

**United States House of Representatives  
Veterans Affairs Committee**

**July 23, 2020**

**Statement for the Record**

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**Veteran Advocate**

Chairman Takano, Ranking Member Roe, and distinguished members of the House Veterans Affairs Committee; I come before you today to urge you to please close a 74 year VA Legal Loophole that has destroyed the lives of Veterans and their families for generations. I sincerely want to thank you for this opportunity and invitation to submit a statement for the record today, and to share my position regarding H.R.4526, also referred to as the ‘Tally-Bill.’ This is an extremely important piece of Veteran Legislation that is imperative to the wellbeing of every Veteran in this country. Nobody is immune to medical malpractice and negligence. We are all humans, and humans make mistakes. However, when tragedy strikes in the form of VA medical malpractice there must be accountability, transparency, and safeguards effectively put in place to protect those Veterans injured as a result of these mistakes., H.R.4526 will do just that. It will provide the injured Veteran with rightful information in a timely manner to include the employment status of the accused clinician(s) so the injured Veteran can make informed and timely decisions after suffering personal injury by either VA negligence or wrongful actions within VA hospitals and clinics. Veterans deserve a fair and equitable system similar to the private sector, instead of a system full of legal loopholes that is stacked against them in every way possible.

**Summary**

WHAT IS THE FEDERAL TORT CLAIMS ACT? Since its enactment in 1946, the Federal Torts Claims Act (FTCA) has been the legal mechanism for compensating people who have suffered personal injury by the negligent or wrongful action of employees of the US government. The FTCA permits an individual to bring a lawsuit directly against the federal government for certain VA-caused injury or death, when that individual has suffered damages, personal injury, or death due to the negligent actions of a federal government employee or agency acting within the scope of employment.

Federal law determines who is an "employee" vs. "independent contractor" but the scope of employment issues under the FTCA are decided by the state law of occurrence. The FTCA defines "employee of the government" to include "officers or employees of any federal agency . . . and persons acting on behalf of a federal agency in an official capacity, temporarily or permanently in the service of the United States. Many VA hospitals and facilities currently hire independent contractors to perform medical procedures and provide health care. These individuals are not considered government employees therefore any malpractice claims will not give rise to a claim under the FTCA. The government often denies liability and contends that the alleged negligence was not caused by an employee but an independent contractor. This legal defense is very effective unless dealt with adequately, as VA medical centers frequently contract with private universities or hospitals for physicians. In each situation, the Office of General counsel must isolate the portion of work out of which the claim arose. If an employer-employee relationship is present, the government is held liable. If the injury was caused by an independent contractor, the government is not liable. The independent contractor can still be sued in their private capacities in state court but not under the FTCA.

The FTCA's definition of "government employee," includes officers and employees of federal agencies, but specifically excludes "any contractor with the United States." 28 U.S.C. § 2671. Thus, the independent contractor exception to the FTCA often bars federal government liability and denies FTCA protection to

the defendant party. The independent contractor is thereby liable for damages as a private citizen.

I will now lay out my story, and statement of facts on how this law is ruining the lives of Veterans because it has turned into a “legal loophole”, and is no longer working in the way it was intended to work since its creation in 1946. A lot has changed over the last 74 years pertaining to independent contractors working within VA hospitals and clinics across the country. This is why immediate legislative correction is needed without further delay to ensure the rights and protections of all Veterans.

## **THE VA LEGAL LOOPHOLE THAT RUINED MY LIFE AND SET ME ON A MISSION**

Many thoughts ran through my mind during a fateful visit to a Department of Veterans Affairs (VA) emergency room. One of them was not, “Is this doctor who’s treating me an independent contractor or government employee”? But this would turn out to be perhaps the most critical question, secondary only to what was causing the excruciating pain that brought me to my knees in my most desperate time of need.

In January 2016, my life changed in ways that I could have never seen coming or ever imagined. I endured grueling pain, bed soaking night sweats, and endless hours of lying on the cold bathroom floor desperately seeking any sort of relief. After multiple trips to the emergency room and an x-ray, I was injected with Dilaudid, Toradol, and Kenalog and was given a diagnosis of a “low back sprain” and sent home with a cocktail of pain pills.

This would continue for (4) months until surgery was finally approved because my wife paid out of pocket for an MRI to prove to the VA that something was medically wrong inside my spine. To the surgeon’s surprise, as I lay open on the operating table, he found the cause of my pain — a bone eating staph infection that

was aggressively attacking my spine and was destroying my spinal bone, tissue, discs, nerves, and internal organs. An infection that would've been detected much earlier had the emergency room clinician(s) ordered a simple blood test and an MRI. In the (4) months I waited for my surgery in excruciating pain no blood tests or diagnostic testing was performed. I am very lucky to have survived such an ordeal.

Once we realized that this untreated and near fatal infection led to a host of other residual medical diagnosis, and I would be left with permanent injuries my family and I decided to file a claim under the Federal Tort Claims Act (FTCA) for medical malpractice and gross negligence. Six months into the claims process, I began to receive calls from the VA's General counsel's office. The VA attorneys would repeatedly admit that the "VA failed to meet the standard of care and there was a breach in liability" and they were working on settling our claim. We were asked to be patient as "this is a very long and tiring process." They appeared very sincere, apologetic, and to show a great deal of compassion. These optimistic calls of certainty came at our most desperate, and vulnerable times of need and they continued on for several months as we tried everything we could to stave off complete financial ruin. They already had me physically beat up, battered, and hanging on for dear life due to the life changing medical malpractice injuries that will put most if not all victims in a state of incapacitation. Then depression, anxiety, and hopelessness set in as my family and I completely shifted into survival mode and tried to comprehend and fully understand just how things went south so fast, while remaining hopeful that compensation would soon be coming to recoup a lifetime of lost earning potential. Meanwhile the mortgage is late, credit card debt is stacking up, kids need clothes, food on the table, car payments, the bills are all still due, and now the injured veteran is no longer working due to the severe injuries sustained by the incompetency by several clinician(s).

Then the bombshell dropped. Nearly one year into the claims process, we received a letter stating that the VA was not responsible for the medical malpractice and gross negligence. The reason given: The clinician who made the error(s) was not a VA employee, rather an independent contractor working within the VA, and

behind the VA veil, thus the Federal Tort Claims Act did not apply. This meant my only recourse was to sue the clinician in state court for damages. However, by the time the VA “conveniently” revealed this crucial information the California state statute of limitations had expired by mere days. It seemed as if the Office of General counsel had already strategized this outcome and were able to cherry pick the clinicians involved in my care by screening everyone involved and were able to tie at least (1) independent contractor to my case, and pre-selected the "fall guy" based on the independent contractor clause and exemption. This is how the VA Office of General counsel gained the upper hand. They repeatedly fed my family and I false hope and promises only to pull the rug right out from under our feet, denying our claim based on a “technicality” and an employment status, and left us holding the bag with no viable recourse, accountability or due process. This delayed notification of fault, combined with the FTCA exclusion of independent contractors, provided the agency with the perfect black hole through which medical malpractice claims disappear forever, no matter how egregious the wrong is or how badly it has ruined lives.

The "VA Independent Contractors" are only labeled as such when they get in trouble. Why would they work in VA hospitals, and clinics wear VA badges, VA doctors coats, have VA business cards, see VA patients, and produce VA reports, and come to the same place of business everyday, use supplies, copy machines, printers, have keys to the building and call themselves "independent". By definition this is classified as an "employee", but this is how the Office of General counsel can effectively deny and deflect all liability away from the VA and place it directly on the backs of unidentified independent contractors. The way they protect the independent contractors after medical malpractice claims have been submitted is they hold on to crucial information of the case all while the clock is ticking. When the state statute of limitations runs out, (expire) the VA attorneys will drop a letter denying everything they already admitted to, and advise you to sue the said clinician(s) in state court.

By that time you have zero recourse because the state statutes have completely expired. This is how they strip your right to due process. This formula also works

very well with retaining these "independent contractors" because according to the VA books medical malpractice never occurred within the VA system thus blaming the independents. This practice also serves to "water down" the numbers the VA provides relating to annual medical malpractice numbers. In turn they are never reported to the National Practitioner Data Bank because there is now no record of it. And yes the "Independent Contractor" the VA General counsel threw under the bus is still employed at the same VA and is considered to be in "good standing" with the VA and the State of California. A report that a VA whistleblower sent me shows there were numerous VA Emergency Room clinicians that failed to meet the standard of care and there was a clear breach in liability, not just a single "independent contractor" at fault.

My brother and I spoke with the Chief counsel, as well as several other VA attorneys after my denials. They stated that it takes upwards of a year to find out the employment status of clinicians who have been accused of medical malpractice. That seems as if it should be the first box that's checked when receiving any tort claim. Or perhaps this is how they see their way out of these cases? They wear you down until you give up, and leave you holding the bag in a condition where your survivability has been greatly affected because the injuries that occurred now prevent you from securing gainful employment. I would bet there is a very strong correlation here with veteran suicide as I was nearly a statistic myself because of the physical pain and trauma, depression, anxiety, and the helplessness that you encounter when dealing with the VA attorneys. Chief counsel also stated this has happened before and it will happen again with greater frequency due to an increase in independent contractors hired by the VA.

Because of this horrific nightmare and the number of other veterans who already have endured this type of egregious treatment, it was time for me to take action. As I began uncovering jaw dropping information, and started to connect the dots on how these cases were manipulated by VA attorneys, I embarked on a mission to change the very law that essentially ruined my life. I formed an online legislative team, and we drafted a bill, we call it the 'Tally-Bill' or H.R.4526. To date we have

had (3) House bills formally introduced, as well as (1) Senate companion bill, to H.R.4526. Obviously our work is being heard and members of Congress are realizing we must address and fix this issue ASAP as we have an estimated 8 million American Veterans who are enrolled in VA healthcare, and will remain at risk until we have law. This law, if passed, would protect all Veterans who seek treatment in every VA hospital and clinic regardless of the employment status of the clinician. It would effectively place the necessary safeguards that are needed to ensure veteran protection to include a clear path of legal recourse in a timely manner, and force the office of VA General Counsel to work in good faith with veterans who are victimized by medical errors.

This bi-partisan veteran legislation will ensure the rights and protections of all veterans and their families after falling victim to VA medical malpractice. The ‘Brian Tally VA Employment Transparency Act’, was introduced in partnership with Congressman Mike Levin and Congressman Mark Meadows. We have made extraordinary headway in Congress, however, our mission is not complete! We continue to fight and advocate daily to ensure we effectively close this 74 year VA legal loophole that has dishonored Veterans and their families for generations and will continue to do so until Congress acts and passes H.R.4526. VA hospitals and clinics can no longer be the place where accountability goes to die. We owe it to our Veterans to fix this systemic problem once and for all.

Respectfully Submitted,

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