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TEXT:

SUBJECT:

Applicability of State Law to VA Facilities in Massachusetts in Administering Psychotropic Drugs.

(This opinion, previously issued as Opinion of the General Counsel 9-86, dated August 1, 1985, is reissued as a Precedent Opinion pursuant to 38 C.F.R. §§ 2.6(e)(9) and 14.507. The text of the opinion remains unchanged from the original except for certain format and clerical changes necessitated by the aforementioned regulatory provisions.)

To: VA District Counsel

QUESTIONS PRESENTED:

(1) Whether VA facilities in Massachusetts must follow Rogers v. Commissioner of Mental Health Department, 458 N.E.2d 308 (S.J.Ct.Mass.1983) in administering psychotropic drugs to incompetent patients; (2) whether VA should as a matter of comity follow State law in such cases; (3) if not, whether current VAc procedures are sufficient to meet the constitutional requirements for administering such drugs to patients who are incapable of making decisions regarding use ofsuch drugs; and (4) if not, what options are available to the Agency to correct those deficiencies, particularly in Massachusetts; and (5) what are the implications under the Federal Tort Claims Act (the FTCA) in determining not to follow state law in administering such drugs.

COMMENTS:

The opinion examined whether VA, in administering psychotropic drugs in VA medical facilities in Massachusetts is governed by Rogers, supra.

That case held that, except in emergencies, psychotropic drugs may not be administered under State law to involuntarily committed patients against their will unless they have been adjudicated incompetent and a substituted judgement rendered that the treatment is in the best interest of the patient. Id., 314- 315. Rogers' procedural history is noteworthy. Initially, the U.S. District Court for the District of Massachusetts held that a State hospital had violated the 14th amendment due process rights of inmates to refuse the administration of psychotropic drugs. Rogers v. Okin, 478 F.Supp, 1342 (D.Mass.1979). The U.S.

Court of Appeals for the First Circuit then affirmed, finding that the 14th amendment provides a qualified right to be free from nonemergent treatment with psychotropic drugs. Rogers v. Okin, 634 F.2d 650 (1st Cir.1980). The U.S. Supreme Court held that the constitutional issues in the case should be resolved only after related state law questions were addressed by State courts, and remanded the case to the First Circuit. Mills v. Rogers, 457U.S. 291 (1982). The First Circuit then certified the related State law questions, including the issue of whether State law gave a patient a right to refuse treatment with such drugs, to the Supreme Judicial court of Massachusetts, which decided those questions primarily on State statutory and common law grounds. 458 N.E.2d at 312, note 7. After the State Court decision in Rogers, the first circuit remanded the original civil action to the district court to resolve the Federal constitutional questions. The First Circuit commented, however, with regard to the pertinent protections under State law:

As the United States Supreme Court anticipated in Mills v. Rogers, 457 U.S. at 303, 102 S.CT. at 2450, Massachusetts law required "greater protection of relevant liberty interests than the minimum adequate to survive scrutiny under the Due Process Clause." We need not identify the precise level of procedural protection required under the Constitution, because it is apparent the Massachusetts procedures rise well above the minima required by any arguable due process standard.

Rogers v. Okin, 738 F.2d 1, 8 (1st Cir.1984).

We have concluded that VA facilities in Massachusetts need not follow Rogers. When State law conflicts with Federal law, Federal law must prevail. U.S. Const. art. VI, cl. 2. See also Ridgway v. Ridgway, 454 U.S. 46, 54-60 (1981); Nash v. Florida Industrial Commission, 389 U.S. 235, 239-40 (1967). In Ohio v. Thomas, the Supreme Court held that the State could not prosecute a Federal employee for his actions in administration of a federal facility, and stated:

Whatever jurisdiction the State may have over the place or ground where the Federal institution is located, it can have none to interfere ... nor has it power to prohibit or regulate the furnishing of any article of food which is approved by the officers of the home, by the board of managers and by Congress. Under such circumstances the police power of the State Has no application. [Emphasis added.]

173 U.S. 276, 283 (1899) (State law prohibiting use of oleomargarine not applicable to federal soldiers' Home). The principle has been applied in a variety of situations where courts have invalidated State laws because of their interference with the operation of the Federal government. For example, in Johnson v. Maryland, the Court held that the State could not prosecute a Federal employee for driving without a State license when acting in his official capacity: "Even the most unquestionably and most universally applicable of

State laws ... will not be allowed to control the conduct of a U.S. employee ... acting under and in pursuance of the laws of the United States." 254 U.S. 51, 57 (1920). And recently in Hancock v. Train, the Court held that the State could not require a Federal agency or instrumentality to obtain a State license under Federal statutes giving States authority to enforce air pollution regulations: " W here congress does not affirmatively declare its instrumentalities or property subject to State regulation, 'the federal function must be left free of regulation.' " 426 U.S. 167, 179 (1976). Also see Don't Tear Down v. Penna. Ave. Dev. Corp., 642 F.2d 527, Note 71 at 534-535 (and cases cited therein) (D.C.Cir.1980).

In this instance, Congress has provided the administrator with broad authority and discretion in administering the VA health care system. See, e.g., 38 U.S.C. § 4101(a) (hospital system for the care and treatment of veterans) and 4131 (informed consent for patient care in VA). The Administrator has exercised that authority to prescribe policies concerning the administration of medical treatment, including provisions relating to patients' consent to treatment and rights in VA medical facilities. 38 C.F.R. §§ 1734 (informed consent for care) and 17.34a (patients rights). These authorities, concerning VA's internal operation, do not provide that State law be followed in administering psychotropic drugs. These authorities do not support the conclusion that we must follow State statute and case law in administering psychotropic drugs in VA facilities. We are unaware of any independent authority except the Fifth Amendment's due process clause that would affect how the Agency should administer psychotropic drugs. Thomas and related cases do not address individual or constitutional rights but rather resolve conflicts between State regulation of a particular activity and its interference with a Federal activity. Rogers, of course, is directly concerned with individual rights created under State statutes and related case law. But in Thomas and related cases, the courts have focused on the State's authority to affect the operations of the Federal government; the source of the state's authority was not at issue. A State statute's concern with individual rights does not alter its nature as an exercise of State power but only the object at which the power is directed. Consequently, Thomas and related cases apply here. As prescriptive rules for administering psychotropic drugs, the State statutes, and related case law, at issue here are no different than those regulations at issue in Thomas and related cases. Indeed, there is no substantive difference between allowing a State official to determine whether a particular item may be served in a Federal veterans' home, as at issue in Thomas, and allowing a State judge to determine whether VA may administer a drug to VA patients, as would be required under State law here. State statutes could accord a patient rights once admitted to a VA facility for care in that facility only if the VA had some independent obligation to follow it. But Thomas clearly holds that Federal agencies have no obligation to follow State law, in the face of Federal standards requiring differing results. Since VA has policies applicable to administering psychotropic drugs in M-2, Part I, Chap. 23, VA has no obligation to follow State

law. The question whether VA procedures are constitutional is distinct from the question of whether VA must follow State law instead.

Consideration has been given to whether any internal VA authorities required VA to follow Rogers. for instance, VA Circular 10-84-95, in discussing 38 C.F.R. § 17.34a, states in pertinent part:

THESE REGULATIONS WERE DESIGNED TO SET FORTH, IN PART, SPECIFIC MINIMUM SUBSTANTIVE AND PROCEDURAL RIGHTS TO BE UNIFORMLY AFFORDED BOTH INVOLUNTARY AND VOLUNTARY PATIENTS UNDERGOING TREATMENT IN VA FACILITY.

* * *

STATIONS WHICH HAVE PRINTED THEIR OWN PATIENT INFORMATION BOOKLET OR PATIENTS RIGHTS PAMPHLET ARE RESPONSIBLE FOR INSURING THAT ITS CONTENTS ARE CONSISTENT WITH THE ABOVE FORM AND POSTER.

The language of the circular, taken as a whole, warrants the conclusion that circular 10-84-95 simply explained, rather than expanded, section 17.34a.

Therefore, Rogers would apply to VA under the Circular only if section 17.34a provides for the application of State law. The pertinent provisions of that regulation are:

No patient in the Veterans Administration medical care system,except as otherwise provided by the applicable State law, shall be denied legal rights solely by virtue of being voluntarily admitted to or involuntarily committed....

* * *

(i) the rights described in this section are in addition to and not in derogation of any statutory constitutional or other legal rights.

38 C.F.R. § 17.34(a)(4) and (i). Providing psychotropic drugs under VA procedures would not deprive anyone of their rights "solely by virtue of being voluntarily admitted or involuntarily committed." Id., § (a)(4). A patient's admission status does not determine whether the patient is able to consent to medication. Section-17.34a did not add to or take away from the legal rights accorded VA patients. Except for rights provided by the regulation, the regulation did not affect any rights a patient otherwise had while in a VA facility. A patient's rights while in a VA facility are determined, however, by Federal law because, as noted, the State's law does not otherwise extend to VA facilities. Therefore, VA facilities need not follow any State law because of regulation. Moreover, VA has procedures which apply to administration of drugs. Manual M-2, Part I, Chap. 23, para. 23-07-.09 (August 27, 1982). By its broard language, this policy would apply to the administration of psychotropic drugs.

VA policy for obtaining consent for "special procedures" requires the Agency to follow State law:

No patient shall be treated by any means or undergo any procedures that may produce irreversible brain damage, such as psycho-surgery, including laser beam tissue ablation and similar procedures, aversive reinforcement conditioning, alteration of reproductive capacity or any unusual or hazardous procedure/treatment, without the prior written voluntary and informed consent of the patient.... Where required by State law, the consent given by a competent patient must be coupled with the written consent of the patient's representative. Where permitted by State law or court authorization, if the patient is unable to give such consent because of disabling condition, written consent of the patient's representative will be obtained after being given adequate opportunity for consultation with independent specialists and legal counsel.

VA Manual M-2, Part I, Chapter 23, para. 23.10c (emphasis added).

Paragraph 23.10c is directed at "Consent for Special Procedures." Each specific procedure described by the paragraph concerns invasive surgical procedures or unorthodox treatments distinctly different than medical treatments involving only drug therapies. These specific procedures effectively limit the general terms, i.e., "any means or ... procedures" and "procedure/treatment," used in that paragraph such that those general terms encompass only procedures of the kind specifically described in the paragraph. Moreover, it is our understanding that psychotropic drugs do not cause irreversible brain damage (i.e.., anatomical change to the brain), which is the subject of the special provision in this manual, although their side effects, including tardive dyskinesia and akathesia, may seriously affect it. See generally Gelman, Mental Hospital Drugs,Professionalism and the constitution, Geo.L.J. 1725, 1740-1749 (1984) (general discussion of antipsychotic drugs and how they work). Therefore, psychotropic drug treatments do not fall into the category of treatments described by that paragraph and, therefore, are not subject to the directive in that paragraph to follow State law.

Due Process

The question of whether Rogers, supra, should be applied in VA facilities in Massachusetts also raises a question as to the constitutionality of VA procedures applicable to the administration of psychotropic drugs to patients who are deemed unable to consent to medical treatment because of physical or mental impairment but who have not been adjudicated incompetent. Those procedures may not be sufficient to meet emerging constitutional standards.

Current VA policy provides: "The patient has the right to refuse or withhold consent" for the administration of any drug. VA Manual M-2, supra, para. 23.07

(August 27, 1982). VA health care personnel may, however, provide necessary medical care without consent in an emergency. Id., para. 23.08. And, where the patient is unable to provide such consent, medical care may be given in nonmergent situations: (1) in the case of a minor, by the consent of a parent or legal guardian, Id., para. 23.09(a); (2) in the case of an adjudicated incompetent, by the consent of a court-appointed guardian; (3) in the case of a person who is unable to give consent because of a physical or mental impairment, by the patient's next of kin or, if next of kin is unavailable or unable to consent, the medical facility must petition a local court for permission to treat the patient. Id.

Massachusetts law requires the exercise of a substituted judgment by a State court on behalf of the incompetent patient.

The factors that the court must take into account in reaching its judgment include the patient's expressed treatment preferences, religious convictions, the impact of the patient's decision on his family, the possibility of adverse side effects, the prognoses with and without treatment. The State's law provides greater protections for the constitutional rights of patients to be free from the unwarranted administration of psychotropic drugs than required by the 14th amendment's due process clause. Rogers, supra, 738 F.2d at 8. State law may, of course, recognize liberty interests more extensive than those independently recognized by the federal Constitution. Mills, supra, at 300.

In connection with both VA and State policy for administering psychotropic drugs to involuntary patients, Federal courts have held, with some variation in formulation, that specific constitutional interests may be implicated where the Government proposed to administer such drugs to patients without their consent: (1) a patient's first amendment interest in being able to think and communicate freely, Scott v. Plante, 532 F.2d 939, 946 (3rd Cir.1976), on appeal after remand, 641 F.2d 117 (3rd Cir.1981), vacated in light of Youngberg v. Romeo, 457 U.S. 307 (1982), at 458 U.S. 1101 (1982), on remand 691 F.2d 634 (3rd Cir.1982); Davis v. Hubbard, 506 F.Supp. 915, 933 (N.D.Ohio 1980); (2) a patient's interest in physical and intellectual integrity and personal security, Rennie v. Klein, 653 F.2d 836, 846 (3rd Cir.1976), vacated in light of Youngberg, supra, at 458 U.S. 1119 (1982), on remand 720 F.2d 266 (1983); Davis, supra, at 933; (3) a patient's interest in making certain kinds of personal decisions with potentially significant consequences, Davis, supra, at 931-933. The administration of such drugs may also implicate an individual's interest in his personal privacy. Scott, supra, at 946, note 9; Rogers, surpa, 634 F.2d at 653. And, in Lojuk v. Quandt, the court found these interests implicated in the VA's administration ECT and recognized the patient's right (under the fifth amendment) to be free from the administration of ECT absent adequate procedural safeguards. 706 F.2d 1456, at 1465 (7th Cir.1983).

The right to avoid unconsented to treatment with such drugs is qualified, not absolute, and thus subject to regulation given sufficient countervailing

Government interests. Id., at 291: Youngberg, supra. at 320. " R estrictions on liberty that are reasonably related to legitimate government objectives are constitutional ." 457 U,S. 320. For example, it appears well-settled that psychotropic drugs may be administered in an emergency without invocation of due process procedures. See, e.g., Rogers, supra, at 634 F.2d 659-661; Rennie, 653 F.2d 852-853. Courts have identified several State interests that in appropriate circumstances may overcome the interest of an incompetent involuntarily committed patient to refuse treatment by psychotropic drugs. The State has an interest in preventing conduct by the patient that may cause injury to persons or property at the facility, Rogers, supra, at 654; and, in VA's instance, the Agency has an interest in insuring authorized medical care is constitutionally provided to patients admitted for such care. Courts have also permitted the administration of psychotropic drugs where the treatment was necessary to ensure that the patient had a reasonable opportunity to improve his condition within a reasonable time. See Rennie, supra, at 853; Okin, supra, at 659-560.

Indeed, the VA may have a constitutional duty to provide adequate medical treatment, as a quid pro quo, to involuntarily committed patients in VA facilities. See e.g., Donald v. O'Connor, 493 F.2d 507, 520-525 (5th Cir.1974) (involuntary civil commitment), aff'd. on other grounds 422 U.S. 563 (1975); Wyatt v. Stickney, 325 F.Supp. 781 (N.D.Ala.1971). "Adequate and errective treatment is constitutionally required because, absent treatment, the hospital is transformed 'into a penitentiary where one could be held indefinitely for no convicted offense'."Wyatt, supra, at 784 (citation omitted); see also Woe v. Cuomo, 729 F.2d 96, 105 (2nd Cir.1984) (where civil commitment is for treatment, treatment must be provided) cert. denied, --- U.S. ----, 105 S.Ct. 339 (1984). Therefore, if adequate and effective treatment requires the use of psychotropic drugs, it could be argued, it could be argued that VA is required to utilize them provided other constitutional safeguards are met.

An analysis of whether VA (or State) procedures for the administration of psychotropic drugs adequately protect patients rights to be be free from the administration of such drugs must (1) identify the applicable constitutional standard by which administration of such drugs will be judged, (2) apply this standard to current VA procedures; and (3) adopt procedures as necessary to meet that standard. The minimal standard was established in Youngberg, which recognized the constitutional rights of involuntary, incompetent patients admitted to a State institution to reasonable conditions safety and freedom from unreasonable restraints. Under Youngberg, the determination whether such an individual's constitutional rights have been violated turns on:

Whether the Defendants' conduct was such a substantial departure from accepted professional judgment, practice or standards in the care and treatment of this plaintiff as to demonstrate the defendants did not base their conduct on professional judgment.

Id., 314. This standard has been applied to determine the propriety of administering psychotropic drugs and ECT to incompetent patients. Rennie, on remand 720 F.2d 267, at 269-270; see also Lojuk, supra, at 1467 (ECT treatment).

Youngberg provided little guidance regarding the procedures necessary to ensure that its standards is met. The case does signal, however, in connection with determining damage recovery for civilly committed patients against health care providers, that health care judgments by State officials will be presumed valid, Id., at 321-322: "courts must show deference to the judgment exercised by a qualified professional." Id. under Youngberg, for instance, we believe that a medical judgment regarding a patient's competency and/or treatment is entitled to deference from the courts. Following Youngberg, in United States v. Leatherman, 580 F.Supp. 977 (D.D.C.1983), appeal dismissed 729 F.2d 863 (D.C.Cir.1984), the court held it consistent with due process requirements for a Federal facility to determine administratively whether (1) a committed patient was competent to make treatment decisions; and (2) whether the patient should be administered psychotropic drugs without his consent in a nonemergent situation to prevent deterioration of his mental condition. Accord: Rennie, supra, 653 F.2d at 848-850 (administration of such drugs without patient's consent). The court noted that the Government's procedure provided a employee to represent the patient's interest, and a means for the participation of patient and family in the decision to provide treatment. See also: Rennie, supra, at 848-849. The government's procedures also required specific findings regarding the need for treatment. And in Rennie, the court upheld, as consistent with due process, a State administrative procedure to review the administration of psychotropic drugs to committed incompetent (and competent) patients. Those procedures required that the initial assessment of a need for psychotropic drugs be reviewed by the State facility's director, or his designee, who must personally examine the patient and concur that force treatment, without patient consent, is necessary. The procedures also required periodic review of the proposed treatment.

Leatherman, Rennie, and, to some extent, Youngberg provide guidance regarding the kind of procedures necessary for VA to withstand constitutional attack in connection with administering psychotropic drugs to involuntary patients, without legal guardians, who are determined by VA to be incompetent for purposes of making treatment decisions. Such procedures should, at a minimum, provide:

(1) the patient, or the patient's representative, an opportunity to be present and participate in the treatment decision process. See Leatherman, supra, at 980 (patient advocate; family participation);

(2) An independent, internal administrative review of all determinations make in connection with the proposed administration of psychotropic drugs to

incompetent, involuntary patients without legal guardians. See Leatherman, supra, at 980; Rennie, supra, 653 F.2d at 848-849. Among the determinations which should be reviewed are the following: "the patient's degree of capacity to make treatment decisions, the likely usefulness of the medications, the availability of alternate means of treatment, the likelihood of physical harm to the patient or others if medication is not administered, the patient's prognosis without medication, and the risks of permanent side effects." Leatherman, supra, at 980.

In applying the standard described above to VA policy stated in paragraph 23.09, it seems clear that insofar as the policy would govern the question of consent to treat an incompetent patient with psychotropic medication, the pertinent provisions do not meet minimal constitutional requirements. VA procedures should be modified to identify a patient's qualified right to refuse psychotropic medications and to provide for administrative review of decisions where psychotropic drugs are administered against the patient's consent.

FTCA

The conclusion that VA is not obligated to follow State law in any revision of its policy on consent in connection with the administration of psychotropic drugs raises an issue regarding liability under the FTCA. Specifically, the issue would arise if the Agency adopted procedures, either nationally or locally, which dod not follow State law. VA should not follow State law, for instance, where that law did not meet minimal due process requirements. Two questions arise: (1) Whether VA would be liable for medical malpractice under the FTCA where physicians followed an Agency policy which conflicted with State law; and (2) whether VA physicians would be personally liable in the event they followed VA policy rather than State law.

Administering psychotropic drugs to incompetent VA patients, under procedures that are inconsistent with State law, would not in itself subject VA to liability under the FTCA. The FTCA provides: "The United State shall be liable respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances." 28 U.S.C. § 2674. However, the Act provides an exception to this waiver of sovereign immunity for:

(a) Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a Federal agency or an employee of the Government, whether or not the discretion involved be abused.

28 U.S.C. § 2680 (emphasis added).

Any VA physician administering psychotropic drugs under an agency-wide policy would be acting "in the execution of a statute or regulation, whether or not such statute or regulation be valid." Id. The history of the FTCA does not precisely specify the meaning of the term "regulation" as used in section 2680(a). The Court has, however, indicated in Dalehite v. United States, 346 U.S. 15 (1953), that the law from which section 2680(a) derives was intended to avoid:

any possibility that the bill might be construed to authorize suit for damages against the Government growing out of an authorized activity ... where no negligence on the part of any Government agency is shown, and the only ground for suit is the contention that the same conduct by a private individual would be tortious, or that the statute or regulation authorizing the project was invalid.... Nor is it desirable or intended that the constitutionality of legislation or the legality or a rule or regulation should be tested through the medium of a damage suit for tort.

Id., at 29, note 21 (concerning section 402 of the Legislative Reorganization Act of 1946). This broad language indicates that Agency policies, such as that suggested above, which are binding upon VA employees, should be considered "regulations" for purposes of FTCA and that VA should therefore not be subject to suit under the Act for pursuing them.

Similarly, an Agency decision to adopt a policy for administering psychotropic drugs is a discretionary function within the meaning of section 2680(a). The "discretionary function" exemption has been well litigated. Dalehite, supra, established that the exception extended at least to:

T he discretion of the executive or the administrator to act according to one's judgment of the best course, ... T he "discretionary function or duty" that cannot form a basis for suit under the FTCA includes determinations made by executives or administrators in establishing plans, specifications or schedules of operations.

Id. at 34-36. See also, e.g., Martin v. United States. 546 F.2d 1355, 1360 (9th Cir.1977) (policy adopted on controlling bears in national parks) cert. denied 432 U.S. 906 (1977); Smith v. United States, 620 F.3d 948-953 (3rd Cir.1980) cert. denied 449 U.S. 870 (1980) (discretionary function protects policy judgments as to the "public interest")

The adoption of an Agency policy is within the "discretionary function" exception as interpreted by these cases. The Administrator's authority to provide medical care is, in the language of applicable statutes, discretionary. See, e.g., 38 U.S.C. §§ 610 and 612 (Administrator "may" provide care). The decision regarding the extent to which provision that care will exceed, or comply with, minimum due process requirements is a judgment which requires that a choice be made

among many alternatives; these include procedures followed by each State as well as those announced in applicable court decisions. Those requirements should be uniform throughout the VA health care system as the care provided nationally under that system is provided under a unitary, statutory and regulatory system. Lack of uniformity may result in findings that VA has denied patients in one part of our system due process protections because, in another part of the system, greater protections are given. See generally, Mills, supra, at 300 Government action would not moot that concern.

Therefore, these choices regarding standards for administering psychotropic drugs, under Dalehit and related cases, are not subject to the exigencies of State law under FTCA. Id., at 36-36. Protection from liability for making such discretionary decisions would extend to any VA physicians executing that policy. Id. However, negligent administration of the drugs covered by the suggested policy is not within the discretionary function exemption of section 2680(a). See, e.g., Griffin v. United States, 500 F.2d. 1059 (3rd Cir.1974).

Similarly, VA physicians, following VA policy, are not likely to be held liable for any act, including the administration of psychotropic drugs, undertaken in furtherance of that policy. A civil action against the United States under the FTCA is the only remedy for malpractice committed by VA physicians and other health care providers in the Department of Medicine and Surgery. 38 U.S.C. § 4116. However, at least one court has held that where an exception under section 2680 prevents a suit against the United States, the immunity provided by section 4116 is not available. This was the situation in Lojuk, supra, where the court, finding that performance of electroconvulsive therapy without any consent, amounted to a battery under State law, held that the Government could not be sued but the action could proceed against the individual VA physician. This rationale could be applied to result in individual liability for VA physicians administering psychotropic drugs without a patient's consent. Several courts have held that the "intentional torts" exception contained in section 2680(h) does not apply unless the Government employee intended to harm, as opposed to treat, the allegedly harmed patient, and therefore, the patient's remedy is against the Government under the FTCA. Fontenelle v. United States, 327 F.Supp. 801 (S.D.N.Y.1971); Lane v. United States, 225 F.Supp. 850 (E.D.Va.1964). And courts have also held, contrary to Lojuk, that Federal law determines what is a "battery" or an "assault" within the meaning of subsection 2680(h). See, e.g., Ramirez v. United States, 567 F.2d 854 (9th Cir.1977). Courts have also held that the subsection's exception was not meant to exclude any for of medical malpractice from the scope of the FTCA. Ramirez, supra, at 856-857. Under state law in Massachusetts, providing medical care without consent constitutes medical malpractice rather than a battery. See Rogers, supra, 634 F.2d 663-66. Title 38, of course, provides that suit against the United States, under the FTCA, is the exclusive remedy against any health care provider in VA's department of Medicine and Surgery for damages for personal injury allegedly arising from malpractice or negligence committed in the course of

their employment. 38 U.S.C. § 4116(a). Therefore, VA health care personnel are not likely to be held personally liable for administering psychotropic drugs without patient consent under the FTCA, although the issue is not free from doubt. In any event, the Administrator may indemnify such employees for any liability. Id.,subsection (e). Employees would also be entitled to raise whatever immunity defenses are otherwise available. See generally, Unpub./Op.G.C. (date November 5, 1975).

Comity

The conclusions that applicable VA procedures for administering psychotropic drugs may not be sufficient to afford adequate due process and that interim procedures need be adopted pending review of agency policy presents the question of whether VA should follow State law in the interim. Previously, VA has complied with State law in situations where compliance would not impose additional obligations on VA. See e.g., Unpub.Op.G.C. (March 15, 1984) (unused body fluids may be provided to State officers after VA treatment). But following procedures which we anticipate will be adopted by State courts to implement Rogers would impose additional obligations, including the requirement that VA physicians execute an affidavit concerning a patient's diagnosis, history, and prognosis, and develop a treatment plan showing that use of psychotic medication is planned and setting forth the other aspects of treatment. Moreover, following State procedures which do not comply with our view of the minimum requirements for due process would not allay the concerns with adequate due process that require reevaluation of VA's current policy.

It is clear, however, that the Massachusetts procedure for administering psychotropic drugs is more than constitutionally sufficient. Rogers, supra, 738 F.2d at 8. Consequently, no objection exists to following the Rogers procedure--developed under State law--pending the Agency's review of its current policy in administering psychotropic drugs to ensure the policy's compliance with developing constitutional requirements. The conclusion that there is no objection to following State law pending agency review of this policy is, however, limited to the facts of this case, where clearly relevant State law has been specifically approved by the Federal judiciary. Any VA facility outside of Massachusetts would have to determine (1) whether applicable State law was judicially approved as constitutionally sufficient; or (2) was consistent with the procedures, described above, before it would be appropriate to follow State law in this area.

HELD:

VA has no obligation to follow State law regarding obtaining consent to administer psychotropic drugs. Current VA procedures may not, however, be sufficient to meet due process requirements for administering such drugs to involuntarily committed patients. These patients have qualified constitutional right to refuse treatment with such drugs which requires

that, except in an emergency, the patient be provided certain procedural protections to determine whether involuntary treatment should proceed. We recommend establishing interim guidelines pending agency-wide action on this issue. These guidelines should minimize or eliminate the risk that the Agency or its employees will be found liable for improperly administering psychotropic drugs. The VA's interest in insuring uniformity in the administration of such drugs through procedures that accommodate those needs do not warrant following State law agency-wide as a matter of comity. However, given the facts here, we have no objection to hospitals in Massachusetts following State procedures pending development of agency-wide procedures.

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