The original documents are located in Box 60, folder "10/8/76 HR3954 Defense Medical Personnel Malpractice Liability Protection Act" of the White House Records Office: Legislation Case Files at the Gerald R. Ford Presidential Library.

APPROVED
OCT 08 1976

S 10/8/76
in Satv.

THE WHITE HOUSE

WASHINGTON

October 4, 1976

ACTION

Last Day: October 12

MEMORANDUM FOR THE PRESIDENT

FROM: JIM CANNON

SUBJECT: H.R. 3954 - Defense Medical Personnel Malpractice Liability Protection Act

Rec'd 10/9/76

archive 10/12/76

Attached for your consideration is H.R. 3654, sponsored by Representative Gonzalez.

The enrolled bill would extend protection against medical malpractice suits to medical personnel of the armed forces, Department of Defense, CIA, the National Guard, and NASA. This protection would cover physicians, dentists, nurses, pharmacists, paramedicals, and other medical support personnel while acting within the scope of their official duties. Except for the National Guard, the bill would make the Federal Tort Claims Act the exclusive remedy for injuries rising from malpractice by medical personnel.

A detailed discussion of the provisions of the enrolled bill is provided in OMB's enrolled bill report at Tab A.

OMB, Max Friedersdorf, Counsel's Office (Kilberg), NSC and I recommend approval of the enrolled bill.

RECOMMENDATION

That you sign H.R. 3654 at Tab B.

EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
WASHINGTON, D.C. 20503

OCT 2 1976

MEMORANDUM FOR THE PRESIDENT

Subject: Enrolled Bill H.R. 3954 - Defense Medical Personnel Malpractice Liability Protection Act
Sponsor - Rep. Gonzalez (D) Texas

Last Day for Action

October 12, 1976 - Tuesday

Purpose

Protects from individual liability certain medical personnel of the Department of Defense, the armed forces, the Central Intelligence Agency, the National Guard, and the National Aeronautics and Space Administration, while they are acting within the scope of their official duties.

Agency Recommendations

Office of Management and Budget	Approval
Department of Defense	Approval
National Aeronautics and Space Administration	Approval
Central Intelligence Agency	Approval
Department of Transportation	Approval
Civil Service Commission	Approval
Department of Justice	Defers to other agencies

Discussion

There has been general agreement among Executive Branch agencies for some time that protection of medical personnel from individual malpractice suits is desirable. The precedent for protecting

government medical personnel, acting within the scope of their employment, from personal liability for medical malpractice was established in 1965 when this protection was provided to Veterans Administration employees. Similar legislation extended this coverage to medical personnel of the Public Health Service in 1970. The Foreign Relations Authorization Act which you approved on July 12, 1976, further extended this protection to employees of the Department of State, including the Agency for International Development.

This enrolled bill would extend protection against medical malpractice suits to medical personnel of the armed forces, Department of Defense, the Central Intelligence Agency, the National Guard, and the National Aeronautics and Space Administration. This protection would cover physicians, dentists, nurses, pharmacists, paramedicals, and other medical support personnel while acting within the scope of their official duties. With the exception of the National Guard, the protection H.R. 3954 would provide is essentially the same as the protection now provided to Veterans Administration, Public Health Service, and State Department employees. The bill would make claims against the United States under the Federal Tort Claims Act the only legal recourse available to claimants seeking remuneration for injury or death allegedly resulting from medical malpractice. For the National Guard, the bill would make an individual medical malpractice liability incurred by a Guard member, acting within the scope of his duties and while engaged in certain training exercises, the liability of the United States.

The Department of the Air Force, on behalf of the Department of Defense, recommends approval of H.R. 3954. In its enrolled bill letter, the Air Force states that the protection which H.R. 3954 would provide would have a positive impact upon the operation of Defense's medical program. The letter notes that the enrolled bill would alleviate

anxiety on the part of Defense medical personnel and would also enhance the Department's ability to recruit and retain these highly skilled personnel.

Paul H. O'Neill
Acting Director

Enclosures

DEPARTMENT OF THE AIR FORCE
WASHINGTON, D.C. 20330

OFFICE OF THE SECRETARY

1 OCT 1976

Dear Mr. Director:

Reference is made to your request to the Secretary of Defense for the views of the Department of Defense with respect to H.R. 3954, 94th Congress, an enrolled bill "To provide for an exclusive remedy against the United States in suits based upon medical malpractice on the part of medical personnel of the armed forces, the Defense Department, the Central Intelligence Agency, and the National Aeronautics and Space Administration, and for other purposes." The Secretary of Defense has delegated the Department of the Air Force the responsibility for expressing the views of the Department of Defense.

The purpose of H.R. 3954 is to provide personal financial liability protection for military and civilian medical personnel of the Department of Defense, the Central Intelligence Agency, the National Aeronautics and Space Administration, the Coast Guard, and the National Guard. Except with respect to the National Guard, the bill would make the Federal Tort Claims Act the exclusive remedy for injuries arising from malpractice by medical personnel acting within the scope of their duties for the Department of Defense.

H.R. 3954 would require the Attorney General to defend or settle any legal action for malpractice against Department of Defense medical personnel individually, and authorize removal of such actions from State courts to the appropriate United States District Court. In addition, the Secretary of Defense is granted authority to hold harmless or provide liability insurance for any Department of Defense medical personnel in malpractice situations

where a remedy under the Federal Tort Claims Act would be precluded, e.g., instances arising in foreign countries or while the personnel involved are on detail to civilian institutions for training purposes. Similar protection would be accorded medical personnel of the Central Intelligence Agency, National Aeronautics and Space Administration, and the Coast Guard.

The protection accorded National Guard medical personnel, however, is somewhat different since they remain employees of the various States except when called into active federal service. Despite being paid by the United States during drills and summer camp, Guard personnel are thus not encompassed by the provisions of the Federal Tort Claims Act. Members of other reserve components are covered by the Act while in a training status. Consequently, H.R. 3954 seeks to provide equivalent protection for Guard medical personnel by indemnifying them against any judgment, costs, or legal fees incurred by defending against malpractice suits arising out of their performance of federally mandated training. This provision is not applicable to claims arising while National Guard medical personnel are performing duty at the call of the respective Governor in their State capacity.

The Department of Defense anticipates this bill having a positive impact upon the operation of our medical facilities. It should provide our medical personnel a degree of protection from personal financial liability equivalent to that derived from medical malpractice insurance. Such insurance is often either unavailable or prohibitively expensive for the military practioner. This protection should alleviate considerable anxiety on the part of Department of Defense medical personnel with respect to their financial liability and thus increase recruiting and retention rates for these highly skilled individuals.

The enactment of H.R. 3954 will be advantageous to the Department of Defense. For this reason, the Department of the Air Force, on behalf of the Department of Defense, recommends that the President sign this enrolled bill into law.

The approval of this enactment will cause no apparent increase in budgetary requirements of the Department of Defense.

This report has been coordinated within the Department of Defense in accordance with procedures prescribed by the Secretary of Defense.

Sincerely,

Nita Ashcraft

Nita Ashcraft
Assistant Secretary of the Air Force
Manpower and Reserve Affairs

Honorable James T. Lynn
Director
Office of Management and
Budget

National Aeronautics and
Space Administration

Washington, D.C.
20546

Office of the Administrator

OCT 1 1976

Director
Office of Management and Budget
Executive Office of the President
Washington, DC 20503

Attention: Assistant Director
for Legislative Reference

Subject: Enrolled Enactment report on H.R. 3954, 94th Congress

This is an Enrolled Enactment report on H.R. 3954, "To provide for an exclusive remedy against the United States in suits based upon medical malpractice on the part of medical personnel of the armed forces, the Defense Department, the Central Intelligence Agency, and the National Aeronautics and Space Administration, and for other purposes." It is submitted pursuant to Mr. James M. Frey's memorandum of September 29, 1976.

In general, the Bill would immunize medical personnel in the Department of Defense, the Central Intelligence Agency, the National Aeronautics and Space Administration, and the National Guard in certain instances, from individual liability in malpractice suits arising from actions taken within the scope of their official duties.

Section 3 of the measure would amend title III of the National Aeronautics and Space Act of 1958, as amended, by adding a new section 307. This new section, which is virtually identical to the DOD portion of the Bill, would have the effect of relieving NASA's medical and paramedical personnel from risk of medical malpractice suits and from the financial burden of maintaining insurance to cover that risk. This important protection is secured by providing that the exclusive remedy for personal injuries arising out of the performance of medical, dental, or related health care functions by NASA medical personnel would be a claim against the United States under the provisions of the Federal Tort Claims Act.

NASA currently has about one hundred civil servants who perform such medical services in the course of their official duties.

Approval of the Enrolled Bill would not have any adverse cost impact on this agency.

Accordingly, the National Aeronautics and Space Administration recommends that the President approve the Enrolled Bill H.R. 3954.

James C. Fletcher
Administrator

CENTRAL INTELLIGENCE AGENCY
WASHINGTON, D.C. 20505

1 October 1976

Mr. James M. Frey
Assistant Director for Legislative Reference
Office of Management and Budget
Washington, D. C. 20503

Dear Mr. Frey:

This is in response to your request for this Agency's views and recommendations on Enrolled Bill H. R. 3954, to provide medical malpractice protection for personnel of the Department of Defense and the Central Intelligence Agency and for other purposes.

This Enrolled Bill has the full support of the Central Intelligence Agency. This Agency worked to include CIA personnel within the provisions of this Bill, and strongly urges the President to sign it into law.

Sincerely,

George Bush
Director

THE SECRETARY OF TRANSPORTATION
WASHINGTON, D.C. 20590

SEP 30 1976

Honorable James T. Lynn
Director
Office of Management and Budget
Washington, D.C. 20503

Dear Mr. Lynn:

Reference is made to your request for the views of the Department of Transportation concerning H.R. 3954, an enrolled bill

> "To provide for an exclusive remedy against the United States in suits based upon medical malpractice on the part of medical personnel of the armed forces, the Defense Department, the Central Intelligence Agency, and the National Aeronautics and Space Administration, and for other purposes."

The enrolled bill adds a new section 1089 to chapter 55 of title 10, United States Code, to provide an exclusive remedy against the United States for damages or personal injury caused by the negligent or wrongful act or omission of any physician, dentist, nurse, pharmacist, or paramedical or other supporting personnel of the armed forces, the Department of Defense, or the Central Intelligence Agency in the performance of medical, dental, or related health care functions while acting within the scope of his duties or employment. The bill specifically provides for Coast Guard medical personnel when the Coast Guard is not operating as a service in the Navy. Other provisions concern medical personnel of the National Guard and the National Aeronautical and Space Administration.

The purpose of the legislation is to immunize medical personnel from individual liability in malpractice suits arising from actions within the scope of their official duties. Currently, medical personnel are immune from individual liability in cases arising from the treatment of active duty military personnel. However, in cases involving the treatment of military dependents and retirees, the issue of individual

liability of the attending medical personnel remains open to question. H.R. 3954 will resolve that question by providing an exclusive remedy against the United States under sections 1346(b) and 2672 of title 28, United States Code.

This Department supports the enrolled bill and recommends that the President sign it.

Sincerely,

William T. Coleman, Jr.

UNITED STATES CIVIL SERVICE COMMISSION
WASHINGTON, D.C. 20415

CHAIRMAN

October 1, 1976

Honorable James T. Lynn
Director
Office of Management and Budget
Washington, D.C. 20503

Attention: Assistant Director for
Legislative Reference

Dear Mr. Lynn:

This is in reply to your request for the views of the Civil Service Commission on enrolled bill H.R. 3954, "To provide for an exclusive remedy against the United States in suits based upon medical malpractice on the part of medical personnel of the armed forces, the Defense Department, the Central Intelligence Agency, and the National Aeronautics and Space Administration, and for other purposes."

The bill extends to the medical personnel of the agencies named in the title, including the Coast Guard, immunity from civil suit and personal liability for acts of alleged medical malpractice performed while acting within the scope of their employment. The bill also provides a grant of authority to the Secretary of Defense to hold harmless or provide insurance coverage for personnel performing medical or medically-related services for the armed forces where the provisions of the Federal Tort Claims Act may not be applicable although the person is acting within the scope of his office or employment.

The Commission notes that medical personnel of the Veterans Administration and Public Health Service have had malpractice protection for some time and that State Department and A.I.D. medical personnel were covered by legislation in this Congress. Although we would prefer general legislation extending personal liability protection to all Federal employees, or at least that medical malpractice protection be extended to all Government medical personnel, we support this legislation as a further step toward that goal and because we recognize that in this area the need for protection is greatest and that recruitment and retention of medical personnel are especially dependent on the availability of this protection.

Accordingly, the Commission recommends that the President sign enrolled bill H.R. 3954.

By direction of the Commission:

Sincerely yours,

Georgiana Sheldon

ACTING Chairman

ASSISTANT ATTORNEY GENERAL
LEGISLATIVE AFFAIRS

Department of Justice
Washington, D.C. 20530

October 1, 1976

Honorable James T. Lynn
Director, Office of Management
and Budget
Washington, D. C. 20503

Dear Mr. Lynn:

In compliance with your request, I have examined a facsimile of the enrolled bill, H.R. 3954, a bill "to provide for an exclusive remedy against the United States in suits based upon medical malpractice on the part of medical personnel of the armed forces, the Defense Department, the Central Intelligence Agency and the National Aeronautics and Space Administration, and for other purposes."

This Act would immunize from civil damage suit medical personnel of the armed forces, the Defense Department, the Central Intelligence Agency, and the National Aeronautics and Space Administration. The remedy by suit against the United States under the Federal Tort Claims Act would be made an exclusive remedy. The Act would also provide that settlements, judgments and cost of defense of civil damage suits brought against the medical personnel of the National Guard would be payable by federal funds.

The Department of Justice favors immunizing the specified medical personnel from suit and providing that the remedy under the Federal Tort Claims Act is exclusive. This same type of protection has previously been accorded legislatively to medical personnel of the Veterans Administration, the Public Health Service and the Department of State. The medical personnel covered by this Act are entitled to similar protection.

In regard to the authorization of federal payment of amounts paid in suits against medical personnel of the National Guard, the Department of Justice defers to the Department of Defense. Therefore, in view of the above comments, the Department of Justice defers to those agencies more directly concerned with the subject matter of the bill as to whether it should receive Executive approval.

Sincerely,

MICHAEL M. UHLMANN
Assistant Attorney General

THE WHITE HOUSE

ACTION MEMORANDUM WASHINGTON LOG NO.:

Date: October 2 Time: 600pm

FOR ACTION: David Lissy
Max Friedersdorf
Bobbie Kilberg
TJC

cc (for information): Jack Marsh
Jim Connor
Ed Schmults

FROM THE STAFF SECRETARY

DUE: Date: October 4 Time: noon

SUBJECT:

H.R. 3954-Defense Medical Personnel Malpractice Liability Protection Act

ACTION REQUESTED:

____ For Necessary Action ____ For Your Recommendations

____ Prepare Agenda and Brief ____ Draft Reply

__x__ For Your Comments ____ Draft Remarks

REMARKS:

please return to judy johnston, ground floor west wing

PLEASE ATTACH THIS COPY TO MATERIAL SUBMITTED.

If you have any questions or if you anticipate a delay in submitting the required material, please telephone the Staff Secretary immediately.

K. R. COLE, JR.
For the President

ACTION MEMORANDUM WASHINGTON LOG NO.:

Date: October 2 Time: 600pm

FOR ACTION: David Lissy
Max Friedersdorf
[redacted]
Bobbie Kilberg

cc (for information): Jack Marsh
Jim Connor
Ed Schmults

FROM THE STAFF SECRETARY

DUE: Date: October 4 Time: noon

SUBJECT:

H.R. 3954-Defense Medical Personnel Malpractice Liability Protection Act

ACTION REQUESTED:

—— For Necessary Action
—— Prepare Agenda and Brief
-x- For Your Comments
—— For Your Recommendations
—— Draft Reply
—— Draft Remarks

REMARKS:

please return to judy johnston,ground floor west wing

No objection

Barry Roth 10/4

PLEASE ATTACH THIS COPY TO MATERIAL SUBMITTED.

If you have any questions or if you anticipate a delay in submitting the required material, please telephone the Staff Secretary immediately.

James M. Cannon
For the President

ACTION MEMORANDUM WASHINGTON LOG NO.:

Date: October 2 Time: 600pm

FOR ACTION: David Lissy
Max Friedersdorf M.F.
Bobbie Kilberg

cc (for information): Jack Marsh
Jim Connor
Ed Schmults

FROM THE STAFF SECRETARY

DUE: Date: October 4 Time: noon

SUBJECT:

H.R. 3954-Defense Medical Personnel Malpractice Liability Protection Act

ACTION REQUESTED:

—— For Necessary Action
—— Prepare Agenda and Brief
-x- For Your Comments
—— For Your Recommendations
—— Draft Reply
—— Draft Remarks

REMARKS:

please return to judy johnston, ground floor west wing

Recommend approval. Jmc

PLEASE ATTACH THIS COPY TO MATERIAL SUBMITTED.

If you have any questions or if you anticipate a delay in submitting the required material, please telephone the Staff Secretary immediately.

James M. Cannon
For the President

ACTION MEMORANDUM WASHINGTON LOG NO.:

Date: October 2 Time: 600pm

FOR ACTION: David Lissy
Max Friedersdorf
Bobbie Kilberg

cc (for information): Jack Marsh
Jim Connor
Ed Schmults

FROM THE STAFF SECRETARY

DUE: Date: October 4 Time: noon

SUBJECT:

H.R. 3954-Defense Medical Personnel Malpractice Liability Protection Act

ACTION REQUESTED:

—— For Necessary Action

—— Prepare Agenda and Brief

—x— For Your Comments

—— For Your Recommendations

—— Draft Reply

—— Draft Remarks

REMARKS:

please return to judy johnston, ground floor west wing

Recommend Approval
William M. Delp

PLEASE ATTACH THIS COPY TO MATERIAL SUBMITTED.

If you have any questions or if you anticipate a delay in submitting the required material, please telephone the Staff Secretary immediately.

James M. Cannon
For the President

MEMORANDUM 5545

NATIONAL SECURITY COUNCIL

October 4, 1976

MEMORANDUM FOR: JAMES M. CANNON

FROM: Jeanne W. Davis

SUBJECT: H. R. 3954

The NSC Staff recommends the approval of H. R. 3954 - Defense Medical Personnel Malpractice Liability Protection Act.

Calendar No. 1199

94TH CONGRESS
2d Session

SENATE

REPORT
No. 94-1264

MALPRACTICE PROTECTION FOR DEFENSE AND OTHER PERSONNEL

SEPTEMBER 20, 1976.—Ordered to be printed

Mr. BYRD (of Virginia), from the Committee on Armed Services, submitted the following

REPORT

[To accompany H.R. 3954]

The Committee on Armed Services, to which was referred the bill (H.R. 3954) to amend title 10 of the United States Code, to provide for an exclusive remedy against the United States in suits based upon medical malpractice on the part of military or civilian medical personnel of the armed forces, and for other purposes, having considered the same, reports favorably thereon with an amendment and recommends that the bill as amended do pass.

COMMITTEE AMENDMENT IN THE FORM OF A SUBSTITUTE

The committee amended the bill by striking all after the enacting clause, substituting new language reflecting changes in the bill and modifying the title of the bill.

PURPOSE OF THE BILL

The bill is intended to provide, through application of the Federal Tort Claims Act, protection from individual liability to certain medical personnel while acting within the scope of their official duties. In short, defense medical personnel would be immunized from malpractice suits. The bill would eliminate the need of malpractice insurance for all such medical personnel, including physicians, dentists, nurses, and other medical support personnel.

CHANGES FROM HOUSE VERSION

The bill as recommended by the Committee differs from the House-passed version in essentially three ways.

EXPANSION OF MEDICAL PERSONNEL TO INCLUDE THE CENTRAL INTELLIGENCE AGENCY, THE NATIONAL AERONAUTICS AND SPACE ADMINISTRATION AND THE COAST GUARD

While few in number, medical personnel of the Central Intelligence Agency (CIA) and the National Aeronautics and Space Administration (NASA) are confronted with the same risks of malpractice liability that threaten defense medical personnel. Officials from CIA and NASA testified before the General Legislation Subcommittee of the Armed Services Committee urging the inclusion of their respective agencies in the bill. The Chairman of the Select Committee on Intelligence and the Chairman and Ranking Minority Member of the Aeronautical and Space Sciences Committee endorsed the inclusion of these agencies.

The Committee felt that the Coast Guard likewise deserved inclusion in the bill. Language was adopted to clarify such inclusion.

PROTECTION FROM MALPRACTICE LIABILITY TO NATIONAL GUARD PERSONNEL WHEN THEY ARE ACTING IN CERTAIN TRAINING EXERCISES

National Guard medical personnel while engaged in certain training activities such as weekend drill and summer camp are provided with full indemnification for any malpractice liability. When they are operating in a federal status as part of the U.S. armed forces, National Guard medical personnel would be covered through application of the Federal Tort Claims Act in the same way as medical personnel of the Department of Defense.

CERTAIN TECHNICAL AND CLARIFYING AMENDMENTS

A variety of minor language changes were made for the purpose of accuracy, consistency, or efficiency.

Principal Effects of the Bill

The bill meets the serious and urgent needs of defense medical personnel by protecting them fully from any personal liability arising out of the performance of their official medical duties. This protection is designed to cover all potential financial liability.

In addition to the changes from the House-passed version, the bill would have the following principal effects:

Make the Federal Tort Claims Act the exclusive remedy for injuries arising from malpractice by medical personnel acting within the scope of their duties for the Department of Defense.

Require the Attorney General to defend or settle any legal action for malpractice against defense medical personnel.

Authorize the Secretary of Defense to hold harmless or provide liability insurance for any defense medical personnel in situations where a remedy under the Federal Tort Claims Act would be precluded—e.g., when a malpractice claim arises in a foreign country.

Legislative History

This bill provides protection to certain medical personnel for malpractice suits by making the Federal Tort Claims Act the exclusive remedy for any claimant. The Federal Tort Claims Act makes the United States liable for negligence of government employees when acting within the scope of their employment in the same way that a private person would be liable under similar circumstances. By making the Federal Tort Claims Act an exclusive remedy, a claimant is forced to sue the United States for damages rather than a government employee in his personal capacity. At least four existing statutes make the Federal Tort Claims Act an exclusive remedy in order to protect a certain class of government employee from personal liability.

In 1961 the Government Driver's Act (Public Law 87–258) made the Federal Tort Claims Act the exclusive remedy for damages sustained as a result of the negligent operation of a motor vehicle by a federal driver acting within the scope of his employment. The result was to protect federal employees in their individual capacity from tort liability arising from the operation of motor vehicles.

In 1965, Congress enacted a bill patterned after the Government Driver's Act which protected medical personnel of the Veterans' Administration for individual tort liability from malpractice when acting within the scope of their employment (Public Law 89–311).

Similar legislation making the Federal Tort Claims Act the exclusive remedy for malpractice was enacted in 1970 to immunize medical personnel of the Public Health Service from personal liability arising out of performance of their medical duties (Public Law 91–623).

More recently, the Foreign Relations Authorization Act of fiscal year of 1977 (Public Law 94–350) immunized medical personnel of the State Department from personal liability for medical malpractice.

In all essential respects these four statutes are similar. Each statute abolished old rights recognized by the common law to obtain the legislative object of protecting certain federal employees from suit in their individual capacities.

H.R. 3954 is modeled after these statutes. It includes revisions and improvements to clarify some of the inconsistencies encountered in the application of the earlier statutes.

Senator Thurmond introduced S. 1395 on April 9, 1975. An identical bill, H.R. 3954, was introduced in the House and reported with amendments from the House Armed Services Committee on June 27, 1975. H.R. 3957 passed the House on July 21, 1975. Due to time limitations and the lateness of the current session, the committee acted on the House bill rather than the bill as introduced by Senator Thurmond.

Background

Defense medical personnel have long been subject to personal liability for actions arising out of their official medical duties. Two legal considerations serve to define this threat of medical malpractice liability.

First, all individuals are generally subject to suit as a result of actions they take or omit. Nevertheless, the courts have long held that government officials, when acting within the scope of their official duties, are immunized from civil liability for torts, *Barr* v. *Matteo*, 360 U.S. 564 (1959). This immunity for government officials, however, is limited and subject to exception. Generally, a government official is

immuned when he is acting in a discretionary or policy-formulating role but is subject to suit when acting in a ministerial role.

Prior to 1974, it was unclear whether a federal medical personnel acting within the scope of his official duties would have personal immunity from tort liability. In *Henderson* v. *Bluemink*, 511 F. 2d 399 (D.C. Cir. 1974), the Court of Appeals held that an Army medical officer did not have absolute immunity from civil liability arising out of actions of a strictly medical nature. The court reasoned that government employees would be protected when they exercised discretion of a governmental nature but would not be protected when they exercised discretion of a purely medical nature. The effect of this case was to make clear that federal medical personnel, when acting within the scope of their official duties, could be subject to personal liability in tort.

Second, the federal government has provided some protection for tort liability to its employees. With the passage of the Federal Tort Claims Act in 1946, the U.S. Government waived its sovereign immunity from suit and submitted to civil liability for torts committed by its employees. Recovery from the United States precludes an action against or recovery from one of its employees based on the same subject matter. For federal medical personnel, this meant that if a claimant recovered from the federal government, the federal medical personnel would be relieved of all personal liability. Thus, the federal medical employee was fully protected from liability so long as an action qualified under the Federal Tort Claims Act and a claimant chose to sue the federal government.

As a result of these considerations, defense medical personnel have had only partial protection from personal liability for medical malpractice. The claimant has had a choice as to suing the medical employee individually or bringing in the United States. In the normal case, it would be advantageous for a claimant to sue the United States for malpractice under the Federal Tort Claims Act. For a variety of reasons, however, a claimant could well decide to sue the federal medical employee in his individual capacity. These reasons include the fact that a claimant is not entitled to a jury trial under the Federal Tort Claims Act; the Federal Tort Claims Act imposes a 2-year statute of limitations, whereas state statutes of limitations against individual medical personnel are often longer than 2 years; and, for emotional or vindictive reasons, a claimant may insist upon suing a federal medical employee in his individual capacity. All of these reasons make the risk of personal liability on the part of federal medical personnel real.

Discussion

Need to protect defense medical personnel

Medical malpractice litigation is on the upsurge in the medical profession as a whole. Similarly, malpractice litigation against defense medical personnel has grown dramatically in recent years. During the period from 1963–1968, there were 26 claims for medical malpractice against defense medical personnel or a yearly average of 4.3 claims. The total amount of the claims was $68,159; the total amount paid for the claims was only $92. During the period from 1969–1974, 382 claims were filed against defense medical personnel or an average of 63.8 claims per year. The total amount of the claims was $154,273,724 and the total amount paid in settlement to date has been $1,436,965. During the first half of fiscal year 1975, 63 claims have been filed totaling $29,787,115 with $1,179,000 paid in settlements to date.

More significant than the overall rise in malpractice litigation has been the steep rise in the number of suits against defense medical personnel in their individual capacities. Just a few years ago, malpractice suits against defense medical personnel in their individual capacities were virtually nonexistent. Presently, approximately 20 malpractice suits involving 37 defense medical personnel in their individual capacities are pending.

In the past, some military physicians have purchased malpractice insurance on their own initiative. They were normally able to purchase policies that would cover them for medical activities anywhere in the United States. Recently, however, the situation with regard to malpractice insurance has been drastically altered. Not noly has it become extraordinarily expensive, but malpractice insurance is often unavailable at any price.

The threat of malpractice litigation encourages medical personnel to practice "defensive medicine." Medical personnel could become unduly cautious in administering to patients and begin to make decisions on the basis of what is in the best interest of the physician rather than the patient. Such a development would raise the cost and lower the quality of medical services. Also physicians might become reluctant to supervise supporting medical personnel because the assumption of supervisory responsibility carries with it the risk of personnel malpractice liability.

The peculiar circumstances surrounding defense medical personnel further contribute to their need for legislative protection. Defense medical personnel, unlike their civilian counterparts, must respond to military orders in providing medical services. The lower pay of defense medical personnel relative to private medical practice makes it especially difficult for them to afford malpractice insurance.

Furthermore, the threat of malpractice litigation inevitably undermines the morale of defense medical personnel. Lowered morale will adversely affect both recruitment and retention of medical personnel, which is paritcularly important in an all-volunteeer environment.

In sum, the threat of personnel liability from medical malpractice could seriously jeopardize the viability of health care within the Defense Department.

Advantages of providing protection through the Federal Tort Claims Act

There are several alternative approaches to providing protection to defense medical personnel from personal liability for malpractice. Indeed, the General Legislation Subcommittee explored the possibility of indemnification programs, special insurance coverage, etc.

Immunizing defense medical personnel from suit through the application of the Federal Tort Claims Act, however, offered several compelling advantages.

First, this approach does not require any new structure or organization. The statutory framework is already in place. The capability to resolve malpractice claims through the Federal Tort Claims Act is presently available in the Justice and Defense Departments.

Secondly, providing immunization through the Federal Tort Claims Act would be the least costly approach. No funds must be set aside or tied up at this time. No new people or organization are required under this approach.

Finally, this approach has been tried in the case of medical personnel of the Veterans' Administration and the Public Health Service and proved to be completely effective. The experience under the Federal Tort Claims Act, both administratively and judicially, has eliminated the inevitable difficulties encountered in the early application of any new approach.

In short, extending protection through the Federal Tort Claims Act is simple, inexpensive, and effective.

VALUE OF MALPRACTICE PROTECTION

Under the policy of an all-volunteer force, the committee has devoted much attention in recent years to the pay and benefits of defense employees. Enactment of this legislation constitutes an additional and substantial benefit to defense medical personnel. If military physicians were required to obtain their own medical malpractice insurance, the costs could be expected to range from a low of $150 to as high as $19,000 depending on the medical specialty and location. Defense officials, in testimony before the General Legislation Subcommittee, estimated that the value of this protection to the average defense medical personnel would be in the range of $400 to $800 a year.

MALPRACTICE PROTECTION FOR NATIONAL GUARD MEDICAL PERSONNEL

PROTECTION TO NATIONAL GUARD MEDICAL PERSONNEL WHEN IN FEDERAL STATUS

Whenever the U.S. armed forces need to be augmented for national security purposes, the National Guard may be ordered, pursuant to statute, to active federal duty. In this "federalized" status the National Guard is a part of the U.S. armed forces, and National Guardsmen become federal employees. Consequently, medical personnel of the National Guard would be immunized from personal liability for malpractice when acting within the scope of their duties.

Under the House-passed bill, National Guard medical personnel would receive malpractice protection only when acting in a federalized status.

NEED TO PROTECT NATIONAL GUARD MEDICAL PERSONNEL DURING TRAINING

Medical personnel of the National Guard are subject to the same risk of malpractice liability during their training exercises as are medical personnel of the Defense Department. National Guard medical personnel perform the same variety of medical functions as do defense medical personnel.

The risk of malpractice liability during training has already begun to undermine the medical mission of the National Guard. In certain cases, medical personnel of the National Guard have objected to administering medical care and have refused to participate in training exercises that involve the treatment of patients.

There is a discernable and growing reluctance on the part of National Guard physicians to supervise supporting medical personnel. This problem is more acute for the National Guard than for the active forces because there is often little correlation between a person's civilian occupation and a person's medical support duties in the National Guard.

Any malpractice insurance that National Guard medical personnel have in civilian employment usually applies only in a specific hospital or area. Much of the training of the National Guard occurs outside their respective states. To obtain adequate malpractice insurance for training exercises would be inordinately expensive, if not impossible.

The threat of malpractice liability poses a powerful disincentive for medical personnel from joining or remaining in the National Guard. If some protection is not provided to the National Guard, its medical capability could be completely destroyed.

FEDERAL PROTECTION TO NATIONAL GUARD MEDICAL PERSONNEL DURING TRAINING

The states have been ineffective and inconsistent in providing protection to National Guard medical personnel for malpractice liability. Incomplete evidence presented to the General Legislation Subcommittee indicates that nine states provide some degree of tort protection to National Guardsmen, but in only three of these states does the protection extend to training exercises.

When acting in the various training modes enumerated in the bill, the National Guard is acting in a state status and under the command of the state governor. Nevertheless, the training of the National Guard in weekend drills and summer camp is in large part training for purposes of national defense. The federal government prescribes the training, supplies the equipment and most of the instructors, and pays the Guardsmen. National Guard training is often conducted in conjuction with active duty units of the U.S. armed forces. Under the "total force concept", National Guard and reserve units are an integral part of the overall defense program.

The training exercises of the National Guard ensure that the Guard will be able to perform a critical role in the national defense when called upon. In light of this significant federal contribution, the United States should be willing to assume significant cost for National Guard training. This bill would have the federal government pay the costs for protecting National Guard medical personnel from personal malpractice liability during training exercises.

INDEMNIFICATION OF NATIONAL GUARD MEDICAL PERSONNEL FOR MALPRACTICE LIABILITY

Although convinced that National Guard medical personnel deserve federal protection from malpractice liability, the committee felt it

would be inappropriate to try to include National Guard medical personnel under the Federal Tort Claims Act. Inclusion of the Guard medical personnel under the framework of the Federal Tort Claims Act raises significant constitutional and legal problems. Moreover, the committee was not convinced that such an approach would provide effective protection to National Guard medical personnel in any event.

Instead, H.R. 3954 as amended by the committee would make the liability of individual Guard medical personnel the liability of the United States. The federal government assumes this liability for the purpose of preserving the capability of the National Guard to contribute to the national defense. In this way the protection is not dependent directly upon a judicial decision—leaving to the courts the determination of federal liability under the law of torts—or the creation of legal fictions—making National Guard medical personnel federal employees.

The protection extended to the National Guard through this indemnification arrangement, however, is intended to be complete and fully comparable to the protection provided to the defense medical personnel under the Federal Tort Claims Act.

Section-by-Section Analysis

SECTION 1

Section 1 adds a new section 1089 to title 10, United States Code.

Subsection (a) of the new section 1089 makes the remedy against the United States provided by 28 USC 1346 (b) and 28 USC 2672 the exclusive remedy for damages arising from medical malpractice by certain U.S. medical personnel. Among other things, 28 USC 1346 (b) gives U.S. district courts exclusive jurisdiction over civil actions on claims against the United States for personal injury or death caused by the negligent or wrongful act of any government employee while acting within the scope of his employment. This provision is the heart of what is commonly known as the Federal Tort Claims Act. This act makes the United States liable, under the local law of the place where the tort occurred, in the same manner and to the same extent as a private individual under like circumstances. 28 USC 2672 is an accompanying provision for the administrative adjustment of similar claims.

The primary effect of subsection (a) is to make the Federal Tort Claims Act the exclusive remedy for specified torts committed by certain medical personnel. Suits for damages for personal injury against such medical personnel in their individual capacities are precluded. The sole remedy would be against the United States.

The constitutionality of making such a remedy exclusive is well settled, *Carr* v. *United States* 422 F. 2d 1007 (4th Cir. 1970), *Thompson* v. *Sanchez* 398 F. Supp. 500 (D. N.J. 1975). Indeed, legislation having a comparable effect presently exists for federal operators of motor vehicles and for medical personnel of the Veterans' Administration, the Public Health Service and the Department of State.

The coverage of subsection (a) is extended to medical personnel of the U.S. armed forces, the Department of Defense and the Central Intelligence Agency. The U.S. armed forces include the U.S. Army, Navy and Air Force as well as the Coast Guard. The Reserves and the National Guard when operating in a federal status pursuant to 10 USC 263 or 32 USC 102 are considered members of the U.S. armed forces and would be included under the coverage of subsection (a). The coverage is also extended to the civilian medical personnel of the Defense Department. In addition, persons employed under personnel service contracts or persons assigned temporarily to the Defense Department or the CIA would be covered under the bill.

Coverage is extended to the CIA in this bill because when the bill was first considered the CIA was under the exclusive jurisdiction of the Armed Services Committee. Subsequently, the Chairman of the new Select Committee on Intelligence endorsed the inclusion of the CIA in this bill. In addition, the CIA is mentioned in other sections of title 10 of the U.S. Code.

The coverage of subsection (a) is limited to medical personnel. The committee intends, however, that medical personnel be broadly defined to include all personnel involved in providing health care. The language is deliberately general so that all types of medical personnel—such as optometrists and podiatrists—who were not specifically mentioned in the bill would still be included under the coverage of the bill.

The application of subsection (a) is restricted to actions for money damages for personal injury including death. It does not cover actions involving contract or property rights. The personal injuries of a claimant must have been caused by either the negligence or wrongful act or omission of the specified medical personnel. The bill addresses claims caused by what is commonly termed "malpractice". The torts covered by this bill are further set forth in subsection (e). In addition, the actions giving rise to the injury must have occurred within the scope of the duties or employment of such medical personnel. The meaning of this requirement has been well defined in case law.

Subsection (b) provides that the Attorney General shall defend any civil action referred to in subsection (a). Such medical personnel are required to initiate notification to the relevant U.S. attorney of any tort action.

Subsection (c) requires that any such civil suit be removed without bond to the appropriate U.S. district court. This removal, however, is dependent upon a certification by the Attorney General that the medical personnel was acting within the scope of his duties. Where it is determined that the medical personnel was not acting within the scope of his duties or employment, no protection is afforded under this bill.

If a U.S. district court remands the case upon a determination that a remedy by suit under the Federal Tort Claims Act would not be available against the United States, the protection available to a medical personnel is set forth in subsection (f).

Subsection (d) was included to emphasize that the Attorney General may compromise or settle any claim described in subsection (a).

Subsection (e) would nullify a provision of the Federal Tort Claims Act which would otherwise exclude any action for assault and battery from the coverage of the Federal Tort Claims Act. In some jurisdictions it might be possible for a claimant to characterize negligence or a

wrongful act as a tort of assault and battery. In this way, the claimant could sue the medical personnel in his individual capacity notwithstanding subsection (a) simply as a result of how he pleaded his case. In short, subsection (e) makes the Federal Tort Claims Act the exclusive remedy for any action, including assault and battery, that could be characterized as malpractice.

Subsection (f) would authorize the appropirate Secretary to hold harmless or provide liability insurance for medical personnel described in subsection (a). The purpose of this section again is to avoid liability being assessed against an individual medical personnel in a situation where the Federal Tort Claims Act would not be applicable. The Federal Tort Claims Act does not apply to actions arising in a foreign country. Also when a medical personnel is assigned to other than a federal department—for example, as part of his military training a doctor is assigned to a private hospital—he may not be covered under the Federal Tort Claims Act. Subsection (f) authorizes the appropriate Secretary to provide protection through indemnification or insurance to medical personnel in those situations.

The committee would expect that any payments made under the authority of subsection (f) would be payable from the appropriation for salaries and expenses.

Subsecion (g) sets forth relevant definitions.

SECTION 2

Section 2 is designed to provide malpractice protection to National Guard personnel engaged in certain training.

Subsection (a) consists of four Congressional findings. These findings demonstrate the need, in order to maintain forces trained to contribute to the national defense, that the federal government provide malpractice protection to National Guardsmen in certain situations. These findings, therefore, establish the critical connection between medical malpractice protection for National Guard medical personnel and the common defense of the United States. At the same time, these findings serve to limit the precedent for a federal assumption of liability to the exigencies of the current medical malpractice insurance crises.

Subsection (b) contains the operative section affecting the National Guard and is in the form of a new section 334 of title 32, U.S. Code.

Subsection (a) of the new section 334 provides that any malpractice liability of National Guard medical personnel in certain circumstances shall become the liability of the United States. This is a gratuitous assumption of liability by the federal government which was found to be necessary to maintain the effectiveness of U.S. armed forces.

The liability assumed by the federal government for National Guard medical personnel is intended to be the same type of liability set forth in subsection (a) of section 1 relating to certain federal medical personnel.

The liability includes the amount of any costs, settlement or judgment as defined. The intent of the committee is for the federal government to assume all liability for such National Guard medical personnel so that they would effectively receive the same immunity from

personal liability as defense medical personnel would receive pursuant to subsection (a) of section 1.

The federal government will asume the liability of National Guard medical personnel for malpractice arising out of actions which occurred in the course of certain training exercises. Training exercises are defined in the bill. Generally, these exercises consist of weekend duty, summer camp, or other duties for which National Guardsmen receive federal pay. When the National Guard is operating in any other state status, for example when they are called out by the state governor for riot control purposes, they would not be covered under the bill.

The amount of any such costs, settlement or judgment against National Guard medical personnel shall be payable in the same manner as other judgments or claims against the United States.

Subsection (b) would have the effect of reducing the liability of the United States for any such claim for damages to the extent that a National Guard medical personnel was covered by any type of insurance. Thus, the federal government would not assume any liabilities which belong to an insurer.

Subsection (c) sets forth conditions to assure full notification to the Attorney General of any such claim against National Guard medical personnel. In addition, the National Guard medical personnel must comply with instructions of the Attorney General relative to the conclusion or final disposition of any claim of damages. For example, the committee did not want to compel the federal government to assume liability in the case where that liability was incurred pursuant to a default judgment. By making the final disposition subject to the approval of the Attorney General, the federal government would be protected against paying unsubstantiated or uncontested claims.

It is not the committee's intention, however, to encourage the Attorney General to become involved in the actual negotiating or litigating process surrounding a claim.

Subsection (d) makes any settlement or negotiated agreement relating to a claim subject to the approval by the Attorney General before such a settlement or agreement is concluded. The purpose of this subjection is to prevent a National Guard medical personnel from agreeing to settle a claim, and thereby obligating the federal government for payment, unless the Attorney General has approved such an agreement or settlement prior to its consummation.

Subsection (e) is designed to avoid any conflict with or disruption of the administrative settlement of claims under 32 USC 715. So long as a claimant is proceeding under Sec. 715, the provisions of this bill will not apply.

Subsection (f) sets forth certain relevant definitions.

SECTION 3

Section 3 is identical to section 1 except that it applies to medical personnel of the National Aeronautics and Space Administration. Although it is included at various points in title 10, NASA has not been under the jurisdiction of the Armed Services Committee, Nevertheless, the Chairman and the Ranking Minority Member of the Commit-

tee on Aeronautical and Space Sciences endorsed the inclusion of NASA in this bill.

A separate provision is necessary for NASA in order that the section pertaining to NASA could be codified with other NASA legislation.

Committee Action

S. 1395 and H.R. 3954 were referred to the General Legislation Subcommittee. The subcommittee met on March 2 and August 27, 1976 to receive testimony from witnesses of the Department of Defense, the Department of Justice, the Central Intelligence Agency, the National Aeronautics and Space Administration, and the National Guard Association. Senator Dale Bumpers also appeared before the subcommittee to support expanding malpractice protection to the National Guard.

On September 10, the full committee met to discuss the legislation. The bill was approved 16–0 on September 14. 1976.

Fiscal Data

The Department of Defense report on S. 1395 stated that the costs of the bill could not be definitively ascertained since possible future claims cannot be accurately forecast. Because the number of medical personnel in the Central Intelligence Agency and the National Aeronautics and Space Administration is so small, the cost of protecting these personnel in this bill should be negligible. Based on the experience of the Veterans' Administration and the Public Health Service, which together have roughly as many medical personnel as the number of federal medical employees affected by this bill, no additional costs to the U.S. government are likely as a result of making the Federal Tort Claims Act an exclusive remedy.

The committee could obtain no information on the future costs to the United States as a result of providing malpractice protection to National Guard medical personnel. As could best be determined, however, there has never been a judgment of malpractice liability entered against a National Guard medical personnel.

Overall, the committee expects the costs of this bill to be slight.

Departmental Positions and Correspondence from Other Committees

Department of the Air Force,
Office of the Secretary,
Washington, D.C., February 6, 1976.

Hon. John C. Stennis,
Chairman, Committee on Armed Services,
U.S. Senate.

Dear Mr. Chairman: Reference is made to your request for the views of the Department of Defense on S. 1395, 94th Congress, a bill "To amend title 10 of the United States Code, to provide for an exclusive remedy against the United States in suits based upon medical malpractice on the part of active duty military medical personnel, and for other purposes." The Department of the Air Force has been

assigned the responsibility for expressing the views of the Department of Defense on this bill.

The purpose of the bill is to add a new section (S 1089) to title 10, United States Code, to make suit against the United States under sections 1346(b) and 2672 of title 28, United States Code (relating to tort claims against the United States), the exclusive remedy for claims arising from alleged malpractice or negligence of active duty medical personnel (and persons in related specialized fields) of the armed forces in the performance of duties in or for a Federal department, agency, or institution. The Attorney General would be required to defend any civil action against a member of the armed forces based on a claim covered by the bill and would be authorized to compromise or settle any such claim as provided in section 2677 of title 28, United States Code. Moreover, the Secretary of Defense or his designees would be authorized to hold those personnel harmless or provide liability insurance against similar claims for damages arising while they were assigned to a foreign country or detailed for service with other than a Federal agency or institution, or when the remedies of third persons described in section 2679(b) of title 28 (pertaining to claims arising from the operation of a motor vehicle) are not available.

The exception in section 2680(h) of title 28 for claims arising out of assault or battery would not bar a claim otherwise covered by the new section. The new section would apply only to claims accruing on or after the first day of the third month after enactment of the bill.

On July 21, 1975, the House of Representatives amended and passed H.R. 3954, a bill which as introduced was identical to S. 1395 (H.R. 3954 as passed is also before your committee). Of the House amendments which affected the substance of the bill, two broadened the scope of the bill to include civilian employees performing medical and medically-related duties, as well as reserve and National Guard personnel in addition to the active duty members originally described, and one amendment allowed the bill to become effective on the date of enactment rather than to delay the effective date for a period of 90 days. (Conforming changes were also made in the title.)

There is now an urgent need both to assure an adequate remedy in all cases against the United States for injury caused by malpractice or negligence by persons in the medical and related specialties in the armed forces, within the scope of their duties, and to make that remedy the exclusive remedy for that malpractice. The proposed exclusive remedy insures the availability of adequate compensation for legitimate malpractice claims and insulates medical practitioners from frivolous lawsuits. Such a provision would be an incentive for a medical career in the armed forces.

Accordingly, the Department of the Air Force, on behalf of the Department of Defense, strongly urges favorable consideration of S. 1395 at this time. This will provide the same protection for medical personnel of the armed forces as is now provided for those personnel of the Veterans' Administration and the Public Health Service.

In addition, the purpose of the bill supports its application to civilian employees of the Department of Defense and members of reserve and National Guard units in the performance of similar duties, as the substantive amendments of H.R. 3954 in the House would provide.

Accordingly, this department recommends that S. 1395 be amended to like effect before enactment. (It should be noted that, apparently through inadvertence, H.R. 3954, as reported with amendments by the House Armed Services Committee, omitted line 3 of page 1 of the bill as introduced and the bill was thus passed, leaving that Act technically defective though understandable.)

The cost of the legislation cannot be definitely ascertained since we are unable to forecast possible future claims.

This report has been coordinated within the Department of Defense in accordance with procedures prescribed by the Secretary of Defense.

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,

DAVID P. TAYLOR,
Assistant Secretary of the Air Force,
Manpower and Reserve Affairs.

DEPARTMENT OF JUSTICE,
Washington, D.C., November 5, 1975.

Hon. JOHN C. STENNIS,
Chairman, Committee on Armed Services,
U.S. Senate, Washington, D.C.

DEAR MR. CHAIRMAN: This is in response to your request for the views of the Department of Justice on S. 1395, 94th Congress, a bill, "To amend Title 10 of the United States Code, to provide for an exclusive remedy against the United States in suits based upon medical malpractice on the part of active duty military medical personnel, and for other purposes."

The Department of Justice is in favor of the enactment of S. 1395, provided it is amended to conform with H.R. 3954 as passed by the House of Representatives on July 21, 1975.

The bill would provide that the remedy against the United States provided by Sections 1346(b) and 2672 of Title 28 for damages arising out of malpractice or negligence on the part of active duty medical or paramedical personnel of the Armed Forces while in the exercise of their duties shall be exclusive of any other civil action or proceeding against the individual whose act or omission gave rise to such claim.

The Attorney General would be obligated to defend any action brought against the individual. Upon certification that the individual was acting within the scope of his employment at the time of the incident out of which the suit arose, the case may be removed to a Federal court and be deemed a tort action against the United States.

The Secretary of Defense or his designees could hold harmless or provide liability insurance for active duty personnel in certain situations where circumstances are such as are likely to preclude the remedies of third persons against the United States described in Section 2679(b) of Title 28 for such damage or injury.

This bill would immunize medical personnel of the Armed Forces from liability for malpractice or negligence while acting in the scope of their employment. Such protection from individual liability has

been granted to Federal drivers (28 U.S.C. § 2679(b)) and medical personnel of the Veterans Administration (38 U.S.C. § 4116) and the Public Health Service (42 U.S.C. § 233).

Nothing in this bill should be construed to expand the class of Federal employees whose acts or omissions can create liability on the part of the United States. We are particularly concerned that this bill might be used as a vehicle for making the United States liable for the acts of non-federalized members of the National Guard. Under existing law they are the employees of their respective states, and the United States is not responsible for their actions.

The Department of Justice is in favor of the enactment of S. 1395, even though our preference is for a bill that would afford equal protection from individual liability to all Federal employees. However, in recognition of the increasing number of suits being filed against military doctors, we can no longer oppose the piecemeal approach. Since the medical personnel of the Veterans Administration and the Public Health Service have received Congressional grants of immunity, there is no rational basis for not granting the protection to military medical personnel. H.R. 3954, the companion bill to S. 1395, was amended to include civilian, as well as active duty medical personnel, and to make the act effective as of the date of enactment. We support both of these amendments.

Subject to the above comments, the Department of Justice recommends enactment of this legislation.

The Office of Management and Budget has advised that there is no objection to the submission of this report from the standpoint of the Administration's program.

Sincerely,

MICHAEL M. UHLMANN,
Assistant Attorney General.

CENTRAL INTELLIGENCE AGENCY,
Washington, D.C., March 1, 1976.

Hon. HARRY F. BYRD, Jr.,
Chairman, Subcommittee on General Legislation, Committee on Armed Services, U.S. Senate, Washington, D.C.

DEAR MR. CHAIRMAN: Mr. George Cary, Legislative Counsel of the Central Intelligence Agency, will be testifying tomorrow before the Armed Services Subcommittee on General Legislation regarding S. 1395. This bill would protect armed forces physicians and other medical personnel from malpractice suits arising from the performance of their official duties. Mr. Cary will urge that S. 1395 be amended to include medical personnel of this Agency within the ambit of this protection.

CIA's medical staff is small, but nevertheless plays an essential role in the fulfillment of our statutory mission. Our medical staff must be able to perform their duties without the constant fear of a crippling malpractice judgment, and without the burden of paying a substantial portion of their salary for insurance for their prescribed duties as Government employees.

S. 1395 is the only legislative vehicle which can offer this protection in the near future. I strongly urge the Armed Services Committee, as this Agency's traditional legislative oversight committee, to amend S. 1395 to protect the CIA medical staff.

Sincerely,

GEORGE BUSH,
Director.

U.S. SENATE,
COMMITTEE ON AERONAUTICAL AND SPACE SCIENCES,
Washington, D.C., February 27, 1976.

Hon. HARRY F. BYRD, JR.,
Chairman, Subcommittee on General Legislation, Committee on Armed Services, U.S. Senate, Washington, D.C.

DEAR MR. CHAIRMAN: It is our understanding that the Subcommittee on General Legislation will soon be taking up legislation to amend Title 10 of the U.S. Code to provide for an exclusive remedy against the U.S. in suits based upon allegations of medical malpractice of personnel of the Department of Defense.

We believe NASA needs similar legislation for its medical personnel of approximately 100. Instead of enacting separate legislation, we ask you to consider adding NASA to the Title 10 amendments that are to be marked up by the Armed Services Committee in the near future.

NASA is now included with the DOD in various setcions of Title 10 of the U.S. Code and we believe that the inclusion of NASA in the sections your Subcommittee will consider would not be inappropriate.

We ask your favorable consideration of this request, and we will be glad to help in any way you desire.

Sincerely,

FRANK E. MOSS,
Chairman.
BARRY GOLDWATER,
Ranking Minority Member.

U.S. SENATE,
SELECT COMMITTEE ON INTELLIGENCE,
Washington, D.C., June 17, 1976.

Hon. JOHN C. STENNIS,
Chairman, Committee on Armed Services,
U.S. Senate, Washington, D.C.

DEAR MR. CHAIRMAN: Reference is made to S. 1395, a bill "To amend title 10 of the United States Code, to provide for an exclusive remedy against the United States in suits based upon medical malpractice on the part of active duty military medical personnel, and for other purposes," which is pending before the Committee on Armed Services.

The Senate Select Committee on Intelligence is aware that your Committee has conducted hearings on S. 1395, including testimony from the Central Intelligency Agency. The Select Committee has informally considered this measure and fully supports the inclusion of

those employees of the CIA who are similarly situated as those enumerated in the bill for the Department of Defense.

Since your Committee took action on this measure before this Committee was given jurisdiction over the CIA by S. Res. 400, we would like to discharge the Select Committee from formal consideration of the bill.

The Committee appreciates your cooperation in this and all other matters of mutual interest.

Sincerely,

DANIEL K. INOUYE,
Chairman.

CHANGES IN EXISTING LAW

In compliance with paragraph 4 of rule XXIX of the Standing Rules of the Senate, changes in existing law proposed to be made by the bill are shown as follows: Existing law to be omitted is enclosed in black brackets, new matter is printed in italic, and existing law in which no change is proposed is shown in roman.

TITLE 10, UNITED STATES CODE—ARMED FORCES

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CHAPTER 55.—Medical and Dental Care

Sec.
1071. Purpose of section 1071–1087 of this title.
1072. Definitions.
1073. Administration of sections 1071–1087 of this title.
1074. Medical and dental care for members and certain former members.
1075. Officers and certain enlisted members; subsistence charges.
1076. Medical and dental care for dependents: general rule.
1088. Air evacuation patients: furnished subsistence.
1089. Defense of certain suits arising out of medical malpractice.

* * * * * * *

§ 1089. Defense of certain suits arising out of medical malpractice

(a) The remedy against the United States provided by sections 1346(b) and 2672 of title 28 for damages for personal injury, including death, caused by the negligent or wrongful act or omission of any physician, dentist, nurse, pharmacist, or paramedical or other supporting personnel (including medical and dental techniques, nursing assistants, and therapists) of the armed forces, the Department of Defense, or the Central Intelligence Agency in the performance of medical, dental, or related health care functions (including clinical studies and investigations) while acting within the scope of his duties or employment therein or therefor shall hereafter be exclusive of any other civil action or proceeding by reason of the same subject matter against such physician, dentist, nurse, pharmacist, or paramedical or other supporting personnel (or the estate of such person) whose act or omission gave rise to such action or proceeding.

(b) The Attorney General shall defend any civil action or proceeding brought in any court against any person referred to in subsection (a) of this section (or the estate of such person) for any such injury. Any such person against whom such civil action or proceeding

is brought shall deliver within such time after date of service or knowledge of service as determined by the Attorney General, all process served upon such person or an attested true copy thereof to such person's immediate superior or to whomever was designated by the head of the agency concerned to receive such papers and such person shall promptly furnish copies of the pleading and process therein to the United States attorney for the district embracing the place wherein the action or proceeding is brought, to the Attorney General and to the head of the agency concerned.

(c) Upon a certification by the Attorney General that any person described in subsection (a) was acting in the scope of such person's duties or employment at the time of the incident out of which the suit arose, any such civil action or proceeding commenced in a State court shall be removed without bond at any time before trial by the Attorney General to the district court of the United States of the district and division embracing the place wherein it is pending and the proceeding deemed a tort action brought against the United States under the provisions of title 28 and all references thereto. Should a United States district court determine on a hearing on a motion to remand held before a trial on the merits that the case so removed is one in which a remedy by suit within the meaning of subsection (a) of this section is not available against the United States, the case shall be remanded to the State court.

(d) The Attorney General may compromise or settle any claim asserted in such civil action or proceeding in the manner provided in section 2677 of title 28, and with the same effect.

(e) For the purposes of this section, the provisions of section 2680 (a) of title 28 shall not apply to any cause of action arising out of a negligent or wrongful act or omission in the performance of medical, dental, or related health care functions (including clinical studies and investigations).

(f) The head of the agency concerned or his designee may, to the extent that he or his designee deems appropirate, hold harmless or provide liability insurance for any person described in subsection (a) for damages for personal injury, including death, caused by such person's negligent or wrongful act or omission in the performance of medical, dental, or related health care functions (including clinical studies and investigations) while acting within the scope of such person's duties if such person is assigned to a foreign country or detailed for service with other than a Federal department, agency, or instrumentality or if the circumstances are such as are likely to preclude the remedies of third persons against the United States described in section 1346(b) of title 28, for such damage or injury.

(g) In this section, head of the agency concerned means

(1) the Director of Central Intelligence, in the case of an employee of the Central Intelligence Agency;

(2) the Secretary of Transportation, in the case of a member or employee of the Coast Guard when it is not operating as a service in the Navy; and,

(3) the Secretary of Defense, in all other cases.

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TITLE 32, UNITED STATES CODE—NATIONAL GUARD

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CHAPTER 3.—PERSONNEL

Sec.

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§ *334. Payment of malpractice liability of National Guard medical personnel*

(a) Upon the final disposition of any claim for damages for personal injury, including death, caused by the negligent or wrongful act or omission of any medical personnel of the National Guard in furnishing medical care or treatment while acting within the scope of his duties for the National Guard during a training exercise, the liability of such medical personnel for any costs, settlement, or judgment shall become, subject to the provisions of this section, the liability of the United States and shall be payable under the provisions of section 1302 of the Act of July 27, 1956 (31 U.S.C. 724a) or out of funds appropriated for the payment of such liability.

(b) The liability for any claim for damages under this section against any medical personnel shall become the liability of the United States only to the extent that the liability of such medical personnel is not covered by inusurance, and such liability shall not constitute co-insurance for any purpose.

(c) Liability of the United States for damages against any medical personnel referred to in subsection (a) shall be subject to the condition that the medical personnel against whom any claim for such damages is made shall—

(1) promptly notify the Attorney General of the claim, and in case of any civil action or proceeding brought in any court against any such personnel, deliver all process served upon such personnel (or an attested true copy thereof) to the immediate superior of such personnel or to such other person designated by the appropriate Adjutant General to receive such papers, who shall promptly transmit such papers to the Attorney General,

(2) furnish to the Attorney General such other information and documents as the Attorney General may request, and

(3) comply with the instructions of the Attorney General relative to the final disposition of a claim for damages.

(d) The liability of the United States under this section shall also be subject to the condition that the settlement of any claim described in subsection (a) of this section be approved by the Attorney General prior to its finalization.

(e) The provisions of this section shall not apply in the case of any claim for damages against any medical personnel settled under the provisions of section 715 of title 32.

(f) As used in this section, the term —

(1) "Medical personnel" means any physician, dentist, nurse, pharmacist, paramedical, or other supporting personnel (including medical and dental technicians, nursing assistants, and therapists) of the Army National Guard or the Air National Guard

(2) "Training exercise" means training or duty performed by medical personnel under section 316, 502, 503, 504 or 505 of this title or under any other provision of law for which such personnel are entitled to or has waived pay under section 206 of title 37.

(3) "Final disposition" means—

(A) a final judgment of any court from which the Attorney General decides there will be no appeal,

(B) the settlement of any claim, or

(C) a determination at any stage of a claim for damages in favor of a medical personnel and from which determination no appeal can be made.

(4) "Settlement" means any compromise of a claim for damages which is agreed to by the claimant and approved by the Attorney General prior to its finalization.

(5) "Costs" includes any costs which are taxed by any court against any medical personnel, normal litigation expenses, attorney's fees incurred by any medical personnel, and such interest as any medical personnel may be obliged to pay by any court order or by statute.

(6) "Claim for damages" means any claim or any legal or administrative action in connection with any claim described in subsection (a) of this section.

(7) "Attorney General" means the Attorney General of the United States.

* * * * * * *

NATIONAL AERONAUTICS AND SPACE ACT OF 1958

(72 Stat. 438; 42 U.S.C. 2459)

Defense of certain malpractice and negligence suits

SEC. 307. (a) The remedy against the United States provided by sections 1346(a) and 2672 of title 28, United States Code, for damages for personal injury, including death, caused by the negligent or wrongful act or omission of any physician, dentist, nurse, pharmacist, or paramedical or other supporting personnel (including medical and dental technicians, nursing assistants, and therapists) of the Administration in the performance of medical, dental, or related health care functions (including clinical studies and investigations) while acting within the scope of his duties or employment therein or therefor shall hereafter be exclusive of any civil action or proceeding by reason of the same subject matter against such physician, dentist, nurse, pharmacist, or paramedical or other supporting personnel (or the estate of such person) whose act or omission gave rise to such action or proceeding.

(b) The Attorney General shall defend any civil action or proceeding brought in any court against any person referred to in subsection (a) of this section (or the estate of such person) for any such injury. Any such person against whom such civil action or proceeding is brought shall deliver within such time after date of service or knowledge of service as determined by the Attorney General, all process served upon such person or an attested true copy thereof to such person's immediate superior or to whomever was designated by the Administrator to receive such papers and such person shall promptly furnish copies of the pleading and process therein to the United States Attorney for the district embracing the place wherein the proceeding is brought to the Attorney General and to the Administrator.

(c) Upon a certification by the Attorney General that any person described in subsection (a) was acting in the scope of such person's duties or employment at the time of the incident out of which the suit arose, any such civil action or proceeding commenced in a State court shall be removed without bond at any time before trial by the Attorney General to the district court of the United States of the district and division embracing the place wherein it is pending and the proceeding deemed a tort action brough against the United States under the provisions of title 28, United States Code, and all references thereto. Should a United States district court determine on a hearing on a motion to remand held before a trial on the merits that the case so removed is one in which a remedy by suit within the meaning of subsection (a) of this section is not available against the United States, the case shall be remanded to the State court.

(d) The Attorney General may compromise or settle any claim asserted in such civil action or proceeding in the manner provided in section 2677 of title 28, United States Code, and with the same effect.

(e) For purposes of this section, the provisions of section 2680(h) of title 28, United States Code, shall not apply to any cause of action arising out of a negligent or wrongful act or omission in the performance of medical, dental, or related health care functions (including clinical studies and investigations).

(f) The Administrator or his designee may, to the extent that the Administrator or his designee deem appropriate, hold harmless or provide liability insurance for any person described in subsection (a) for damages for personal injury, including death, caused by such person's negligent or wrongful act of omission in the performance of medical, dental, or related health care functions (including clinical studies and investigations) while acting within the scope of such person's duties if such person is assigned to a foreign country or detailed for service with other than a Federal department, agency, or instrumentality or if the circumstances are such as are likely to preclude the remedies of third persons against the United States described in section 2679(b) of title 28, United States Code, for such damage or injury.

APPROPRIATIONS

Sec. [307] *308.* (a) There are authorized to be appropriated such sums as may be necessary to carry out this chapter, except that nothing in this chapter shall authorize the appropriation of any amount for

(1) the acquisition or condemnation of any real property, or (2) any other item of a capital nature (such as plant or facility acquisition, construction, or expansion) which exceeds $250,000. Sums appropriated pursuant to this subsection for the construction of facilities, or for research and development activities, shall remain available until expended.

(b) Any funds appropriated for the construction of facilities may be used for emergency repairs of existing facilities when such existing facilities are made inoperative by major breakdown, accident, or other circumstances and such repairs are deemed by the Administrator to be of greater urgency than the construction of new facilities.

(c) Notwithstanding any other provision of law, the authorization of any appropriation to the Administration shall expire (unless an earlier expiration is specifically provided) at the close of the third fiscal year following the fiscal year in which the authorization was enacted, to the extent that such appropriation has not theretofore actually been made.

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94TH CONGRESS } HOUSE OF REPRESENTATIVES { REPORT
1st Session } { No. 94-333

AMENDING TITLE 10 OF THE UNITED STATES CODE, TO PROVIDE FOR AN EXCLUSIVE REMEDY AGAINST THE UNITED STATES IN SUITS AGAINST MILITARY MEDICAL PERSONNEL BASED UPON MALPRACTICE

JUNE 27, 1975.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

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Mr. NEDZI, from the Committee on Armed Services, submitted the following

REPORT

[To accompany H.R. 3954]

The Committee on Armed Services, to whom was referred the bill (H.R. 3954) to amend title 10 of the United States Code, to provide for an exclusive remedy against the United States in suits based upon medical malpractice on the part of active duty military medical personnel, and for other purposes, having considered the same, report favorably thereon with amendments and recommend that the bill as amended do pass.

The amendments are as follows:

On page 2, line 1, strike the words "an active duty" and insert "a".

On page 3, line 20, strike the word "Genral" and insert "General".

On page 3, line 25, strike the word "tile" and insert "title".

On page 4, line 6, strike the words "active duty".

On page 4, lines 21 and 22, strike the words "the first day of the third month which begins following".

Amend the title so as to read:

A BILL To amend title 10 of the United States Code, to provide for an exclusive remedy against the United States in suits based upon medical malpractice on the part of military or civilian medical personnel of the armed forces, and for other purposes.

EXPLANATION OF THE AMENDMENTS

Two of the amendments are technical amendments to correct misspelled words. Two amendments would broaden the scope of the bill to include civilian employees performing medical and medically-related duties, as well as reserve and National Guard personnel in addition to the active duty members originally described. One amendment would allow the bill to become effective on the date of enactment rather than

to delay the effective date for a period of 90 days. The title would be amended to accurately reflect the broadened scope resulting from amendments which would include certain civilian employees as well as reserve and National Guard personnel.

Purpose

The purpose of the bill is to extend to personnel performing medical, paramedical or supportive medically-related services or duties in or for the armed forces, an immunity from civil suit and personal liability for acts of alleged medical malpractice performed while acting within the scope of their employment. Thus, the bill would make the remedy against the United States under the Federal Tort Claims Act the exclusive remedy for claims for damages for personal injury or death arising from alleged malpractice or negligence on the part of personnel described in the bill.

Also, the bill provides a grant of authority to the Secretary of Defense to hold harmless or provide insurance coverage for personnel performing medical or medically-related services for the armed forces where the provisions of the Federal Tort Claims Act may not be applicable although the person is acting within the scope of his office or employment.

Veterans Administration and Public Health Service personnel are currently covered by similar legislation.

Background

Since 1946 the United States has allowed claims and suits against itself for money damages arising out of personal injury or death caused by the wrongful act or omission of employees of the government while acting within the scope of their office or employment, under the provisions of the Federal Tort Claims Act (28 USC 1346(b), 2671–2680). The United States District Courts have exclusive jurisdiction over civil actions arising from claims filed against the United States for such damages and any such actions are tried without a jury. These civil actions against the United States are exclusive remedies.

Thus, over the years the normal course for a plaintiff to follow in claiming money damages for the negligent acts of a government employee has been to bring such actions against the United States in a proper United States District Court under the provisions of the Federal Tort Claims Act. Such a course would normally accrue to the benefit of the plaintiff should he prevail, since there is no limit on the amount of damages that could be awarded by the court (other than as may be limited by applicable state law) and apparently no limit on the assets of the United States to satisfy a judgment.

With regard to personnel as described in the bill, if the claimant chooses to sue the officer or employee individually in a state court for alleged malpractice and the defendant does not have malpractice insurance, the only advantage he has is to remove the case to a Federal District Court and be represented by the Department of Justice. If the defendant loses the case *he* must pay the judgment. Of course, if the individual is sued jointly with the United States and a judgment is entered against both jointly, the United States will satisfy the

judgment. However, if the defendant is sued individually, neither the United States nor the individual can bring in the United States as a party defendant in order to invoke the provisions of the Federal Tort Claims Act.

One may ask why a plaintiff would not join the United States or sue the United States alone in order to claim the benefit of the world's largest self-insurer. There are several possible reasons. For example, a jury trial is not available in such a suit against the United States and the plaintiff may care to obtain jury consideration of the circumstances giving rise to the alleged malpractice. Also, the Federal Tort Claims Act does not cover claims arising in a foreign country. Similarly, the act may not cover claims where the officer or employee of the United States was detailed for duty outside a Federal institution or agency. Also, there are cases where the two-year statute of limitations on claims against the United States may have run out while the local statute for suit in a state court may not have run. In addition, there have been instances where for emotional or vindictive reasons plantiffs have insisted on suing a physician personally for alleged negligence.

Discussion

The present propensity of individuals to pursue more actively alleged medical malpractice and the attendant alarming increase in the cost of malpractice insurance coverage have caused physicians, dentists, nurses, paramedics and other individuals assigned to medically-related duties in the Department of Defense to be increasingly concerned over personal exposure to civil liability for alleged malpractice and their increasing inability to meet the cost of malpractice insurance.

The Department of Justice reported to the Committee that it is defending 20 such lawsuits in which 37 Defense Department defendants are being sued personally for damages in United States District Courts. In all but three cases there is no insurance coverage, and of those three the limitations on liability appear to fall well below the damages claimed. The total damages claimed in those 20 cases is in the amount of $13,755,450.00. The Department of Justice, in reporting its experience regarding the national proliferation of medical malpractice claims and litigation, has advised the Committee that at the present time it is involved in approximately 494 suits characterized as arising out of alleged medical malpractice of officers or employees of the Federal establishment.

Testimony presented to the Committee indicates that it is not necessarily the number of malpractice suits currently pending against personnel described in the legislation that creates the trauma. Rather, it is the threat of such suits and the current experiences throughout the entire medical community which results in genuine concern for the possibility of personal liability and leads to the increasing inclination to practce defensive medicine well beyond the circumstances indicated in the case at hand. An additional factor which should encourage the enactment of this bill is the fact that Veterans' Administration and Public Health Service personnel have been covered by similar legislation going back to the original enactment in 1965. See 38 USC 4116, 42 USC 233.

This legislation would close the loophole by extending to personnel performing medical or medically-related services for the armed forces, immunity from civil suit and personal liability for alleged medical malpractice while acting within the scope of their employment. In substance, the bill would provide for an exclusive remedy against the United States under the Federal Tort Claims Act for claims for money damages for personal injury or death arising from alleged malpractice or negligence on the part of personnel described herein. The legislation is intended to cover not only active duty military personnel but also civilian employees and those members of the reserve components and the National Guard while acting within the scope of their duties or employment. Additionally, the bill would provide coverage through the Secretary of Defense for certain circumstances not included within the scope of the Federal Tort Claims Act, such as incidents arising in a foreign country or possibly in other than a Federal agency or institution where military or civilian personnel may be assigned. A typical example of the latter situation would be a military physician serving a residency in a civilian hospital.

With reference to the proposed subsection (e) of the bill at page 3, line 24, the Committee expressed some concern over the use of the words "assault and battery arising out of negligence" in defining a circumstance where coverage for malpractice could be allowed under the provisions of the Federal Tort Claims Act. The concept of an "assault and battery arising out of negligence" is almost unique to the law of medical malpractice. In early cases involving lack of informed consent to medical treatment the cause of action was drafted as a technical assault and battery. The more modern view is that failure to obtain consent of a patient prior to rendering specific medical treatment is professional negligence. However, since there remains a substantial body of law in many jurisdictions that continues to characterize such an action as one alleging assault and battery, the language has been retained in the bill. Similar language appears in the existing statutory provisions covering Public Health Service personnel in cases involving alleged malpractice.

Departmental Position

Department of the Air Force,
Office of the Secretary,
Washington, D.C., June 5, 1975.

Hon. Melvin Price, *Chairman,*
Committee on Armed Services,
House of Representatives.

Dear Mr. Chairman: Reference is made to your request for the views of the Department of Defense on H.R. 3954, 94th Congress, a bill "To amend title 10 of the United States Code, to provide for an exclusive remedy against the United States in suits based upon medical malpractice on the part of active duty military medical personnel, and for other purposes." The Department of the Air Force has been assigned the responsibility for expressing the views of the Department of Defense on this bill.

The purpose of the bill is to add a new section (§ 1089) to title 10, United States Code, to make suit against the United States under sections 1346(b) and 2672 of title 28, United States Code (relating to tort claims against the United States), the exclusive remedy for claims arising from alleged malpractice or negligence of active duty medical personnel (and persons in related specialized fields) of the armed forces in the performance of duties in or for a Federal department, agency, or institution. The Attorney General would be required to defend any civil action against a member of the armed forces based on a claim covered by the bill and would be authorized to compromise or settle any such claim as provided in section 2677 of title 28, United States Code. Moreover, the Secretary of Defense or his designees would be authorized to hold those personnel harmless or provide liability insurance against similar claims for damages arising while they were assigned to a foreign country or detailed for service with other than a Federal agency or institution, or when the remedies of third persons described in section 2679(b) of title 28 (pertaining to claims arising from the operation of a motor vehicle) are not available.

The exception in section 2680(h) of title 28 for claims arising out of assault or battery would not bar a claim otherwise covered by the new section. The new section would apply only to claims accruing on or after the first day of the third month after enactment of the bill.

There is now an urgent need both to assure an adequate remedy in all cases against the United States for injury caused by malpractice or negligence by persons in the medical and related specialties in the armed forces, within the scope of their duties, and to make that remedy the exclusive remedy for that malpractice. The proposed exclusive remedy insures the availability of adequate compensation in legitimate malpractice claims and insulates medical practitioners from frivolous lawsuits. Such a provision would be an incentive for a medical career in the armed forces.

Accordingly, the Department of the Air Force, on behalf of the Department of Defense, strongly urges favorable consideration of H.R. 3954 at this time. This will provide the same protection for medical personnel of the armed forces as is now provided for those personnel of the Veterans' Administration and the Public Health Service.

In addition, the remedial purpose of the bill supports its application to claims arising both before and after its enactment, subject to the statutes of limitations, provided that no suit or civil action has been commenced before such effective date.

The cost of the legislation cannot be definitely ascertained since we are unable to forecast possible future claims.

This report has been coordinated within the Department of Defense in accordance with procedues described by the Secretary of Defense.

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,

David P. Taylor,
Assistant Secretary of the Air Force,
Manpower and Reserve Affairs.

Committee Position

The Committee on Armed Services, a quorum being present, by unanimous vote, favorably reported H.R. 3954, as amended, on June 23, 1975.

Fiscal Data

Department of the Air Force,
Office of the Secretary,
Washington, D.C., June 18, 1975.

Mr. Williams H. Hogan, Jr.,
Counsel, House Armed Services Committee, House of Representatives, Washington, D.C.

Dear Mr. Hogan: This is in response to your request for information as to the costs associated with the enactment of H.R. 3954.

The Department of Justice will be responsible for handling litigation associated with malpractice suits initiated against medical personnel of the Armed Services. The Department of Justice has advised that based upon present projections there will be no additional manpower costs incurred if the bill is enacted, since any additional litigation work will be absorbed within their present manpower structure.

The possible costs of future claims associated with the legislation cannot be predicted due to the uncertainties associated with such litigation; however, any such costs would be absorbed within the existing budget.

Sincerely,

Joseph J. F. Clark,
Associate Director,
Legislative Liaison.

Thus, a cost factor cannot be assigned to this legislation, but the Committee was informed that the legislation is not expected to stimulate additional claims.

Inflation Impact Statement

For the reasons stated in the information under Fiscal Data above, the Committee does not consider that this bill contains an inflation factor.

Oversight Findings

The Committee indicated a continuing need for a close monitoring of the professional welfare of the military medical establishment in order to promote the retention of medical, dental and other health care delivery personnel, as well as to enhance career opportunities.

Changes in Existing Law

In compliance with the Rules of the House of Representatives, there is herewith printed in parallel columns the text of provisions of existing law which would be repealed or amended by the various provisions of the bill as reported.

Existing Law	The Bill as Reported
Chapter 55.—Medical and Dental Care	Add at the end of the analysis of chapter 55, the following:
Sec.	
1071. Purpose of sections 1071—1087 of this title.	
1072. Definitions.	
1073. Administration of sections 1071—1087 of this title.	
1074. Medical and dental care for members and certain former members.	
1075. Officers and certain enlisted members: subsistence charges.	
1076. Medical and dental care for depedents: general rule.	
1077. Medical care for dependents: authorized care in facilities of uniformed services.	
1078. Medical and dental care for dependents: charges.	
1079. Contracts for medical care for spouses and children: plans.	
1080. Contracts for medical care for spouses and children: election of facilities.	
1081. Contracts for medical care for spouses and children: review and adjustment of payments; reports.	
1082. Contracts for health care: advisory committees.	
1083. Contracts for medical care for spouses and children: additional hospitalization.	
1084. Determinations of dependency.	
1085. Medical and dental care from another executive department: reimbursement.	
1086. Contracts for health care for certain members, former members, and their dependents.[1]	
1087. Programing facilities for certain members' former members, and their dependents in construction projects of the uniformed services.	
1088. Air evacuation patients: furnished subsistence.	"1089. Defense of certain malpractice and negligence suits.".

EXISTING LAW

THE BILL AS REPORTED

Chapter 55 of title 10, United States Code is amended by adding the following new section at the end thereof:

"§ 1089. Defense of certain malpractice and negligence suits.

"(a) The remedy against the United States provided by sections 1346(b) and 2672 of title 28 for damages for personal injury, including death, allegedly arising from malpractice or negligence of a physician, dentist, nurse, pharmacist, or paramedical (for example, medical and dental technicians, nursing assistants, and therapists) or other supporting personnel of the armed forces in furnishing medical care or treatment while in the exercise of his duties in or for the Department of Defense or any other Federal department, agency, or institution shall hereafter be exclusive of any other civil action or proceeding by reason of the same subject matter against such physician, dentist, nurse, pharmacist, or paramedical or other supporting personnel (or his estate) whose act or omission gave rise to such claim.

"(b) The Attorney General shall defend any civil action or proceeding brought in any court against any person referred to in subsection (a) of this section (or his estate) for any such damage or injury. Any such person against whom such civil action or proceeding is brought shall deliver within such time after date of service or knowledge of service as determined by the Attorney General, all process served upon him or an attested true copy thereof to his immediate superior or to whomever was designated by the Secretary of Defense to receive such papers and such per-

son shall promptly furnish copies of the pleading and process therein to the United States attorney for the district embracing the place wherein the proceeding is brought, to the Attorney General and to the Secretary of Defense.

"(c) Upon a certification by the Attorney General that the defendant was acting in the scope of his employment in or for the Department of Defense or any other Federal department, agency, or institution at the time of the incident out of which the suit arose, any such civil action or proceeding commenced in a State court shall be removed without bond at any time before trial by the Attorney General to the district court of the United States of the district and division embracing the place wherein it is pending and the proceeding deemed a tort action brought against the United States under the provisions of title 28 and all references thereto. Should a United States district court determine on a hearing on a motion to remand held before a trial on the merits that the case so removed is one in which a remedy by suit within the meaning of subsection (a) of this section is not available against the United States, the case shall be remanded to the State court.

"(d) The Attorney General may compromise or settle any claim asserted in such civil action or proceeding in the manner provided in section 2677 of title 28, and with the same effect.

"(e) For purposes of this section, the provisions of section 2680(h) of title 28 shall not apply to assault and

EXISTING LAW

THE BILL AS REPORTED

battery arising out of negligence in the performance of medical, surgical, dental, or related functions, including the conduct of clinical studies or investigations.

"(f) The Secretary of Defense or his designees may, to the extent that he or his designees deem appropriate, hold harmless or provide liability insurance for any physician, dentist, nurse, pharmacist, or paramedical or other supporting personnel of the armed forces for damages for personal injury, including death, negligently caused by any such personnel while acting within the scope of his office or employment and as a result of the performance of medical, surgical, dental, or related functions, including the conduct of clinical studies or investigations, if such person is assigned to a foreign country or detailed for service with other than a Federal agency or institution, or if the circumstances are such as are likely to preclude the remedies of third persons against the United States described in section 2679(b) of title 28, for such damage or injury."

SEC. 2. This Act shall become effective on the date of its enactment and shall apply to only those claims accruing on or after the effective date.

SUMMARY

BACKGROUND AND PURPOSE

This bill would extend to personnel as described in the bill performing medical and medically-related services for the armed forces, immunity from civil suit and personal liability for alleged medical malpractice while acting within the scope of their employment or official duties. In substance, the bill would make the remedy against the United States under the Federal Tort Claims Act the exclusive remedy for money claims arising from alleged malpractice on the part of military members on active duty, reservists, guardsmen and civilian employees of the Department of Defense. Also, there are additional provisions for covering personnel who may be assigned by the armed forces for duty under circumstances where the Federal Tort Claims Act may not apply. Veterans Administration and Public Health Service personnel are currently covered by similar legislation.

FISCAL DATA

There is no foreseeable increase in appropriations for the Department of Defense as the result of claims or suits which could be brought as the result of enactment of this bill.

DEPARTMENT POSITION

The Department of Defense favors enactment of H.R. 3954, as amended.

COMMITTEE POSITION

The Committee on Armed Services on June 23, 1975 favorably reported the bill, as amended, by unanimous vote, a quorum being present.

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H. R. 3954

Ninety-fourth Congress of the United States of America

AT THE SECOND SESSION

Begun and held at the City of Washington on Monday, the nineteenth day of January, one thousand nine hundred and seventy-six

An Act

To provide for an exclusive remedy against the United States in suits based upon medical malpractice on the part of medical personnel of the armed forces, the Defense Department, the Central Intelligence Agency, and the National Aeronautics and Space Administration, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That (a) chapter 55 of title 10, United States Code, is amended by adding at the end thereof a new section as follows:

"§ 1089. Defense of certain suits arising out of medical malpractice

"(a) The remedy against the United States provided by sections 1346(b) and 2672 of title 28 for damages for personal injury, including death, caused by the negligent or wrongful act or omission of any physician, dentist, nurse, pharmacist, or paramedical or other supporting personnel (including medical and dental technicians, nursing assistants, and therapists) of the armed forces, the Department of Defense, or the Central Intelligence Agency in the performance of medical, dental, or related health care functions (including clinical studies and investigations) while acting within the scope of his duties or employment therein or therefor shall hereafter be exclusive of any other civil action or proceeding by reason of the same subject matter against such physician, dentist, nurse, pharmacist, or paramedical or other supporting personnel (or the estate of such person) whose act or omission gave rise to such action or proceeding.

"(b) The Attorney General shall defend any civil action or proceeding brought in any court against any person referred to in subsection (a) of this section (or the estate of such person) for any such injury. Any such person against whom such civil action or proceeding is brought shall deliver within such time after date of service or knowledge of service as determined by the Attorney General, all process served upon such person or an attested true copy thereof to such person's immediate superior or to whomever was designated by the head of the agency concerned to receive such papers and such person shall promptly furnish copies of the pleading and process therein to the United States attorney for the district embracing the place wherein the action or proceeding is brought, to the Attorney General and to the head of the agency concerned.

"(c) Upon a certification by the Attorney General that any person described in subsection (a) was acting in the scope of such person's duties or employment at the time of the incident out of which the suit arose, any such civil action or proceeding commenced in a State court shall be removed without bond at any time before trial by the Attorney General to the district court of the United States of the district and division embracing the place wherein it is pending and the proceeding deemed a tort action brought against the United States under the provisions of title 28 and all references thereto. Should a United States district court determine on a hearing on a motion to remand held before a trial on the merits that the case so removed is

one in which a remedy by suit within the meaning of subsection (a) of this section is not available against the United States, the case shall be remanded to the State court.

"(d) The Attorney General may compromise or settle any claim asserted in such civil action or proceeding in the manner provided in section 2677 of title 28, and with the same effect.

"(e) For purposes of this section, the provisions of section 2680(h) of title 28 shall not apply to any cause of action arising out of a negligent or wrongful act or omission in the performance of medical, dental, or related health care functions (including clinical studies and investigations).

"(f) The head of the agency concerned or his designee may, to the extent that he or his designee deems appropriate, hold harmless or provide liability insurance for any person described in subsection (a) for damages for personal injury, including death, caused by such person's negligent or wrongful act or omission in the performance of medical, dental, or related health care functions (including clinical studies and investigations) while acting within the scope of such person's duties if such person is assigned to a foreign country or detailed for service with other than a Federal department, agency, or instrumentality or if the circumstances are such as are likely to preclude the remedies of third persons against the United States described in section 1346(b) of title 28, for such damage or injury.

"(g) In this section, 'head of the agency concerned' means—

"(1) the Director of Central Intelligence, in the case of an employee of the Central Intelligence Agency;

"(2) the Secretary of Transportation, in the case of a member or employee of the Coast Guard when it is not operating as a service in the Navy; and

"(3) the Secretary of Defense, in all other cases.".

(b) The table of sections at the beginning of such chapter 55 is amended by adding at the end thereof the following:

"1089. Defense of certain suits arising out of medical malpractice.".

SEC. 2. (a) The Congress finds—

(1) that the Army National Guard and the Air National Guard are critical components of the defense posture of the United States;

(2) that a medical capability is essential to the performance of the mission of the National Guard when in Federal service;

(3) that the current medical malpractice crisis poses a serious threat to the availability of sufficient medical personnel for the National Guard; and

(4) that in order to insure that such medical personnel will continue to be available to the National Guard, it is necessary for the Federal Government to assume responsibility for the payment of malpractice claims made against such personnel arising out of actions or omissions on the part of such personnel while they are performing certain training exercises.

(b) Chapter 3 of title 32, United States Code, is amended by adding at the end thereof a new section as follows:

§ 334. Payment of malpractice liability of National Guard Medical personnel

(a) Upon the final disposition of any claim for damages for personal injury, including death, caused by the negligent or wrongful act or omission of any medical personnel of the National Guard in furnishing medical care or treatment while acting within the scope of

his duties for the National Guard during a training exercise, the liability of such medical personnel for any costs, settlement, or judgment shall become, subject to the provisions of this section, the liability of the United States and shall be payable under the provisions of section 1302 of the Act of July 27, 1956 (31 U.S.C. 724a), or out of funds appropriated for the payment of such liability.

"(b) The liability for any claim for damages under this section against any medical personnel shall become the liability of the United States only to the extent that the liability of such medical personnel is not covered by insurance, and such liability shall not constitute coinsurance for any purpose.

"(c) Liability of the United States for damages against any medical personnel referred to in subsection (a) shall be subject to the condition that the medical personnel against whom any claim for such damages is made shall—

"(1) promptly notify the Attorney General of the claim, and in case of any civil action or proceeding brought in any court against any such personnel, deliver all process served upon such personnel (or an attested true copy thereof) to the immediate superior of such personnel or to such other person designated by the appropriate Adjutant General to receive such papers, who shall promptly transmit such papers to the Attorney General.

"(2) furnish to the Attorney General such other information and documents as the Attorney General may request, and

"(3) comply with the instructions of the Attorney General relative to the final disposition of a claim for damages.

"(d) The liability of the United States under this section shall also be subject to the condition that the settlement of any claim described in subsection (a) of this section be approved by the Attorney General prior to its finalization.

"(e) The provisions of this section shall not apply in the case of any claim for damages against any medical personnel settled under the provisions of section 715 of title 32.

"(f) As used in this section, the term—

"(1) 'Medical personnel' means any physician, dentist, nurse, pharmacist, paramedical, or other supporting personnel (including medical and dental technicians, nursing assistants, and therapists) of the Army National Guard or the Air National Guard.

"(2) 'Training exercise' means training or duty performed by medical personnel under section 316, 502, 503, 504, or 505 of this title or under any other provision of law for which such personnel are entitled to or has waived pay under section 206 of title 37.

"(3) 'Final disposition' means—

"(A) a final judgment of any court from which the Attorney General decides there will be no appeal,

"(B) the settlement of any claim, or

"(C) a determination at any stage of a claim for damages in favor of a medical personnel and from which determination no appeal can be made.

"(4) 'Settlement' means any compromise of a claim for damages which is agreed to by the claimant and approved by the Attorney General prior to its finalization.

"(5) 'Costs' includes any costs which are taxed by any court against any medical personnel, normal litigation expenses, attorney's fees incurred by any medical personnel, and such interest as any medical personnel may be obligated to pay by any court order or by statute.

"(6) 'Claim for damages' means any claim or any legal or administrative action in connection with any claim described in subsection (a) of this section.

"(7) 'Attorney General' means the Attorney General of the United States.".

(c) The table of sections at the beginning of such chapter 3 is amended by adding at the end thereof the following:

"334. Payment of malpractice liability of National Guard medical personnel.".

SEC. 3. Title III of the National Aeronautics and Space Act of 1958, as amended, is amended by redesignating section 307 as 308 and by inserting after section 306 a new section 307 as follows:

"DEFENSE OF CERTAIN MALPRACTICE AND NEGLIGENCE SUITS

"SEC. 307. (a) The remedy against the United States provided by sections 1346(b) and 2672 of title 28, United States Code, for damages for personal injury, including death, caused by the negligent or wrongful act or omission of any physician, dentist, nurse, pharmacist, or paramedical or other supporting personnel (including medical and dental technicians, nursing assistants, and therapists) of the Administration in the performance of medical, dental, or related health care functions (including clinical studies and investigations) while acting within the scope of his duties or employment therein or therefor shall hereafter be exclusive of any other civil action or proceeding by reason of the same subject matter against such physician, dentist, nurse, pharmacist, or paramedical or other supporting personnel (or the estate of such person) whose act or omission gave rise to such action or proceeding.

"(b) The Attorney General shall defend any civil action or proceeding brought in any court against any person referred to in subsection (a) of this section (or the estate of such person) for any such injury. Any such person against whom such civil action or proceeding is brought shall deliver within such time after date of service or knowledge of service as determined by the Attorney General, all process served upon such person or an attested true copy thereof to such person's immediate superior or to whomever was designated by the Administrator to receive such papers and such person shall promptly furnish copies of the pleading and process therein to the United States Attorney for the district embracing the place wherein the proceeding is brought to the Attorney General and to the Administrator.

"(c) Upon a certification by the Attorney General that any person described in subsection (a) was acting in the scope of such person's duties or employment at the time of the incident out of which the suit arose, any such civil action or proceeding commenced in a State court shall be removed without bond at any time before trial by the Attorney General to the district court of the United States of the district and division embracing the place wherein it is pending and the proceeding deemed a tort action brought against the United States under the provisions of title 28, United States Code, and all references thereto. Should a United States district court determine on a hearing on a motion to remand held before a trial on the merits that the case so removed is one in which a remedy by suit within the meaning of subsection (a) of this section is not available against the United States, the case shall be remanded to the State court.

"(d) The Attorney General may compromise or settle any claim asserted in such civil action or proceeding in the manner provided in section 2677 of title 28, United States Code, and with the same effect.

"(e) For purposes of this section, the provisions of section 2680(h) of title 28, United States Code, shall not apply to any cause of action arising out of a negligent or wrongful act of omission in the performance of medical, dental, or related health care functions (including clinical studies and investigations).

"(f) The Administrator or his designee may, to the extent that the Administrator or his designee deem appropriate, hold harmless or provide liability insurance for any person described in subsection (a) for damages for personal injury, including death, caused by such person's negligent or wrongful act or omission in the performance of medical, dental, or related health care functions (including clinical studies and investigations) while acting within the scope of such person's duties if such person is assigned to a foreign country or detailed for service with other than a Federal department, agency, or instrumentality or if the circumstances are such as are likely to preclude the remedies of third persons against the United States described in section 2679(b) of title 28, United States Code, for such damage or injury.".

SEC. 4. This Act shall become effective on the date of its enactment and shall apply only to those claims accruing on or after such date of enactment.

Speaker of the House of Representatives.

Vice President of the United States and
President of the Senate.