



# ST. THOMAS JOURNAL OF COMPLEX LITIGATION

Volume 7

Summer 2020

## COMBATING THE FERES DOCTRINE

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Shaymaa Shwel\*

*“Feres was wrongly decided and heartily deserves the ‘widespread, almost universal criticism’ it has received.”<sup>1</sup>*

Sgt. 1st Class Richard Stayskal (“Stayskal”), a Green Beret and former Marine, husband, and father of two daughters was deployed to Iraq in 2004.<sup>2</sup> During his deployment, this Green Beret was shot by an Iraqi sniper, a shot which lodged a bullet in his [left] lung, nearly killing him.<sup>3</sup> Stayskal miraculously survived the sniper round that pierced his left lung because of the excellent work of his doctors; however, thirteen years later, he would not be so lucky.<sup>4</sup>

In January 2017, Stayskal was selected by the Army Special Forces Group to attend Special Forces Underwater Dive School, and because of his previous gunshot wound it was mandatory for him to have a CT scan done for both his safety and the safety of others.<sup>5</sup> Stayskal visited Womack Army Medical Center at Fort Bragg,<sup>6</sup> a military installation in North Carolina, to have a CT scan done and reviewed, and after being given a clean bill of health, he was cleared for dive school.<sup>7</sup> However, around March of 2017, Stayskal started to experience difficulty breathing, specifically when he would lay down.<sup>8</sup> His breathing problems became so severe that Stayskal began to cough up blood, he recalled “it [feeling] like [he] was being waterboarded with blood.”<sup>9</sup> In May of 2017, Stayskal was rushed to Womack Army Medical Center where the doctors reread Stayskal’s CT scan from January and determined that there was an abnormality that needed to be reexamined.<sup>10</sup> Yet, strangely enough, Stayskal was sent home with a diagnosis of pneumonia.<sup>11</sup> However, this

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<sup>1</sup> *United States v. Johnson*, 481 U.S. 681, 700 (1987) (5-4 decision) (Scalia, J., dissenting).

<sup>2</sup> J.D. Simkins, *This Green Beret is battling cancer — and the government — after Army medical’s ‘gross malpractice’*, ARMY TIMES (Nov. 7, 2018), <https://www.armytimes.com/news/your-army/2018/11/07/this-green-beret-is-battling-cancer-and-the-government-after-army-medicals-gross-malpractice>.

<sup>3</sup> Maggie Sergio, *Rich Stayskal: New bill named after Pinehurst Green Beret*, SANDHILLS SENTINEL (May 6, 2019), <http://sandhillssentinel.com/rich-stayskal-new-bill-named-after-pinehurst-green-beret>.

<sup>4</sup> *Id.*

<sup>5</sup> James Clark, *Dying of cancer, this Green Beret has one last mission: Getting Congress to fight for military medical malpractice reform*, TASK & PURPOSE (Sept. 12, 2019 3:25 PM), <https://taskandpurpose.com/richard-stayskal-feres-doctrine-congress>.

<sup>6</sup> WOMACK ARMY MEDICAL CENTER, <https://tricare.mil/mtf/Womack/About-Us> (last visited on Nov. 17, 2019) (providing background information on Womack Army Medical Center).

<sup>7</sup> Maggie BenZvi, *Green Beret with Terminal Cancer Fights to Sue the Military for Medical Malpractice*, COFFEE OR DIE (Sep. 26, 2019), <https://coffeordie.com/green-beret-medical-malpractice>.

<sup>8</sup> Clark, *supra* note 5.

<sup>9</sup> Kristina Fiore, *Green Beret Fights to Sue Military Doctors – Sgt. Richard Stayskal has been pushing Congress to make a change to the “Feres Doctrine”*, MEDPAGE TODAY (Sep. 11, 2019), <https://www.medpagetoday.com/publichealthpolicy/militarymedicine/82079>.

<sup>10</sup> Brenda Breslauer, Vicky Nguyen & Kit Ramgopal, *U.S. service members can’t sue military doctors. A terminally ill Green Beret is fighting to change that.*, NBC NEWS (Nov. 12, 2019 4:44 PM), <https://www.nbcnews.com/health/health-care/u-s-soldiers-can-t-sue-military-doctors-terminally-ill-n1070516>.

<sup>11</sup> Simkins, *supra* note 2.

time around, it was dire because after Stayskal was sent home, his condition worsened once more, which is when Stayskal knew he could not trust his doctor's diagnosis.<sup>12</sup>

After advocating for permission to get an appointment with a civilian pulmonologist, he was finally able to see a doctor by the end of June 2017.<sup>13</sup> Six months after his first appointment at Womack Army Medical Center in Fort Bragg, the civilian pulmonologist diagnosed Stayskal with stage 3A non-small lung cancer.<sup>14</sup> Even though Stayskal had been diagnosed and was being treated, by December 2017 the aggressive cancer had spread throughout his body.<sup>15</sup> After his first visit to the civilian pulmonologist in June 2017 he discovered that the Army doctors had taken notice of the mass in his lung, but chose not to act or notify Stayskal of the irregular growth they had discovered.<sup>16 17</sup> Stayskal is currently diagnosed with stage IV lung cancer and does not know how long he has to live.<sup>18</sup> Adding insult to his injury, Stayskal is unable to file suit alleging medical malpractice by incompetence of the government doctors because of a doctrine called the *Feres Doctrine*.<sup>19</sup>

There are two ways that the *Feres Doctrine* can be overturned, thus allowing servicemen to sue the government: (1) by the United States Supreme Court overturning its initial ruling, or (2) by Congress passing legislation that amends the Federal Tort Claims Act (the "FTCA").<sup>20</sup> In 2019, Stayskal and his attorney headed out to Washington, D.C. to initiate a change of the current law and met with Senator John Kennedy (R-Louisiana) and Senator Mazie Hirono (D-Hawaii).<sup>21</sup> Senator Kennedy and Senator Hirono have introduced a version of the SFC Richard Stayskal Military Medical Accountability Act of 2019 (the "Stayskal Act"), that would allow the servicemembers to sue the government for cases involving military medical malpractice.<sup>22</sup> In December of 2019, Congress passed its version of the Stayskal Act and President Donald Trump signed it as part of the National Defense Authorization Act.<sup>23</sup> The provision in the National Defense Authorization Act introduced a change to a law preventing past and present service members from being able to sue the federal government.<sup>24</sup>

Because of the injustice of the *Feres Doctrine*, this note will discuss the following: (1) the history surrounding the FTCA and the *Feres doctrine*; (2) the direction the Stayskal Act was

<sup>12</sup> Clark, *supra* note 5.

<sup>13</sup> Fiore, *supra* note 9.

<sup>14</sup> BenZvi, *supra* note 7.

<sup>15</sup> Fiore, *supra* note 9.

<sup>16</sup> Dianna Cahn, *A Green Beret says the military failed to detect his cancer. Now he seeks to hold the government accountable.*, STARS AND STRIPES (Jan. 14, 2019), <https://www.stripes.com/news/us/a-green-beret-says-the-military-failed-to-detect-his-cancer-now-he-seeks-to-hold-the-government-accountable-1.564423>.

<sup>17</sup> Victoria Albert, *Solider with cancer fights to change law shielding military from malpractice suits*, CBS NEWS (Aug. 13, 2019 7:37 AM), <https://www.cbsnews.com/news/feres-doctrine-active-duty-service-members-cant-sue-for-medical-malpractice-that-could-be-about-to-change>.

<sup>18</sup> Simkins, *supra* note 2.

<sup>19</sup> Clark, *supra* note 5.

<sup>20</sup> *Id.*

<sup>21</sup> *Sens. Kennedy (R-La.) & Hirono (D-Hawaii) Introduce Legislation to Protect Active Duty Military from Medical Negligence*, JOHN KENNEDY UNITED STATES SENATOR FOR LOUISIANA (Sep. 10, 2019), <https://www.kennedy.senate.gov/public/2019/9/sens-kennedy-r-la-hirono-d-hawaii-introduce-legislation-to-protect-active-duty-military-from-medical-negligence>.

<sup>22</sup> *Id.*

<sup>23</sup> Jessica Savage, *Historic changes to military malpractice law allows federal government to be sued*, WTOC (Jan. 9, 2020 6:13 PM), <https://www.wtoc.com/2020/01/09/historic-changes-military-malpractice-law-allows-federal-government-be-sued>.

<sup>24</sup> *Id.*

projecting for; (3) a suggestion for Congress to mark an end to the *Feres* Doctrine era and allow military medical malpractice claims; and (4) finally, conclude with a summary of this note’s goals.

### **I. Federal Tort Claims Act and *Feres***

The judicial doctrine of sovereign immunity holds that the government cannot be sued without its consent.<sup>25</sup> The idea of sovereign immunity has been established prior to the 20<sup>th</sup> Century, with the idea that the King was not able to commit any wrongdoing.<sup>26</sup> In *Schillinger v. United States*, the court stated, “The United States cannot be sued in their courts without their consent, and in granting such consent Congress has an absolute discretion to specify the cases and contingencies in which the liability of the Government is submitted to the courts for judicial determination.”<sup>27</sup>

However, the FTCA is an exception to the doctrine of sovereign immunity, and under the FTCA an individual is allowed to bring a claim against the federal government for personal injuries resulting from an act of negligence by “any employee of the Government while acting within the scope of his office or employment...”<sup>28</sup> Before 1946, after a tort was committed by a federal employee, claimants were not left with a remedy.<sup>29</sup> In an effort to resolve this dilemma and impose liability on the United States for its negligent employees in the same magnitude as private individuals in similar situations, the FTCA was passed.<sup>30</sup> In order for a claim to be filed under the FTCA an individual must show:

- (1) he or she was injured, or his or her property was damaged by a federal government employee;
- (2) the employee was acting within the scope of his or her official duties;
- (3) the employee was acting negligently or wrongfully; and
- (4) the negligent or wrongful act proximately caused the injury or damage of which he or she complains.<sup>31</sup>

However, the FTCA also has a list of exceptions in which it does not apply, one of them being the military.<sup>32</sup> However, a claim can be dismissed for a lack of subject matter jurisdiction,

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<sup>25</sup> *Cohens v. Virginia*, 19 U.S. 264, 303 (1821) (stating “a sovereign and independent State is not liable to the suit of any individual, nor amenable to any judicial power, without its own consent.”); *Sovereign immunity*, CORNELL LAW SCHOOL, [https://www.law.cornell.edu/wex/sovereign\\_immunity](https://www.law.cornell.edu/wex/sovereign_immunity) (last visited Oct. 6, 2019) (defining and providing background information sovereign immunity).

<sup>26</sup> *Feres v. United States*, 340 U.S.135, 139 (1950); *Sovereign Immunity*, *supra* note 25.

<sup>27</sup> *Schillinger v. United States*, 155 U.S. 163, 166 (1894).

<sup>28</sup> 28 U.S.C. §1346(b) (2020).

<sup>29</sup> *William v. Luneburg*, Encyclopedia of U.S. History, *Federal Tort Claims Act (1946)*, ENCYCLOPEDIA.COM (May 31, 2020), <https://www.encyclopedia.com/history/united-states-and-canada/us-history/federal-tort-claims-act> (providing significant background information on the Federal Tort Claims Act).

<sup>30</sup> Amy M. Hackman, *The Discretionary Function Exception to the Federal Tort Claims Act: How Much is Enough?*, 19 CAMPBELL L. REV. 411, 413 (1997) (quoting 28 USC § 2674 (1996)).

<sup>31</sup> Federal Tort Claims Against Federal Judiciary Personnel, UNITED STATES COURTS, <https://www.uscourts.gov/rules-policies/judiciary-policies/federal-tort-claims-against-federal-judiciary-personnel> (last visited Oct. 7, 2019).

<sup>32</sup> 28 U.S.C. §2680 (2019) (listing the exceptions that would not apply to a tort claim based on a Government employee).

in situations where an exception applies.<sup>33</sup> The exceptions to the FTCA in regard to the military indicates that “any claim arising out of the combatant activities of the military or naval forces, or the Coast Guard, during time of war,” would not be applicable to be covered by the FTCA.<sup>34</sup> As this note continues the *Feres* Doctrine will be discussed, and how the combatant activities exception was modified and expanded to apply to more than just combatant activities.<sup>35</sup>

In 1949 in *Brooks v. United States*, the issue was “whether members of the United States Armed Forces can recover under that [Torts Claims] Act for injuries not incident to their service.”<sup>36</sup> In *Brooks*, three men were riding in their car when they attempted to enter an intersection before they were struck by a United States Army truck, driven by an employee of the Army.<sup>37</sup> At the time of the accident, two of the three men driving in the truck were in the United States Armed Forces, and the government moved to dismiss the claim on the basis that they were barred from recovery under the FTCA.<sup>38</sup> The District Court disagreed with the government, whereas the Court of Appeals reversed the decision of the lower court in a divided decision, which allowed for the United States Supreme Court to grant certiorari.<sup>39</sup> The U.S. Supreme Court held that the accident was not incident to the victim’s service in the army, thus they could claim tort actions under the Tort Claims Act.<sup>40</sup>

In *Feres*, the Supreme Court decided on “whether the Tort Claims Act extends its remedy to one sustaining ‘incident to the service’ what under other circumstances would be an actionable wrong.”<sup>41</sup> The Court considered three separate cases in one opinion, in which the primary focus was on the fact that all three events occurred while each claimant was on active duty and was injured because of negligence of others in the armed forces.<sup>42</sup> The Court ultimately decided that because the injuries to the servicemember occurred out of or in the course of activity incident to service, the federal government was not liable under the FTCA.<sup>43</sup>

*Feres* was decided in 1950, and the Supreme Court held “that the Government is not liable under the Federal Tort Claims Act for injuries to servicemen where the injuries arise out of or are in the course of activity incident to service.”<sup>44</sup> This Supreme Court decision applied to all activity

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<sup>33</sup> See *Broudy v. United States*, 661 F. 2d 125, 128 (1981) (dismissing the appellant’s claim, seeking to recover for the wrongful death of her husband while he was in the service, for lack of subject matter jurisdiction); Hackman, *supra* note 30, at 413.

<sup>34</sup> 28 U.S.C. §2680(j).

<sup>35</sup> See generally *Feres*, 340 U.S. 135.

<sup>36</sup> *Brooks v. United States*, 337 U.S. 49, 50 (1949).

<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

<sup>39</sup> *Id.* at 51; see also *U.S. v. Brooks* 169 F.2d 840, 846 (4th Cir. 1948) (opining the FTCA does not apply even to claims of injuries or death by soldiers that are not caused by their service).

<sup>40</sup> *Brooks*, 337 U.S. 49, 51.

<sup>41</sup> *Feres*, 340 U.S. at 138.

<sup>42</sup> See *id.* at 135, 137-38 (briefing the three consolidated cases in: *Feres*, *Jefferson v. United States*, and *United States v. Griggs*. In *Feres*, the victim was on active duty service and perished by a fire while in his barracks at Pine Camp, New York and the action was executed by *Feres*’ executrix and the underlying cause of action was negligence for housing the serviceman in the barracks that was known or should have been known to be dangerous. In *Jefferson*, which the victim while in the Army underwent an abdominal operation, and eight months later during another surgery a towel marked ‘Medical Department U.S. Army,’ was found in his stomach, and the underlying cause of action in this was that the towel was left in the plaintiff’s stomach negligently by an army surgeon; and the final is the *Griggs* case, were *Griggs*’ executrix filed a claim alleging that the decedent “met death” due to negligence of army surgeons.).

<sup>43</sup> *Id.* at 146; see also Bryce H.P. Mendez and Kevin M. Lewis, *Military Medical Malpractice and the Feres Doctrine*, CONG. RESEARCH SERV., IF11102, (2019).

<sup>44</sup> *Feres*, 340 U.S. at 146.

in relation to the servicemembers' service, including medical malpractice claims of a servicemember that occurred while on duty.<sup>45</sup> Therefore, the decision meant that no matter the injury caused to the servicemember, if it was caused during their time in the military, as an active servicemember, the healthcare professional would not be held liable under the FTCA.<sup>46</sup> The *Feres* doctrine is rooted in three policy rationales:

- (1) The distinctively federal nature of the relationship between the government and members of its armed forces, which argues against subjecting the government to liability based on the fortuity of the situs of the injury; (2) the availability of alternative compensation systems; and (3) the fear of damaging the military disciplinary structure.<sup>47</sup>

Additionally, in an affirmation of the *Feres* Doctrine, *United States v. Johnson* answered the question: “whether the tortfeasor in an alleged negligence claim by a federal government employee must be another servicemember?”<sup>48</sup> The Court decided that even if the alleged negligence is by a civilian employee of the federal government, the *Feres* doctrine bars an FTCA action for an activity incident to service for a servicemember.<sup>49</sup> The *Feres* decision has prevented many servicemembers from raising a claim.<sup>50</sup> With several attempts to overturn the *Feres* decision, the most recent is the Stayskal Act presented by the senators.<sup>51</sup>

## **II. Medical Malpractice and the Stayskal Act**

Medical malpractice occurs when a hospital, doctor, or other health care professional causes an injury to a patient, either through a negligent act or omission.<sup>52</sup> Injuries to a patient can include, but are not limited to: a misdiagnosis, failure to properly read test results, or improperly treating a patient.<sup>53</sup> A patient can bring a case against a healthcare professional to recover for their injuries as long as they can show a violation of the standard of care, that an injury was caused by

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<sup>45</sup> *Id.*

<sup>46</sup> *Id.*; see also Patricia Kime, *Law prevents some family members from suing the military*, MILITARYTIMES (July 5, 2015), <https://www.militarytimes.com/pay-benefits/military-benefits/health-care/2015/07/05/law-prevents-some-family-members-from-suing-the-military>.

<sup>47</sup> *Atkinson v. United States* 825 F.2d 202, 204 (1987).

<sup>48</sup> See generally *Johnson*, 481 U.S. 681.

<sup>49</sup> *Id.*

<sup>50</sup> Meghann Myers, *New for 2020: Here's why troops can't sue the military for medical malpractice, and how that's changing*, MILITARYTIMES (Dec. 23, 2019), <https://www.militarytimes.com/news/your-military/2019/12/23/new-for-2020-heres-why-troops-cant-sue-the-military-for-medical-malpractice-and-how-thats-changing/> (presenting cases in which the *Feres* Doctrine has prevented active military members from filing medical malpractice claims against the government).

<sup>51</sup> Leo Shane III, *Supreme Court rejects bid to overturn prohibition on military malpractice cases*, MILITARYTIMES (May 20, 2019), <https://www.militarytimes.com/news/pentagon-congress/2019/05/20/supreme-court-rejects-bid-to-overturn-prohibition-on-military-malpractice-cases/> (explaining the Supreme Court's decision of not revisiting the *Feres* Doctrine).

<sup>52</sup> *What is Medical Malpractice?*, AMERICAN BOARD OF PROFESSIONAL LIABILITY ATTORNEYS, <https://www.abpla.org/what-is-malpractice> (last visited Oct. 7, 2019) (explaining the basis of medical malpractice).

<sup>53</sup> *Medical Malpractice Law and Legal Definition*, USLEGAL, <https://definitions.uslegal.com/m/medical-malpractice> (last visited Nov. 16, 2019) (providing examples of what medical malpractice cases would involve).

that negligence, and the injury resulted in significant damages to the patient.<sup>54</sup> However, in the military, medical malpractice is a field lacking frequent discussion since it is very narrow in its application.

Because of the decision to fight the *Feres* Doctrine, Stayskal testified against Congress in efforts to urge lawmakers to change the *Feres* Doctrine.<sup>55</sup> Stayskal has conveyed that he is not just fighting for money, but he is fighting to ensure that doctors adequately perform their jobs, and those who neglect to do so are removed from their positions.<sup>56</sup> He is arguing for a change not only for himself, but for other service members and their families who do not have the same right as the rest of the citizens in the United States regarding medical malpractice.<sup>57</sup>

The Stayskal Act proposes an amendment to Chapter 171 of title 28, United States Code by adding §2681 titled “Claims against the United States for injury and death of members of the Armed Forces of the United States,” and it reads:

A claim may be brought against the United States under this chapter for damages relating to the personal injury or death of a member of the Armed Forces of the United States arising out of a negligent or wrongful act or omission in the performance of medical, dental, or related health care functions (including clinical studies and investigations) that is provided at a covered military medical treatment facility by a person acting within the scope of the office or employment of that person by or at the direction of the Government of the United States.<sup>58</sup>

The Stayskal Act will cover facilities that are described in subsections (b), (c), and (d) of section 1073d of title 10, Military medical treatment facilities.<sup>59</sup>

### III. Turning the Page on *Feres*

Now is the time for change, the *Feres* Doctrine must be modified. As previously discussed, under the *Feres* doctrine, servicemembers are not allowed to recover for negligence claims against federal employees even if they occurred in non-combat areas.<sup>60</sup> However, as Justice Scalia<sup>61</sup> articulated in his dissenting opinion in *Johnson*, the language of § 2680(j) expressly “excludes ‘[a]ny claim arising out of the *combatant activities* of the military or naval forces, or the Coast Guard, *during time of war*,’ [] demonstrating that Congress specifically considered, and provided

<sup>54</sup> Yvette Brazier, *What is medical malpractice?*, MEDICAL NEWS TODAY (Apr. 5, 2017), [https://www.medicalnewstoday.com/articles/248175.php#what\\_is\\_medical\\_malpractice](https://www.medicalnewstoday.com/articles/248175.php#what_is_medical_malpractice).

<sup>55</sup> Diane Wilson, *New bill in Congress named after Fort Bragg Soldier could pave way for troops to sue for medical malpractice*, ABC11 NEWS (May 3, 2019), <https://abc11.com/politics/medical-malpractice-bill-named-after-bragg-soldier-dying-from-cancer/5282326>.

<sup>56</sup> Diane Wilson, *Soldier fighting lung cancer says medical mistake by military doctor will cost him his life*, ABC 13 (Dec. 10, 2018), <https://abc13.com/health/soldier-says-medical-mistake-will-cost-him-his-life/4855564>.

<sup>57</sup> *Id.*

<sup>58</sup> SFC Richard Stayskal Military Medical Accountability Act of 2019, H.R. 2422, 116th Cong. (2019).

<sup>59</sup> H.R. 2422; *see also* 10 U.S.C. §1073(b), (c), and (d) (2019) (specifying the medical centers, hospitals, and ambulatory care centers that are considered military medical treatment facilities).

<sup>60</sup> *Feres*, 340 U.S. 135, 141-42 and 146 (consolidating three cases and neither of the then-servicemembers were in a combat area at the time of the negligent acts committed by government employees).

<sup>61</sup> Encyclopedia of World Biography, *Scalia, Antonin*, ENCYCLOPEDIA.COM (2019), <https://www.encyclopedia.com/people/social-sciences-and-law/supreme-court-biographies/antonin-scalia> (providing significant background information of Justice Scalia).

what it thought needful for, the special requirements of the military.”<sup>62</sup> Hence, if Congress had intended for the exception decided in *Feres* to exist, they would have considered, and provided, it like they done with the exception for preventing claims arising on a combat zone.<sup>63</sup>

The decision of *Feres* states that “the Government is not liable under the Federal Tort Claims Act for injuries to servicemen where the injuries arise out of or are in the course of activity *incident to service*.”<sup>64</sup> (emphasis added). However, there are two issues within that statement: (1) the FTCA does not use the phrase *incident to service*, and (2) the Court in *Feres* did not define what it means for an activity to be incident to service. Nevertheless, if the phrase *incident to service* were to be defined, dissecting the phrase is the starting point. First off, *incident* is defined as an event that occurs as a result of a connection.<sup>65</sup> *Service* is defined as the duty or work of a person.<sup>66</sup> Individually the meaning of *incident* and *service* are clear, however when these words are combined to create the phrase *incident to service*, their meaning has proven to be anything but clear. Thus, to ultimately clarify its meaning, Congress should implement the following definition for *incident to service*: an event that is within the scope of the service member’s duties while on active duty.

Using that definition, the claims of each of the servicemembers are not in accordance with the reasons of why they are rejected. For example, child birth, as in the case of Rebekah Daniel, is not within the scope of a servicemember’s duties as a member in the service.<sup>67</sup> Additionally, neither is Stayskal’s case, since the main issue in Stayskal’s situation was that the Army doctors neglected to notify him of a mass in his lung, and that neglect delayed his treatment.<sup>68</sup> Neither case arose out of issues related to the servicemember’s duties in the military, such as a gunshot wound to the leg while in combat, or a death arising from a truck exploding while in enemy territory.<sup>69</sup>

The idea that an active servicemember is not permitted to sue for medical malpractice is difficult to grasp. The rationale behind allowing medical malpractice claims is to provide compensation to patients injured by the negligence of healthcare professionals, and to deter negligent practice by healthcare professionals.<sup>70</sup> Should not all doctors be held to the same standard? If all doctors take the same oath when they enter the medical field, then they should all be held accountable for their actions no matter their employer; at the end of the day they have the

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<sup>62</sup> *Johnson*, 481 U.S. 681, 693 (Scalia, J., dissenting).

<sup>63</sup> *Id.*; see 28 U.S.C. §2680(j) (listing an exception to section 1346(b)); see also Kevin M. Lewis, *The Feres Doctrine: Congress, the Courts, and Military Servicemember Lawsuits Against the United States*, CONG. RESEARCH SERV., LSB10305 (2019).

<sup>64</sup> *Feres*, 340 U.S. at 146.

<sup>65</sup> See *Incident*, DICTIONARY.COM (2019), <https://www.dictionary.com/browse/incident?s=ts> (providing multiple definitions for the word incident).

<sup>66</sup> See *Service*, DICTIONARY.COM (2019), <https://www.dictionary.com/browse/service?s=t> (providing a multitude of definitions for the term service).

<sup>67</sup> See generally *Daniel v. United States*, 139 S. Ct. 1713; see also Claudia Grisales, *Supreme Court declines to hear case to allow military medical malpractice lawsuits*, STARS AND STRIPES (May 20, 2019), <https://www.stripes.com/supreme-court-declines-to-hear-case-to-allow-military-medical-malpractice-lawsuits-1.581863> (detailing the case of Rebekah Daniel who bled to death after child birth, and her husband sought to overturn the *Feres Doctrine* but the Supreme Court declined for the petition to move forward).

<sup>68</sup> Wilson, *supra* note 56.

<sup>69</sup> See *Brooks*, 337 U.S. 49.

<sup>70</sup> Daniel P. Kessler, *Evaluating the Medical Malpractice System and Options for Reform*, HHS PUBLIC ACCESS (Oct, 17, 2011), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3195420>.



same responsibility to maintain and restore an individual's health.<sup>71</sup> The *Feres* Doctrine is not only preventing active servicemembers from bringing medical malpractice claims, but it is protecting military doctors that have committed negligent acts.

### a. The Supreme Court's Role

As previously mentioned, there are two ways for the *Feres* Doctrine to be overturned, one being the Supreme Court overturning it itself. The decision in *Feres* has barred several claims, and has also tied the hands of circuit courts across the nation due to its ruling.<sup>72</sup> The Supreme Court has previously overturned two-hundred and thirty-six of its own decisions.<sup>73</sup> The decisions that have been overturned range from racial segregation when *Plessy v. Ferguson* was overturned by *Brown v. Board of Education*, to capital punishment cases when *McGautha v. California* was overturned by *Gregg v. Georgia*.<sup>74</sup> However, the Supreme Court has repeatedly turned down the opportunity to take on the challenge of overturning *Feres*.<sup>75</sup> The most recent case to challenge the *Feres* Doctrine at the Supreme Court, was *Daniel v. United States*.<sup>76</sup> Daniel's petition was denied, and while Justice Thomas<sup>77</sup> dissented from the denial of certiorari, it is notable that, Justice Ginsburg<sup>78</sup> would have granted the petition for a writ of certiorari, dissented from the denial of certiorari.<sup>79</sup> Although the Supreme Court has repeatedly refused to overturn *Feres*, there is another option to making the change, and that is for Congress to take on the lead role.

### b. Next Steps for Congress

At the present stage, in order for the *Feres* Doctrine to be overturned Congress must adopt the entire idea that the Stayskal Act is presenting which is primarily overturning the *Feres* Doctrine. The current statute was not created by the legislatures with the intent to bar military claims under the FTCA in cases other than those that arise from combat activities.<sup>80</sup> With the National Defense Authorization Act, the troops are still not able to file lawsuits in court but they

<sup>71</sup> *Doctor Job Description*, BETTERTEAM (May 16, 2019), <https://www.betterteam.com/doctor-job-description>.

<sup>72</sup> See *Ritchie v. U.S.*, 733 F.3d 871 (9th Cir. 2013) (stating "unless and until Congress or the Supreme Court choose to" change the decision in *Feres* the Circuit Court is "bound by controlling precedent.").

<sup>73</sup> AJ Willingham, *The Supreme Court has overturned more than 200 of its own decisions. Here's what it could mean for Roe v. Wade*, CNN (May 29, 2019, 7:31 AM), <https://www-m.cnn.com/2019/05/29/politics/supreme-court-cases-overturned-history-constitution-trnd/index.html?r=https%3A%2F%2Fwww.google.com%2F>.

<sup>74</sup> *Id.*

<sup>75</sup> See *Witt ex rel. Estate of Witt v. U.S.*, 564 U.S. 1037 (2011) (denying a writ of certiorari for the death of an Air Force Staff Sgt. after receiving negligent medical treatment while in a military hospital); see also <https://www.stripes.com/news/us/patients-recount-medical-horrors-under-care-of-military-doctors-with-no-legal-recourse-1.579146> (explaining Air Force Staff Sgt. Dean Patrick Witt died after an appendectomy caused by a nurse who "administered a lethal dose fentanyl and incorrectly inserted a breathing tube into his esophagus").

<sup>76</sup> See generally *Daniel*, 139 S. Ct. 1713.

<sup>77</sup> Encyclopedia of World Biography, *Thomas, Clarence*, ENCYCLOPEDIA.COM (2019), <https://www.encyclopedia.com/people/social-sciences-and-law/supreme-court-biographies/clarence-thomas> (providing significant background information of Justice Scalia).

<sup>78</sup> Encyclopedia of World Biography, *Bader Ginsburg, Ruth*, ENCYCLOPEDIA.COM (2019), <https://www.encyclopedia.com/people/social-sciences-and-law/supreme-court-biographies/ruth-joan-bader-ginsburg> (providing significant background information of Justice Ginsburg).

<sup>79</sup> See *Daniel*, 139 S. Ct. 1713 (Thomas, J., dissenting).

<sup>80</sup> 28 U.S.C. §2680 (provides a list of exceptions that 28 U.S.C. §1346(b) does not apply to).

are able to file claims through a Pentagon review process.<sup>81</sup> The country is in desperate need for a drastic change, one that would hold negligent individuals accountable. Congress should have allowed for a modification of the current law, instead if allowed for the Department of Defense to handle the entire process which still prevents complete ramifications to occur. As Dwight Stirling from the Center for Law and Military Policy correctly stated, “having the entire process handled within the Department of Defense is a little a fox guarding the hen house.”<sup>82</sup>

### **i. The Lives Affected**

The result of *Feres* has been implemented over the course of nearly seventy years.<sup>83</sup> Like Stayskal, Walter Daniel is among those affected by the results of *Feres*. Walter Daniel’s wife, Navy Lieutenant Rebekah Daniel, died post-labor due to postpartum hemorrhaging, which may have been prevented if the medical staff had exercised the proper standard of care.<sup>84</sup> However, as a result of the decision in *Feres*, Walter Daniel was unable to pursue a lawsuit against the medical staff.<sup>85</sup> These are just a couple of the victims of the *Feres* Doctrine, and because of these injustices the *Feres* Doctrine should be overturned.

The change needs to start with military installations. Thousands of service members should be the first priority for receiving healthcare services from practitioners that are focused on providing the best service available. Womack Army Medical Center is located in Fort Bragg, the largest Army installation worldwide by population.<sup>86</sup> With the Womack Army Medical Center serving over 160,000 TRICARE<sup>87</sup> beneficiaries,<sup>88</sup> the risk of medical malpractice is too high for a mistake on behalf of a negligent employee to occur.

Allowing for individuals that are receiving healthcare from the military to sue is not a new concept within the military. A majority of the 9.4 million individuals that do receive healthcare from the military can sue, whereas active servicemembers are the only ones prohibited from doing so.<sup>89</sup> This rationale does not add up logically or morally. First off, it does not make logical sense because the *Feres* Doctrine only applies to active service members and not retirees or to the service member’s family. Secondly, it does not make moral sense because, as Congresswoman Rep. Jackie Speier (D-California) who had initially introduced the Stayskal Act stated, “[a prisoner] can sue under the FTCA for malpractice but a service member cannot who is not in a combat setting?”

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<sup>81</sup> Jay Price, *New Law Permits Military Members To Seek Settlements For Medical Malpractice*, WUSF (Jan. 3, 2020 10:07 AM), <https://www.wusf.org/new-law-permits-military-members-to-seek-settlements-for-medical-malpractice>.

<sup>82</sup> Ryan Finnerty, *Service Members May Now Seek Compensation For Medical Malpractice In Military Hospitals*, HAWAII PUBLIC RADIO (Feb. 11, 2020), <https://www.hawaiipublicradio.org/post/service-members-may-now-seek-compensation-medical-malpractice-military-hospitals#stream>.

<sup>83</sup> *See Daniel*, 139 S. Ct. 1713.

<sup>84</sup> *Id.*

<sup>85</sup> *Id.*

<sup>86</sup> Womack Army Medical Center, *supra* note 6.

<sup>87</sup> *Tricare*, MILITARY.COM, <https://www.military.com/benefits/tricare> (last visited Nov. 17, 2019) (explaining Tricare “is government managed health insurance” provided to active duty service members).

<sup>88</sup> *Army Medicine*, U.S. ARMY, <https://www.goarmy.com/amedd/health-care/facilities/womack-army-medical-center.html> (last visited Nov. 17, 2019).

<sup>89</sup> Clark, *supra* note 5.

This is a gross example of judicial activism of the worse kind.”<sup>90</sup> <sup>91</sup> That speaks volumes because there are individuals that are in combat zones putting their lives on the line for an entire country having less rights than most other citizens in the United States.

## ii. Moving in the Right Direction

One argument behind keeping the *Feres* Doctrine comes from Paul Figley, professor of legal rhetoric at American University’s Washington College of Law, who argues that altering the *Feres* Doctrine would disrupt the “vital and special relationships between the government and its service members.”<sup>92</sup> However, the main argument is not to sue to Government for compensation, the main purpose behind the movement for change is to hold health professionals accountable for their negligence and not allowing life-altering mistakes to go by uncared for.

Senator Lindsey Graham (R-South Carolina) is against overturning the *Feres* Doctrine stated:

The deal is: You sign up for the military. You get disability. You get benefits. Your family gets well taken care of and you’re not able to sue. It’s not just malpractice. You have the Federal Torts Claim Act that’s available to you. But, when pilots fly new planes, we’re not gonna create liability there. I think it’s a trade-off that’s stood the test of time.<sup>93</sup>

However, Senator Graham’s statement is not the reasoning behind why the *Feres* Doctrine should be overturned. It is to hold negligent employees accountable and because the need for the change is highly misunderstood; yet another reason why the change is so necessary.

The implementation of the Stayskal Act is essential, and proposes the appropriate amount of change to law. Even if the Stayskal Act is implemented as a new section to the FTCA, the current regulation with respect to not allowing service members to initiate a lawsuit for medical mistakes that occurred in a combat zone<sup>94</sup> will remain intact, which is a completely reasonable proposal. This proposal is completely reasonable because a medical mistake that occurred in a combat zone is likely to occur because of the general nature associated with being in a combat zone. The Stayskal Act stays within the limits of the FTCA by “allowing claims against the United States for injury and death of members of the armed forces caused by improper medical care,”<sup>95</sup> because it does not over step and is geared towards holding negligent employees liable for their actions.

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<sup>90</sup> Patricia Kime, *Bill Would Let Troops Sue for Military Medical Malpractice*, Military.com (Apr. 30, 2019), <https://www.military.com/daily-news/2019/04/30/bill-would-let-troops-sue-military-medical-malpractice.html>.

<sup>91</sup> See generally *United States v. Muniz*, 374 U.S. 150 (1963) (holding that federal prisoners are available to sue under the FTCA for negligence of government employees, including malpractice suits); see also Sasha Volokh, *Prisoner litigation against public persons: how many ways can you lose?*, THE WASHINGTON POST (Feb. 18, 2004 11:54 AM), <https://www.washingtonpost.com/news/volokh-conspiracy/wp/2014/02/18/prisoner-litigation-against-public-prisons-how-many-ways-can-you-lose/>.

<sup>92</sup> Kime, *supra* note 90.

<sup>93</sup> Matt Grant, *Bill that would give soldiers right to sue government for medical malpractice stalls in Senate*, FOX 46 CHARLOTTE (Oct. 14, 2019), <https://www.fox46charlotte.com/news/bill-that-would-give-soldiers-right-to-sue-government-for-medical-malpractice-stalls-in-senate>.

<sup>94</sup> Clark, *supra* note 5.

<sup>95</sup> H.R. 2422.

This new method is said to be “the second best thing” according to Speier, which is quoted to be “a huge win.”<sup>96</sup> However, the individuals who pursue a career protecting this country deserve more than the second best thing, they deserve justice, not because they are entitled to it, but because they earned it. One argument presented for not allowing actual lawsuits to be initiated is because litigation becomes a distraction and takes time from the sole mission of the military, and that is to defend the nation.<sup>97</sup> However, that claim is not valid because military lawyers that hold the title “lawyer”<sup>98</sup> should understand that holding that title also includes holding the responsibilities of what the job entails.

The new change is not enough because as Dwight Stirling, who also serves as a lawyer in the California National Guard, best stated: “We lock the doors of the courthouse, and we say we appreciate the fact that you are giving your life to help to preserve our freedom . . . [b]ut we’re not going to give you the access to go to court and hold the wrongdoer to account.”<sup>99</sup> The new law does in fact hold someone accountable, however, the accountability is technically behind closed doors and to the discretion of the Pentagon. Therefore, if the servicemember does not agree with Department of Defense’s evaluation of the case there is no alternative recourse.

### c. Changing the Statute of Limitations

The new legislation allows victims two years from the date of injury to file a claim, with the exception of the year 2020 in which individuals can “file claims for injuries that occurred in 2017.”<sup>100</sup> However, the statute of limitations on filing a claim is highly unjust because other federal claims outside of the malpractice field allow for greater amounts of time, ranging from as minimal of six years to twenty years.<sup>101</sup>

One example is that an individual can be prosecuted for federal tax evasion after six years of the crime; but an individual that has a military medical malpractice claim is not afforded the same courtesy. However, because a medical malpractice claim is a civil claim and not a criminal claim, I propose that, at a minimum, the statute of limitations be extended to three years. The three-year calculation is based on the greatest statute of limitations across the United States, which is prevalent in several states, such as Maryland, Massachusetts, and Montana.<sup>102</sup> To be exact with the statute of limitations, it must be clear that the suggested three-year limitation is based on the date of when the injury is discovered. Although some states do have a statute of repose,<sup>103</sup> it is to be clear that a statute of repose should not be included in changing the proposed statute of limitations.

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<sup>96</sup> Price, *supra* note 81.

<sup>97</sup> *Id.*

<sup>98</sup> See *lawyer*, VOCABULARY.COM (2020), <https://www.vocabulary.com/dictionary/lawyer> (defining lawyer as “a professional who is qualified to offer advice about the law or represent someone in legal matters.”).

<sup>99</sup> Emily Elena Dugdale, *A New Law Allows Troops To Seek Compensation For Malpractice By Military Doctors*, WUSF NEWS (Jan. 3, 2020), <https://wusfnews.wusf.usf.edu/post/new-law-allows-troops-seek-compensation-malpractice-military-doctors>.

<sup>100</sup> *What Are the Statute of Limitations for Federal Crimes*, W|K, <https://www.wklaw.com/statute-of-limitations-for-federal-crimes> (last visited Mar. 2, 2020).

<sup>101</sup> *Id.*

<sup>102</sup> Heather Morton, *Medical Liability/Malpractice Statutes of Limitations*, NCSL (Mar. 20, 2014), <https://www.ncsl.org/research/financial-services-and-commerce/medical-liability-malpractice-statutes-of-limitation.aspx>.

<sup>103</sup> See *Statute of repose*, CORNELL LAW SCHOOL LEGAL INFORMATION INSTITUTE (2020), [https://www.law.cornell.edu/wex/statute\\_of\\_repose](https://www.law.cornell.edu/wex/statute_of_repose) (defining statute of repose).

#### IV. Conclusion

In conclusion, the best way to phrase the reasoning behind overturning the *Feres* Doctrine and passing the Stayskal Act the initial way it was presented was said best by Congressman Markwayne Mullin (R-Oklahoma), “[t]his legislation provides checks and balances to the Military Health System to ensure physicians are providing the highest levels of care to our men in women in uniform and gives patients recourse against negligent care.”<sup>104</sup> This analysis proposes that Congress overturn the *Feres* Doctrine to ensure that government employees are held responsible for their negligence by: (1) passing the original Stayskal Act proposed; (2) adding a definition for ‘incident to service’ to the Stayskal Act in order to clarify the meaning for future cases; and (3) extending the statute of limitations without imposing a statute of repose.

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<sup>104</sup> *Reps Introduce Bipartisan Bill to Restore Military Servicemembers’ Rights to Sue for Medical Malpractice*, UNITED STATES CONGRESSMAN JAMIE RASKIN (Apr. 30, 2019), <https://raskin.house.gov/media/press-releases/rep-introduce-bipartisan-bill-restore-military-servicemembers-rights-sue>.