

Health Law Outlook

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HEALTH LAW
FORUM



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2L

*Class of
2022*

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Since leaving active duty and starting his law school career, Tom has assumed various leadership positions in the community. Currently, he serves as the New Jersey State Field Operations Leader for Team Rubicon USA, a nation-wide nonprofit that recruits, organizes, trains, and deploys military veterans to disaster sites in the United States and around the world. As a member of Team Rubicon, Tom has deployed throughout the country and continues to take an active role in Team Rubicon's ongoing COVID-19 response.

Additionally, he is a current New Jersey Search and Rescue team member and AmeriCorps alumnus. At Seton Hall Law, Tom serves as Treasurer for the Student Veterans Association and an ambassador for Service to School (S2S), a nonprofit helping veterans and service members gain admission to college or graduate school.

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Abstract: In 1950 the Supreme Court ruled that the government is not liable for injuries sustained by United States military personnel arising out of or in the course of activity “incident to service.”¹ The practical effect of this ruling, referred to as the *Feres* Doctrine, is that servicemembers are barred from collecting punitive damages from the United States government for any personal injuries sustained while on active duty. This bar on legal remedies has been applied to cases of medical malpractice, sexual assault, rape, physical violence, driving under the influence of alcohol or narcotics, exposure to deathly substances, and discrimination.² While each of these categories warrant further discussion, the focus of this Essay will be limited to medical malpractice. On December 19, 2020, President Trump signed the 2020 National Defense Authorization Act which contained a provision curtailing the *Feres* Doctrine’s reach as it relates to medical malpractice.³ As a result, servicemembers can now file administrative claims with the Department of Defense for compensation for medical malpractice.⁴ Despite rhetoric suggesting a complete success, this law has a fairly narrow application, has yet to be properly enacted, and is far from an overturn of *Feres*.

I. Introduction:

Before 1946, sovereign immunity, a descendent of the common law principle of “the King can do no wrong,” provided an almost complete bar to civil tort actions against the United States government.⁵ It was not until the passage of the Federal Tort Claims Act (FTCA) on June 25, 1946 that Congress allowed United States citizens to recover for torts committed by federal employees or members of the armed forces.⁶ There were, of course, several exceptions laid out by the FTCA in which the government retained limited liability.

The primary, and vastly expansive, exception to the FTCA is the “discretionary function exception” (DFE), which provides that the United States is not liable for any claim “based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.”⁷ The DFE has two prongs: (1) due care and (2) discretionary function.⁸ The first inquiry in this analysis is whether the actions taken by the employee were discretionary or controlled by required statutes or regulations.⁹ If the employee was subject to a particular statute

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¹ *Feres v. United States*, 340 U.S. 135, 146 (1950).

² Andrew Popper, *Rethinking Feres*, WASHINGTON COLL. OF LAW RES. PAPER NO. 2019-08, 15 (2019).

³ National Defense Authorization Act for Fiscal Year 2020, S. 1790, 116th Cong. §731 (2019).

⁴ *Id.*

⁵ Popper, *supra* note 2, at 2; *see also* THE FEDERALIST NO. 81, at 397 (Alexander Hamilton) (Terence Ball ed., 2003) (“[I]t is inherent in the nature of sovereignty not to be amendable to the suit of an individual without its consent.”).

⁶ Capt. Samuel F. Wright, *Feres Doctrine Revisited*, SERV. MEMBERS LAW CTR. LAW REV. NO. 16070, 2 (2016).

⁷ 28 U.S.C. § 2680(a) (1996).

⁸ Amy M. Hackman, *The Discretionary Function Exception to the Federal Tort Claims Act: How Much is Enough?*, CAMPBELL LAW REV. VOL. 19, 413 (1997).

⁹ *United States v. Gaubert*, 499 U.S. 315, 326 (1991).

or regulation, the federal court will apply the due care prong.¹⁰ The due care inquiry is straightforward and follows a standard negligence analysis. Either the statute or regulation would lay out an applicable standard of care, or, if not, the standard would be an objective inquiry of whether the employee used due care in applying the statute or regulation.¹¹ The FTCA does not define the second prong, the discretionary prong, and is therefore far more unclear. This lack of clarity has been the root of many discussions and debates over the applicability of the FTCA.¹²

The DFE is the first of thirteen exceptions to the FTCA described in 28 U.S.C § 2680. The most relevant of these remaining twelve exceptions provides that sovereign immunity will not be waived in “any claim arising out of the combatant activities of the military or naval forces or the Coast Guard in time of war.”¹³ On its face, this exception appears to apply exclusively to injuries sustained by servicemembers involved in combat operations during wartime. When considered alongside the DFE, however, this provision has raised, and continues to raise, several questions as to how the FTCA should be applied to injuries sustained by servicemembers and their families from factors “incident to service,” but unrelated to combat operations. This vaguely defined phrase, which the Supreme Court used in the 1950 case *Feres v. United States*, has become the focal point of the controversy surrounding the *Feres* Doctrine.¹⁴ Without an adequate definition, this phrase has become an almost complete liability shield in virtually any case involving servicemembers. If Congress provides a clear and concise definition of actions and injuries “incident to service,” the impunity perpetrators currently enjoy will cease, and military leadership will be given the tools needed to address many of the harms servicemembers currently face.

II. *Feres v. United States* (1950)

The *Feres* Doctrine is derived from three separate Supreme Court cases reviewed in 1950. The first, *Feres v. United States*, involved an active duty soldier stationed at Pine Camp, New York (today Fort Drum, New York), who was killed in a barracks fire.¹⁵ The executrix of his estate brought suit against the federal government under the FTCA, alleging the fire was the result of the Government’s negligent failure to detect and correct the defect in the barracks’ heating system as well as failure to maintain a fire watch.¹⁶ In *Jefferson v. United States*, a soldier underwent abdominal surgery.¹⁷ During a subsequent operation, a 30 inch by 18 inch towel imprinted with “Medical Department, U.S. Army” was found in his abdomen.¹⁸ The last case, *Griggs v. United States*, involved a suit against the federal government by the executrix of an active duty soldier

¹⁰ Hackman, *supra* note 8.

¹¹ *Id.*

¹² *See, e.g.*, *Tippett v. United States*, 108 F.3d 1194, 1196 (10th Cir. 1997) (“If the discretionary function exception applies to the challenged governmental conduct, the United States retains its sovereign immunity, and the district court lacks subject matter jurisdiction to hear the suit.”); *Rosebush v. United States*, 119 F.3d 438, 444 (6th Cir. 1997) (Merrit, J. dissenting) (“Our Court’s decision in this case means that the discretionary function exception has swallowed, digested and excreted the liability-creating sections of the [FTCA]. It decimates the Act.”).

¹³ Federal Tort Claims Act, 28 U.S.C. §§ 1346(b)(1); 28 U.S.C. 2680(i).

¹⁴ *Feres*, 340 U.S. at 136 (“[T]he 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.”).

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Jefferson v. United States*, 178 F.2d 518, 518 (4th Cir. 1949).

¹⁸ *Id.*

who died in the midst of surgery.¹⁹ The Supreme Court granted review of all three cases and consolidated them for appeal.²⁰

In a near unanimous ruling, the Supreme Court concluded that the Government is not liable under the FTCA for injuries to servicemembers arising out of or in the course of activity “incident to service.”²¹ The Court’s ruling, and failure to define the phrase “incident to service,” essentially rewrote the FTCA as it pertains to servicemembers. An exception to the FTCA maintains sovereign immunity to “any claim arising out of the *combatant* activities of the military or naval forces or the Coast Guard, *during time of war.*”²² The Court, however, considered this exception in tandem with 28 U.S.C. § 2671 which defines “employee of the Government” to include “members of the military or naval forces of the United States,” and provides that “acting within the scope of his office or employment, in the case of a member of the military or naval forces of the United States, means acting in the line of duty.”²³ The Court applied this interpretation to the DFE, finding the FTCA “infer[s] allowance of claims arising from noncombat activities in peace.”²⁴ This inference has been described by one commentator as “one of the most extreme examples of judicial activism in the history of the Supreme Court.”²⁵

The Court’s reasoning in *Feres* is widely contested. Had Congress intended the FTCA to bar the entire Department of Defense from civil tort litigation in any circumstance, they would have done so explicitly.²⁶ What the FTCA does say explicitly is that sovereign immunity is not waived in claims arising out of “*combatant*” activities “*in times of war.*”²⁷ Had Congress intended 28 U.S.C. section 2671’s definitions to be the Court’s guiding principles, then creation of such an exception would be unnecessary. Similarly, the FTCA would not have used the qualifying term “combatant” or phrase “in a time of war” if they did not intend those qualifiers to be determinative.²⁸ The Court’s language suggests they are filling in the gaps of the FTCA, but this was less a “gap-filler” and more a completely new prohibition on liability not created by Congress.

Feres continues to receive bipartisan criticism in both chambers of Congress, the Supreme Court, and the Executive. Justice Scalia, writing for the dissent in *United States v. Johnson* (1997), and joined by Justices Brennan, Marshall, and Stevens, wrote:

In sum, neither the three original *Feres* reasons nor the post hoc rationalization of ‘military discipline’ justifies our failure to apply the FTCA as written. *Feres* was

¹⁹ *Griggs v. United States*, 178 F.2d 1, 2 (10th Cir. 1949).

²⁰ *Id.*

²¹ *Feres*, 340 U.S. at 146.

²² 28 U.S.C. § 2680(j) (emphasis added).

²³ 28 U.S.C. § 2671.

²⁴ *Feres*, 340 U.S. at 138.

²⁵ Jonathon Turley, *Pax Militaris: The Feres Doctrine and the Retention of Sovereign Immunity in the Military System of Governance*, 31 GEO. WASH. L. REV. 1, 89 (2003).

²⁶ *United States v. Johnson*, 481 U.S. 681, 703 (1987) (“But because [the decedent] devoted his life to serving his country’s Armed Forces, the Court today limits his family to a fraction of the recovery they might otherwise have received. If our imposition of that sacrifice bore the legitimacy of having been prescribed by the people’s elected representatives, it would (insofar as we are permitted to inquire into such things) be just. But it has not been, and it is not. I respectfully dissent.”) (Scalia, J., dissenting).

²⁷ 28 U.S.C. § 2680(j) (emphasis added).

²⁸ *Id.*

wrongly decided and heartily deserves the ‘widespread, almost universal criticism’ it has received.²⁹

In 2019, the Supreme Court denied certiorari for another case, *Daniel v. United States*, refusing to reconsider *Feres*.³⁰ The case arose from a claim of medical malpractice and wrongful death by Lieutenant Commander Walter Daniel behalf of his late wife, Lieutenant Rebekah Daniel, who died from postpartum hemorrhaging four hours after what was considered a low-risk pregnancy.³¹ The Ninth Circuit “regretfully reach[ed] the conclusion that his claim [was] barred by the *Feres* Doctrine.”³² Justice Thomas, dissenting from the Supreme Court’s denial of certiorari, argued that “denial of relief to military personnel and distortions of other areas of law to compensate — will continue to ripple through our jurisprudence as long as the Court refuses to reconsider *Feres*.”³³ Justice Ginsburg joined Justice Thomas in a willingness to grant certiorari.³⁴

As Justice Jackson noted in his opinion, if Congress believes the Supreme Court wrongly decided *Feres*, then Congress has the power to amend the FTCA.³⁵ Despite numerous attempts over the past seventy years, however, no bills have been enacted by Congress to overturn *Feres*.³⁶ While Congress has amended the FTCA, until 2020, none of these amendments impacted the Court’s interpretation of *Feres*.³⁷

III. Justifications for the *Feres* Doctrine

In considering the expansive impact of the “incident to service” bar used in *Feres*, it is worth considering the justifications behind the Supreme Court’s ruling and the opposition presented to any attempts to overrule it. Some of the more compelling justifications relate to the importance of maintaining military chain-of-command discipline and the existence of adequate alternative remedies.

First, military discipline and the adherence to a chain-of-command is the backbone of military organizational culture and effectiveness. The concern is that if servicemembers are able to sue, the chain-of-command structure would “get bogged down in lengthy and possibly frivolous lawsuits [that may] substantially disrupt the military mission . . . [taking] resources away from compelling military needs to avoid legal actions.”³⁸ To restate, supporters of the *Feres* Doctrine want to insulate military leadership from the fear of civil tort litigation. If the liability shield is lifted, military leaders will have to second-guess each of their decisions for fear of legal ramifications, thereby undermining the military’s effectiveness, efficiency, and allocation of resources.

²⁹ *Johnson*, 481 U.S. at 700 (Scalia, J. dissenting) (citing *In re “Agent Orange” Prod. Liab. Litig.*, 580 F. Supp. 1242, 1246 (EDNY), *appeal dismissed*, 745 F.2d 161 (2d Cir. 1984)).

³⁰ *Daniel v. United States*, 139 S. Ct. 1713, 1713 (2019).

³¹ *Daniel v. United States*, 889 F.3d 978, 980 (9th Cir. 2018).

³² *Id.*

³³ *Daniel*, 139 S. Ct. at 1714.

³⁴ *Id.* at 1713.

³⁵ *Feres*, 340 U.S. at 138.

³⁶ Wright, *supra* note 6, at 7.

³⁷ *Id.*

³⁸ Leo Shane III, *The Argument for Keeping the Feres Doctrine*, STARS AND STRIPES 216 (Apr. 2, 2012) (referring, *inter alia*, to comments of the Solicitor General).

However, there are no concrete data, studies, or documented history to support the assertion that access to Article III courts to address egregious misconduct undermines the UCMJ.³⁹ Lifting the liability shield “means only that there would be a remedy in a court of law for isolated, undeniably unacceptable misconduct clearly not essential to military operations, order, or discipline.”⁴⁰ The argument that allowing a servicemember’s claim undermines military discipline only makes sense if that claim was in relation to a sanction action, such as compliance with a commander’s guidance. Medical malpractice does not satisfy this requirement. Furthermore, preventing servicemember claims relating to egregious misconduct is more likely to foster a toxic command climate and undermine military discipline. If egregious misconduct is allowed to continue without proper accountability, there is little incentive for perpetrators to cease or take necessary precautions.

Second, proponents of the *Feres* Doctrine argue that the system in place for military compensation is adequate to address such claims.⁴¹ The current compensation framework provides funds to servicemembers with injuries “incident to service” in the way of free medical care and receiving generous insurance, retirement, and other general benefits without having to prove fault.⁴² Additional recovery in Article III courts for those already receiving such benefits may be seen as unjust enrichment.⁴³ These arguments fail to consider the possibility that these benefits may be insufficient or too unreliable to appropriately or adequately remedy injured servicemembers. Furthermore, the unjust enrichment argument assumes that courts would allow a servicemember to seek and receive damages twice for the same costs.⁴⁴ A simple solution to this issue would be giving servicemembers the opportunity to opt-out of the military compensation system to pursue a civil tort claim.⁴⁵

IV. The 2020 National Defense Authorization Act

The fact that a provision allowing medical malpractice claims for servicemembers was included in the 2020 National Defense Authorization Act is due in large part to the activism of Sergeant First Class (SFC) Richard Stayskal.⁴⁶ In early 2017 SFC Stayskal was misdiagnosed with pneumonia by military medical personnel after observing what “even an inexperienced ‘[first year] resident would have seen’” as cancer.⁴⁷ By the time SFC Stayskal was properly diagnosed by civilian doctors, the cancer had spread through the rest of his body and he was given a life expectancy of one year.⁴⁸

³⁹ Popper, *supra* note 2, at 58.

⁴⁰ *Id.*

⁴¹ Leo Shane III, *Bid to Allow Troops to Sue for Military Medical Malpractice Hits Senate Snag*, MIL. TIMES (Sept. 11, 2019) (“We have compensation for people who are killed or injured in the military . . . we are not going to open Pandora’s box.”) (quoting Senator Lindsay Graham).

⁴² Popper, *supra* note 2, at 53.

⁴³ *Id.*

⁴⁴ *Id.* at 56.

⁴⁵ *Id.*

⁴⁶ 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/>.

⁴⁷ *Id.* (quoting Dr. Louis Leskosky, a board-certified radiologist hired by the law firm representing SFC Stayskal).

⁴⁸ *Id.*

In 2019, the “SFC Richard Stayskal Military Medical Accountability Act of 2019” was proposed in both chambers of Congress with bipartisan support.⁴⁹ The bill was meant to “amend chapter 171 of title 28, United States Code, to allow suit against the United States for injuries and deaths of the Armed Forces of the United States caused by improper medical care, and for other purposes.”⁵⁰ Despite bipartisan support in the House of Representatives and Senate, the bill faced procedural challenges. Senator Lindsey Graham, chairman of the Senate Judiciary Committee, opposed the bill as written, citing concerns about “opening Pandora’s box” and exposing the Pentagon to constant court battles.⁵¹ Rather than allowing servicemembers to sue, the resulting compromise allows “claim[s] against the United States for personal injury or death incident to the service of a member of the uniformed services that was caused by the medical malpractice of a Department of Defense health care provider” provided that the “act or omission constituting medical malpractice occurred in a covered military medical treatment facility.”⁵²

While a step in the right direction, the 2020 NDAA leaves several questions unanswered. For example, the provision inadequately addresses claims by third parties. This is especially problematic in cases involving military mothers. A recent, notable case that highlights this issue is *Ortiz v. United States*. In *Ortiz*, the Tenth Circuit barred the husband of a female Air Force officer from bringing a claim against the government for the brain trauma suffered by their child due to a negligent delivery.⁵³ The *Ortiz* case highlights how the *Feres* Doctrine has not only limited the government’s liability to servicemembers, but also to claims brought by a third party when a third party’s injury is derived from an injury sustained to a servicemember, referred to as the “genesis test.”⁵⁴ The genesis test, as used in *Ortiz*, requires the court to determine first whether there was an “incident-to-service injury to a servicemember and second whether the injury to the third party was derivative of that injury.”⁵⁵ In *Ortiz*, the court ruled that the child’s oxygen loss was the result of the servicemember’s drop in blood pressure allegedly caused by negligent administration of medication, and therefore *Feres* barred an FTCA claim based on the child’s injuries.⁵⁶ In *Ortiz*, the Tenth Circuit “join[ed] the many panels of this Court that have criticized the inequitable extension of this doctrine to a range of situations that seem far removed from the doctrine’s original purposes.”⁵⁷

Another example of this comes from *Mondelli v. United States* where a servicemember’s child was born with retinal blastoma, a genetically transferred form of cancer of the retina, due to her father’s service when he was ordered to stand near and march towards the site of a nuclear explosion without protective clothing.⁵⁸ The resulting radiation doses were believed to cause the injuries to his daughter’s eye.⁵⁹ The Third Circuit lamented that barring the claim would be an

⁴⁹ SFC Richard Stayskal Military Medical Accountability Act of 2019, H.R. 2422, 116th Congress (2019).

⁵⁰ *Id.*

⁵¹ Roxana Tiron & Travis J. Tritten, *Trump Ally Graham Opposes Troops’ Bid to Sue on Botched Care*, BLOOMBERG GOV’T (Sept. 18, 2019), <https://news.bloomberglaw.com/health-law-and-business/trump-ally-graham-opposes-troops-bid-to-sue-over-botched-care>.

⁵² National Defense Authorization Act for Fiscal Year 2020, S. 1790, Sec. 731, 116th Cong. (2019–2020) (enacted).

⁵³ *Ortiz v. United States*, 786 F.3d 817, 818 (10th Cir. 2015).

⁵⁴ Tara Wilke, *Military Mothers and Claims Under the Federal Tort Claims Act for Injuries that Occur Pre-Birth*, 91 NOTRE DAME L. REV. 160 (2016).

⁵⁵ *Ortiz*, 786 F.2d at 818.

⁵⁶ *Id.*

⁵⁷ *Id.* at 823 (quoting *Costco v. United States*, 248 F.3d 863, 869 (9th Cir. 2001)).

⁵⁸ *Mondelli v. United States*, 711 F.2d 567, 569 (3d Cir. 1983).

⁵⁹ *Id.*

injustice but nevertheless “conclude[d], with reluctance, that the claims . . . are barred.”⁶⁰ In a similar Ninth Circuit case, a wrongful death action was filed by a servicemember’s husband after a pregnant servicemember was ordered by her superiors to conduct physical training in contravention of her doctor’s orders, which induced premature labor.⁶¹ The Ninth Circuit ruled that “in light of Supreme Court and our own precedent, we *regretfully* conclude that [*Feres* bars the claim].”⁶² While circuit courts continue to note the unjust and overly expansive application of the *Feres* Doctrine, they are bound by Supreme Court precedent. Fortunately, it seems that in allowing harmed servicemember to file claims, the 2020 NDAA is also inferring the rights of third parties to bring claims. Past *Feres* case law, however, has highlighted the need for courts to make exceptions explicit.

Additionally, the language of the provision appears to give broad discretion to the Secretary of Defense and provides little procedural guidance, which has already proved problematic.⁶³ The NDAA provides that the “Secretary [of Defense] *may* allow, settle, and pay a claim against the United States.”⁶⁴ The modal verb “may” suggests compensation for any claim is not guaranteed and gives the Department of Defense discretion with whether to comply. Natalie Khawam, the attorney who represented SFC Stayskal, reported that as of October 15, 2020, her firm had filed more than 75 claims, including more than 60 malpractice and 14 wrongful death cases, and had received no response from the Department of Defense.⁶⁵ Upon inquiry, a Department of Defense spokeswoman stated that claims would be processed once they developed an “interim final rule to implement the processing of claims, which allows servicemembers to file medical malpractice claims under certain circumstances.”⁶⁶ If these claims are eventually processed, the NDAA provides that, assuming the Secretary of Defense determines the claim to be “meritorious,” any amount in excess of \$100,000 must be reported to the Secretary of the Treasury for payment.⁶⁷ Without clear or concise guidelines on how this process is supposed to work, such procedures for compensation will be at best inefficient and at worst withheld entirely.

V. Congress Must Amend the FTCA by Explicitly Defining “Incident to Service”

Strict reliance on the Department of Defense’s ability and willingness to pay administrative claims is insufficient to make servicemembers harmed by military medical malpractice whole. Furthermore, when faced with claims brought by servicemembers, the Supreme Court has continually relied on the “incident to service” precedent left by *Feres* in denying certiorari, most recently in *Daniel v. United States* (2019).⁶⁸ Supreme Court justices on both ends of the political spectrum have voiced criticisms of this reliance on *Feres*, most notably Justice Ginsburg, Justice

⁶⁰ *Id.* at 569–70.

⁶¹ *Ritchie v. United States*, 733 F.3d 871, 872 (9th Cir. 2013).

⁶² *Id.* at 878–79 (emphasis added).

⁶³ Joce Sterman, Alex Brauer, & Andrea Nejman, *Despite Change From Congress, Military Malpractice Claims Have Gone Unanswered*, ABC 7 WASHINGTON, D.C. (Oct. 15, 2020), <https://wjla.com/news/spotlight-on-america/despite-change-from-congress-military-malpractice-claims-have-gone-unanswered>.

⁶⁴ *Id.* (emphasis added).

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ National Defense Authorization Act for Fiscal Year 2020, S. 1790, Sec. 731, 116th Cong. (2019–2020) (enacted).

⁶⁸ *Daniels*, 139 S. Ct. at 1713 (“Such unfortunate repercussions – denial of relief to military personnel and distortions of other areas of law to compensate – will continue to ripple through our jurisprudence as long as the Court refuses to reconsider *Feres*.”) (Thomas, J., dissenting).

Thomas, and Justice Scalia.⁶⁹ While *Feres* still stands, overwhelming discretion is granted to the government to essentially decide whether or not to prosecute itself. In order to offset the harm caused by *Feres*, Congress must limit this discretion. To accomplish this, Congress must amend the FTCA by explicitly defining what types of activities and injuries truly are “incident to service.”

The solution to this issue is not a complete lifting of the federal government’s liability shield. Amending the FTCA to narrowly define “incident to service” will help in identifying which injuries are actionable and which are not. Military service often involves training and actions which “outside the military . . . could be seen as tortious but in fact are vitally important” and must remain unactionable.⁷⁰ As stated earlier, the concern that allowing civil tort litigation on behalf of servicemembers will undermine military discipline is legitimate if left unclear. It should not be particularly difficult, however, to differentiate vitally important training or operational objectives from egregious misconduct. Professor Andrew Popper, a veteran of the Marine Corps and staunch opponent of the *Feres* Doctrine, outlined seven specific behaviors that must be actionable, among them medical malpractice. These seven categories are: (1) sexual assault; (2) rape; (3) extreme physical violence or acts that fall within the definition of torture, domestic violence, and child abuse; (4) acts of clear or gross medical malpractice; (5) exposure of servicemembers to pharmaceuticals, narcotics, or toxins *without informed and voluntary consent*; (6) while in military *service*, acts of driving under the influence of alcohol or narcotics on more than one occasion; (7) and acts of patterns of invidious discrimination on the basis of race, religion, ethnicity, or gender.⁷¹ Declaring that any of the above behaviors are “incident to service” is unreasonable because they neither satisfy a discernable operational nor clear training objective.

Congress must adopt a clear standard for deciding what types of behaviors are “incident to service.” The courts have applied the “incident to service” standard so broadly that virtually any activity involving a servicemember qualifies.⁷² Congress should explicitly make each of the seven behaviors above actionable. Further, for behaviors not described above, the Court must ask whether they satisfy a clear operational or training objective. If they do not, then the DFE should not apply.

VI. Call to Action

In an attempt to maintain military discipline, the Supreme Court’s ruling in *Feres* created a grave injustice; its inequitable results are frequently cited by reluctant courts compelled to follow its precedent.⁷³ There are many different lenses through which one could approach this ruling, each involving a unique set of moral, practical, and legal implications.

⁶⁹ *Id.*

⁷⁰ *Chappell v. Wallace*, 462 U.S. 296, 300 (1983) (“Civilian courts must . . . hesitate long before entertaining a sui which asks the court to tamper with the established relationship between enlisted military personnel and their superior officers; that relationship is at the heart of the necessarily unique structure of the Military Establishment.”).

⁷¹ Popper, *supra* note 2, at 95.

⁷² *See Warner v. United States*, 720 F.2d 837, 839 (5th Cir. 1983) (noting that activities such as shopping might be incident to service if they occur during brief off-duty periods); *see also United States v. Shearer*, 473 U.S. 52 (1984). In that case, a servicemember was kidnapped and killed while away from base by an assailant permitted to stay on base by his superiors despite having been convicted of an unrelated manslaughter in Germany. *Id.* The deceased’s family brought suit alleging negligence for failure to remove the assailant. *Id.* The Court barred the claim under the “incident to service” standard. *Id.*

⁷³ *See, e.g., Peluso v. United States*, 474 F.2d 605, 606 (3d Cir. 1973), *cert. denied*, 414 U.S. 879 (1973).

First, from a moral standpoint, servicemembers are being asked to fight and possibly give their lives for a system of justice from which they themselves are excluded. Virtually every Congressman, President, and politician has dedicated considerable time to thanking military personnel and veterans for their service and sacrifice. If those expressions of appreciation are genuine, they should be supported by action. Congress is uniquely situated to pass legislation undoing the harmful effects of the *Feres* Doctrine, as attempted by Representative Speier in 2019.⁷⁴ Legislation passed to date, including the 2020 NDAA, is insufficient.

Second, from a practical standpoint, misconduct is deterred by accountability for misconduct. As discussed in earlier sections, an argument frequently used in support of the *Feres* Doctrine is that civil tort litigation will undermine military discipline and respect for the chain-of-command.⁷⁵ While the military is certainly predicated on discipline, which is characterized by the willing and responsive compliance with regulation, it is also predicated on accountability.⁷⁶ If the federal government is never held responsible for misconduct, then there is nothing to deter its repetition. Conversely, if Congress imposes liability on the federal government for conduct the federal government already prohibits, such as medical malpractice, such a deterrence will ensure that perpetrators are held responsible and decrease the prevalence of such misconduct. This is a fundamental goal and principle of tort law in the civil justice system.⁷⁷

Lastly, from a legal standpoint, the *Feres* decision rests on dubious grounds and must be negated by Congressional action. In his *Feres* opinion, Justice Jackson acknowledged the unstable foundation upon which the Court built its ruling, writing “no conclusion can be above challenge, but if we misinterpret the Act, at least Congress possesses a legal remedy.”⁷⁸ Congress must acknowledge the *Feres* ruling for what it is—an overreaching act of judicial activism. Judges are not legislators or formulators of public policy. Their roles are to resolve disputes and determine the constitutionality of particular actions, but not to make law. Congress must use the legal remedy it possesses to reign in this act of judicial activism.

⁷⁴ Press Release, Rep. Jackie Speier, Rep. Speier’s Bill Amending the *Feres* Doctrine to Allow Servicemembers to Sue for Med. Malpractice Included in House Def. Bill (Jul. 10, 2019) (on file with author).

⁷⁵ *Johnson*, 481 U.S. at 682 (“[M]ilitary discipline may be impermissibly affected by the suit since the judgments and decisions underlying the military mission are necessarily implicated, and the duty and loyalty that servicemembers owe to their services and the country may be undermined.”).

⁷⁶ CSM Shelton R. Williamson, Combat Studies Institute Press, *Standards of Discipline: An In-Depth Look at Where We Once Were and Where We Are Now*, U.S. ARMY, May 20, 2013, https://www.armyupress.army.mil/Portals/7/combat-studies-institute/csi-books/FromOneLeadertoAnother_II.pdf (“Military discipline’ . . . is defined as the state of order and obedience among personnel in a military organization and is characterized by . . . prompt and willing responsiveness to orders and understanding compliance to regulation.”).

⁷⁷ Jill Weiber Lens, *Tort Law’s Deterrent Effect and Procedural Due Process*, 50 TULSA L. REV. 1 (2014)

⁷⁸ *Feres*, 340 U.S. at 138.

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