

June 2021

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### Recommended Citation

Taylor C. Spillers, *Fighting the FTCA: Medical Malpractice, Veterans, and the VA*, 74 Ark. L. Rev. 333 (2021).

Available at: <https://scholarworks.uark.edu/alr/vol74/iss2/9>

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# FIGHTING THE FTCA: MEDICAL MALPRACTICE, VETERANS, AND THE VA

Taylor C. Spillers\*

## I. INTRODUCTION

*“Never in my career have I encountered an individual with that many [medical] errors and misdiagnoses.” – Margie Scott, MD<sup>1</sup>*

Dr. Levy, who served as the Chief of Pathology at the Fayetteville Veterans Health Care System of the Ozarks (“Fayetteville VA”) from 2005 to 2018, diagnosed veterans with an error rate of 10%.<sup>2</sup> The “pathology practice average is 0.7%.”<sup>3</sup> Of the more than 3,000 cases Dr. Levy misdiagnosed, 589 were classified as “Level 3 (major) errors” which should always “trigger an [internal] investigation.”<sup>4</sup> Unfortunately, no investigations ensued until Dr. Levy’s ultimate arrest, although the Fayetteville VA addressed Dr. Levy’s behavior repeatedly throughout his employment.

In 2015, the Fayetteville VA received numerous complaints accusing Dr. Levy of drinking on the job, all of which he denied.<sup>5</sup>

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1. Ninette Sosa & Garrett Fergeson, *Former VA Pathologist Sentencing Continues into 2nd Day*, KNWA FOX24 (Jan. 21, 2021), [<https://perma.cc/T8GL-ULNU>] (Dr. Margie Scott is the Medical Center Director at the Central Arkansas Veterans Healthcare System).

2. *Id.*

3. Doug Thompson, *Hidden Errors of Doctor Told in Courtroom*, ARK. DEMOCRAT GAZETTE (Jan. 22, 2021), [<https://perma.cc/R7PB-Y6QZ>].

4. For context, the VA conducted a *nationwide* review around 1990 and found just 100 Level 3 errors *total*. Dr. Levy had 589 in just thirteen years. Sosa & Fergeson, *supra* note 1.

5. *Id.*

In 2016, the Fayetteville VA caught Dr. Levy actively practicing medicine with a blood alcohol level of 0.39 and temporarily suspended him.<sup>6</sup> Dr. Levy was allowed to resume his position as the Chief of Pathology and maintain his annual salary of \$225,000 after completing three months of rehab, swearing to abstain from intoxicating substances, and agreeing to random drug and alcohol testing.<sup>7</sup> For the next two years, Dr. Levy ingested a chemical known as “2-methyl-2-butanol” to achieve a drunken state while going undetected on forty different urine and blood samples he submitted during that time.<sup>8</sup> The Fayetteville VA finally fired Dr. Levy in 2018 after he was arrested for driving under the influence, and an investigation into his former patients began.<sup>9</sup> Dr. Levy took an oath as a physician “to do no harm” but ultimately told hundreds of veterans they had cancer when they did not, or that they did not have cancer when, in fact, they did.<sup>10</sup> He also actively concealed his mistakes by falsifying medical records to appear as though another pathologist agreed with his diagnoses.<sup>11</sup>

Dr. Levy’s case is just one example, although a particularly egregious example, of medical malpractice in the United States, and more specifically, at the U.S. Department of Veterans Affairs (the “VA”).<sup>12</sup> According to the National Practitioner Data Bank, roughly 11,000 to 13,000 medical malpractice payments are made every year nationally.<sup>13</sup> 412 of those payments were made on behalf of VA providers in 2019.<sup>14</sup> Across the board, actual medical malpractice numbers are significantly higher considering 95% of legitimate malpractice victims do not have “meaningful access to the civil justice system . . . unless their damages are significantly larger than [normal],” and many victims simply

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6. *Id.*

7. *Id.*

8. *Id.*

9. Sosa & Ferguson, *supra* note 1.

10. *Id.*

11. *Id.*

12. The term “VA” is used to encompass the U.S. Department of Veterans Affairs, in general, rather than one specific administration within the Department. *See generally About VA*, U.S. DEP’T OF VETERANS AFFS., [https://perma.cc/65BG-764C] (Apr. 6, 2021).

13. *Data Analysis Tool*, NAT’L PRAC. DATA BANK, [https://perma.cc/PD8J-58W6]. (last visited Mar. 8, 2021) (data represents the year of payment, not the year the malpractice occurred).

14. *See infra* Appendix I.

choose not to file lawsuits.<sup>15</sup> For instance, while approximately 1% of hospital patients are injured by malpractice each year, fewer than 2% of those injured will file claims.<sup>16</sup> Studies also show that “the poor and elderly are [even] less likely to sue,” which, demographically speaking, encompasses many veterans.<sup>17</sup>

When veterans do bring medical malpractice claims,<sup>18</sup> however, they find themselves in starkly different legal situations compared to non-veterans (“civilians”).<sup>19</sup> Rather than file a typical medical malpractice lawsuit in state court against the provider or institution directly responsible for the harm, veterans can only sue the United States of America through the Federal Tort Claims Act (“FTCA”).<sup>20</sup> This Article argues that the FTCA should not provide immunity to medical professionals at the VA because it significantly limits veterans’ access to attorneys, to courts, and to damage awards. Part I introduces the FTCA and explores the juxtaposition between civilians and veterans injured by medical malpractice. Part II demonstrates why the FTCA is not only a less favorable option for veterans but one that places veterans at a significant disadvantage compared to civilians. Part III argues that shielding medical professionals from individual liability under the FTCA ultimately harms the reputation of the VA and the providers who deliver quality and competent care to veterans. With recent (and longstanding) calls for change at the VA, removing the FTCA and its immunity in medical malpractice lawsuits is a necessary step towards giving veterans the care they deserve.

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15. See Joanna Shepherd, *Uncovering the Silent Victims of the American Medical Liability System*, 67 VAND. L. REV. 151, 154 (2014).

16. *Id.* at 153.

17. William B. Weeks et al., *Tort Claims Analysis in the Veterans Health Administration for Quality Improvement*, 29 J. L. MED. & ETHICS 335, 340 (2001).

18. For clarification, this is only true if the alleged medical malpractice occurred at a VA medical center and/or at the hands of a medical practitioner employed by the Federal Government. The FTCA does not apply to veterans who are injured by medical malpractice at a privately owned and operated hospital or medical facility and/or a medical practitioner in private practice. See KEVIN M. LEWIS, CONG. RSCH. SERV., R45732, THE FEDERAL TORT CLAIMS ACT (FTCA): A LEGAL OVERVIEW 7-8 (2019), [<https://perma.cc/5FSD-4WKE>].

19. The term “civilian” is used throughout this article only to distinguish between veterans and non-veterans.

20. See 28 U.S.C. § 1346(b); see also 38 U.S.C. § 7316.

## II. BACKGROUND

### A. Department of Veterans Affairs Overview

There are currently more than nineteen million veterans in the United States who courageously served in the U.S. Army, Navy, or Air Force.<sup>21</sup> As compensation for their service, veterans are entitled to free healthcare benefits through the VA.<sup>22</sup> More than nine million of those former servicemen and women utilize and rely on the VA Health Care System today.<sup>23</sup> Although free for veterans, the VA is publicly funded.<sup>24</sup> In the 2019 fiscal year alone, more than eighty billion taxpayer dollars went toward funding veterans' medical care.<sup>25</sup>

As America's largest integrated health care system with 1,454 health care facilities, including 171 VA medical centers and 1,283 outpatient sites across the United States, the VA is a veteran's one-stop-shop for medical, dental, and vision care.<sup>26</sup> Given the magnitude of services it provides, the VA employs more than 367,200 full-time health care professionals and support staff and serves as the "nation's largest provider of graduate medical education" by partnering with academic institutions to provide nearly 117,000 residency, fellowship, and training positions.<sup>27</sup> In addition to directly hiring providers, the VA also independently contracts with a range of health care

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21. *Department of Veterans Affairs Statistics at a Glance*, NAT'L CTR. FOR VETERANS ANALYSIS & STATS., [https://perma.cc/ZTT3-237R] (Dec. 31, 2019) [hereinafter *Statistics at a Glance*]. For purposes of these statistics, Marines are included in the Department of the Navy.

22. *See Eligibility for VA Health Care*, U.S. DEP'T OF VETERANS AFFS., [https://perma.cc/H5GB-S43Y] (Sept. 17, 2020).

23. *Statistics at a Glance*, *supra* note 21.

24. *See Key Elements of the U.S. Tax System: How Much Does the Federal Government Spend on Health Care?*, TAX POL'Y CTR., [https://perma.cc/7D6B-826J] (May 2020).

25. *Id.* *See also About VHA*, U.S. DEP'T OF VETERANS AFFS., [https://perma.cc/Y3M9-GP8M] (Apr. 9, 2021) (The health care system has an "annual budget of approximately \$68 billion.").

26. *About VHA*, *supra* note 25. These numbers are constantly changing as the VA expands and contracts. These figures are current as of April 9, 2021.

27. *Id.* The VA also has more than 46,000 active volunteers and 15,000 affiliated medical faculty. *Id.* These numbers are constantly changing as the VA expands and contracts. These figures are current as of April 9, 2021.

professionals.<sup>28</sup> Unlike civilian patients who select their doctors, veterans are not afforded the right to choose their medical providers at the VA.<sup>29</sup> Instead, veterans are assigned to a healthcare team at a specific VA location.<sup>30</sup>

## B. FTCA Overview

In theory, every individual practicing medicine is susceptible to medical malpractice. Roughly 99% of physicians in high-risk specialties and 75% of those in low-risk specialties face a medical malpractice claim by the age of 65.<sup>31</sup> However, the doctrine of sovereign immunity protects healthcare providers<sup>32</sup> employed by the VA—given their status as federal employees.<sup>33</sup> Therefore, they cannot be sued in their individual capacity for medical malpractice even when they commit blatant wrongdoing, like Dr. Levy.<sup>34</sup> Instead, the government assumes liability on their behalf under the FTCA.<sup>35</sup> Therefore, when a veteran is harmed by the tortious conduct of a VA employee, the veteran's *only* legal course of action is to sue the United States of America under the FTCA rather than file a typical medical malpractice lawsuit against the individuals or institutions responsible for the harm.<sup>36</sup>

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28. Cf. LEWIS, *supra* note 18, at 8-9.

29. *Your VA Primary Care Provider and PACT Team*, U.S. DEP'T OF VETERANS AFFS., [https://perma.cc/XM72-HEAM] (last visited Apr. 30, 2020).

30. *Id.* (A veteran's health care team includes a primary care provider, clinical pharmacist, registered nurse, and licensed practical nurse or medical assistant and clerk).

31. Anupam B. Jena et al., *Malpractice Risk According to Physician Specialty*, 365 NEW ENG. J. MEDICINE, 629, 629 (2011).

32. Under the FTCA, a healthcare provider is "a physician, dentist, podiatrist, chiropractor, optometrist, nurse, physician assistant, expanded-function dental auxiliary, pharmacist, or paramedical (such as medical and dental technicians, nursing assistants, and therapists), or other supporting personnel." 38 U.S.C. § 7316(a)(2).

33. See 20 REASONS DOCTORS LIKE WORKING FOR THE VETERANS HEALTH ADMINISTRATION 27 (2016), [https://perma.cc/RL6B-XGDL] [hereinafter 20 REASONS].

34. 28 U.S.C. § 1346(b)(1); 28 U.S.C. § 2671.

35. 28 U.S.C. § 1346(b)(1). In order for the FTCA to cover VA employees, they must be "acting within the scope of [their] office or employment[.]" meaning they were hired to perform the act in question or were promoting the employer's interest at the time they acted. LEWIS, *supra* note 18, at 11-12.

36. See 28 U.S.C. § 7316(a)(1) ("[D]amages for personal injury, including death, allegedly arising from malpractice or negligence of a health care employee of the Administration in furnishing health care or treatment while in the exercise of that employee's duties in or for the Administration shall be exclusive of any other civil action or proceeding

*1. Purpose and Function of the FTCA*

Before the FTCA's enactment in 1946, a victim injured by a tortious government employee could only recover by asking "Congress to enact private legislation affording them relief[.]"<sup>37</sup> Unsurprisingly, private legislation was rarely granted.<sup>38</sup> To combat this problem and provide victims with a more practical means of compensation, Congress created the FTCA and shifted the burden of deciding complicated tort claims from Congress to the courts.<sup>39</sup> Along with its "compensatory purpose, the FTCA also aims to 'deter tortious conduct by federal personnel' by rendering the United States liable for the torts of its agents[.]"<sup>40</sup> Congress hoped that this would "incentiviz[e] the government to carefully supervise its employees."<sup>41</sup> While the FTCA is an expansive and comprehensive statute, this Article focuses only on the FTCA in the context of medical malpractice at the VA.

Proponents of the FTCA, including Congress, recognize the FTCA's limitations.<sup>42</sup> They argue, however, that veterans should generally prefer to sue the government (under the FTCA) rather than the individual physician (under a civilian medical malpractice claim) because the government has deeper pockets than the physician.<sup>43</sup> In particular, every payment made by the government comes from a "permanent and indefinite

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by reason of the same subject matter against the health care employee (or employee's estate) whose act or omission gave rise to such claim.").

37. See LEWIS, *supra* note 18, at 4.

38. See *id.*

39. See *id.* at 5-6.

40. *Id.* (quoting *Loumiet v. United States*, 828 F.3d 935, 941 (D.C. Cir. 2016)).

41. *Id.*

42. See Thomas K. Kruppstadt, *Determining Whether a Physician is a United States Employee or an Independent Contractor in a Medical Malpractice Action Under the Federal Tort Claims Act*, 47 BAYLOR L. REV. 223, 225-26 (1995) ("Occasionally [it is within] the plaintiff's best interest . . . to argue that the government physician is an independent contractor . . . if [they] prefer[] a jury trial, a state court, or a state statute of limitations that is longer than the two year federal statute of limitations [imposed under the FTCA].").

43. See Christa L. Britton, *Torts: Anderson v. Eichner — Although Faculty Physicians, Resident Physicians, and Interns Face Private Tort Liability for Medical Malpractice, the State is Immune*, 49 OKLA. L. REV. 537, 547 (1996); see also Kruppstadt, *supra* note 42, at 224-25.

appropriation” known as the Judgment Fund (the “Fund”).<sup>44</sup> Congress created the Fund in 1956 to eliminate the need for Congress to determine, settle, and allocate appropriations for each claim brought against the United States.<sup>45</sup> “Originally, the Fund was available only for judgments . . . less than \$100,000,” which Congress believed would cover 98% of claims.<sup>46</sup> However, this proved to be a grossly inaccurate estimate as judgments skyrocketed by the mid-1970s.<sup>47</sup> Since that time, the Fund no longer has a monetary cap and awards of any amount may be appropriated, including attorneys’ fees, post-judgment interest, court fees, and compensation for court-appointed experts.<sup>48</sup>

Nevertheless, most Americans know little to nothing about the Fund or its sizable payments.<sup>49</sup> In 2019, the Fund allocated more than \$100,000,000 solely to victims of medical malpractice at the VA.<sup>50</sup> Notably, the Fund makes payments of this magnitude every year on behalf of negligent VA providers. Figure 1 represents the allocation of funds, both at the administrative level and the court level, from 2005 to 2020.<sup>51</sup>

### Figure 1

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44. VIVIAN S. CHU & BRIAN T. YEH, CONG. RSCH. SERV., R42835, THE JUDGMENT FUND: HISTORY, ADMINISTRATION, AND COMMON USAGE 3 (2013), [<https://perma.cc/NM3X-XUZN>] [hereinafter CRS JUDGMENT FUND].

45. *Id.* at 2-3.

46. *Id.* at 4.

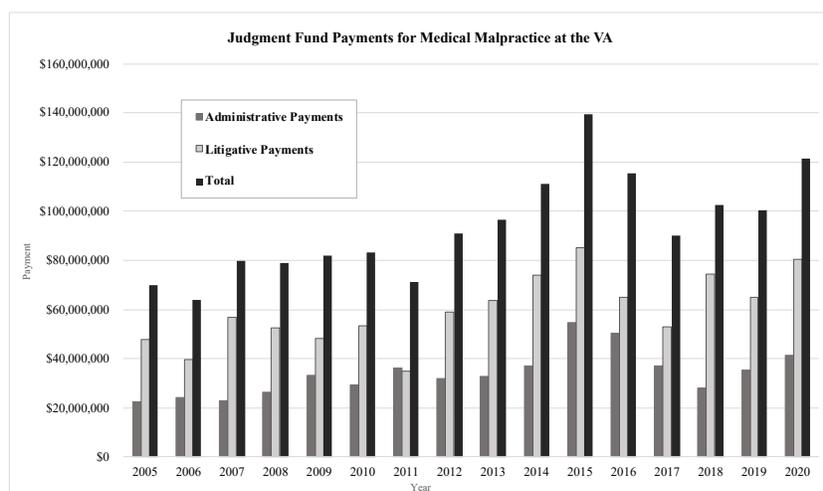
47. *See id.*

48. *See id.* at 8-9 (describing costs allowable under awards paid from the Fund, including other costs approved under 28 U.S.C. §1920, such as transcripts, fees related to witnesses, materials for presentation in the case, and docket fees).

49. *See* Sen. Deb Fischer & Sen. Cory Gardner, *Senators Fischer and Gardner: Obama Administration Is Irresponsible and Risky with Judgment Fund*, TIME (Oct. 13, 2016), [<https://perma.cc/Z4QY-CLBX>] (explaining that the Senators “introduced the Judgment Fund Transparency Act . . . to see how taxpayer dollars are spent”).

50. *See infra* Figure 1.

51. *Judgment Fund Payment Search*, BUREAU FISCAL SERV., [<https://perma.cc/Q374-LPNV>] (last visited Mar. 16, 2021). Search results from January 1 to December 31 each year. Required Search Field refined to Department of Veteran Affairs. Optional Search Fields refined as follows: (1) Type: Principal; (2) Code and Description: 28 U.S.C. 1346(b) Med Mal; 28 U.S.C. 2677 Med Mal; and 28 U.S.C. 2672 Med Mal; (3) Payment Amount: N/A Administrative payments represent settlements made at the administrative level. Litigative payments represent payments made at the federal court level. *See infra* Appendix I (listing the precise payments per calendar year).



Fund values *only* represent the monetary value of settlements and judgments paid by the government to its victims and do not encompass the total cost of medical malpractice paid by the government.<sup>52</sup> On top of Fund totals, the government also pays to defend each medical malpractice claim.<sup>53</sup> For instance, the government pays roughly \$11,300,000 per year to retain VA defense attorneys.<sup>54</sup> Unsurprisingly, the “Fund remains a source of continued controversy and discussion . . . .”<sup>55</sup>

## *2. Mechanics of a FTCA Medical Malpractice Lawsuit*

In practice, medical malpractice claims function much differently under the FTCA than medical malpractice claims brought by civilians against providers in their individual capacity. While both veteran and civilian malpractice claims use the

52. See *Judgment Fund*, BUREAU FISCAL SERV., [https://perma.cc/NY7B-KV24] (last visited Mar. 1, 2020).

53. See Weeks et al., *supra* note 17, at 340-43 (“[O]ther hidden costs—time when providers are giving depositions, time when administrators are reviewing claims—make the overall cost of tort claims [within the VA] much more substantial” than the reported Fund numbers.).

54. *Id.* at 335, 343. Note that reported values are from 1989 to 2000 and could be substantially higher today.

55. CRS JUDGMENT FUND, *supra* note 44, at 1.

substantive law of the state where the tortious conduct occurred, the FTCA substantially changes the procedural law governing a veteran's claim.<sup>56</sup> The two major changes include whom to file a lawsuit against and how.

a. Whom to File a Lawsuit Against under the FTCA

Civilians injured by medical malpractice may tailor their lawsuit towards a multitude of defendants, including the tortious provider, the hospital, and the insurance company that provides malpractice insurance to the provider.<sup>57</sup> Veterans injured by medical malpractice have only one option: the United States of America. Not only does the FTCA control who the defendant is, but it also places many veterans in an uncomfortable position by forcing them to sue the country they once honorably served.<sup>58</sup> The *only* time a veteran can escape the FTCA and, instead, sue the tortious provider through a typical, state malpractice claim is when that provider happens to be an independent contractor to the VA.<sup>59</sup>

Still, the distinction between employees and independent contractors has not always been clear and has hindered many veterans' chances of recovery altogether. Veteran Brian Tally serves as one example. Tally filed a claim under the FTCA after his doctor—whom Tally believed to be a VA employee—failed to discover a bone-eating staph infection in his spine.<sup>60</sup> It took the VA more than a year to inform Tally that his doctor was actually an independent contractor.<sup>61</sup> Not only was Tally's lawsuit against the United States dismissed at that point, but the

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56. See TULLY RINCKEY, A GUIDE TO SUING THE DEPARTMENT OF VETERANS AFFAIRS FOR MEDICAL MALPRACTICE 3-4 (2011), [<https://perma.cc/MGH3-PCYJ>] [hereinafter GUIDE TO SUING THE VA].

57. See Ezekiel J. Emanuel & Linda L. Emanuel, *What Is Accountability In Health Care?*, 124 ANNALS OF INTERNAL MED. 229, 230 (1996).

58. Cf. James D. Ridgway, *The Splendid Isolation Revisited: Lessons From the History of Veterans' Benefits Before Judicial Review*, 3 VETERANS L. REV. 135, 205 n.464 (2011) (offering patriotism as a reason that many veterans of the Vietnam War were reluctant to sue the U.S. government for health complications stemming from exposure to Agent Orange).

59. See LEWIS, *supra* note 18, at 9.

60. Leo Shane III, *After a Years-long Fight, Veterans Will See New Medical Malpractice Protections*, MIL. TIMES. (Jan. 6, 2021), [<https://perma.cc/H4V2-P2SX/>].

61. *Id.*

statute of limitations had expired on a potential medical malpractice lawsuit against the doctor.<sup>62</sup> Tally was therefore left without legal recourse.<sup>63</sup> In response to Tally's preventable situation, legislators passed a bill in January 2021 mandating that department officers "clearly identify the employment status of any individuals involved in [a veteran's] case within a month of a veteran submitting a malpractice claim."<sup>64</sup> The remainder of this Article assumes the tortfeasor was a VA employee.

#### b. How to File a Lawsuit under the FTCA

While civilians can make written demands or file complaints in state court, veterans must submit an "administrative claim" to the VA's Regional Counsel (the "Agency") before they can file a lawsuit in federal court.<sup>65</sup> This two-step procedure was intended to "ease court congestion" and "provide fairness to plaintiffs" by encouraging more settlements at the administrative level "that would lead to less work for all [the parties] involved."<sup>66</sup>

Administrative claims are made by submitting a Standard Form 95 ("SF-95") to the Agency within two years of the claim's accrual.<sup>67</sup> The SF-95 is a two-page, generic form that essentially asks the veteran to divulge the basis of the claim, the nature and extent of the injury, and the sum certain amount of the claim before conducting formal discovery.<sup>68</sup> The dollar amount written here is an absolute limit on the amount sought and cannot be raised at any point in the future unless a veteran shows "newly discovered evidence [that was] not reasonably discoverable at the time of presenting the [administrative] claim to the [Agency]

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62. *Id.*

63. *Id.*

64. *Id.*; see also *Veterans Receive New Medical Malpractice Protections*, A.B.A. (Jan. 29, 2021), [<https://perma.cc/YQ9P-Q54S>].

65. See GUIDE TO SUING THE VA, *supra* note 56, at 13-14.

66. Daniel Shane Read, *The Courts' Difficult Balancing Act to Be Fair to Both Plaintiff and Government Under the FTCA's Administrative Claims Process*, 57 BAYLOR L. REV. 785, 791-92 (2005).

67. GUIDE TO SUING THE VA, *supra* note 56, at 13-14 (A claim accrues at "the time the injury and its cause should have been discovered by a reasonable person.").

68. See STANDARD FORM 95, [<https://perma.cc/B8FX-SCV2>].

...”<sup>69</sup> After receiving the SF-95, the Agency has six months to either settle or deny the claim.<sup>70</sup> If the Agency denies the claim, a veteran may appeal the decision once, giving the Agency another six months to reevaluate the claim before making a final determination.<sup>71</sup>

After submitting an administrative claim, there are three situations that allow a veteran to file a formal lawsuit in federal court: (1) the Agency denies the administrative claim, either initially or on appeal; (2) the Agency offers a settlement amount that the veteran believes is insufficient; or (3) the Agency does not respond to the administrative claim within six months.<sup>72</sup> If the Agency denies the administrative claim (option 1), a veteran only has six months to file a lawsuit in federal court before the claim is “forever barred.”<sup>73</sup> If a settlement or verdict is reached at any point in the administrative or adjudicative process, monies are taken from the Fund, given to the veteran, and the case is closed.<sup>74</sup>

### III. FTCA CREATES LIMITATIONS ON VETERANS’ MALPRACTICE OPTIONS

The FTCA not only changes the *who* and *how* of medical malpractice, but it also takes away certain legal rights that civilians in state malpractice claims otherwise enjoy. The FTCA is not only a less favorable option for veterans but also an unfair option because it limits their access to attorneys, courts, and damage awards.

#### A. Limited Access to Attorneys

Medical malpractice is already a complex area of law and practiced by few attorneys.<sup>75</sup> Most attorneys avoid medical

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69. See 28 U.S.C. § 2675(b).

70. See GUIDE TO SUING THE VA, *supra* note 56, at 18-19.

71. 28 C.F.R. § 14.9(b) (2021).

72. GUIDE TO SUING THE VA, *supra* note 56, at 3.

73. See 28 U.S.C. § 2401(b).

74. See CRS JUDGMENT FUND, *supra* note 44, at 6.

75. See *e.g.*, Stephen Daniel & Joanne Martin, *Plaintiffs’ Lawyers, Specialization, and Medical Malpractice*, 59 VAND. L. REV. 1051, 1060-61 (2006).

malpractice lawsuits because they are “complex, risky, and expensive to prepare” in relation to the average personal injury case.<sup>76</sup> One study on the caseload composition of 541 plaintiffs’ attorneys in Texas showed that more than half of the attorneys, 54.4%, did not handle a single medical malpractice case for this reason.<sup>77</sup> Of the attorneys “who handled at least one malpractice matter . . . the median percentage of their business made up by malpractice [was only] 10 percent[.]”<sup>78</sup> Attorneys reported that they would rather diversify their case composition to avoid the risk of losing all the money spent preparing a medical malpractice case if the case was ultimately lost.<sup>79</sup> Only 46 of the 541 attorneys devoted 50% or more of their business to medical malpractice.<sup>80</sup>

Like all lawsuits, obtaining legal representation is crucial. For instance, represented veterans often recover twice as much as those who submit their claims without the help of an attorney.<sup>81</sup> Unfortunately, however, the FTCA adds an additional layer of confusion and difficulty to medical malpractice claims, making a veteran’s case even less appealing to an already small number of attorneys willing to try medical malpractice cases. Attorneys, themselves, describe lawsuits under the FTCA as “trickier than suing a private citizen”<sup>82</sup> and “unduly confusing and complex without the guidance of an attorney [who has] particular experience in filing malpractice claims on behalf of veterans.”<sup>83</sup> The most deterring aspect of a veteran’s case, however, is the FTCA’s cap on attorneys’ fees.

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76. *Id.* at 1061 (A lawyer who only handles a minimal amount of medical malpractice cases noted, “[M]alpractice cases are really expensive to develop . . . [A]nyone can take a car wreck case and try it, but for the medical malpractice cases you’ve got to know more about the medicine.”).

77. *Id.* at 1060.

78. *Id.* at 1061.

79. *Id.* at 1060-61 (one lawyer reported losing \$50,000 on just one case).

80. Daniel & Martin, *supra* note 75, at 1061.

81. *Veterans Affairs (VA) Hospital Medical Malpractice*, NAT’L TRIAL L., [<https://perma.cc/DX3Z-9UYJ>].

82. David Goguen, *Suing the Government for Negligence: The Federal Tort Claims Act*, NOLO, [<https://perma.cc/QV2J-Z5DK>] (last visited Feb. 28, 2021) (“[Y]ou will have to jump through a number of hoops, and the lawsuits are subject to a lengthy and sometimes confusing list of limitations.”).

83. *VA Malpractice Attorneys in Orange County*, HODES MILMAN, LLP, [<https://perma.cc/8CUH-VCEY>] (last visited Feb. 28, 2021).

*1. FTCA Cap on Attorneys' Fees*

Under the FTCA, if the government settles the case at the administrative level (that is, after a SF-95 form is filed with the Agency but before a lawsuit is filed in federal court), an attorney is only entitled to 20% of the settlement award.<sup>84</sup> If, on the other hand, a veteran prevails later in federal court, the attorney is entitled to 25% of the award.<sup>85</sup> These percentages are extremely low for medical malpractice cases. Contingency fees in civilian cases range from 33% to 40% on average,<sup>86</sup> and studies demonstrate that capping this fee makes it less likely an attorney will try the case.<sup>87</sup> Although 33% to 44% contingency fees can portray medical malpractice attorneys as “greedy, opportunistic lawyer[s]” that take even the weakest cases simply to profit off the “extravagant amounts” awarded, high contingency fees coupled with high damage awards are necessary to offset the high cost of litigation.<sup>88</sup> Lawyers frequently decline to take even the most obvious malpractice cases when the potential damages do not offset the costs associated with taking the case.<sup>89</sup> Moreover, the judicial system has various safety nets in place to discourage attorneys from filing frivolous lawsuits.<sup>90</sup>

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84. 28 U.S.C. § 2678.

85. 28 U.S.C. § 2678.

86. Shephard, *supra* note 15, at 166.

87. Steven Garber et al., *Do Noneconomic Damages Caps and Attorney Fee Limits Reduce Access to Justice for Victims of Medical Negligence?*, 6 J. EMPIRICAL LEGAL STUD. 637, 681 (2009) (study demonstrating that attorneys are less likely to take meritorious medical malpractice cases when noneconomic damage caps and attorney fees limits would reduce attorney fees); *cf.* Shephard, *supra* note 15, at 155 (explaining that many “damage-restricting tort reforms have [already] made it economically infeasible for attorneys to take many medical malpractice cases.”).

88. *See* Daniel & Martin, *supra* note 75, at 1052.

89. *See* Daniel & Martin, *supra* note 75, at 1064 (associated costs include screening, preparing, litigating, billable hours, referral costs, and other overheads); *see also* A. Russell Localio et al., *Relation Between Malpractice Claims and Adverse Events due to Negligence: Results of the Harvard Medical Practice Study III*, 325 NEW ENG. J. MED. 245, 249 (1991) (“Trial lawyers usually accept only the relatively few cases that have a high probability of resulting in a judgment of negligence with an award large enough to defray the high costs of litigation.”).

90. Geoff Boehm, *Debunking Medical Malpractice Myths: Unraveling the False Premises Behind “Tort Reform”*, 5 YALE J. HEALTH POL’Y L. & ETHICS 357, 359 (2005) (“[T]he contingency fee arrangement[ , itself ] . . . screens out baseless lawsuits.”); *see also* FED. R. CIV. P. 11(c) (possible sanctions imposed for filing baseless claims).

A single medical malpractice case can take up to \$500,000 merely to litigate, with the average just below \$100,000.<sup>91</sup> For comparison, the median litigation cost for an automobile tort case is \$43,000.<sup>92</sup> Real property cases typically cost \$66,000 to litigate and contract cases average around \$91,000 in litigation expenses.<sup>93</sup> Medical malpractice cases cost substantially more because attorneys must interpret the law *and* the medicine.<sup>94</sup> For instance, medical malpractice lawyers report spending \$10,000 on experts simply to determine whether to take the case initially.<sup>95</sup> While “specialists” in the field often hire “nurse-lawyers” or “physician-lawyers” to “internalize some of [these] important expert costs[,]” many attorneys do not have this luxury.<sup>96</sup> Instead, they must hire medical experts to ensure their cases are adequately screened and litigated.<sup>97</sup> Of course, the more specialized the expert, the more expensive the hourly billing.<sup>98</sup> For example, experts in emergency medicine bill at a national average rate of \$381 per hour to review a case, whereas, experts in neurosurgery bill at \$741 per hour.<sup>99</sup> Calling medical experts at trial is even pricier, at \$494 per hour for emergency medicine and \$1,134 per hour for neurosurgery.<sup>100</sup>

Along with expert costs, malpractice attorneys themselves expend sizable hours on each case.<sup>101</sup> Specifically, 472 average billable hours per case if it “progress[es] all [the] way through trial and post-disposition proceedings.”<sup>102</sup> In contrast, attorneys

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91. Shepherd, *supra* note 15, at 165-66 (at the very least, attorneys expect to spend \$50,000).

92. Paula Hannaford-Agor & Nicole L. Waters, *Estimating the Cost of Civil Litigation*, 20 CT. STAT. PROJECT 1, 7 (2013), [<https://perma.cc/69P3-DUCM>].

93. *Id.*

94. See Shepherd, *supra* note 15, at 165; see also Daniel & Martin, *supra* note 75, at 1061.

95. Daniel & Martin, *supra* note 75, at 1063-64.

96. *Id.* at 1062. Attorneys were considered “specialists” if “[medical] malpractice comprised 50 percent or more of their business.” *Id.* at 1061.

97. *Id.* at 1062.

98. See *Expert Witness Fee Calculator*, EXPERT INST., [<https://perma.cc/JF49-Z9LT>] (last visited Mar. 10, 2021).

99. *Id.*

100. *Id.*

101. See Hannaford-Agor & Waters, *supra* note 92, at 6.

102. *Id.* Cf. Anupam B. Jena et al., *Outcomes of Medical Malpractice Litigation Against US Physicians*, 172 ARCHIVES OF INTERNAL MED. 892, 893 (2012) (reporting that it takes thirty-nine to forty-three months to reach a verdict in court).

only expend 196 billable hours on automobile cases from start to finish, 284 hours on real property cases, and 367 hours on contract cases.<sup>103</sup>

All in all, plaintiffs' attorneys are not reimbursed for these expenses, if at all, until the case is closed. Typically, attorneys will pay the litigation costs if they lose the case.<sup>104</sup> If they win the case, the plaintiff will usually pay for the litigation costs *in addition to* the agreed upon contingency fee.<sup>105</sup> Since "attorneys bear the risk of paying the litigation costs if a case loses, contingen[cy] fee arrangements require attorneys to evaluate cases in terms of the risks and potential returns of the case."<sup>106</sup> Consider the associated risk of each contingency fee agreement when an attorney spends \$50,000 litigating a case worth only \$150,000 in damages:

(1) In a civilian case, an attorney working at a 33% contingency fee "risk[s] the same amount he stands to earn; he pays \$50,000 in litigation costs if he loses the case, and he earns a \$50,000 contingen[cy] fee if he wins the case."<sup>107</sup>

(2) An attorney working at a 20% contingency fee at the administrative level under the FTCA pays \$50,000 in litigation costs if he loses the case and earns \$30,000 if he settles the case.

(3) An attorney working at a 25% contingency fee at the court level under the FTCA pays \$50,000 in litigation costs if he loses the case and earns \$37,500 if he wins the case.

Under the FTCA, the attorney risks losing more than he stands to earn at both the administrative level and at the court level. Therefore, an attorney would surely deny this case at the screening stage. Veterans need higher potential damages to offset the FTCA's low attorneys' fees in order to make their cases economically feasible for attorneys. This is a considerable burden to overcome given most lawyers rarely accept a case with

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103. Hannaford-Agor & Waters, *supra* note 92, at 6.

104. Shepherd, *supra* note 15, at 166.

105. *Id.*

106. *Id.*

107. *Id.*

potential damages below \$100,000, while some take nothing below \$1,000,000, working at contingency fees of 33% or more.<sup>108</sup>

## B. Limited Access to the Court System

“The right to sue and defend in [American] courts is . . . one of the highest and most essential privileges of citizenship . . . .”<sup>109</sup> Even noncitizens are afforded access to American courts when they are injured on U.S. soil.<sup>110</sup> So why then are veterans treated differently?

### 1. Administrative Claim Hurdle

To reach federal court, a veteran must first exhaust their administrative remedies. While the administrative process was designed to “lead to less work for all [parties] involved[,]” it forces veterans to file an administrative claim, potentially wait a year, and *then* file a lawsuit in federal court.<sup>111</sup> Civilians, on the other hand, file only one lawsuit directly with the court.

The administrative claims process does not encourage adequate and appropriate settlements for every meritorious claim as Congress intended. 14.6% of claims (1,610 claims) filed at the VA from 1989 to 2000 were only settled *after* veterans exhausted their administrative remedies and proceeded to federal court.<sup>112</sup> Furthermore, Figure 1 demonstrates the sheer increase in payments made at the court level compared to the administrative level every year.<sup>113</sup> Overall, the administrative claims process functions as an obstacle for many valid claims. The Agency generally takes 375 days (12.5 months) to deny administrative claims and 444 days (14.8 months) to settle administrative

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108. Daniel & Martin, *supra* note 75, at 1065; *see also* Shepherd, *supra* note 15, at 154 (explaining that attorneys routinely reject 90% of incoming malpractice claims for insufficient funds).

109. *Chambers v. Baltimore*, 207 U.S. 142, 148 (1907).

110. *See* U.S. CONST. art. III, § 2, cl. 1; *see generally* 28 U.S.C. § 1391 (venue requirements).

111. Read, *supra* note 66, at 792.

112. Weeks et al., *supra* note 17, at 336.

113. *Supra* Figure 1; *see also infra* Appendix I (precise values).

claims.<sup>114</sup> Congress claims that these wait-times “ease court congestion” by filtering out meritless lawsuits.<sup>115</sup> However, every claim that is denied at the administrative level, regardless of its merit, can still be filed in federal court after the Agency denies it. Therefore, the process more likely “ease[s] court congestion” by disincentivizing the already small percentage of medical malpractice victims who wish to seek legal recourse from actually obtaining legal recourse.

## 2. No Jury Trial Allowed

Jury trials are considered a “fundamental constitutional right” in the United States enjoyed by nearly every civilian medical malpractice litigant.<sup>116</sup> Jury trials are such a foundational aspect of the American legal system that many state courts have struck down entire laws as unconstitutional when they infringe on a jury’s power to decide medical malpractice cases.<sup>117</sup> Veterans, however, are not given the right to a jury trial under the FTCA (assuming their case reaches the trial stage) and, instead, must undergo bench trials.<sup>118</sup> In a bench trial, only one federal judge decides the case in its entirety, including whether the case has merit, and if so, how much compensation the veteran is entitled to.<sup>119</sup>

Excluding the FTCA, bench trials are mandatory only in cases of pure questions of law and equity, such as divorce, child custody, permanent injunctions, and foreclosures—all much different from the standard medical malpractice case.<sup>120</sup> The issue is not that bench trials are flawed per se. In fact, there are certain circumstances where bench trials are preferred over jury

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114. Weeks et al., *supra* note 17, at 336 (days from the time an administrative claim was filed).

115. See Read, *supra* note 66, at 791.

116. B. Sonny Bal, *An Introduction to Medical Malpractice in the United States*, 467 CLINICAL ORTHOPEDICS & RELATED RSCH. 339, 341 (2009), [<https://perma.cc/V46V-3VCE>]; see Boehm, *supra* note 90, at 366; see also U.S. CONST. amend. VII (“[T]he right of trial by jury shall be preserved . . .”).

117. See e.g., Boehm, *supra* note 90, at 366 n.45 (one example is damage caps).

118. 28 U.S.C. § 2402.

119. See *Trial by Jury May be a Better Choice Than a Bench Trial*, HG.ORG, [<https://perma.cc/STL3-J8WY>] (last visited Mar. 22, 2021).

120. *Id.*

trials, such as criminal cases where the defendant's appearance is unfavorable or among unpopular parties like insurance companies.<sup>121</sup> Instead, the problem is that those litigants *strategically waived* their right to a jury trial in favor of a bench trial, whereas veterans are *forced to forgo* their right to a jury trial regardless of their preferred trial strategy.

### C. Limited Damage Awards

In addition to capping damage awards to the amount written on the SF-95 filed before discovery takes place,<sup>122</sup> veterans cannot receive punitive damages under the FTCA.<sup>123</sup> Albeit punitive damages are not usually awarded in civilian medical malpractice cases because doctor error is usually “simple human mistake” and “truly accidental[,]” they are nonetheless awarded when appropriate.<sup>124</sup> Courts have found punitive damages appropriate in civilian cases in instances “of gross negligence and outrageous conduct by a health care provider[.]”<sup>125</sup> The exact standard of conduct warranting punitive damages varies amongst jurisdictions, but usually involves conduct categorized as “malfeasance, misfeasance, or nonfeasance.”<sup>126</sup>

For example, in *Gomez v. Cabatic*, a New York court awarded punitive damages to a civilian after an endocrinologist destroyed original medical records to avoid liability in a wrongful death suit involving her treatment of a child.<sup>127</sup> The Tenth Circuit also upheld an award of punitive damages in *Macsenti v. Becker*, where a grossly impaired dentist passed out ten to fifteen times while performing dental surgery, keeping the patient sedated for ten long hours, and the patient suffered brain damage as a

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121. *Id.*

122. *See* 28 U.S.C. § 2675(b).

123. 28 U.S.C. § 2674.

124. Catherine M. Sharkey, *Unintended Consequences of Medical Malpractice Damage Caps*, 80 N.Y.U. L. REV. 391, 415-16 (2005). *But see* 2 JOHN J. KIRCHER & CHRISTINE M. WISEMAN, PUNITIVE DAMAGES: LAW AND PRACTICE § 17:4 (2d ed. 2020) (“A significant number of cases in which punitive damages have been awarded against a professional involve members of the medical profession . . .”).

125. Sharkey, *supra* note 124, at 415.

126. KIRCHER & WISEMAN, *supra* note 124.

127. *Gomez v. Cabatic*, 159 A.D.3d 62, 76 (N.Y. App. Div. 2018).

result.<sup>128</sup> The court determined that these punitive damages were awarded for their “proper function of punishing the offender and deterring others so as to benefit society.”<sup>129</sup>

Seemingly similar conduct has occurred at various VA establishments. For example, at the Fayetteville VA, Dr. Levy tampered with medical records similar to the endocrinologist in *Gomez* and was impaired like the dentist in *Macsenti* while practicing medicine.<sup>130</sup> Although Dr. Levy’s actions were just as egregious and harmful as the doctors’ actions in the civilian cases, punitive damages are off the table simply because a VA employee caused the harm—another unfair FTCA nuance. This is despite the fact that punitive damages and the FTCA share a similar goal: punitive damages are awarded to “punish[] the offender and deter[] others,”<sup>131</sup> and the FTCA is “aim[ed] to ‘deter tortious conduct by federal personnel[.]’”<sup>132</sup>

#### IV. BENEFITS OF LETTING VETERANS ACCESS THE CIVILIAN MALPRACTICE SYSTEM

As it currently stands, the FTCA draws a divide between conduct and accountability. The FTCA is theoretically supposed to deter tortious conduct by holding the United States responsible for its employees’ actions,<sup>133</sup> and the Fund is supposed to “provide an end to the ‘hardship and injustice’” caused by government employees.<sup>134</sup> However, Americans persistently criticize the VA and the quality of care it delivers despite the

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128. *Macsenti v. Becker*, 237 F.3d 1223, 1242, 1244-45 (10th Cir. 2001).

129. *Id.* at 1245.

130. See *supra* notes 1-11 and accompanying text.

131. *Macsenti*, 237 F.3d at 1245.

132. LEWIS, *supra* note 18, at 5-6; cf. Michael Frakes & Anupam B. Jena, *Does Medical Malpractice Law Improve Health Care Quality?*, 143 J. PUB. ECON. 142 app. at 7 (2016) (citation omitted), [<https://perma.cc/H3EH-6ZKB>] (“Nonetheless, despite the infrequent application of such awards, considering that punitive damages are generally not insured by liability carriers, it remains reasonable to believe that physicians may be sensitive to the threat posed by punitive awards.”).

133. LEWIS, *supra* note 18, at 5-6 (quoting *Loumiet v. United States*, 828 F.3d 935, 941 (D.C. Cir. 2016)).

134. Bruce G. Hart, Jr., *Medical Malpractice Protection Under the Federal Tort Claims Act: Protecting Both Physicians and Claimants*, 58 FORDHAM L. REV., 1107, 1110 n.19 (1990) (citing 1 L. JAYSON, *HANDLING FEDERAL TORT CLAIMS* § 65.01 at 3-3 to 3-4, (1989)).

Fund's payouts. In 2017, Americans ranked the VA last in popularity amongst ten similar federal agencies and departments, including the IRS and United States Postal Service.<sup>135</sup> Multiple investigations and scandalous stories have surfaced in recent years too, calling attention to numerous hiring and reporting issues within the VA.<sup>136</sup> Removing the FTCA from medical malpractice lawsuits at the VA would benefit veterans from a litigation standpoint by giving them the same legal rights as civilians. It would also hold both VA providers and the VA system accountable for medical malpractice which, in the long haul, will improve veterans' care.

Under the FTCA, VA employees are practically invisible to the legal consequences of medical malpractice. Administrative claims are mailed directly to the VA's Regional Counsel, every settlement and judgement is taken directly from the Fund, and even "deposition[] [requests] by [a] claimant['s] counsel must be approved and coordinated by VA legal staff" before a physician partakes in any legal discussions.<sup>137</sup> The VA also openly advertises immunity as one of the top twenty reasons doctors like working for the VA, stating in one hiring brochure:

Medical personnel have statutory immunity from "individual" malpractice liability while acting within scope of employment. A VA physician cannot be sued in civil court for the malpractice (tort) claim. Providers feel less threatened by the malpractice climate while working for the government because if a patient sues a VA doctor, they are instead are [sic] suing the federal government . . . Separate medical malpractice insurance is not required to be maintained.<sup>138</sup>

Even when providers commit acts that would typically warrant punitive damages in a civilian setting, they remain immune from

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135. Kristen Bialik, *The Changing Face of America's Veteran Population*, PEW RSCH. CTR. (Nov. 10, 2017), [<https://perma.cc/8XYB-MEF8>].

136. See, e.g., Donovan Slack, *USA TODAY Investigation: VA Knowingly Hired Doctors with Past Malpractice Claims, Discipline for Poor Care*, USA TODAY (Dec. 13, 2017), [<https://perma.cc/E3M3-MDQV>]; *Timeline: The Story Behind the VA Scandal*, USA TODAY (May 21, 2014), [<https://perma.cc/ZU7B-SEQ6>] (Arizona VA scandal where records were falsified to hide wait times).

137. 20 REASONS, *supra* note 33, at 27.

138. *Id.*

liability.<sup>139</sup> Despite their perpetual immunity under the FTCA for medical negligence, medical professionals are still reported to the National Practitioner Data Bank (“NPDB”) whenever a medical malpractice payment is made on their behalf.<sup>140</sup> Reporting requirements, therefore, subject the physician “to some degree of professional accountability[.]”<sup>141</sup> However, the VA has slipped up on reporting and screening requirements in the past, meaning negligent providers have sometimes faced no degree of professional accountability.

Per VA policy, hiring personnel must run a query of the NPDB before hiring an individual to ensure their “medical licenses are current and in good standing[.]”<sup>142</sup> However, shady NPDB profiles “do[] not automatically disqualify a provider from working at VA medical centers” since each VA has broad discretion in the hiring process.<sup>143</sup> Once a provider is hired, it is the VA’s responsibility to monitor the NPDB for “new adverse information about an existing provider” and address any other concerns pertaining to a provider’s clinical care.<sup>144</sup> VA officials are required to report any serious concerns about a provider’s clinical care to state licensing boards.<sup>145</sup> This gives state licensing boards the ability to “investigate and determine if a provider’s conduct or ability to deliver care warrants action against the provider’s medical license.”<sup>146</sup>

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139. See *supra* Part II.C.

140. See 42 U.S.C. § 11131.

The NPDB is an electronic repository administered by the U.S. Department of Health and Human Services that collects and releases information on providers who either have been disciplined by a state licensing board, professional society, or health care entity, such as a hospital, or have been named in a medical malpractice settlement or judgment.

U.S. GOV’T ACCOUNTABILITY OFF., GAO-20-152T, VA HEALTH CARE: ACTIONS NEEDED TO ENSURE PROVIDER QUALIFICATIONS AND COMPETENCE 1 (2019) (statement of Sharon M. Silas, Director Health Care before the Subcommittee on Oversight and Investigations, Committee on Veterans’ Affairs, and House of Representatives) [hereinafter GAO REPORT].

141. Britton, *supra* note 43, at 546.

142. GAO REPORT, *supra* note 140, at 1-2. See also U.S. GOV’T ACCOUNTABILITY OFF., GAO-19-6, VETERANS HEALTH ADMINISTRATION: GREATER FOCUS ON CREDENTIALING NEEDED TO PREVENT DISQUALIFIED PROVIDERS FROM DELIVERING PATIENT CARE 13 (2019).

143. GAO REPORT, *supra* note 140, at 2.

144. *Id.*

145. *Id.* at 3.

146. *Id.*

Be that as it may, “the VA Office of Inspector General and the media have reported . . . multiple cases of quality and safety concerns regarding specific VA providers.”<sup>147</sup> The Government Accountability Office (“GAO”) highlighted these concerns, and the explicit disregard for VA policy, in a 2019 report. Specifically, the report reviewed 57 out of the 1,664 VA employees who had an adverse report in the NPDB as of September 30, 2016.<sup>148</sup> In that sample alone, the VA “took action against some providers with disqualifying information in the NPDB but overlooked others.”<sup>149</sup> One of the overlooked providers “surrendered [his] license in 2014, while [still] employed at [the] VA, but was not [terminated] by the VA medical center until after [the GAO’s] inquiries in 2018.”<sup>150</sup> Another provider was “prescribing controlled substances without appropriate registration” but was not reported to the Drug Enforcement Administration until after the GAO’s investigation.<sup>151</sup>

The GAO “also found that VA medical centers hired or retained some . . . providers who they acknowledged had disqualifying adverse information in the NPDB, which is inconsistent with [VA] policy.”<sup>152</sup> For instance, the VA “hired a provider who had a state license revoked for patient neglect and substandard care” *at the time* the provider was hired in 2014.<sup>153</sup> Many providers were also not reported to the NPDB or state licensing boards when their conduct warranted such reporting. One unreported provider had VA documentation showing that his “surgical incompetence resulted in numerous repeat surgeries for veterans.”<sup>154</sup> Another provider “was terminated for cause related to patient abuse after only [two] weeks of work at the facility[,]”

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147. *Id.* (“[R]eport[s] range[d] from providers lacking appropriate qualifications to poor performance and provider misconduct . . .”)

148. GAO REPORT, *supra* note 140, at 4 n.9.

149. *Id.* at 6.

150. *Id.*

151. *Id.*

152. *Id.*

153. GAO REPORT, *supra* note 140, at 6.

154. *Id.* at 13 (finding only one of nine providers under the GAO’s review were reported to the NPDB). Reporting providers to the NPDB prevents “provider[s] who delivered substandard care at one VA medical center [from] obtain[ing] privileges at another VA medical center or at hospitals outside of [the] VA’s health care system.” *Id.* at 14.

but still went unreported.<sup>155</sup> Sadly, the failure to abide by VA policies leads “to unsafe care and potential harm” for veterans.<sup>156</sup>

Instead of spending upwards of one hundred million taxpayer dollars every year to shield these providers, the government should require VA employees to procure their own liability insurance. This is an obtainable objective too. Nearly every medical professional outside of the VA has malpractice insurance that covers lawsuits brought against them, including independent contractors to the VA who are not protected by the FTCA.<sup>157</sup> Most states require physicians to have malpractice insurance anyways, and many hospitals require it as a condition of granting hospital privileges.<sup>158</sup> The *only* reason the VA does not require their employees to have traditional malpractice insurance is because they treat the FTCA as their malpractice insurance.<sup>159</sup> However, no one at the VA pays a premium to have this “insurance,” it is simply handed to them. The perception of immunity—especially as advertised—may be incentivizing doctors who are otherwise unemployable at other institutions because of their malpractice history to work for the VA. Requiring every VA provider to apply for and obtain independent medical malpractice insurance in the future would serve as an extra screening step for quality care at the VA.

In 2017, Congress passed the VA Accountability and Whistleblower Protection Act to “remove Federal employees who undermine the public trust or fail the American people.”<sup>160</sup> While debate is ongoing about whether the Act is successfully “chang[ing] the culture at the VA for the better[.]”<sup>161</sup> scandalous

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155. *Id.* at 13.

156. *See id.* at 3.

157. *See* Bal, *supra* note 116, at 340.

158. *See id.*; *see also* *Understanding Medical Malpractice Insurance*, INS. INFO. INST., [<https://perma.cc/3AMX-WLWF>] (last visited Mar. 21, 2021).

159. *See* 20 REASONS, *supra* note 33, at 27.

160. Alana Abramson, *President Donald Trump Just Delivered His First State of the Union. Read the Full Transcript.*, TIME (Jan. 30, 2018), [<https://perma.cc/5T47-8NMC>]; *See also* Department of Veterans Affairs Accountability and Whistleblower Protection Act of 2017, S. 1094, 115th Cong. (2017).

161. Nicole Ogrysko, *Under New Accountability Act, VA Employees Fear One Mistake Will Cost Them Their Jobs*, FED. NEWS NETWORK (Mar. 19, 2018), [<https://perma.cc/WUL4-LGFG>] (worrying that the Act is causing the wrong individuals to be terminated).

stories such as that of Dr. Levy at the Fayetteville VA continue to shock and upset the public. Not only does the lack of accountability at the VA physically and psychologically hurt veterans and their families, it also creates massive distrust within our nation's largest healthcare system and tarnishes the reputation of the many VA employees who do provide quality care to our veterans.<sup>162</sup> Perhaps placing accountability back on the physician and the institution, rather than the government, will successfully change the VA's reputation for the better and ensure veterans receive the care they deserve.<sup>163</sup>

## V. CONCLUSION

The FTCA significantly disadvantages veterans injured by medical malpractice at the VA. Not only does the FTCA require veterans to sue their country instead of the provider responsible for their harm, but it also reduces access to attorneys, courts, and damage awards. Removing the FTCA and its immunity in medical malpractice lawsuits at the VA would create a nexus between provider conduct and accountability. This can only benefit the VA's reputation. Most importantly, it would give veterans the same legal rights as civilians in medical malpractice lawsuits. Veterans deserve, at the very least, the same treatment as civilians, and it is time they are afforded it.

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162. *See, e.g.,* Sosa & Fergeson, *supra* note 1 (The Chief Investigator for the VA noted that, “[Dr.] Levy’s actions have hurt the ability to hire doctors at the [VA].”); *cf.* INST. OF MED., TO ERR IS HUMAN: BUILDING A SAFER HEALTH SYSTEM 1 (1999) (“Errors also are costly in terms of loss of trust in the health care system by patients and diminished satisfaction by both patients and health professionals. . . . Health professionals pay with loss of morale and frustration at not being able to provide the best care possible. Society bears the cost of errors as well, in terms of lost worker productivity . . . and lower levels of population health status.”).

163. *Cf.* Frakes & Jena, *supra* note 132, at 158 (“All told, it appears that the relationship between health care quality and changes in clinical malpractice standards works in an expansionary direction only. That is, once physicians provide a high level of quality, they may maintain such practices even when the law may loosen its expectations at a later date. In contrast, physicians who provide a quality of care that is below what is expected by the law raise their practice to meet the higher expectations set by the law. Malpractice forces that alter the legal clinical standard to which physicians are held may therefore be effective in elevating the quality floor.”).

**Appendix I**<sup>164</sup>

Calendar Year	Administrative Payments	Litigative Payments	Total
2005	\$22,473,295.84	\$47,636,242.88	<b>\$70,109,538.72</b>
2006	\$24,340,123.53	\$39,586,842.80	<b>\$63,926,966.33</b>
2007	\$23,057,405.52	\$56,788,477.64	<b>\$79,845,883.16</b>
2008	\$26,518,144.10	\$52,624,223.02	<b>\$79,142,367.12</b>
2009	\$33,414,607.80	\$48,385,503.50	<b>\$81,800,111.30</b>
2010	\$29,562,953.85	\$53,599,301.42	<b>\$83,162,255.27</b>
2011	\$36,417,606.85	\$34,975,631.29	<b>\$71,393,238.14</b>
2012	\$32,145,895.38	\$58,922,067.01	<b>\$91,067,962.39</b>
2013	\$32,787,580.53	\$63,740,614.89	<b>\$96,528,195.42</b>
2014	\$37,099,775.33	\$74,219,579.08	<b>\$111,319,354.41</b>
2015	\$54,613,446.16	\$85,004,153.22	<b>\$139,617,599.38</b>
2016	\$50,499,186.54	\$64,865,273.40	<b>\$115,364,459.94</b>
2017	\$37,102,400.16	\$52,791,223.70	<b>\$89,893,623.86</b>
2018	\$28,143,394.55	\$74,237,826.27	<b>\$102,381,220.82</b>
2019	\$35,385,893.00	\$64,945,782.00	<b>\$100,331,675.00</b>
2020	\$41,175,449.91	\$80,412,551.84	<b>\$121,588,001.75</b>

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164. See *Judgment Fund Payment Search*, *supra* note 51.