The changing landscape of military medical malpractice: from the Feres Doctrine to present

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Medical malpractice suits within the military have historically been limited by the Feres Doctrine, a legal precedent arising from a Supreme Court decision in 1950, which stated that active-duty personnel cannot bring suit for malpractice against either the United States government or military healthcare providers. This precedent has increasingly become a focus of discussion and reform as multiple cases claiming malpractice have been dismissed. Recently, however, the National Defense Authorization Act of 2020 initiated the first change to this precedent by creating an administrative body with the sole purpose of evaluating and settling claims of medical malpractice within the military's \$50 billion healthcare system. This article seeks to present the legal history related to military malpractice and the Feres Doctrine as well as discuss the potential future implications that may arise as the Feres Doctrine is modified for the first time in 70 years.

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ON July 3, 1945, an aviation mechanic in the United States Army underwent a cholecystectomy at Fort Belvoir Community Hospital, a military treatment facility (MTF) in Virginia. Following his honorable discharge from the military in 1946, he sought treatment at Johns Hopkins University Hospital in Baltimore, Maryland, for progressive nausea and emesis. During surgery at Johns Hopkins, a 30-inch by 18-inch surgical towel bearing the legend "Medical Department U.S. Army" was discovered in his abdomen and removed. The civil suit that ensued alleged that the towel was left in his abdomen as a result of negligence during his surgery at Fort Belvoir, and while it was determined as a matter of fact that negligence had occurred, the court held that as a matter of law, the United States government could not be held liable.

This case, *Jefferson v United States*, was one of the original tests of the ability of servicemembers or their families to seek recompense from the United States government for injuries occurring as a result of negligent medical care, and has formed the basis for subsequent interpretations of federal liability for medical malpractice. Courts have almost uniformly held that members of the armed forces cannot sue the government in such circumstances.^{1,2} Recent legislation, however, has provided servicemembers and their families with an avenue to obtain some degree of

compensation. In the following article, we present the historical barriers to litigation for military medical malpractice, and consider this new legislation and its implications for the future of military medicine.

The History of Military Medical Malpractice

Civil litigation against the United States government is permitted under the Federal Tort Claims Act (FTCA 1946), which waives sovereign immunity and allows individuals to bring a claim against the government.^{2,3} An important exception to the legal remedies provided by the FTCA, however, is in the special case of injuries related to active-duty service in the military, even when those injuries are caused by negligence on the part of the federal government or its representatives. This interpretation of the FTCA forms the basis of the Feres Doctrine.

In 1950, three civil suits were brought against the United States under the FTCA, two of which involved allegations of medical malpractice.³ These cases were subsequently combined into one unanimous United States Supreme Court opinion (*Feres v United States*, 340 US 135 [1950]). Based on three lines of reasoning, the court held that the government is not liable for the injuries suffered by servicemembers when those injuries are incident to their mil-

ABBREVIATIONS FTCA = Federal Tort Claims Act; MTF = military treatment facility; NDAA = National Defense Authorization Act.

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FIG. 1. Timeline of military medical malpractice claims. This figure displays some of the pertinent attempted tort claims discussed against the United States government in chronological order.^{1,3–18,23,32}

itary service. First, although the FTCA assigns to the government tort liability similar to a private individual under “like circumstances,” there are clear differences between the United States military and private individuals (e.g., individuals are not legally entitled to conscript and mobilize private military forces). Allowing servicemembers to pursue damages for injuries incident to military service would therefore expose the government to “novel and unprecedented liabilities.” Second, although the FTCA defers to the laws of the state in which negligence is alleged to have occurred, the relationship between servicemembers and the military is federal in nature, and personnel are relocated at the discretion of the federal government. Thus, the court argued that it would be inappropriate for military compensation to be based on location. Finally, the court argued that if the FTCA had intended to allow for compensation for military malpractice suits, the legislators would have provided a method for adjusting Veterans Administration disability benefits based on the compensation provided.^{1,2}

Despite frequent would-be tort claims from injured soldiers and dependents, the precedent has been consistently upheld over the past 70 years, even while many decisions have been critical of its principles.^{4–15} Even in decisions that have openly criticized the Feres Doctrine, case after case has upheld its principles.^{15,16} Unable to reverse decades of precedent, several courts have more strictly defined who is and is not subject to the Feres Doctrine. For example, some have excluded discharged veterans injured at Veterans Administration hospitals, whereas others decidedly include military reservists injured or killed in training exercises^{4,6,7} (Fig. 1, Table 1).

In the mid-2000s, as the United States found itself embroiled in Operation Enduring Freedom and Operation Iraqi Freedom, an attempt at reform through legislation was proposed. The Carmelo Rodriguez Military Medical Accountability Act of 2009 sought to allow for claims for personal injury or death of servicemembers from medical negligence in a military setting.¹⁷ Under heavy criticism of its estimated \$2.7 billion price tag, though, it ultimately failed to pass.^{17–19}

The Ethics of the Feres Doctrine

Critics of the Feres Doctrine have generally focused on three main points. First and most obviously, the inability of servicemembers to seek compensation from the government for medical malpractice results in a loss of autonomy and rights. This is compounded by the fact that whether and how much compensation is provided to patients or their dependents is determined by the very same entity alleged to have committed the negligent act.

Second, whereas medical care delivered in the forward-deployed setting is explicitly not subject to the FTCA, the majority of medical care provided to servicemembers is conducted outside of combat zones in modern medical centers.¹⁷ Therefore, there should be no military-related reason why such patients should not expect and receive the same care that they would in a civilian hospital, and thus there should be no reason why they would not be able to sue should their care deviate from the standard of care.²⁰

Finally, critics of the Feres Doctrine note that the stated rationale for upholding the precedent has changed drastically over the years, evolving from the argument advanced in the original decision in 1946 to include protecting military unity, preventing second-guessing of orders, and preventing minimization of wartime injuries by rewarding malpractice injuries at a higher monetary value. The ever-changing explanations for upholding the Feres Doctrine, they argue, suggest a weak legal foundation, and are instead used by the judiciary to avoid actually analyzing the merits of individual cases.^{2,21}

In response, proponents of the Feres Doctrine maintain that increased litigation does not solve the issues at hand. Rather than leaving compensation subject to the court, they hold it would be more just for Congress to create a system or provision for restitution for servicemembers injured by negligent care. Also, they note that because the FTCA permits action against the United States government and not the allegedly negligent individual, litigation in these cases would have minimal impact on changing the behavior of military healthcare providers. In any event, there is already a mechanism for reporting negligent military

TABLE 1. Details on legislation and court decisions regarding military malpractice (1946–2020)

Event	Details/Allegations	Court Decision & Implication
FTCA 1946 ³	A waiver on sovereign immunity.	Grants individuals the power to sue the US government for civil wrongdoings.
<i>Brooks v United States</i> , 1949 ³²	Father and 2 sons struck by military truck. Both sons were in the service at the time.	Draws the line of government responsibility for injury not caused by service.
<i>Feres v United States</i> , 1950 ¹	1. Feres—active-duty servicemembers perished by fire in the barracks. 2. Jefferson—towel left in abdominal cavity postsurgery. 3. Griggs—alleged negligence and unskillful medical treatment by army surgeon.	Government is not liable under the FTCA for injuries to servicemembers when the injuries arise out of or are in the course of activity incident to service.
<i>United States v Brown</i> , 1954 ⁴	Nerve damage, defective tourniquet postsurgery.	A discharged veteran can file tort claims for injury suffered after discharge.
<i>Layne v United States</i> , 1961 ⁵	Fatal crash during training mission.	Officer's widow could not sue the US for negligence.
<i>United States v Carroll</i> , 1966 ⁶	Reservist suffered injuries sustained as a passenger in a military aircraft.	Feres Doctrine applies to reservists.
<i>United States v Shearer</i> , 1985 ¹⁶	Off-duty army private was kidnapped and murdered by another servicemember.	FTCA waiver of sovereign immunity does not apply to claims arising out of assault or battery.
<i>Del Rio v United States</i> , 1987 ¹²	Negligence in prenatal care received.	Child's claim for prenatal injuries was not barred under Feres.
<i>Carmelo Rodriguez Military Medical Accountability Act</i> , 2009 ¹⁷	Amends the FTCA to allow claims for damages for personal injury or death of servicemember secondary to negligence in medical, dental, or other health-related fields.	Bill expired without congressional action.
NDA 2020 ²³	Troops are able to file claims.	Authorizes Secretary of Defense to allow, settle, and pay an administrative claim against the US government in the context of medical negligence.

Includes select events and court proceedings starting from the FTCA through the NDA 2020. Although it covers a majority of the pertinent cases, it by no means is meant to be all-inclusive. This represents the efforts of many servicemembers and their families to fight against the Feres Doctrine principles.^{1,3–18,23,32}

physicians to both the National Practitioners Data Bank and state medical licensing groups.^{10,19,22} Additionally, proponents of the Feres Doctrine point out that only 30% of the patients cared for in the military's healthcare network are active duty; the rest are beneficiaries and dependents. Thus, 70% of patients in MTFs are already able to sue the government under the FTCA.^{17,19}

The Present-Day Military Medical Malpractice Process

In April 2019, Representative Jackie Speers introduced the SFC Richard Stayskal Military Medical Accountability Act of 2019, which proposed an exemption to the Feres Doctrine permitting active-duty servicemembers or their representatives to file a medical malpractice claim against certain Department of Defense facilities. Specifically, the exemption would apply to medical malpractice claims arising within major military clinics and hospitals; care provided in the field (i.e., in combat, on ships, or at battalion aid stations) would continue to be protected under Feres. The act was incorporated into the National Defense Authorization Act for Fiscal Year 2020 (NDA 2020). In doing so, the 116th Congress finally legislated an alternative to the Feres Doctrine. For the first time since 1950, servicemembers who experience personal injury or die due to medical malpractice by a Department of Defense healthcare provider serving in a covered MTF can seek compensation for injuries resulting from negligent

care.²³ Although the change does not specifically permit medical malpractice lawsuits per se, it grants provisions for servicemembers to file administrative claims with the Secretary of Defense for medical malpractice compensation. Effective January 1, 2020, the NDA 2020 covers retroactive negligence claims back to January 2017 and has set aside \$400 million to compensate soldiers over the next 10 years.²³

Discussion and Implications for Military Medicine

The last several months of military medicine have seen a change that has been building for 70 years. Whereas medical malpractice lawsuits remain out of reach to active-duty servicemembers, this new administrative claims process, which provides compensation for injuries due to negligent care, could represent the first step toward more drastic changes. Accordingly, military neurosurgeons may soon face litigation like their civilian counterparts.

Neurosurgeons have the highest annual rate of malpractice claims of any medical specialty, with 19.1% of neurosurgeons facing at least one claim annually. Only 54.2% of these claims are decided in favor of the surgeon, which is lower than the national average of 75% across all other specialties.²⁴ Healthcare liability costs as a whole are estimated to be more than \$55 billion in annual healthcare spending, with an additional estimated \$210 billion in expenses attributed to defensive medicine.^{25,26} The volume

of claims and damages awarded has increased dramatically in the 21st century, particularly in spine surgery.^{27–29} With the increased litigation risk, spine surgeons are up to three times more likely to practice defensive medicine compared to nonspine neurosurgeons.^{25,30}

An important question that needs to be answered is whether tort exposure will decrease medical negligence and improve care. For the time being, military neurosurgeons remain insulated from personal liability, because the FTCA shifts liability to the government.³ Therefore, it is unlikely that compensation awarded to injured patients by the military medical system would significantly affect the individual practice of military physicians.²¹ More to the point, even if the threat of litigation were likely to affect individual practice, as we see in the civilian spine literature, defensive medicine does not lead to better patient care.^{25,31}

Regarding the NDAA 2020, it remains unclear how claims will be processed and awarded after filing. The Congressional Budget Office estimates \$2.7 billion in spending if claims and awards were to mirror the civilian landscape, in contrast to the \$400 million set aside under the NDAA 2020.^{17,19,23} While it seems unlikely that \$40 million awards will be commonplace, with only 15% of the estimated necessary funding allocated, claimants may be unpleasantly surprised.¹⁸ Additionally, claimants will bear the cost of all legal fees regardless of whether or not the case is won. Nevertheless, the NDAA 2020 represents an important first step toward compensating servicemembers injured by negligent care, and a significant departure from the prevailing interpretation of federal liability in medical malpractice.

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