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Feres Lives: How the Military Medical Malpractice Administrative Claims Process Denies Servicemembers Adequate Compensation

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Feres Lives: How the Military Medical Malpractice Administrative Claims Process Denies Servicemembers Adequate Compensation

*By: Robert A. Diehl**

"The report of my death was an exaggeration." — Mark Twain, 1897

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I. INTRODUCTION.

For more than seventy years, active-duty members of the United States armed forces injured by the negligence of military medical practitioners have been denied redress in the federal courts for their injuries. Surviving spouses, children, and probate estates have been turned away from the courthouse. The United States Supreme Court has justified this practice in a series of cases interpreting the Federal Tort Claims Act ("FTCA"),[1] a partial waiver of the federal government's sovereign immunity to suits sounding in law. These precedents—collectively called the *Feres* doctrine—are a judicial invention constructed from a complex and opaque series of arguments about the structure of the federal system of statutory compensation for servicemembers.[2] The arguments often ignore the plain meaning of the broad, sweeping language of the FTCA, and have been criticized as internally incoherent, and productive of absurd and unfair results.[3]

Thus, many commentators celebrated when Congress enacted legislation in 2019 authorizing the Department of Defense to evaluate and settle servicemembers' military medical malpractice claims through an administrative claims process.[4] But to eulogize *Feres* would be premature. This Article argues that aside from the simple fact that servicemembers still may not sue for their injuries in federal court, there is good reason to think that the claims process will produce inadequate compensation for servicemembers and have the latent effect of insulating and entrenching the *Feres* doctrine for many years to come.[5]

Part II.A gives a brief account of American sovereign immunity jurisprudence and the enactment of the FTCA, and Part II.B explains the development of the Supreme Court's *Feres* doctrine. Part II.C describes a recent legislative effort to overturn the *Feres* Doctrine and the 2019 enactment of an administrative claims process for servicemember military medical malpractice claims. Then, Part III addresses critical analyses of the Court's *Feres* doctrine jurisprudence, considers certain positive aspects of the administrative claims legislation, and criticizes its shortcomings. Finally, Part IV

1. Federal Tort Claims Act, 28 U.S.C. §§ 1346, 2671–2680.
2. *See generally* John B. Wells, Comment, *Providing Relief to the Victims of Military Medicine: A New Challenge to the Application of the Feres Doctrine in Military Medical Malpractice Cases*, 32 DUQ. L. REV. 109, 110–17, 124–29 (1993) (explaining the origin of the Feres doctrine and arguing that it should not apply in cases of military medical malpractice).
3. *See, e.g.*, United States v. Johnson, 481 U.S. 681, 692 (1987) (Scalia, J., dissenting).
4. *See infra* Part III.B.
5. *See infra* Part III.C.

proposes judicial and legislative solutions that aim to mitigate the substantive unfairness faced by servicemembers injured by military medical malpractice and makes several recommendations for scholars and activists concerned with that unfairness. Part V provides brief concluding remarks.

II. BACKGROUND

A. *Sovereign Immunity and the Federal Tort Claims Act*

The doctrine of sovereign immunity posits that a sovereign power cannot be sued in its own court unless the sovereign consents to the suit.[6] The Framers of the United States Constitution were familiar with the doctrine—which has its origin in traditional English law[7]—and they wrote or argued on various occasions that it was incorporated in the structure of the Constitution as to the state governments.[8] Justice Joseph Story wrote in 1840 that the federal government retained immunity through the structure of its Article III grant of jurisdiction to the federal courts because the federal judicial power over "controversies to which the United States shall be a party" applies only to actions where the United States is a plaintiff.[9] The Supreme Court has since approved of this view.[10]

Narrowly-tailored exceptions to the federal government's immunity have existed as early as 1855, but personal injury tort claims remained mostly barred for most of the country's history.[11] In the nineteenth and early twentieth centuries, Congress provided limited remedies including a system of private bills to compensate

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6. *See generally* Gregory C. Sisk, *A Primer on the Doctrine of Federal Sovereign Immunity*, 58 OKLA. L. REV. 439, 440 (2005) (describing the origins and basic premises of American federal sovereign immunity doctrine).

7. The King's immunity was in part a consequence of the English view that a lord should not sit in judgment of a claim against himself. *See generally* Guy I. Seidman, *The Origins of Accountability: Everything I Know About the Sovereign's Immunity, I Learned from King Henry III*, 49 ST. LOUIS U. L.J. 393, 395 (2005) (explaining the historical origins of sovereign immunity doctrine in English law).

8. *See* Sisk, *supra* note 6, at 443; *see also, e.g.*, THE FEDERALIST NO. 81, at 5 (Alexander Hamilton) (McLean ed., 2020) ("It is inherent in the nature of sovereignty not to be amenable to the suit of an individual WITHOUT ITS CONSENT.") (emphasis in original).

9. U.S. Const. art. III, § 2, cl. 1; JOSEPH STORY, A FAMILIAR EXPOSITION OF THE CONSTITUTION OF THE UNITED STATES § 332, at 199 (1840).

10. *See* United States v. Lee, 106 U.S. 196, 239 (1882) (explaining that the United States cannot be sued except when authorized by an act of Congress).

11. Gregory C. Sisk, *The Continuing Drift of Federal Sovereign Immunity Jurisprudence*, 50 WM. & MARY L. REV. 517, 530–31, 533–34 (2008). Congress waived sovereign immunity over contract and federal statutory claims in 1855, and admiralty claims in 1920. *Id.* In 1882, the Supreme Court recognized a constitutional ejectment claim against federal agents in possession of private real property. *Lee*, 106 U.S. at 218, 220–21 (citing U.S. CONST. amend. V).

personal injury claims.[12] But private bills were inefficient, and Congress was especially hesitant to grant bills to a particular class of claimants—persons injured while serving in the United States armed forces.[13] Congress justified this practice on the ground that various administrative settlement schemes existed specifically to compensate servicemembers.[14] However, the remedies awarded by those schemes were often inadequate as compared to those available in tort.[15]

Finally, in 1946, Congress enacted the FTCA, a limited waiver of the federal government's sovereign immunity that, for the first time, granted the federal courts exclusive subject matter jurisdiction over certain tort claims against the federal government.[16] It authorized the courts to decide:

> [C]ivil actions on claims against the United States . . . for money damages . . . for . . . 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 in accordance with the law of the place where the act or omission occurred.[17]

The FTCA also permitted federal agencies to evaluate and settle tort claims administratively,[18] and imposed a requirement that FTCA claimants exhaust those administrative remedies before suing in federal court.[19] Congress expressly excluded "claim[s] arising out of the combatant activities of the military . . . during time of war,"[20] and "claim[s] arising in a foreign country" from the waiver of sovereign immunity.[21] Despite this broad language, federal courts were initially hesitant to interpret the FTCA with the full breadth possible under the statutory text.[22] Instead, they followed the common law doctrine that "statutes in derogation of sovereign

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12. *See* Note, *Military Personnel and the Federal Tort Claims Act*, 58 YALE L.J. 615, 617–18 (1949) [hereinafter *Military Personnel*].
13. *Id.* at 618 n.12.
14. *See, e.g.*, Military Personnel Claims Act, 59 Stat. 225 (1945) (authorizing settlement of small claims by servicemembers, but precluding recovery for personal injury or wrongful death "incident to . . . service").
15. See *Military Personnel*, *supra* note 12, at 620 n.23.
16. 28 U.S.C. §§ 1346, 2671–2680.
17. *Id.* § 1346(b).
18. *Id.* § 2672.
19. *Id.* § 2675.
20. *Id.* § 2680(j).
21. *Id.* § 2680(k).
22. *See Military Personnel*, *supra* note 12, at 615.

immunity must be strictly construed,"[23] and FTCA military plaintiffs suffered for it.[24]

B. *Feres Jurisprudence and Rationales*

Three years after the FTCA was enacted, the Supreme Court considered the question of servicemembers' FTCA claims for the first time in *Brooks v. United States*.[25] Scholars predicted that the Court would interpret the FTCA to categorically include servicemembers' claims.[26] The plaintiffs, Welker Brooks and his brother Arthur Brooks (through his estate), were active duty servicemembers.[27] While on leave away from base, the brothers rode in an automobile with their father James Brooks along a public highway in North Carolina.[28] As the Brooks' vehicle navigated an intersection, a United States Army truck driven by a civilian Army employee struck the Brooks' vehicle on its side, killing Arthur Brooks and grievously injuring Welker and James Brooks.[29] Welker Brooks and the estate of Arthur Brooks filed FTCA claims.[30]

Critically, the Supreme Court granted certiorari to resolve the narrow question of servicemembers' ability to sue for "injuries not incident to their service."[31] Noting the absence of any statutory language expressly excluding claims by servicemembers, the Court held that servicemember plaintiffs were not categorically barred from bringing FTCA claims.[32] The Court reasoned that the inclusion of the "combatant activities" and "foreign country" exceptions[33] and the legislative history of the FTCA[34] suggested that Congress

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23. *Id. See generally* SHAMBIE SINGER & NORMAN J. SINGER, 3 SUTHERLAND STATUTORY CONSTRUCTION § 62:1 (8th ed. 2018), Westlaw (database updated Nov. 2021) (explaining that a court will interpret a statute to waive sovereign immunity only to the extent that the plain language clearly expresses an intention to consent to suit and liability).

24. *See, e.g.*, Long v. United States, 78 F. Supp. 35, 37 (S.D. Cal. 1948) (finding that civilian War Department driver who deviated from normal route and caused a car accident was not acting in scope of employment for FTCA purposes); *see also Military Personnel*, *supra* note 12, at 615 n.2.

25. 337 U.S. 49, 50–51 (1949).

26. *See Military Personnel*, *supra note* 12, at 618.

27. *Brooks*, 337 U.S. at 50–51.

28. *Id.* at 50.

29. *Id.*

30. *Id.*

31. *Id.* at 50. The "incident to service" distinction was a product of pre-FTCA military claims practice. *See* Military Personnel Claims Act, 59 Stat. 225 (excluding claims for injuries "incident to . . . service").

32. *Brooks*, 337 U.S. at 51.

33. 28 U.S.C. § 2680(j), (k).

34. "There were eighteen tort claims bills introduced between 1925 and 1935. All but two contained exceptions denying recovery to members of the armed forces. When the

had affirmatively contemplated FTCA claims by servicemembers, and intended to include them in the waiver of sovereign immunity.[35] It therefore allowed the Brooks' claims to proceed.[36]

One year after concluding that servicemembers could sue for injuries incurred not "incident to service,"[37] the Court confronted what it characterized as the inverse question in *Feres v. United States*.[38] The Court considered whether "claimant[s who], while on active duty and not on furlough, sustained injury due to negligence of others in the armed forces" could state claims under the FTCA.[39] *Feres* involved three consolidated cases, all featuring negligence claims by or on behalf of servicemembers who were on active duty when they were injured: LT Rudolph Feres was killed in a barracks fire; Arthur K. Jefferson, an enlisted U.S. Army soldier, had a towel marked "Medical Department U.S. Army" removed from his abdomen eighteen months after surgery by military doctors; LTC Dudley R. Griggs died due to alleged "negligent and unskillful treatment received by army [*sic*] surgeons."[40] The Supreme Court unanimously held that the plaintiffs could not state FTCA claims because their injuries "[arose] out of or [were] in the course of activity incident to service."[41]

Departing from its textual approach in *Brooks*,[42] the *Feres* Court explained its decision in terms of three interpretive policy rationales. The first rationale was the only one based on the text of the FTCA: "The United States shall be liable . . . in the same manner and to the same extent as a private individual under like circumstances . . . ."[43] The Court interpreted this language to mean that an FTCA claim may proceed only if the relationship between the plaintiff and the federal government is analogous to a relationship between private persons where precedent indicates tort liability may exist.[44] Considering the government in its whole military capacity, the Court concluded that no analogous precedent for private

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present Tort Claims Act was . . . introduced, the exception concerning servicemen had been dropped." *Brooks*, 337 U.S. at 51–52.

35. "It would be absurd to believe that Congress did not have the servicemen in mind . . . when this statute was passed." *Id.* at 51.

36. *Id.* at 54.

37. *Id.* at 50, 54.

38. 340 U.S. 135, 138 (1950).

39. *Id.* (quoting *Brooks*, 337 U.S. at 52) ("This is the 'wholly different case' reserved from our decision in [*Brooks*].").

40. *Id.* at 136–37.

41. *Id.* at 146.

42. *See Brooks*, 337 U.S. at 51 (interpreting textual provisions of the FTCA).

43. 28 U.S.C. § 2674; *Feres*, 340 U.S. at 141; *see also* 28 U.S.C. § 1346(b)(1) (using similar language about parallel private liability).

44. *Feres*, 340 U.S. at 142.

tort liability existed.[45] The Court tacitly acknowledged the absolutizing character of its analysis:

> [I]f we consider relevant only a part of the circumstances and ignore the status of both the wronged and the wrongdoer in these cases we find analogous private liability. In the usual civilian doctor and patient relationship, there is of course a liability for malpractice . . . . But the [Government's] liability . . . here is that created by 'all the circumstances[.]'[46]

But the Court provided no citation for the "*all* the circumstances" language,[47] which does not appear in the statutory text,[48] and it did not explain why this standard applies with such force only in cases involving servicemember plaintiffs.[49]

Second, the Court opined that the FTCA's requirement that courts apply state tort law indicated that Congress intended to exclude claims "incident to service" from its waiver of sovereign immunity.[50] Under this "distinctively federal character" rationale, the Court reasoned that federal law should generally govern the government-servicemember relationship,[51] and that subjecting servicemembers who cannot control where they are stationed to heterogenous state law would constitute poor public policy.[52] Those servicemembers, the Court wrote, cannot "limit the jurisdiction in which it will be possible for federal activities to cause [them] injury."[53] This unfairness, the Court concluded, was evidence that Congress had not intended to authorize FTCA claims by active duty servicemembers.[54]

Finally, the Court found that claims "incident to service" should be excluded because servicemembers can generally obtain some measure of no-fault compensation under several statutes that authorize administrative payments to servicemembers.[55] Congress has enacted a patchwork of non-adversarial statutory benefit schemes to compensate servicemembers and their families for

45. *Id.*
46. *Id.*
47. *Id.* (emphasis added).
48. The statutes contemplate the United States as an indeterminate "private tortfeasor" under "like" circumstances. 28 U.S.C. §§ 1346(b)(1), 2674.
49. *See, e.g.*, United States v. Muniz, 374 U.S. 150, 152–53 (1963) (permitting FTCA suits by federal prisoners).
50. *Feres*, 340 U.S. at 146.
51. *Id.* at 143–44.
52. *Id.* at 142–43.
53. *Id.*
54. *Id.* at 146.
55. *Id.* at 145.

injuries and death that occur during military service, many of which were already in place when *Feres* was decided.[56] The Veterans Benefits Act ("VBA") is the primary vehicle for compensating a servicemember who suffers a service-connected injury.[57] The VBA compensates a servicemember who becomes disabled or whose disability is aggravated by an injury sustained while a member of the uniformed services, notably including injuries caused by military medical treatment.[58] By contrast, the Military Claims Act ("MCA")[59]—the primary vehicle for compensating a servicemember's ordinary personal injury claim—expressly bars any claim for an injury incurred "incident to service," thus excluding claims arising from military medical treatment.[60] Observing that the text of the FTCA did not specify how or whether an FTCA judgment was to be adjusted against statutory compensation,[61] the Court concluded that because the policy of the FTCA was to "extend a remedy to those who had been without,"[62] Congress must not have intended to create an additional remedy for servicemembers.[63]

The Court ultimately distinguished the *Feres* cases from *Brooks* on the grounds that the *Feres* plaintiffs' injuries had occurred "incident to service."[64] But the Court did not explain how it distinguished between plaintiffs in the Brooks' position—on active duty furlough, driving along a public highway away from base[65] and deemed to be "under no orders or duty and on no military mission,"[66]—and a plaintiff in Arthur K. Jefferson's position—active duty and not on furlough, but anesthetized, and undergoing non-

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56. *See, e.g.*, 38 U.S.C. §§ 1301–1323 (dependency and indemnity compensation for service-connected deaths); *id.* §§ 1501–1562 (pension for non-service-connected disability or death or for service); *id.* §§ 1701–1754 (hospital, nursing home, domiciliary, and medical care); *id.* §§ 1901–1988 (life insurance).

57. *See id.* §§ 1101–1163.

58. *Id.* § 1110. When a former servicemember files a VBA claim, the Veterans Administration considers medical evidence provided by the veteran and either denies the claim or assigns the veteran a disability rating based on the severity of the disability and certain other considerations. *See* 38 C.F.R. §§ 4.1–4.31. If accepted, the veteran then receives a monthly payment based on the disability rating according to a statutorily-fixed schedule. For example, a disability rating of 10% corresponds to a monthly payment of $123, a disability rating of 20% corresponds to a monthly payment of $243, and so forth. 38 U.S.C. § 1114.

59. *Id.* §§ 2731–2740.

60. *Id.* § 2733(b)(3). The MCA replaced the Military Personnel Claims Act, which was in place at the time *Feres* was decided, and which provided substantially the same relief. 59 Stat. 225 (1945).

61. Feres v. United States, 340 U.S. 135, 144 (1950).

62. *Id.* at 140.

63. *Id.* at 144.

64. *Id.* at 146.

65. Brooks v. United States, 337 U.S. 49, 50 (1949).

66. *Feres*, 340 U.S. at 146.

combat-related surgery.[67] Whereas the active duty servicemembers in *Brooks* could have been recalled to active duty at a moment's notice, Jefferson was not competent to perform any duty, no matter how urgent the order.

Four years later, the Supreme Court considered the scope of the "incident to service" standard in *United States v. Brown*.[68] The plaintiff, Peter Brown, had injured his knee while on active duty and received treatment from military doctors, had been honorably discharged, and had subsequently received negligent medical treatment at a veteran's hospital, causing "serious[]" and "permanent[]" damage to the nerves in Brown's leg.[69] In a brief opinion, the Court noted the rules announced in *Brooks* and *Feres*[70] and held that because Brown had alleged that the government negligence occurred only after he was discharged, his injury was not "incident to service," and his FTCA claim could proceed.[71]

Though *Brown* could be read as an indication that the Court would apply the "incident to service" standard more leniently, it did just the opposite.[72] In subsequent decisions, the Court repeated and amplified dicta in *Brown* to entrench the judicial prohibition on "incident to service" FTCA claims.[73] Discussing the law of *Feres*, the *Brown* Court wrote:

> The peculiar and special relationship of the soldier to his superiors, the effects of maintenance of such suits on discipline, and the extreme results that might obtain if suits under the [FTCA] were allowed for negligent orders given or negligent acts committed in the course of military duty, led the [*Feres*] Court to read the [FTCA] as excluding claims of that character.[74]

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67. *Id.* at 137.
68. 348 U.S. 110, 112 (1954).
69. *Id.* at 110–11.
70. *Id.* at 111–12.
71. *Id.* at 112.
72. *See, e.g.*, United States v. Johnson, 481 U.S. 681, 690–91 (1987) (emphasizing military discipline rationale in analysis of *Brown*, 348 U.S. at 112); United States v. Shearer, 473 U.S. 52, 57 (1985) (quoting military discipline dicta in *Brown*, 348 U.S. at 112); Stencel Aero Eng'g Corp. v. United States, 431 U.S. 666, 673 (1977) (disclaiming any FTCA case that would require "second-guessing [of] military orders").
73. *Brown*, 348 U.S. at 112; *see also* cases cited *supra* note 72 (focusing on the novel military discipline rationale first introduced in *Brown*).
74. *Brown*, 348 U.S. at 112.

But the *Feres* Court had not actually made this argument.[75] *Brown* thus introduced military discipline as a new and independent rationale for the *Feres* doctrine.[76]

For the next half century, federal courts applied the *Feres* doctrine strictly and developed a jurisprudence based on duty status and the three-part rationalization synthesized in the original *Feres* trilogy.[77] By 1977, the military discipline rationale had replaced the private parallel liability rationale in the Supreme Court's *Feres* analysis. This effectively severed the doctrine from any basis in the FTCA's positive statutory text.[78] That year, the Court held in *Stencel Aero Engineering Corp. v. United States* that a fighter jet parts manufacturer could not maintain an indemnity claim against the government after it was sued by a Missouri Air National Guard pilot who was injured while ejecting from his fighter jet.[79] In addition to elevating the military discipline rationale, the *Stencel* Court recast *Feres*'s emphasis on alternative compensation as implicating the mere *availability* of no-fault statutory compensation rather than the FTCA's lack of a clear adjustment clause.[80]

The policy confusion continued in *United States v. Shearer*[81] and *United States v. Johnson*.[82] In *Shearer*, the phrase "incident to service" appeared only once,[83] and the Court stated that "*Feres* seems best explained by . . . the effects of the maintenance of such suits on discipline . . . ."[84] In a footnote, the *Shearer* Court described the distinctively federal character and alternative compensation rationales as "no longer controlling."[85] By contrast, the *Johnson* Court asserted that it "ha[d] never deviated" from the "incident to service" standard,[86] and that the distinctively federal character, alternative compensation, and military discipline rationales controlled in cases implicating the *Feres* doctrine.[87]

75. *Compare id. with* Feres v. United States, 340 U.S. 135, 141–42 (1950), *and* Brooks v. United States, 337 U.S. 49, 52 (1949).
76. *See Johnson*, 481 U.S. at 694 (Scalia, J., dissenting).
77. *See id.* at 692; *Shearer*, 473 U.S. at 57; *Stencel*, 431 U.S. at 673.
78. *Stencel*, 431 U.S. at 671–72.
79. *Id.* at 673.
80. *Compare id.* at 673 ("[T]he military compensations scheme provides an upper limit of liability for the Government as to service-connected injuries."), *with Feres*, 340 U.S. at 144 ("The absence of [a clause adjusting these two types of remedy] is persuasive that there was no awareness that the [FTCA] might be interpreted to permit recovery for injuries incident to military service.").
81. 473 U.S. at 57, 58 n.4.
82. 481 U.S. 681, 686 (1987).
83. 473 U.S. at 57.
84. *Id.* (quoting United States v. Muniz, 374 U.S. 150, 162 (1963)).
85. *Shearer*, 473 U.S. at 58 n.4.
86. *Johnson*, 481 U.S. at 686.
87. *Id.* at 689–90.

In a harsh dissent joined by three other Justices, Justice Scalia characterized the Court's *Feres* jurisprudence as materially unfair and inconsistent with the text of the FTCA.[88] Justice Scalia would have found that Congress did intend the FTCA to extend its waiver to "incident to service" claims because, in addition to *not* specifically excluding such claims, Congress *did* specifically exclude certain discrete categories of injuries that would ordinarily apply to certain servicemember claims.[89] Moreover, a strict interpretation of the parallel private liability requirement—the only *Feres* rationale based in the FTCA's text—would make several of the FTCA's enumerated exceptions superfluous.[90] Thus, Justice Scalia would have held that the exclusion of certain discrete categories of "incident to service" claims demonstrated Congress' intention to permit "incident to service" claims under the FTCA generally.[91]

Johnson marked the last time the Supreme Court entertained a serious challenge to the substance of its *Feres* doctrine.[92] Despite—or perhaps because of—the Court's extensive but opaque treatment of *Feres* over the years, the lower federal courts have come to apply a virtually *per se* prohibition on servicemember FTCA claims based on active duty military status at the time of the injury.[93] Although the lower courts generally retain and utilize the "incident to service" language, they often give only brief attention to the question of what actually constitutes activity "incident to service."[94] With the possible exception of the Fifth Circuit, the courts tend to avoid the question altogether.[95] For a servicemember victim of military medical malpractice, *Feres* therefore operates as a complete bar

88. *Id.* at 692, 703.

89. *Id.* at 693 (citing Brooks v. United States, 337 U.S. 49, 51(1949)).

90. "[P]rivate individuals typically do not, for example, transmit postal matter, 28 U.S.C. § 2680(b), collect taxes or customs duties, § 2680(c), impose quarantines, § 2680(f), or regulate the monetary system, § 2680(i)." *Id.* at 694 (Scalia, J., dissenting).

91. 28 U.S.C. § 2674; *Johnson*, 481 U.S. at 694–95.

92. *Johnson*, 481 U.S. 681.

93. *See, e.g.*, Stephenson v. Stone, 21 F.3d 159, 162 (7th Cir. 1994) (dismissing FTCA claim by survivors of servicemember who was killed by Army sergeant against whom decedent was expected to testify, because "a servicemember's injury is incident to . . . service whenever the injury is incurred while . . . on active duty or subject to military discipline"); Loughney v. United States, 839 F.2d 186, 188 (3d Cir. 1988) (holding that FTCA suit on behalf of active duty servicemember who suffered post-operative respiratory arrest and coma following surgery was barred by *Feres* because "[i]t is simply the military status of the claimant that is dispositive"); Torres v. United States, 621 F.2d 30, 32 (1st Cir. 1980) (barring former servicemember's FTCA claim for Army's negligent failure to classify his discharge as "honorable," because "discharge is incident to every soldier's military service").

94. *See* cases cited *supra* note 93.

95. Parker v. United States, 611 F.2d 1007, 1013–14 (5th Cir. 1980) (applying three-factor test considering duty status, situs of injury, and activity at time of injury to find that servicemember's death in off-reservation automobile accident caused by fellow soldier was not "incident to service").

against FTCA suit unless the servicemember was already discharged from the service when injured.

C. *Recent Legislative Effort to Overturn Feres, and the National Defense Authorization Act of 2020*

In recent decades, members of Congress have proposed legislation on several occasions that would overturn the *Feres* doctrine as applied to medical malpractice claims.[96] Most recently, the SFC Richard Stayskal Military Medical Accountability Act of 2019 ("SFC Richard Stayskal Act") would have overturned *Feres* in medical malpractice cases and precluded adjustment of damage awards to account for military life insurance payments.[97] SFC Richard Stayskal is a former U.S. Army Green Beret whose military doctors failed to properly diagnose a tumor on his lung, resulting in the progression of Stayskal's illness into stage four terminal lung cancer.[98] Because Stayskal's active duty status barred him or his estate from bringing an FTCA claim, Stayskal petitioned Congress for a legislative remedy.[99] The SFC Richard Stayskal Act gained the support of various members of Congress of both major political parties, but it also faced staunch opposition.[100] By late 2019, it was apparent that the stand-alone legislation would not be enacted.[101]

In a compromise, legislators aligned with the Department of Defense approved an amendment to the National Defense Authorization Act for Fiscal Year 2020 ("NDAA") that would authorize the Department of Defense to receive and settle military medical

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96. *See* Carmelo Rodriguez Military Medical Accountability Act of 2009, S. 1347, 111th Cong. (2009); H.R. 1478, 111th Cong. (2009); *see also* H.R. 6093, 110th Cong. (2008); H.R. 2684, 107th Cong. (2001); H.R. 3407, 102d Cong. (1991); S. 347, 100th Cong. (1987); H.R. 1054, 100th Cong. (1987); S. 489, 99th Cong. (1985); H.R. 3174, 99th Cong. (1985).

97. SFC Richard Stayskal Act of 2019, S. 2451, 116th Cong. (2019); H.R. 2422, 116th Cong. (2019). The provision against adjustments would have been in keeping with the common law rule that compensatory tort damages are generally not adjusted to account for benefits the plaintiff has received from collateral sources. *See* RESTATEMENT (SECOND) OF TORTS § 920A(2) (AM. L. INST. 1979).

98. 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/.

99. Roxana Tiron & Travis J. Tritten, *Deadly Tumors, Surgical Lapses: Troops Court Trump in Bid to Sue*, BLOOMBERG GOV'T (July 30, 2019, 12:00 AM), https://about.bgov.com/news/deadly-tumors-surgical-lapses-troops-court-trump-in-bid-to-sue/.

100. Matt Grant, *Bill That Would Give Soldiers Right to Sue Government for Medical Malpractice Stalls in Senate*, FOX46 CHARLOTTE (Oct. 15, 2019, 12:06 AM), https://www.fox46.com/news/bill-that-would-give-soldiers-right-to-sue-government-for-medical-malpractice-stalls-in-senate/. In a rare move, the Department of Defense publicly opposed the legislation when it was introduced. *Id.*

101. *Id.*

malpractice claims through an in-house administrative process.[102] The amendment would leave the general *Feres* bar intact, but add a formal avenue for servicemembers to present their claims for consideration apart from the statutory benefits to which they were already entitled.[103] Congress passed the NDAA with the administrative process amendment, and President Donald Trump signed it into law on December 20, 2019.[104] The amendment was codified at 10 U.S.C. § 2733a, Chapter 163 "Military Claims," and expanded the provisions of the MCA—not the FTCA.[105]

In permissive language, the statute states that the "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 member of the uniformed services that was caused by the medical malpractice of a Department of Defense health care provider."[106] The alleged negligence must have occurred in the scope of the health care provider's employment,[107] and must have occurred at a covered medical facility.[108] The statue defines "Department of Defense health care provider" as "a member of the uniformed services, civilian employee of the Department of Defense, or personal services contractor of the Department . . . [,]"[109] and "covered medical facility" is defined elsewhere in Title 10.[110] A servicemember must present a claim in writing to the Department of Defense "within two years after the claim accrues,"[111] and it must be otherwise barred under other applicable law, viz., the *Feres* doctrine.[112] Attorney's fees are not recoverable,[113] and attorneys are prohibited from charging their clients certain fees.[114] Again in permissive language, the statute provides that the Department of Defense may pay up to $100,000 on any meritorious claim, and may refer any excess amount to the Department of the Treasury for payment.[115] The statute also requires the Department of Defense to promulgate

102. Pub. L. No. 116–92 § 731, 133 Stat. 1198 (2019).
103. Id.
104. Pub. L. No. 116–92.
105. *See* discussion *supra* Part II.B (discussing the MCA and other statutory compensation schemes available to servicemembers).
106. 10 U.S.C. § 2733a(a).
107. *Id.* § 2733a(b)(2).
108. *Id.* § 2733a(b)(3).
109. *Id.* § 2733a(i)(2).
110. *Id.* § 1073d(b)–(d).
111. *Id.* § 2733a(b)(4). *See generally* 51 AM. JUR. 2D *Limitations of Actions* §§ 130, 160, Westlaw (database updated Nov. 2021) (describing accrual and the "discovery rule").
112. 10 U.S.C. § 2733a(b)(5).
113. *Id.* § 2733a(c).
114. *Id.* § 2733a(g).
115. *Id.* § 2733a(d).

regulations implementing the administrative process,[116] including uniform standards for evaluating claims based on the FTCA law of negligence in a majority of states.[117] The Department of Defense promulgated an interim final rule containing these regulations on June 17, 2021.[118] Finally, the statute imposes an annual reporting requirement whereby the Department of Defense must submit certain data and information about the claims it has processed in the previous year to the Senate and House Committees on Armed Services.[119]

III. ANALYSIS.

A. *Inequity and Incoherence in Feres Jurisprudence*

A servicemember injured in service of the United States should have the right to seek redress in federal court if the injury was proximately caused by the negligence of the United States government. The unfairness of the *Feres* doctrine in military medical malpractice cases is well documented, and the *Feres* rationales have been thoroughly excoriated by scholars and judges alike.[120] To revive these arguments at length would exceed the scope of this Article. But it bears repeating that *Feres* regularly visits cruel results upon servicemembers and families who have already experienced immense tragedy.[121] Such was the case of U.S. Navy LT Rebekah Daniel, who died in 2014 after receiving negligent natal care at a military hospital.[122] The Court of Appeals for the Ninth Circuit wrote:

116. *Id.* § 2733a(f)(2)(A).

117. *Id.* § 2733a(f)(2)(B).

118. Medical Malpractice Claims by Members of the Uniformed Services, 86 Fed. Reg. 32, 194 (June 17, 2021) (to be codified at 32 C.F.R. pt. 45).

119. 10 U.S.C. § 2733a(h).

120. *See, e.g.*, Daniel v. United States, 139 S. Ct. 1713 (2019) (Thomas, J., dissenting) (quoting United States v. Johnson, 481 U.S. 681, 700 (1987) (Scalia, J., dissenting)); Andrew F. Popper, *Rethinking Feres: Granting Access to Justice for Service Members*, 60 B.C. L. REV. 1491, 1518 (2019); Deirdre G. Brou, *Alternatives to the Judicially Promulgated Feres Doctrine*, 192 MIL. L. REV. 1, 40 (2007); Jonathan Turley, *Pax Militaris: The Feres Doctrine and the Retention of Sovereign Immunity in the Military System of Governance*, 71 GEO. WASH. L. REV. 1, 12 (2003).

121. *See, e.g.*, Kelly v. United States, No. 19-cv-00978-BAS-AHG, 2020 WL 6074113, at *1, *6 (S.D. Cal. May 22, 2020) (declining to hear FTCA claim by estate of U.S. Navy seaman Antonio Contreras, who suffocated to death as a result of internal bleeding shortly after receiving military treatment for nasal dyspnea); Bosh v. United States, No. C19-5616 BHS-TLF, 2019 WL 6115016, at *1–2, *5 (W.D. Wash. Sept. 12, 2019) (dismissing U.S. Army soldier Emel Bosh's FTCA claim for injuries and expenses incurred as a result of compelled administration of anthrax vaccine).

122. Daniel v. United States, 889 F.3d 978, 980 (9th Cir. 2018) (affirming dismissal of FTCA claim by Rebekah Daniel's widower), *cert. denied*, 139 S. Ct. 1713.

> Lieutenant Daniel served honorably and well, ironically professionally trained to render the same type of care that led to her death. If ever there was a case to carve out an exception to the *Feres* doctrine, this is it. But only the Supreme Court has the tools to do so.[123]

The Supreme Court denied certiorari.[124]

Justice Scalia's observation that "nonuniform recovery cannot possibly be worse than (what *Feres* provides) [sic] uniform nonrecovery" is near tautological.[125] The statutory benefits otherwise available to servicemembers for medical malpractice injuries "incident to service" are inadequate.[126] This is particularly troubling because, at present, adverse military medical events appear to be increasing in frequency,[127] and the Department of Defense lacks a coherent understanding of the extent of the deficiencies in its medical system.[128] Because "medical care provided to servicemembers is conducted . . . in modern medical centers[,] there should be no military-related reason . . . why they would not be able to sue should their care deviate from the standard of care."[129]

B. *Progress and Positive Reception of Administrative Medical Malpractice Claims Process for Servicemembers*

The new military medical malpractice administrative claims process has been praised by some as a "step in the right direction" toward ensuring that servicemembers are equitably compensated when they are injured by negligent medical care.[130] For the first time, a servicemember who has suffered military medical malpractice may present his or her claim to a federal office statutorily

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123. *Daniel*, 889 F.3d at 982.

124. Daniel v. United States,139 S. Ct. 1713 (2018).

125. *Johnson*, 481 U.S. at 695–96 (Scalia, J., dissenting).

126. See Hugh B. McClean, *Delay, Deny, Wait till They Die: Balancing Veterans' Rights and Non-Adversarial Procedures in the VA Disability Benefits System*, 72 SMU L. REV. 277, 283–85 (2019); Brou, *supra* note 120, at 45–48.

127. U.S. GOV'T ACCOUNTABILITY OFF., GAO-18-378, DOD HEALTH CARE: DEFENSE HEALTH AGENCY SHOULD IMPROVE TRACKING OF SERIOUS ADVERSE MEDICAL EVENTS AND MONITORING OF REQUIRED FOLLOW-UP 9 (2018).

128. U.S. GOV'T ACCOUNTABILITY OFF., GAO-18-574, DEFENSE HEALTH CARE: EXPANDED USE OF QUALITY MEASURES COULD ENHANCE OVERSIGHT OF PROVIDER PERFORMANCE (2018).

129. Callum D. Dewar et al., *The Changing Landscape of Military Medical Malpractice: From the Feres Doctrine to Present*, 49 NEUROSURGICAL FOCUS, 2020, at 1, 2, https://doi.org/10.3171/2020.8.FOCUS20594.

130. Patricia Kime, *A Dent to Feres: Troops to Be Able to File Claims—But Not Sue—For Medical Malpractice*, MIL. TIMES (Dec. 11, 2019), https:// www.militarytimes.com/news/pentagon-congress/2019/12/11/a-dent-to-feres-troops-to-be-able-to-file-claims-but-not-sue-for-medical-malpractice/; *see also* Pub. L. No. 116-92 § 731, 133 Stat. 1198.

authorized to evaluate and settle the claim on its merits without strict consideration for the servicemember's disability status.[131] The medical malpractice statute does not overturn the *Feres* doctrine, but some commentators—including one Congressional sponsor—have nevertheless declared "victory" for proponents of the SFC Richard Stayskal Act.[132] Others have gone so far as to incorrectly state that the *Feres* doctrine has been repealed as to medical malpractice claims.[133]

For proponents of the *Feres* doctrine, the administrative claims process is a compromise that crafts a remedy where one was lacking, and also accounts for the concerns they cite to rationalize the doctrine.[134] The process preserves the uniform, non-adversarial nature of military compensation,[135] and avoids placing servicemembers and their commanders on opposite sides of contentious litigation.[136] The statute demonstrates legislative sympathy for the notion that the government should fairly compensate injured servicemembers through an expansion of legal remedies.[137] And, federal courts might take this as a signal to interpret and apply their *Feres* jurisprudence more sympathetically to plaintiff servicemembers.[138]

C. *Problems with Administrative Process for Military Medical Malpractice Claims*

Despite the praise and tepid gains occasioned by the medical malpractice statute, the administrative claims process fails to meaningfully remedy the injustices of the *Feres* doctrine. The evaluation

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131. 10 U.S.C. § 2733a.

132. Press Release, Jackie Speier, Congresswoman, Rep. Speier Applauds Partial Feres Fix in NDAA Conference Report to Allow Compensation for Victims of Medical Malpractice (Dec. 10, 2019), https://speier.house.gov/2019/12/rep-speier-applauds-partial-feres-fix-in-ndaa-conference-report-to-allow-compensation-for-victims-of-medical-malpractice; Ella Torres, *Terminally Ill Green Beret Wins Victory in Battle to File Claim Against Military for Alleged Malpractice*, ABC NEWS (Dec. 11, 2019, 12:41 PM), https://abcnews.go.com/Politics/terminally-ill-green-beret-wins-victory-battle-file/story?id=67630964.

133. *See, e.g.*, David J. Halberg, *Military Families Can Now Sue for Medical Malpractice*, HALBERG & FOGG PLLC (Jan. 6, 2020), https://www.southfloridainjurylawyerblog.com/military-families-can-now-sue-for-medical-malpractice/.

134. *See generally* Paul Figley, *In Defense of Feres: An Unfairly Maligned Opinion*, 60 AM. U. L. REV. 393 (2010) (arguing in favor of the *Feres* doctrine).

135. 10 U.S.C. § 2733a(f)(2)(B).

136. *Feres Doctrine—A Policy in Need of Reform?: Hearing Before the Subcomm. on Mil. Pers. of the H.R. Comm. on Armed Serv.*, 116th Cong., 123 (2019) (statement of Paul Figley, former Deputy Director, Torts Branch, Civil Division, United States Department of Justice).

137. *See* 165 CONG. REC. H10085 (daily ed. Dec. 11, 2019) (statement of Rep. Jackie Speier) ("After 70 years, we have tackled the Feres doctrine . . . to provide justice and compensation for medical malpractice performed at noncombat settings.").

138. *See* Dewar et al., *supra* note 129, at 3 ("[T]his new administrative claims process . . . could represent the first step toward more drastic changes.").

process is inherently biased, and the amount and availability of compensation under the statute are limited in scope. Worse, the existence of an alternative compensation system will entrench the *Feres* doctrine by structurally and doctrinally insulating it from judicial review and criticism.

1. Limited Scope

The new legislation only permits the Department of Defense to compensate claims for negligence committed by a "Department of Defense health care provider"[139] in a "covered military medical treatment facility."[140] A "covered" facility means a medical center, hospital, or ambulatory care center maintained by the Department of Defense.[141] Thus, a servicemember may not file a claim for an injury incurred at a facility maintained by the Department of Veterans Affairs ("VA"), or resulting from the negligence of a civilian employee or contractor of the VA.[142] Congress has imposed this obscure limitation even though active duty servicemembers are eligible for—and regularly do receive—treatment at VA health care facilities.[143] Moreover, the VA provides extensive practical training to inexperienced medical students and trainees.[144] At least one commentator has expressed concern that the claims process therefore excludes the servicemembers who may be most at risk of medical negligence, and most in need of a legal remedy.[145]

2. Structural Inadequacy

The claims process will not consistently provide adequate compensation to the servicemembers who are eligible to file a claim. Critical parts of the statute are written in permissive language, the statute gives the Department of Defense broad discretion to regulate the standards by which claims will be evaluated, and the

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139. 10 U.S.C. § 2733a(a), (b)(2), (c).
140. *Id.* § 2733a(b)(3).
141. *Id.* § 2733a(i)(2), 1073d(b)–(d).
142. *See* Daniel Perrone, *The Feres Doctrine: Still Alive and Well After the 2020 National Defense Authorization Act?*, JURIST (Mar. 14, 2020, 1:00 PM), https://www.jurist.org/commentary/2020/03/daniel-perrone-feres-doctrine-ndaa/.
143. *See id.*; *VA & TRICARE Information*, DEP'T VETERANS AFFAIRS, https://www.va.gov/VADODHEALTH/TRICARE.asp (last visited Jan. 10, 2021).
144. "In Academic Year 2017, 43,565 medical residents, 24,683 medical students, 463 Advanced Fellows, and 849 dental residents . . . and students received some or all of their clinical training in VA." *Medical and Dental Education Program*, DEP'T VETERANS AFFAIRS, https://www.va.gov/oaa/gme_default.asp (last visited Jan. 10, 2021); *see* Perrone, *supra* note 142.
145. *See* Perrone, *supra* note 142.

Department of Defense is too deeply conflicted to evaluate these claims in an objective, disinterested manner.[146]

Under a plain language interpretation of the medical malpractice claims statute, the Department of Defense is merely *authorized* to compensate servicemembers who file meritorious claims.[147] The statute provides that the Department "*may* allow, settle, and pay a claim against the United States" for medical malpractice "incident to the service" of a servicemember.[148] Then, the statute clarifies that such "[a] claim *may* be allowed, settled, and paid . . . only if" certain requirements are met.[149] Another subsection states that the Department of Defense "*may* pay the claimant $100,000 . . . ."[150] By contrast, the word "shall" is used merely to impose requirements about reporting,[151] promulgation of implementing regulations,[152] and attorney's fees.[153]

The Department of Defense can also mitigate its own liability through its near-total regulatory and administrative control of the claims evaluation process.[154] The evaluative standards must be consistent with the law "in a majority of States,"[155] but there is no uniform state law rule for determining a physician's standard of care for purposes of medical malpractice.[156] "Medicine is an inexact science and eminently qualified physicians may differ as to what

146. 10 U.S.C. § 2733a(a), (b), (d)(1).

147. In modern statutory construction, "may" ordinarily indicates that the subject is authorized—not required—to take an action. *See* Opati v. Republic of Sudan, 140 S. Ct. 1601, 1609 (2020) (quoting Halo Electronics, Inc. v. Pulse Electronics, Inc., 136 S. Ct. 1923, 1931 (2016)) (indicating that use of "may" in a remedial statute "'*clearly* connotes discretion'") (emphasis in original)). "May" has sometimes been interpreted to mandate action by a public official. *See, e.g.*, John T. v. Marion Indep. School Dist., 173 F.3d 684, 688 (8th Cir. 1999) (applying Iowa law) (giving mandatory effect to clause following other mandatory language in statute that created legal right in student to an educational interpreter which "*may* be provided on nonpublic school premises") (emphasis added). However, the presumption of mere permissiveness is especially strong where, as here, Congress has used both "may" and "shall" at different places in the same statute. *See, e.g.*, Lopez v. Davis, 531 U.S. 230, 241 (2001) (holding that use of "may" and "shall" in same criminal statute indicated congressional intent that "may" denote discretion, and "shall" denote mandate). Moreover, "a waiver of the Government's sovereign immunity will be strictly construed, in terms of its scope, in favor of the sovereign." Lane v. Peña, 518 U.S. 187, 192 (1996). *See also* SINGER & SINGER, *supra* note 23, at 1.

148. 10 U.S.C. § 2733a(a) (emphasis added).

149. *Id.* § 2733a(b) (emphasis added).

150. *Id.* § 2733a(d)(1) (emphasis added).

151. *Id.* § 2733a(e), (h).

152. *Id.* § 2733a(f).

153. *Id.* § 2733a(c)(2), (g).

154. *Id.* § 2733a(f).

155. *Id.*

156. *See generally* STEVEN E. PEGALIS, 1 AM. L. MED. MALPRACTICE § 3.3, Westlaw (database updated June 2021).

constitutes a preferable course of treatment."[157] Out of concern for isolated rural practitioners, the traditional rule therefore held that a physician's standard of care was determined by the "accepted medical practices in [the physician's] community."[158] Today, "probably a majority" of states have adopted a reasonably-prudent-professional standard, but variety remains the rule.[159] The military health system is composed of 475 medical centers, hospitals, and medical clinics of various sizes and levels of service.[160] Physicians at lower-capacity facilities—especially those which are geographically isolated or ill-equipped—may have less experience performing certain medical procedures, and would thus be less skillful than their counterparts in larger facilities.[161] Out of the same concern that inspired the traditional "locality" rule, the Department of Defense is therefore incentivized to mitigate its liability by tacking the standard of care to the "lowest common denominator" of care that abides in these marginal facilities.[162]

The interim final rule promulgated by the Department of Defense appears to leave space for this sort of hedging. Indeed, the rule provides that the professional duty of a military physician is that which obtains in a "comparable clinical setting[,]"[163] and that the "standard of care in the military context may be impacted by the particular setting and the availability of resources in that setting."[164] Ambiguously, the rule also provides that the standard of care is "based on . . . national standards, not the standards of a particular region, State or locality."[165] This language creates ample room for creative interpretation by claims evaluators.

Furthermore, the claims statute requires the Department of Defense to establish only an administrative appeals process,[166] and the interim rule provides that administrative determinations under the

157. Fitzgerald v. Manning, 679 F.2d 341, 347 (4th Cir. 1982) (quoting Rogers v. Okin, 478 F. Supp. 1342, 1385 (D. Mass. 1979)) (applying Virginia law).

158. Stuart M. Speiser et al., 4 AM. L. TORTS § 15:18, Westlaw (database updated March 2021).

159. *Id.*

160. *MHS Facilities*, MIL. HEALTH SYST., https://www.health.mil/I-Am-A/Media/Media-Center/MHS-Health-Facilities (last visited Jan. 13, 2021); *Military Hospitals and Clinics*, TRICARE, https://www.tricare.mil/FindDoctor/AllProviderDirectories/Military.aspx (last visited Jan. 13, 2021).

161. *See* Steven Sternberg & Lindsay Huth, *Safety in Numbers: Low Volumes at Military Hospitals Imperil Patients*, U.S. NEWS & WORLD REP. (Apr. 19, 2018, 12:00 PM), https://www.usnews.com/news/national-news/articles/2018-04-19/patient-shortage-erodes-military-surgeons-skills-preparedness-for-war.

162. *Id.*

163. 32 C.F.R. § 45.6(b).

164. *Id.*

165. *Id.*

166. 10 U.S.C. § 2733a(f)(2)(A)(iii).

claims process are "final and conclusive" and not subject to judicial review.[167] The Supreme Court has held that courts should generally defer to administrative determinations,[168] and the lower federal courts have repeatedly upheld similar "final and conclusive" determinations under other provisions of the MCA against due process challenges.[169] Therefore, a servicemember claimant who is unjustly denied an adequate administrative remedy will have no recourse in the Article III courts. An administrative appeals process raises the same fairness concerns as the claims process itself. The statute simply does not provide an adequate safeguard against arbitrary or deficient factual or legal determinations. For these reasons, the Department of Defense has substantial ability to mitigate its own liability under the claims process.

Relatedly, the Department of Defense is too irreconcilably conflicted to fairly adjudicate servicemembers' military medical malpractice claims. It has financial and public relations interests in denying claims and limiting compensatory awards.[170] It was obvious to the thirteenth century English who crafted the early sovereign immunity doctrine that a conflicted party cannot reasonably sit in judgment of itself, and it is still obvious today.[171]

The Department of Defense operates on a budget,[172] and, like other federal agencies, is subject to internal rationalizing forces that tend toward the efficient—if not equitable—use of agency resources.[173] Ordinarily, a federal agency is not financially deterred from awarding a sizeable administrative remedy because agency monetary judgments, awards, and settlements are most often paid not from an agency's own limited appropriations, but from the Judgment Fund.[174] The Judgment Fund is a permanent appropriation available to all federal agencies that is not subject to regular

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167. 32 C.F.R. § 45.14(a).

168. Lindahl v. Off. of Pers. Mgmt., 470 U.S. 768, 791 (1985) (finding that former civilian employee of the Navy, who was discharged for disability and alleged that his administrative disability claim was improperly denied on factual grounds concerning the degree of his disability, was not entitled to judicial review of determination except for constitutional matters).

169. *See, e.g.*, Hata v. United States, 23 F.3d 230, 234 (9th Cir. 1994); Rodrigue v. United States, 968 F.3d 1430, 1435 (1st Cir. 1992); Broadnax v. United States Army, 710 F.2d 865, 867 (D.C. Cir. 1983).

170. 10 U.S.C. § 2733a(d)(1).

171. *See* Seidman, *supra* note 7, at 423–24.

172. *See, e.g.*, Pub. L. No. 116-92, 133 Stat. 1198 (2019).

173. *See generally* Jennifer Nou, *Intra-Agency Coordination*, 129 HARV. L. REV. 421 (2015) (describing how agency leaders can direct administrative outcomes by utilizing a variety of organizational methods).

174. See Timothy A. Furin, *An Overview of the Judgment Fund and How Its Availability Can Impact Claim Settlements*, ARMY LAW., 2019 no. 3, at 31–32.

congressional reauthorization.[175] A judgment, award, or settlement is eligible for payment from the Judgment Fund if it is authorized by statute, is final, is monetary, and may not legally be paid from any other source of agency funds.[176]

The medical malpractice statute, however, authorizes the Department of Defense to pay up to $100,000 on a meritorious claim before Judgment Fund monies become available.[177] Compare this with the case of an FTCA administrative settlement. A federal agency is authorized to pay only up to $2,500 from the agency's own funds to satisfy an administrative FTCA settlement.[178] Judgment Fund monies are therefore available to pay the majority of most FTCA settlements. As a practical matter, the award and payment of medical malpractice administrative claims are for the Department of Defense a zero-sum proposition. Any potential award must be offset by a cut in another more-favored area. Worse, the Department of Defense's reported inability to accurately predict the upper limit of its potential liability under the claims statute creates an intense financial motive to prudently—but unfairly—limit awards today out of fear that it will face unforeseen liability tomorrow.[179]

Finally, the Department of Defense—always a recruiter—has a public relations interest in limiting damage awards. "The Department of Defense is more dependent upon public opinion than are other governmental agencies,"[180] and it is already facing recruiting shortages."[181] There has been little research specifically examining the connection between litigation and military recruitment in the United States, but unfavorable public opinion about other factors has been found to negatively impact recruitment efforts.[182]

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175. *Id.*

176. 31 U.S.C. § 1304(a). *See* Furin, *supra* note 174, at 32.

177. 10 U.S.C. § 2733a(d)(1).

178. 28 U.S.C. § 2672.

179. *See* U.S. GOV'T ACCOUNTABILITY OFF., GAO-18-378, DOD HEALTH CARE: DEFENSE HEALTH AGENCY SHOULD IMPROVE TRACKING OF SERIOUS ADVERSE MEDICAL EVENTS AND MONITORING OF REQUIRED FOLLOW-UP (2018) (adverse medical events in military system increasing); U.S. GOV'T ACCOUNTABILITY OFF., GAO-18-574, DEFENSE HEALTH CARE: EXPANDED USE OF QUALITY MEASURES COULD ENHANCE OVERSIGHT OF PROVIDER PERFORMANCE (2018) (oversight of military health system deficient).

180. Curt Nichols, *Public Opinion and the Military: A Multivariate Exploration of Attitudes in Texas*, 43 J. POL. & MIL. SOCIO. 75, 77 (2015).

181. *See* Dennis Laich, *Manning the Military: America's Problem*, MIL. TIMES (July 22, 2019), https://www.militarytimes.com/opinion/commentary/2019/07/23/manning-the-military-americas-problem/.

182. *See, e.g.*, Joseph Williams & Kevin Baron, *Military Sees Big Decline in Black Enlistees: Iraq War Cited in 58% Drop Since 2000*, BOS. GLOBE (Oct. 7, 2007), http://archive.boston.com/news/nation/articles/2007/10/07/military_sees_big_decline_in_black_enlistees/; Damien Cave, *Growing Problem For Military Recruiters: Parents*, N.Y. TIMES (June 3, 2005),

Moreover, involvement in adverse litigation negatively impacts the reputations and public perception of other institutions like corporations.[183] It is therefore reasonable to conclude that high-profile medical malpractice awards highlighting the incompetence of Department of Defense health care providers could hurt recruitment efforts. The Department of Defense cannot eschew its reporting responsibilities under the claims statute, but it can control its disposition and awards on individual claims, and will therefore be rationally inclined to deny and limit awards whenever possible.[184]

3. *Chilling Effect on Judicial Review and Criticism of the Feres Doctrine*

The medical malpractice administrative claims process will entrench the *Feres* doctrine in two ways. First, it presents an additional structural barrier to appellate review of the doctrine. Second, it will be used as a rationalizing device for proponents of the *Feres* doctrine to argue that because a remedy is already available to an injured servicemember, adversarial Article III adjudication is therefore unnecessary.[185] It is *non-legislation*—legislation that signals a political priority or sympathy and alters the existing legal framework, but which latently limits the effect of the legislation, or prevents other progressive changes from being implemented. With non-legislation, a legislator can signal his or her sympathy for a favored policy position without fully committing his or her political capital to legislation that is disfavored by political donors or party elites.[186] By enacting an administrative claims process, Congress

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https://www.nytimes.com/2005/06/03/nyregion/growing-problem-for-military-recruiters-parents.html.

183. *See, e.g.*, Michael Hadani, *The Reputational Costs of Corporate Litigation: Long-Term Reputation Damages to Firms' Involvement in Litigation*, 24 CORP. REPUTATION REV. 234, 243 (2021), https://doi.org/10.1057/s41299-020-00106-0.

184. *See* 10 U.S.C. § 2733a(e), (h).

185. *See supra* Part II.B (examining the alternative compensation rationale in the *Feres* trilogy).

186. Consider the Patient Protection and Affordable Care Act of 2010, Pub. L. No. 111–148, 124 Stat. 119 (2010) ("ACA"). With Democrats firmly in control of Congress, President Barack Obama was under pressure to enact comprehensive health care reform. Many liberal pundits urged a system of single-payer health insurance, while conservative pundits intensely opposed the idea. *Compare* Paul Krugman, *Why Americans Hate Single-Payer Insurance*, N.Y. TIMES (July 28, 2009, 11:45 AM), https://krugman.blogs.nytimes.com/2009/07/28/why-americans-hate-single-payer-insurance/ (advocating for single-payer health insurance), *with* Alan B. Miller, *Medicare for All Isn't the Answer*, WALL ST. J. (Aug. 12, 2009, 7:30 PM), https://www.wsj.com/articles/SB10001424052970204251404574344342571670158 (advocating against single-payer health insurance). Instead, Congress enacted a market-oriented reform which notably did not establish a public health insurance option. *See* James Taranto, *ObamaCare's Heritage*, WALL ST. J. (Oct. 19, 2011), https://www.wsj.com/articles/SB10001424052970204618704576641190920152366. The ACA was *non-legislation*

has satisfied its patrons in the national security establishment, and secured praise in the national press, and perhaps a stay on the *Feres* matter.[187]

First, the claims process will insulate the *Feres* doctrine from judicial review by decreasing opportunities for courts to consider servicemembers' medical malpractice claims.[188] Such claims would ordinarily face dismissal under *Feres*, but the mere presence of the question in federal dockets increases the chance for reversal.[189] Because administrative determinations under the claims process are not subject to judicial review, cases that might otherwise occasion the Supreme Court's reconsideration of the *Feres* doctrine will instead be funneled into a procedural dead end.[190]

The claims process also imposes a burdensome filing procedure on claimants. Although "[a]ny written claim will suffice,"[191] a claimant must collect and produce an assortment of items including a factual indication of the conduct that caused the claimant's injury, a demand for a sum certain, the claimant's signature, and, unless the negligence is obvious, an affidavit stating that the claimant "consulted with a health care professional who opined that a [Department of Defense] health care provider" negligently caused the injury.[192] If the claimant is represented by an attorney or other representative, the claimant must provide various affidavits regarding the representation.[193] Although the rules do not require a claimant to submit an expert report with an initial claim, the Department of Defense may subsequently require the claimant to provide an expert report at the claimant's expense within ninety days,

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because it signaled sympathy for expanding health care coverage and modified the existing legal framework, but left the broader system of private health insurance intact. See tabular data for 2013 to present in *Health Insurance Coverage of the Total Population*, KFF, https://www.kff.org/other/state-indicator/total-population/ (last visited Jan. 16, 2021); Gary Claxton et al., *Health Benefits in 2018: Modest Growth in Premiums, Higher Worker Contributions At Firms With More Low-Wage Workers*, 37 HEALTH AFFS. 1892, 1893 exh.1 (2018). In the 2020 Democratic presidential primary, former Vice President Joe Biden opposed further health insurance reforms, arguing that the ACA is an adequate alternative. *See* Jacob Pramuk, *Biden Argues "Medicare for All" Supporters Want to Get Rid of Obamacare*, CNBC (last updated July 15, 2019, 3:08 PM), https://www.cnbc.com/2019/07/15/biden-unveils-health-care-plan-to-expand-obamacare-hits-medicare-for-all.html.

187. *See, e.g.*, Dave Phillipps, *U.S. Troops Could Soon Be Able to Sue Over Medical Blunders*, N.Y. TIMES (Dec. 11, 2019), https://www.nytimes.com/2019/12/11/us/military-lawsuit-malpractice-feres.html; Steve Sternberg, *Military Can No Longer Avoid Medical Malpractice Claims*, U.S. NEWS & WORLD REP. (Dec. 19, 2019), https://www.usnews.com/news/health-news/articles/2019-12-19/military-can-no-longer-avoid-medical-malpractice-claims.

188. *See, e.g.*, cases cited *supra* notes 168, 169.

189. *See, e.g.*, cases cited *supra* notes 168, 169.

190. *See supra* text accompanying notes 166–69.

191. 32 C.F.R. § 45.4(a).

192. *Id.* § 45.4(b).

193. *Id.*

or else forfeit the claim.[194] Moreover, a claimant bears the burden of proving its claim, but the rules do not provide a claimant the right to conduct a compulsory discovery process beyond the claimant's own medical records.[195]

A defect in the initial claim procedure may be fatal to a claim.[196] Because an FTCA plaintiff must exhaust all administrative remedies in order to obtain federal subject matter jurisdiction,[197] the administrative claims process may therefore become a procedural trap, a graveyard for claims which—if put before the right Court—might otherwise inspire a change to the Court's *Feres* doctrine.

Finally, the existence of a claims process tailored specifically for military medical malpractice claims will serve as a rhetorical device to excuse and legitimize the ongoing denial of fair servicemember access to the courts. The Supreme Court—as the only nominally non-political branch of the federal government—is frequently faced with the uncomfortable task of passing judgment on matters where the letter of the law or the mere prospect of adjudication by an unelected body runs counter to the government or Court's interests. Professor Alexander M. Bickel has suggested that the Court's practice of avoiding so-called "political questions"[198] is an exercise in prudence concerned with the Court's institutional legitimacy.[199] Adjudicating servicemember tort claims—although not technically a political question—has always been regarded as a burdensome, thankless, and sometimes uncomfortable duty.

Until 1946, a petition on Congress for a private bill of relief was the primary means by which a private person could seek tort compensation from the government.[200] The system was inefficient,

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194. *Id.* §§ 45.4(d), 45.12(c).

195. *Id.* § 45.4(d), (e).

196. *See, e.g.*, McNeil v. United States, 508 U.S. 106, 113 (1980) (dismissing procedurally defective FTCA claim that was filed without assistance of counsel); Bialowas v. United States, 443 F.2d 1047, 1049–50 (3d Cir. 1971) (dismissing FTCA claim because plaintiff-at-trial failed to cure defects on SF 95 submitted to Post Office Department).

197. 28 U.S.C. § 2675; *see, e.g.*, Boseski v. N. Arlington Mun., 621 Fed. App'x 131, 136 (3d Cir. 2015) (holding that former U.S. Army soldier who reported alleged sexual assault to superior officer but did not file claim with Department of Defense had not exhausted administrative remedies, therefore "the District Court correctly dismissed her FTCA claims with prejudice, as 'forever barred'").

198. *See* Baker v. Carr, 369 U.S. 186, 217 (1962) ("Prominent on the surface of any case held to involve a political question is found[, inter alia:] [1] a textually demonstrable constitutional commitment of the issue to a coordinate political department; or [2] a lack of judicially discoverable and manageable standards for resolving it; or [3] the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion . . . .").

199. *See* ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 125–26, 183–84 (1962).

200. *See supra* Part II.A.

often resulted in arbitrary judgments, and was roundly abhorred by legislators themselves: then-Congressman John Quincy Adams once pejoratively quipped that compensating private persons was "judicial business."[201] It seems unlikely, then, that the federal judiciary, with its focus on judicial economy and efficiency,[202] celebrated its acquisition of this new species of tort law. Indeed, these claims place the federal courts in the uncomfortable position of adjudicating questions about the actions of other governmental departments.

In this light, the *Feres* doctrine—with its shifting rationales and emphasis on alternative compensation—seems rationally tailored to the task of sidestepping the awkward duty of adjudicating servicemember FTCA claims.[203] By enacting the military medical malpractice *non-legislation,* Congress spares the federal courts the unwanted task of denying these claims and puts the unfairness and incoherence of *Feres* out-of-sight and perhaps out-of-mind. The bitter pill of denying servicemembers access to the courthouse for injuries entirely beyond their control goes down easier when the judge can cite a compensation scheme—inadequate though it may be—that has been specially enacted to compensate the very sort of injury complained of. The burden is passed along to the Department of Defense, and all parties—Congress, the federal courts, and the Department of Defense—may take satisfaction with this simulacrum of justice. All parties, except for the injured servicemember.

IV. PROPOSAL

The United States Supreme Court should reconsider and overturn its judicial *Feres* doctrine, which holds that servicemembers may not sue under the FTCA for injuries that occurred "incident to service."[204] There are compelling reasons to overturn the *Feres* doctrine for all applications,[205] but the Court should at the very least overturn the doctrine as to military medical malpractice claims, where its application is unambiguously unfair and incoherent.[206] The Court has not reconsidered the *Feres* doctrine in any depth

201. *See* Figley, *supra* note 136, at 398–99.
202. *See generally* Toby J. Stern, *Federal Judges and Fearing the "Floodgates of Litigation"*, 6 U. PA. J. CONST. L. 377, 382 (2003).
203. *See supra* Parts II.B, II.C.
204. Feres v. United States, 340 U.S. 135, 146 (1950).
205. The *Feres* doctrine has been criticized for its use in cases of alleged sexual misconduct, for example. *See* Comment, Chelsea M. Austin, *Who's Got Your Six? Ramifications of the Court's Refusal to Define "Incident to Service" in the Feres Doctrine on Military Sexual Assault Survivors*, 2018 MICH. ST. L. REV. 987, 1012 (2018).
206. *See supra* Part III.A.

since *Johnson* was decided in 1987.[207] In that case, Justice Scalia wrote for a four-Justice dissent that *Feres* was "wrongly decided," and that he would reverse the doctrine to permit servicemember FTCA suits.[208] Aside from curtly applying the *Feres* doctrine in one other case,[209] and denying several petitions for certiorari that would raise the issue,[210] the Court has not revisited the doctrine in over three decades. None of the Justices who sat on the *Johnson* Court remain on the Court today.[211] Justice Thomas has clearly indicated his willingness to overturn the doctrine.[212] And, Justice Amy Coney Barrett—the newest Justice on the Court—is a self-described textualist,[213] an opponent of strict application of *stare decisis*,[214] and has been described as Justice Scalia's "heir."[215] Although it is hard to know how all the Justices might rule in a case actually applying the *Feres* doctrine today, the question is ripe for consideration.

If the Supreme Court is unwilling to reconsider and overturn the *Feres* doctrine as applied to military medical malpractice, Congress should reintroduce and enact an amended version of the SFC Richard Stayskal Act. Like the original, the amended SFC Richard Stayskal Act would expressly authorize the federal courts to hear and decide FTCA claims by servicemembers injured as a result of military medical malpractice and would proscribe adjustment of damages for such claims to account for awards under the military's

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207. 481 U.S. 681 (1987).

208. *Id.* (Scalia, J., dissenting).

209. *See* United States v. Stanley, 483 U.S. 669, 683–84 (1987) (extending *Feres* doctrine to exclude *Bivens* action for injury "incident to service").

210. *See* Doe v. United States, 141 S. Ct. 1498 (2021), *denying cert. to* 815 Fed. App'x 592 (2d Cir. 2020); Daniel v. United States, 139 S. Ct. 1713, *denying cert. to* 889 F.3d 978 (9th Cir. 2019); Lanus v. United States, 570 U.S. 932, *denying cert. to* 492 Fed. App'x 66 (11th Cir. 2012); Matthew v. Dep't of Army, 558 U.S. 821, *denying cert. to* 311 Fed. App'x 409 (2d Cir. 2009); Costo v. United States, 534 U.S. 1078 (2002), *denying cert. to* 248 F.3d 863 (9th Cir. 2001).

211. *Justices 1789 to Present*, SUP. CT. OF THE U.S., https://www.supremecourt.gov/about/members_text.aspx (last visited Oct. 30, 2020).

212. *See Doe*, 141 S. Ct. 1498 (Thomas, J., dissenting); *Daniel*, 139 S. Ct. 1713 (Thomas, J., dissenting); *Lanus*, 570 U.S. 932 (Thomas, J., dissenting).

213. *See* Amy Coney Barrett, *Substantive Canons and Faithful Agency*, 90 BOS. U. L. REV. 109, 121 (2010) (explaining that textual statutory construction produces a more faithful interpretation than substantive canons of construction).

214. *See* Amy Coney Barrett, *Stare Decisis and Due Process*, 74 U. COL. L. REV. 1011, 1012–13 (2003) (arguing that inflexible application of *stare decisis* may unconstitutionally bind litigants through *de facto* preclusion, because subsequent litigants were not party to the action setting the precedent). Justice Barrett's textualism and opposition to strict *stare decisis* suggest an openness to considering a plain-meaning interpretation of the *Feres* doctrine.

215. Justice Barrett also notably served as law clerk for Justice Scalia. Michael Tarm, *Amy Coney Barrett, Supreme Court Nominee, Is Scalia's Heir*, ASSOC'D PRESS NEWS (Sept. 26, 2020), https://apnews.com/article/election-2020-ruth-bader-ginsburg-chicago-us-supreme-court-courts547b7de5b6ebabedee46b08b5bb37141.

group life insurance policy.[216] But, for interpretive clarity, the legislation's grant of subject matter jurisdiction should be revised:

> A person may sue the United States under this chapter for damages for personal injury or death incident to the service of a member of the Armed Forces arising out of a negligent or wrongful act or omission in the performance of a medical, dental, or related health care function (including a clinical study or investigation). A person may only sue under this section if the medical, dental, or related health care function was provided at a covered medical treatment facility by a person acting within the scope of that person's office, employment, or assignment at the direction of the Government of the United States. A claim under this section is exclusive of any other civil action or proceeding by reason of the same subject matter against the person (or the estate of the person) whose act or omission gave rise to the action or proceeding.[217]

Congress should expand the grant of subject matter jurisdiction by defining "covered medical treatment facility" to mean not only facilities maintained by the Department of Defense,[218] but also those maintained by the Department of Veterans Affairs.[219]

Alternatively, if Congress does not overturn the *Feres* doctrine in its medical malpractice application, then it should amend the current administrative claims statute to make several improvements. First, Congress should replace the permissive language described in Part III.C.2, *supra*, to mandate—rather than merely permit—compensation of claims on the merits. The revised statute should provide in pertinent part that the Department "*shall* allow, settle, and pay a claim against the United States"[220] and, that the Department "*shall* allow, settle, and pay a claim . . . only if" the statutory requirements are met.[221] Congress should also amend the statute to provide that the Department of Defense will not be charged with evaluating these claims. Instead, an entity that is better situated

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216. *See* S. 2451 § 2; H.R. 2422 § 2.
217. *Compare* this text, *with* unrevised text at S. 2451 § 2(a) *and* H.R. 2422 § 2(a). *See generally* ROBERT J. MARTINEAU & MICHAEL B. SALERNO, LEGAL, LEGISLATIVE, AND RULE DRAFTING IN PLAIN ENGLISH (2005) (providing conventions for clear legislative and rule drafting).
218. *See* S. 2451 § 2(a); H.R. 2422 § 2(a) (defining "covered military medical treatment facility" as a facility described at 10 U.S.C. § 1073d(b), (c), or (d), *viz.*, a military medical center, hospital, or ambulatory center).
219. Perrone, *supra* note 142.
220. *Compare* this text, *with* unrevised text at 10 U.S.C. § 2733a(a).
221. *Compare* this text, *with* unrevised text at 10 U.S.C. § 2733a(b).

to exercise disinterested judgment over these claims should perform that task—perhaps a panel of medical experts employed by the Department of Justice with short, rotating tenures.

Like the proposed SFC Richard Stayskal Act legislation, the administrative claims statute should be amended to increase its scope of coverage. The definition of "covered military medical treatment facility" should be expanded to include facilities maintained by the Department of Veterans Affairs, and the proviso that the negligent or wrongful act be committed by "a Department of Defense health care provider" should be amended with the language "a person acting within the scope of that person's office, employment, or assignment at the direction of the Government of the United States."[222] For good measure, Congress should also specify that "personal services contractors, such as the medical residents, students[,] and fellows receiving their training in VA facilities" are included in the sweep of this language.[223]

To remove any incentive for the Department of Defense to interfere with the fair administration of claims, Congress should eliminate the subsection of the claims statute providing that the Department of Defense must pay up to $100,000 on a meritorious claim before Judgment Fund monies become available to satisfy the remainder of the award.[224] Instead, Judgment Fund monies should be made available to cover all or most of any award granted under the claims process. To protect against deficient judgments, Congress should create a right of appeal to a federal district court for review of administrative determinations of fact and law. Finally, Congress should specify that presentment of a claim under the administrative process satisfies the FTCA requirement that a prospective medical malpractice plaintiff exhaust available administrative remedies in order to state an FTCA claim.[225]

Failing an overturn of the *Feres* doctrine for medical malpractice applications, legal scholars and commentators should closely monitor the Department of Defense's annual reports to the Congressional Armed Services committees, which are required under the medical malpractice statute until 2025.[226] Researchers should conduct empirical studies to estimate and compare—based on available data—the expected number and dollar amount of awards under the process with those actually awarded. This research should include

222. *See* 10 U.S.C. § 2733a(a), (b)(3); Perrone, *supra* note 142.
223. Perrone, *supra* note 142.
224. *See* 10 U.S.C. § 2733a(d).
225. *See* 28 U.S.C. § 2675.
226. *See* 10 U.S.C. § 2733a(h).

both an econometric element and a qualitative element based on claimant interviews. An independent factfinding function aimed at constructing comprehensive case studies of claimants' injuries and interactions with the claims process would also be useful. If it appears that the Department of Defense may be improperly denying claims or issuing deficient damage awards, researchers should present this data to Congress and make it available to law firms that frequently litigate in military, veterans, and medical malpractice tort law. Scholars should also encourage attorneys who do choose to litigate in this area to responsibly challenge the constitutional adequacy of the claims process claims on their clients' behalf.

V. CONCLUSION.

The *Feres* doctrine is more alive than ever. The newly established administrative claims process cracks open one door to injured servicemembers' recovery, but the courthouse doors remain firmly shut, and the prospect of alternative compensation under the claims process—the product of carefully tailored *non-legislation*—will be used as a legitimizing device to justify the *Feres* doctrine's continued application in military medical malpractice cases. The claims process is a poor substitute for careful consideration by an Article III court applying the accumulated wisdom of the common law of torts. It is a mere simulacrum of justice where the party facing liability also serves as judge, witness, and jury. The men and women who serve in this country's armed forces simply deserve better. Congress and the federal judiciary should resist the suggestion that the claims process constitutes an adequate alternative system of compensation and should instead reconsider and overturn the *Feres* doctrine as applied in medical malpractice cases. The specter of *Feres* will continue to haunt our country's moral conscience until they do.