MEMORANDUM

TO : Office of the Director, NIH
Institute Directors
Scientific Directors
Clinical Directors
Department Chiefs, Clinical Center

February 9, 1954

FROM : Director, Clinical Center

SUBJECT: Malpractice--Information regarding case of Koos v. United States

Following is a copy of a memorandum from Mr. Edward J. Rourke, addressed to Dr. Shannon, and a summary report of a recent court decision which will be of interest to the NIH staff.

S/

John A. Trautman

TO : Dr. James A. Shannon
Associate Director, NIH

February 4, 1954

FROM : Edward J. Rourke /s/ E.J.R.

SUBJECT: Malpractice--Koos v. United States

For your information there is attached a summary report of a recent court decision having significance to your clinical staff. In brief the decision indicates that if an injured patient in a Government hospital bases his claim for damages not on negligence but on the absence of a legally effective consent to the procedure that harmed him, then the United States Government is not liable.

Such a decision leaves the Government physician and his associates solely liable for the damages. As a practical matter the decision emphasizes the importance to staff members personally of securing informed and competent consents to any procedures involving risk of harm.

U.S.D.C. Minn. (Joyce, J.); Koos v. United States, January 15, 1954.

22 LW 2334 (1/26/54)

Veteran whose right leg, instead of his injured left leg, was operated upon at Veterans Administration hospital cannot recover under Federal Torts Claims Act since Act excludes injuries based on assault and battery.

The act of the surgeon in performing the operation without the veteran's consent constituted an assault and battery under applicable Minnesota law. This rule is not peculiar to Minnesota but is the general rule.

Of course the same act and others as alleged, including the negligence of the employees other than the surgeon, would also constitute sufficient basis for recovery in a negligence action. But the mere existence of what might be referred to as a separable claim based on negligence does not negative the existence of assault and battery.

(Text) "It does not appear that the words 'assault and battery' as found in [28 U.S.C. 2680 (h), Sec. 421 (h) Federal Tort Claims Act] have such a narrow or restricted scope as to exclude the performance of such surgical operation. Such history as is available with reference to the section does not disclose any clear legislative purpose or intent with reference to the exclusions enumerated, so as to warrant a departure from the plain meaning of the phrase. Cf. Note, 56 Yale L.J. 534, 547. Nor is its plain meaning colored and limited by the other categories of torts included in the enumeration. The section is not limited to intentional or violent torts. Jones v. United States, 2d Cir., 22 Law Week 2204. Even if the term was subject to interpretation it does not appear that any different result would be reached. Although the scope of the Act as a whole should not be restricted by refinement of construction, 'the sovereignty of the United States raises a presumption against its suability, unless it is clearly shown; nor should a court enlarge its liability to suit beyond what the language requires.' Eastern Transportation Co. v. United States, 272 U.S. 675, 686. Cf. Dalehite v. United States, 346 U.S. 15 [21 LW 4431]. The one case directly considering the content of the term 'assault' as found in this section has held it includes acts not embraced within its common law meaning. United States v. Hambleton, 9th Cir., 185 F.2d 564."

Since the unauthorized operation constituted an assault and battery, any attempt to segregate and separately state a cause of action for negligence is unavailing. The fact of the negligent transfer of the site of the operation and the resulting delay in performing the wanted operation "arose out of" the assault and battery and formed an integral part of the entire incident.

(Text) "It is immaterial that the negligence may have occurred first in point of time. United States v. Wilcox, D.C., S.D.N.Y., 22 Law Week 2271. See Duenges v. United States, D.C., S.D.N.Y., 114 F. Supp. 751 [22 LW 2141] (claim arising out of false imprisonment); Broadway Open Air Theatre, Inc. v. United States, 4th Cir., 22 Law Week 2250 (claim arising in respect of the assessment or collection of any tax)."