

Y4
Ar 5/3:
M 46/7

494
Ar-5/3
M 46/7

MALPRACTICE PROTECTION TO DEFENSE MEDICAL PERSONNEL

GOVERNMENT DOCUMENTS

Storage EB 2 2 1977

FARRELL LIBRARY
STATE UNIVERSITY

HEARINGS

BEFORE THE

SUBCOMMITTEE ON GENERAL LEGISLATION

OF THE

COMMITTEE ON ARMED SERVICES

UNITED STATES SENATE

NINETY-FOURTH CONGRESS

SECOND SESSION

ON

S. 1395 and 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

MARCH 2, AUGUST 27, AND SEPTEMBER 10, 1976

Printed for the use of the Committee on Armed Services



U.S. GOVERNMENT PRINTING OFFICE

WASHINGTON : 1976

77-986

KSU LIBRARIES
A 11900 305107 ✓

MHC/M
7-2/3
11A

MAINTAINANCE PROTECTION TO DEFENSE MEDICAL
PERSONNEL

COMMITTEE ON ARMED SERVICES

JOHN C. STENNIS, Mississippi, *Chairman*

STUART SYMINGTON, Missouri

HENRY M. JACKSON, Washington

HOWARD W. CANNON, Nevada

THOMAS J. MCINTYRE, New Hampshire

HARRY F. BYRD, Jr., Virginia

SAM NUNN, Georgia

JOHN C. CULVER, Iowa

GARY HART, Colorado

PATRICK J. LEAHY, Vermont

STROM THURMOND, South Carolina

JOHN TOWER, Texas

BARRY GOLDWATER, Arizona

WILLIAM L. SCOTT, Virginia

ROBERT TAFT, Jr., Ohio

DEWEY F. BARTLETT, Oklahoma

T. EDWARD BRASWELL, Jr., *Chief Counsel and Staff Director*

JOHN T. TICER, *Chief Clerk*

SUBCOMMITTEE ON GENERAL LEGISLATION

HARRY F. BYRD, Jr., Virginia, *Chairman*

THOMAS J. MCINTYRE, New Hampshire

SAM NUNN, Georgia

PATRICK J. LEAHY, Vermont

DEWEY F. BARTLETT, Oklahoma

JOHN TOWER, Texas

ROBERT TAFT, Jr., Ohio

W. CLARK McFADDEN II, *General Counsel*

(II)



CONTENTS

MARCH 2, 1976

Statements of:

	Page
Byrd, Hon. Harry F., Jr., U.S. Senator, State of Virginia, chairman, Subcommittee on General Legislation, Committee on Armed Services, U.S. Senate-----	1
Thurmond, Hon. Strom, U.S. Senator, State of South Carolina-----	3
Clark, Brig. Gen. Ernest J., Director of Professional Services, Office of the Surgeon General, U.S. Air Force-----	7
Reed, Brig. Gen. Walter D., Assistant Judge Advocate General of the U.S. Air Force-----	10
Cary, George L., Legislative Counsel, Central Intelligence Agency, accompanied by Dr. Charles Borer and Dr. Donald Massey-----	25
Hosenball, S. Neil, General Counsel, National Aeronautics and Space Administration, accompanied by Dr. David L. Winter, of NASA, Director of Life Sciences-----	27
Greenlief, Maj. Gen. Francis S., retired, executive vice president of the National Guard Association, accompanied by Col. William Blatt, retired, general counsel of the National Guard Association-----	29
Kruse, Charles J., acting chief, Torts Section, Civil Division, Department of Justice-----	19

AUGUST 27, 1976

Bumpers, Dale, a U.S. Senator from the State of Arkansas-----	42
Greenlief, Maj. Gen. Francis S., executive vice president, National Guard Association-----	45
Skowron, Col. Ralph A., Acting Adjutant General For Delaware National Guard-----	45
Cahill, Col. William W., Jr., Staff Judge Advocate, Military Department of the State of Maryland, Maryland Army National Guard-----	48
Peterson, Neil, Assistant Chief, Tort Section, Civil Division, Department of Justice-----	52

SEPTEMBER 10, 1976

Armed Services Committee discussion-----	65
--	----

(III)

MALPRACTICE PROTECTION TO DEFENSE MEDICAL PERSONNEL

TUESDAY, MARCH 2, 1976

U.S. SENATE,
COMMITTEE ON ARMED SERVICES,
SUBCOMMITTEE ON GENERAL LEGISLATION,
Washington, D.C.

The subcommittee met, pursuant to notice, at 10:30 a.m., in room 212, Russell Senate Office Building, Hon. Harry F. Byrd, Jr., chairman, presiding.

Present: Senators Byrd, Thurmond, and Nunn.

Also present: W. Clark McFadden II, general counsel.

OPENING STATEMENT BY THE CHAIRMAN

Senator BYRD. The committee will come to order. The General Legislation Subcommittee meets this morning to consider legislation which would provide certain defense and other medical personnel protection from personal liability arising out of malpractice claims. The subcommittee will focus on S. 1395, a bill sponsored by the ranking minority member of the Senate Armed Services Committee, Senator Strom Thurmond of South Carolina.

[The bill referred to follows:]

[S. 1395, 94th Cong., 1st sess.]

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

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That chapter 55 of title 10, United States Code, is amended—

(a) by adding a 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 an active duty 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 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 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 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 active duty 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."

(b) by adding at the end of the analysis of chapter 55 the following:

"1089. Defense for certain malpractice and negligence suits."

SEC. 2. This Act shall become effective on the first day of the third month which begins following the date of its enactment and shall apply to only those claims accruing on or after the effective date.

Senator BYRD. S. 1395 was originally introduced by Senator Thurmond on April 9, 1975, and was referred to the Senate Judiciary Committee. Subsequently, the Judiciary Committee was discharged from its consideration of S. 1395 and the bill was referred to the Armed Services Committee.

Among other things, S. 1395 would make the Federal Tort Claims Act the exclusive remedy for personal injury or death arising from from malpractice for active duty medical personnel acting within the scope of their employment for any Federal department.

In addition, the bill would authorize the Secretary of Defense to reimburse or provide liability insurance for any malpractice claim arising in a foreign country against active duty medical personnel. The House Armed Services Committee has already considered legislation identical to S. 1395. The House Armed Services Committee reported H.R. 3954 to the floor with one significant amendment: Malpractice protection was extended to civilian and National Guard and Reserve medical personnel when in the exercise of their duties for any Federal department.

H.R. 3954 passed the House on July 21, 1975.

The subcommittee looks forward to hearing from Senator Thurmond and getting the benefit of his knowledge and insight into this important area of malpractice protection.

The first witness this morning will be Brig. Gen. Ernest J. Clark, Director of Professional Services, Office of the Surgeon General of the U.S. Air Force, and Brig. Gen. Walter D. Reed, Assistant Judge Advocate General of the U.S. Air Force—if those two witnesses will take their places at the table.

It is my understanding that the Department of the Air Force will represent the views of the Defense Department, including the military services and the National Guard Bureau and Reserve forces.

Good morning, Senator Thurmond.

Senator THURMOND. Good morning.

Senator BYRD. Next, the subcommittee will hear from Mr. John Kruse, acting chief, Torts Section, Civil Division of the Department of Justice. The views of the Department of Justice are most relevant, since they will be directly involved in the implementation of this legislation.

The subcommittee will also hear from representatives of the Central Intelligence Agency and the National Aeronautics and Space Administration. I might say that I have letters from the Central Intelligence Agency, signed by George Bush, Director, and a letter from the Senate Committee on Aeronautical and Space Sciences, signed by the chairman, Frank E. Moss, and by the ranking minority member, Senator Barry Goldwater.

At the appropriate time, I will insert those letters into the record. At this point, Senator Thurmond, would you care to make your presentation?

Senator THURMOND. I'd appreciate it. I'm due at the White House in about 15 minutes. Thank you so much.

STATEMENT OF SENATOR STROM THURMOND, A U.S. SENATOR FROM THE STATE OF SOUTH CAROLINA

Senator THURMOND. Mr. Chairman, the purpose of my testimony this morning is speaking in favor of my bill, S. 1395, to amend title 10 of the United States Code to provide for an exclusive remedy for military active duty medical personnel who may be faced with certain malpractice or medical suits.

Mr. Chairman, as you know, medical personnel of both the Veterans' Administration (VA) and the Public Health Service (PHS) are already protected against malpractice suits. Also, military physicians are protected under the existing law from malpractice suits brought by military personnel, but are not protected against dependents.

This bill would make the remedy against the United States under the Federal Tort Claims Act the exclusive remedy for claims of damages for personal injuries or death arising from alleged malpractices on the part of any active duty medical personnel.

The bill also provides a grant of authority to the Secretary of Defense to hold harmless or provide insurance coverage for personnel performing medical service where provisions of the Federal Tort Claims Act may not be applicable.

The members of this subcommittee are well aware that in recent years the number of medical malpractice suits brought against medical personnel, particularly in the civilian sector, have increased dramatically. The Defense Department medical practitioner is in the unique position of not only handling a large medical practice, but often has to proceed with medical remedies in instances where a civilian physician can refuse to provide treatment.

Presently, roughly 50 percent of all physicians employed by the Federal Government work for either the VA or PHS. The remaining 50 percent are made up almost entirely of physicians employed by the Defense Department.

Because of the recent malpractice trends, there are now 20 suits pending which involve 37 Defense defendants. Besides the increase in suits, the amounts of individual damage judgments are rising. These trends have resulted in sharp increases in the cost of malpractice insurance and I am told some military doctors have taken out their own insurance to protect themselves in cases in which they are not covered by the Federal Government. Mr. Chairman, essentially my bill would have the following effects:

One, it brings all active duty military medical personnel under the Federal Tort Claims Act. Two, it requires the Attorney General to defend those personnel in all malpractice suits. Three, it provides for the removal to a Federal court of any malpractice suit against military medical personnel acting within the scope of their duties. Four, it provides for extension of Federal tort coverage to include actions for assault and battery arising out of negligence against active duty medical personnel. Five, it provides authority to the Attorney General to make out-of-court settlements. Six, it authorizes the Secretary of Defense to provide protection for any medical personnel acting within the scope of his job if remedy under the Federal Tort Claims Act is precluded.

In summary, my bill would merely assure that active duty military physicians, dentists, nurses, pharmacists, technicians, nursing assistants, therapists, and other supporting personnel of the Armed Forces would not as individuals be subjected to malpractice suits.

Mr. Chairman, in the staff work done on this bill in the committee and as a result of the House action on a similar bill, I would support several amendments to S. 1395. These amendments would have the following effect:

One, they would expand the protection provided active duty military in S. 1395 to civilian medical personnel within DOD and those Federal Reserve components carrying out duties for the Department of Defense and such personnel employed by the Central Intelligence Agency, U.S. Coast Guard, and National Aeronautics and Space Administration.

According to my understanding, the Senate Aeronautical and Space Sciences Committee which would normally claim jurisdiction as to NASA's employees, is agreeable to inclusion of their personnel in this legislation. Also, they would provide that the bill become effective upon enactment. They would include several technical amendments which do not change the bill, but are considered desirable as determined during staff preparation for these hearings.

Another important consideration would be the inclusion of the National Guard under this legislation. While they would be automatically protected under S. 1395 when in Federal service, the question arises as to whether they should be included during drill periods and while on active duty for training.

The subcommittee would be breaking new ground if it extends this coverage, however meritorious it might be. We would be expanding the class of Federal employees whose acts or missions can create liability on the part of the United States. Under existing law, National Guard personnel are employees of their respective States and the United States is not responsible for their actions.

On the other hand, the monthly drills and annual active duty training of the Guard are carried out primarily to enable them to meet their Federal mission. Furthermore, a majority of Guard funding and support is provided by the National Government as their primary role is a Federal one, particularly under the total force concept.

It would be my hope the subcommittee would accept the House Armed Services Committee amendment, providing inclusion of the National Guard under the medical malpractice provisions of this bill when the National Guard is in Federal service. This service should be done. The subcommittee should also carefully consider the Federal Government's obligation to expand that coverage to provide malpractice protection for National Guard medical personnel during monthly drills and on annual active duty training. This inclusion requires special study here as the Senate Armed Services Committee is the principal legislative committee for jurisdiction over the National Guard.

Now, Mr. Chairman, I want to say that question, I think, is probably one of the main questions you're going to have to decide: whether you are going to include the National Guard. Of course, they will automatically be included when they are called to Federal duty. Now, it is provided here that their mission is primarily Federal and, therefore, that their monthly drills and their 2 weeks active duty a year for training, since it's all calculated for the purpose of keeping this county prepared, then the question arises whether that should be included in this bill, too. And that's a judgment the committee will have to make.

I recommend you carefully consider it. If you don't go with both, you could go with the 2 weeks active duty training, since their duties are primarily for the benefit of our Nation as a whole, although I don't think I would have especial objection to making the exception here in putting in the bill that since their duties are primarily for national defense, that it is felt it's a national responsibility, and, therefore, their drill periods and their annual duty should be considered as Federal service to be included under this bill.

Finally, Mr. Chairman, may I express to you and the members of the subcommittee my appreciation for the time you've spent in considering this legislation, as I feel it is badly needed. It has the full support of the Department of Defense and DOD advises there is no foreseeable increase in appropriations necessary following enactment of S. 1395.

I wish to thank you very much, sir, and if there's any special question I can answer real quickly, I'd be glad to try to do it or come back later, if you'd like me to.

Senator BYRD. Thank you very much, Senator Thurmond. As one of the Nation's foremost experts on both military matters and national defense matters, your views have great weight in the entire Congress. I'd like to ask one question.

Senator THURMOND. Yes.

Senator BYRD. My question pertains to the significance of including the National Guard in this legislation. Does including the National Guard involve a constitutional question, and also, would we be infringing on the right of the States if we included the Guard?

Senator THURMOND. I don't much think it would necessarily be infringing on the rights of the States, although now the State militias are called, which is the National Guard—are State employees. They are responsible to the State and to the Governor in peace time and only when they are federalized do they then become subject to the orders of the President and are subject as any other Federal troops.

It's a serious question, I admit, as to whether the monthly drills and 2 weeks annual duty training should be included as Federal service to come under this bill. But the only purpose in the Guard, from the Federal standpoint, is to have them prepared to perform Federal duties. They have to train to do that, they have to train monthly and train annually.

And since that is a Federal function—now, of course, if the States would be responsible for those—but so far, I don't think the States have assumed responsibility, or not many of them, for these monthly drills and annual training. If they would assume that, that would be right. But the guardsmen are primarily to help keep this country prepared and that is a national responsibility. I don't think it would be too far out of line if we include the monthly drills and the annual training under this bill.

Senator BYRD. I'm a strong supporter of the National Guard. I think there is some question as to exactly what should be done with the Guard under this proposal, and I think a compromise—such as you suggest—might be the best solution to it.

I do think the question of whether or not to include the National Guard in this legislation is going to present a problem to the committee—

Senator THURMOND. Well, it is. It is a question that will have to be reconciled and I think it could be reconciled, either way that you care to take it, to be frank. I think I give probably the benefit to the members of the Guard and other personnel in the Guard, since they are primarily there to serve their Nation in case they are needed.

Senator BYRD. Thank you very much, Senator Thurmond.

Senator THURMOND. Thank you very much, Mr. Chairman. I appreciate your usual courtesy and the expertise you show in handling these matters.

Senator BYRD. The first witness will be Brig. Gen. Ernest J. Clark, Director of Professional Services, Office of the Surgeon General of the U.S. Air Force. May I suggest to the witnesses—not only the two who are already before the subcommittee, but others who will be called—that any lengthy prepared statements be submitted for the record and a summary giving the key points of the testimony be presented to the subcommittee, so this hearing may move expeditiously.

General Clark, you may proceed.

STATEMENT OF BRIG. GEN. ERNEST J. CLARK, DIRECTOR OF PROFESSIONAL SERVICES, OFFICE OF THE SURGEON GENERAL, U.S. AIR FORCE

General CLARK. Mr. Chairman, I am happy to be here this morning. I will submit my statement for the record and proceed with only a few comments to highlight what we consider the important problem. (The prepared statement follows:)

PREPARED STATEMENT OF BRIG. GEN. ERNEST J. CLARK, DIRECTOR OF PROFESSIONAL SERVICES, OFFICE OF THE SURGEON GENERAL, U.S. AIR FORCE

Mr. Chairman and distinguished members of the committee, I am Brigadier General Ernest J. Clark, Director of Professional Services in the Air Force Office of the Surgeon General. The Department of the Air Force has been assigned the responsibility for expressing the views of the Department of Defense on this bill. The Department of the Air Force, on behalf of the Department of Defense, strongly urges favorable consideration of S. 1395 with amendments as passed by the House in the companion bill H.R. 3954. We are all aware of the serious problems concerning malpractice liability in the civilian community. In the military services we are also seeing a very different claims climate from that of ten years ago. As an example, in the Air Force Claims Administration Management Program during the six years from 1963 to 1968, there are listed 26 claims for medical malpractice, and average of 4.3 claims per year. The total amount claimed was \$68,159.71, and the total amount paid by the Air Force was \$92.25. In our latest figures for the six year period of 1969 to 1974, there were a total of 382 claims filed, an average of 63.67 claims per year. The total amount claimed was \$154,273,724.00, and to date, the Air Force has paid \$1,436,965.16 in settlement. For this fiscal year, as of December 31, 1975, there have been 63 claims for a total of \$29,787,115.80, and \$1,179,000.00 has been paid in settlements. I mention this experience to highlight the increasing severity of the claims climate. Also each claim carries the potential of litigation. The Air Force currently has 82 cases in litigation. This is up from the 59 cases in litigation at the time of our testimony before the House.

In regard to physicians being named in suits in which the United States is not a party, there are two physicians in the Air Force, ten in the Army, and eight in the Navy for a total of twenty such individuals. There were only fifteen named alone at the time of my testimony last Summer.

In the past, litigation against military physicians was unlikely because of the excellent claims procedures provided by congressional legislation, because suit against the government was potentially more profitable, and because many courts have accepted the plea that physicians were acting in an official capacity in the practice of medicine. The low level of claims activity in the past is also a very significant factor. However, there is no bar to suit against the individual military physician if the claimant does not proceed against the United States Government.

A recent case in the United States Court of Appeals for the District of Columbia may have a significant effect on the liability of military physicians. In *Henderson v. Blumink*, July 26, 1974, the Court of Appeals reversed the conclusion of the District Court that "appellee's employment by the Army as a medical officer confers absolute immunity for his allegedly tortious conduct." The decision noted that "as a general rule, government officials are privileged to enjoy a blanket of immunity from civil liability for torts committed while acting in the line of their official duty . . ." but in the instant case, ". . . the significant factor is that the discretion exercised might have medical rather than governmental." The opinion went on to state, "We note with particular interest the statutory provision relieving the Veterans' Administration medical personnel from personal liability from malpractice. The extension of similar protection to the class of which appellee is a member is properly in the realm of the legislative branch of the United States. We refrain from affording absolute immunity by judicial decision."

Purchasing civilian malpractice insurance is not a viable option for military physicians. Many of the companies who previously wrote malpractice insurance are no longer willing to do so. There is currently no clear-cut availability

of insurance for military physicians in all risk categories. Overseas, there is very little opportunity, if any, for a military physician to obtain malpractice insurance, and some of our claims have been generated as a result of medical care provided overseas. Also, there is some question of coverage under the Federal Tort Claims Act for military physicians who are assigned to civilian institutions for training. Without the proposed legislation we may encounter some difficulty in detailing individuals for training at these institutions.

In the past, it was possible for a military physician to obtain a malpractice insurance policy which would be good anywhere in the United States. Now, with different states writing varying laws on the subject, availability of coverage as well as rates may be dependent upon geographic location. As an example, a military physician assigned in the District of Columbia may obtain coverage through the D.C. Medical Society which is good only so long as his practice is based in the District. To obtain this coverage, he must first obtain a license to practice in the District and must become an active, dues-paying member of the medical society. He may then obtain malpractice insurance at civilian premium rates which vary from \$815.00 to \$5895.00 annually, depending on specialty. In Maryland, private insurance carriers are no longer writing malpractice insurance, and for a military physician stationed there, it appears that the only malpractice insurance coverage that might be obtained would be through the newly created state insurance pool. Regulations for coverage require that the individual be licensed to practice in the state. Not only would such malpractice coverage be unusually burdensome for the individual military physician financially, but also if military physicians were required to have state licensure and membership in a local medical society at each duty location, reassignment and utilization of physicians would be subject to severe delays and complexities. This situation would be totally unresponsive to military needs.

There is considerable concern expressed by our physicians about not being fully protected against personal liability. We have noted some expression of reluctance to accept certain responsibilities, particularly in carrying out assigned duties outside their specialty, such as in the emergency room. In addition, military physicians do not have as much control over their professional activities as they would in private practice. When a physician is worried about the threat of malpractice liability, it would be expected to see him slower in seeing patients, hesitant in performing elective surgery and high risk procedures, and liberal in ordering x-rays and laboratory studies which are more for the purpose of providing liability protection than for the benefit of the patient. In these situations, we do not get the maximum value for our health care dollar.

Anxiety concerning malpractice protection can be a contributing factor to separation from the service. Physicians who want complete coverage and cannot afford it in the military service believe that they will be able to pay the premiums of civilian coverage out of the income they expect in civilian practice. Contrariwise physicians who believe they have greater malpractice protection in the military services would be encouraged to stay in our join the service. A positive solution to the malpractice problem in the Department of Defense by enactment of S. 1395 would have a significant effect on retention and accession of physicians.

We are very appreciative of the fact that this proposed legislation will cover all health professionals. Dentists have the same vulnerability to legal actions as physicians. The use of Physician Assistants Nurse Practitioners, and other extenders has enhanced our capability to provide medical care to our patient population. However, these individuals have increased exposure to liability as a result of their extended patient care responsibilities, and the responsible physician is likewise exposed to increased liability. In some instances, physicians have been reluctant to supervise such practitioners because of the increased risk. Such reticence could have a very serious impact on this important program.

We believe that the physicians in the Department of Defense have the same need for liability protection as do the physicians in the Veterans Administration and Public Health Service. In fact, they may have a greater need because of world-wide assignment requirements and because of the more temporary nature of many of these assignments. As suggested by the Appeal Court decision in *Henderson v. Bluemink*, exclusive coverage of VA and PHS physicians may actually increase the risk of legal action against military physicians.

In summary, enactment of S. 1395 will have a highly favorable influence on the accession and retention of physicians, but even more than this, because of the current liability of individual military physicians to alleged acts of malpractice, because of the increasingly litigious climate that presently exists in the

nation, because of the requirements of the military services which cannot be tied to availability of civilian malpractice protection, and because of the serious impact malpractice vulnerability has on morale and patient care, the Department of Defense strongly supports enactment of S. 1395.

General CLARK. I will start out by saying—speaking for the Department of Defense—we strongly urge favorable consideration of S. 1395. It is our perception that the medical malpractice threat to military medical personnel is a serious problem. The reasons for this primarily are based on the individual's ability to procure protection for himself through civilian sources.

In the past, many of our physicians have taken it upon themselves, at their own expense, to obtain malpractice insurance. In recent years, this has become more difficult. In some cases, it's less than desirable, and in other cases, it's not available at all. It particularly is true in an overseas assignment.

When it is available, the insurance is a very costly situation and it is rapidly accelerating. The protection is also limited from State to State, so that the individual practitioner has no guarantee of the protection he may be able to obtain.

The other reason I consider important to us is that the military member has little, if any, control over his assignment or the scope of his practice in medicine. In a civilian situation, the practitioner is able to control his own environment to preclude getting into a high-risk area to the degree he thinks necessary. That's not possible in a military situation to allow us to meet military requirements.

The other effects that the problem may have are that it creates a reluctance on the part of our practitioners to accept responsibilities outside of their usual specialty area. And in the military practice, it's often necessary to require a broad scope of activities of our military officers.

Senator BYRD. Looking back, say, 5, 6, or 10 years, what percentage of medical personnel of the Department of Defense has had malpractice insurance? Has it been customary?

General CLARK. Yes, sir. I would say it has been customary, although I cannot give you specific figures. It has been a high percentage of physicians. Other practitioners, such as our nurse practitioners, dentists, and physician assistants, which is a recent type of practitioner, less so, but physicians, I would say it has been customary.

Senator BYRD. It's been only in the last few years, though, that medical malpractice insurance has become much of a problem; isn't it?

General CLARK. That's right, in the last 2 or 3 years, insurance has become more difficult to obtain and the malpractice climate has been such that the threat apparently actually has increased.

Senator BYRD. Have there been many malpractice suits brought in recent years against the Department of Defense or personnel within the Department of Defense?

General CLARK. Yes, sir. In the last year or two, that has increased considerably. I believe we have some—

Senator BYRD. Well, give me some facts on—go back 5 years or whatever period prior to the last couple of years.

General CLARK. I have some figures on claims, which perhaps would be of interest that I can read for the record. In the—

Senator BYRD. What I'd like to know is: Has it been a problem prior to the last couple of years?

General CLARK. No. I would say until the last 2 years, it has not been a serious problem, primarily because the physicians have been able to get insurance and they felt comfortable with their own insurance and it was not—

Senator BYRD. Well, have there been many court actions, whether the physicians had insurance or didn't have insurance? Have there been many court actions prior to the last couple of years?

General CLARK. Until the last year or so, there have been very few involving physicians only without the Government being involved.

Senator BYRD. Do you have anything further you wanted to say at the moment?

General CLARK. I would like to add the problem also of reluctance on the part of physicians to supervise our other medical practitioners. We rely a great deal at the present time on the use of physician assistants, nurse practitioners, and other health care providers. Our physicians, of course, have to supervise those individuals and thereby incur an additional risk, since they're not doing the work themselves. Without protection, there is some reluctance to do that. And physicians have the tendency, in the absence of protection, to practice defensive medicine, which of course, involves a lot of X-rays, laboratory studies, and other measures that are designed primarily to protect him rather than for the benefit of the patient. That's not a cost-effective situation.

Senator BYRD. I'll have questions for you, General, a little later on. I thought I'd call on General Reed now. But before doing so, is my understanding correct that the two of you will represent the views of the Defense Department and the three services, as well as the Air Force?

General CLARK. Yes, sir. That's correct.

General REED. That's correct.

Senator BYRD. General Reed?

General REED. Mr. Chairman, I have a prepared statement which I can submit. I can summarize it, I think, briefly.

[The prepared statement follows:]

PREPARED STATEMENT OF BRIG. GEN. WALTER D. REED, THE ASSISTANT JUDGE
ADVOCATE GENERAL, U.S. AIR FORCE

It is a pleasure for me to appear before this subcommittee to provide information on the problem of medical malpractice claims and suits against members of the armed forces in an individual capacity, and to discuss the proposed remedial legislation, 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."

As General Clark has explained in detail, our inability to assure military medical personnel, that they cannot be held personally liable for malpractice is creating a severe morale problem, especially in view of the current increase in the cost of commercial malpractice insurance, the increase in the incidence of malpractice claims in both the government and the private sector, and the resulting crisis in the private sector of the medical profession.

Our inability to provide the desired assurance regarding personal liability, stems from the fact that United States law, for the most part, does not prevent a suit against the individual, even where the law allows a claim or suit against the United States for the same incident, unless the claimant has settled with the United States or a judgment is entered against the claimant or the United States. The only statutory exceptions are for medical personnel of the Veterans' Administration (38 U.S.C. 4116) and the Public Health Service (42 U.S.C. 233) and for employees generally who are sued for claims arising out of operation

of a motor vehicle for the government (28 U.S.C. 2679(b)) or for claims covered by certain admiralty laws (46 U.S.C. 741-752; 781-790). In addition, the Federal courts have recognized an immunity for officers of the government in the exercise of some governmental discretion and functions, but this appears to be limited to peculiarly governmental discretion and functions and one Court of Appeals at least has withheld immunity from a military physician in a malpractice case (*Henderson v. Bluemink*, 511 F.2d 399 (D.C. Cir. 1974)). For the most part, when a member of the armed forces is sued for malpractice, the fact that the alleged malpractice may have occurred in the performance of duty provides only limited protection:

1. First, if the individual is sued along with the United States and a judgment is entered against both jointly, the United States will satisfy the judgment.

2. Second, if the claimant chooses to sue the individual alone, neither the United States nor the individual sued, can bring in the United States as a defendant. The only special advantage the military member has is the power to remove the case to a Federal court, if it is begun in a State court, and to be represented by the Department of Justice—if he does not have malpractice insurance. If the individual loses the case, he—or his insurer, if he has one—must pay the judgment.

Fortunately, there have been only a small number of malpractice suits solely against individual members of the armed forces—so far. The extensive authority for administrative payment of claims against the United States is a major reason for this. The procedures for payment of these claims are comparatively uncomplicated for the claimant, and produce reasonably prompt and adequate payments. Even when a claimant is not satisfied with the terms of the settlement offered by the administrative process, in the great majority of cases he sues the United States alone or with the individual. This is, perhaps, because of the belief in the greater certainty of payment by the United States in the event of a judgment for a large sum.

Notwithstanding the advantages of proceedings against the United States, some claimants have chosen to sue the allegedly negligent military member alone. Such suits are likely to continue to occur.

In the first place, a claimant may choose to sue the individual alone in order to obtain a jury's evaluation of the facts of the alleged malpractice, the degree of care exercised by the individual sued, or the value of the injury or death. A jury trial is not available in a suit against the United States.

In the second place, there are a number of situations in which suit against the United States is not possible. For example, the United States cannot be sued under the (so-called) Federal Tort Claims Act (28 U.S.C. 1346(b), 2671-2680) for claims arising in a foreign country, though other statutes allow the payment of claims—but not suits—in those cases. Or the shorter period of the statute of limitations on claims against the United States might have run whereas the longer period for suits against individuals has not. Or, again, the alleged malpractice may have occurred when the military member was detailed to an agency of a State or a private institution. Finally, there is always the possibility of a suit in a court of a foreign country in circumstances where protection under treaty, other international agreement, or foreign law is either non-existent or unavailable.

Thus, though it is a much smaller risk than in the private sector, the risk remains that a military health professional will be sued for malpractice and found personally liable, alone, for an enormous sum. Because of this risk, the military health professionals feel compelled to seek personal malpractice insurance and the great increase in the cost of this insurance in many areas has, in the view of many military health professionals, significantly diluted the value of incentives for a career in the armed forces. Accordingly, statutory protection like that afforded medical personnel of the Veterans' Administration and Public Health Service appears likely to be the least expensive and most effective means of removing a serious impediment to recruiting and retaining career medical personnel.

S. 1395 would, if enacted, accomplish the purpose of removing the risk of malpractice litigation to the extent that it is possible for United States law to do so. It appears to have been modeled on the Veterans' Administration and Public Health Service law (38 U.S.C. 4116 and 42 U.S.C. 233). In effect, it makes the so-called Federal Tort Claims Act the exclusive remedy in malpractice and negligence cases involving medical care and treatment by active duty military health professionals in the performance of their duties, but only to the extent that that law—slightly modified—now allows suits against the United States.

Beyond that, the bill relies upon a grant of authority to the Secretary of Defense to hold the health professional harmless, or provide liability insurance for him, to protect him from suits for personal injury or death negligently caused by him in the performance of his medical or related duties.

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.

The purpose of S. 1395 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, it is recommended that S. 1395 be amended to like effect before enactment.

This concludes my prepared statement. I would be pleased to present to the subcommittee additional statistics on the suits and claims and to respond to any other questions you may have.

STATEMENT OF BRIG. GEN. WALTER D. REED, THE ASSISTANT JUDGE ADVOCATE GENERAL OF THE U.S. AIR FORCE

General REED. First of all, under the law as it is practiced in the United States—the various States—doctors are personally liable for damages caused by their negligence or malpractice while in the performance of official duties.

Now, claims are being made against doctors and doctors are being sued, both jointly with the United States, and in their individual capacity. They have no protection against such suits and if judgment is entered against them in their individual capacity, there is no way that they can join the United States or have anyone else pay those claims, if they are not covered by liability insurance.

The law places an extremely high standard of care upon doctors as it is now practiced in the United States. And the law has provided extremely high recoveries against doctors for damages caused due to malpractice or negligence. In fact, it is so high that if an individual had to personally bear that responsibility, it would be almost ruinous of his career.

Senator BYRD. You're speaking now of the claims.

General REED. Yes, sir.

Senator BYRD. Not of the cost of the insurance?

General REED. I will speak of the cost of insurance. It has either now gone to—it costs so high that he cannot afford it under his military pay or it's not even available at all. In many instances, the insurance carriers are just refusing to write that kind of coverage in the present environment. So there is no protection for the individual, should the injured party choose to claim individually against the doctor.

And this is creating a serious morale problem, a serious retention problem so far as military medical professionals are concerned. Now, the House of Representatives on July 21 passed H.R. 3954, which was identical to the S. 1395, except it is broader in two aspects: It includes civilian employees performing medical and medically related duties, as well as Reserve and National Guard personnel while in Federal service in addition to the active duty members, which we've already

described, as well as it would become effective upon enactment, rather than waiting for a period of 90 days.

Now, the purpose of S. 1395 supports its application to civilian employees of the Department of Defense and members of the Reserve and National Guard units in the performance of similar duties, as the substantive amendments of the House bill would provide. Accordingly, it is the position of the Department of Defense, and we recommend that the Senate bill S. 1395 be amended to a like effect as that of the House version.

Senator BYRD. But, General Reed, what is your position and what is the Defense Department's position, with regard to including the CIA, NASA, and the Coast Guard in legislative amendments to title 10?

General REED. Well, they were not included in the House bill. They certainly are not inconsistent with the purposes and we certainly would have no objection to the inclusion of these agencies within the Senate bill and the House bill.

Senator BYRD. I have received a letter from the chairman and ranking minority member of the Senate Committee on Aeronautical and Space Sciences. The purport of this letter is to request that NASA medical personnel be included. A paragraph of the letter says:

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.

I will insert in the record at this point the letter signed by Frank E. Moss, chairman, and Barry Goldwater, ranking minority member.

[The letter referred to follows:]

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 sections 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,

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

Senator BYRD. I have a letter from the Director of the Central Intelligence Agency. I won't read it all, but I'll read a part of it.

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, signed George Bush, Director.

I will put this letter in full in the record at this point.
[The letter referred to follows:]

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.

Senator BYRD. Have you completed your testimony?

General REED. Yes, sir. If you have any questions or desire other statistics, I'd be glad to provide those.

Senator BYRD. General, you mentioned that the cost of malpractice insurance is very costly. Do you have some figures to support that?

General CLARK. I can give you examples, Mr. Chairman. In some specialties, of course, risk is much higher than others, surgery being an example of a high-risk specialty. Some orthopedic surgeons in the State of California, I believe, pay insurance premiums in the range of \$45,000 a year. And if you can find examples of premiums from that level down, the average certainly is not that high. But it's very difficult to procure insurance for less than several thousand dollars, even for the low-risk specialties, if you can obtain it at all.

As General Reed says, many insurance companies have declined to write malpractice insurance because of the cost.

Senator BYRD. Well, it would be helpful to the subcommittee to determine the value of malpractice protection, as envisioned in S. 1395. Could you set forth for the subcommittee the cost of malpractice insurance for various Defense medical personnel that would be required in the absence of this legislation?

General CLARK. Yes. I don't have that for the moment, but we can submit the figures for the record, Mr. Chairman.

Senator BYRD. Well, where will you get the figures from?

General CLARK. We will have to survey our individual medical personnel who have attempted to get or have civilian insurance.

Senator BYRD. Well, do you have facts now as to how many doctors have malpractice insurance?

General CLARK. No, sir.

Senator BYRD. How many of your own personnel, that is, Defense Department personnel?

General CLARK. No. I don't have those figures. It's extremely variable. An individual may have insurance. Then he is transferred to another State and that insurance is no longer valid and he's not able to obtain it. So it would be a changing situation from day to day, as our personnel move around.

Senator BYRD. What I'm trying to establish for the record is—you may have answered this before, but I'm not clear on it—is it customary or not customary for military medical personnel to have malpractice insurance?

General CLARK. I think the best way I can answer that is that it has been customary in the past when the individuals could afford it and when it was available. And in the last couple of years, it has become more and more difficult to obtain the insurance and more and more difficult to afford it.

So, certainly, a much smaller percentage of our people have insurance today than had it 3 years ago—not because they don't need it or don't want it, but because they can't afford it and it's not available.

Senator BYRD. How does the cost of that insurance compare with the cost of a similar amount of insurance for someone in private practice?

General CLARK. As far as I'm aware, Mr. Chairman, there's no difference. It costs the military member the same as it would a civilian member, depending upon the specialty.

Senator BYRD. Well, I think it would be well if you would present for the record a detailed estimate of the value of this legislation to various Defense medical personnel.

General CLARK. All right, sir.

Senator BYRD. In other words, what benefit will accrue to the military, medical personnel, as a result of this legislation?

General CLARK. We will get those figures and submit them. I would reemphasize that it's difficult to get accurate figures that would be valid for any period of time because it's constantly changing. But we will attempt to—

Senator BYRD. Well, the premiums will go up at some future time and that's recognized, but you could certainly find out what it is now or what it was last week or last month.

General CLARK. Yes, sir.

Senator BYRD. I think that's what we would like to have for the record.

MALPRACTICE INSURANCE COSTS

We have polled five Air Force medical facilities in various parts of the country to obtain estimates of the percentage of individuals who carried professional liability insurance to cover their military medical practice five years ago and of those who carry it for the same purpose today. We also attempted to determine the average premium paid by these members and the availability and cost to new physicians who might be assigned to the area. The facilities polled were Wilford Hall USAF Medical Center, San Antonio, Texas; David Grant USAF Medical Center, Travis AFB, California; USAF Medical Center Keesler, Keesler AFB, Mississippi; USAF Regional Hospital MacDill, MacDill AFB, Florida; and USAF Regional Hospital Langley, Langley AFB, Virginia. The statistics we obtained are very rough and should be used for approximation purposes only.

Of 47 physicians who were in the service five years ago, only four were carrying liability insurance at that time. There is some indication that this number would

have been higher if we had inquired if they had carried malpractice insurance at any time during their military career. Of 159 physicians queried about liability coverage now, only 20 indicated that they carried policies to cover their military practice. The premiums range from a low of \$150.00 to a high of \$1,200.00 with an average of approximately \$536.00. These figures came exclusively from Texas and Mississippi. In both these localities it was reported that there was no clear-cut availability of coverage. It was noted that insurance companies are reluctant to underwrite a new man moving in.

Insurance is clearly available in Florida and California, but there were no reports of anyone carrying insurance to cover their military practice. In both areas it is necessary to be licensed to practice medicine in the state, and it may be necessary to be a member of the local medical societies. In California the cost of this membership alone would be \$565. For Classes I to V the premiums in Florida were from \$814 to \$5,148, and the premiums in California were \$3,000 to \$19,000. In addition, in California a supplemental premium is required during the first year which varies from \$2,400 for Class I to \$14,000 for Class V. While this supplement is being paid, the basic premium is reduced 50%.

At Langley AFB, Virginia, the only information available is anecdotal. It indicates a reluctance of private carriers to write insurance for military physicians. The only physician at Langley with liability coverage is a civilian who works half-time and pays a premium of \$550 a year for coverage. Three physicians leaving the service this summer, a cardiologist, an ophthalmologist and an otolaryngologist, report they have been given premium quotes of \$2,300, \$3,000 and \$6,000. It is assumed this premium rate would be applicable to military physicians as well.

As indicated in the above information, coverage for physicians in the Class V risk group—anesthesiologists, neurosurgeons and orthopaedic surgeons—may be as high as \$5,148 to \$19,000 in varying parts of the country. Active duty physicians in these locations cannot be expected to pay these premiums out of their military salary. In addition, in Florida and California, as well as other areas, state licensure is required to obtain insurance. If a man had a state license at one duty location and we transferred him where he had to get another state license, such relicensure requirements would severely hamper our management of military medical resources.

In summary, professional liability insurance availability is based on locality and may either be difficult to obtain or its availability may be predicated on state licensure. Reliance on civilian protection would complicate accomplishment of the military mission. In addition, premiums in some areas of the country are prohibitively high and vary greatly between specialties while basic military compensation takes no account of specialty. Such factors make it highly inequitable to ask our military physicians to turn to civilian sources of protection. However, if every military physician were required to obtain civilian liability protection, the cost would range from \$150 (though more likely \$400 to \$800) as a low to \$19,000 plus at the high end depending on specialty and location.

Senator BYRD. Would you also please provide a history of the number and amount of malpractice judgments that have been entered against individual defense medical personnel?

General CLARK. Yes, sir. We'll submit that for the record.

General REED. I think we can get that.

Senator BYRD. I beg your pardon?

General REED. We have some of those figures today, yes, sir.

[The information follows:]

MALPRACTICE INSURANCE COSTS

No defense medical personnel have ever been held individually liable in a malpractice judgment.

Senator BYRD. Well, if you have some of those figures today, you might mention those figures.

General REED. Yes, sir.

Senator BYRD. Before doing that, you don't have any figures today giving the cost of malpractice insurance for various categories?

General REED. I can give you one concrete example—

Senator BYRD. All right.

General REED [continuing]. If that would be helpful.

Senator BYRD. Yes. That would be a help.

General REED. A military physician whom I discussed this problem with recently stated that he had carried medical malpractice for years; his premiums had increased up until about 2 years ago from \$400 a year to about \$800 a year.

Last year his insurance carrier told him that they no longer would write malpractice insurance for him, that it was becoming so expensive and so much of a risk that his carrier refused to write the insurance. So he said, "Well, I must have insurance to protect myself against these high risks. How about finding me a carrier, since I've been a customer of yours for some time?"

The insurance carrier checked with Lloyds of London and some other underwriters. The cheapest insurance he could buy for his particular position was \$12,000 a year and it ranged up to \$18,000 a year for 1 year's premium for medical malpractice for that particular military position.

Senator BYRD. So if you were in private practice, it would presumably cost about the same?

General REED. At least the same and perhaps more.

Senator BYRD. Well, I thought that we had just established that the premiums for the two would be about the same.

General CLARK. It is, as far as I know.

Senator BYRD. So as far as you know, it is?

General CLARK. Yes, sir. In the past, insurance companies often did have reduced rates for military members because the threat of malpractice was less for that group. In recent years, that has not been so. Insurance companies generally charge the same rates for military members.

Each situation is assessed by the insurance company and there is no table of premiums that one can refer to. They assess it based on the risk. In a recent survey, Mr. Chairman, in attempting to get figures such as you are requesting, of 10 insurance companies that were polled, to get an idea of their premiums, 8 of those 10 had stopped writing malpractice insurance.

Senator BYRD. Well, that would apply also to those in private practice. They would have the same difficulty in getting it.

General CLARK. Yes, sir. Yes, sir.

General REED. [Nodding head.]

Senator BYRD. So it does not apply merely because a man is in the armed services?

General CLARK. Not at all.

Senator BYRD. You had some figures you were going to submit?

General REED. Well, I would only add that the example I cited—that individual doctor no longer carries malpractice insurance because he absolutely cannot afford it on his military salary. With respect to malpractice claims against the Air Force, unfortunately, I don't have these figures for the Department of Defense, but just as an illustrative example, in 1971 there were 64 claims submitted against the Air Force for medical malpractice in the amount of \$17,558,000. In 1975 that

figure had increased to 151 claims and \$84 million in the total amount of the claims.

Senator BYRD. We will take the 1971 figure. How many individuals and how many cases?

General REED. There were 64 claims. Now—

Senator BYRD. Sixty-four claims. Have they been settled?

General REED. During that year, we settled claims in the amount of \$226,000. Now, whether or not that settlement figure during that year is for those identical claims, I can't say. I'm just giving you the figures of the amount claimed and the amount settled.

In the first half of fiscal year 1976, we had claims against us in the amount of \$29,787,000. We have settled claims in the amount of \$1,179,000 against 63 claims, which illustrates that while there may have been more than 63 doctors involved, there would have been at least that number in which we have paid out in claims over \$1.1 million.

Now, with respect to suits, last year when we testified before the House Armed Services Committee, we had 53 active suits pending against the Air Force for medical malpractice. Today we have 73 active lawsuits pending. In addition to those, we now have 9 suits pending against the Air Force with military physicians. Thirteen of them joined as defendants. So we have 13 physicians now being sued with the United States joined as defendants in the Air Force.

Senator BYRD. Thirteen physicians. How does that compare with your total number? How many do you have altogether in the Defense Department?

General REED. We have 82 suits pending—

Senator BYRD. No. How many medical officers in the Defense Department?

General REED. I can't give you the total figure in the Defense Department. I can give you a total figure of physicians who are being sued in their individual capacity in which they are personally responsible and that's 20. We have 20 military physicians now defendants in lawsuits in which they are—

Senator BYRD. What is the total number of military physicians that you have?

General REED. I can't give you that.

General CLARK. I can't answer that for the entire Defense Department, but there are approximately 3,800 in the Air Force.

Senator BYRD. 3,800 in the Air Force?

General CLARK. Yes, sir. The Army would be more than that, of course.

Senator BYRD. It would be more, and then you have the Navy, so it must be probably 15,000.

General CLARK. We could submit accurate figures, if you desire.

Senator BYRD. Suppose you submit that for the record?

[The information follows:]

There are a total of 11,291 physicians in the Department of Defense as of February 29, 1976: Air Force, 3,164; Navy, 3,698; Army, 4,429.

General REED. The total amount, Mr. Chairman, of these lawsuits, though, is for \$80 million—the amount claimed in which these individuals are either joined with the United States or being sued in their individual capacity.

Senator BYRD. Well, haven't court cases denied military members a right to sue the Federal Government for injuries incident to service?

General REED. Yes, sir. These are not suits brought by military members. The Feres doctrine precludes the individual military member from suing the doctor. These are for dependents and others who are entitled to treatment in military facilities.

I might give you one other figure. As of the 28th of January, for the first 7 months of this fiscal year, we have had six judgments entered against the Air Force in a total amount of \$946,000. So it just gives you the magnitude of the risks.

Senator BYRD. What category of physicians would they be?

General REED. Mostly surgeons, I believe. I can't give you the break-out. One was a surgeon, that I know for certain, but the others I couldn't say. I can get that, if necessary.

Senator BYRD. Well, if you two would stand by, we will go to the next witness. I may have some additional questions.

General CLARK. Yes, sir.

Senator BYRD. Thank you very much, gentlemen.

Next the subcommittee will hear from Mr. Jack Kruse, Acting Chief, Torts Section, Civil Division of the Department of Justice.

**STATEMENT OF J. CHARLES KRUSE, ACTING CHIEF, TORTS SECTION,
CIVIL DIVISION OF THE DEPARTMENT OF JUSTICE**

Mr. KRUSE. Mr. Chairman, I'm pleased to be here on behalf of the Department of Justice to provide our views in favor of the passage of S. 1395.

Senator BYRD. Glad to have you, sir.

Mr. KRUSE. I have a prepared statement, which I'll be glad to submit.

Senator BYRD. It will be printed in full in the record.

[The prepared statement follows:]

**PREPARED STATEMENT OF J. CHARLES KRUSE, ACTING CHIEF, TORTS SECTION, CIVIL
DIVISION, DEPARTMENT OF JUSTICE**

Mr. Chairman, I appreciate the opportunity to appear before this Subcommittee on behalf of the Department of Justice in support of S. 1395.

The Bill would extend to military personnel performing medical, paramedical, or supportive, medically-related, services or duties in or for the Department of Defense, an immunity from civil suit and personal liability for acts of alleged medical malpractice performed within the scope of their employment. This would be accomplished by the provision in the Bill which, in substance would make the remedy against the United States under the Federal Tort Claims Act, the *exclusive* remedy for claims for money damages for personal injury, or death, arising from alleged malpractice or negligence on the part of the personnel described in the Bill.

If enacted, a claimant would be required to pursue his remedy against the United States under the Federal Tort Claims Act procedures for the redress of claims which arise in the course of medical care and treatment by Department of Defense personnel. If an individual referred to in the Bill is sued on a claim arising after the effective date, the Attorney General would be obligated to defend the action and upon a certification by the Attorney General that the individual was acting within the scope of his employment at the time of the

incident out of which the suit arose, the suit is deemed to be a suit against the United States under the Federal Tort Claims Act as set out in Title 28 of the United States Code. Judgments and settlements in such cases are payable by the United States.

S. 1395 closely parallels prior legislation enacted with respect to Veterans Administration and Public Health Service medical and paramedical personnel which appears in 38 U.S.C. § 4116 and 42 U.S.C. § 233. These statutes, enacted in 1965 and 1970, respectively, are closely patterned on legislation adopted in 1961, codified in subsections (b) through (e) of § 2679, of Title 28, which applies to lawsuits against federal motor vehicle operators. Those statutes pertaining to government vehicle operators and the medical and paramedical personnel of the Veterans Administration and the Public Health Service have very successfully and efficiently provided the desired protection from financial liability to those specified categories of federal employees, while at the same time providing a method for a claimant to seek redress from the United States.

The effect of S. 1395 would be simply to accord to Department of Defense medical and paramedical personnel the same protection from personal suit and liability previously extended to other designated personnel performing services for the United States government. The Department of Justice favors its enactment.

S. 1395 is identical to H.R. 3954 as it was introduced in the House of Representatives. H.R. 3954 was amended in the House to provide (1) that the Bill would apply to civilian as well as active duty employees of the Department of Defense, and (2) that the Act shall become effective immediately upon the date of its enactment, rather than approximately three months later as originally proposed. The Department of Justice endorses both of those amendments.

The Department of Justice would suggest a further, technical amendment to S. 1395 by striking the language on page 4, line 16 "described in section 2679(b)", and substituting therefor ", provided by section 1346(b) and 2672". The reference to section 2679(b), which we recommend striking, is a section relating to automobile accident cases. The suggested additional language applies to all Federal Tort Claims Act cases, and is precisely as stated in 38 U.S.C. § 4116, the statute relating to Veterans Administration medical and paramedical employees.

The national proliferation of medical malpractice claims and litigation is, to a degree, reflected in the Justice Department's recent experience. At the present time, the Department is involved in approximately 546 suits arising out of or based upon alleged medical malpractice. Since there is presently no statutory proscription against suing a military doctor, nurse, dentist or paramedical employee, the Department, according to our records, is currently providing legal representation to 35 individuals who have been named as individual defendants in litigation or joined as a party defendant with the United States or other parties in malpractice litigation. These are individuals who are not protected by malpractice insurance and who are, understandably, concerned over the potential of an adverse judgment against them. Under existing law such a judgment is their personal responsibility.

Though our past experience at the Department in providing counsel to the individual reflects that statistically the personal financial risk to the doctor, nurse or paramedical has been minimal, recent court decisions suggest that at the present time the financial risk to the individual is both apparent and real. For the Justice Department, we see no justifiable basis for medical personnel assigned to the Department of Defense to bear a risk that, by reason of prior legislation, is not shared by their medical or paramedical counterparts at the Veterans Administration and Public Health Service or by Department of Defense employees who are involved in driving automobiles.

I shall be pleased to receive any questions the Subcommittee may have.

Senator BYRD. You may proceed to summarize your statement.

Mr. KRUSE. I think the basic factors contained in the bill have been well-summarized already. I'll just briefly mention some of the factors that I think are most significant. One point would be that S. 1395 is not innovative in that it is not creating something new and unknown, but rather is following a well-established track record of other bills

which have become law and which pertain to other categories of Federal employees. How this kind of statute would be construed by the courts is quite well-known because there is established legal precedent.

The series of similar statutes started in 1961. The first covered all Government drivers. The next covered Veterans' Administration physicians and paramedical employees. Later the same kind of coverage was provided to medical employees of the Public Health Service. I think S. 1395 is needed expansion of the statutory scheme to provide the same kind of coverage to the medical and paramedical employees of the Department of Defense.

In 1961, it was the intent of the Congress to relieve rural mail carriers of the obligation of buying automobile insurance. That same purpose should be compelling to the Congress in this day and age in relieving military physicians of a much, much larger obligation of buying expensive medical malpractice insurance. In addition, something that is much broader spread, is relieving medical personnel of the agonizing worry and concern of whether they might be sued and whether there might be a judgment rendered against them.

Senator BYRD. How would you value the cost benefit to a physician in the service?

Mr. KRUSE. Could I put a number expressed in terms of dollars as to what it would save him?

Senator BYRD. Yes.

Mr. KRUSE. I would be governed solely by what I know through newspapers, professional literature, and other statistics that the cost of medical malpractice is rising dramatically, as I believe General Clark said, talking in terms of \$45,000 per year for some specialties. I have heard prices in some areas significantly higher than that. I heard a statistic recently that a neurosurgeon in, I believe it was the District of Columbia, pays in excess of \$12,000 a year. To the extent that the physician is relieved of that cost, it would be definitely expressed in terms of many thousands of dollars per year per physician.

Senator BYRD. Thank you.

Good morning, Senator Nunn.

Senator NUNN. Hello, Senator Byrd.

Mr. KRUSE. Mr. Chairman, I might add that the number of cases in which individual physicians have been sued directly has increased quite markedly in the last several years. Five to ten years ago in the Department of Justice where we do provide representation to Government physicians who have been sued, a suit against a military physician was a rarity. It was a very unusual occurrence. In contrast—and most of this increase, I would say, has been within the last 2 to 3 years—we are now currently defending individual physicians in 19 separate lawsuits, which involve a total of 35 individual physicians who do not have insurance.

I have itemized these cases. Because of Privacy Act reasons and so forth, I have not listed the individual physicians' names, but if it would be of any help to the subcommittee, I'd be glad to submit the data on those cases.

Senator BYRD. Yes. The subcommittee would like to have it for the record and I think it's appropriate not to use the names.

[The information follows:]

Caption	District civil No. filing date	Government employee defendant	Branch of service	Codefendants	Ad damnum	Where and when occurred	Nature of case	Insurance coverage
Barrett v. United States, et al.	District of Colorado, 75-W-253, Mar. 11, 1975.	4 doctors	Army	United States	\$500,000	Fitzsimmons Army Medical Center (Denver) June-September 1972.	Diagnosis of chest pain. Coronary surgery.	None.
Benitez v. State of Arizona, et al.	Superior Court, Maricopa County (Phoenix, Ariz.), C-291-786, Apr. 16, 1974.	2 doctors	do	State of Arizona; 3 private doctors.	2,000,000	Arizona State Children's Hospital, February 1970.	Leg injury from knee surgery (ortho).	Possible coverage under hospital policy.
Bigelow v. United States	Western District of Michigan, M-13-73-CA, April 1973.	1 doctor	Air Force	United States	900,000	Sawyer AFB Hospital, Michigan, April 1971.	Emergency room—failure to diagnose neck fracture.	None.
Camira v. United States, et al.	Northern District of New York, 74-CV-501, Dec. 3, 1974.	1 doctor	do	do	4,000,000	Plattsburgh, N.Y. AFB Hospital, Apr. 15, 1971.	Failure to diagnose meningitis by pediatrician.	Do.
Cunning v. United States, et al.	Southern District of California, 74-580-S, Dec. 12, 1974.	1 doctor	Navy	do	360,000	Navy Hospital, San Diego, 1968 to April 1972.	Death (OB-GYN)	Do.
Florian v. United States, et al.	Northern District, Ohio, C-74-418, May 7, 1974.	1 dentist	Air Force	do	1,000,000	Minot, N.D. AFB Hospital, March 8, 1972.	Oral surgery	Do.
Gagnon v. United States, et al.	District of Maine, 75-77-SD, July 10, 1975.	6 doctors: 4 Navy, 2 Air Force.	Navy, Air Force.	do	1,600,000	Naval Hospital, Maine; Pease AF Hospital, June 1973.	Allegedly delayed surgery.	2 have insurance; 4 have none.
Gonzales v. Bexar County Hospital District, et al.	Texas State Court, 150 Judicial District, 73-CI-11094, August 1974.	1 nurse	Air Force	County Hospital, Ayerst Laboratories, and 23 private doctors.	545,450	Bexar County Hospital (San Antonio, Tex.), October 1971.	Death, haloethane anesthesia for surgery.	Possible coverage under hospital policy.
Henderson v. Government doctor	District of Columbia, 2088-72, November 1972.	1 doctor	Army	None	(^c)	Walter Reed Army Hospital, 1969.	Failure to diagnose cancer.	None.

Jackson v. Government doctor.....	District of Colorado, 75-F-31, January 9, 1975.	1 doctor.....	Air Force.....	500,000	Air Force Hospital, Lakenheath, England, August 24, 1972.	Delivery of child—loss of kidney.	Do.
Kellock v. United States, et al.....	Central District of California, 74-3580-ALS, Dec. 6, 1974.	3 doctors.....	United States.....	1,000,000	Edwards AFB, Calif. Hospital, February 1973.	Diagnosis of ruptured appendix.	Do.
Kennedy v. Government doctor.....	District of Massachusetts, 75-37-I, Jan. 6, 1975.	1 doctor.....	Navy.....	400,000	Chelsea Naval Hospital (Boston), January-June 1973.	Orthopedic care after automobile accident.	Do.
Martinez v. Government doctors.....	District of New Jersey, 74-1282, July 18, 1974.	2 doctors.....	Army.....	()	Paterson Army Hospital, New Jersey, Jan. 23, 1974.	Death—gall bladder surgery.	Do.
Mitchell v. Government doctor.....	Superior Court of New Jersey, Monmouth City, L-6644-75, Oct. 23, 1975.	1 doctor.....	do.....	()	Fort Monmouth, New Jersey, March 1974.	Diagnosis of knee injury--	Do.
Slaton v. United States, et al.....	Western District of Louisiana, 19706, Jan. 2, 1974.	1 doctor.....	United States.....	100,000	Fort Polk, La. Hospital, February 1972.	Treatment of pancreatic condition.	Do.
Southard v. United States, et al.....	Eastern District of Pennsylvania, 73-2788, Dec. 7, 1973.	1 doctor.....	do.....	500,000	Fort Gordon Army Hospital, May 1968.	Surgical removal of malignant wart.	Do.
Targos v. Government doctors.....	Eastern District of California, S-74-638-PCW, Oct. 19, 1974.	2 doctors.....	do.....	50,000	Sharpe Army Depot Clinic (California), Oct. 12, 1973.	Treatment of on job orthopedic injury.	Do.
Wilson v. Gerlinger Carrier Co., et al.	Eastern District of Pennsylvania, 73-910, Nov. 1, 1973.	6 doctors.....	Navy.....	500,000	Philadelphia Naval Hospital, May 1972.	Death—diagnosis of head injury.	Do.

1 None stated.

Mr. KRUSE. The Department of Justice is also in favor of the House amendments which expanded the coverage from active duty servicemen to include also the civilian employees of the Department of Defense. The Department endorses that idea. I think the National Guard question poses serious and substantial questions, but as far as the civilian side of the employees, we're definitely in favor of that.

Senator BYRD. Would that include NASA and the CIA?

Mr. KRUSE. On that matter, we would defer to those agencies and to the wisdom of Congress of including them under this bill or otherwise. I think the military doctor physician is the overwhelming concern, and whether the NASA and CIA physicians should be included in this or in a separate bill is of no concern to the Justice Department.

Senator BYRD. But you do feel it presents a problem insofar as the National Guard personnel?

Mr. KRUSE. A very serious and substantial question in that including it in this bill might be considered to be directly inconsistent with a basic provision in the Judicial Code, which is the waiver of sovereign immunity. The Congress has waived sovereign immunity, only insofar as it is based upon acts of Federal employees. The Guard employees are State employees. Thus, the Congress has not waived sovereign immunity based upon acts of those State employees.

Senator BYRD. I think that is a very serious question. I personally am very much inclined to support the National Guard, and am inclined to want to support the position of the National Guard Association on this matter. But I do think that including the National Guard in this legislation presents a very serious problem as you point out.

Mr. KRUSE. If I'm wrong on that—if they're not activated—well, then, my statement is obviously incorrect.

Senator BYRD. Thank you very much. Senator Nunn?

Senator NUNN. I don't have any questions, Mr. Chairman, at this time.

Senator BYRD. Well, thank you, Mr. Kruse. If you don't mind waiting a little while, we may have some other questions for you.

Mr. KRUSE. I'd be very pleased to stay.

Senator BYRD. The subcommittee will hear now from representatives of the Central Intelligence Agency and the National Aeronautics and Space Administration.

Senator BYRD. Good morning, gentlemen.

Mr. CARY. Good morning, Senator Byrd.

Senator BYRD. You were here when I read parts of the letter from the Space Committee and also from Director Bush of the CIA?

Mr. CARY. Yes, sir.

Senator BYRD. You might briefly summarize your position and put whatever statement you wish in the record.

Mr. CARY. All right, sir. I do have a short statement.

Senator BYRD. Identify yourself.

Mr. CARY. I'm George Cary, Legislative Counsel for the CIA. I am accompanied by the Chief of our Medical Services, Dr. Charles Bohrer, and Mr. Donald Massey of my staff.

Senator BYRD. Welcome. And who do we have here?

Mr. HOSENBALL. Mr. Chairman, Neil Hosenball, the General Counsel, of NASA, accompanied by Dr. David L. Winter, of NASA, Director of Life Sciences.

Senator BYRD. Thank you. You may proceed.

STATEMENT OF GEORGE L. CARY, LEGISLATIVE COUNSEL,
CENTRAL INTELLIGENCE AGENCY

Mr. CARY. I do have a short statement, Mr. Chairman, which I'll summarize in the interest of time, in view of the fact that much of it has been covered by prior statements.

We do appreciate this opportunity to discuss the Central Intelligence Agency's interest in S. 1395 and to request this subcommittee to include medical personnel of the CIA within the provisions of the bill.

Services which our medical personnel provide domestically are comparable to those provided by other departments and agencies in Government. Our medical personnel overseas are responsible for assisting in the primary care and treatment of agency employees, dependents, and certain other Government personnel assigned in the area, as well as assisting and carrying out this agency's responsibilities abroad as they are related to clinical care.

Often our physicians overseas are required to diagnose and prescribe treatment for patients whose condition they cannot evaluate in person, but which is only described to them by cable from outlying stations. Under these conditions, which are far from ideal, physicians could be considered particularly vulnerable to malpractice suits.

Senator BYRD. You're speaking now about the dependents of CIA personnel?

Mr. CARY. I'm talking about employees, dependents, and others for whom we may have a responsibility in our activities, sir.

Senator BYRD. How many do you have in the CIA? What medical personnel do you have in the CIA?

Mr. CARY. We have less than 100, Senator. Adding comparable protection to that which is afforded uniformed and civilian physicians of the armed forces, in addition to those already protected by statute will mean, based on 1974-1975 American Medical Association statistics, that approximately 98 percent of Federal physicians will be protected from malpractice liability.

The small number of CIA physicians in the remaining two percent of Federal doctors should not be excluded from the benefits of this Federal policy. We believe that the CIA's medical staff deserves the same protection as that afforded the VA and the Public Health Services under S. 1395.

We respectfully request that the Armed Service Committee, which has for over 25 years exercised legislative oversight over the CIA, amend S. 1395 to protect the CIA medical staff. That concludes our presentation, Mr. Chairman.

[The prepared statement follows:]

PREPARED STATEMENT BY GEORGE L. CARY, LEGISLATIVE COUNSEL, CENTRAL
INTELLIGENCE AGENCY

Mr. Chairman: We appreciate this opportunity to discuss the Central Intelligence Agency's interest in S. 1395 and to request this Committee to include medical personnel of the CIA within the provisions of the bill. The bill, as introduced, would extend to medical personnel of the armed forces immunity from civil suits and personal liability for acts of alleged malpractice performed while acting within the scope of their employment.

The current crisis in the medical malpractice field has been well documented and is the subject of great concern to many of us in both our public and private capacities. CIA's small medical staff has not been immune from the hardships of the current malpractice crisis. Our medical staff, though comparatively small performs an essential role in the fulfillment of the Agency's statutory mission. In the United States, these employees conduct pre-employment, entrance-on-duty and periodic physical examinations, administer immunizations, provide first-aid or emergency care, and consult with employees regarding problems (both clinical and psychiatric) which are caused by or affect their job performance.

Our medical personnel overseas are responsible for assisting in the primary care and treatment of Agency employees, dependents, and certain other Government personnel assigned in the area, as well as assisting in carrying out certain of this Agency's responsibilities abroad related to clinical care. Often our physicians overseas are required to diagnose and prescribe treatment for patients whose condition they cannot evaluate in person, but which is only described to them in a cable from an outlying station. Under these conditions, which are far from ideal, physicians can be considered particularly vulnerable to malpractice suits.

Under the current state of the law, our medical personnel can be held personally liable to satisfy malpractice judgments, even though they were acting within the scope of their employment. The Federal Tort Claims Act [28 U.S.C. 1346(b) and 2672] waives the sovereign immunity of the United States and permits suits against the Federal Government for the tortious conduct of Federal employees acting within the scope of their employment. However, the Act does not proscribe private suits against the individual employee; it only establishes a normally more attractive alternative.

There are exceptions to the general rule that the Federal Tort Claims Act remedy does not preclude a personal suit against the employee whose conduct is in question. The Federal Tort Claims Act was amended in 1961 to make that Act the sole remedy for damages, injuries and death resulting from the operation of any motor vehicle by any employee of the United States acting within the scope of his employment [28 U.S.C. 2679, P.L. 87-258]. In 1965, medical personnel of the Veterans Administration were protected from personal suits by an amendment to Title 38 which made the Federal Tort Claims Act the sole remedy for their alleged malpractice [38 U.S.C. 4116, P.L. 89-311]. Similar protection was granted medical personnel of the Public Health Service in 1970 [42 U.S.C. 233, P.L. 91-623]. Adding comparable protection to uniformed and civilian physicians of the armed forces will mean, based on 1974-1975 American Medical Association statistics, that approximately 98 percent of Federal physicians will be protected from malpractice liability. The small number of CIA physicians, in the remaining 2 percent of Federal doctors, should not be excluded from the benefits of this Federal policy.

Malpractice insurance does not offer an acceptable alternative to civil immunity. Many companies have determined that under the current state of the law they cannot offer medical malpractice insurance at any cost, and have terminated existing policies or have refused to renew them when they expire. The premiums of those Agency physicians who carry malpractice insurance have increased an average of 89 percent between 1973 and 1975.

Whatever the cost or availability of malpractice insurance, the Agency feels it is unjust that our physicians must choose between personal vulnerability to a large malpractice award and paying, if they can obtain it, enormous fees for protection in their official duties as Federal employees. We believe CIA's medical staff deserves the same protection as that afforded VA and Public Health Service personnel, and proposed for the armed services under S. 1395. We respectfully request that the Armed Services Committee, which has for over 25 years exercised legislative oversight of the Central Intelligence Agency, amend S. 1395 to protect the CIA medical staff. Thank you very much.

Senator BYRD. I have a memorandum here showing the number of physicians, the breakdown. It's a classified statement.

Mr. CARY. Yes, sir.

Senator BYRD. And just out of curiosity, why would that need to be classified?

Mr. CARY. Generally, Mr. Chairman, as you are familiar in other respects of our activities, conclusions can be drawn by extrapolating from various figures on support personnel and related activities. For this reason we don't normally release the specific numbers of our people in various categories.

Senator BYRD. Senator Nunn?

Senator NUNN. No questions.

Senator BYRD. Our next witness will be Mr. Hosenball.

STATEMENT OF S. NEIL HOSENBALL, GENERAL COUNSEL, NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

Mr. HOSENBALL. Mr. Chairman and members of the committee, I have a very short statement. I appreciate very much this opportunity to appear before the subcommittee this morning to discuss with you the request of Chairman Moss and Senator Goldwater that NASA be included in the proposed legislation to amend title 10 of the United States Code to provide for an exclusive remedy against the United States in suits based upon allegations of medical malpractice of personnel of the Defense Department.

NASA would welcome such action. It would extend the relief being considered for Defense Department personnel to NASA's medical and paramedical civil servants. NASA currently has 102 civil servants who perform medical services in the course of their official duties. These include 25 medical doctors, 10 of whom are flight surgeons, and 1 dentist.

Among other things, these personnel provide traditional medical care to the astronauts, many of whom are active duty military officers, and to their wives and children, as well as supporting programs designed to investigate the physiological mechanisms underlying observed changes in man during his exposure to space flight.

NASA is now included with the Department of Defense in several sections of title 10 of the United States Code. And it is our view that inclusion of NASA in the proposed section 1089 will be quite appropriate since it would obviate the need for separate legislation for NASA's relatively few medical and paramedical civil servants.

NASA defers to the views of the Department of Justice with respect to the details of the personal immunity which would be granted to NASA's personnel, if they were included in the proposed section 1089, and with respect to the procedures which would be followed in removing a personal lawsuit to the U.S. district court.

Mr. Chairman, this concludes my statement. I hope its brevity would not belie the strong interest that NASA has in being included in this proposed legislation.

Senator BYRD. Its brevity will be helpful.

Mr. HOSENBALL. Both Dr. Winter and myself are prepared to answer any questions that the subcommittee might have.

Senator BYRD. Have there been malpractice suits filed against NASA personnel?

Mr. HOSENBALL. No, sir. We've had two claims against NASA but no malpractice suits against NASA personnel. I think this is largely due to the fact that, until recently, at least, it was thought that the

exclusive remedy was against the Government. However, in a recent case, *Henderson v. Blumink*, [511 F. 2d 399], it was held that an Army doctor was not necessarily immune from suit in his individual capacity. The effect of this decision is that our doctors might be sued individually. Someone alleging malpractice could either sue him individually or proceed against the Government as well.

Senator BYRD. Does NASA have psychiatrists and psychologists?

Dr. WINTER. We have psychologists. As of this moment, we have no psychiatrists on board.

Senator BYRD. Thank you. Senator Nunn?

Senator NUNN. I don't have any questions, Mr. Chairman.

Senator BYRD. Thank you gentlemen very much.

Mr. CARY. Thank you, sir.

Mr. HOSENBALL. Thank you, sir.

Senator BYRD. Now we come to the more difficult part, the representatives of the National Guard Association. Before doing that, may I ask Mr. Kruse one question?

Mr. KRUSE. Yes, Mr. Chairman.

Senator BYRD. Mr. Kruse, do you think it is advisable that the legislation be amended so as to define when a medical consultant could be treated as a medical employee of the Defense Department so as to be included under coverage of the bill?

Mr. KRUSE. I would be against that provision, Mr. Chairman, for the reason that there are so many different types of consultants used in so many different means and manners that to attempt to define them and spell it out would be difficult enough, but, more important, one would always be in jeopardy of running afoul of the danger of unintentionally excluding someone by omission. This same basic question has been handled, I think, efficiently and successfully, in the PHS and VA situations, and I would feel strongly that it would be best not spelled out.

Senator BYRD. Do you think it would be advisable to amend the Federal Tort Claims Act to include a cross-reference to S. 1395, as it would appear if adopted in title 10 of the U.S. Code?

Mr. KRUSE. To put the cross-reference in the Federal Tort Claims Act itself in title 28 of the U.S. Code?

Senator BYRD. Yes.

Mr. KRUSE. I don't see any need for that. It is not done in the PHS bill, which is under title 38, and the VA bill under title 42. There's no cross-reference and there's been no problem.

Senator BYRD. And my final question is: It's my understanding that some States, which are setting up a self-insurance scheme or arrangement which would provide all of the licensed physicians of the State to contribute for malpractice protection, in your judgment would the passage of this legislation result in the exemption of Defense medical personnel from making contributions?

Mr. KRUSE. I would be unable to answer that question, Mr. Chairman.

Senator BYRD. Maybe you would want to try to answer it for the record.

Mr. KRUSE. Well, let me say that I know this is a question which some of the agencies have studied. It is not the kind of matter with

which I've been involved and I have not had an opportunity to read those different provisions of State law and I can't comment on something with which I'm not familiar.

Senator BYRD. All right, thank you.

Would the next two witnesses identify themselves?

General GREENLIEF. Mr. Chairman, I'm Maj. Gen. Francis Greenlief, retired, executive vice president of the National Guard Association.

Senator BYRD. Welcome, General.

General GREENLIEF. Thank you, sir. And I'm accompanied by Col. William Blatt, retired, who is the general counsel of our association.

**STATEMENT OF MAJ. GEN. FRANCIS GREENLIEF, RETIRED, AND
EXECUTIVE VICE PRESIDENT OF THE NATIONAL GUARD ASSO-
CIATION**

General GREENLIEF. Mr. Chairman, my statement is only 7½ minutes long. I think the subject is so important that, with your indulgence, I would like to present the whole statement.

Senator BYRD. Please proceed.

General GREENLIEF. Mr. Chairman and members of the subcommittee, the National Guard Association of the United States welcomes this opportunity to present its views on this important legislation to the Senate Subcommittee on General Legislation.

The National Guard Association of the United States strongly urges enactment of S. 1395, 94th Congress, subject to its perfection to provide the same protection to National Guard medical personnel engaged in federally authorized and directed training or duty, as it would provide for those in the Army and the Air Force.

Although it is evident from its report, No. 94-333, that the House of Representatives believe that H.R. 3954, 94th Congress, as amended and passed, would cover Reserve and National Guard, as well as active duty personnel, it is apparent that it would extend no protection to National Guard medical personnel while engaged in training under the provision of section 502 to 505, of title 32, United States Code. Although all members of the Army National Guard and Air National Guard are also reserves of the Army and the Air Force respectively, they do not ordinarily perform their training duty in the Federal status the provisions of title 10, United States Code.

Conventionally guardsmen perform their inactive duty training and annual field training under title 32 provisions. For the purpose of many laws, for example, title 10 military laws providing benefits such as retirement, title 37 provisions relating to pay and allowances, title 38 provisions relating to veterans' benefits, and title 5 provisions relating to military leave for Federal employees, title 32 training duty by guardsmen is fully equated to similar training and duty performed by other Reservists under the provisions of title 10.

And Mr. Chairman, because of the colloquy between yourself and the distinguished Senator from South Carolina and his statement that he had no objection to the inclusion of the National Guard, but an expression of concern whether or not it really is proper—I'd like, sir, to divert briefly from my statement to read from Public Law 476.

It's chapter 608, section 714, Public Law 476, 1952. And it's now codified in title 10 in United States Code, section 3686 and 8686; and it reads:

All military training, duties, and service performed by members of the National Guard of the United States or members of the Air National Guard of the United States, while in their status as members of the National Guard or Air National Guard of the several states, territories, and the District of Columbia, for which they are entitled by law to receive pay from the United States, shall be considered military training duties and service in the service of the United States performed by them as Reserve members of the Army and the Air Force.

Mr. Chairman, the law already very clearly says that guardsmen performing training in this status are in the service of the United States. Now, in their training configuration, National Guard medical personnel perform the same, varied service for members of all components of the Armed Forces and their dependents and others entitled to Government and medical care, as do their counterparts in the active establishment and in the Army Reserve and the Air Force Reserve.

They are equally vulnerable to malpractice action and just as rightfully concerned as physicians and surgeons generally with respect to expensive litigation and skyrocketing medical malpractice insurance premiums. They are fully deserving of the same protection that this proposed legislation would give their fellow practitioners in the other military components.

Failure to provide this protection across the board would not only be unjust and inequitable, it could also be expected to dissuade sorely needed medical personnel from joining or remaining in the National Guard, and instead to favor other components where they would be immune from malpractice suits.

Section 1(a) of H.R. 3954 would make the remedy against the United States under sections 1346(b) and 2672 of title 28 the exclusive remedy for in-scope medical malpractice cases. However, the Supreme Court of the United States has held that those sections provide no basis for actions arising out of the activities of the National Guard while engaged in training or duty under provisions of title 32.

A minor exception exists with respect to the District of Columbia National Guard, which does have a unique status. Since there is now no remedy under the cited sections of title 28, and the bill is confined to individuals currently covered by them, it seems clear that National Guard medical personnel would not be covered by S. 1395 nor by H.R. 3954 as passed by the House.

At present, a person who claims to have suffered property loss or personal injury as the result of the National Guard training activities may present his claim under authority of section 715 of title 32, which is patterned after section 2733 of title 10, and authorizes the administrative settlement of claims.

That's the National Guard Claims Act. The claimant cases arising out of National Guard training activities does not have a right to judicial relief against the United States if his claim is rejected as without merit, or excessive in amount, as he would have if the tortfeasor were a member of any other component of the Armed Forces. His only recourse is a civil suit against individual guardsmen, and perhaps against his State, if it has waived sovereign immunity and permits such suits.

In order to grant protection for National Guard medical personnel, S. 1395 should be amended to provide that such personnel, while engaged in training or duty under the provisions of title 32 and acting in line of duty, are to be considered to be acting in the scope of employment by the Army or the Air Force, as the case may be.

Coverage, of course, would be restricted to medical service performed while on federally authorized and directed training or duty and it would not extend to activities authorized by State law or required by State authorities, such as disaster relief and providing medical aid to the civil authority in emergency situations.

Mr. Chairman, the members of our association are grateful for the opportunity to appear before your committee in support of this legislation. And I would be happy to attempt to answer any questions you may have, sir.

Senator BYRD. Thank you, General. As you know, you—and by “you,” I mean both you as an individual and the National Guard Association—you have a sympathetic subcommittee. I do think this presents a rather difficult problem. We’ll try to resolve it the best way we can. Let me ask you a few questions.

What have been the number and amount of personnel judgment awards against individual members of the National Guard for medical malpractice?

General GREENLIEF. Sir, I do not have that information, nor do I have any knowledge that there have, as yet, been suits filed. National Guard doctors, of course, being civilian doctors, do carry medical malpractice insurance, but there appears to be a problem now arising as to whether or not it covers them while they are in military status.

I would cite an example of something that happened last year, sir, to demonstrate the problem. In the State of Maryland, 136th Evacuation Hospital was scheduled to train at Fort Dix. Therein lies a large part of the problem with their own malpractice insurance because in the Guard they very often practice outside their own State.

This hospital unit of about 30 doctors was ordered to Fort Dix. The doctors in that unit happened to be, in the main, interns practicing or doing their internship at Johns Hopkins and Baltimore hospitals. These doctors became aware that they were not covered at all because their only medical malpractice coverage was provided by their hospital.

Those doctors declined to perform medical service during field training. The result was that there were a few doctors in the hospital that had coverage that would protect them, but the Army, specifically the U.S. Forces Command, had to order regular Army doctors to Fort Dix to perform the medical services that these doctors would have performed. And that pretty much demonstrates the problem our doctors are facing.

Senator BYRD. I am informed that physicians who are members of the Reserves or National Guard must have malpractice insurance for their private practice; is that correct?

General GREENLIEF. Yes, sir, as any other doctor would—“must have” by their own circumstances, not required by any military regulation.

Senator BYRD. Now, this insurance coverage would cover all periods of active or inactive training by reservists and Federal or State duty by the National Guard.

General GREENLIEF. Sir, it may or may not. That would depend on the insurance company and my information is that such policies are written to cover their practice in their State. The Air Force general commented that the rates vary from State to State, which would indicate that the company writes the policy for practice in a given locale.

National Guard doctors very often perform their medical services outside of their own State and are performing their medical services, as in the case of this evacuation hospital, not just on National Guard personnel, but they move into active Army and active Air Force hospitals and perform their services for regular members, for dependents, and anybody else who is authorized Government medical service who may go to that hospital.

Senator BYRD. You mentioned earlier that some of those doctors refused to perform services?

General GREENLIEF. Yes, sir. They declined to practice medicine. Now, they went to field training and they did conduct training of their medical personnel and training themselves. But they declined to go into the hospital and be practicing physicians because they had no protection at all.

Senator BYRD. Is that normal procedure or—

General GREENLIEF. Sir, that's the first time it has occurred. The whole medical malpractice malaise appears to be of a fairly recent vintage. It never has been a problem before, but never before have we read in the papers of doctors indulging in job action any place either.

Senator BYRD. Well, as I understand it, when a physician applies for malpractice insurance, the insurance companies require a listing of all circumstances under which a physician will be practicing, including military duty. His rates are based upon this and other information. Periodic duty or training with the National Guard or Reserves in no way increases the insurance rates of a physician, I am informed.

Such duty offers decidedly less exposure to suit in malpractice than the physician's private practice. Would you have any comment on that?

General GREENLIEF. Sir, I do not have that information. I would not challenge the information you have. I would only point out that our doctors say that it is a very severe problem to them.

Senator BYRD. It is also my understanding that the only exclusionary clauses written into medical malpractice insurance are those denying coverage for practice in catastrophic situations, such as war. In other words, the regular insurance would cover military duty.

General GREENLIEF. Sir, the only way that I could respond to that would be to make some telephone calls to a number of our doctors and present case histories of what their insurance could provide.

Senator BYRD. What would be the estimated cost to the U.S. Government of extending malpractice protection to the National Guard in their various training statuses?

General GREENLIEF. Sir, I noted in the House report a statement that Justice concluded there would be no increased manpower costs to Justice because they would handle it within the framework of their existing manning, and second, that they were unable to estimate the cost to the U.S. Government. On the same basis, I would think, we would be unable to estimate that.

Senator NUNN. Would the Senator yield just for a question?

Senator BYRD. Certainly.

Senator NUNN. It seems to me that the overall insurance rates would be based on the degree of exposure. If a doctor instead of being home on the weekend or instead of being on a 2-week vacation where, indeed, practicing medicine in the National Guard, that his rate of exposure would be increased, and therefore his insurance premium would be increased.

General GREENLIEF. That would certainly seem reasonable.

Senator NUNN. And on the other hand, there are doctors now who are self-insured. Certainly if the doctor is self-insured, every time he does something additional to what he otherwise would have done, it increases his own exposure.

General GREENLIEF. Senator, I would certainly—

Senator NUNN. I don't know how many of yours are, but I know that some of them are.

General GREENLIEF. Senator Nunn, I would certainly agree with what you would say and would particularly point out that the National Guard doctor practicing medicine on the weekend would be practicing in an environment somewhat less desirable than his normal practice in his office and his hospital. And that might well cause the insurance company to raise their rate. You had one point?

Colonel BLATT. Just one thing. Senator Byrd, if I might, coming back to the situation in Maryland, those doctors in the National Guard who are called upon at field training to perform medical service, were full-time residents and interns in the hospitals and they were covered by the hospitals. They had no other malpractice insurance—and we have many throughout the United States in that situation who would not normally maintain or seek to obtain medical malpractice insurance because they are covered. Only when they step out of that coverage in that hospital, then, as was the case with the Maryland physicians, they had no malpractice insurance to take with them.

General GREENLIEF. They had none at all.

Senator BYRD. Thank you. The authority to train the militia, including the National Guard, is reserved to the States by Article 1, section 8, clause 16 of the Constitution. Federal authorities do not have command or control over National Guard units or members when they are in the Federal active service. The liability imposed by the Federal Tort Claims Act is based on a theory that the master is responsible for a servant or agent.

Since the Federal Government would not have control or command over the National Guard forces in their training status, why should the Federal Government be responsible for any torts of malpractice committed by the National Guard forces?

General GREENLIEF. Mr. Chairman, there are a number of answers to that and I'll attempt to be brief. I would start with the fact that today, with the total force policy, the National Guard bears such a very major share of the responsibility for the defense of the Government, that certainly the training which they direct, although conducted by the National Guard, should pass that responsibility to the Federal Government. For example, of the total mobilized combat power of the U.S. Army, 46 percent is provided by the Army National Guard. In the Air National Guard, you'll find that the total personnel assigned to the U.S. Air Force's Tactical Air Command, 58 percent are Air National Guardsmen.

We provide 10 percent of the refueling capability of the Strategic Air Command refueling flight. We provide something like 40 percent of the tactical reconnaissance forces of the Air Force and there are some other numbers that I could add in there.

Number one, today this Nation's defense plan cannot work unless the National Guard can do its thing, when and where required. To that end, the supervision and the control of the National Guard by the Federal Government has increased tremendously, specifically in the last several years.

In the Air National Guard and in the relationship of the Air National Guard to the Air Force, the Air Force manages the Guard and the Reserve by use of the gaining command concept, and the gaining commands of the Air Force, Tactical Air Command, Military Airlift Command, Strategic Air Command, and all of the others. They exercise such a degree of direction, control, and supervision that the line between that and command is a very, very fine one and largely semantic. In the Army, they have recently adopted within the last couple of years, a policy and a program known as affiliation, where Army National Guard units are trained as a part of a regular unit. They are scheduled to deploy as a part of that unit. And, again, sir, the command relationships there is semantically not command, but the Federal Government prescribes the training to be conducted; they supervise the training. And if the units fail to meet the Federal Government standards, those units are put on probation and ultimately eliminated.

And finally, sir, I would go back again to the Reserve Forces Act and read again from what the law already says. And that is that—and—I'll just read part of it—"All military training duties and service performance of the National Guard of the United States or members of the Air National Guard of the United States shall be considered military training duties and service in the service of the United States."

Mr. Chairman, I am not a lawyer, but that language sounds very clear to me. It says that the status of the National Guardsman training in his National Guard status is performing service in the service of the United States. And for that reason, sir, we believe very strongly that National Guard doctors are entitled to the same protection as all other military or governmental doctors would be provided.

Senator BYRD. What contributions are the States making toward providing malpractice protection to National Guard personnel when acting in their State National Guard status?

General GREENLIEF. Sir, I do not have that information. I can get it and add it for the record.

Senator BYRD. Well, I wish you would.

General GREENLIEF. Yes, sir.

[The information follows:]

NATIONAL GUARD ASSOCIATION OF THE UNITED STATES,

Washington, D.C., March 8, 1976.

HON. HARRY F. BYRD, JR.,
U.S. Senate,
Washington, D.C.

DEAR MR. CHAIRMAN: In response to your request of March 2, 1976, during the hearings on S. 1395, as to the type of protection afforded under State law in cases involving alleged malpractice by National Guard medical personnel, the

attached tabulation is furnished. It is based upon the most recent information supplied by the Adjutants General of the several States, Puerto Rico, the Virgin Islands, and the District of Columbia.

Sincerely,

FRANCIS S. GREENLIEF,
Major General, NGUS (Retired),
Executive Vice President.

Attachment.

State	Claims provisions		Immunity from suit (guardsman) ³	Note ⁴
	Type ¹	Scope ²		
Alabama	2	1, 5		
Alaska	4		1	
Arizona	2, 4	2		
Arkansas	2			
California				A
Connecticut	2, 4	2		
District of Columbia				B
Florida	1	5	4	C
Georgia	4			
Hawaii	1, 4	1		
Idaho	1, 4	2, 4		
Illinois	1	1, 5	4	
Indiana	1, 4	2	4	
Iowa	1	1, 3	4	
Kansas			(5)	
Kentucky	2, 4	5		
Louisiana	1	2, 4	4	
Maine	4	2	4	
Maryland	4	4, 5		
Massachusetts	2	5	1	
Michigan	4	2		
Minnesota	2, 4	1		
Mississippi			4	
Missouri	1, 4	2, 3	1	D
Montana	1, 4	2, 5		
Nebraska	1, 2, 4	2, 3	1	
Nevada	1, 4	2	3	
New Jersey	1, 4	2	4	
New Mexico	1	2, 5		
New York	1, 4		1	
North Carolina	1, 2	2		
North Dakota			3	
Ohio	1	1, 3, 4	4	
Oklahoma			4	
Oregon	1, 3, 4	2, 3, 4	4	E
Pennsylvania	3, 4	2	4	
Puerto Rico	1	2		
Rhode Island	1, 4	2		
South Carolina			4	F
South Dakota			4	G
Tennessee	2			
Texas			1	
Vermont	4	2		
Virginia			3	
Washington	4			
West Virginia	1, 4			
Wisconsin	2, 4		(5)	

¹ Type of claims procedure: 1—Tort Claims Act; 2—claims commission; 3—small claims; 4—commercial insurance.

² Scope: 1—in State only; 2—wherever occurring; 3—State duty only; 4—State and title 32 training; 5—State active duty only.

³ Immunity: 1—State duty only; 2—title 32 training duty; 3—State and title 32 training; 4—None.

⁴ Note: A—no sovereign immunity in California; B—FTCA applies at all times to District of Columbia National Guard; C—\$50,000/\$100,000 maximum, balance by legislature action; D—tort defense fund pays up to \$100,000; E—maximum \$50,000 1 person, \$300,000 1 accident; F—maximum \$30,000; G—attorney general may pay maximum \$3,000.

⁵ Uncertain.

Senator NUNN. May I ask one question here? The definition of militia has always been, as I understand it, connected with State functions?

General GREENLIEF. Yes, sir.

Senator NUNN. But is not there also a dual role or aren't all National Guardsmen considered both part of the militia and part of the overall Federal structure?

General GREENLIEF. Yes, sir.

Senator NUNN. Don't they have a dual role? At least a great majority of the National Guardsmen have a dual role.

General GREENLIEF. All, sir. The law prescribes that a federally recognized member of the National Guard, and that's all we're talking about, are also members of the Reserves of the Army or the Reserves of the Air Force.

The question arises here because that is not the status in which they perform their training. They perform their training under title 32 rather than title —

Senator NUNN. Yes.

General GREENLIEF. But any National Guard officer, all National Guard officers, hold a commission in either the Reserve of the Army or the Reserve of the Air Force, as well as a commission in the National Guard of the United States.

Senator BYRD. By extending malpractice protection to the National Guard when in their State status, would not the Congress be effectively concluding that, for purposes of malpractice, National Guard forces are employees of the Federal Government?

General GREENLIEF. Sir, I think they would be, to the same extent that the Reserve Forces Act says they are performing service in the service of the United States. There was considerable discussion earlier about the National Guard being State employees. I recognize that we're using that term in the sense it would include military personnel. But I would point out that although they may be State employees for the purpose of the law, they are, in fact, military personnel being paid Federal pay, earning Federal retirement.

And it would certainly seem that there is ample precedent there to include them in this coverage, just as they are now provided protection and coverage by the National Guard Claims Act.

Senator BYRD. Do you think it would be preferable to provide an administrative remedy for malpractice claims by National Guardsmen when in the State status, rather than make the Federal Tort Claims Act the exclusive remedy for malpractice?

General GREENLIEF. No, sir. I do not. And I would cite the experience we've had with the National Guard Claims Act. In 1960 the National Guard sought to have its members included under the Federal Tort Claims Act. Senator Eastland has introduced such a bill in this Senate.

In 1960, it was concluded that an administrative remedy might suffice and the National Guard Claims Act was passed, which provides an administrative remedy in that the Service Secretary may allow a claim up to \$25,000 for any individual claim and if the \$25,000 is not an adequate amount, he may then pass the claim to the Congress for a consideration as an Individual Relief Act.

This act has not served well. I would cite what occurred in the case of the Iowa Air National Guard about 2 years ago when the Secretary of the Air Force—let me say the Air Force in general—was so slow in solving a claim and was so ungenerous that there were good farm people in the State of Iowa who severely suffered, suffered so much that the Governor of Iowa, in fact, grounded the Army and the Air National Guard. The Secretary of the Air Force then reacted and came to the Congress and it was resolved.

The National Guard Claims Act does not fill the bill. We recommend strongly that that act be superseded by a Federal Tort Claims Act inclusion of the National Guard.

Senator BYRD. Thank you, General. Senator Nunn?

Senator NUNN. I don't have any other questions.

Senator BYRD. Committee Counsel Clark McFadden would like to ask some questions.

Mr. McFADDEN. The National Guard Association has provided me—on a staff basis—with two draft amendments which presumably would achieve the objective you are seeking.

General GREENLIEF. Yes, sir.

Mr. McFADDEN. I would like to introduce these into the record at this time. But I would also like to note that it's my reading and understanding of these amendments that they would go so far as to amend the Federal Torts Claims Act as well as amending the legislation before us on malpractice protection.

(The documents referred to follow:)

MALPRACTICE PROTECTION FOR NATIONAL GUARD MEDICAL PERSONNEL

Amend proposed section 1089 of title 10, United States Code, added by H.R. 3954, 94th Congress, by adding subsection (g) to read as follows:

“(g) For purposes of this section [and sections 1346 (b), 2671, and 2672 of title 28], a person described in subsection (a) who is engaged in training or duty as a member of the National Guard under section 316, 502, 503, 504, or 505 of title 32, or any other provision of law for which he is entitled to or has waived pay under section 206 of title 37, is considered to be a member of the military forces of the United States.”

H.R. 3954, AMENDMENT

Intended to be proposed by ----- to H.R. 3954, 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 medical personnel, and for other purposes, viz: At the appropriate place in the bill insert a new section as follows:

Sec. ----. (a) The second paragraph of section 2671 of title 28, United States Code, is amended by inserting after the words “members of the military or naval forces of the United States” the words “members of the Army National Guard or the Air National Guard while engaged in training or duty under sections 316, 502, 503, 504 or 505 of title 32, United States Code, or any other provision of law for which such a member is entitled to, or has waived, pay under section 206 of title 37, United States Code.”

(b) The third paragraph of section 2671 of title 28, United States Code, is amended by inserting after the words “a member of the military or naval forces of the United States” the words “or a member of the Army National Guard or the Air National Guard.”

General GREENLIEF. Mr. McFadden, we provided two amendments, if my memory serves me correctly. The one that we're supporting today would propose to amend section 1089 of title 10, United States Code, by adding a subsection G to the proposed bill. And it reads:

(g) For purposes of this section [and sections 1346 (b), 2671, and 2672 of title 28,] a person described in subsection (a) who is engaged in training or duty as a member of the National Guard under section 316, 502, 503, 504, or 505 of title 32, or any other provision of law for which he is entitled to or has waived pay under section 206 of title 37, is considered to be a member of the military forces of the United States.

And Mr. McFadden, my understanding of that language would be to include the National Guardsmen performing in their normal training status in S. 1395 as written and, in my judgment, does not affect FTCA.

Senator BYRD. I'm advised that it amends the Federal Torts Claims Act and if that does, it gets into a jurisdictional matter, it seems to me.

General GREENLIEF. No, sir. We are not attempting to amend the Tort—

Senator BYRD. Well, that's what it says here. "For purposes of this section [and sections 1346 (b), 2671, and 2672 of title 28,]" which counsel advises me is the Federal Torts Claim Act.

Colonel BLATT. That's correct, sir.

Senator BYRD. So it is amended that—

Colonel BLATT. But subsection (a) of 1089 of your bill, sir, the one before you says: "The remedy against the United States provided by sections 1346 (b) and 2672 of title 28 for damages," et cetera, "shall be exclusive remedy." Now, in order to tie the thing together, you've got to bring the guardsmen under so that they come within the coverage of subsection (a) of section 1089.

Senator BYRD. Well, maybe you gentlemen in the Justice Department and the committee counsel could get together and try to work it out.

General GREENLIEF. Yes, sir. We're not attempting to amend the Federal Tort Claims Act at this time, sir. And we'll be happy to do that.

Any further questions?

Mr. McFADDEN. I think it might be well for the record for you to elaborate what duties and exercises of the National Guard would not be covered by your amendments to this legislation.

General GREENLIEF. Mr. McFadden, any performance of duty without Federal pay or without Federal direction would not be covered. For example, if the Governor ordered his troops out to restore law and order—State pay—they would not be covered. If the Governor ordered out the Guard to protect a town destroyed by a tornado, or protecting it from looters, that would not be covered.

In short, any service performed for the State without Federal pay would not be covered. We seek only coverage when the National Guard is performing duties training for its Federal mission.

Senator BYRD. Well, now, would that lead to the situation you said happened in Maryland, when the Maryland doctor, who—the governor called out for militia duty, took the position of: "Well, now, I won't do that, because I'm not covered."

General GREENLIEF. Senator, it could well. And I would view that and the National Guard Association views that as a pure State problem, because in that instance they are not performing in the service of the United States, and therefore, there is no reason why the Federal Government should be responsible.

Senator BYRD. What is the attitude of the National Guard toward doctors who refuse to perform their duties, such as the subcommittee was told, those who refused to do their duty in New Jersey?

General GREENLIEF. Sir, if that continued, we have no choice but to suggest that they go to a component where they can receive the same

malpractice coverage. And the result would be, if that occurred, that the National Guard would lose its capability to perform its Federal mission because of its lack of medical services.

Senator BYRD. Well, are you saying that the Guard is condoning a member of the Guard from doing the duty that he has been sworn in to do and assigned to do and being paid to do?

General GREENLIEF. Sir, that is the only case I know of that it occurred and it's so dramatic in demonstrating the problem that I used that example.

Senator BYRD. Well, it demonstrates the problem, but it also demonstrates, it seems to me, that there's a condoning of what you might call a disobedience of orders.

General GREENLIEF. Sir, in that instance, the mission was fulfilled by those doctors who—they did not decline to perform their duties. They went to training; they conducted the training of their personnel. What they did not do was to perform medical practice in the Army Hospital at Fort Dix.

Senator BYRD. That's why they're in there. That's why they were taken into the Guard—to perform medical practice.

General GREENLIEF. Yes, sir.

Senator BYRD. They weren't taken into the Guard to go out and drill.

General GREENLIEF. They were not drilling, sir. They were teaching the medical personnel of their hospital.

Senator BYRD. Well, they weren't there for teaching. They were there for the purpose of performing medical services, if and when medical services were required.

General GREENLIEF. Yes, sir. And as a result, sir, if that problem could not be solved, you are exactly right. We could not use those doctors and we would be limited to those doctors who were willing to take the risk.

Senator BYRD. But you're looking at it from a little different point of view and I'm not—

General GREENLIEF. Well, I see your point, sir.

Senator BYRD. I'm not using this case to argue against what you are seeking.

General GREENLIEF. I understand that, sir.

Senator BYRD. I'm not using that at all. The only thing I'm suggesting is that it seems to me that the Guard is condoning the refusal of military personnel to do the duty to which they are assigned to do.

General GREENLIEF. Senator Byrd, I think I'm essentially in agreement with you. But as a matter of semantics, I'm saying it a little differently. I'm saying that that occurred one time. On that one occasion, a different arrangement was made which fulfilled the mission.

In the meantime, we are trying to solve the problem. And, sir, that's what you and I are talking about at the moment. If we do not solve that problem, we cannot condone it and those doctors would have to go elsewhere.

Senator BYRD. Well, that's what I'm getting at.

General GREENLIEF. That's precisely the point.

Senator BYRD. I'm not denying it's a problem. But I am expressing concern that military personnel would be permitted to disregard their duties without—or to put it another way—that the Guard is condoning the refusal of military personnel to do their duty.

General GREENLIEF. I think our only difference, Senator, is that I agree they condoned it on this one occasion. They cannot, will not condone it, and as a result, unless we can provide medical malpractice coverage so that the doctors are willing to practice, we, the Guard, will ask them to go to other components where they can get the coverage.

But the result of that will be that the Guard will lose its medical capability, and hence, much of readiness. No. We cannot tolerate what occurred in that instance.

Senator BYRD. I just hope the military service, whether it be the National Guard or whether it be the Army, the Navy, the Marine Corps, or the Air Force, doesn't get to the point where they say, "Well, if somebody doesn't want to do their duty, we're not going to worry about it."

General GREENLIEF. Well, we are worried, sir. We do not condone it. That's why we're trying to fix it. If it cannot be remedied, then they'll leave the Guard and they'll go someplace else. And the people we have left, whatever number they are, will practice.

Senator BYRD. Well, thank you very much.

General GREENLIEF. Thank you, sir. I appreciate the opportunity very much.

Senator BYRD. The subcommittee is adjourned.

[Whereupon, at 12:05 p.m., the subcommittee adjourned, subject to call of the Chair.]

MALPRACTICE PROTECTION TO DEFENSE MEDICAL PERSONNEL

FRIDAY, AUGUST 27, 1976

U.S. SENATE,
SUBCOMMITTEE ON GENERAL LEGISLATION
OF THE COMMITTEE ON ARMED SERVICES,
Washington, D.C.

The subcommittee met at 2 p.m., in room 212, Russell Senate Office Building, Hon. Harry F. Byrd, Jr., chairman, presiding.

Present: Senators Byrd and Bartlett.

Staff present: W. Clark McFadden II, general counsel; Louise Hoppe, research assistant; Doris Connor, clerical assistant; Christopher Lehman, assistant to Senator Byrd; Susan Pitts, assistant to Senator McIntyre; Doug Racine, assistant to Senator Leahy; Ron Lehman, assistant to Senator William Scott; Fred Ruth, assistant to Senator Bartlett; and Bob Brown, assistant to Senator Bumpers.

OPENING STATEMENT BY SENATOR HARRY F. BYRD, JR., CHAIRMAN

Senator BYRD. The subcommittee will come to order. Would the various witnesses take seats at the table and reserve the first chair for Senator Bumpers.

The General Legislation Subcommittee has before it S. 1395, a bill to provide malpractice protection to defense medical personnel by making the Federal Tort Claims Act the exclusive remedy for malpractice claims.

At an earlier hearing (March 2, 1976), the subcommittee received testimony from the Department of Defense, the Department of Justice and other Federal agencies in support of S. 1395 and recommended various amendments.

At the same hearing, General Greenleaf of the National Guard Association testified in support of an amendment which would extend the malpractice protection of S. 1395 to National Guardsmen while acting in a State training status.

In short, the amendment would make a member of the National Guard engaged in specified State training activities "considered to be a member of the military forces of the United States" for purposes of S. 1395 and the Federal Tort Claims Act.

Witnesses from the Department of Justice testified that providing such protection to the National Guard through the Federal Tort Claims Act would raise serious legal problems and therefore could not be supported by the Department of Justice.

Both Senator Thurmond, the bill's sponsor, and witnesses from the Department of Defense testified that inclusion of the National Guard would raise significant legal questions.

The subcommittee meets this afternoon to further explore the issue of whether to include the National Guard under the protection of the Federal Tort Claims Act when it is operating in a State training status.

The subcommittee is pleased to have as witnesses Senator Dale Bumpers, Col. Ralph A. Skowron, acting adjutant general for the Delaware Air National Guard; Col. William W. Cahill, Jr., staff judge advocate, Military Department, State of Maryland, and Mr. Neil R. Peterson, assistant chief, Tort Section, Civil Division, Department of Justice.

Colonel Skowron and Colonel Cahill are appearing on behalf of the National Guard Association and are accompanied by Maj. Gen. Francis S. Greenleaf, executive vice president of the National Guard Association.

At this point, the Chair sees that the Senate is now in the process of voting. We will recess the subcommittee temporarily. By that time, I would assume that Senator Bumpers will appear and we can proceed slightly off schedule. We stand in recess temporarily.

[A brief recess was taken.]

Senator BYRD. Senator Bumpers, the committee is pleased to have you with us this afternoon and you may proceed as you wish, sir.

STATEMENT OF DALE BUMPERS, A U.S. SENATOR FROM THE STATE OF ILLINOIS

Senator BUMPERS. Thank you very much. I have a brief statement I would like to make in support of an amendment which I will present to the committee and subsequently on the floor, if the committee does not agree to it, which deals with the inclusion of the National Guard under the terms of S. 1395.

As a former Governor of my State, I had considerable firsthand experience with the National Guard and the vital role it plays in the local and State levels in disaster and emergency situations. Time and again I had occasion to call upon the Guard to provide emergency relief to rural communities and urban centers alike which had been struck by devastating tornadoes or rampaging floods. I have a keen appreciation for the paramount role that the Guard plays in performing its State mission.

But, it is not the State mission that I am here to talk about today. Rather, I wish to comment on the extremely deleterious effect that noninclusion of Guard personnel within the purview of the Thurmond bill would have on (1) attraction of medical professionals into the National Guard; and (2) ultimately medical care for the National Guard personnel.

The crux of the argument against including the Guard appears to be that Guard personnel are not employees of the Federal Government and, consequently, do not satisfy the master-servant requirement. Since the Governor of the State is the commander in chief of the Guard, commands it, and appoints the adjutant general, it is argued by some that the inclusion of the Guard under the terms of the Thurmond

bill would be a usurpation of State control over its own militia. Nothing could be further from the truth.

It is true that Federal authorities do not command the individual Guard units. But it is equally true that virtually every other requirement of the master-servant relationship is present in the Guard's arrangement with the Federal Government.

Under the Constitution, the authority to train the militia is reserved to the respective States, "according to the discipline prescribed by Congress." Thus, the Federal Government prescribes the training to be performed, and supplies the arms and equipment to be used, pays the troops, and inspects to see that the manner and quality of training meets designated Federal standards.

Failure to meet such standards in training operations would result in loss of Federal reserve status and, of equal importance, loss of Federal revenue. Clearly, to characterize these employees as mere State servants without Federal control is a gross simplification which simply is not borne out in fact.

There is no dispute as to coverage for National Guard medical personnel when their units are activated for Federal service. At such times, they would be covered under the Thurmond bill as now drafted, and when the Guard unit is acting in its State role, performing emergency relief or disaster assistance, protection would not be forthcoming either under the Thurmond bill or my amendment. But my amendment would extend malpractice coverage for Guard medical personnel during summer training and drill periods.

Let me emphasize that this would not represent a preemption of a State prerogative. It does not open the door to a wider trespass on State control. It simply recognizes that Guard training, under the Federal Constitution, takes place pursuant to Federal standards with Federal service for the purpose of performing Army and Air Reserve missions.

We all know the severe impact that exorbitant malpractice premiums have had on primary medical care. Why should we deny such protection to those medical personnel who perform an essential medical function during Guard training sessions?

There is precedent for considering Guard personnel as Federal employees even during periods of training. Sections 3686 and 3687 of title 10 of the United States Code provide that for the purpose of military benefits, members of the Army National Guard and the Air National Guard, when engaged in inactive duty training, shall be considered training in Federal service as Reserves of the Army and Air Force. In addition, since 1960, the Federal Government has been paying claims which arise out of Guard training activities.

There can be no question that members of the National Guard act as essential cogs in our national military scheme. As Congress specified in title 32, section 102 of the United States Code, the Guard provides "an integral part of the first-line defense of the United States."

Both the Army and the Air National Guards are trained and equipped so as to be easily assimilated into active units of the Army and Air Force upon mobilization and in the event of armed conflict.

One final point. When I was Governor of my State, my wife had the vision and determination to spearhead a program for the immunization of all children in Arkansas against the debilitating impact of mumps, measles, rubella, whooping cough, polio, and other childhood diseases.

The program known as "Every Child in '74" was eminently successful in that approximately 400,000 children in the State were successfully inoculated against these dreaded diseases. Yet, the program would not have been nearly the achievement it was without the yeoman service of the National Guard and its medical personnel who performed most of the inoculations.

I am currently proposing a national immunization program. This is not the swine flu program; this is an entirely different one. But it would be of critical importance to have the valuable participation of Guard medical personnel without the threat of medical malpractice hanging over their heads like some sword of Damocles.

For this reason, I have included a provision in my amendment to assure that Guard medical personnel will have the benefit of malpractice protection when acting in medical immunization programs, financed in whole or in part by Federal funds.

[The amendment referred to follows:]

AMENDMENT

Intended to be proposed by Mr. Bumpers 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.

Viz: On page 4, line 17, strike out the quotation marks and the second period.

In page 4, between lines 18 and 19, insert the following:

"(g) For purposes of this section and sections 1346(b) and 2672 of title 28, a person described in subsection (a) who is engaged (1) in training or duty as a member of the National Guard under sections 316, 502, 503, 504, or 505 of title 32, or any other provision of law for which he is entitled to or has waived pay under section 206 of title 37, or (2) in any medical immunization program as a member of the National Guard which is carried out by any State, or local subdivision of any State, or by any private non-profit organization and which is financed in whole or in part with Federal funds, shall be considered a member of the Armed Forces."

Senator BUMPERS. Mr. Chairman, I strongly feel that it is only fair that Guard medical personnel be placed on an equal footing with other defense medical personnel. To continue to subject these physicians to the threat of substantial civil litigation in their individual capacities with no Federal protection does a disservice to this extremely important leg of our reserve forces.

Mr. Chairman, I would like to make one other point, and that is that in the swine flu program which the Congress has just adopted and which the President has already signed, will provide the very thing that we are talking about here and that is the master-servant relationship is not necessary.

As a matter of fact, so far as breach of warranty is concerned, the U.S. Government stands in the shoes of the vaccine manufacturer. So I think that is a clean precedent. To hang our hat on the master-servant relationship would not only be a misnomer, but patently unfair to Guard personnel.

Again, Mr. Chairman, I appreciate very much your allowing me to be here and I would be happy to try to expand on this and answer any questions that you might have.

Senator BYRD. Thank you very much, Senator Bumpers. I would like to say that I share your high regard for the National Guard. I would like to see something done to protect the National Guard in

the matter of malpractice. I think I should point out that in previous meetings of this committee, both Senator Thurmond, the sponsor of the legislation, and the Justice Department testified that there are serious legal questions involved. That is the purpose of the meeting today, to explore those questions further.

We have other witnesses. I suppose now would be the time to call on Colonel Skowron to make his presentation, and then I understand Colonel Cahill also has a presentation.

General Greenlief, will you introduce these gentlemen?

STATEMENT OF MAJ. GEN. FRANCIS S. GREENLIEF, EXECUTIVE VICE PRESIDENT, NATIONAL GUARD ASSOCIATION

General GREENLIEF. I might introduce these gentlemen to you briefly. First of all, I appreciate having had the opportunity to appear before your subcommittee previously and I pretty much told you at that time everything, so I have no prepared statement now.

Senator BYRD. You made a fine presentation, I might say.

General GREENLIEF. At the end, I may ask for the opportunity to summarize, but at this time I have no statement. I would like to introduce Col. Ralph A. Skowron, who is the acting adjutant general for the State Guard of Delaware. He is also an ophthalmologist. He practices in civilian life with a medical group.

Colonel Cahill is the State judge advocate for the military department of the State of Maryland and Colonel Cahill is a partner in the law firm of Weinberg & Green, practicing in Baltimore and he is the immediate past president of the Baltimore Bar Association.

STATEMENT OF COL. RALPH A. SKOWRON, ACTING ADJUTANT GENERAL FOR DELAWARE NATIONAL GUARD

Colonel SKOWRON. Mr. Chairman, as a physician, citizen-soldier of the National Guard, I welcome this opportunity to appear before you. I strongly urge the enactment of S. 1395, 94th Congress, subject to the addition of perfecting language to assure National Guard medical personnel engaged in training or duty authorized and funded under Federal law, the same protection that the bill would provide for their counterparts in the Army Reserve and Air Force Reserve.

Many of the medical officers of the National Guard are, like myself, employed and receive our liability coverage from our employers who do not extend our coverage for duty with the National Guard. In addition, large numbers of our medical officers are residents and interns in hospitals which carry their medical liability insurance. However, that insurance provides no protection against liability for activities not connected with the specific hospital program.

We have doctors of medicine, doctors of osteopathy, dentists, nurses, and a variety of "paramedics" in the ranks of the National Guard. Except for the coverage they enjoy while performing medical services in a hospital or other facility which may carry medical liability insurance for them, all of our medical personnel must provide it for themselves for participation in the National Guard. If they feel they need and can afford such insurance, they must obtain and pay for it out of

their own pockets. The types and scope of medical liability insurance coverage are many and varied, as you know.

There are geographical limitations. Some policies cover only specific areas of a State; some cover an entire State; others cover a number of named States; and nationwide protection is provided by some companies.

There are limitations on the type of medical practice that is covered. Some policies are restricted to a specialty, such as obstetrics or neurosurgery; while others cover a broad spectrum, such as family or general practice; some cover medical group practice; and some include coverage during periods of military training or duty, while others do not. Finally, there are established dollar ceilings, which may vary widely.

In most cases, a physician or dentist whose malpractice insurance policy does not cover him while he is engaged in military training or duty could have it extended to cover such periods, upon application and payment of an additional premium. However, the cost is often prohibitive. For example, a physician in Michigan's 127th Hospital has reported that he would have to pay an additional annual premium of \$5,000 in order to have his medical malpractice insurance extended to cover his Air National Guard activities.

Since medical personnel of the National Guard may often be required to perform their duty wherever their units may be sent, and without regard to the nature of their civilian medical specialties, it is obvious that the broader liability exposure would in nearly every case increase the cost of their insurance.

But whatever the expense, nominal or astronomical, our medical personnel in the National Guard do not feel that they should have to protect and pay for insurance to protect themselves from liability for official military activities. The income the National Guard doctor or dentist derives from his military avocation is most often substantially less than he could earn in the same time in his private practice. If the threat of ruinous civil liability is not removed by providing protection for line of duty medical activities, an exodus of professional medical personnel may well be expected. As it is today, many strongly object to performing any medical practice, including physical examinations, and are only willing to participate in training not involving the treatment of patients.

The military, out of necessity, has long relied heavily on the "paramedic"—classically the medical aid man, or corpsman assigned to small units during field conditions. Increasing use is being made today of others specially trained for assignment to military medical units, such as hospitals, in order to relieve physicians and nurses of routine duties.

In these instances, there is frequently little, if any, correlation between the duties of the National Guardsman's civilian occupation and those of his paramedical assignment in the Guard. Unlike the physician, dentist, or nurse who may very well have medical malpractice insurance covering their private practice, the paramedic almost certainly has no similar insurance capable of extension to cover his military occupation.

The paramedic who may be called upon to act in an emergency without direct supervision by a professional medical officer may be reluctant to act if he must risk a possible lawsuit with a threat of crippling personal monetary loss.

For the purpose of most Federal laws, such as those relating to pay, retirement, leave, and veterans' benefits, National Guard training or duty under title 32, United States Code, is equated with similar training or duty of the Army Reserve and Air Force Reserve under title 10 of the United States Code.

Guardsmen in their title 32 configuration perform the same varied services as do members of other components in the treatment of members of the Armed Forces, their dependents, and others entitled to Government medical care.

National Guard medical personnel are entitled, as a matter of principle and right, to the same insulation from individual financial liability for the performance of medical services. Without that protection, the Guard may well be expected to be reduced to a small number of doctors, dentists, nurses, and "paramedics", that would be inadequate in numbers to provide the support and services essential to, and expected of the accomplishment of the National Guard mission.

I am very grateful for this opportunity to appear as a citizen-soldier before your committee in support of this legislation. I will do my best to answer any questions you may have of me.

Senator BYRD. Thank you, Colonel. Normally, the Chair would like to hear all the witnesses before getting into questions, but the Senate is in session and Senator Bumpers may have to leave, so I have two questions that I would like to ask Senator Bumpers at this point.

In the amendment you have proposed, there is a provision which would provide malpractice protection through the Federal Tort Claims Act to National Guardsmen when acting in medical immunization programs. As a result of the recent controversy surrounding tort liability in connection with immunization programs, the swine flu legislation requires that:

The Secretary of Health, Education, and Welfare shall conduct a study of the scope and extent of liability for personal injuries or death arising out of immunization programs and of alternative approaches to providing protection against such liability—including a compensation system—for such injuries. Within 1 year of the date of enactment of this act, the Secretary shall report to the Congress the findings of such study and such recommendations for legislation—including proposed drafts to carry out such recommendations—as the Secretary deems appropriate.

At the same time, the President has established a products liability task force which is to examine and make recommendations on tort liability in immunization programs. In light of these developments, may I ask the Senator from Arkansas do you think it would be premature for the Armed Services Committee to provide separate liability protection to the National Guard in immunization programs or similar programs?

Senator BUMPERS. Mr. Chairman, the answer to that would be no. I think, first of all, that the immunization the National Guard gives to their own people—for example, I think the National Guard medical personnel will give swine flu immunizations to their own members—those who give it, if they do it on a weekend drill, would not now be protected except for the bill which the Senate just passed, and the President signed into law.

Except for the bill which we just recently passed which provides that the United States will stand as far as warranty is concerned in

place of the vaccine manufacturers, the vaccine manufacturers would not be relieved from actions in negligence. I definitely think the same coverage ought to be extended to National Guardsmen engaged in immunization for childhood diseases, as they did in Arkansas. One, because the possible exposure is just so infinitesimal as to be almost not worth consideration; and second, I think that those immunizations, when you consider the fact that 30 million children in this country are susceptible to one or more of the childhood diseases, I think those immunizations are equally important.

So to say that it is premature, I would have to disagree very strongly with that.

Senator BYRD. The Chair was really asking the question rather than expressing a judgment.

Senator BUMPERS. I am sorry, I didn't mean to indicate otherwise.

Senator BYRD. Just one additional question. In the meantime, I have sent to see what the vote is on.

Senator BUMPERS. It is a motion to instruct the Sergeant at Arms to tell all Senators to come to the floor.

Senator BYRD. I suppose we might as well make the vote, then.

[A brief recess was taken.]

Senator BYRD. The Chair has another question for Senator Bumpers, which will be placed in the record at this point.

Senator BYRD. It has been well established that National Guard medical personnel do not presently have adequate protection from malpractice liability. Could you recommend or support any other solution to this problem other than extending protection to the Guard under the Federal Tort Claims Act—that is, through indemnification programs, insurance arrangements, et cetera?

(Senator Bumpers answer follows:)

My first preference of course is to make the Federal Tort Claims Act the exclusive remedy for malpractice claims against National Guard medical personnel. As I think I've made abundantly clear in this hearing, I feel very strongly that these personnel are trained to perform a federal mission and should have the protection of the FTCA during such periods.

Alternatively, perhaps a hold harmless agreement or other guarantee by the federal government would provide the necessary protection. But the disadvantage of these arrangements is that the doctor or nurse involved would have to go through the trial proceeding and incur the front and expenses of court costs and legal fees before reimbursement would be forthcoming from the federal government. This understandably would be an expensive and time consuming hassle for the Guard member and for that reason I would consider a guarantee or hold harmless arrangement as definitely "second best" to FTCA protection.

Senator BYRD. The next witness is Colonel Cahill.

**STATEMENT OF COL. WILLIAM W. CAHILL, JR., STAFF JUDGE
ADVOCATE, MILITARY DEPARTMENT OF THE STATE OF MARY-
LAND, MARYLAND ARMY NATIONAL GUARD**

Colonel CAHILL. Mr. Chairman, having reviewed the statement presented to the subcommittee by Maj. Gen. Francis S. Greenleaf, which sets forth the applicable statutory references, the pivotal decision of the Supreme Court of the United States in Maryland for use of *Levin v. United States*, and the problems confronting National Guard physicians nationwide, my comments will be restricted to the

specific dilemma which arose in the Maryland National Guard in late spring of 1975.

At that time, Col. Frank E. Barranco, commanding officer of the 132d Combat Support Hospital, contacted the adjutant general of Maryland and indicated that certain physicians within his command had expressed deep concern as to their possible exposure to civil liability for professional negligence which might occur during their summer training in July.

The adjutant general directed Lt. Col. L. Robert Evans and me to report to the hospital at the next scheduled drill for the purpose of answering any and all questions as to the possible liability of members of that command.

We were told that the unit would train at Fort Drum, N.Y., and that they would be treating not only National Guard personnel, but also Regular Army personnel, including their families. We were also told that there were 20 physicians within the unit and that all but a few would be involved in rendering medical care during summer duty at Fort Drum. It was then explained to us—and we had not known this before—that only two of the physicians were engaged in private practice and carried professional liability insurance.

The remaining 18 physicians were either residents in training or members of the house staff in local hospitals; it was pointed out to us that those 18 physicians were covered by professional liability insurance policies issued to the hospitals, but that this coverage was not available when they treated patients away from the hospital premises.

We were then questioned as to whether those physicians who did not have insurance coverage of their own and who were sued for professional negligence occurring during summer training would be provided with a defense, or indemnified by either the State of Maryland or the U.S. Government.

We first explained to them that the Federal Tort Claims Act did not provide coverage nor immunity as regards National Guard personnel, including those physicians. We then entered into a discussion regarding three Maryland statutes which, under certain circumstances, might provide immunity, legal defense, and indemnity.

They were informed that it was our considered opinion that none of the aforementioned statutes would afford them any protection for acts or omissions occurring during summer camp; we felt certain that these statutes were limited to State duty upon the order of the Governor of the State of Maryland.

I think even some physicians in the Guard were confused as to exactly what that statute was. We broke it down into three categories: one, where you would be ordered up by the Governor as we were in the riots in 1968, the riots in Cambridge in 1963, and also in 1970 and 1971. That would be pure State duty and in Maryland they would be provided by the Attorney General and the Board of Public Health would have no authority to indemnify them. Unfortunately, none of this would apply during title 32 and of course the third status, being active Federal duty.

In summary, we were compelled to inform these 18 physicians that they alone would be responsible for their defense and satisfaction of any suit or judgment against them.

We did look into the insurance question. We cannot get a policy of insurance for less than a month. The cost is high. Most agents don't want to write it. You can't get excess. You can't write anything over \$100,000 and \$300,000, which we do not consider adequate coverage today.

Senator BYRD. What do you consider to be adequate coverage today?

Colonel CAHILL. I am in a bad position to answer that.

Senator BYRD. I don't want to put you on the spot.

Colonel CAHILL. I am defending the case of a 26-year-old quadriplegic. There are five defendants at one hospital. The case has a value of between \$1½ million and \$2 million, and frankly, it is a damage to the spinal cord and a fracture dislocation of cervical area of the spine. I would say \$1 million or better.

Senator BYRD. Is that the customary figure that most civilian doctors use?

Colonel CAHILL. I think most of them today are trying, if they can find it. The excess market is very difficult. I think most doctors, if they can find them, have a price that they can't pay.

Colonel SKOWRON. I have \$1 million type of coverage, on a group basis, \$3 million, and if I were a neurosurgeon, I would consider that inadequate.

Senator BYRD. Thank you.

Colonel CAHILL. We did consider the insurance question. We found that what we could purchase really wasn't adequate in any event and the price was wrong. What we did, Mr. Chairman, the doctors felt that it would not be fair to them to ask them to go to Fort Drum and treat people and expose themselves, so we reduced the training program for them and they did not perform medical care during that encampment.

What I am saying is if all prospective candidates for commission in the medical units of the National Guard are realistically made aware of their exposures while performing title 32 training or duty (which would include medical service or treatment), we feel that only those physicians who carry insurance in their private practices will enlist. It has been our experience in the Maryland National Guard that in order to keep our strength up, we have to fall back on the residents and house staff people in the hospitals. These are the people who frankly need the money, and we are able to attract.

If, when you swear them in, you tell them what their exposures are and they did not know, we feel that we cannot attract them. So we would respectfully urge enactment of Senate bill S. 1395, as amended, so we can avoid those problems in the future. Thank you.

Senator BYRD. Thank you, Colonel.

I have a number of questions which I would ask that the witnesses answer for the record.

QUESTIONS SUBMITTED BY SENATOR BYRD; ANSWERS SUPPLIED BY
COLONEL CAHILL AND COLONEL SKOWRON

Senator BYRD. The Federal Tort Claims Act is based on the principle of respondeat superior, that is, a master who has control or authority over a servant is responsible for the wrongful acts of that servant. As the court stated in *United States v. Eleazer*, 177 F. 2d 918 (1949):

"The whole structure and content of the Federal Tort Claims Act makes it crystal clear that in enacting it and thus subjecting the Government to suit in

fort, the Congress was undertaking with the greatest precision to measure and limit the liability of the Government, under the doctrine of respondeat superior, in the same manner and to the same extent as the liability of private persons under that doctrine were measured and limited in the various States."

In order for the courts under the Federal Tort Claims Act to find the Federal Government—the master—responsible for the negligence of the National Guard—the servants—the Federal Government must have control or authority over the National Guard.

The amendment proposed by the National Guard would by statute deem National Guardsmen in a training status to be members of U.S. military forces for purposes of malpractice protection. Yet, article 1, section 8, of the U.S. Constitution reserves to the States "the authority of training the militia." How can the Congress by statute create a Federal authority over the militia or National Guard in a training status when the Constitution specifically reserves such authority to the States?

The WITNESSES. In view of the amended bill, which does not attempt to place National Guardsmen in title 32 status, under the Federal Tort Claims Act, this question is moot.

Senator BYRD. As has already been pointed out, the Federal Government provides a variety of benefits—pay, equipment, instruction, and so forth—to the National Guard in a State training status without making the guardsmen members of the U.S. Armed Forces. Would it not be more logical and straightforward for the Federal Government to provide malpractice benefits in the same direct manner rather than by creating a legal fiction that the National Guard in a State training status are members of the U.S. Armed Forces?

The WITNESSES. In view of the amendments to the bill, yes.

Senator BYRD. In *Maryland v. United States*, 381 U.S. 41 (1965), a suit was brought under the Federal Tort Claims Act against a pilot of the Maryland National Guard for personal injuries arising out of his negligence in operating a jet aircraft during weekend training.

The Supreme Court noted that at the time of his negligence, the guardsman was being paid, equipped, and supplied by the Federal Government. Nevertheless, the Court found that in his training status the guardsman remained under the command of the State Governor. Thus, the Court held that the pilot was a State employee rather than a Federal employee and could not be held liable under the Federal Tort Claims Act.

So long as the Governor remains in command of the Guard when in a State-training status, how can the Federal courts be expected to reverse the Supreme Court decision and hold the Federal Government liable for the torts of National Guardsmen?

The WITNESSES. This question relates to the Supreme Court decision of *Maryland v. United States*, 381 U.S. 41 (1965); stated simply, it is the position of the National Guard that there has been sufficient change in the status of technicians, that the Supreme Court, faced with the same set of facts as in *Levin*, would reach a different decision.

Senator BYRD. Could the National Guard Association support an amendment to section (f) of S. 1395 which would allow the Secretary of Defense to hold harmless or provide liability insurance to National Guardsmen for medical malpractice?

The WITNESSES. Yes, emphatically.

Senator BYRD. It is not an unwise policy to deem the National Guard when in a training status to be members of the U.S. Armed Forces for some purposes—that is, receiving malpractice protection—and not for other purposes? Would you object to legislation which federalized the National Guard when in a training status?

The WITNESSES. Yes.

Senator BYRD. Not only does this amendment seek to bring National Guardsmen in State training status under the coverage of the Federal Tort Claims Act for purposes of malpractice, but it would make the Federal Tort Claims Act the exclusive remedy for any personal injury caused by such guardsmen.

Would not this exclusivity nullify any existing malpractice protection that States presently offer their National Guard—through claims procedures, indemnification, or otherwise—and at the same time eliminate any incentive for the States in the future to contribute to protecting their guardsmen from malpractice liability?

The WITNESSES. Yes; but we feel strongly that the responsibility of medical malpractice committed by medical personnel of the National Guard, in title 32 status, should be the responsibility of the U.S. Government and not the several States.

Senator BYRD. The next witness will be Mr. Neil Peterson, Assistant Chief, Tort Section, Civil Division, Department of Justice.

STATEMENT OF NEIL PETERSON, ASSISTANT CHIEF, TORT SECTION, CIVIL DIVISION, DEPARTMENT OF JUSTICE

Mr. PETERSON. Thank you, Mr. Chairman. I appreciate the opportunity to appear before you. I have no prepared statement as such, Mr. Chairman, in view of the fact that Mr. Kruse, the section chief of my section, has appeared before you previously with a statement of his views and answered various questions.

I am, however, available to answer any questions the Chair would like to address to me.

Senator BYRD. Would the amendment as proposed by the National Guard Association have the effect of amending the Federal Tort Claims Act?

Mr. PETERSON. I feel that it would, in effect, amend the Federal Tort Claims Act by at least indirectly broadening the definition of the term "employee of the United States," as that term is contained in 28 U.S.C. 2671 at the present time.

May I go further and just comment that one of the difficulties is, for purposes of the Federal Tort Claims Act, an employee as defined in 2671 must be acting within the scope of his duties and employment for the United States at the time of the act or omission which is asserted to give rise to liability.

The difficulty with it is—and Senator Bumpers addressed himself to this briefly—we speak normally in terms of the master-servant relationship which is one principle of State law, but the primary indicia of that relationship is the question of control: Is the individual who is performing the service controlled in his day-to-day operations?

Now, Senator Bumpers himself admits that this day-to-day control is not present and this has traditionally been the touchstone of liability under the Federal Tort Claims Act. So it is our opinion that merely by amending the definition of the term "employee" you don't necessarily creat the nexus of governmental liability that the Guard would seek to have effected under the bill.

Senator BYRD. Is it true that in 1960 the Senate Judiciary Committee specifically rejected legislation that would have extended the coverage of the Federal Tort Claims Act to the National Guard?

Mr. PETERSON. Yes, Mr. Chairman. It is correct that the Senate did reject such legislation at that time and in fact I might point out that that rejection was specifically averred to by the U.S. Supreme Court in the decision in the case of *Maryland ex rel. Levin v. United States* in 1964 as one of the reasons for holding in that case that an employee of the Air National Guard was neither an employee of the United States, nor was he specifically controlled by the United States for the purpose of Tort Claims Act liability.

That decision has been averred to and followed in several lower court decisions.

Senator BYRD. As I understand it, in order to obtain immunity from suit under S. 1395, the Attorney General must certify 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."

Justice Department witnesses have indicated that even if S. 1395 were enacted to include the National Guard, National Guardsmen in a training status still may not be sufficiently under the control of the Federal Government to be considered servants of the Federal Government or acting within the scope of their employment for the Federal Government.

Thus, isn't it possible that the Attorney General would refuse to make the required certification, thereby precluding any malpractice protection to National Guardsmen?

Mr. PETERSON. Well, let me answer the second question first, Mr. Chairman. Certainly a refusal by the Attorney General to certify the scope of employment of the individual involved would have the effect of withdrawing any immunization of him.

The effect of the Attorney General's certification under the comparable bills which have been referred to in the committee before, the Veterans' Administration bill and the Public Health Service bill, and the recently enacted bill which immunizes State Department doctors who are actually employees of the United States—what happens under them there is that upon certification, the employee is immunized and the United States is substituted as defendant. The Attorney General can make that certification and it is customarily made initially in my office, and it is made on the basis of whether there is sufficient control over the individual at the time.

We have employees of the United States in other situations as to which we say there is no such control under the Federal Drivers Act and we refuse to certify their scope of employment. So there is precedent for the Attorney General declining to certify the scope of employment for even Government employees, and certainly this would be true under the proposed measure of the National Guard.

Senator BYRD. Well, do I understand you accurately then that your office would make the recommendation to the Attorney General?

Mr. PETERSON. Yes, sir.

Senator BYRD. And from what you say today, it is unlikely that your office would make an affirmative recommendation?

Mr. PETERSON. That is correct, sir.

Senator BYRD. It seems to me this further emphasizes the legal aspect involved. Frankly, I think that something should be worked out to protect the National Guard doctors. I think they need and deserve to be protected and whether this is a way to protect them is a matter of some dispute, I suppose.

Since there are significant legal questions involved in this, what would you think about referring this aspect, only dealing with the National Guard, to the Judiciary Committee for its consideration?

General GREENLIEF. Mr. Chairman, I would be very much disappointed and opposed to that. I understand the problem you face. I have some notes and about a 4-minute summary that I might address all of that and explain why I would be opposed to that.

Senator BYRD. That would be fine.

General GREENLIEF. Mr. Chairman, there has been so much discussion over the legal aspects of Senator Bumpers' amendment that while dealing with the technicalities of the master-servant relationship, the basic issue is that National Guard medical personnel desperately need medical malpractice protection and they need this protection even more than the other components who are already covered by the Federal Tort Claims Act.

We are not just seeking benefits for the almost 19,000 medical personnel of the Army National Guard and the 4,500 of the Air National Guard, we are seeking to maintain the medical capability as a National Guard force.

This is not just a State force problem. The National Guard is larger than the unit programs of all the other Federal Reserve components combined. This is important to national defense because the Army National Guard provides 46 percent of the combat power of the U.S. Army. The Air National Guard is 58 percent of the Tactical Air Command and they are 60 percent of the Aerospace Defense Command and certain significant percentages of the other Air Force commands.

It is my very strong personal belief that the medical capability of the National Guard force may well be destroyed if this legislation is passed without providing for National Guard medics for the reasons that both Colonel Skowron and Colonel Cahill have alluded to.

No right thinking doctor who had any interest in protecting his family could agree to serve as a National Guard medical officer without any protection when he can join other components and enjoy that protection. The Reserve Forces Act—title 10, United States Code, sections 3686 and 8686—that is the full name—says that the training duty of the National Guard is, and I quote: “* * * considered active duty for training in Federal service.”

Mr. Chairman, the words “in Federal service” clearly establish a master-servant relationship, at least to the same extent that it does in the case of the Army Reserve and the Air Force Reserve.

Mr. Chairman, I am not a lawyer, but it seems to me that the Congress established a clear precedent for what we ask when it passed the national swine flu immunization program of 1976, Public Law 94-380, because that act provided that the Federal Government accept the responsibility and liability for the acts of commercial pharmaceutical houses and I quote from the law: “in the same manner and to the same extent that the United States would be liable in any other action brought against it under section 1346(b) of a capital 171” and the references in law are to the Federal Tort Claims Act. The national swine flu immunization program says the United States will accept the responsibility and liability for the acts of commercial pharmaceutical houses just as it would under the Federal Tort Claims Act.

It may be true, but I have not heard that the Justice Department suggested unconstitutionality of that act or worried about a master-servant relationship between the United States and the pharmaceutical houses; and as a nonlawyer, I find it very difficult to understand why we should now worry about the master-servant relationship between the United States and the National Guard medical personnel, particularly in view of all of the existing precedent-setting legislation.

Finally, Mr. Chairman, constitutionality is not decided by the Justice Department, it is decided by the courts. I would suggest that Senator Bumpers' amendment be accepted and that the amended S. 1395 be adopted. Then if the Justice Department believes it might be unconstitutional, the court can decide the issue in due time.

Mr. Chairman, in relation to the Justice Department statement, that the Attorney General might fail to certify a National Guardsman, I would say that as I read the law, the Attorney General could also make such a decision to decline to certify a regular. I am quite certain, Mr. Chairman, that if the Attorney General declined to certify a National Guard medical officer who was being sued, because of his National Guard status, the National Guard would in fact produce a case to be decided by the Supreme Court and we would then settle that constitutional question, and I believe that is the way to settle a constitutional question. We now have only a question and not a fact.

Mr. Chairman, I know that I said that I am not a lawyer and I am not trying to sound like one. I would like to think I am a soldier and as a soldier I can tell you that all military medical personnel need this legislation and as amended by Senator Bumpers, the National Guard needs it more than all of the others. For those reasons, sir, we would persist in recommending that this subcommittee accept the amendment prepared by Senator Bumpers.

Senator BYRD. Thank you, General. I am not in disagreement with hardly anything you have said. I recognize the importance of protecting the National Guard medical personnel. I think it is very important, just as the Guard itself is very important, and I believe something needs to be done about it. However, I am not a lawyer.

As to comparing this with the flu vaccine legislation, as a nonlawyer I am not sure whether it is exactly the same because we have a State relationship involved in the matter which we don't have with the flu vaccine. But be that as it may, I am totally sympathetic with what you are trying to accomplish, but I do think there is a serious problem involved here from the point of view of the States. There are significant legal aspects involved which I think the committee has to consider. This is not a legal committee, of course, as you know. It is not a judicial committee.

General GREENLIEF. I would agree with your statement that there is a significant legal question, and sir, we are asking the committee to address that. It is true, as I said in earlier statements, that in 1960 the Judiciary Committee declined to provide to include the National Guard in the Federal Tort Claims Act. However, at the same time, they wrote legislation and passed it, the National Guard Claims Act. The principal feature of that act is to provide that the United States of America accept the responsibility for and pay the claims of National Guardsmen when the Secretary of the Service determines it and then provide that the Congress pay additional amounts.

I would suggest, sir, that that demonstrates very clearly acceptability by the United States of America for the tortuous acts of National Guardsmen, which is all we are addressing here.

Senator BYRD. Senator Bartlett.

Senator BARTLETT. As a cornfield lawyer, I would like to say that I consider those who aren't lawyers possessing a very high level of intelligence normally in judgment. I happen to believe that someone who

is a specialist in apples will do a very good job, particularly if they happen to be a Senator and worry about how many apples are taken away from every person in this country because of a Government which seems to be wanting to play a bigger role in our lives.

So, I certainly agree with the chairman that it is not a requirement that General Greenlief be a lawyer.

How many suits have been brought against the National Guard medical personnel in the past year?

General GREENLIEF. Sir, I do not have figures to that extent. It is a fairly new phenomenon. As a matter of fact, our doctors and our members have not really been aware of the problem until it became a very serious problem nationally.

Senator BARTLETT. Could you furnish the committee with those figures?

General GREENLIEF. Yes, sir; I certainly will attempt to get them.

Senator BARTLETT. Would the State Guard person who is here have any figures on that?

Colonel CAHILL. I don't know nationwide. I know of one suit in Maryland in the past. Of course, you just recently had a decision for a long time which would have advised our doctors that probably they had a qualified immunity. A recent case in the District of Columbia pretty well made it clear. So that is fairly recent.

Actually, Senator, I would say that I don't think much of this came into focus perhaps until Kent—many suits against guardsmen. Guardsmen began to ask questions, I found, being a legal officer.

Senator BARTLETT. So you are saying it is a new ball game.

Colonel CAHILL. Yes; and the problem when you talk to the doctors, I don't think any of them like to think that they are going to commit an act that would justify being sued, but I think that they are all very much afraid of that one case against that one doctor because the verdicts that they are seeking, at least in our jurisdiction, are big. You are not talking about something that you could pay off in 5 years, you could be wiped out.

General GREENLIEF. Senator Bartlett, while this colloquy has been going on, my legal counsel has reminded me that following the previous hearing, we did ask the State for reports of the number of cases that had been before it. The answer that we got back is there have not been any processes in court.

I could cite an Army Times item that does relate to the Army to give some increase in volume. Last year, 1975, there were 24 suits that were filed in Federal district courts under the Federal Tort Claims Act. These are not National Guard cases, but there have been 21 in the first 6 months of this year, certainly indicating an increasing trend. In the National Guard as of now, none to our knowledge have gone to court.

Senator BARTLETT. In general, it has been established that the National Guard medical personnel do not currently have adequate protection from malpractice liability. Could you recommend or support any other solution to this problem other than extending the protection to the Guard under the Federal Tort Claims Act—such things as indemnification programs, insurance arrangements, and so on?

General GREENLIEF. Senator Bartlett, there is an alternative. In my mind, it is not nearly as good and I don't know whether our doctors

would find it acceptable or not. But in section (f) of S. 1395, it provides that the Secretary of Defense may hold harmless and indemnify active-duty personnel when they are practicing medicine in a foreign country or service with another Federal agency, circumstances when the Federal Tort Claims Act does not cover them. So it would be possible to amend or rewrite section (f) to provide that the Secretary of Defense shall hold harmless and provide liability insurance for National Guard medical personnel performing training duty under the provisions of title 32.

That would be an improvement, sir. It would not be as good as the coverage we seek because the coverage we seek provides that the sole defendant in this case is the U.S. Government. Under this provision, the defendant would have to defend himself, pay his own court costs and have a significant investment.

I would also suspect that the Department of Defense might find it very, very expensive to consider providing the liability insurance. That is not a disadvantage to the National Guard, but I would think that the Government might be very concerned about that. So revision of section (f) would improve the situation for our doctors and would provide them some protection where they now have none.

Senator BYRD. Would you yield at this point?

Senator BARTLETT. Yes.

Senator BYRD. Could the committee ask the Justice Department witness if he would comment on that aspect of it?

Mr. PETERSON. On the hold harmless, Mr. Chairman?

Senator BYRD. On the suggestion of General Greenlief and also any suggestions that the Justice Department might have to meet the problem. We have to have some way to try to solve this problem.

Mr. PETERSON. Fine. Mr. Chairman, first of all, in the hold harmless or indemnification provision which is included as a potential remedy under section (f) of the Senate measure, that provision is included in the bill because there is no remedy by suit available against the United States under the provisions of the Federal Tort Claims Act for cases of negligence arising in foreign countries.

There is a specific exception for that. It was with this in mind—you see, what you have done is under the substantive provision of the bill, you are going to immunize a doctor, substitute the United States, and make the sole remedy that against the United States. That falls down when you are in a foreign country because the United States by other provisions of the bill cannot be liable in that situation. So, to that extent, where there is an employee relationship with the United States and also where there is privity between the United States and the individual doctor sought to be held liable, you can enter into a hold harmless or indemnification agreement.

The difficulty with that proposition in relation to the National Guard goes back once again to the question of control. Mr. Kruse raised this in his prepared remarks initially to the committee. We have no control over the doctors and even in the possibility that we would be defending them, we have no control over the records or over obtaining them, because they are not otherwise employees of the United States as are the normal military doctors. So we are right back to the control question, and I don't think that the hold harmless and the indemnification remedy of subsection (f) would be appropriate in the instance of the National Guard for that reason.

If I might go with the Chair's permission and make a few additional comments on some of the material that has come out thus far, I think it might help the Chair to understand more of our position in relation to the legal issues pending in adopting such a measure. We do have constitutional problems and concededly the Department of Justice is not an arbiter of the Constitution; the Supreme Court is. However, the Supreme Court has spoken on the issue, of course, in the *Levin* case and said the United States does not have sufficient day-to-day control over these people to make the United States responsible for them.

Now, merely changing the statutory language to say that they are employees does nothing to change their status in terms of giving us more control over them. So there is no substantive effect upon the National Guard program. We have the usual difficulties that have been raised before the committee with constitutionality under article 1, section 8 of the Constitution. There is also a provision in the fifth amendment of the Constitution exempting certain military personnel from grand jury proceedings in a time of war. There is a specific reference to the militia, an ancestor of the National Guard, and exempting them out in certain provisions, except when they are in federalized service. That is another instance of the constitutional question.

The general or possibly the colonel mentioned the question of the *Kent State* case. One of the things you are doing in this instance is you are talking about National Guardsmen as employees of the United States for purposes of this legislation. In *Scheuer v. Rhodes*, the *Kent State* case, the Supreme Court held that the Guard is amenable to suit under 42 U.S.C. 1983. That is a section of the Civil Rights Act which deals with deprivation of due process under color of State law. The Guard personnel are amenable to suit under that.

What do you do to that section of the judicial code if you begin to treat various sections of the Guard as Federal employees? What happens to the State nexus in the case of suit against them? Are you destroying a civil rights remedy? I raise that as an indicia of the involved legal questions which are present here.

The colonel mentioned giving advice to governmental personnel that they were entitled to qualified immunity up until the *Henderson v. Blumink* decision in the Court of Appeals for the District of Columbia. It has been our policy in the Department of Justice never to advise any individual doctor in the military that we thought he had qualified immunity, because he did not. That was our constant policy notwithstanding a couple of lower court decisions holding that the doctors' acts in relation to the physician-patient relationship were sufficiently discretionary within the meaning of policy function which was addressed under the immunity defense. So we have never considered that immunity available to the doctor. Every agency of the Government that has raised that question we have advised not to tell doctors that they were entitled to qualified immunity.

I raise those additional comments. If the Chair or Senator Bartlett have any other questions, I would be happy to respond.

Senator BYRD. Senator Bartlett raised the question with General Greenleaf as to what other course of action might be taken other than this legislation and that is the question I want to raise with you. What suggestion do you have as to what course of action may be taken?

Mr. PETERSON. The only other suggestion I could offer would be something which is raised incidentally in the Public Health Service bill which somewhat parallels the basic bill being considered here, that is the insurance remedy—buying the insurance for the National Guard doctors and paramedics and medical personnel as part of the Government's contribution to the ongoing costs of the Guard. I think that is perhaps the only mechanism by which to avoid the legal issues inherent in other remedies.

General GREENLIEF. That is one of the provisions of section (f) that I addressed where it provides hold harmless or provides liability insurance, and I understood Mr. Peterson to say that would be objectionable. I just thought I heard him say that is a solution.

Mr. PETERSON. I am sorry to say I understood your original comment to be you can hold harmless or indemnify them. I was responding to that.

General GREENLIEF. I really intended to say the language of S. 1395 was "or provide liability insurance."

Mr. PETERSON. We would not have a legal problem with the provision of insurance as with other remedies and would not object to that.

General GREENLIEF. I would just like to clear the record to point out that the Ohio National Guard in the Kent State crisis was in State status. They had no Federal status. They are not federally paid and so on, and so any discussion of that is not germane to this issue.

Mr. PETERSON. Mr. Chairman, if I might make one further comment, the question has been raised of the parallel of this remedy to that provided in the swine flu legislation. I think I will perhaps be the unfortunate individual who will be in charge of the swine flu litigation, a task I don't exactly look forward to, but there is a difference between that legislation and this legislation.

First of all, the swine flu legislation was enacted with obvious reference to the commerce clause of the Constitution, a totally different basis for Federal legislation in the area. Second, we must understand what the Government is doing in relation to fostering, developing, and administering the national swine flu immunization program—the Government has so structured the matter in terms of setting standards for the pharmaceutical industry and approving each batch that comes off the line—that in effect the Government is directing substantially the ongoing operation and distribution of the vaccine.

Now, it is a well known principle of law that even though you have an independent contractor, in some situations you can exercise such a degree of control over the contractor that he becomes your employee. This is what is happening with the swine flu program and this is why Congress could take this step.

The situation is different with the Guard and control is the touchstone for the Supreme Court in saying we didn't have the nexus in the *Levin* case.

General GREENLIEF. May I ask your indulgence to respond, because Mr. Peterson has just beautifully made our case. I wonder if the Justice Department is aware of the control that the Federal Government exercises over the National Guard. Let me tick them off and compare them with what he has just stated about controlling the pharmaceutical houses.

The Federal Government prescribes all of the qualifications for enlistment in the National Guard. The Federal Government pays them for performing training which the Federal Government prescribes and supervises. In reference to rejecting vaccine, if the training of the National Guard is not performed to the satisfaction of the Federal Government, the Federal Government rejects that training because if National Guard units do not meet Federal qualifications, they have their Federal recognition withdrawn. If members of the National Guard fail to meet all of the standards of quality of the Federal Government, their Federal recognition is withdrawn.

I submit, sir, the Federal Government has a very, very strong control over the National Guard, at least as strong as they will have over the quality of the vaccine produced in the pharmaceutical companies. That is very clearly spelled out in Federal regulations and law. There can be no question that the Federal Government controls everything that occurs in the training period of the National Guard. They prescribe it. They supervise it. They grade it. They reject it if it is inadequate. They prescribe the qualifications for enlistment and commission. They reject people if they fail to meet qualifications or fail to maintain them. Sir, that sounds like control to me, at least to this extent.

Senator BARTLETT. I was just given part of article I of the Constitution, section 8. I think it applies to the point you are making. I am not certain whether it clarifies it or confuses it, but this is the Constitution: ". . . to provide for organizing, arming, and disciplining the militia and for governing such part of them as may be employed in the service of the United States, reserving to the States respectively, the appointment of the officers, and the authority of training the militia . . .". That would sound like it is refuting your argument. Then it goes on to say: ". . . according to the discipline prescribed by Congress."

So, as a cornfield lawyer, it would sound to me as if the control—I guess that is what authority means—is a bicontrol, rather than only to the States, and that it is a control that is exercised by both the Federal Government and the States; is that not correct?

Mr. PETERSON. Senator, if I might address that for just a moment, when you are talking about control, it is whether you have the power of the purse strings. You are, in effect, talking about the end product of what you are buying with your Federal money not the day-to-day operation. The National Guard in a sense is not that dissimilar in many respects, in terms of the indicia of the control General Greenleaf has mentioned guarantees under OEO and other publicly funded products.

What happens is individual State grantees come in with a program that must be reviewed by the Federal Government. The personnel are appointed with the approval of the Federal Government. The Federal Government can step in in some instances to remove the personnel. The composition of their board between business, the private sector, and the poor people is all governed by Federal statutes and regulations. The amount of Federal contribution is governed by statutes and Federal regulations quite comparable to the Guard.

The Supreme Court in the case of *Orleans v. United States* held categorically that the United States is not responsible under the Federal Tort Claims Act for the activities of those grantees. It is quite comparable to the Guard and I think that another case, in addition to

the *Levin* decision, that the Guard is not sufficiently controlled on a day-to-day basis by the United States for the United States to be responding in damages.

Colonel CAHILL. Mr. Chairman, I wonder if I could respond to that, because I had not heard these questions until I got here and maybe I got lost. Respondeat superior, which is developed in the case law—I have never understood it to be a limitation on the Congress of the United States. I simply get lost with that concept except in the *Levin* case which was a Maryland case of an airplane crash and the court dealt with the law at that time. That was the law in 1965. But as I read in the case of *United States v. Aliza*, it says the whole structure and concept of the Federal Tort Claims Act makes it crystal clear that in enacting it and thus leading the Government to suit in tort, the Congress was undertaking with the greatest precision to measure and limit the liability of the Government.

The Congress can determine the extent to which it is going to measure its liability under that act and I see nothing unconstitutional or contrary to the law of agency or any other law that says if the Congress so determines they can say a title 32 guardsman, title 32 duty and training, for the purpose of that he is a servant of the Government. I find nothing to prevent that at all.

When you get into the power of Congress, on this question of control, you can go on forever with it. The National Guard training status in title 32 is very difficult to define, but Congress has the power to say there he is.

Senator BARTLETT. Mr. Chairman, could we have the gentleman from the Justice Department comment on that statement?

Mr. PETERSON. I was just looking through the Supreme Court decision in the case of *United States v. Orleans* and I would like to quote just a small part of its language, and I don't know if this will help.

The Tort Claims Act was never intended and has not been construed by this Court to reach employees or agents of all federally funded programs that confer benefits on people.

These are the OEO programs that I was referring to earlier.

Senator BARTLETT. That wasn't quite the point that the gentleman made, that an act of Congress would stand up constitutionally was his point, and it was not unconstitutional. Congress could operate in this area.

Mr. PETERSON. Senator, the difficulty is, that to answer that specific question—whether Congress by legislative determination can say that the United States exercises sufficient control over someone for it to be responsible for them legally—is a legal matter.

Now, as I pointed out at the beginning of my remarks before you arrived, Senator, one of the things that this bill would in effect do would be to amend the definition of employee of the United States under section 2671 of the Tort Act. That is one thing. That can be done and there is no problem with doing that, but that still does not answer the question of whether there is sufficient control.

Now, if we are leaving everything as it is and just saying Congress stays with the status quo, but that the United States has sufficient control over these National Guard personnel for the United States to respond in damages for their acts, then the Congress is running squarely into the face of the Supreme Court decision in *Levin*. There is

no more or less control since *Levin* than there was before it. The element of control has not changed and in *Levin* the Supreme Court plainly said there is not sufficient control there.

Senator BARTLETT. But can that control be also gained—but there is sufficient control?

Mr. PETERSON. To answer your question, Senator, yes. The Congress, I imagine, could enact legislation providing for more control, more day-to-day control of the National Guard by the Federal Government. Whether specifically that would be constitutional or not in view of article I, section 8, and possibly of the fifth amendment of the Constitution I don't know; I wouldn't address that question.

But this is the highlight, Senator, the day-to-day control, and let me read just one sentence from the *Orleans* decision where the Supreme Court said:

The question here is not whether the county action agency receives federal money and must comply with federal standards and regulations, but whether its day-to-day operations are supervised by the federal government.

Now, this is the same touchstone that was involved in the *Levin* decision, the day-to-day supervision. The Supreme Court felt there was not an adequate amount of that in *Levin*. It has reiterated the same standards in *Orleans*.

Yes, I believe you could adopt broad-reaching legislation to effectuate more day-to-day control over the doctors. For instance, you could probably say they are part of the military establishment if you want—just actually take them in as Federal doctors if it didn't meet with a constitutional objection—because they are also in the National Guard.

I am not prepared to address that specific constitutional question of such far-ranging implications. Yes, mechanically you could pass such legislation and in my opinion it would be necessary at a minimum to effectuate enough control to get around the *Levin* and *Orleans* decisions.

Senator BARTLETT. Could this gentleman comment on control?

Colonel CAHILL. My position is that if Congress sees fit, it can say *Levin* be damned. That is my proposition. That is, I am not going to argue against the Supreme Court as it construed the Federal Tort Claims Act in 1965 in *Levin*. I can't—that is the law of the land. If this subcommittee were to report the bill out favorably and it goes out on the floor of the Senate and through the House of Representatives, it is the law of the country and if you want to designate that OEO under the Federal Tort Claims Act that you have sufficient control as far as you are concerned, I say you can do it. That is my very point.

I say that you can say as regards National Guardsmen that there is sufficient concept of control as far as we are concerned. We intend to include them within the act. We intend to measure the liability just as this case says, because that is the power of Congress.

General GREENLIEF. Might I also add, sir, that there has been a significant increase in Federal control since the *Levin* case. For example, that was in 1965. Today, the day-to-day activities of the National Guard are managed and controlled by the technicians who are Federal employees. In addition, there has been a great increase in control and supervision by both the Active Army and the Active Air Force over the training of the National Guard, a very significant increase in that 11-year period.

I know that very well. I was very much a part of establishing those controls and it is a significant increase. Whether or not it is a significant increase enough for a court to consider, I don't know, but it does meet the criteria of a significant increase in Federal control.

Senator BARTLETT. Thank you.

Senator BYRD. I just have one question for Mr. Peterson. Would it be possible to provide for Federal reimbursement of State losses as a result of individual State liability for members of the National Guard?

Mr. PETERSON. Mr. Chairman, do I correctly understand that you are assuming the State has in some manner or other in effect picked up the tab for liability?

Senator BYRD. Assume just for the purpose of discussion the State assumes the liability.

Mr. PETERSON. As we are asking the Federal Government to?

Senator BYRD. Yes.

Mr. PETERSON. I think that under the out-and-out grant program unrelated to the Federal Tort Claims Act, if the Congress wanted, in its wisdom, to make that a part of the bill, it would be paid for by the National Guard. I think it could do so, and I think it could probably do that without constitutional objection.

Senator BYRD. Thank you very much.

General GREENLIEF. We appreciate very much the opportunity, sir.

Senator BYRD. The hearing is adjourned.

[Whereupon, at 4:02 p.m., the subcommittee adjourned, subject to call of the Chair.]

ARMED SERVICES COMMITTEE DISCUSSION, S. 1395, IN OPEN SESSION

FRIDAY, SEPTEMBER 10, 1976

U.S. SENATE,
COMMITTEE ON ARMED SERVICES,
Washington, D.C.

The committee met, pursuant to notice, at 9:50 a.m. in room 212, Russell Senate Office Building, Hon. John C. Stennis, chairman, presiding.

Present: Senators Stennis, Cannon, Byrd of Virginia, and Nunn.

Also present: T. Edward Braswell, Jr., chief counsel and staff director; W. Clark McFadden II, general counsel; John T. Ticer, chief clerk; Phyllis A. Bacon, assistant chief clerk; Charles J. Conneely, Kenneth W. Fish, John A. Goldsmith, James C. Smith, Francis J. Sullivan and George F. Travers, professional staff members; and Louise R. Hoppe and Robert Ujakovich, research assistants. Susan Pitts, assistant to Senator McIntyre; Christopher Lehman, assistant to Senator Byrd; Doug Racine, assistant to Senator Leahy; Ron Lehman, assistant to Senator Scott; and Fred Ruth, assistant to Senator Bartlett.

The CHAIRMAN. Senator Byrd, chairman of the General Legislation Subcommittee, will recommend to us now the so-called medical malpractice bill.

Senator Byrd, we are glad you could be here. We will put this bill on the table and make a record of it.

We will dispose of it in good time.

Senator BYRD. Thank you, Mr. Chairman.

Mr. Chairman and gentlemen of the committee, I present to the committee H.R. 3954, malpractice protection for defense medical personnel.

The purpose of H.R. 3954 is intended to provide through application of the Federal Tort Claims Act and within the scope of their duties for the Department of Defense protection from individual liability active-duty medical personnel.

In short, defense medical personnel would be immunized from malpractice suits.

The bill would eliminate the need for malpractice insurance for defense medical personnel, including physicians, dentists, nurses, and other medical support personnel.

H.R. 3954 would have the following principal effects: To 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. It would require the Attorney

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

It would 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, namely when a malpractice claim arises in a foreign country.

What is the need?

Presently, the protection of the Federal Tort Claims Act is available to Defense medical personnel in malpractice suits only if the plaintiff chooses to sue the Federal Government. For a variety of reasons, however, plaintiffs may prefer to sue defense medical personnel in their individual capacity for malpractice.

Thus, defense medical personnel are exposed to a significant risk of malpractice liability. This risk of malpractice liability is particularly severe for Defense medical personnel who, unlike their civilian counterparts, must respond to military orders in providing medical services and must do so at lower pay.

Without this legislation, the recruitment, retainment and morale of Defense medical personnel can be expected to suffer greatly.

H.R. 3954, in its present form, differs from the House-passed version in essentially two ways. One, coverage of medical personnel has been expanded to include the Central Intelligence Agency, the National Aeronautics and Space Administration, and the Coast Guard.

Two, the National Guard medical personnel are protected when they are operating in a training status with Federal pay. What to do with National Guard personnel, has caused something of a problem. Because of constructional and statutory problems, the National Guard is not included under the coverage of the Federal Tort Claims Act, but instead is provided with Federal indemnification of any malpractice liability against National Guard medical personnel.

This approach avoids the legal objections of the Department of Justice and has the support of the National Guard Association.

The Defense Department also supports the bill in its present form.

The malpractice protection provided by H.R. 3954 is urgently needed at this time. I recommend that the bill be reported favorably by the committee, Mr. Chairman.

The CHAIRMAN. That is a very good report.

While we are on this legal point, you mentioned indemnification. I believe our General Counsel, W. Clark McFadden II, worked on this.

Senator BYRD. Clark McFadden worked out the technicalities of it. If the committee would like more detail, I would like Mr. McFadden to speak.

The CHAIRMAN. For the record, you have three hard-headed lawyers here. Let's let Clark make a statement. I have not warned him of this.

Mr. McFADDEN. In the present form, the bill essentially parallels a variety of other legislation for other parts of the Federal Government to provide malpractice protection, that is, the Veterans' Administration has this and the Public Health Service. The State Department just recently received a similar authorization. The legislation is fairly straightforward, although it involves some technicalities relating to tort law and court application of tort law.

Extending protection to the National Guard presented a particularly difficult problem because the approach of the Federal Tort

Claims Act is dependent upon the U.S. Government waiving its sovereign immunity for the torts of its own employees.

National Guardsmen, when they are in a training status, are under the authority of the State Governor and are technically not employees of the Federal Government. In fact, the militia clause of the Constitution specifically states that the authority to train the militia is reserved to the States.

If we were to try to put the National Guard under the framework of the Federal Tort Claims Act, we would encounter both constitutional and statutory problems. At the same time, I think the subcommittee was convinced that the National Guard, in particular, has a real problem with malpractice liability. Most of their training, particularly with the Air National Guard, is done for Federal purposes. Also, it is often done outside their own State and in conjunction with Federal military forces.

Senator NUNN. They are receiving Federal pay.

Mr. McFADDEN. They are receiving Federal pay, and they are flying jet aircraft, and so forth. Such training often does not relate to a State mission.

In such situations medical personnel are not covered by their own normal malpractice insurance, since most malpractice insurance now is tied to the particular hospital or area in which the medical personnel practice.

So were these medical people not to have any protection from the Federal Government, it would be a tremendous risk to them to participate in Guard exercises and training.

Senator NUNN. Also, the affiliated brigade concept, they train with Federal troops, in some cases. I know in Georgia, for instance, we have a National Guard brigade affiliated with the division at Fort Stuart.

Mr. McFADDEN. There is a strong rationale and justification for the Federal Government to step in and provide some protection to these people.

The CHAIRMAN. On the legal side, now, you are convinced that the bill makes the proper distinctions, and straddles the two, on the idea of indemnification, the State-Federal?

Mr. McFADDEN. Yes. It fully protects National Guard medical personnel.

Senator NUNN. Could he go into a little bit more detail about what has been done in this bill to take care of that National Guard problem?

Mr. McFADDEN. What we do to avoid going through the framework of the Federal Tort Claims Act is simply to provide for a gratuitous assumption of liability by the Federal Government of any liability against an individual guardsman while operating within the scope of his duties in a specified status. This would thereby make the Federal Government liable under the Judgments and Claims Act for all liability, all costs, including legal expenses, and any other fees that the guardsmen incur, as the result of any action that they took in this particular training status.

It does have the slight disadvantage that the guardsman would be reimbursed only after he has gone through a whole court process or the claim is finally settled or determined, but we felt that with this legislation on the books that Guardsmen would be able to go out

and get legal help on the basis that the lawyers receive their fee after the claim is settled. Therefore, there would be no personal financial liability to any medical personnel through this whole process.

Senator BYRD. I think that we should point out that the National Guard would have preferred to come under the Federal Tort Claims Act. The Justice Department strongly opposed that, and this represents a compromise between the two positions.

As I understand it, both the Department of Justice and the National Guard Association now approves this compromise proposal.

Senator Bumpers testified in favor of the original proposal, but I understand he also has approved this.

Senator NUNN. I think that Senator Byrd and Clark have done a good job, working at a very difficult problem.

The CHAIRMAN. Senator Cannon?

Senator CANNON. Mr. Chairman, the Federal Tort Claims Act is somewhat limited in scope, and I would like to ask if this has a broader liability arena than one would have under the normal Federal Tort Claims Act?

Mr. McFADDEN. Yes, it does, as a matter of fact. The Federal Tort Claims Act has a long list of exceptions.

One in particular that is relevant to medical malpractice is assault and battery. Assault and battery is not covered as a tort under the Federal Tort Claims Act.

What has happened, in several State jurisdictions in cases of medical malpractice, is plaintiffs will plead that what would reasonably be considered malpractice is instead assault and battery. That is, if an operation was done on someone's arm and his arm became damaged as a result of the operation, he would plead that the damage done to him constituted assault and battery rather than malpractice, and thereby try to get out from under the Federal Tort Claims Act.

We have specifically nullified the exception of assault and battery in this bill so assault and battery actions would come under the protection of the Federal Tort Claims Act.

That is the only situation that we have found that we need to expand the coverage of the Federal Tort Claims Act.

Senator CANNON. Are you saying that to expand that coverage under the Federal Tort Claims Act so that the protection is exactly the same whether you are suing under the Federal Tort Claims Act or whether you are suing the National Guard personnel exclusive under this bill?

Mr. McFADDEN. We are saying the protection between the National Guard and Federal employees is exactly the same, the payment of the Federal Government in the end is exactly the same.

The difference is, under the Federal Tort Claims Act, the Justice Department defends you, so you do not have legal costs.

Senator NUNN. You say assault and battery? Let us say a regular Army doctor is charged with civil suit assault and battery. Is that covered under the Federal Tort Claims Act, or not?

Mr. McFADDEN. That would not be covered.

Senator NUNN. What happens to it?

Mr. McFADDEN. There is no immunity. The Federal Government is not liable for assault and battery by its employees.

Senator NUNN. Individual liability, not Federal liability?

Mr. McFADDEN. We closed that loophole in this legislation. That is the exception, assault and battery, does not apply. The Federal Government will accept the liability in that case.

Senator NUNN. For both Guard and—

Mr. McFADDEN. Guard and the Federal Government.

Senator NUNN. How broad do you make it now? I see the reason for doing that, but suppose instead of operating in assault and battery, a doctor walks up and hits somebody on the head with a pipe.

Is that included, too?

Mr. McFADDEN. The protection is limited to medical personnel acting within the scope of their official duties within the Defense Department.

Senator NUNN. You do not open up the whole field of assault and battery?

Mr. McFADDEN. No, sir.

The CHAIRMAN. That is what I was going to ask.

What is the possibility of opening up other exceptions?

Mr. McFADDEN. There is at lot of case law on this matter, relating to the medical personnel in the Federal Government. I think that the Justice Department is satisfied that we are not opening this up in any way, and most of these loopholes have been very well-defined in the law already.

The CHAIRMAN. Senator Cannon?

Senator CANNON. This is not precisely on this bill.

I would like to ask the question while we are on it, what is the extent of liability of the Guard for Guard employees?

I am thinking of this type of situation, because as a lawyer, I tried a Federal tort claims case many years ago in which a pilot did not exercise the proper degree of skill and flew into an operations building and very seriously injured a woman working therein.

What is the liability of the Guard in that kind of a case, now, because they obviously could not be covered under the Federal Tort Claims Act.

Mr. McFADDEN. Right.

This legislation does not affect anything other than medical malpractice.

Senator CANNON. I understand that, generally.

Mr. McFADDEN. Generally, the problem would be that the individual guardsman is liable or the State is liable, if the State has waived sovereign immunity. A classic case occurred in Iowa where a guardsman negligently crashed his jet. There was a tremendous financial liability associated with the crash. Naturally the State wanted the Federal Government to come in and pay the liability.

The Federal Government refused to assume the liability. The Justice Department prevailed in extended litigation and the Federal Government would not pick up the liability.

Finally, the Governor of Iowa declared that he was going to close down the Guard in Iowa. He grounded the Air National Guard, at which point the Defense Department said, we will pay the liability gratuitously, without admitting whether we are legally liable or not.

Senator NUNN. Does that set a precedent so now the Federal Government is virtually liable?

Mr. McFADDEN. As a practical matter, in that sort of situation, the State has great leverage over the Federal Government to say, if you will not pay, we will just ground the Air National Guard, whose primary function is Federal. Arguably 99 percent of the Air National Guard is for Federal purposes.

The CHAIRMAN. Any other discussion of this bill?

All right, Senator, you make a motion, and I will second it.

Senator BYRD. I so move.

The Chairman. I second.

All right. We will let this lie on the table now. It is up for further discussion. I hope we can pass on it very early next week.

All right. Do you have anything further, Senator Byrd?

Senator BYRD. That is all, Mr. Chairman.

The CHAIRMAN. Thank you very much for going into all of these matters and doing this work. It has not been easy, I can tell.

The committee went on to other matters.





