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8/10/1/76

APPROVED
OCT 1 - 1976

THE WHITE HOUSE
WASHINGTON
October 1, 1976

ACTION
Last Day: October 5

Posted
10/2/76
archives
10/4/76

MEMORANDUM FOR

THE PRESIDENT

FROM:

JIM CANNON *Jim Cannon*

SUBJECT:

S. 2830 - For the relief of Gary A. Broyles

Attached for your consideration is S. 2830, sponsored by Senator Hart.

The enrolled bill would provide the beneficiary \$120,000 as compensation for permanent injuries he suffered at a United States Army Hospital.

Additional information is provided in OMB's enrolled bill report at Tab A.

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

RECOMMENDATION

That you sign S. 2830 at Tab B.





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

SEP 28 1976

MEMORANDUM FOR THE PRESIDENT

Subject: Enrolled Bill S. 2830 - For the relief of Gary
A. Broyles
Sponsor - Sen. Hart (D) Michigan

Last Day for Action

October 5, 1976 - Tuesday

Purpose

To provide \$120,000 to Gary A. Broyles as compensation for permanent injuries he suffered at a United States Army Hospital.

Agency Recommendations

Office of Management and Budget	Approval
Department of the Army	No objection
Department of Justice	Defers to Army

Discussion

On January 27, 1965, Gary A. Broyles, a 4-month-old infant, was operated on for repair of a hydrocele and hernia at the United States Army Hospital at Fort Sill, Oklahoma. At the time, Gary's father, Gary G. Broyles, was on active duty as an enlisted member of the United States Army.

As a result of admitted negligence on the part of United States Army personnel, Gary A. Broyles suffered severe injuries during the course of this surgery. Gary must permanently wear an external urine collection device and his sexual identification, orientation, and functioning may be adversely affected. As an additional result, he also suffers recurrent urinary tract infections and has been hospitalized at least 17 times during the past 10 years.

Gary's parents filed a \$250,000 claim with the United States Army Claims Service in 1974, seeking compensation for their son's injuries. Although the Army admits negligence, a 2-year statute of limitations provision in current law prevents the Army from authorizing reimbursement in this matter without appropriate legislative action. Subsequently, Gary's father filed a complaint in a United States District Court seeking damages of \$350,000. This suit was recently held in abeyance by the court pending the outcome of S. 2830. This suit could also be barred by the statute of limitations if it is resumed.

S. 2830 would authorize the Secretary of the Treasury to pay Gary A. Broyles the sum of \$120,000 in full settlement and satisfaction of all his claims against the United States for compensation for permanent personal injuries suffered by him as a result of the surgical procedures performed at the United States Army Hospital, Fort Sill, Oklahoma, on January 27, 1965. The enrolled bill would place a 10 percent ceiling of the amount paid in settlement of this claim on any attorney fees paid in connection with this claim.

The enrolled bill is identical to a substitute draft bill which the Department of the Army recommended to the Senate Committee on the Judiciary when reporting on the introduced version of S. 2830. It should be noted that prior to OMB clearance of the Army report and substitute draft bill, the Department of Justice opposed any form of legislative relief. Justice argued that relief would be premature and inappropriate in view of the pending litigation,



be discriminatory, preferential and have the tendency to create an undesirable precedent. However, after discussions with OMB personnel, Justice informally agreed not to oppose the Army's favorable position, and it was submitted to the Committee.

The primary reasons for favoring private relief in this case are Army's admitted negligence and the fact that, as a minor, Gary A. Broyles should not be held accountable for the failure to submit a timely claim for damages. Moreover, the Army advises that the \$120,000 specified in this bill is an amount negotiated by it and the attorney representing the Broyles family as a full and final settlement of this claim. Thus, as the Senate Committee on the Judiciary noted in reporting on S. 2830, the bill:

"... has the effect of not only expediting and insuring the satisfaction of the family's claim, but protects the interests of the U.S. by preventing, through waiver of the statute of limitations, further suit in excess of the amount specified."

James M. Frey
Assistant Director for
Legislative Reference

Enclosures





DEPARTMENT OF THE ARMY
WASHINGTON, D.C. 20310

24 SEP 1976

Honorable James T. Lynn
Director, Office of Management
and Budget
Washington, DC 20403

Dear Mr. Lynn:

Reference is made to your request for the views of the Department of the Army on enrolled enactment S. 2830, 94th Congress, "For the relief of Gary A. Broyles."

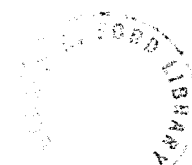
The Department of the Army is not opposed to the enrolled enactment.

The purpose of the act is to compensate Gary A. Broyles, a minor, for permanent personal injuries suffered by him as a result of surgical procedures performed at the United States Army Hospital, Fort Sill, Oklahoma, on January 27, 1965. As a result of negligent surgical procedures in a hernia operation the boy has required continuous catheter drainage through his abdominal wall. Although his parents' administrative claim for damages was denied because of their failure to file within the two year jurisdictional time limit of section 2401(b), title 28, United States Code, the Department of the Army believes that some form of compensation is appropriate in view of the clear negligence of military medical personnel and the permanent nature of the child's urinary tract diversion.

Approval of the enactment will cost \$120,000.

Sincerely,

JACK E. HOBBS
ACTING ASSISTANT SECRETARY OF THE ARMY
(FINANCIAL MANAGEMENT)



Department of Justice
Washington, D.C. 20530

September 27, 1976

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

Dear Mr. Lynn:

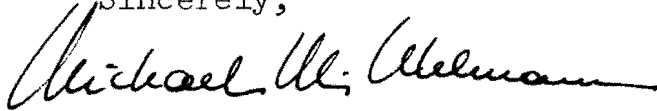
In compliance with your request, I have examined a facsimile of the enrolled bill S. 2830, "For the Relief of Gary A. Broyles."

This private relief legislation would authorize and direct the Secretary of the Treasury to pay the sum of \$120,000 to Gary A. Broyles in full settlement and satisfaction of his claims against the United States for personal injuries arising out of surgical procedures performed at an Army hospital in January 1965. Such a claim for personal injuries arising out of alleged medical malpractice at Government medical facilities is cognizable under the Federal Tort Claims Act, 28 U.S.C. §§ 1346(b), 2671, et seq., and a lawsuit filed by Gary A. Broyles is in fact presently pending against the United States under that Act in the Eastern District of Michigan. The suit was recently held in abeyance by the Court pending the outcome of S. 2830.

For the reasons set forth in our letter of May 5, 1976, which provided the views of this Department on the Department of the Army's report on S. 2830, a bill "For the relief of Gary A. Broyles", the Department of Justice remains opposed to the enactment of this private relief legislation. In addition to being premature in light of the pending lawsuit and the absence of a judicial determination on either the merits of the claims or the statute of limitation issue, the bill constitutes discriminatory and preferential treatment and creates, in our view, a highly undesirable precedent. However, although this Department opposes its enactment, we do not believe that our opposition warrants a veto recommendation.

Therefore, in view of the decision of Congress in this matter, the Department of Justice defers to the Department of the Army as to whether this bill should receive Executive approval.

Sincerely,

A handwritten signature in cursive script that reads "Michael M. Uhlmann". The signature is written in dark ink and is positioned above the typed name.

MICHAEL M. UHLMANN
Assistant Attorney General



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

SEP 28 1976

MEMORANDUM FOR THE PRESIDENT

Subject: Enrolled Bill S. 2830 - For the relief of Gary
A. Broyles
Sponsor - Sen. Hart (D) Michigan

Last Day for Action

October 5, 1976 - Tuesday

Purpose

To provide \$120,000 to Gary A. Broyles as compensation for permanent injuries he suffered at a United States Army Hospital.

Agency Recommendations

Office of Management and Budget	Approval
Department of the Army	No objection
Department of Justice	Defers to Army

Discussion

On January 27, 1965, Gary A. Broyles, a 4-month-old infant, was operated on for repair of a hydrocele and hernia at the United States Army Hospital at Fort Sill, Oklahoma. At the time, Gary's father, Gary G. Broyles, was on active duty as an enlisted member of the United States Army.

THE WHITE HOUSE

ACTION MEMORANDUM

WASHINGTON

LOG NO.:

Date: September 28

Time: 830pm

FOR ACTION: Max Friedersdorf
Bobbie Kilberg

cc (for information):

Jack Marsh
Jim Connor
Ed Schmults

FROM THE STAFF SECRETARY

DUE: Date:

September 30

Time:

200pm

SUBJECT:

S.2830-Relief of Gary Broyles

ACTION REQUESTED:

For Necessary Action

For Your Recommendations

Prepare Agenda and Brief

Draft Reply

For Your Comments

Draft Remarks

REMARKS:

please return to juddy 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

THE WHITE HOUSE
WASHINGTON

September 29, 1976

MEMORANDUM FOR: JIM CAVANAUGH

FROM: MAX L. FRIEDERSDORF *M.L.F.*

SUBJECT: S.1787 - Relief of Maria Lisa Manalo ✓
S.2668 - Relief of Arturo Moreno Hernandez ✓
S.2770 - Relief of Anthony Augustus Daley ✓
S.2956 - Relief of Teresa Marie Salman ✓
S.2481 - Relief of Oscar Rene Hernandex Rustrian
S.1404 - Relief of Mrs. Kyong Chu Stout
S.1477 - Relief of Beatric Serrano-Toledo
→ S.2830 - Relief of Gary Broyles ✓

The Office of Legislative Affairs concurs with the agencies
that the subject bill be signed.

Attachments

THE WHITE HOUSE

ACTION MEMORANDUM

WASHINGTON

LOG NO.:

Date: September 28

Time: 830pm

FOR ACTION: Max Friedersdorf
Bobbie Kilberg

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

FROM THE STAFF SECRETARY

DUE: Date: September 30

Time: 200pm

SUBJECT:

S.2830-Relief of Gary Broyles

ACTION REQUESTED:

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

REMARKS:

please return to judy johnston, ground floor west wing

Approved Kilberg 9/30/76

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

Calendar No. 1068

94TH CONGRESS }
2d Session }

SENATE

{ REPORT
No. 94-1133

GARY A. BROYLES

AUGUST 6, 1976.—Ordered to be printed

Mr. EASTLAND, from the Committee on the Judiciary,
submitted the following

REPORT

[To accompany S. 2830]

The Committee on the Judiciary, to which was referred the bill (S. 2830) for the relief of Gary A. Broyles, having considered the same, reports favorably thereon, with an amendment, and recommends that the bill, as amended, do pass.

AMENDMENT

The Committee proposes an amendment to strike all after the enacting clause and insert in lieu thereof the following:

That notwithstanding any other provision of law, the Secretary of the Treasury is authorized and directed to pay out of any money in the Treasury not otherwise appropriated, to Gary A. Broyles, a minor, the sum of \$120,000 in full settlement and satisfaction of all his claims against the United States for compensation for permanent personal injuries suffered by him as a result of surgical procedures performed at the United States Army Hospital, Fort Sill, Oklahoma, on or about January 27, 1965.

SEC. 2. No more than 10 per centum of the amount paid in settlement of this claim shall be paid to or delivered to or received by any agent or attorney on account of services rendered in connection with this claim. Any person violating the provisions of this section shall be deemed guilty of a misdemeanor punishable by a fine not exceeding \$1,000.

PURPOSE OF AMENDMENT

The purpose of the amendment is to provide a sum certain award of \$120,000; eliminate the authorization for the Secretary of the Army to make Gary A. Broyles a "designee"; provide that the award made herein is in full satisfaction of all claims by Gary A. Broyles against

the United States arising out of the surgical procedures at Fort Sill; and limit the amount of attorney's fees to no more than 10 percent of the final amount awarded. The amendment is made upon the recommendation of the Department of the Army. The Department had previously drafted the original language of S. 2830, but recommends that the amended version receive favorable consideration by the Senate.

PURPOSE OF THE BILL

The purpose of S. 2830, as amended, is to provide relief to Gary A. Broyles for injuries he suffered as a child, caused by the negligence of military medical personnel during and after surgery performed on Mr. Broyles at the U.S. Army Hospital, Fort Sill, Oklahoma, on January 28, 1965.

STATEMENT

This legislation arises out of admitted negligence on the part of military medical personnel in performing surgery on Gary A. Broyles, in 1965 at Reynolds Army Hospital, Fort Sill, Oklahoma, causing permanent injury to the claimant.

The facts of this case based on the records of the Department, mandating private legislative relief, outlined in the Department's report to the Committee on S. 2830, are as follows:

Gary A. Broyles, son of Gary G. Broyles of Livonia, Michigan, was born on 2 October 1964. On 27 January 1965, while his father was serving on active duty as an enlisted member of the United States Army at Fort Sill, Oklahoma, Gary A. Broyles was operated on at Reynolds Army Hospital, Fort Sill, for surgical repair of bilateral hydrocele and a direct right inguinal hernia. The surgery was performed by an Army medical officer who located the bilateral inguinal hernias and repaired them through a single, transverse, suprapubic incision. The child was released from the hospital the next day, 28 January 1965. On 29 January 1965 he was brought to the hospital by his family with the complaint of a high fever, acute illness, and an absence of bowel movement since discharge from the hospital. Surgical exploration, performed on 30 January 1965, revealed that: (1) both anterior rectus sheaths had been incised transversely and the right rectus abdominal muscle had been completely avulsed; (2) the left abdominal rectus muscle was also incised transversely; and (3) in the midline there was a hole in the peritoneum communicating with a perforation of the bladder. Upon opening the bladder, two of the cotton sutures used in the hernia repair were encountered, having passed completely through the bladder wall. Unreteral catheters were introduced in an attempt to decrease the dilation of the ureters. The child was placed on continuous catheter drainage on 10 April 1965 as continued tests revealed an improper reflux of waste products into the dilated ureters.

The child's father was separated from the United States Army on 12 May 1965, at which time the family requested that the child's medical care be transferred to the Urology

Department of the University of Michigan Medical School. On 15 March 1966, because of continued hydronephrosis, a bilateral cutaneous ureterostomy was performed. This surgery resulted in a permanent urinary diversion with drainage through the abdominal wall and use of an ureterostomy bag. Recurrent urinary tract infections have occurred, and the child has been hospitalized at least 17 times in the last 10 years due to complications arising from his original operation. Although hospitalizations over the last several years have been decreasing, it is expected that the child will require continued strict medical supervision due to persistent urinary tract infections and evaluation of his urinary diversion system.

In addition to the physical complications, it is apparent that this child may suffer psychological damage. Sexual identification, orientation and functioning may be adversely affected. Moreover, the wearing of an external collection appliance, with urine coming out of the anterior abdominal wall, is an unsightly social liability requiring continual social adjustments. Restrictions on future employment can also be expected.

The Department believes that due to the permanent nature of the child's injury and the admitted negligence on the part of the U.S. Army personnel, some form of relief is warranted. However, the claimant is barred from pursuing an administrative or legal remedy due to the running of the two-year statute of limitation, 28 U.S.C. § 2401. As explained in the Army's report to the Committee:

... [T]he child's parents engaged a private attorney to seek compensation for their son's injuries. A lawsuit was thereupon filed against the United States, in the United States District Court, Eastern District of Michigan, seeking damages for medical malpractice, fraudulent concealment, and breach of contract. Because the family failed to present their claim to the Department of the Army for an administrative determination prior to instituting judicial proceedings, as required by section 2675, title 28, United States Code, the parties stipulated to a dismissal of the suit without prejudice. Their administrative claim against the United States was filed with the United States Army Claims Service on 19 September 1974 seeking recovery of \$250,000. On 16 July 1975, this claim was denied by the United States Army Claims Service on the grounds that the claim had not been presented within two years after its accrual as required by section 2401(b), title 28, United States Code. The jurisdictional significance of the statute of limitations obstacle was stressed by the Claims Service based upon numerous Federal judicial opinions. As an alternative means of recovery, the Claims Service expressed continued Department of the Army support for private legislative relief.

Subsequent to the denial of his administrative claim, the father of Gary A. Broyles again filed a complaint against the United States in the United States District Court, East-

ern District of Michigan, on 3 December 1975, seeking damages of \$350,000 for the injuries sustained. This action is presently pending. The Department of the Army believes that any lawsuit instituted against the United States in this matter will be barred by the statute of limitations.

It is only through the running of the statute of limitations, 28 U.S.C. § 2401, that the claimant has as yet received no compensation from the Department of the Army. As stated in their report to the Committee, the statute is a jurisdictional matter which cannot be waived, and therefore the Department must await appropriate legislative action. It recognizes the inherent equitable reasons for rendering some form of compensation in this case. For this reason, the Department had initiated an continues to support the granting of relief through private legislation on behalf of Mr. Broyles and recommends to the Committee S. 2830 with an amendment.

The Department of the Army originally drafted S. 2830, a relief bill for Gary A. Broyles. It provided for the waiving of the statute of limitations to allow for a settlement by the Secretary of the Army. It also authorized the Secretary to make Mr. Broyles a "designee of the Secretary" for the purpose of receiving treatment at a U.S. medical facility until Mr. Broyles is 25. It also did not place a limit on attorney's fees to be awarded upon payment of the claim.

Since negotiations between the Army and the attorney representing the Broyles family indicate both sides believe that \$120,000 would be an acceptable award, delays and staff processing could be avoided by specifying the exact amount in the bill. This has the effect of not only expediting and insuring the satisfaction of the family's claim, but protects the interests of the U.S. by preventing through waiver of the statute of limitations, further suit in excess of the amount specified.

As for the original language of S. 2830 requiring the Secretary of the Army to make claimant a "designee of the Secretary" for the purpose of receiving medical care at an Army medical treatment facility until he is 25 years old, the Committee notes that pursuant to the authority of Army regulation 40-3, 17 Sept. 1973, and recurrent provisions of the annual Department of Defense Appropriations Act, the Secretary has complete discretion to "designate" persons for such care. This bill as introduced merely gives the Secretary authority he already possesses and then limits that authority by imposition of an age limit. The Committee agrees with the Department when they state that a request for such status on behalf of Gary A. Broyles may be submitted in the future to the Secretary should the funds awarded by the bill be exhausted or should an extraordinary medical expense not now envisioned occur.

Finally, as is customarily done in such cases, provision should be made for a maximum amount of the award to be paid as attorney's fees.

The Committee accepts the Department of the Army's recommendations and the reasons therefore as contained in their report to the Chairman on S. 2830, and recommends to the Senate the amended bill to provide for a sum certain in the amount of \$120,000 in full satisfaction of all claims arising out of the events in question; eliminate the authorization to make a Gary A. Broyles a "designee"; and pro-

vide for a limit to the amount of attorney's fees to no more than 10 percent of the final amount awarded. Further, it agrees with the Department of the Army when they state that the facts fully support making an exception to the statutory restrictions; it being inequitable to deny relief to Gary A. Broyles and his family under the circumstances of this case. The Committee, therefore, recommends that the Senate act favorably on this bill, as amended.

Attached and made a part of this report is a letter from the Department of the Army dated June 22, 1976.

DEPARTMENT OF THE ARMY,
Washington, D.C., June 22, 1976.

HON. JAMES O. EASTLAND,
Chairman, Committee on the Judiciary, U.S. Senate, Washington,
D.C.

DEAR MR. CHAIRMAN: Reference is made to your request for the views of the Department of the Army on S. 2830, a bill "For the relief of Gary A. Broyles."

The bill provides: "That notwithstanding the time limitations of two years and the monetary limit of \$25,000 prescribed by sections 2401 and 2675 and section 2672, title 28, United States Code, the Secretary of the Army is authorized to accept, adjudicate and make an award to Gary A. Broyles for his claims arising out of a surgical procedure at United States Army Hospital, Fort Sill, Oklahoma, on January 28, 1965; the Secretary is also authorized to make the said Gary A. Broyles a 'designee of the Secretary' for the purpose of receiving treatment at a United States Army medical facility until Gary A. Broyles attains the age of twenty-five years."

The records of the Department of the Army disclose the following facts:

Gary A. Broyles, son of Gary G. Broyles of Livonia, Michigan, was born on 2 October 1964. On 27 January 1965, while his father was serving on active duty as an enlisted member of the United States Army at Fort Sill, Oklahoma, Gary A. Broyles was operated on at Reynolds Army Hospital, Fort Sill, for surgical repair of bilateral hydrocele and a direct right inguinal hernia. The surgery was performed by an Army medical officer who located the bilateral inguinal hernias and repaired them through a single, transverse, suprapubic incision. The child was released from the hospital the next day, 28 January 1965. On 29 January 1965 he was brought to the hospital by his family with the complaint of a high fever, acute illness, and an absence of bowel movement since discharge from the hospital. Surgical exploration, performed on 30 January 1965, revealed that: (1) both anterior rectus sheaths had been incised transversely and the right rectus abdominal muscle had been completely avulsed; (2) the left abdominal rectus muscle was also incised transversely; and (3) in the midline there was a hole in the peritoneum communicating with a perforation of the bladder. Upon opening the bladder, two of the cotton sutures used in the hernia repair were encountered, having passed completely through the bladder wall. Ureteral catheters were introduced in an attempt to decrease the dilation of the ureters. The child was placed on continuous catheter draining on 10 April 1965 as

continued tests revealed an improper reflux of waste products into the dilated ureters.

The child's father was separated from the United States Army on 12 May 1965, at which time the family requested that the child's medical care be transferred to the Urology Department of the University of Michigan Medical School. On 15 March 1966, because of continued hydronephrosis, a bilateral cutaneous ureterostomy was performed. This surgery resulted in a permanent urinary diversion with drainage through the abdominal wall and use of an ureterostomy bag. Recurrent urinary tract infections have occurred, and the child has been hospitalized at least 17 times in the last 10 years due to complications arising from his original operation. Although hospitalizations over the last several years have been decreasing, it is expected that the child will require continued strict medical supervision due to persistent urinary tract infections and evaluation of his urinary diversion system.

In addition to the physical complications, it is apparent that this child may suffer psychological damage. Sexual identification, orientation and functioning may be adversely affected. Moreover, the wearing of an external collection appliance, with urine coming out of the anterior abdominal wall, is an unsightly social liability requiring continual social adjustments. Restrictions on future employment can also be expected.

In response to these developments, the child's parents engaged a private attorney to seek compensation for their son's injuries. A lawsuit was thereupon filed against the United States, in the United States District Court, Eastern District of Michigan, seeking damages for medical malpractice, fraudulent concealment, and breach of contract. Because the family failed to present their claim to the Department of the Army for an administrative determination prior to instituting judicial proceedings, as required by section 2675, title 28, United States Code, the parties stipulated to a dismissal of the suit without prejudice. Their administrative claim against the United States was filed with the United States Army Claims Service on 19 September 1974 seeking recovery of \$250,000. On 16 July 1975, this claim was denied by the United States Army Claims Service on the grounds that the claim had not been presented within two years after its accrual as required by section 2401(b), title 28, United States Code. The jurisdictional significance of the statute of limitations obstacle was stressed by the Claims Service based upon numerous Federal judicial opinions. As an alternative means of recovery, the Claims Service expressed continued Department of the Army support for private legislative relief.

Subsequent to the denial of his administrative claim, the father of Gary A. Broyles again filed a complaint against the United States in the United States District Court, Eastern District of Michigan, on 3 December 1975, seeking damages of \$350,000 for the injuries sustained. This action is presently pending. The Department of the Army believes that any lawsuit instituted against the United States in this matter will be barred by the statute of limitations. However, it does not believe that the failure to file a timely claim would of itself constitute a bar to relief of a minor claimant and recognizes the inherent equitable reasons for rendering some form of compensation in this case. The Department agrees that negligence on the part of military medi-

cal personnel in performing the 1965 surgery was, in fact, the cause of permanent injury to Gary A. Broyles. However, as the statute of limitations is a jurisdictional matter which cannot be waived, the Department of the Army cannot authorize reimbursement in this matter without appropriate legislative action.

The bill as introduced authorizes the Secretary of the Army to make an award to Gary A. Broyles. No sum certain or limitation on any maximum amount to be awarded is contained in the bill. However, negotiations between the Department of the Army and the attorney representing the Broyles family indicate that both sides believe that \$120,000 would be an acceptable award. This amount should be specified in the bill, and the Secretary of the Treasury directed to pay this amount. Only further delays and staff processing will be achieved by authorizing the Secretary of the Army to make an award. Waiver of the \$25,000 limitation of section 2672, title 28, United States Code, eliminates the need for prior Attorney General approval of the award, but does not eliminate the requirement that the award be transmitted to the Department of the Treasury and the Office of Management and Budget for inclusion in a deficiency appropriation bill (para 4-11c, Army Regulation 27-20, 18 Sep 1970; 28 C.F.R. 14.10).

Moreover, the bill as introduced waives the 2 year statute of limitations of section 2401, title 28, United States Code (waiver of the provisions of 28 U.S.C. 2675 is unclear as no 2 year limitations is contained therein). If this bill were enacted in its present form and the Broyles family decided to submit a claim in excess of \$120,000, then, upon administrative denial of that claim, they would have the right to pursue judicial remedies. As the United States has admitted negligence in the performance of the 1965 surgery, the only question to be resolved in the trial of this matter would be the issue of damages. Protection of the United States interests in preventing the institution of such a lawsuit could be achieved, and has been so proposed, by entering into a settlement agreement with the Broyles family wherein they agree to submit and accept an award of \$120,000 pursuant to the authority of this bill. However, it is possible that passage may occur prior to the signing of the settlement agreement. Therefore, it appears that the interests of all parties will be better served by passage of the inclosed substitute draft bill specifying an award of \$120,000 in full satisfaction of the claims involved.

The bill as introduced also authorizes the Secretary of the Army to make Gary A. Broyles a "designee of the Secretary" for the purpose of receiving medical care at an Army medical treatment facility until he is 25 years old. This provision accomplishes nothing except to limit the Secretary's present authority in this matter. Pursuant to the author of Army Regulation 40-3, 17 September 1973, and recurrent provisions of the annual Department of Defense Appropriations Act, the Secretary has complete discretion to "designate" persons for such care. This bill as introduced merely gives the Secretary authority he already possesses and then limits that authority by imposition of an age limit. In view of the foregoing the Department's substitute draft bill does not include this "designee" provision. If, at some time in the future, the funds awarded pursuant to this bill should be exhausted, or should an extraordinary medical expense not now envisioned occur, then Gary A. Broyles could submit a request for "designee" status at

that time. Whether the Secretary would approve such request cannot be determined at this time, but would depend upon the policies then in effect. Certainly the equities of the case and the status of funds awarded by this bill would be important considerations.

The bill as introduced does not provide a limitation on the amount of attorney's fees to be awarded out of this payment. The proposed settlement agreement of \$120,000 was to be based upon \$109,000 damages for future expenses and \$11,000 attorney's fees. However, the Department of the Army believes that the amount of attorney's fees should be a matter for determination between the family and their attorney, subject to a maximum amount specified in the bill for legislative relief. Therefore, the draft substitute bill provides for a maximum payment of 10 percent of this award to an attorney.

The Department of the Army is of the opinion that the relief provided in its substitute draft bill is equitable for all parties. Due to the permanent nature of the child's urinary tract diversion and the admitted negligence on the part of the United States Army personnel, some form of relief appears warranted in this situation.

Accordingly, it would be inequitable to deny relief under these circumstances, and the facts fully support making an exception to the statutory restrictions.

For the foregoing reasons the Department of the Army recommends that the bill be amended in accordance with the inclosed substitute draft bill and, as amended, be favorably considered. The amendments provide a sum certain award of \$120,000; eliminate the authorization for the Secretary of the Army to make Gary A. Broyles a "designee"; provide that the award made herein is in full satisfaction of all claims by Gary A. Broyles against the United States arising out of the surgical procedures at Fort Sill; and limit the amount of attorney's fees to no more than 10 percent of the final amount awarded.

The cost of the bill, if enacted in accordance with the recommendations of this Department, will be \$120,000.

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 consideration of the Committee.

Sincerely,

HADLAI A. HULL,
Assistant Secretary of the Army.

○

GARY A. BROYLES

SEPTEMBER 13, 1976.—Committed to the Committee of the Whole House and ordered to be printed

Ms. JORDAN, from the Committee on the Judiciary,
submitted the following

REPORT

[To accompany S. 2830]

The Committee on the Judiciary, to whom was referred the bill (S. 2830) for the relief of Gary A. Broyles, having considered the same, report favorably thereon without amendment and recommends that the bill do pass.

PURPOSE

The purpose of the proposed legislation is to pay Gary A. Broyles, a minor, the sum of \$120,000 in full settlement and satisfaction of his claims against the United States for compensation for permanent personal injuries suffered by him as a result of surgical procedures performed at the United States Army Hospital, Fort Sill, Oklahoma, on or about January 27, 1965.

STATEMENT

The Department of the Army in a report to the Senate Committee on the Judiciary indicated that it would have no objection to a bill providing for the payment of \$120,000 to the minor claimant.

This legislation arises out of admitted negligence on the part of military medical personnel in performing surgery on Gary A. Broyles, in 1965 at Reynolds Army Hospital, Fort Sill, Oklahoma, causing permanent injury to the claimant.

The facts of this case based on the records of the Department, mandating private legislative relief, outlined in the Department's report to the Committee on S. 2830, are as follows:

Gary A. Broyles, son of Gary G. Broyles of Livonia, Michigan, was born on 2 October 1964. On 27 January 1965, while his father was serving on active duty as an enlisted member of the United States Army at Fort Sill, Oklahoma, Gary A. Broyles was operated on at Reynolds Army Hospital, Fort Sill, for surgical repair of bilateral hydrocele and a direct

right inguinal hernia. The surgery was performed by an Army medical officer who located the bilateral inguinal hernias and repaired them through a single, transverse, suprapubic incision. The child was released from the hospital the next day, 28 January 1965. On 29 January 1965 he was brought to the hospital by his family with the complaint of a high fever, acute illness, and an absence of bowel movement since discharge from the hospital. Surgical exploration, performed on 30 January 1965, revealed that: (1) both anterior rectus sheaths had been incised transversely and the right rectus abdominal muscle had been completely avulsed; (2) the left abdominal rectus muscle was also incised transversely; and (3) in the midline there was a hole in the peritoneum communicating with a perforation of the bladder. Upon opening the bladder, two of the cotton sutures used in the hernia repair were encountered, having passed completely through the bladder wall. Unreteral catheters were introduced in an attempt to decrease the dilation of the ureters. The child was placed on continuous catheter drainage on 10 April 1965 as continued tests revealed an improper reflux of waste products into the dilated ureters.

The child's father was separated from the United States Army on 12 May 1965, at which time the family requested that the child's medical care be transferred to the Urology Department of the University of Michigan Medical School. On 15 March 1966, because of continued hydronephrosis, a bilateral cutaneous ureterostomy was performed. This surgery resulted in a permanent urinary diversion with drainage through the abdominal wall and use of an ureterostomy bag. Recurrent urinary tract infections have occurred, and the child has been hospitalized at least 17 times in the last 10 years due to complications arising from his original operation. Although hospitalizations over the last several years have been decreasing, it is expected that the child will require continued strict medical supervision due to persistent urinary tract infections and evaluation of his urinary diversion system.

In addition to the physical complications, it is apparent that this child may suffer psychological damage. Sexual identification, orientation and functioning may be adversely affected. Moreover, the wearing of an external collection appliance, with urine coming out of the anterior abdominal wall, is an unsightly social liability requiring continual social adjustments. Restrictions on future employment can also be expected.

The Department stated in its report that due to the permanent nature of the child's injury and the admitted negligence on the part of the U.S. Army personnel, relief in the form of the bill amended by the Senate is warranted. However, the claimant is barred from pursuing an administrative or legal remedy due to the running of the two-year statute of limitation, 28 U.S.C. § 2401. As explained in the Army's report to the Committee:

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... [T]he child's parents engaged a private attorney to seek compensation for their son's injuries. A lawsuit was thereupon filed against the United States, in the United States District Court, Eastern District of Michigan, seeking damages for medical malpractice, fraudulent concealment, and breach of contract. Because the family failed to present their claim to the Department of the Army for an administrative determination prior to instituting judicial proceedings, as required by section 2675, title 28, United States Code, the parties stipulated to a dismissal of the suit without prejudice. Their administrative claim against the United States was filed with the United States Army Claims Service on 19 September 1974 seeking recovery of \$250,000. On 16 July 1975, this claim was denied by the United States Army Claims Service on the grounds that the claim had not been presented within two years after its accrual as required by section 2401(b), title 28, United States Code. The jurisdictional significance of the statute of limitations obstacle was stressed by the Claims Service based upon numerous Federal judicial opinions. As an alternative means of recovery, the Claims Service expressed continued Department of the Army support for private legislative relief.

Subsequent to the denial of his administrative claim, the father of Gary A. Broyles again filed a complaint against the United States in the United States District Court, Eastern District of Michigan, on 3 December 1975, seeking damages of \$350,000 for the injuries sustained. This action is presently pending. The Department of the Army believes that any lawsuit instituted against the United States in this matter will be barred by the statute of limitations.

It is only through the running of the statute of limitations, 28 U.S.C. § 2401, that the claimant has as yet received no compensation from the Department of the Army. As stated in their report to the Committee, the statute is a jurisdictional matter which cannot be waived, and therefore the Department must await appropriate legislative action. It recognizes the inherent equitable reasons for rendering some form of compensation in this case. For this reason, the Department had initiated and continues to support the granting of relief through private legislation on behalf of Mr. Broyles and recommends to the Committee S. 2830 with an amendment.

The Senate report stated that the Department of the Army originally drafted S. 2930, a relief bill for Gary A. Broyles. It provided for the waiving of the statute of limitations to allow for a settlement by the Secretary of the Army. It also authorized the Secretary to make Mr. Broyles a "designee of the Secretary" for the purpose of receiving treatment at a U.S. medical facility until Mr. Broyles is 25. It also did not place a limit on attorney's fees to be awarded upon payment of the claim.

The Senate report also stated that since negotiations between the Army and the attorney representing the Broyles family indicate both sides believe that \$120,000 would be an acceptable award, delays and staff processing could be avoided by specifying the exact amount in

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the bill. This has the effect of not only expediting and insuring the satisfaction of the minor's claim, but protects the interests of the U.S. by preventing through waiver of the statute of limitations, further suit in excess of the amount specified.

As to the original language of S. 2830 requiring the Secretary of the Army to make claimant a "designee of the Secretary" for the purpose of receiving medical care at an Army medical treatment facility until he is 25 years old, it may be noted that pursuant to the authority of Army regulation 40-3, 17 Sept. 1973, and recurrent provisions of the annual Department of Defense Appropriations Act, the Secretary has complete discretion to "designate" persons for such care. This bill as introduced merely gave the Secretary authority he already possesses and then limits that authority by imposition of an age limit.

Finally, as is customarily done in such cases, provision should be made for a limit on the amount of the award to be paid as attorney's fees.

The Committee accepts the Department of the Army's recommendations and the reasons therefore as contained in their report to the Chairman of the Senate Committee on S. 2830 providing for a payment of the sum of \$120,000 in full satisfaction of all claims arising out of the events in question, and providing for a limit to the amount of attorney's fees to *no more* than 10 percent of the final amount awarded.

The Committee notes that the bill is made payable to a minor, and it is assumed that payment will be made in a manner that will provide for adequate protection of the minor's interest and adequate supervision over the handling of the minor's funds and the disbursement and the accounting therefor as provided in the applicable state law.

It is recommended that the bill be considered favorably.

Attached and made a part of this report is a letter from the Department of the Army dated June 22, 1976.

DEPARTMENT OF THE ARMY,
Washington, D.C., June 22, 1976.

HON. JAMES O. EASTLAND,
Chairman, Committee on the Judiciary,
U.S. Senate, Washington, D.C.

DEAR MR. CHAIRMAN: Reference is made to your request for the views of the Department of the Army on S. 2830, a bill "For the relief of Gary A. Broyles."

The bill provides: "That notwithstanding the time limitations of two years and the monetary limit of \$25,000 prescribed by sections 2401 and 2675 and section 2672, title 28, United States Code, the Secretary of the Army is authorized to accept, adjudicate and make an award to Gary A. Broyles for his claims arising out of a surgical procedure at United States Army Hospital, Fort Sill, Oklahoma, on January 28, 1965; the Secretary is also authorized to make the said Gary A. Broyles a 'designee of the Secretary' for the purpose of receiving treatment at a United States Army medical facility until Gary A. Broyles attains the age of twenty-five years."

The records of the Department of the Army disclose the following facts:

Gary A. Broyles, son of Gary G. Broyles of Livonia, Michigan, was born on 2 October 1964. On 27 January 1965, while his father was

serving on active duty as an enlisted member of the United States Army at Fort Sill, Oklahoma, Gary A. Broyles was operated on at Reynolds Army Hospital, Fort Sill, for surgical repair of bilateral hydrocele and a direct right inguinal hernia. The surgery was performed by an army medical officer who located the bilateral inguinal hernias and repaired them through a single, transverse, suprapubic incision. The child was released from the hospital the next day, 28 January 1965. On 29 January 1965 he was brought to the hospital by his family with the complaint of a high fever, acute illness, and an absence of bowel movement since discharge from the hospital. Surgical exploration, performed on 30 January 1965, revealed that: (1) both anterior rectus sheaths has been incised transversely and the right rectus abdominal muscle had been completely avulsed; (2) the left abdominal rectus muscle was also incised transversely; and (3) in the midline there was a hole in the peritoneum communicating with a perforation of the bladder. Upon opening the bladder, two of the cotton sutures used in the hernia repair were encountered, having passed completely through the bladder wall. Ureteral catheters were introduced in an attempt to decrease the dilation of the ureters. The child was placed on continuous catheter draining on 10 April 1965 as continued tests revealed an improper reflux of waste products into the dilated ureters.

The child's father was separated from the United States Army on 12 May 1965, at which time the family requested that the child's medical care be transferred to the Urology Department of the University of Michigan Medical School. On 15 March 1966, because of continued hydronephrosis, a bilateral cutaneous ureterostomy was performed. This surgery resulted in a permanent urinary diversion with drainage through the abdominal wall and use of an ureterostomy bag. Recurrent urinary tract infections have occurred, and the child has been hospitalized at least 17 times in the last 10 years due to complications arising from his original operation. Although hospitalizations over the last several years have been decreasing, it is expected that the child will require continued strict medical supervision due to persistent urinary tract infections and evaluation of his urinary diversion system.

In addition to the physical complications, it is apparent that this child may suffer psychological damage. Sexual identification, orientation and functioning may be adversely affected. Moreover, the wearing of an external collection appliance, with urine coming out of the anterior abdominal wall, is an unsightly social liability requiring continual social adjustments. Restrictions on future employment can also be expected.

In response to these developments, the child's parents engaged a private attorney to seek compensation for their son's injuries. A lawsuit was thereupon filed against the United States, in the United States District Court, Eastern District of Michigan, seeking damages for medical malpractice, fraudulent concealment, and breach of contract. Because the family failed to present their claim to the Department of the Army for an administrative determination prior to instituting judicial proceedings, as required by section 2675, title 28, United States Code, the parties stipulated to a dismissal of the suit without prejudice. Their administrative claim against the United States was filed with

the United States Army Claims Service on 19 September 1974 seeking recovery of \$250,000. On 16 July 1975, this claim was denied by the United States Army Claims Service on the grounds that the claim had not been presented within two years after its accrual as required by section 2401(b), title 28, United States Code. The jurisdictional significance of the statute of limitations obstacle was stressed by the Claims Service based upon numerous Federal judicial opinions. As an alternative means of recovery, the Claims Service expressed continued Department of the Army support for private legislative relief.

Subsequent to the denial of his administrative claim, the father of Gary A. Broyles again filed a complaint against the United States in the United States District Court, Eastern District of Michigan, on 3 December 1975, seeking damages of \$350,000 for the injuries sustained. This action is presently pending. The Department of the Army believes that any lawsuit instituted against the United States in this matter will be barred by the statute of limitations. However, it does not believe that the failure to file a timely claim would of itself constitute a bar to relief of a minor claimant and recognizes the inherent equitable reasons for rendering some form of compensation in this case. The Department agrees that negligence on the part of military medical personnel in performing the 1965 surgery was, in fact, the cause of permanent injury to Gary A. Broyles. However, as the statute of limitations is a jurisdictional matter which cannot be waived, the Department of the Army cannot authorize reimbursement in this matter without appropriate legislative action.

The bill as introduced authorizes the Secretary of the Army to make an award to Gary A. Broyles. No sum certain or limitation on any maximum amount to be awarded is contained in the bill. However, negotiations between the Department of the Army and the attorney representing the Broyles family indicate that both sides believe that \$120,000 would be an acceptable award. This amount should be specified in the bill, and the Secretary of the Treasury directed to pay this amount. Only further delays and staff processing will be achieved by authorizing the Secretary of the Army to make an award. Waiver of the \$25,000 limitation of section 2672, title 28, United States Code, eliminates the need for prior Attorney General approval of the award, but does not eliminate the requirement that the award be transmitted to the Department of the Treasury and the Office of Management and Budget for inclusion in a deficiency appropriation bill (para 4-11c, Army Regulation 27-20, 18 Sep 1970; 28 C.F.R. 14.10).

Moreover, the bill as introduced waives the 2 year statute of limitations of section 2401, title 28, United States Code (waiver of the provisions of 28 U.S.C. 2675 is unclear as no 2 year limitations is contained therein). If this bill were enacted in its present form and the Broyles family decided to submit a claim in excess of \$120,000, then, upon administrative denial of that claim, they would have the right to pursue judicial remedies. As the United States has admitted negligence in the performance of the 1965 surgery, the only question to be resolved in the trial of this matter would be the issue of damages. Protection of the United States interests in preventing the institution of such a lawsuit could be achieved, and has been so proposed, by entering into a settlement agreement with the Broyles family wherein they

agree to submit and accept an award of \$120,000 pursuant to the authority of this bill. However, it is possible that passage may occur prior to the signing of the settlement agreement. Therefore, it appears that the interests of all parties will be better served by passage of the inclosed substitute draft bill specifying an award of \$120,000 in full satisfaction of the claims involved.

The bill as introduced also authorizes the Secretary of the Army to make Gary A. Broyles a "designee of the Secretary" for the purpose of receiving medical care at an Army medical treatment facility until he is 25 years old. This provision accomplishes nothing except to limit the Secretary's present authority in this matter. Pursuant to the authority of Army Regulation 40-3, 17 September 1973, and recurrent provisions of the annual Department of Defense Appropriations Act, the Secretary has complete discretion to "designate" persons for such care. This bill as introduced merely gives the Secretary authority he already possesses and then limits that authority by imposition of an age limit. In view of the foregoing the Department's substitute draft bill does not include this "designee" provision. If, at some time in the future, the funds awarded pursuant to this bill should be exhausted, or should an extraordinary medical expense not now envisioned occur, then Gary A. Broyles could submit a request for "designee" status at that time. Whether the Secretary would approve such request cannot be determined at this time, but would depend upon the policies then in effect. Certainly the equities of the case and the status of funds awarded by this bill would be important considerations.

The bill as introduced does not provide a limitation on the amount of attorney's fees to be awarded out of this payment. The proposed settlement agreement of \$120,000 was to be based upon \$109,000 damages for future expenses and \$11,000 attorney's fees. However, the Department of the Army believes that the amount of attorney's fees should be a matter for determination between the family and their attorney, subject to a maximum amount specified in the bill for legislative relief. Therefore, the draft substitute bill provides for a maximum payment of 10 percent of this award to an attorney.

The Department of the Army is of the opinion that the relief provided in its substitute draft bill is equitable for all parties. Due to the permanent nature of the child's urinary tract diversion and the admitted negligence on the part of the United States Army personnel, some form of relief appears warranted in this situation.

Accordingly, it would be inequitable to deny relief under these circumstances, and the facts fully support making an exception to the statutory restrictions.

For the foregoing reasons the Department of the Army recommends that the bill be amended in accordance with the inclosed substitute draft bill and, as amended, be favorably considered. The amendments provide a sum certain award of \$120,000; eliminate the authorization for the Secretary of the Army to make Gary A. Broyles a "designee"; provide that the award made herein is in full satisfaction of all claims by Gary A. Broyles against the United States arising out of the surgical procedures at Fort Sill; and limit the amount of attorney's fees to no more than 10 percent of the final amount awarded.

The cost of the bill, if enacted in accordance with recommendations of this Department, will be \$120,000.

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 consideration of the Committee.

Sincerely,

HADLAI A. HULL,
Assistant Secretary of the Army.

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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

For the relief of Gary A. Broyles.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That notwithstanding any other provision of law, the Secretary of the Treasury is authorized and directed to pay out of any money in the Treasury not otherwise appropriated, to Gary A. Broyles, a minor, the sum of \$120,000 in full settlement and satisfaction of all his claims against the United States for compensation for permanent personal injuries suffered by him as a result of surgical procedures performed at the United States Army Hospital, Fort Sill, Oklahoma, on or about January 27, 1965.

SEC. 2. No more than 10 per centum of the amount paid in settlement of this claim shall be paid to or delivered to or received by any agent or attorney on account of services rendered in connection with this claim. Any person violating the provisions of this section shall be deemed guilty of a misdemeanor punishable by a fine not exceeding \$1,000.

Speaker of the House of Representatives.

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