THE DETRIMENTAL PITFALL OF THE FTCA: OVERTURNING *FERES* & ENDORSING THE SERGEANT FIRST CLASS RICHARD STAYSKAL MILITARY MEDICAL ACCOUNTABILITY ACT OF 2019

Comment

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I. INTRODUCTION

A female lieutenant in the United States Navy and a male lieutenant commander in the United States Coast Guard learned they were expecting a daughter.[1] They were ecstatic to become parents and raise their soon-to-be-born daughter.[2] On March 9, 2014, while still on active-duty status, the lieutenant was admitted to a naval hospital and gave birth to her daughter.[3] The pregnancy went well and the baby was born healthy.[4] However, immediately following the pregnancy, the young lieutenant experienced postpartum hemorrhaging and tragically died approximately four hours after delivery.[5]

The lieutenant commander was devastated at the unforeseen, tragic death of his wife.[6] He was left alone to care for and provide for his new beloved daughter.[7] Following his wife's heartbreaking, unexpected death, the

1. Daniel v. United States, 889 F.3d 978, 980 (9th Cir. 2018).
2. *See id.*
3. *Id.*
4. *Id.*
5. *Id.*
6. *See id.*
7. *See id.*

lieutenant commander asserted claims of medical malpractice and wrongful death against the United States Government based on allegations that the negligence of the medical staff at the naval hospital directly caused his wife's death.[8] The lieutenant commander believed he had proof of negligence, causation, and damages for the death of his young wife.[9] He just needed his day in court to obtain justice, recover monetary damages, and have closure from this horrific incident.[10]

Unfortunately for the lieutenant commander, the naval hospital's negligence in causing the death of his wife will likely never be uncovered because a detrimental pitfall silently awaits all active-duty service members.[11] This silent pitfall will forever bar his lawsuit, and this lieutenant commander will never have his day in court.[12] The United States Government will likely never have to pay a single penny for the government employees' potential negligence in the preventable death of the lieutenant commander's beloved wife.[13]

Numerous avenues to barring a medical malpractice claim exist to the detriment of active-duty service members, veterans, and military families.[14] This Comment will focus on one of those avenues: the *Feres* doctrine.[15] The *Feres* doctrine prohibits active-duty service members from pursuing tort lawsuits against the United States for service-related injuries.[16] Moreover, the *Feres* doctrine is the detrimental, silent barrier preventing the lieutenant commander and other grieving military victims of medical malpractice from asserting tort suits and obtaining justice.[17]

This Comment discusses the evolution and history of the *Feres* doctrine and the rationales the United States Supreme Court made in *Feres v. United States* for making its decision to establish the *Feres* doctrine.[18] Although the *Feres* doctrine has been analyzed and argued for and against in numerous academic articles, this Comment is the first to argue completely overturning *Feres* based on the proposed legislation of the Sergeant First Class Richard Stayskal Military Medical Accountability Act of 2019 (SFC Stayskal Act).[19]

Part II of this Comment provides a background on the doctrine of sovereign immunity and the enactment of the Federal Tort Claims Act

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8. *Id.*
9. *See id.*
10. *See id.*
11. *See id.*
12. *See id.*
13. *See id.*
14. *See id.*
15. *See* Feres v. United States, 340 U.S. 135 (1950).
16. *See id.* at 141–44.
17. *See id.*
18. *Id.*
19. SFC Richard Stayskal Military Medical Accountability Act of 2019, H.R. 2422, 116th Cong. (2019).

(FTCA).[20] Further, Part II analyzes the evolution, history, and rationales of the *Feres* doctrine found in the Supreme Court's prior precedent of *Feres v. United States*.[21] In addition, Part II focuses on the medical malpractice precedent pre-*Feres* and post-*Feres*.[22]

Part III analyzes previous legislation proposals and the unsuccessful attempts at overturning the *Feres* doctrine.[23] Furthermore, Part III discusses the origin and language of the prominent SFC Stayskal Act.[24] In particular, this Part outlines the events leading to the proposal of the SFC Stayskal Act.[25]

Part IV discusses and analyzes the recent enactment of S. 1790 National Defense Authorization Act for Fiscal Year 2020 (NDAA 2020) and its impact on the *Feres* doctrine.[26] Part IV examines the relevant language of the NDAA 2020 and its effectiveness—or lack of effectiveness—in overturning *Feres*.[27]

Part V discusses why *Feres* should be completely overturned based on a textualist approach to the FTCA and a public policy argument regarding fairness and justice—principles deeply rooted in this country's history.[28] Part VI will explore why the proposed SFC Stayskal Act is appropriate legislation to completely overturn the *Feres* doctrine, yet nevertheless is too narrow of an Act.[29] Further, Part VI will analyze the next step after the adoption of the SFC Stayskal Act regarding why and how the Act can be written in a broader sense as to apply to all suits currently barred under *Feres*.[30]

Part VII re-examines the *Feres* Court's three rationales—with the fourth rationale provided years later—behind establishing the *Feres* doctrine.[31] This Part also provides counterarguments to these rationales and further discusses why these counterarguments should be relied upon.[32] Part VIII attacks the effectiveness of the NDAA 2020, arguing that the NDAA 2020 is a step in the right direction regarding the overturning of *Feres*; however, it is not and should not be the finish line.[33] Finally, Part IX encompasses concluding remarks concerning the overturning of the *Feres* doctrine.[34]

This Comment is the first to make the recommendation that Congress should completely overturn the *Feres* doctrine through the enactment of the

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20. *Infra* Part II (discussing sovereign immunity and enactment of the FTCA).
21. *Infra* Part II (analyzing evolution of *Feres* and rationales of U.S. Supreme Court).
22. *Infra* Part II (analyzing pre-*Feres* and post-*Feres* cases).
23. *Infra* Part III (reviewing history of legislation proposals attempting to overturn *Feres*).
24. *Infra* Part III (introducing language of SFC Stayskal Act).
25. *Infra* Part III (outlining events giving rise to SFC Stayskal Act).
26. *Infra* Part IV (discussing recently enacted NDAA 2020).
27. *Infra* Part IV (analyzing language and impact of NDAA 2020).
28. *Infra* Part V (arguing overturning *Feres* from textualist and policy standpoint).
29. *Infra* Part VI (exploring SFC Stayskal Act and its narrowness).
30. *Infra* Part VI (proposing amended language to SFC Stayskal Act).
31. *Infra* Part VII (discussing the *Feres* Court's rationales in establishing the *Feres* doctrine).
32. *Infra* Part VII (countering the *Feres* Court's rationales in establishing the *Feres* doctrine).
33. *Infra* Part VIII (attacking ineffectiveness of NDAA 2020).
34. *Infra* Part IX (concluding argument to overturn *Feres*).

SFC Stayskal Act.[35] To allow justice to be carried forward and to hold potential defendants liable for their negligence, Congress should intervene and enact the SFC Stayskal Act because the United States Supreme Court misinterpreted *Feres* and has failed to overturn the *Feres* doctrine established in the 1950 Supreme Court case, *Feres v. United States*.[36] Although the NDAA 2020 has partially repealed the *Feres* doctrine, the SFC Stayskal Act will effectively overturn the *Feres* doctrine, giving active-duty service members the ability to allege claims and file suits against the United States Government for injuries sustained through governmental employees' medical malpractice.[37]

II. FEDERAL TORT CLAIMS ACT & THE *FERES* DOCTRINE

Prior to 1946, sovereign immunity provided an almost complete bar to civil tort actions against the federal government.[38] The rule of sovereign immunity as it applies to the United States is not explicitly written in the United States Constitution, but is instead derived by implication.[39] The United States inherited the principle of sovereign immunity from the law of England, where the notion is that "the King can do no wrong."[40] The United States Supreme Court described sovereign immunity as the Government's "exceptional freedom from legal responsibility" for the tortious acts of its employees.[41]

A. Federal Tort Claims Act

Enacted on August 2, 1946, the Federal Tort Claims Act was established to provide a limited waiver to the United States' governmental sovereign immunity.[42] Thus, the FTCA allowed plaintiffs to allege specific claims against the United States for negligence of a governmental employee.[43]

35. *See* SFC Richard Stayskal Military Medical Accountability Act of 2019, H.R. 2422, 116th Cong. (2019).

36. *See id.*

37. *See id.*

38. United States v. McLemore, 45 U.S. 286, 288 (1846) ("[T]he [federal] government is not liable to be sued, except with its own consent, given by law.").

39. *See* Principality of Monaco v. State of Mississippi, 292 U.S. 313, 321 (1934).

40. Comm'rs of the State Ins. Fund v. United States, 72 F. Supp. 549, 552 (S.D.N.Y. 1947).

41. Keifer & Keifer v. Reconstruction Fin. Corp., 306 U.S. 381, 388 (1939).

42. 28 U.S.C. § 2675 (2018).

43. *Id.*

1. FTCA Background and History

On July 28, 1945, a United States Army bomber, operated by an Army officer, shocked the nation when it crashed into New York City's iconic Empire State Building.[44] This crash resulted in several personal injuries and took the lives of a large number of innocent people.[45] At the time of the airplane crash, the victims and families of this frightful accident were left without a remedy and had no cause of action for negligence against the United States—the employer of the Army bomber pilot.[46] This was because the United States, through the doctrine of sovereign immunity, was not subject to suit in civil tort actions.[47] However, twelve months later, in response to this horrific incident, on August 2, 1946, Congress enacted the FTCA providing an exception to the Government's sovereign immunity.[48]

2. FTCA Medical Malpractice Statute

The FTCA has existed for nearly seventy-five years.[49] The Act has held and continues to hold the United States Government liable for its negligence.[50] The FTCA, in part, states:

> Subject to the provisions of chapter 171 of this title, the district courts . . . shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.[51]

Thus, because the Army bomber pilot was negligent when he crashed into the Empire State Building, the victims of the Empire State Building incident were among the first plaintiffs to have the opportunity to sue the United States under the newly established FTCA.[52] However, instead of granting the ability to immediately file suit, the FTCA requires that plaintiffs first utilize the administrative process.[53] Plaintiffs must first present their

44. *Comm'rs of the State Ins. Fund*, 72 F. Supp. at 551.
45. *Id.*
46. *Id.*
47. *Id.*
48. *Id.*
49. *Id.*
50. *Id.*
51. 28 U.S.C. § 1346(b)(1) (2018).
52. *Comm'rs of the State Ins. Fund*, 72 F. Supp. at 552.
53. 28 U.S.C. § 2675.

claim of negligence, within two years of the claim accrual, to the appropriate federal agency and allow that agency at least six months to investigate and have an opportunity to propose a settlement agreement.[54] Only if the agency denies the claim or fails to settle the claim within six months may plaintiffs file suit in federal district court against the United States.[55]

3. Exceptions to the FTCA

Although the FTCA provides for a limited waiver of the United States Government's immunity from suit, there are a number of exceptions—thirteen to be exact—stated in the Act that allow the United States to remain immune from suit.[56] Two specific exceptions apply to this Comment.[57] They include: "(j) Any claim arising out of the combatant activities of the military or naval forces, or the Coast Guard, during time of war [and] (k) [a]ny claim arising in a foreign country."[58] Because of the vast amount of enumerated exceptions explicitly stated in the FTCA, it is clear that Congress intended to exclude certain claims under the FTCA alleged against the United States.[59]

4. Pre-Feres*:* Brooks v. United States *(1949)*

In 1949, the United States Supreme Court first encountered the issue of whether service members were barred from bringing suit under the FTCA.[60] In *Brooks v. United States*, service members Welker Brooks and Arthur Brooks were driving in an automobile along a public highway with their father, James Brooks.[61] Arthur was driving the vehicle as it came to a stop at an intersection.[62] Upon entering and crossing the intersection, a United States Army truck, driven by a civilian employee of the Army, struck the Brookses' car from the left.[63] Arthur Brooks was immediately killed.[64] Welker and his father survived but were severely injured.[65]

Welker Brooks and the administrator of Arthur Brooks's estate brought actions against the United States under the FTCA.[66] The federal district judge held that the Army truck driver was negligent in causing the crash and

54. *See id.* § 2675(a).
55. *Id.*
56. *See id.* § 2680.
57. *See id.* § 2680(j)–(k).
58. *See id.*
59. *See id.* § 2680.
60. *See* Brooks v. United States, 337 U.S. 49 (1949).
61. *Id.* at 50.
62. *Id.*
63. *Id.*
64. *Id.*
65. *Id.*
66. *Id.*

rendered a verdict for the Brookses.[67] However, the court of appeals reversed the judgment, reasoning that because the Brookses were in the Armed Forces of the United States at the time of the accident, they were subsequently barred from recovery.[68]

The United States Supreme Court granted certiorari and determined that filing suit under the FTCA while in the Armed Forces did not preclude the Brookses' recovery against the United States.[69] The Court in its holding for the Brookses stated: "The [FTCA]'s terms are clear. . . . We are not persuaded that 'any claim' means 'any claim but that of servicemen.' The [FTCA] does contain [thirteen] exceptions. None exclude [the Brookses'] claims."[70] The Court went on to state that it would be "absurd" to believe that Congress intended to exclude claims alleged by service members under the FTCA.[71] Although the Court found for the Brookses, it limited its holding when the Court stated: "Were the accident [in this case] incident to the Brooks' service [in the Armed Forces], a wholly different case would be presented."[72]

B. Feres v. United States

The "wholly different case," as alluded to in *Brooks*, appeared just one year later, in 1950, in a consolidation of three cases famously referred to as *Feres v. United States*.[73]

1. Consolidation: Feres*,* Jefferson*,* Griggs

In *Feres v. United States*, the common denominator underlying the three consolidated cases was that each claimant, while on active-duty status, sustained injuries because of the negligence of others in the Armed Forces.[74] The first case, *Feres*, involved a decedent who was burned to death in the barracks at Pine Camp, New York.[75] The plaintiff in the *Feres* case alleged negligence in quartering the decedent in barracks with a defective heating lamp, ultimately leading to the decedent's death.[76]

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67. *Id.*
68. *Id.* at 51.
69. *Id.*
70. *Id.* (citation omitted).
71. *Id.*
72. *Id.* at 52.
73. Feres v. United States, 340 U.S. 135 (1950); Nicole Melvani, Comment, *The Fourteenth Exception: How the* Feres *Doctrine Improperly Bars Medical Malpractice Claims of Military Service Members*, 46 CAL. W. L. REV. 395, 397 (2010).
74. *Feres*, 340 U.S. at 136–38 (1950).
75. *Id.* at 136–37.
76. *Id.* at 137.

Moreover, the second case, *Jefferson*, concerned a plaintiff whom underwent an abdominal operation while in the Army.[77] Eight months after the initial operation, during another operation and after the plaintiff had been discharged, a 30 x 18 inch surgical towel marked "Medical Department U.S. Army" was discovered and removed from the plaintiff's stomach.[78] The plaintiff in *Jefferson* alleged negligence in the military doctor's performance of the previous abdominal operation, i.e., negligently leaving the foreign body inside the plaintiff's stomach.[79]

Finally, the third case, *Griggs*, involved a plaintiff whom had his life taken while on active-duty status because of an Army surgeon's alleged negligent and unskillful medical treatment.[80] Thus, because of the consolidation of cases, the *Feres* Court was presented with both a wrongful death cause of action and claims of medical malpractice.[81]

The United States Supreme Court, in its ultimate holding in *Feres*—again the consolidation of *Feres*, *Jefferson*, and *Griggs*—held that "the Government is not liable under the Federal Tort Claims Act for injuries to [service members] where the injuries arise out of or are in the course of activity incident to service."[82] Although the *Feres* Court was faced with multiple causes of action, the *Feres* holding nevertheless applied to both the claims of medical malpractice and the wrongful death action.[83] To come to its holding, the *Feres* Court provided three rationales.[84]

2. Feres *Rationales*

The first rationale the *Feres* Court mentioned included the private liability language of the FTCA.[85] The explicit language of the FTCA, as mentioned previously, states: "The United States shall be liable . . . in the same manner and to the same extent as a private individual under *like* circumstances . . . ."[86] In *Feres*, the United States Supreme Court reasoned that the plaintiffs in the case could "point to no liability of a 'private individual'" that was even remotely analogous to that which the plaintiffs asserted against the United States.[87] The Court went on to state: "[N]o private individual has power to conscript or mobilize a private army with such

77. *Id.*
78. *Id.*
79. *Id.*
80. *Id.*
81. *Id.*
82. *Id.* at 146.
83. *Id.* at 136–37.
84. *Id.* at 141–44; *see infra* Part II.B.2 (outlining the three rationales the *Feres* Court utilized).
85. *Feres*, 340 U.S. at 141–42.
86. 28 U.S.C. § 2674 (2018) (emphasis added).
87. *Feres*, 340 U.S. at 141.

authorities over persons as the Government vests in echelons of command."[88] The Court further explained that even if the Court were to treat a private individual as including a state, the nearest equivalent would be the relationship between the individual states and their respective militia.[89] The Court concluded that the Government's liability has no parallel—no equivalent—liability to that of a private individual when taking into consideration "*all* of the circumstances."[90] Thus, because of no finding of private individual liability, the Court reasoned Congress would not have intended to allow service members to recover under the FTCA.[91]

The Court's second rationale consisted of the distinct relationship between the federal government and its Armed Forces.[92] As the *Feres* Court stated: "The relationship between the Government and members of its [A]rmed [F]orces is 'distinctively federal in character.'"[93] The Court reasoned that federal authority should exclusively govern this federal relationship and not state authority.[94] The Court inferred that Congress never intended state law to interfere with this distinct federal relationship.[95] The Court explained: "We do not think that Congress, in drafting [the FTCA], created a new cause of action dependent on local law for service-connected injuries or death due to negligence."[96]

In its justification, the Court elaborated on why a soldier is at a peculiar disadvantage in litigation.[97] More specifically, the Court reasoned that an active-duty service member has no choice as to where he or she can elect to file suit, unlike a veteran or civilian.[98] For this reason, the *Feres* Court implied that permitting service members to bring suit against the United States Government would be unfair to the service members because they would be subject to the tort law of the place where they were stationed, but not voluntary residents, because of their active-duty status.[99]

Lastly, the third rationale provided in the *Feres* Court's holding was the idea that the simple, certain, and uniform compensation scheme for injuries or death of those in the armed services—the servicemen's benefits statutes—were already in place.[100] Service members, the Court suggested, were

88. *Id.* at 141–42.
89. *Id.* at 142.
90. *Id.* (emphasis added).
91. *Id.*
92. *Id.* at 143.
93. *Id.*
94. *Id.* at 143–44.
95. *Id.* at 146.
96. *Id.*
97. *Id.* at 145.
98. *Id.* at 143–44.
99. *Id.* at 143; *see* Melvani, *supra* note 73, at 397 (citing *Feres*, 340 U.S. at 143).
100. *Feres*, 340 U.S. at 144.

"already well provided for" under existing benefits compensation statutes.[101] The Court found it significant that Congress, in providing these existing servicemen's benefits statutes, failed to state how money received administratively through benefits would be taken into account if a service member brought suit under the FTCA against the United States and received a judgment.[102] Thus, the Court reasoned because of Congress's silence, Congress did not intend for service members to possess two types of recovery: Receiving both benefits and a monetary judgment under the FTCA.[103] Therefore, because of the benefits statute's pre-existence, the Court found that a service member's recovery under an FTCA judgment was not the intent of Congress.[104]

A few years later, the United States Supreme Court provided a fourth rationale to justify its *Feres* holding in *United States v. Brown*.[105] In *Brown*, a discharged veteran alleged negligence in the treatment of his left knee in a Veteran's Administration Hospital.[106] Because the Court believed the case to be governed under *Brooks* and not *Feres*—the negligent act giving rise to the veteran's injury was not incident to military service—the Court held the veteran was able to file suit against the United States.[107]

In its holding, the *Brown* Court alluded to this fourth rationale in justifying its prior *Feres* holding.[108] This fourth rationale encompassed the special relationship between a soldier and his superiors, the effects of the maintenance of lawsuits on military discipline, and the extreme results that might take effect if suits under the FTCA were allowed for negligent orders given or negligent acts committed in the course of military duty.[109] The concern the *Brown* Court had was the effect lawsuits alleged by service members against their superiors might have on military discipline.[110] This fourth rationale has been regarded as the "best" explanation for the holding in *Feres*; however, nowhere in the *Feres* decision is this rationale alluded to.[111]

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101. *Id.* at 140.
102. *Id.* at 144; Paul Figley, *In Defense of* Feres*: An Unfairly Maligned Opinion*, 60 AM. U. L. REV. 393, 453 (2010).
103. *Feres*, 340 U.S. at 144.
104. *Id.*
105. United States v. Brown, 348 U.S. 110, 112 (1954).
106. *Id.* at 110.
107. *Id.* at 113.
108. *Id.* at 112.
109. *Id.*
110. *Id.*
111. United States v. Johnson, 481 U.S. 681, 698–99 (1987) (Scalia, J., dissenting).

3. "Incident to Service"

The distinction between the holdings in *Brooks v. United States* and *Feres v. United States* first outlined the "incident to service" concept. [112] In *Brooks*, the Supreme Court held that service members are able to recover under the FTCA for claims that have no relationship to their service in the military; thus, the Brookses were able to file suit against the United States because the car collision had no relation to their military service.[113] On the other hand, in *Feres*, the Court held that service members may *not* recover from alleged claims under the FTCA that arise out of, or are in the course of, activity "incident to their service."[114] Thus, whether a service member can assert a claim against the United States Government depends on whether the claim arises incident to the claimant's military service.[115]

There is no clear-cut answer as to when a service member's death, injury, or loss is incident to service, as the phrase itself does not appear in the language of the FTCA.[116] Whether claims "arise out of or are in the course of activity incident to service" is ultimately a question of fact.[117] Four factors—none of which are necessarily dispositive—help determine if an injury arises out of or is in the course of activity incident to service.[118] These include the following: (1) the place where the negligent act took place; (2) the duty status of the plaintiff when the negligent act occurred; (3) the benefits accruing to the plaintiff because of his or her status as a service member; and (4) "the nature of the plaintiff's activities at the time" the negligent act occurred.[119] Furthermore, in *Parker v. United States*, the court stated that whether the activity engaged in by a service member when he or she was injured is incident to service is determined by examining "the totality of the circumstances."[120] In *Parker*, the Fifth Circuit Court of Appeals held that Janet A. Parker was able to recover from a wrongful death action on behalf of her deceased service member husband, Jack Lowe Parker.[121]

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112. Feres v. United States, 340 U.S. 135, 138 (1950).
113. Brooks v. United States, 337 U.S. 49, 52–54 (1949).
114. *Feres*, 340 U.S. at 146.
115. *See id.*
116. 28 U.S.C. § 1346 (2018).
117. *See* Johnson v. United States, 704 F.2d 1431, 1435 (9th Cir. 1983) (citing *Feres*, 340 U.S. at 146).
118. *See id.* at 1436–39.
119. *See id.*
120. Parker v. United States, 611 F.2d 1007, 1013 (5th Cir. 1980).
121. *Id.* at 1008 (examining whether the plaintiff could claim damages after her husband died in a car accident on a road maintained by the Army).

C. Post-Feres

Following the holding in *Feres*, the outcome of cases began to change tremendously.[122] No longer could active-duty service members retain a remedy for the negligence of governmental employees when their injuries were incident to their service in the military.[123] This immediate change allowed military doctors and other hospital personnel freedom from medical malpractice liability if their patient was an active-duty service member.[124]

1. Read v. United States *(2013)*

In *Read v. United States*, active-duty service member Colton Read underwent laparoscopic gallbladder surgery.[125] Two Air Force surgeons performed the surgery at David Grant Medical Center.[126] The surgery resulted in an injury to Read's descending abdominal aorta.[127] The surgeons attempted to repair this injury, but Read required amputation of both of his legs.[128] Read lost his ability to walk because of the negligence of the two military surgeons.[129]

Colton Read and his wife, Jessica Read, filed suit against the United States under the FTCA for medical malpractice.[130] The United States filed a motion to dismiss for lack of subject matter jurisdiction pursuant to the *Feres* doctrine.[131] Reasoning that the *Feres* doctrine bars actions brought under the FTCA when a service member on active-duty sustains injuries from surgery performed by military doctors, the court found that Read's injuries were incident to service and not actionable under the FTCA.[132]

2. Ortiz v. United States ex rel. Evans Army Community Hospital *(2015)*

In *Ortiz v. United States ex rel. Evans Army Community Hospital*, the Tenth Circuit Court of Appeals was faced with a case that required the court to consider whether the United States Government is immune from damages for injuries its agents caused to an active-duty service woman's baby during

122. Feres v. United States, 340 U.S. 135, 146 (1950).
123. *Id.*
124. *Id.*
125. Read v. United States, 536 F. App'x 470, 471 (5th Cir. 2013) (per curiam).
126. *Id.*
127. *Id.*
128. *Id.*
129. *Id.*
130. *Id.*
131. *Id.*
132. *Id.* at 472–73.

childbirth.[133] Captain Heather Ortiz was an active-duty service member in the United States Air Force.[134] In March 2009, Captain Ortiz was admitted to Evans Army Community Hospital for a scheduled c-section.[135] The hospital nurse gave Ortiz a dose of Zantac, which is used to prevent aspiration of gastric acid during labor.[136] However, if that nurse had referred back to Ortiz's medical records required per the standard of care, the nurse would have realized Ortiz was allergic to Zantac.[137] Ortiz suffered an allergic reaction to the Zantac.[138] To counteract the allergic reaction, a doctor gave Ortiz a dose of Benadryl.[139] The Benadryl caused a precipitous drop in Captain Ortiz's blood pressure, leading to hypotension, causing inadequate blood flow and insufficient perfusion of the uterus and the placenta.[140] As a result of Ortiz's hypotension, her baby daughter was deprived of oxygen *in utero*, leading to severe, permanent injuries, including brain trauma.[141] This brain damage ultimately caused Ortiz's innocent, helpless daughter to develop Cerebral Palsy.[142]

The plaintiff in the case, George Ortiz—Captain Ortiz's husband—sued the United States seeking compensation for his child's injures, her long-term medical care, and her life-care needs.[143] Following the district court's holding that the *Feres* doctrine barred Ortiz's claims, the Tenth Circuit affirmed, holding that the intrauterine injury to Ortiz's daughter "had its genesis in a service-related injury to a service person," and thus, was barred.[144] The Tenth Circuit held that the incident to service language derived from *Feres* extended to an injury of a third party—Ortiz's innocent, vulnerable daughter.[145]

In Justice Scalia's dissent in *United States v. Johnson*—a case in which a majority of the Supreme Court reaffirmed its prior decision in *Feres*—Justice Scalia stated that the *Feres* Court should not have recognized an exception barring service members from bringing FTCA suits because Congress did not expressly enact one; instead, quite the contrary, Congress actually excluded it.[146] According to Justice Scalia, the *Feres* Court had "no

133. Ortiz v. United States *ex rel*. Evans Army Cmty. Hosp., 786 F.3d 817, 818 (10th Cir. 2015).
134. *Id.*
135. *Id.* at 818–19.
136. *Id.* at 819; *see Zantac Tablet*, WEBMD, https://www.webmd.com/drugs/2/drug-4090-7033/zantac-oral/ranitidine-tablet-oral/details (last visited May 30, 2020).
137. *Ortiz*, 786 F.3d at 819.
138. *Id.*
139. *Id.*
140. *Id.*
141. *Id.*
142. *Id.*
143. *Id.*
144. *Id.* at 831.
145. *Id.*
146. United States v. Johnson, 481 U.S. 681, 692 (1987) (Scalia, J., dissenting).

justification . . . to read exemptions into the [FTCA] beyond those provided by Congress. If the [FTCA] is to be altered that is a function for [Congress,] the same body that adopted it."[147] Justice Scalia summed up his dissent, arguing: "*Feres* was wrongly decided and heartily deserves the 'widespread, almost universal criticism' it has received."[148]

3. Daniel v. United States *(2019)*

The widespread, almost universal criticism Justice Scalia alluded to can be seen in *Daniel v. United States*, where the United States Supreme Court, on May 20, 2019, refused to grant certiorari.[149] By refusing certiorari, the Court allowed the *Feres* doctrine to continue to bar potential meritorious claims in the area of medical malpractice.[150]

In *Daniel*, Rebekah Daniel served honorably as a lieutenant in the United States Navy.[151] Walter Daniel, Rebekah's husband, was a lieutenant commander in the United States Coast Guard.[152] In 2013, the two learned they were expecting a daughter.[153] Lieutenant Rebekah resigned from her post and planned to take family leave following the birth of her daughter.[154] On March 9, 2014, while still on active-duty status, Rebekah was admitted to Naval Hospital Bremerton and gave birth to her daughter.[155] Following the birth, Rebekah experienced postpartum hemorrhaging.[156] As a result, Rebekah died approximately four hours after delivery.[157]

Following the unforeseen death of his wife, Lieutenant Commander Walter Daniel asserted claims of medical malpractice and wrongful death against the United States based on allegations that Lieutenant Rebekah Daniel's death resulted from the negligence of the medical staff at Naval Hospital Bremerton.[158] Unfortunately for Walter, the hospital's negligence in causing the death of his wife will likely never be uncovered.[159] Walter's suit against the hospital is forever barred and he will never have his day in court.[160] Walter will likely never obtain a remedy despite the loss of his

147. *Id.* at 702.
148. *Id.* at 700 (citation omitted).
149. Daniel v. United States, 889 F.3d 978, 980 (9th Cir. 2018); *see Johnson*, 481 U.S. at 700 (arguing that *Feres* was wrongly decided).
150. *Daniel*, 889 F.3d at 980.
151. *Id.*
152. *Id.*
153. *Id.*
154. *Id.*
155. *Id.*
156. *Id.*
157. *Id.*
158. *Id.*
159. *Id.* at 982.
160. *Id.*

wife.[161] The *Feres* doctrine provides no remedy and no justice for the Walter's all around the world.[162]

Relying on Justice Scalia's dissent in *Johnson*, Justice Thomas dissented in the denial of certiorari in *Daniel*, stating: "I write again to point out the unintended consequences of this Court's refusal to revisit *Feres*."[163] Justice Thomas further argued: "Such unfortunate repercussions—denial of relief to military personnel . . .—will continue to ripple through our jurisprudence as long as the Court refuses to reconsider *Feres*."[164]

III. PROPOSED LEGISLATION TO OVERTURN *FERES*

There have been numerous attempts in recent history trying to fix *Feres*.[165] First in 2008, with an act of Congress led by the family of Marine Sergeant Carmelo Rodriguez.[166]

A. A History of Proposed Legislation Attempting to Fix Feres

Sergeant Rodriguez, a twenty-nine-year-old platoon leader, died from melanoma skin cancer in November 2007.[167] By the time of his death, he had quickly declined in weight from 190 pounds to a mere 80 pounds.[168]

His family claimed that his military doctors recorded several potentially cancerous tumors on his body over an eight-year period, however, the doctors never informed him or his family.[169] The military doctors continuously misdiagnosed Sergeant Rodriguez's melanoma as a wart or birthmark.[170] Finally, Sergeant Rodriguez saw a dermatologist who informed him of the devastating news.[171] Sergeant Rodriguez was diagnosed with stage III malignant melanoma and underwent three surgeries, radiation, and

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161. *Id.*

162. *Id.*; *see* Feres v. United States, 340 U.S. 135, 146 (1950).

163. Daniel v. United States, 139 S. Ct. 1713, 1713 (2019) (Thomas, J., dissenting) (mem) (No. 18-460).

164. *Id.* at 1714.

165. *See, e.g.*, Carmelo Rodriguez Military Medical Accountability Act of 2008, H.R. 6093, 110th Cong. (2008).

166. Byron Pitts, *Military Can't Be Sued for Malpractice*, CBS NEWS (Mar. 24, 2009, 6:43 PM), https://www.cbsnews.com/news/military-cant-be-sued-for-malpractice/.

167. *Id.*

168. Melvani, *supra* note 73, at 405 (citing *The Carmelo Rodriguez Military Medical Accountability Act of 2009: Hearings on H.R. 1478 Before the Subcomm. on Commercial and Admin. Law of the H. Comm. on the Judiciary*, 111th Cong. 119 (2009) (statement of Ivette Rodriguez, sister of Sgt. Carmelo Rodriguez)).

169. *Id.* at 405–06.

170. *Id.*

171. *Id.*

chemotherapy.[172] Unfortunately, it was too late.[173] Sergeant Rodriguez was told he only had one year left to live as the cancer had spread to his lymph nodes, liver, kidney, and stomach.[174] Rodriguez's doctors informed him that if the cancer had been caught and diagnosed earlier, it most likely would have saved his life.[175]

As a result of the doctors' negligent misdiagnosis, in May 2008 Representative Maurice Hinchey (D-N.Y.) introduced H.R. 6093, The Carmelo Rodriguez Military Medical Accountability Act of 2008, to the House of Representatives.[176] The Act provided:

> Claims may be brought under this chapter for damages against the United States for 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 takes place other than in the context of combat and is provided by persons acting within the scope of their office or employment by or at the direction of the Armed Forces of the United States, whether inside or outside the United States.[177]

Unfortunately, the 2008 bill failed to gain traction and was not passed.[178]

Following the rejection of the 2008 bill, in March 2009 Representative Maurice Hinchey (D-N.Y.) introduced a second bill, H.R. 1478, The Carmelo Rodriguez Military Medical Accountability Act of 2009, to the House of Representatives.[179] The language of this bill drew vast similarities to the language of the 2008 bill.[180] The 2009 bill, similar to the 2008 bill, "would allow service members injured or killed as a result of military medical malpractice to bring suit" against the United States Government under the FTCA.[181] Again, however, the bill failed to make its way through the House.[182]

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172. *Id.*
173. *Id.*
174. *Id.*
175. *Id.*
176. Carmelo Rodriguez Military Medical Accountability Act of 2008, H.R. 6093, 110th Cong. § 2(a) (2008).
177. *Id.*
178. *Id.*
179. Carmelo Rodriguez Military Medical Accountability Act of 2009, H.R. 1478, 111th Cong. (2009); Melvani, *supra* note 73, at 407.
180. H.R. 6093.
181. H.R. 1478; Melvani, *supra* note 73, at 407.
182. H.R. 1478.

B. The Sergeant First Class Richard Stayskal Military Medical Accountability Act of 2019

Much attention has surrounded a novel Act that will effectively overturn the *Feres* doctrine and allow active-duty service members to bring claims and file suit against the United States Government for medical malpractice.[183] Members of the 116th Congress have yet again introduced legislation to allow active-duty service members to bring certain lawsuits that *Feres* might otherwise prohibit.[184] The Act encompasses the same administrative process as the FTCA.[185] Thus, a claimant must file a claim against the United States Government before the ability to file suit.[186] Introduced into the House of Representatives on April 30, 2019, the SFC Stayskal Act provides as follows:

> 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.[187]

The SFC Stayskal Act was introduced following the unfortunate events in Sergeant First Class Richard Stayskal's life.[188] Sergeant Stayskal, a thirty-seven-year-old Green Beret, began experiencing severe breathing problems in January 2017.[189] After he could hardly sleep at night due to suffering from shortness of breath, Stayskal checked himself into the Womack Army Medical Center on post at Fort Bragg, North Carolina.[190]

The doctors at Womack took a CT scan of his chest and later sent Stayskal home, informing him that he "was fine."[191] Stayskal, however, was far from fine.[192] A few short months later, in May 2017 Stayskal was rushed to the Veteran's Administration Hospital for a second visit.[193] The doctors

183. SFC Richard Stayskal Military Medical Accountability Act of 2019, H.R. 2422, 116th Cong. (2019).

184. *Id.*

185. *Id.*; *see* 28 U.S.C. § 2675 (2018).

186. 28 U.S.C. § 2675; H.R. 2422.

187. H.R. 2422 § 2(a).

188. J.D. Simkins, *This Green Beret Is Battling Cancer—and the Government—After Army Medical's 'Gross Malpractice'*, ARMYTIMES (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/.

189. *Id.*

190. *Id.*

191. *Id.*

192. *Id.*

193. *Id.*

reevaluated Stayskal's January CT scan and noticed a suspicious abnormality requiring immediate attention and a "transbronchial biopsy."[194] Unfortunately, neither Stayskal nor his wife ever received this critical information and were instead sent home after being told he had a simple case of pneumonia.[195]

Shortly after being diagnosed with pneumonia, Stayskal began coughing up blood.[196] Following those events, in June 2017 Stayskal was diagnosed with stage IV lung cancer and was told he had a life expectancy of a little over one year—Stayskal received aggressive treatment that extended his life and he is alive today.[197]

Moved by Stayskal's story, as well as others who have experienced and suffered from medical malpractice at the hands of a military doctor, Representative Jackie Speier (D-CA) introduced H.R. 2422, the SFC Richard Stayskal Military Medical Accountability Act, in April 2019.[198] "Feres represents the worst of judicial legislating and it's long past time that Congress fix this injustice," Speier stated after the House voted to include the bill in the latest National Defense Authorization Act draft.[199] "Our service members deserve the right to sue the government when negligent medical care results in their injuries or deaths," Speier stated.[200] Sergeant Stayskal, along with Speier, grabbed President Trump's attention regarding the proposed bill when Stayskal met with the President minutes before a rally in Greenville, North Carolina.[201] After Stayskal informed the President of the title of the Act, President Trump had Stayskal repeat the title and then the President repeated the title back to Stayskal.[202] Moreover, Vice President Mike Pence later informed Stayskal: "If [the President] said those words back to you, he's definitely going to take a look into it."[203]

The outcomes of recent litigation are pending due to the proposal of the SFC Stayskal Act.[204] For example, in *Luckey v. United States Department of the Navy*, Danyelle Luckey was a personnel assistant in the United States

194. *Id.*
195. *Id.*
196. *Id.*
197. *Id.*
198. Meghann Myers, *Dying of Cancer, a Green Beret Makes His* Feres *Doctrine Case to President Trump*, MILITARYTIMES (July 19, 2019), https://www.militarytimes.com/news/your-military/2019/07/19/dying-of-cancer-a-green-beret-makes-his-feres-doctrine-case-to-president-trump/.
199. *Id.*
200. *Id.*
201. *Id.*
202. *Id.*
203. *Id.*
204. *See, e.g.*, Luckey v. United States Dep't of the Navy, No. 18-CV-06071-HSG, 2019 WL 4059855, slip op. at *1 (N.D. Cal. Aug. 28, 2019) (staying the case pending the outcome of the National Defense Authorization Act of 2020, which incorporates the SFC Stayskal Act).

Navy.[205] Luckey passed away onboard the U.S.S. Ronald Reagan.[206] Plaintiffs Derrick and Annette Luckey, Danyelle's parents, brought suit against the United States and the United States Department of the Navy alleging medical malpractice against the defendants.[207] The Luckeys claimed the defendants' failure to treat their daughter aboard the U.S.S. Reagan proximately caused Danyelle's death.[208] The Luckeys have "request[ed] that this action be stayed for a period that is the shorter of (a) completion of the current 116th Congressional session, or (b) a determination as to [the SFC Stayskal Act]."[209] The United States Northern District of California agreed with the Luckeys and ordered the case to be "stayed" pending the resolution of the SFC Stayskal Act.[210]

IV. NATIONAL DEFENSE AUTHORIZATION ACT FOR FISCAL YEAR 2020

On December 19, 2019, Congress passed the National Defense Authorization Act for Fiscal Year 2020 (NDAA 2020), and President Trump subsequently signed this Act into law.[211] When signing the Act into law, President Trump remarked: "This is a truly historic day for the American Armed Forces. In just a few minutes, I will proudly sign into law the largest-ever investment in the United States military. In fact, I can say: the largest ever, by far."[212]

A. The Language and Effectiveness of the NDAA 2020

The recently enacted NDAA 2020 includes a provision that somewhat adopts the SFC Stayskal Act and partially overturns the *Feres* doctrine.[213] The provision, including authorization of claims asserted by service members against the United States Government for personal injury or death due to medical malpractice, states the following:

> [T]he Secretary [of Defense] may allow, settle, and pay a *claim* against the United States for personal injury or death incident to the service of a

205. *Id.*
206. *Id.*
207. *Id.*
208. *Id.*
209. *Id.* at *2.
210. *Id.*
211. National Defense Authorization Act for Fiscal Year 2020, Pub. L. No. 116–92 § 731, 133 Stat. 1198, 1457 (2019).
212. Donald J. Trump, President of the United States, Remarks by President Trump at Signing Ceremony for S.1790, National Defense Authorization Act for Fiscal Year 2020 (Dec. 20, 2019, 7:51 PM), https://www.whitehouse.gov/briefings-statements/remarks-president-trump-signing-ceremony-s-1790-national-defense-authorization-act-fiscal-year-2020/.
213. 10 U.S.C. § 2733a (2018).

> member of the uniformed services that was caused by the medical malpractice of a Department of Defense health care provider.[214]

As prescribed in this Act, the *claim* asserted must be for personal injury or death resulting from the performance of medical, dental, or related health care functions at a military medical treatment facility.[215] Furthermore, the wrongful act or omission must be from a Department of Defense health care provider acting within the scope of employment.[216]

Although this Act is a breakthrough in the attempt to overturn the *Feres* doctrine as service members now have the ability to bring claims against the United States Government for medical malpractice, the Act nevertheless is not as effective as many may believe it to be.[217] Although the Act permits *claims* to be brought against the Government, the Act still forbids the ability of service members to file *suit* against the Government.[218] Therefore, if the Secretary of Defense denies a service member's claim, the service member can take no additional steps to obtain compensation and justice.[219] Service members, even with the newly enacted NDAA 2020, will never have their day in court.[220] Because of the Act's ineffectiveness, additional steps must be taken in order to completely overturn the *Feres* doctrine.[221]

V. CONGRESS SHOULD PASS THE SERGEANT FIRST CLASS RICHARD STAYSKAL MILITARY MEDICAL ACCOUNTABILITY ACT OF 2019 TO COMPLETELY OVERTURN THE *FERES* DOCTRINE

The detrimental pitfall that silently awaits grieving military victims of medical malpractice is the *Feres* doctrine. Because the United States Supreme Court misinterpreted *Feres* and has failed to overturn the *Feres* doctrine, Congress should intervene and enact the SFC Stayskal Act. This Act will effectively overturn the *Feres* doctrine, allowing active-duty service members the ability to allege claims and file suit against the United States Government for injuries sustained through medical malpractice.[222]

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214. *Id.* (emphasis added).

215. *Id.* § 2733a(a).

216. *Id.* § 2733a(b)(2).

217. *Id.* § 2733a.

218. Brenda Breslauer & Vicky Nguyen, *Service Members Will Soon Be Able to File Claims Against the Military for Medical Malpractice*, NBC NEWS (Dec. 20, 2019, 3:08 PM), https://www.nbcnews.com/health/cancer/servicemembers-will-soon-be-able-file-claims-againstmilitary-medical-n1104561.

219. *See id.*

220. *Id.*

221. National Defense Authorization Act for Fiscal Year 2020, Pub. L. No. 116–92 § 731, 133 Stat. 1198, 1457 (2019).

222. SFC Richard Stayskal Military Medical Accountability Act of 2019, H.R. 2422, 116th Cong. (2019).

A. Enacting the Sergeant First Class Richard Stayskal Military Medical Accountability Act of 2019

The United States Supreme Court made an uncharacteristic mistake when the Court decided *Feres v. United States*.[223] Although the Court had its rationales, as previously discussed in this Comment, the Court nevertheless decided *Feres* wrongly. Because of the Court's decision in establishing the *Feres* doctrine, numerous active-duty service members have never, and currently will never, have their day in court.[224] Over the past seventy years, the Court has failed to even consider overturning its prior precedent, which is evident from its recent refusal to grant certiorari in *Daniel v. United States*.[225] By refusing to grant certiorari in *Daniel*, the Court allowed the *Feres* doctrine to continue to bar potential meritorious claims in an area never contemplated by Congress: Medical malpractice.[226] Because the United States Supreme Court passed up a significant opportunity to correct one of its uncharacteristic mistakes in its decision in *Feres*, it is now time for Congress to take action into its own hands.[227] There are a variety of reasons as to why Congress should put an end to the long precedent of the *Feres* doctrine and enact the SFC Stayskal Act.

1. Textualist Approach to the FTCA Is the Correct Interpretation

A textualist approach is the correct interpretation of the FTCA. Although the FTCA lists numerous exceptions—thirteen to be exact—where certain claims are barred, there is no provision in the FTCA expressly excluding or barring the claims of active-duty service members injured in military hospitals.[228] Further, alluding to Justice Scalia's dissent in *United States v. Johnson*, Justice Scalia stated that the *Feres* Court had "no justification" and no authority to create a fourteenth exception to the FTCA.[229] If Congress really intended to bar active-duty service members from claims against the Government for injuries sustained "incident to service," Congress would have included it.[230]

Moreover, referencing Justice Scalia's dissent in *Johnson*, Justice Thomas dissented in the recent denial of certiorari in *Daniels*.[231] Justice

223. Feres v. United States, 340 U.S. 135, 146 (1950).
224. *Id.*
225. Daniel v. United States, 889 F.3d 978 (9th Cir. 2018), *cert. denied*, 139 S. Ct. 1713 (2019) (mem).
226. *Id.*
227. *See infra* Part VI.B (proposing legislative language).
228. 28 U.S.C. § 1346 (2018).
229. United States v. Johnson, 481 U.S. 681, 702 (1987) (Scalia, J., dissenting).
230. *Id.*
231. Daniel v. United States, 139 S. Ct. 1713, 1713–14 (2019) (mem) (Thomas, J., dissenting).

Thomas stated: "Had Congress itself determined that servicemembers cannot recover for the negligence of the country they serve, the dismissal of their suits 'would . . . be just.'"[232] As previously discussed, however, Congress provided no provision in the FTCA that expressly excludes or bars the claims of active-duty service members.[233] Furthermore, the United States Supreme Court admitted in *Brooks v. United States* that the exceptions to the FTCA that exclude claims "are too lengthy [and] specific, and . . . such exceptions make it clear to us that Congress knew what it was about when it used the term 'any claim'" in the FTCA.[234]

Congress provided two exceptions to the FTCA that relate to military service as mentioned earlier.[235] This Comment particularly focuses on one of those exceptions: "(j) Any claim arising out of the combatant activities of the military or naval forces, or the Coast Guard, during time of war."[236] This language suggests that Congress intended to protect the Government against claims arising out of events taking place through combatant activities during times of war.[237] This interpretation is certainly reasonable; however, "combatant activities" does not—and should not—indicate claims arising from medical malpractice, i.e., when a military doctor breaches the standard of care.

From a pro-*Feres* perspective, one might argue that the correlation between combatant activities and medical malpractice might be the fact that a service member could get injured on the battlefield during combatant activities and be rushed to a hospital where the doctors commit medical malpractice. This correlation, however, is not intriguing because it should be irrelevant where or how the service member sustains an injury; common law indicates a doctor nevertheless has a duty to treat each patient that walks in the door in the same manner and with the same standard of care.[238] It makes little sense that a doctor—who has the same duty to every patient—is free from liability in one instance, yet held accountable in another instance. If a service member receives an injury on the battlefield and a doctor provides proper treatment for that injury, that is one thing; but, if a service member receives an injury on the battlefield and then a doctor advances or worsens that injury by committing malpractice, that is completely different.

A textualist approach to the FTCA would enable a service member to bring a cause of action against the United States when medical malpractice

232. *Id.* at 1714 (quoting *Johnson*, 481 U.S. at 703 (Scalia, J., dissenting)).
233. 28 U.S.C. § 1346.
234. Brooks v. United States, 337 U.S. 49, 51 (1949).
235. 28 U.S.C. § 2680(j)–(k).
236. *Id.* § 2680(j).
237. *Id.*
238. ANNE E. MELLEY, PAUL STEINBERG & THEODORE WYMAN, MEDICAL MALPRACTICE ACTIONS § 101 (2020).

has occurred, whether the service member was on active-duty or not.[239] Again, nowhere in the FTCA medical malpractice statutes are the words "active-duty" or "incident to service" found.[240] The United States Supreme Court had little justification in deciding to create a fourteenth exception to the FTCA; that is Congress's authority, not the Court's authority.[241]

The Supreme Court should not have read into the law and enforced additional exceptions that Congress did not intend to enforce. As the United States Supreme Court misinterpreted *Feres* and the FTCA, it is time for Congress to intervene to change the injustice our service members have endured for over seventy years. Justice Scalia was correct when he stated: "*Feres* was wrongly decided and heartily deserves the 'widespread, almost universal criticism' it has received."[242] *Feres* represents seventy years of injustice and seventy years of unfairness, and this will continue unless Congress takes action.

2. Policy to Remedy Meritorious Medical Malpractice Claims

Fairness must be maintained in the field of medical malpractice. Justice must be obtained. Imagine a civilian enters a hospital to get her appendix removed because she has appendicitis. Initially everything goes well. The doctor performs the surgery successfully, however, unintentionally leaves a 4 x 4 inch surgical towel in the civilian's abdomen. The doctor sutures the incision closed, leaving the foreign body inside the civilian's abdomen. As a result, the civilian develops complications from the surgery including high fever, abdominal pain, and drainage from the surgical wound. Believing the doctor somehow botched the surgery, the civilian goes back to the doctor who then reopens the incision to discover a massive infection that has developed as a direct result of the towel being negligently left during the surgery. The civilian becomes extremely sick due to this infection, requiring a long hospitalization, and nearly dies. The civilian then sues the doctor for medical malpractice and has her day in court, having the opportunity to obtain the remedy that justice demands. This is a classic example of a doctor committing medical malpractice, and a civilian demonstrating her right to recover for the damages she sustained due to the doctor's negligence.

Now, on the other hand, an active-duty service member experiences and endures the exact scenario at a military hospital. The service member has appendicitis and needs immediate surgery. The military doctor performs the surgery only to leave a 4 x 4 inch surgical towel in the service member's abdomen. In turn, the service member develops a massive infection and

239. *See* 28 U.S.C. § 1346 (2018).
240. *Id.*
241. *See id.* § 2680.
242. United States v. Johnson, 481 U.S. 681, 700 (1987) (Scalia, J., dissenting).

nearly dies. This scenario closely replicates the *Jefferson* case in *Feres v. United States*,[243] as well as *Martin v. United States*.[244] In *Martin*, however, the active-duty service member, Michael Moyer, had his life cut short as military doctors committed malpractice causing complications following surgery for appendicitis that ultimately lead to Michael's death.[245] Because of the Court's uncharacteristic mistake in its decision in *Feres*, Michael's descendants, the plaintiff in *Jefferson*, and active-duty service members will never have their day in court.[246] They will likely never obtain the justice they so rightfully deserve only because they chose to serve our country. Their active-duty status as service members forever bars their claim.[247] These military doctors will likely never be held liable for the negligence and malpractice they have committed.[248]

The fact that a civilian has the opportunity to have his or her day in court, yet an active-duty service member—a service member defending our country with honor and dignity—who experienced and endured the same malpractice cannot, makes for a very unjust, unreasonable outcome. Public policy arguments are to be made when fairness is required and justice is demanded. Fairness and justice are principles rooted in our great country's history. This public policy argument is made because fairness and justice must be maintained in medical malpractice cases—not diverted from. For the last seventy years, the *Feres* doctrine has prevented fairness and justice from being attained for our service members.[249]

VI. NEXT STEP: STAYSKAL SHOULD BE BROADENED BECAUSE *FERES* APPLIED TO CLAIMS OUTSIDE MEDICAL MALPRACTICE

Revisiting the three consolidated cases of *Feres*, *Jefferson*, and *Griggs*, the latter two both involved alleged claims of medical malpractice; however, *Feres* involved alleged negligence when quartering a soldier in barracks with a defective heating lamp that led to the soldier's untimely death.[250] Therefore, the *Feres* Court had to consider not only claims of medical malpractice, but also a wrongful death action.[251] When the Court delivered its holding, the same holding applied to both the medical malpractice claims and the wrongful death action, as all three claimants were barred under the newly

243. Feres v. United States, 340 U.S. 135, 137 (1950).
244. Martin v. United States, 404 F. Supp. 1240, 1241 (E.D. Pa. 1975).
245. *Id.*
246. *See Feres*, 340 U.S. at 137; *Martin*, 404 F. Supp. at 1241.
247. *See Martin*, 404 F. Supp. at 1241.
248. *See id.*
249. *Feres*, 340 U.S. at 146.
250. *Id.* at 136–37.
251. *Id.*

established *Feres* doctrine.[252] Further, numerous cases that did not involve medical malpractice have been barred under the *Feres* doctrine over the years.[253]

A. The Stayskal Act Is Too Narrow

The SFC Stayskal Act focuses on claims and suits for medical malpractice as indicated in its language: "Performance of medical, dental, or related health care functions . . . provided at a covered military medical treatment facility."[254] Although the passing of this Act would drastically change the context of military medical malpractice—now allowing active-duty service members to bring suit against the United States for medical malpractice—the Act, nevertheless, is still too narrow.[255] Again, the *Feres* case was not limited solely to medical malpractice because the Court applied its holding to a wrongful death action as well.[256] Thus, in order to extinguish the *Feres* doctrine for good, the SFC Stayskal Act must contain language that is broad enough to cover all areas barred under *Feres*.

B. Proposed Legislation

In addition to arguing Congress's enactment of the already reputable SFC Stayskal Act, this Comment proposes the removal of certain language from the SFC Stayskal Act to completely overturn the *Feres* doctrine. This proposal expands the SFC Stayskal Act because *Feres* covers a broader range of claims outside of the area of medical malpractice.[257] Therefore, in order for active-duty service members to be free to assert any claim and file any suit they may have against the United States, the SFC Stayskal Act must be broadened.

As previously analyzed, the SFC Stayskal Act currently states:

> 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

252. *Id.* at 146.

253. *See, e.g.*, McConnell v. United States, 478 F.3d 1092, 1093 (9th Cir. 2007) (holding that *Feres* barred a claim arising from a service member's fatal boating accident); United States v. Shearer, 473 U.S. 52 (1985) (holding a mother's wrongful death action alleging that the Army's negligence caused her son's kidnapping and murder was barred by *Feres*).

254. SFC Richard Stayskal Military Medical Accountability Act of 2019, H.R. 2422, 116th Cong. § 2681(a) (2019).

255. *Id.*

256. *See Feres*, 340 U.S. at 146.

257. *Id.*

> 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.[258]

Rather, the amended SFC Stayskal Act should state:

> 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, *unrelated to combatant activities, arising out of a negligent or wrongful act or omission in the performance of functions* provided at a military 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.[259]

Enacting this broadened SFC Stayskal Act would now completely overturn the prior precedent of *Feres v. United States*.[260] Members of this nation's Armed Forces—active-duty service members sacrificing their life everyday for this nation's freedom—will now have their day in court considering they are the ones fighting to uphold principles in this nation's justice system. They will now have the ability to file suit and obtain a remedy and file suit for injuries they sustain through the negligent actions and omissions of governmental employees. This is just. This is fair.

VII. COUNTERING THE FOUR RATIONALES OF *FERES*

As discussed earlier in this Comment, the *Feres* Court provided three rationales for establishing the *Feres* doctrine.[261] These three rationales include the following: (a) no parallel private liability exists as required by the FTCA; (b) federal authority governs the relationship between a government and its Armed Forces; and (c) the servicemen's benefits statutes pre-existence.[262] Further, following *Feres*, in *United States v. Brown*, the United States Supreme Court provided a fourth rationale: Military discipline.[263] The following sections will explore the faults of these four rationales.[264]

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258. H.R. 2422 § 2681(a) (emphasis added).
259. *See id*.
260. *Feres*, 340 U.S. at 146.
261. *See id.* at 141–44.
262. *See id.* at 141–45.
263. United States v. Brown, 348 U.S. 110, 112 (1954).
264. *See infra* Parts VII.A–D (countering the *Feres* Court's rationales in establishing the *Feres* doctrine).

A. Parallel Private Liability Does Exist as Required by the FTCA

The United States governmental liability is parallel to private, individual liability as required under the FTCA.[265] The Court's finding of no parallel private liability stems from the status of both the wronged (a service member) and the wrongdoer (the United States Government employee).[266] The Court reasoned that Congress did not intend to allow service members to recover under the FTCA because the United States Government's liability has no parallel to that of a private individual when considering *all* of the circumstances.[267]

However, the United States Supreme Court's "private liability" rationale is not intriguing.[268] It is abundantly clear that private individuals may well be held liable for their negligent maintenance of heating facilities that led to a fire and death in the *Feres* case.[269] Moreover, private surgeons would surely be subject to liability for negligent medical treatment constituting medical malpractice such as was alleged in *Griggs* and *Jefferson*.[270] The Court even admitted in *Feres* that "if we consider relevant only a part of the circumstances and ignore the status of both the wronged and wrongdoer in these cases we find analogous private liability."[271]

Additionally, the Court would later reject the lack of "parallel liability" argument as seen in *Indian Towing Co. v. United States*, where the Court held the FTCA did not exclude "liability in the performance of activities which private persons do not perform."[272] The Court explained: "[I]t is hard to think of any governmental activity . . . which is 'uniquely governmental,' in the sense that its kind has not at one time or another been, or could not conceivably be, privately performed."[273]

Further, the FTCA's language simply alludes to liability of a private individual under *like* circumstances, not *all* circumstances as the Supreme Court referenced.[274] The fact that the wrongdoer under the FTCA is a United States Government employee does not indicate a lack of parallel private liability.

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265. 28 U.S.C. § 1346(b)(1) (2018).
266. *Feres*, 340 U.S. at 142.
267. *Id.*
268. *See id.* at 141–42.
269. *Id.* at 136–37.
270. *Id.* at 137.
271. *Id.* at 142.
272. *See* Indian Towing Co. v. United States, 350 U.S. 61, 64, 75 (1955) (holding the U.S. Government liable for the Coast Guard negligently operating a lighthouse light); Melvani, *supra* note 73, at 413 (citing *Indian Towing Co*., 350 U.S. at 64).
273. *Indian Towing Co.*, 350 U.S. at 68.
274. 28 U.S.C. § 2674 (2018); *Feres*, 340 U.S. at 142.

B. Federal Authority Recognizes the Governance of State Law

The language of the FTCA recognizes the governance of state law.[275] The Court's argument that federal authority governs the relationship of a government and its Armed Forces is far-reaching.[276] The Court reasoned that this federal relationship should never be governed by state law and inferred that Congress would have never intended state law to interfere with this federal relationship.[277] However, the language of the FTCA is clear.[278] The FTCA states: "[D]istrict courts . . . shall have exclusive jurisdiction of civil actions on claims against the United States . . . under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the *law of the place* where the act or omission occurred."[279]

By using this language, Congress intended one of two things: Either the governing law is of the *country* where the act or omission took place, or the governing law is of the *state* where the act or omission took place.[280] Because Congress included an exception to the FTCA (as previously mentioned) prohibiting suits against the United States Government for "[a]ny claim arising in a foreign country," the latter of the two must be the correct interpretation.[281] Therefore, the FTCA can be read as follows: *District courts . . . shall have exclusive jurisdiction of civil actions on claims against the United States . . . under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the [state] where the act or omission occurred.*[282]

If the *Feres* Court sincerely believed that Congress never intended for state law to interfere with the federal relationship between a government and its Armed Forces, why would Congress explicitly mention the application of state law in the FTCA?[283] Further, the Court even admitted that a particular disadvantage to service members in bringing suits against the Government is that they would be subject to the tort law of the state where they were located at the time of the injury.[284]

Moreover, referring back to Justice Scalia's dissent in *United States v. Johnson*, Justice Scalia considered this rationale "absurd," stating: "There seems to me nothing 'unfair' about a rule which says that, just as a serviceman injured by a negligent *civilian* must resort to state tort law, so

275. 28 U.S.C. § 1346(b)(1).
276. *Feres*, 340 U.S. at 143.
277. *Id.* at 146.
278. 28 U.S.C. § 1346(b)(1).
279. *See id.* § 2674 (emphasis added).
280. *Id.*
281. *Id.*; *see id.* § 2680(k).
282. *See id.* § 1346(b)(1).
283. *Id.*
284. Feres v. United States, 340 U.S. 135, 145 (1950).

must a serviceman injured by a negligent Governmental employee."[285] Although there is a federal relationship between the government and its Armed Forces, that relationship is not exclusive and this rationale is lacking because service members can recover under the FTCA for injuries that are *not* incidental to service.[286]

C. The Servicemen's Benefits Statute's Prior Existence Does Not Justify Eliminating Tort Liability

The prior existence of the servicemen's benefits statutes does not justify eliminating the United States' tort liability under the FTCA. The Court provided that because of the preexisting benefits statutes, service members have a remedy regardless of filing a lawsuit or not.[287] The only argument that can be made from the pro-*Feres* perspective is that Congress did include an exclusiveness of remedy section in the FTCA.[288] However, the exclusive remedy pertains to the remedy from a cause of action against the United States, not the servicemen's benefits statutes.[289] Further, although Congress established a compensatory system for service members, Congress did not include a provision in the FTCA declaring the compensatory system to be the exclusive remedy available to service members.[290] Yet, the United States Supreme Court's rationale in *Feres* reflected and alluded to the fact that Congress was silent—other than the cause of action being exclusive—when contemplating the available remedies to service members under the FTCA.[291] The Court reasoned that because Congress was silent, Congress must have intended to allow service members only one, exclusive remedy (benefits) even though Congress explicitly stated the available remedy of the cause of action.[292]

Moreover, this rationale has been implemented inconsistently. The most well-known inconsistent application of this rationale is found in *Brooks v. United States*.[293] The serviceman involved in *Brooks* had the same servicemen's benefits and compensation available to him as those involved in *Feres*; yet, Brooks was able to file suit.[294] In *Feres*, the United States Supreme Court attempted to draw a distinction from the *Brooks* case, stating the injury to Brooks did not arise out of nor was in the course of military

285. United States v. Johnson, 481 U.S. 681, 695–96 (1987) (Scalia, J., dissenting).
286. *Id.* at 691–92 (majority opinion).
287. *Feres*, 340 U.S. at 144.
288. 28 U.S.C. § 2679(b)(1) (2018).
289. *Id.*
290. *See id.*
291. *Feres*, 340 U.S. at 144.
292. *Id.*
293. *See* Brooks v. United States, 337 U.S. 49, 51 (1949).
294. *Id.* at 53.

duty.[295] But nevertheless, Brooks, having the same type of benefits and compensation as those in *Feres*, was able to file suit while the *Feres* plaintiffs were not.[296]

Furthermore, as alluded to previously in *United States v. Brown*, the United States Supreme Court held that a veteran *may* recover under the FTCA for an injury sustained in a veterans hospital as a result of the negligent treatment of a service-connected disability, even though that veteran was entitled to and received veteran's disability payments to compensate him for such injury.[297]

In *Brooks* and *Brown*, the existence of a comprehensive compensation remedy was not a barrier to recovery under the FTCA.[298] Instead, while Brooks and Brown did receive veterans benefits, they nevertheless were able to file suit against the United States Government.[299] In *United States v. Johnson*, however, the Supreme Court commented that benefits provided by the Veterans' Benefits Act were intended by Congress to be the sole remedy for service-related injuries, and that they provide an upper limit of liability for the Government for such injuries.[300] Again, Congress did include an exclusiveness of remedy section in the FTCA; however, the exclusive remedy pertains to the remedy from a cause of action against the United States, not the servicemen's benefits statutes.[301] The Court misinterpreted Congress's intent under the FTCA.

Further, the problematic aspect of the servicemen's benefits rationale is this: The amount of benefits with respect to a given injury does not govern whether *Feres* applies to a suit based on that same injury. Just as the *Feres* doctrine does not apply in some situations, such as that in *Brooks* and *Brown*, there are situations in which benefits are not awarded but *Feres* bars suit.[302]

D. Stayskal Will Not Interfere with Military Discipline

The SFC Stayskal Act will not interfere with military discipline. However, this rationale does have legitimacy because there is a possibility that some suits brought by active-duty service members will adversely affect military discipline. Many would agree with the Government's argument that allowing service members access to the judicial court system under the FTCA for claims arising when they are in immediate command and duty would shift

295. *Feres*, 340 U.S. at 146.
296. *See Brooks*, 337 U.S. 49; *Feres*, 340 U.S. 135.
297. United States v. Brown, 348 U.S. 110, 113 (1954).
298. *See Brooks*, 337 U.S. 49; *Brown*, 348 U.S. 110.
299. *See Brooks*, 337 U.S. 49; *Brown*, 348 U.S. 110.
300. United States v. Johnson, 481 U.S. 681, 690–92 (1987).
301. *Id.*
302. *See, e.g.*, Purcell v. United States, 656 F.3d 463, 467 (7th Cir. 2011) (applying *Feres* even though the estate of an active-duty serviceman who committed suicide did not receive any benefits).

the regulation and control from the military establishment to the courts, and thus "require judicial re-examination of the conduct of military affairs."[303]

However, many would also agree with Justice Scalia when he stated: "I do not think the effect upon military discipline is so certain, or so certainly substantial, that we are justified in holding (if we can ever be justified in holding) that Congress did not mean what it plainly said in the [FTCA] . . . ."[304] Although there might be a possibility of a decline in military discipline if service members can sue their superiors, this Comment does not focus on service members suing their superiors.

Instead, this Comment—through the enactment of the SFC Stayskal Act—advocates and focuses on service members suing their doctors for medical malpractice. Military doctors are not service members' superiors.[305] Service members do not receive commands from their doctors.[306] They do not carry out the demands of their doctors.[307] They are not under the direct authority and supervision of their doctors.[308] Thus, this "best" rationale has little to no affect or relevance in this Comment's argument for the adoption of the SFC Stayskal Act.

VIII. ATTACKING S. 1790 NATIONAL DEFENSE AUTHORIZATION ACT FOR FISCAL YEAR 2020

The NDAA 2020 is both effective and ineffective.[309] The recently passed Act now gives active-duty service members the ability to file *claims* of medical malpractice against the Department of Defense.[310] Although the NDAA 2020 partially overturns the *Feres* doctrine, the Act is not as effective and sufficient as many may believe it to be.[311]

A. The NDAA 2020 Provides a Step in the Right Direction, Yet Is Nevertheless Ineffective

Although the NDAA 2020 is a step in the right direction, it is nevertheless ineffective and insufficient regarding the overturning of *Feres*.

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303. Johansen v. United States, 191 F.2d 162, 163 (2d Cir. 1951).

304. *Johnson*, 481 U.S. at 698 (Scalia, J., dissenting).

305. *See* Carol Luther, *The Pay Scale for Army Doctors*, HOUS. CHRONICLE, https://work.chron.com/pay-scale-army-doctors-7103.html (last updated July 1, 2018) (explaining that military doctors enter the military as officers and climb the ranks just like any other military officer).

306. *See id.*

307. *See id.*

308. *See id.*

309. National Defense Authorization Act for Fiscal Year 2020, Pub. L. No. 116–92 § 731, 133 Stat. 1198, 1457 (2019).

310. *Id.*

311. *Id.*

The Act is ineffective because it diverts from the FTCA's well-established process—that is, allowing claimants to file *suit* against the Government upon their claim being denied administratively.[312] The ability of a claimant to file suit under the FTCA holds the Government accountable and ensures a fair and just decision is achieved. The NDAA 2020 now allows active-duty service members to become claimants, giving them the ability to submit claims under the FTCA.[313] However, even with the passage of the NDAA 2020, active-duty service members continue to be deprived of the ability to bring suit as they are prohibited from filing suit if their claim is denied.[314]

A second aspect of the NDAA 2020's ineffectiveness is the administrative claim process.[315] Although many people might not realize, the Act's provision allowing the authorization of claims is a biased process.[316] For example, active-duty service members' claims are asserted against the Department of Defense's health care provider.[317] However, the claim asserted is evaluated and then either paid or denied by the Secretary of Defense, the leader and chief executive officer of the Department of Defense.[318] Therefore, this process provides no oversight from the judicial system, i.e., a federal judge.

The NDAA 2020 does provide a provision requiring that uniform standards consistent with the FTCA are to be applied when evaluating, settling, and paying alleged claims.[319] However, an unwavering bias is nevertheless present when the leader and chief executive officer of the Department—whom a claim is alleged against—is the very person determining whether the alleged claim succeeds.[320] This steadfast bias could easily result in the denial of claims, regardless of their merit.

Although the NDAA 2020 is undoubtedly a breakthrough in the attempt to overturn the *Feres* doctrine, it is only a first step, as the Act nevertheless is ineffective.[321] Because of the Act's deficiency and lack of full justice for active-duty service members, additional steps must be taken in order to completely overturn the *Feres* doctrine—steps including the passage of the SFC Stayskal Act.[322]

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312. *Id.*
313. *Id.*
314. *Id.*
315. *Id.*
316. *Id.*
317. *Id.*
318. *Id.*; *Secretary of Defense Dr. Mark T. Esper*, U.S. DEP'T DEF., https://www.defense.gov/Our-Story/Meet-the-Team/Secretary-of-Defense/ (last visited May 30, 2020).
319. § 731, 133 Stat. at 1457.
320. *Id.*; *Secretary of Defense Dr. Mark T. Esper*, *supra* note 318.
321. § 731, 133 Stat. at 1457.
322. *Id.*; SFC Richard Stayskal Military Medical Accountability Act of 2019, H.R. 2422, 116th Cong. (2019).

IX. CONCLUSION

The detrimental pitfall that silently awaits grieving military victims of medical malpractice is the *Feres* doctrine. This doctrine establishes that the United States Government is not liable under the FTCA for injuries to service members where the injuries arise out of or are in the course of activity incident to service.[323] Because the Supreme Court misinterpreted *Feres* and has failed to overturn the *Feres* doctrine, Congress should intervene and enact the SFC Stayskal Act.

A serviceman entered the hospital for gallbladder surgery and walked out with his legs amputated, with no ability to ever walk again.[324] Due to a doctor's negligence, a servicewoman, after giving birth to her new baby daughter, experienced postpartum hemorrhaging and died hours later, never having the opportunity to be the mother she aspired to be.[325] An innocent child was deprived of oxygen *in utero* leading to permanent brain damage and Cerebral Palsy—permanent conditions that this child must live with for the rest of her life.[326] Finally, Richard Stayskal, a thirty-seven-year-old Green Beret, was told he merely had a simple case of pneumonia only to be diagnosed months later with Stage IV lung cancer, a terminal diagnosis.[327]

All of these potential meritorious lawsuits either have or will be barred under the *Feres* doctrine. Furthermore, although the NDAA 2020 has been a breakthrough in overturning *Feres*, the Act is nevertheless ineffective and continues to prohibit these lawsuits from being filed.[328] Why limit active-duty service members' ability to file suit when veterans under the FTCA and civilians under state laws have this right to be heard in court? No difference in legal remedy related to medical malpractice should be tolerated in our country based simply on whether or not an individual is an active member of a branch of our military. Military individuals and families will continue to potentially be left without a remedy. Military doctors will likely not be held accountable for their negligent, horrific medical malpractice. This is not just. This is not fair. This violates the principles this country was founded upon. It is time for Congress to take action. It is time for the *Feres* doctrine to be no more. Once the *Feres* doctrine has been overturned for FTCA claims, the Military Claims Act—the overseas equivalent to the FTCA—will need to follow suit.

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323. *See* Feres v. United States, 340 U.S. 135 (1950).

324. Read v. United States, 536 F. App'x 470, 471 (5th Cir. 2013).

325. Daniel v. United States, 889 F.3d 978, 980 (9th Cir. 2018).

326. Ortiz v. United States *ex rel.* Evans Army Cmty. Hosp., 786 F.3d 817, 818 (2015).

327. Simkins, *supra* note 188.

328. National Defense Authorization Act for Fiscal Year 2020, Pub. L. No. 116–92 § 731, 133 Stat. 1198, 1457 (2019).