SEC. 706. CLARIFICATION OF APPLICABILITY OF FEDERAL TORT CLAIMS ACT TO SUBCONTRACTORS EMPLOYED TO PROVIDE HEALTH CARE SERVICES TO THE DEPARTMENT OF DEFENSE.

Section 1089(a) of title 10, United States Code, is amended in the last sentence by—

(1) striking "if the physician, dentist, nurse, pharmacist, or paramedical" and inserting "to such a physician, dentist, nurse, pharmacist, or paramedical";

(2) striking "involved is"; and

(3) inserting before the period at the end the following: "or a subcontract at any tier under such a contract".

Section-by-Section Analysis

Section 1091 of title 10, United States Code, permits the Department of Defense and the military services to award personal services contracts to companies and individuals, so that the workers under those contracts provide health care services under government supervision and control. Section 1089 of title 10 provides that the personal services contract health care workers, under authority of section 1091, are covered as government employees for medical malpractice purposes under the Federal Tort Claims Act. However, it is not clear whether this coverage also applies to subcontractors. This proposal resolves this issue by including those individuals working under a subcontract, ensuring the viability of personal services contracts for health care services at medical treatment facilities (MTF's).

Clarity on this issue is important as it significantly impacts the staffing of all military MTF's as a large percentage of health care services are contracted and the bulk of those are personal services. Having a prime contractor supported by multiple tiers of subcontractors has become the norm, not the exception, under these contracts. The services must be able to promise all contract health care providers that they will be shielded from malpractice liability no matter which contractor tier actually supplied the providers on the MTF's behalf.

The Navy has contracts in place for more than 4600 personal services contract (PSC) health care workers (HCWs) providing services at various MTFs, including those with a high percentage of deploying military providers and those that provide care for large numbers of returning wounded warriors. Personal services contract providers work on-site at MTFs, integrated within the department and are supervised by government personnel. These health care workers fill many specialties, including critical Post-Deployment Health Reassessment (PDHRA) and Psychological Health/Traumatic Brain Injury (PH/TBI) positions. The Army and Air Force also contract for thousands of personal services contract providers. Personal services contracts include express language which indicates that the contracts are for personal services

and that the workers will be supervised as government employees. As such, based on the contract language and the administration of the contract, an employer-employee relationship is created between the government and the health care worker.

By statute, the contractors/workers are not required to assume medical malpractice liability. This greatly reduces the costs of the contract to obtain critical health care services to supplement active duty and civilian personnel, as well as provide specialties and/or locations that aren't available in the government workforce. These contracts include contracts awarded directly to individuals and those awarded to companies who then recruit health care workers. Estimates are that more than half of personal services contracts awarded to companies are subcontracted to other companies. Often, contractors utilize subcontractors with expertise in recruiting for a medical specialty, e.g., labor and delivery registered nurses.

This proposal will ensure that 1) personal services contracts may continue to be used by the military services; 2) avoid disputes with contractors and health care workers over relevant statutory and contract terms; and, 3) avoid the need to convert services to more costly and less effective non-personal services contract vehicles.

Budget Implications: The proposal has no budgetary impact as it addresses medical malpractice under services contracts and not amounts appropriated for procurement of items or services.

Changes to Existing Law: This proposal would amend section 1089(a) of title 10, United States Code, as follows:

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

(a) The remedy against the United States provided by sections 1346 (b) and 2672 of title 28 for damages for personal injury, including death, caused by the negligent or wrongful act or omission of any physician, dentist, nurse, pharmacist, or paramedical or other supporting personnel (including medical and dental technicians, nursing assistants, and therapists) of the armed forces, the National Guard while engaged in training or duty under section 316, 502, 503, 504, or 505 of title 32, the Department of Defense, the Armed Forces Retirement Home, or the Central Intelligence Agency in the performance of medical, dental, or related health care functions (including clinical studies and investigations) while acting within the scope of his duties or employment therein or therefor shall hereafter be exclusive of any other civil action or proceeding by reason of the same subject matter against such physician, dentist, nurse, pharmacist, or paramedical or other supporting personnel (or the estate of such person) whose act or omission gave rise to such action or proceeding. This subsection shall also apply ~~if the~~ <u>to such a</u> physician, dentist, nurse, pharmacist, or paramedical or other supporting personnel (or the estate of such person) ~~involved is~~ serving under a personal services contract entered into under section 1091 of this title <u>or a subcontract at any tier under such a contract</u>.

* * * * *