnify an Eligible Person for reasonable expenses, including attorney's fees, incurred in presenting a defense in a civil or other non-criminal proceeding if the Eligible Person has been wholly successful, on the merits or otherwise, in such defense.

II. Standards for Indemnification

Defense or payment under this policy may be provided only if all of the following conditions of conduct are met to the satisfaction of the Board of Regents:

- The Eligible Person's actions or omissions were within the scope of his or her Smithsonian duties and authority.
- The Eligible Person proceeded in an objectively reasonable and good-faith belief that the conduct was in the best interests of the Smithsonian.
- The Eligible Person reasonably believed that the conduct was lawful.
- The acts or omissions did not constitute dishonesty, gross negligence, recklessness, or intentional misconduct.
- The Eligible Person did not receive any personal benefit to which he or she was not legally entitled.
- The Eligible Person cooperates continuously and fully with the Smithsonian Institution and the Department of Justice in the defense of the proceeding.

III. Exclusions

The protections of this policy shall not extend to:

- Any liability to the Smithsonian Institution or the United States or defense expenses incurred in a proceeding resulting in liability to them.

- Any proceeding brought by an Eligible Person against the Smithsonian Institution or its interests.
- Any Smithsonian Institution, Inspector General, or legislative inquiry, audit, or review.
- Any financial liability, penalty, assessment, or expenses paid by insurance or indemnification from another source.
- Any indemnification prohibited by law.

IV. Procedure to Request Representation or Payment of Liabilities

A. Time Period for Requests

To qualify for legal defense and payment of liabilities an Eligible Person must inform the Smithsonian Institution's Office of General Counsel, within five business days of receiving actual notice, that the Eligible Person has been named as a party or witness in a proceeding.

The Office of General Counsel will make an initial determination, in consultation with the United States Department of Justice, whether the Eligible Person is subject to the protections of the Westfall Act or other Federal laws. If so, the Office of General Counsel will request the Department of Justice to represent the Eligible Person in accordance with the Department's regulations, 28 C.F.R. §§ 50.15, 50.16. Alternatively, the Office of General Counsel may offer representation to the Eligible Person through its attorneys or through outside counsel.

In the event that representation is not provided by the Department of Justice or the Smithsonian (through OGC or outside counsel), the Eligible Person shall notify the Office of General Counsel within five business days after receiving notice of that decision whether the Eligible Person intends to seek indemnification of liability or expenses. The Eligible Person may submit a request for advance payment of expenses at any time thereafter and must submit a request for indemnification no later than 30 days after a final non-appealable judgment, order, or settlement. The Office of General Counsel will advise the Regents whether the request should be granted or denied.

B. Decision by the Board of Regents

The Board of Regents will consider requests for legal defense, advances, and payment of liabilities based on its judgment and guided by the standards set out in this policy. The Board may make its decision by: (1) a majority vote of a quorum of

the members of the Board or (2) a majority vote of a quorum of the members of an appropriate Committee designated by the Board. If such a quorum is not obtainable or, even if obtainable, a quorum of disinterested Regents so directs, the Board may seek and rely upon a written opinion of independent legal counsel.

V. Prerogatives of the Board of Regents

The Board of Regents may continue to refine and amend this policy based on its experience and judgment, and reserves the right to modify or withdraw this policy in its sole discretion, except as to proceedings based on acts or omissions that occurred before the modification or withdrawal.