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IN FOCUS

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Military Medical Malpractice and the *Feres* Doctrine

The Department of Defense (DOD) employs physicians and other medical personnel to administer health care services to servicemembers. Occasionally, however, patient safety events occur and providers commit medical malpractice by rendering health care in a negligent fashion, resulting in the servicemember's injury or death. This In Focus discusses the standards and procedures governing the disposition of medical malpractice claims that servicemembers and non-servicemembers assert against the United States, as well as pertinent considerations for Congress.

Malpractice Claims: Servicemembers

Outside the military context, a victim of medical malpractice may potentially obtain recourse by pursuing litigation against the negligent provider and/or his employer. A servicemember injured as a result of malpractice committed by a military health care provider, however, may encounter significant obstacles if he attempts to sue the United States. Although the United States has rendered itself amenable to certain types of lawsuits by enacting the Federal Tort Claims Act (FTCA), the Supreme Court has interpreted the FTCA to immunize the federal government from liability "for injuries to servicemen where the injuries arise out of or are in the course of activity incident to service." According to the Court, "suits brought by service members against the Government for injuries incurred incident to service" would undesirably embroil "the judiciary in sensitive military affairs at the expense of military discipline and effectiveness." This exception to tort liability is known as the *Feres* doctrine, after the 1950 Supreme Court decision that first articulated the rule. Many lower federal courts have concluded that *Feres* generally prohibits military servicemembers from asserting malpractice claims against the United States based on the negligent actions of health care providers employed by the military. (Different legal standards might apply, however, to independent contractors who the United States hires to provide health care services to servicemembers.)

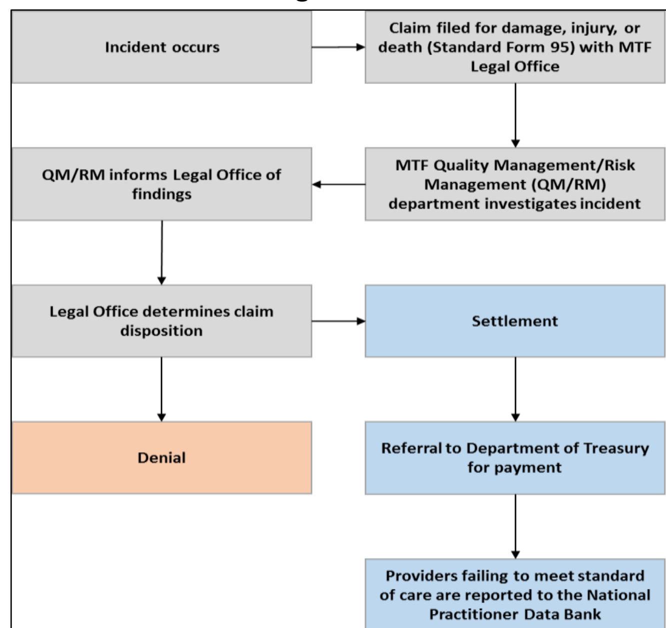
Alternatives to Tort Liability

As a result of *Feres*, servicemembers harmed by the malpractice of a military health care provider must ordinarily pursue avenues other than FTCA litigation against the federal government to obtain monetary compensation or other forms of relief. One potential avenue is Servicemembers' Group Life Insurance (SGLI), which "automatically insure[s] . . . any member of a uniformed service on active duty" up to $400,000 "against death" unless the servicemember "elect[s] in writing not to be insured." Federal law also entitles any "member of an armed force . . . who dies while on active duty" to a $100,000 "death gratuity paid to or for the [servicemember's] survivor." An injured servicemember who is no longer fit for duty may also be eligible for a disability rating and accompanying compensation through the Integrated Disability Evaluation System. Injured servicemembers may be entitled to other benefits as well; for instance, servicemembers may continue to receive free health care while they remain in the military. The Department of Veterans Affairs may also continue to provide free or low-cost health care to servicemembers after they are discharged from the military, as well as other benefits.

Malpractice Claims: Non-servicemembers

Depending on the circumstances, victims of military medical malpractice who are non-servicemembers (such as military retirees, spouses, and children of servicemembers) may still be able to pursue litigation against the United States under the FTCA. However, the FTCA's statute of limitations and administrative exhaustion requirement generally require the claimant to file a claim with the agency within two years of the date on which the claimant knows of the factual basis for his injury and its cause. **Figure 1** illustrates the administrative process for settling a medical malpractice claim against the United States.

Figure 1. Adjudicating Malpractice Claims for Non-servicemembers Through the Administrative Process



Source: Department of Defense.

Note: Graphic adapted by CRS. MTF = Military Treatment Facility.

Under 28 U.S.C. § 2672, federal agencies may settle certain claims for "personal injury or death caused by the negligent or wrongful act or omission of any employee of the agency while acting within the scope of his office or employment" and issue compensatory damages. Although there are no statutory caps on compensatory damages issued by or on behalf of DOD, the Attorney General or his designee must approve in writing settlements in excess of $300,000.

Considerations for Congress

Addressing the *Feres* Doctrine

Over the past several decades, Congress has held multiple hearings to assess whether to modify the *Feres* doctrine to allow servicemembers to pursue medical malpractice litigation against the United States. Opponents of *Feres* maintain that the military benefits discussed above are not sufficient to fully compensate victims of military medical malpractice for their injuries. Supporters, by contrast, argue that allowing servicemembers to sue the government for the medical decisions of military employees would adversely affect military order, discipline, and effectiveness.

Because the *Feres* doctrine is predicated upon a judicial interpretation of the FTCA, Congress possesses the ability to override *Feres* by amending the FTCA. To that end, Members of Congress have periodically introduced bills that would abrogate the *Feres* doctrine with respect to medical malpractice claims. To date, however, none have passed.

Legislative proposals to modify the *Feres* doctrine implicate a variety of legal, economic, and policy issues. First and foremost, broadening the circumstances in which servicemembers may validly sue the federal government would likely increase the amount of money the United States must pay each year to defend against litigation and satisfy adverse monetary judgments. Leaving *Feres* unchanged, however, could result in innocent servicemembers bearing the financial burden of the government's negligence. As an alternative to increasing the government's exposure to suit by narrowing its immunity under *Feres*, Congress could offer additional non-judicial remedies to servicemembers injured by military medical malpractice, such as by expanding servicemembers' entitlement to military or veterans benefits.

Addressing Medical Quality Management

Congress may also consider addressing factors that may contribute to medical malpractice incidents or the quality of care in DOD health care facilities.

Standardization of DOD's Patient Safety Program. Currently, DOD uses sentinel event (i.e., adverse medical events that are likely to cause patient injury or death) data to "inform system-wide patient safety improvement initiatives." However, each DOD entity that administers military treatment facilities (i.e., Defense Health Agency, Army, Navy, and Air Force) has different procedures for reporting and tracking sentinel events. A 2018 Government Accountability Office (GAO) review of DOD's patient safety program and adverse medical event reporting identified numerous inconsistencies in policies and processes. GAO also found that the "fragmented process" for tracking led to missing or incomplete reports and duplicative reporting. DOD plans to initiate program standardization as part of congressionally directed Military Health System reform that transfers the administration of military hospitals and clinics to the Defense Health Agency. Congress could engage in further oversight of DOD's implementation of these efforts or direct additional study on the relationship between adverse medical events, patient safety initiatives, and malpractice trends.

Defensive Medicine Practices. DOD providers may practice defensive medicine, or the use of unnecessary tests, procedures, or medications to avoid potential malpractice. Recent civilian health care delivery studies have associated the use of defensive medicine practices with increased health care costs, reduced quality of care, and reduced patient satisfaction. Congress could direct further study on the prevalence of defensive medicine practices in DOD and direct measures to maintain health care quality, maintain data transparency, and curb health care costs.

Relevant Statutes and Regulations

10 U.S.C. §§ 1475-1491—Benefits for Deceased Personnel

10 U.S.C. §§ 1071-1110b—Military Medical Care

28 U.S.C. §§ 1346(b)(1), 2401(b), 2671-80—Federal Tort Claims Act

38 U.S.C. §§ 1965-1980a—Servicemembers' Group Life Insurance

28 C.F.R. § 14—Administrative Claims Under the Federal Tort Claims Act

32 C.F.R. § 536.80—Payment of costs, settlements, and judgments related to certain medical malpractice claims

32 C.F.R. § 536.84—Scope for claims under the Federal Tort Claims Act

CRS Products

CRS In Focus IF10530, *Defense Primer: Military Health System*, by Bryce H. P. Mendez

Other Resources

Feres v. United States, 340 U.S. 135 (1950)

United States v. Johnson, 481 U.S. 681 (1987)

Government Accountability Office, *Defense Health Agency Should Improve Tracking of Serious Adverse Medical Events and Monitoring of Required Follow-up*, GAO-18-378, April 2018

U.S. Congress, House Committee on the Judiciary, *Carmelo Rodriguez Military Medical Accountability Act of 2009: Report to Accompany H.R. 1478*, 111th Cong., 2d sess., 2009, H.Rept. 111-466

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