IRRATIONALLY INCIDENT TO SERVICE: A LEGISLATIVE SOLUTION TO THE *FERES* PROBLEM

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ABSTRACT

The Federal Tort Claims Act waives the United States' sovereign immunity and allows civil tort lawsuits to be filed against it, subject to specifically enumerated exceptions where that immunity is retained. Absent from the Act is any exception precluding medical malpractice lawsuits by military servicemembers arising from negligent care provided by military physicians. In 1950, four years after the Act was passed, the Supreme Court decided Feres v. United States and read an "incident to service" test into the Act to hold that any connection between the alleged malpractice and a plaintiff's status as an active duty servicemember is an absolute jurisdictional bar to relief. Lower federal courts have been bound by Feres ever since, and the Supreme Court has repeatedly refused to reconsider it.

This Note examines how the Feres doctrine arose, its implications, prior legislative attempts at invalidating it, and the eventual creation of an administrative remedy that leaves Feres intact. It then analyzes the military's deliberate structural transformation of its medical assets into what is functionally now a comprehensive global healthcare system, and the critical distinction between combat and routine military-provided medical care that has stymied prior efforts at reform. This Note then offers novel, targeted proposals to legislatively abrogate Feres's effect on servicemember malpractice cases, provide a

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direct pathway to the courts for complex claims ill-suited to an administrative remedy, and other procedural improvements to the existing statutory and regulatory schemes.

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INTRODUCTION

In 2003, Staff Sergeant Dean Witt underwent a routine appendectomy at a military hospital.[1] His nurse negligently administered a "lethal dose of fentanyl resulting in respiratory and cardiac arrest[,] . . . failed to call code blue, used pediatric equipment for resuscitation, and misdirected a breathing tube."[2] Witt was left in a vegetative state until his family took him off life support.[3] When his

1. U.S. HOUSE ARMED SERVS. COMM., *20190430 Feres Doctrine – A Policy in Need of Reform?*, at 51:13 (YouTube, Apr. 30, 2019) [hereinafter *Feres Hearing*], https://www.youtube.com/watch?v=7w2GDluoisA&t=5s [https://perma.cc/F3M5-YPWS].

2. *Id.* That same "badly understaffed" anesthesia unit was previously implicated in another Airman's death following a routine surgery. Walter F. Roche Jr., *Willing to Die, but Not This Way*, L.A. TIMES (Apr. 20, 2008, at 00:00 PT), https://www.latimes.com/archives/la-xpm-2008-apr-20-na-feres20-story.html [https://perma.cc/ZEK4-48CM].

3. *Feres Hearing*, *supra* note 1, at 51:53.

widow filed a wrongful death case against the government, it was dismissed under protest by the very judge entering the order.[4] That judge found the "alleged facts . . . so egregious and the [government's] liability . . . so clear" that he gave "serious consideration" to denying the government's motion "in spite of" established Supreme Court precedent, and he urged the Ninth Circuit to hear the case en banc and reverse his dismissal.[5] A Ninth Circuit panel affirmed the decision.[6]

That court, like all federal courts, was bound by *Feres v. United States*, a 1950 Supreme Court decision that held the Federal Tort Claims Act ("FTCA" or "the Act") is an outright jurisdictional bar to *all* servicemember medical malpractice lawsuits arising from treatment provided "incident to service," regardless of the suit's underlying merits or how attenuated that service connection may be.[7]

Feres has been forcefully criticized for over seventy years by jurists and legislatures[8] because the FTCA itself contains no explicit "incident to service" provision barring non-combat related tort claims by servicemembers.[9] Some judges have characterized *Feres* as "problematic court precedent"[10] that is "indefensible as a matter of law, . . . senseless as a matter of policy," and an "[ir]rational way of protecting military discipline and decision making."[11] While *Feres* does have some supporters who champion its putative rationales,[12] many lower federal court judges who are constrained to apply *Feres* only do so while issuing a plea for its reversal.[13] The Court has had several opportunities to do so in the last ten years alone, and has denied certiorari each time under dissent.[14]

Congress has repeatedly taken note of the Court's stance and made numerous attempts over the past forty years to abrogate *Feres*—none succeeded.[15] One such attempt, inspired by a Green Beret whose terminal lung cancer was missed on a routine X-ray, eventually became a pathway

4. Witt v. United States, No. 08-CV-02024, 2009 U.S. Dist. LEXIS 9451, at *5–7 (E.D. Cal. Feb. 9, 2009), *aff'd*, 379 F. App'x 559 (9th Cir. 2010), *cert. denied*, 564 U.S. 1037 (2011).

5. *Id.* at 5–6.

6. Witt v. United States, 379 F. App'x 559, 560 (9th Cir. 2010), *cert. denied*, 564 U.S. 1037 (2011).

7. *See infra* Section I.C (*Feres*); Section II.A (discussing the "incident to service" test).

8. *See infra* Section II.A (judicial criticism); Sections II.B–C (legislative criticism).

9. *See infra* Sections I.A–B (discussing the FTCA and its exceptions).

10. Lombard v. United States, 690 F.2d 215, 233 (D.C. Cir. 1982) (Ginsburg, J., concurring in part and dissenting in part).

11. Carter v. United States, 145 S. Ct. 519, 521–22 (2025) (Thomas, J., dissenting in denial of certiorari).

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

13. *See supra* notes 4–6; *infra* note 89 and accompanying text.

14. *See Carter*, 145 S. Ct. at 519 (collecting cases).

15. *See infra* Sections II.B–C (discussing prior legislative efforts).

for administrative relief allowing the Department of Defense ("DOD") to settle claims within strict monetary and procedural limits ("§ 2733a").[16] Despite this limited success, *Feres* itself remained untouched, and it was implicitly ratified again in early 2025 with the Court's denial of certiorari in *Carter v. United States*.[17] Congress's decades-long hesitation to wade into the military's affairs[18] and legislate *Feres* out of the Court's interpretation of the FTCA[19] has prevented courts from recognizing the obvious distinction between a servicemember whose medical malpractice claim arises from battlefield care rendered incident to combat, and one whose claim derives from routine medical care that by happenstance was provided incident to their uniformed service.[20]

Part I of this Note will explore the relevant background of the FTCA and servicemember lawsuits up to the *Feres* decision. Part II will examine how the *Feres* doctrine has been applied, Congressional attempts at a response, the eventual creation of a limited administrative remedy, and the deficiencies in that system. Part III will attempt to answer the battlefield versus routine medical care question by examining the combat and non-combat components of the military's medical system and draw a line that comports with how that system is structured today. Lastly, Part IV will offer a series of legislative proposals to abrogate *Feres*'s effect on servicemember medical malpractice cases and address some of the second order consequences that would follow.[21]

16. *See infra* Section II.C (discussing that case and § 2733a). As of this Note's publication, Congress had yet to amend the Department of Defense's enabling statute to formally codify its name change to the "Department of War" in accordance with President Trump's Executive Order. *Compare* Exec. Order No. 14347, 90 Fed. Reg. 43893 (Sep. 5, 2025) (name change), *with* 10 U.S.C. § 111(a) ("The Department of Defense is an executive department of the United States."). Accordingly, this Note uses "Department of Defense" and "DOD" to refer to that executive department.

17. *See infra* notes 96–101 and accompanying text (discussing *Carter*).

18. *See*, *e.g.*, H.R. REP. NO. 111-466, at 20–22 (2010) (discussing its reservations).

19. The FTCA's principal author, Rep. Emmanuel Celler, was quoted in 1948 explaining that any reading of it that "exclude[s] a member of the Armed Forces from [its] benefits" is "utterly erroneous," and that service-connected entitlements have "nothing whatsoever to do with, and are utterly unrelated to the right to sue . . . ." Note, *Military Personnel and the Federal Tort Claims Act*, 58 YALE L.J. 615, 621 n.26 (1949) [hereinafter *Military Personnel and the FTCA*].

20. *See* discussion *infra* Section III.B.

21. *Feres* has created a large body of case law on various subjects unrelated to medical malpractice, to include cases arising from servicemember sexual assault. *See generally*, Lauren C. Brady, Note, *When Sexual Assault Becomes Incident to Military Service*, 31 J.L. & POL'Y 97 (2022) (discussing same). While those areas merit further exploration, this Note will only focus on military medical malpractice.

I. INCIDENT TO SERVICE

A. The Federal Tort Claims Act

The United States had absolute tort immunity at common law for most of its history, absent an ad hoc legislative waiver of that immunity.[22] Prior to the FTCA, an injured party's "only practical recourse" was to petition Congress for a "private bill" granting them relief.[23] By the 1920s, that system had become "a nearly intolerable burden" with over 2,000 such bills introduced in the 68th Congress alone on behalf of constituents seeking some form of redress from the government.[24] After twenty years of hearings to identify a solution, President Truman signed the FTCA into law in 1946.[25] The Act waives the United States' sovereign immunity for personal injury and wrongful death lawsuits,[26] subject to thirteen exceptions where that immunity is retained,[27] and makes the FTCA the exclusive remedy for all claims cognizable under it.[28] Two exceptions relevant to military personnel are the "combatant activities" and "foreign country" exceptions[29] which have been rarely invoked.[30] The *Feres* doctrine is the only judicially created exception to the FTCA's waiver of sovereign immunity.[31]

22. The United States must affirmatively "consent to be sued." Principality of Monaco v. Mississippi, 292 U.S. 313, 321 (1934); United States v. Lee, 106 U.S. 196, 239 (1882) (quoting United States v. Clarke, 33 U.S. 436, 444 (1834) ("As the United States are not suable of common right, the party who institutes such suit must bring his case within the authority of some act of congress, or the court cannot exercise jurisdiction over it."")). That immunity also extended to employees of the government. MICHAEL D. CONTINO & ANDREAS KUERSTEN, CONG. RSCH. SERV., R45732, THE FEDERAL TORT CLAIMS ACT (FTCA): A LEGAL OVERVIEW 4 n.36 (2023) [hereinafter FTCA: A LEGAL OVERVIEW].

23. FTCA: A LEGAL OVERVIEW, *supra* note 22, at 4.

24. Many of those bills were vetoed during and after World War II in the lead up to the FTCA's enactment. Figley, *supra* note 12, at 399–400, 410–12.

25. *Id.* at 400–02. Relevant portions of the FTCA are presently codified in 28 U.S.C. §§ 1346(b), 2401–02, 2671–80.

26. A cognizable claim must be "[1] against the United States, [2] for money damages, . . . [3] for . . . personal injury or death [4] caused by the negligent or wrongful act or omission of any employee of the Government [5] while acting within the scope of his office or employment, [and] [6] under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred." FDIC v. Meyer, 510 U.S. 471, 477 (1994) (quoting 28 U.S.C. § 1346(b)).

27. 28 U.S.C. § 2680.

28. 28 U.S.C. § 2679(b)(1).

29. 28 U.S.C. §§ 2680(j), (k).

30. *See* FTCA: A LEGAL OVERVIEW, *supra* note 22, at 28 (opining the "foreign country" exception is meant to shield the United States from liability in cases where foreign law is controlling); H.R. REP. NO. 111-466, at 2–4 (noting the "combatant activities" exception only applies under "a formal declaration of war").

31. *See* FTCA: A LEGAL OVERVIEW, *supra* note 22, at 31.

Assuming there are no applicable exceptions that would bar a claim, the Act's "administrative exhaustion" provision requires potential litigants to first "present[]" their case "to the appropriate Federal agency" for internal adjudication[32] within two years of its accrual.[33] Any settlement reached at this stage is binding, and any claim not settled must be "finally denied" by the agency before the claimant can file suit in district court, which has original and exclusive jurisdiction.[34] If the agency denies the claim outright, the claimant must file suit within six months.[35] Or, if the agency makes no decision within six months of presentment, the claimant can deem that inaction "a final denial," invoke "constructive exhaustion," and file suit within six months.[36] Jury trials are almost completely prohibited for FTCA claims that do reach the courts,[37] and any recovery is capped at the initial demand amount to the agency[38] subject to a discovery rule that permits increases only "upon newly discovered evidence," or "allegation and proof of intervening facts . . . ."[39]

These requirements collectively serve one of the FTCA's underlying policy goals of "limiting the circumstances in which a plaintiff may successfully obtain a damages award" through what amount to cost control measures[40] owing to the government's finite resources to defend cases filed against it.[41] While that itself is legitimate, the system established to facilitate that end can be overly burdensome or even dispositive on servicemembers injured by military medical malpractice.[42]

32. 28 U.S.C. § 2675(a). "Presentment" is generally defined as supplying the agency with "sufficiently specific information" to investigate liability, value the claim, and consider settlement. Collins v. United States, 996 F.3d 102, 119 (2d Cir. 2021); *see also* 28 C.F.R. § 14.2 (2025) (listing requirements for § 2733a claims).

33. 28 U.S.C. § 2401(b).

34. 28 U.S.C. §§ 2672, 2675(a), 1346(b)(1).

35. 28 U.S.C. § 2401(b). Unlike the FTCA's administrative exhaustion requirement, its "time bars are nonjurisdictional and subject to equitable tolling." United States v. Wong, 575 U.S. 402, 420 (2015).

36. 28 U.S.C. § 2675(a); *see* FTCA: A LEGAL OVERVIEW, *supra* note 22, at 36–37 (discussing constructive exhaustion).

37. The only exception to the no jury trial provision is for suits against the government for improperly collected taxes and penalties by the IRS. 28 U.S.C. § 2402 (cross-referencing § 1346(a)(1), which allows such suits).

38. 28 U.S.C. § 2675(b).

39. *Id.* An expert's opinion "that the worst possibilities had materialized," when those "worst possibilities" were already known is insufficient to invoke the discovery rule. Reilly v. United States, 863 F.2d 149, 171–72 (1st Cir. 1988) (holding "newly discovered" means "the information in question [must be] sufficiently new, . . . sufficiently unforeseen, [and] sufficiently material").

40. FTCA: A LEGAL OVERVIEW, *supra* note 22, at 2.

41. *See id.* at 34.

42. *See id.* at 5–6; *infra* Part IV (discussing proposed solutions).

B. Claims by Servicemembers During World War I and World War II

In the World War I era, private bills waiving the United States' sovereign immunity in tort primarily dealt with causes of action arising at sea involving government vessels or those related to the government's wartime operation of railroads.[43] A line of cases beginning in 1928 barred servicemember lawsuits under those bills for various textual and policy reasons,[44] including the notion that Congress had provided for other means of compensation in the event of injury or death.[45] The Court would later rely on that "alternative benefits rationale" to justify *Feres*.[46]

Three years before the FTCA and during the height of World War II, the 1943 Military Claims Act ("MCA")[47] was Congress's attempt to provide a uniform administrative system to resolve tort claims by servicemembers.[48] The MCA authorized the War Department (the DOD's predecessor) to pay small claims, up to $500 during peacetime and $1,000 during wartime, for "personal injury or death, caused by [its] military personnel or civilian employees . . . acting within the scope of their employment, or otherwise incident to noncombat activities[,]" and it barred recovery if those injuries "occur[ed] incident to their service."[49] The MCA does not define "incident to their service[,]"[50] but the Judge Advocate General's Department did, describing it as "while engaged in the actual performance of some official duty."[51] As a result, contemporary scholars read "incident to their service" narrower than "scope of employment" used in other parts of the MCA that allowed recovery on

43. Figley, *supra* note 12, at 405.

44. *See id.* at 405–08 (discussing those cases in § I.B.2).

45. *See id.* at 403–05 (discussing in § I.B.1 entitlements and compensation including life insurance, medical care, and VA disability benefits).

46. *See* United States v. Johnson, 481 U.S. 681, 688–90 (1987) (identifying alternative compensation as one of *Feres*'s "three broad rationales").

47. Act of July 3, 1943, Pub. L. No. 78-112, 57 Stat. 372.

48. *See* Figley, *supra* note 12, at 408.

49. 57 Stat. at 372–73. Adjusted for inflation, the wartime cap was approximately $19,000 at the time of this writing. *CPI Inflation Calculator*, BUREAU OF LAB. STAT., https://data.bls.gov/cgi-bin/cpicalc.pl?cost1=1000&year1=194301&year2=202409 [https://perma.cc/7MK8-2RTM] (last visited Oct. 31, 2025). While that cap may be attributed to then-available servicemember entitlements, contemporary research suggests those entitlements were viewed as "acts of sovereign grace [that were] not expressly designated as exclusive remedies." *See Military Personnel and the FTCA*, *supra* note 19, at 619–20.

50. 57 Stat. at 373.

51. *Military Personnel and the FTCA*, *supra* note 19, at 621 n.28.

"non-incident" claims.[52] *Feres* and its progeny have functionally reversed that interpretation.[53]

C. Brooks *and* Feres

Three years after the FTCA was passed, the Supreme Court heard *Brooks v. United States* to decide whether servicemembers "can recover under [the FTCA] for injuries *not* incident to their service."[54] *Brooks* involved a fatal motor vehicle accident on a public highway between an off-duty soldier and a military vehicle.[55] In a short four-page opinion, the Court allowed the lawsuit to proceed,[56] holding that the statutory grant of subject matter jurisdiction over "any claim founded on negligence" was clear,[57] and that the FTCA's substantial legislative history further evidenced that intent.[58] It then offered a series of hypotheticals on the exclusiveness of remedy and the potential for double recovery.[59]

Brooks's significance lies in its incorporation of the "incident to service" test from pre-FTCA cases and the MCA, and its implicit ratification of that test without defining it,[60] laying the groundwork for the *Feres* decision one year later:

> The Government envisages dire consequences . . . . A battle commander's poor judgment, *an army surgeon's slip of hand*, . . . all would ground tort actions against the United States. But we are dealing with an accident which had nothing to do with the Brooks' army careers . . . . *Were the accident incident to the Brooks' service, a wholly different case would be presented.* We express no opinion as to it, but we may note that only in its

52. *Id.* at 621–22. Today, the MCA has a $100,000 cap but maintains the "incident to service" bar. 10 U.S.C. §§ 2733(a), (b)(3). Before § 2733(a, the DOD could deny malpractice claims brought under the MCA by "relying on the *Feres* doctrine to construe the MCA's incident to service exclusion." Hata v. United States, 23 F.3d 230, 234–35 (9th Cir. 1994).

53. *See infra* Sections I.C, II.A.

54. Brooks v. United States, 337 U.S. 49, 50 (1949) (emphasis added).

55. *Id.*

56. *Id.* at 51–54.

57. *Id.* at 51 ("It would be absurd to believe that Congress did not have the servicemen in mind in 1946, when this statute was passed.").

58. Of the eighteen bills introduced between 1925 and 1935 that preceded the FTCA, sixteen "contained exceptions denying recovery to members of the armed forces[,]" yet the final version contained no such language. *Id.* at 51–52.

59. The Court punted on damages, refusing to "pronounce a doctrine of election of remedies, when Congress has not done so" and noted the record was insufficient to create what would functionally be a new collateral source rule. *See id.* at 53–54.

60. *See id.* at 52–53.

> context . . . [are *Dobson*, *Bradey*, and *Jefferson* relevant]. See the similar distinction in [the MCA] . . . .[61]

In 1950, the Court heard the consolidated case of *Feres v. United States* to decide whether the FTCA barred recovery for servicemembers injured "incident to the service" when those same injuries "under other circumstances would be an actionable wrong."[62] The Court held all three claims were barred, noting the "vital distinction" in *Brooks* was that those injuries "did not arise out of or [were sustained] in the course of military duty."[63]

Feres offered a strained reading of the FTCA, opining that because it renders the United States liable "in the same manner and to the same extent as a private individual under like circumstances," and because "no private individual has power to conscript or mobilize a private army[,]" liability cannot attach.[64] The two other bases for the decision are entirely absent from the plain text of the FTCA's exceptions—that "[t]he relationship between the Government and members of its armed forces is 'distinctively federal in character,'"[65] and that various "systems of simple, certain, and uniform compensation" already exist.[66] In support of that latter point, the Court analogized to state workers' compensation

61. *Id.* at 52 (emphasis added). *Dobson* and *Bradey* were pre-FTCA maritime tort cases involving sailors aboard navy ships, and *Jefferson* was a servicemember medical malpractice case consolidated on appeal into *Feres*. *Id.*; *see* Figley, *supra* note 12, at 405–07, 426–27 (discussing *Dobson*, *Bradey*, and *Jefferson*).

62. The three consolidated cases involved a fatal barracks fire (*Feres*), an Army surgeon leaving a towel inside a soldier's abdomen (*Jefferson*), and a fatally botched surgery (*Griggs*). Feres v. United States, 340 U.S. 135, 136–38 (1950).

63. *Id.* at 146.

64. *Contrast id.* at 141–42 (distinguishing the military capabilities of private citizens and the government), *with* United States v. Johnson, 481 U.S. 681, 692–95 (1987) (Scalia, J., dissenting) (maintaining *Feres*'s "parallel private liability" rationale is its only justification that "purports to be textually based," and that the Court rejected it outright seven years later).

65. *Contrast Feres*, 340 U.S. at 143, 146 ("Without exception, the relationship of military personnel to the Government has been governed exclusively by federal law. . . . [Accordingly,] [w]e cannot impute to Congress such a radical departure from established law in the absence of express congressional command."), *with* Carter v. United States, 145 S. Ct. 519, 521–22 (2025) (Thomas, J., dissenting in denial of certiorari) (citations omitted) ("The Federal Government comprises many 'distinctively federal' entities beyond the military . . . . [and] [i]f consistently applied, the uniformity rationale would thus exempt much of [them] from liability, contrary to the manifest purpose of the FTCA.").

66. *Contrast Feres*, 340 U.S. at 144, 145 (creating the "federal character" and "alternative benefits" rationales of barring such claims), *with Carter*, 145 S. Ct. at 522 (rejecting those rationales as controlling or even persuasive).

schemes that provided recovery then-commensurate with state trial verdicts.[67]

The "federal character" and "alternative benefits" rationales are two of the three that subsequent courts have used to justify *Feres*.[68] The third—the "military discipline" rationale—is now the most prevalent[69] and is notably absent from *Feres* itself despite being briefed and argued by the parties.[70] It is best described as a species of the political question doctrine that prevents federal courts from exercising subject-matter jurisdiction over claims that would involve courts questioning military decision-making and require servicemembers to testify as to each other's actions.[71] The Court first articulated the military discipline rationale in *United States v. Brown*, four years after *Feres*, as a counterfactual supporting the proposition that *Feres* did not bar veterans' claims that arose after they separated from service.[72]

The Court has since ratified the military discipline rationale in subsequent *Feres* decisions,[73] including when the underlying tortfeasor was not a uniformed servicemember.[74] Its application can be counterintuitive. Other suits involving "military orders or decisionmaking usually turn[] on 'the government's control of the *tortfeasor*.'"[75] But "*Feres* turns on the status of the *victim*, barring suits by servicemembers when a 'civilian' would be allowed to challenge 'the same acts, by the same injurer, in the same disciplinary relationship to

67. *Feres*, 340 U.S. at 145.

68. *See, e.g.*, Atkinson v. United States, 825 F.2d 202, 204 (9th Cir. 1987) (citing Stencel Aero Eng'g Corp. v. United States, 431 U.S. 666, 671–72 (1977)), *cert. denied*, 485 U.S. 987 (1988); *accord* Richards v. United States, 176 F.3d 652, 655 (3d Cir.), *reh'g denied*, 185 F.3d 564 (3d Cir. 1999), *cert. denied*, 528 U.S. 1136 (2000).

69. *See Johnson*, 481 U.S. at 690–91.

70. *Contrast Feres*, 340 U.S. 135 (ignoring the issue), *with* Figley, *supra* note 12, at § III(A) (summarizing the government's briefed position that subjecting "claims arising from military orders to varying state law rules or judicial review . . . would undermine military discipline," and discussing the plaintiffs' rebuttal).

71. *E.g.*, McMahon v. Presidential Airways, Inc., 502 F.3d 1331, 1350–51 (11th Cir. 2007) ("[W]hen the Court has discussed the military judgments . . . rationale, it has often mixed in reference to political question cases . . . . [and] [o]ur political question cases have, in turn, cited . . . [that] rationale when . . . [faced with] interfering with military judgments.").

72. *See* United States v. Brown, 348 U.S. 110, 112–13 (1954).

73. *See* Stencel Aero Eng'g Corp., 431 U.S. at 671–74; Chappell v. Wallace, 462 U.S. 296, 299, 304–05 (1983); United States v. Shearer, 473 U.S. 52, 57–59 (1985).

74. *Johnson*, 481 U.S. at 682–83, 691–92.

75. Carter v. United States, 145 S. Ct. 519, 522–23 (2025) (Thomas, J., dissenting in denial of certiorari) (quoting Taber v. Maine, 67 F.3d 1029, 1042 (2d Cir. 1995)).

the government.'"[76] Courts continue to wrestle with this inversion when forced to dismiss facially meritorious cases.[77]

II. WIDESPREAD, ALMOST UNIVERSAL CRITICISM

A. Irrationally Incident to Service

In medical malpractice cases, lower federal courts simply stop at the "incident to service" test once they determine the servicemember was on active duty when the cause of action arose.[78] The only general agreement among them is that *all* medical treatment a servicemember receives while on active duty, including emergent maternity care and routine elective procedures, is categorically deemed "incident to service," and any lawsuit against the government arising from that treatment is barred by *Feres* without any consideration of its merits.[79] This is because courts have no clear guidance on what, if any, limits *Feres* has, with one decrying that "the notion of 'incident to service' is a repository of ambiguity."[80]

76. *Id.* (emphasis added) (quoting *Taber*, 67 F.3d at 1042).

77. *See, e.g.*, Witt v. United States, No. 08-CV-02024, 2009 U.S. Dist. LEXIS 9451, at *5–6 (E.D. Cal. Feb. 9, 2009), *aff'd*, 379 F. App'x 559 (9th Cir. 2010), *cert. denied*, 564 U.S. 1037 (2011).

78. Madsen v. United States *ex rel.* U.S. Army, 841 F.2d 1011, 1014 (10th Cir. 1987) ("[O]nce [that determination is made] . . . the treatment is necessarily incident to service and judicial inquiry ends."); *accord* Jones v. United States, 112 F.3d 299, 301–02 (7th Cir.), *cert. denied*, 522 U.S. 865 (1997). If "incident to service" was a creature of statute, the absurdity doctrine could offer some plaintiffs a long shot argument that it really should be read as "incident to *combat*." *See* ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 234–39 (2012) (discussing the doctrine and its use).

79. *See* Atkinson v. United States, 825 F.2d 202, 205–06 (9th Cir. 1987) (failure to diagnose acute preeclampsia during a self-referred visit for its symptoms resulting in a stillborn child), *cert. denied*, 485 U.S. 987 (1988); *accord* Rayner v. United States, 760 F.2d 1217, 1217–19 (11th Cir.) (failure to diagnose and treat a fatal reaction to a standard contrast agent used in routine spinal imaging), *reh'g denied*, 767 F.2d 938 (11th Cir. 1985) (en banc), *cert. denied*, 474 U.S. 851 (1985); Cutshall v. United States, 75 F.3d 426, 427–29 (8th Cir. 1996) (missed diagnosis of non-Hodgkin's lymphoma in a self-referred visit that was eventually identified during pregnancy and where chemotherapy caused a premature birth); Hayes v. United States *ex rel.* U.S. Dep't of Army, 44 F.3d 377, 378–79 (5th Cir.) (severed vein during an elective hernia repair surgery resulting in death), *cert. denied*, 516 U.S. 814 (1995); Appelhans v. United States, 877 F.2d 309, 310, 313 (4th Cir. 1989) (missed diagnosis of an infected venous ulceration); Borden v. Veterans Admin., 41 F.3d 763, 763–64 (1st Cir. 1994) (negligently treated knee injury from an off-duty basketball game).

80. *See* Persons v. United States, 925 F.2d 292, 295 (9th Cir. 1991). Some courts have tried to define "incident to service" narrower than mere active duty status and consider if the plaintiff was on leave, but there is little consensus. *See* Schnitzer v. Harvey, 389 F.3d 200, 204–05 (D.C. Cir. 2004) (collecting cases).

In other contexts, some lower courts have attempted to cabin the broadly applied "incident to service" test to prevent absurd results.[81] *Pierce* was a personal injury matter that arose from an off-base, off-duty car accident.[82] Rather than mechanically dismiss the case, the Eleventh Circuit applied a factor test that considered where the injury occurred, the plaintiff's duty status, and what he was doing at the time.[83] Finding Pierce was driving his own car off-base while conducting personal business, the court allowed his case to proceed.[84] In a rare showing, the court chastised the government's contention that Pierce running a personal errand was "proximately related to military duties because they are part of the life of a soldier":

> Servicemen have to live somewhere. The mere fact that he was stationed at Fort Stewart does not mean that everything Pierce did . . . [was] proximately related to military service. To accept the government's contention would be to construe any conceivable personal activity as "incident to service" because that activity happened to be performed by a member of the armed forces. We refuse to accept such a construction, for to do so would preclude the class of servicemen from bringing an action . . . [because they] are wearing a United States uniform.85

Pierce also rejected the government's military discipline argument, finding "Pierce's claim poses no threat to the military disciplinary structure"[86] because routine car accident cases do "not involve 'second-guessing military orders,'" and because the "evidence offered to establish the alleged negligence would not call into question the 'management' of the military" or other command decisions.[87] *Pierce*'*s* effect on *Feres* has been negligible, only having been favorably cited twice outside the

81. *See, e.g.*, Pierce v. United States, 813 F.2d 349 (11th Cir. 1987).

82. *Id.* at 350–51. Pierce sued the government on a respondeat superior theory because the other driver involved in the accident was a Navy recruiter. *See id.*

83. *See id.* at 352–53. The Ninth Circuit uses a similar test while also considering any "benefits accru[ed]" from the plaintiff's service, which functionally reiterates *Feres*' alternative benefits rationale. *Compare* Costo v. United States, 248 F.3d 863, 867 (9th Cir. 2001), *cert. denied*, 534 U.S. 1078 (2002) (considering military benefits), *with* Feres v. United States, 340 U.S. 135, 145 (1950) (discussing alternative compensation schemes).

84. *See Pierce*, 813 F.2d at 353–54.

85. *Id.* at 354.

86. *Id.* (citing United States v. Shearer, 473 U.S. 52, 58 (1985)).

87. *Id.* (citations omitted). The court held "[t]his case should be governed by *Brooks*, and not by *Feres*" because "Pierce's claims would clearly be actionable if he had been a civilian," and that "[t]he government cannot avoid responsibility for tortious conduct merely by relying on the fact that at the time of the accident, Pierce was a member of the armed forces." *Id.*

Eleventh Circuit, both times by trial courts in mine-run car accident cases.[88]

Decisions from federal courts protesting their own *Feres* rulings are legion.[89] One of those cases was brought by the widower of Navy Lieutenant Rebekah Daniel who died shortly after giving birth in a Navy hospital.[90] The Ninth Circuit noted that Daniel served as a Navy obstetrics nurse at the very hospital where she died and was "ironically professionally trained to render the same type of care that led to her death."[91] The opinion dismissing her case closed with a common refrain — "[i]f ever there were 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."[92]

There is palpable disagreement on the Court regarding the *Feres* question. Justice Thomas, dissenting from the Court's denial of certiorari in *Daniel*, cautioned that "unfortunate repercussions . . . will continue to ripple through our jurisprudence as long as the Court refuses to reconsider *Feres*."[93] Justice Scalia's dissent in *Johnson,* joined by Justices Brennan, Marshall, and Stevens, declared that *Feres* "is now sustained only by three disembodied estimations of what Congress *must* (despite what it enacted) have intended."[94] That dissent includes a phrase that has become canonical in *Feres* jurisprudence and has been quoted for decades by jurists across the country: "*Feres* was wrongly decided and heartily deserves the widespread, almost universal criticism it has received."[95]

88. *See* Brown v. United States, 410 F. Supp. 2d 3, 6 (D. Mass. 2006); Mack v. United States, No. CIV.00-2296, 2001 U.S. Dist. LEXIS 2471, at *6–8 (D. Md. Feb. 21, 2001).

89. *See, e.g.*, Monaco v. United States, 661 F.2d 129, 134 (9th Cir. 1981) ("The result in this case disturbs us . . . ."), *cert. denied*, 456 U.S. 989 (1982); *accord* Jaffee v. United States, 663 F.2d 1226, 1239 (3d Cir. 1981) (en banc) ("This is a difficult and troubling decision."), *cert. denied*, 456 U.S. 972 (1982); Pérez v. P.R. Nat'l Guard, 951 F. Supp. 2d 279, 296 (D.P.R. 2013) ("We join the chorus of higher courts and renowned jurists who have vehemently expressed their disdain for the unbridled *Feres* doctrine.").

90. Daniel v. United States, 889 F.3d 978, 980 (9th Cir. 2018), *cert. denied*, 587 U.S. 1020 (2019).

91. *Id.* at 980, 982.

92. *Id.* at 982.

93. Daniel v. United States, 587 U.S. 1020, 1021 (2019) (Thomas, J., dissenting in denial of certiorari).

94. United States v. Johnson, 481 U.S. 681, 695 (1987) (Scalia, J., dissenting). Justice Scalia noted the alternative benefits and military discipline rationales are belied by the FTCA's plain text, which makes no reference to them and already contains two explicit military specific exceptions. *Id.* at 697–99.

95. *Id.* at 700–01 (internal quotations omitted) (quoting *In re* Agent Orange Prod. Liab. Litig., 580 F. Supp. 1242, 1246 (E.D.N.Y. 1984)); *e.g.*, cases cited, *supra* note 79 (utilizing that quotation).

That criticism continues to this day. In February 2025, the Supreme Court denied certiorari in *Carter v. United States*, a medical malpractice case brought by a now-paralyzed reservist that had the potential to disrupt *Feres* or provide a vehicle for the Court to overrule it entirely.[96] Justice Thomas dissented, noting that the Court had already "abandoned each of [*Feres*'s original] rationales" by 1963 and that they were "no longer controlling" by the 1980s after the Court had already shifted to military discipline rationale.[97] Aggrieved by the Court's decision to yet again pass on reconsidering *Feres*, he quoted critical opinions joined by generations of Justices from "across the jurisprudential spectrum"[98] and identified five active circuit splits on *Feres* issues.[99] Justice Thomas encouraged courts not to "look for a principled explanation for our *Feres* case law [because] there is nothing to find."[100] Instead, he urged judges to "simply ask whether a controlling decision has held that the *Feres* doctrine barred suit under materially indistinguishable circumstances" and "[i]f not, [to] allow the suit to proceed."[101] It is doubtful lower courts will follow his guidance while *Feres* and its progeny remain controlling precedent.

B. Incident to Politics

Notable legislative attacks on the *Feres* doctrine began in the mid-1980s on the heels of internal DOD audits that "revealed serious deficiencies in military medical care."[102] Congressman Barney Frank then introduced a series of bills between 1987 and 2000 to legislatively abrogate *Feres* by amending the FTCA to allow active duty servicemembers to bring lawsuits for "personal injury or death . . . aris[ing] out of medical or dental care furnished . . . [by] a fixed medical facility operated by the . . . military department or . . . by the United

96. Carter v. United States, 145 S. Ct. 519, 519 (2025) (Thomas, J., dissenting in denial of certiorari).

97. *See id.* at 520–21 (internal quotation omitted).

98. *Id.* at 523 (identifying criticism by Justices Douglas, Brennan, Marshall, Blackmun, Scalia, Ginsburg, and Gorsuch).

99. *Id.* at 525–26 (identifying current circuit splits on sexual assault, derivative claims by children for injuries sustained in utero, toxic tort exposure, and the doctrine's applicability to "dual-status technicians" like Carter).

100. *Id.* at 526.

101. *Id.*

102. *See* Chris Spolar, *Bills Would Let Military Patients Sue*, WASH. POST (Feb. 21, 1985), https://www.washingtonpost.com/archive/politics/1985/02/21/bills-would-let-military-patients-sue/bb3f9bf9-b27a-4eb0-9265-e0900d19be22/ [https://perma.cc/CW5G-HEFT]; Melissa Feldmeier, Comment, *At War with the* Feres *Doctrine: The Carmelo Rodriguez Military Medical Accountability Act of 2009*, 60 CATH. U. L. REV. 145, 162–63 (2010).

States."[103] None of them saw a full vote on the house floor.[104] His final bill was referred to committee the day before the September 11th attacks where it was forgotten, making it the last attempt to address *Feres* prior to the onset of the Global War on Terror ("GWOT") era.[105]

By 2008, the GWOT era reached its zenith with over 187,000 boots on the ground in Iraq and Afghanistan,[106] and headlines of military medical malpractice arising from non-combat related care were emerging in the press.[107] One such story was that of Marine Sergeant Carmelo Rodriguez who was never told of a skin cancer finding in his initial 1997 medical exam.[108] He deployed to Iraq in 2005, where information about his condition was again withheld, and he died in 2007 of stage four melanoma.[109]

His story led to a namesake bill that gained public support[110] and sought to allow claims arising from *any* medical care rendered "by or at the direction of the Government of the United States."[111] It also prohibited any Servicemember's Group Life Insurance payouts from acting as an offset to reduce the tort recovery.[112] However, while explicitly designating the FTCA's "combatant activities" and "foreign country" exceptions inapplicable, the bill created a new, more powerful exception specifically tailored to the ongoing GWOT by prohibiting "any claim[s] arising out of the combatant activities of the Armed Forces *during time of armed conflict*."[113] Despite opponents in the Judiciary

103. H.R. 1054, 100th Cong. (as referred to S. Judiciary Subcomm. on Cts. & Admin. Prac., June 17, 1988); *accord* H.R. 3407, 102d Cong. (Oct. 6, 1992); H.R. 3799, 106th Cong. (as referred to Subcomm. on Immigr. & Claims, Mar. 10, 2000).

104. *See* bills cited *supra* note 103.

105. *See* H.R. 2684, 107th Cong. (as referred to Subcomm. on Immigr. & Claims, Sep. 10, 2001).

106. AMY BELASCO, CONG. RSCH. SERV., R40682, TROOP LEVELS IN THE AFGHAN AND IRAQ WARS, FY2001-FY2012: COST AND OTHER POTENTIAL ISSUES 9 tbl. 1 (2009).

107. Byron Pitts, *A Question of Care: Military Malpractice?*, CBS NEWS (Jan. 31, 2008, at 17:15 ET), https://www.cbsnews.com/news/a-question-of-care-military-malpractice/ [https://perma.cc/N5UP-6JLA].

108. *Id.*

109. Feldmeier, *supra* note 102, at 164 n.141.

110. *See* H.R. 1478, 111th Cong. (2009); Nick Schwellenbach, *House Committee Moves to Allow Suits for Military Medical Malpractice*, CTR. FOR PUB. INTEGRITY (Oct. 9, 2009), https://publicintegrity.org/national-security/house-committee-moves-to-allow-suits-for-military-medical-malpractice/ [https://perma.cc/9EZX-QC56].

111. H.R. 1478 § 2(a). The bill did not attempt to define or have any exclusions for emergent combat care provided in or near theater. *See id.*

112. *Id.*; *see also infra* Section IV.D (discussing offsets).

113. H.R. 1478 § 2(c) (emphasis added); *see also* H.R. REP. NO. 111-466, at 3 (2010) (noting this language was "intended to encompass a broader range of combat activity, so that a formal declaration of war is not a prerequisite" to barring a claim).

Committee citing familiar policy arguments against abrogating *Feres*,[114] the bill passed committee, only to never be introduced to the full house for a vote.[115]

C. Sergeant First Class Richard Stayskal and 10 U.S.C. § 2733a

In January of 2017, Green Beret Sergeant First Class Richard Stayskal was selected to attend Special Forces Underwater Dive School but was required to first undergo a lung CT scan at an Army medical center because of a prior gunshot wound.[116] Stayskal was told he was cleared, but he experienced difficulty breathing and a general decline in his health over the next few months.[117] By May, he was coughing up blood and rushed himself to the on-base emergency room.[118] The military physician dismissed his symptoms as walking pneumonia, but he was back a week later in significantly worse shape, only to be discharged again.[119]

After his commander directly intervened, Stayskal got permission from the base hospital to be seen by an off-post civilian doctor who promptly ordered a biopsy.[120] He was diagnosed with stage 3A lung cancer.[121] Stayskal's medical records showed the tumor was visible on his pre-dive school CT scan, at half the size and in only one area of his lung,[122] and that it was then-recommended he follow up with a pulmonologist, a recommendation he never received.[123] By January 2018, he was diagnosed terminal stage four when the cancer had gone metastatic.[124] Had it been caught in January 2017 before it spread, it could have been treated.[125]

114. The points in opposition included military discipline and uniformity, the current no fault system of administrative compensation, and increased costs to taxpayers. H.R. REP. No. 111-466, at 22–27.

115. H.R. 1478, 111th Cong. (2010).

116. *Feres Hearing*, *supra* note 1, at 42:06.

117. *Id.* at 43:20.

118. *Id.* at 44:00; James Clark, *'It's A Scandal' — Inside the Fight to Hold the Military Accountable for Medical Malpractice*, TASK & PURPOSE (June 17, 2021, at 14:20 ET), https://taskandpurpose.com/news/feres-doctrine-military-medical-malpractice/ [https://perma.cc/NU3A-UJE8].

119. *Feres Hearing*, *supra* note 1, at 45:00.

120. Clark, *supra* note 118.

121. *Feres Hearing*, *supra* note 1, at 47:40.

122. *Id.* at 48:40.

123. *See* Clark, *supra* note 118.

124. *Feres Hearing*, *supra* note 1, at 48:40.

125. Clark, *supra* note 118.

Stayskal's case led to a public outcry, and Stayskal himself aggressively lobbied Congress while undergoing cancer treatment.[126] His Congressman introduced a bill bearing his name that, similar to prior efforts, sought to legislatively abrogate *Feres* by directly amending the FTCA.[127] The Act lifted much of its language from the 2009 Carmelo Rodriguez bill,[128] but it was more specific in defining the courts' jurisdiction by limiting claims to medical care provided at a class of statutorily defined "covered military medical treatment facilit[ies]" and excluded "battalion aid stations or other medical treatment locations deployed in an area of armed conflict."[129] The bill itself never left committee,[130] but it inspired[131] a provision in the 2020 DOD budget that created a new administrative remedy for servicemembers injured by military medical malpractice ("§ 2733a").[132] The maximum recovery under § 2733a for non-economic damages is $750,000.[133]

126. *See* Brenda Breslauer, et al., *U.S. Service Members Can't Sue Military Doctors. A Terminally Ill Green Beret Is Fighting to Change That*, NBC NEWS (Nov. 12, 2019, at 16:44 ET), https://www.nbcnews.com/health/health-care/u-s-soldiers-can-t-sue-military-doctors-terminally-ill-n1070516 [https://perma.cc/YW8L-SV4J].

127. *See* SFC Richard Stayskal Military Medical Accountability Act of 2019, H.R. 2422, 116th Cong. (Apr. 30, 2019); *Hudson Invites SFC Richard Stayskal to State of the Union*, RICHARD HUDSON (Feb. 3, 2020), https://hudson.house.gov/press-releases/hudson-invites-sfc-richard-stayskal-to-state-of-the-union [https://perma.cc/HN5E-MLBE]; Rachael Riley, *Congressman, Colleagues Name Bill After Fort Bragg Soldier Sufferieng* [sic] *from Terminal Cancer*, FAYETTEVILLE OBSERVER (May 3, 2019, at 21:15 ET), https://www.fayobserver.com/story/news/military/2019/05/04/bill-named-after-fort-bragg-soldier-suffering-terminal-cancer/5262194007/ [https://perma.cc/SS97-BCBN].

128. Carmelo Rodriguez Military Medical Accountability Act of 2009, H.R. 1478, 111th Cong. (2009); H.R. 2422, 116th Cong. (2019).

129. H.R. 2422, 116th Cong. §§ 2(a), (e). A "covered medical treatment facility" is a "[m]edical center[]," "[h]ospital[]," or "[a]mbulatory care center[]" that is "maintain[ed]" by the DOD. 10 U.S.C. § 1073d(b)–(d) (defining those terms).

130. H.R. 2422, 116th Cong. (as reported by Subcomm. on the Const., C.R., & C.L., May 20, 2019). The Stayskal Act's exclusive reliance on § 1073d and its vague use of "battalion aid stations or other [deployed] medical treatment locations" was likely an impediment to its passage as written. *See infra* Section III.B (discussing battlefield medical care); *infra* Section VI.A (discussing these deficiencies and proposing statutory language).

131. *See* Ella Torres, *Terminally Ill Green Beret Wins Victory in Battle to File Claim Against Military for Alleged Malpractice*, ABC NEWS (Dec. 11, 2019, at 12:41 ET), https://abcnews.go.com/Politics/terminally-ill-green-beret-wins-victory-battle-file/story?id=67630964 [https://perma.cc/P2MT-684D].

132. *See* National Defense Authorization Act for Fiscal Year 2020, Pub. L. No. 116-92, § 731, 133 Stat. 1198, 1457–1460 (2019) (codified as amended at 10 U.S.C. § 2733a).

133. Medical Malpractice Claims by Members of the Uniformed Services; Notice of Increase in Cap on Non-Economic Damages, 88 Fed. Reg. 72443 (Oct. 20, 2023) [hereinafter § 2733a Non-Economic Damages Cap].

The DOD's first required annual reports to Congress illustrate the difficulties of successfully presenting a § 2733a claim.[134] In 2023, 141 claims were processed,[135] and the DOD offered settlement on *ten*.[136] Twenty-four were rejected as facially deficient,[137] and twenty-two were denied because "the standard of care [had been] met or there was no proximate causation."[138] The remaining eighty-two rejections account for over half of all claims that year.[139] Twenty-nine were barred as derivative claims, such as loss of consortium by a family member.[140] Fifty-three were rejected because of a failure "to cure a deficient filing, including failing to provide an expert report,"[141] which the DOD can demand while the claimants are themselves barred from conducting any discovery on the DOD beyond requesting their own medical records through channels outside § 2733a.[142] There is no accelerated pathway or enforcement mechanism to enable servicemembers to request and receive their own records from the DOD in a timely manner in the context of presenting a § 2733a claim.[143]

134. *See* U.S. DEP'T OF DEF., REPORT TO THE COMMITTEES ON ARMED SERVICES OF THE SENATE AND THE HOUSE OF REPRESENTATIVES: MEDICAL MALPRACTICE CLAIMS BY MEMBERS OF THE UNIFORMED SERVICES 4 (2024) [hereinafter FY 2023 REPORT]. The 2022 report was not publicly available and was obtained by this author in December 2024 through a Freedom of Information Act Request. U.S. DEP'T OF DEF., REPORT TO THE COMMITTEES ON ARMED SERVICES OF THE SENATE AND THE HOUSE OF REPRESENTATIVES: MEDICAL MALPRACTICE CLAIMS BY MEMBERS OF THE UNIFORMED SERVICES 4 (2023) (on file with author) [hereinafter FY 2022 REPORT]. Neither report contained itemized data on settlement payments by branch. *See* FY 2022 REPORT; FY 2023 REPORT. This author contacted Military.com reporter, Patricia Kime, who provided her email correspondence with the relevant Army, Navy, and Air Force departments which contain that data. *See* sources cited *infra* notes 144–46.

135. FY 2023 REPORT, *supra* note 134, at 3.

136. FY 2023 REPORT, *supra* note 134, at 3. The prior year's statistics are substantially similar. *See* FY 2022 REPORT, *supra* note 134, at 2.

137. *See* FY 2023 REPORT, *supra* note 134, at 3.

138. *Id.* at 4.

139. *See id.* at 3–4.

140. *See id.* at 4. One of the first derivative claims under § 2733a to be denied was filed by Stayskal's wife. *See* Ian Shapira, *A Green Beret's Cancer Changed Military Malpractice Law. His Claim Still Got Denied.*, WASH. POST (Mar. 29, 2023, at 07:00 ET), https://www.washingtonpost.com/dc-md-va/2023/03/29/army-malpractice-richard-stayskal-claim-denied/ [https://perma.cc/BV85-P8F2].

141. FY 2023 REPORT, *supra* note 134, at 4. "Deficient filing[s]" were the largest category of denied claims in 2023 at about 37%, up from 21% in 2022. *See* FY 2023 REPORT, *supra* note 134, at 3–4; FY 2022 REPORT, *supra* note 134, at 2–3.

142. 32 C.F.R. § 45.4(d)–(e) (2025).

143. *See id.* at § 45.4(e); *infra* Section IV.D (proposing compulsory disclosure).

As of late 2024, the Navy paid three claims totaling $950,000,[144] and the Air Force paid five at $75,325.[145] The Army paid twelve totaling $3.3 million,[146] with the bulk of that figure presumably comprising a single claim by a soldier's estate for a missed diagnosis of stage four rectal cancer.[147] The majority of that award is likely future lost wages because the then-cap on non-economic damages was $600,000.[148]

Absent from the Army's settlement reporting is the claim of Sergeant First Class Stayskal, whose highly publicized lost chance case effectively created § 2733a.[149] His claim was *denied* because the DOD contended there was "no evidence that [his] . . . prognosis or chance of survival was adversely affected by the delay in the diagnosis of lung cancer."[150] Yet, the Secretary of the Army personally admitted that "the standard of care was not met" and offered Stayskal a $600,000 payment from a "special discretionary funding authority."[151]

While the existence of the § 2733a system is arguably necessary for relatively simple low-dollar cases that can and should be resolved quickly, Stayskal's case and the military's explicit admission that the process inspired by it did not work is an exemplar of why that process should be re-examined.[152] Any review of that scheme must also consider the military medical system itself where Stayskal was first *required* to seek care, which has transitioned over time from a fluid combat casualty-oriented operation into a comprehensive, bona fide global medical system.[153]

144. E-mail from Patricia Babb, U.S. Navy Civilian JAG, to Patricia Kime, Rep., Military.com (May 16, 2024, at 14:43 ET) (on file with author).

145. E-mail from MSgt Deana Heitzman, Superintendent of U.S. Air Force Pub. Affs., to Patricia Kime, Rep., Military.com (May 14, 2024, at 16:18 ET) (on file with author).

146. E-mail from Bryce S. Dubee, Media Rels. - People, U.S. Army Off. Chief Pub. Affs., to Patricia Kime, Rep., Military.com (May 15, 2024, at 16:16 ET) (on file with author).

147. *See* Patricia Kime, *Soldier's Family Awarded 'Multimillion Dollar' Medical Malpractice Claim from DoD*, MILITARY.COM (Dec. 22, 2022), https://www.military.com/daily-news/2022/12/22/soldiers-family-awarded-multimillion-dollar-medical-malpractice-claim-dod.html [https://perma.cc/S28L-WBHA].

148. *See* § 2733a Non-Economic Damages Cap, *supra* note 133.

149. *See* Shapira, *supra* note 140.

150. *Id.*

151. *Id.*

152. *See infra* Part IV.

153. *See infra* Section III.A.

III. THE MILITARY MEDICAL SYSTEM

A. From Feres *to the Modern Era*

From the time of its founding until World War II, the military had no centralized medical authority, with the Army and Navy each maintaining their own medical departments.[154] Their resources were far from static, and by the time *Feres* was decided in 1950, the post-World War II draw down reduced the military's combined bed capacity to 34,000 from a height of 750,000 in the Army alone during the war.[155] At the same time, employer-sponsored health insurance had just become commonplace,[156] presumably changing the public's perception of what benefits ought to accrue from military service which had only just begun to rapidly move away from relying on the draft.[157]

The modern, centralized military health system arguably began with a series of boards and commissions in the late 1940s, the creation of the DOD-wide Office of Medical Services in 1949, and the passage of the Dependents' Medical Care Act of 1956.[158] That Act created, among provisions for dependents, a statutory entitlement for active duty servicemembers to receive "[m]edical and dental care in any medical facility of the uniformed services . . . ."[159] It was not comprehensive by today's standards, having been designed to mimic the "hospital-based system of care" in line with contemporary civilian employer-sponsored plans.[160] However, the Act's implementation directive to the Secretary of

154. *See* Defense Health Agency: Improving Health and Building Readiness, Mil. Health Sys., https://www.health.mil/About-MHS/Military-Medical-History/Historical-Timelines/History-of-the-DHA [https://perma.cc/3732-MDYX] (last visited Nov. 2, 2025); *see also* Elder Granger et al., *Historical Evolution of Medical Quality Assurance in the Department of Defense*, 175 MIL. MED. 581, 581 (2010).

155. RICHARD V. N. GINN, *Medical Support for a World Power*, *in* 7 THE HISTORY OF THE U.S. ARMY MEDICAL SERVICE CORPS 197, 197 (1997), https://achh.army.mil/history/book-historyofusarmymsc-chapter7 [https://perma.cc/JA6F-5PRM].

156. The share of Americans with employer-sponsored insurance grew from nine to over fifty percent from 1940 to 1950. Aaron E. Carroll, *The Real Reason the U.S. Has Employer-Sponsored Health Insurance*, N.Y. TIMES: THE UPSHOT (Sep. 5, 2017), https://www.nytimes.com/2017/09/05/upshot/the-real-reason-the-us-has-employer-sponsored-health-insurance.html [https://perma.cc/4R7M-YPRY].

157. *See Induction Statistics*, SELECTIVE SERV. SYS., https://www.sss.gov/history-and-records/induction-statistics/ [https://perma.cc/HP2B-N4C7] (last visited Nov. 2, 2025).

158. *See* Defense Health Agency: Improving Health and Building Readiness, *supra* note 154.

159. Dependents' Medical Care Act, Pub. L. No. 84-569, §§ 201–301, 70 Stat. 250, 252–54 (1956).

160. It excluded elective care, chronic diseases, and mental health. *See* MICHELLE DOLFINI-REED & JENNIFER JEBO, CTR. NAVAL ANALYSES, THE EVOLUTION OF THE MILITARY

Defense explicitly affirmed an implied post-World War II operational position that all military healthcare should be centralized.[161]

That centralization effort proceeded rapidly. By the time the military had completely transitioned into an all-volunteer force with the end of the Vietnam War,[162] it had already created CHAMPUS in the 1960s, which was later updated and rebranded into TRICARE in the 1980s, that provided an in-house managed care network for all servicemembers who were automatically enrolled, and their dependents, who could opt-in.[163] By 2000, just before the onset of the GWOT era, military medical beneficiaries numbered over eight million.[164] This wholesale transformation makes the military's "decision to maintain a comprehensive medical system rather than . . . a smaller combat medical staff" self-evident,[165] and the result is that servicemembers are now reliant "on a system that depends to a great degree on self-regulation."[166]

That policy choice culminated with the creation of the Defense Health Agency ("DHA") in 2013, which absorbed management of all DOD-run military treatment facilities ("MTFs"), TRICARE, and other functions.[167] At a high level, the DHA "standardized policies, procedures, . . . clinical and business practices," expanded markets into new states and overseas, and consolidated the web presence of 140 separate facilities.[168] On the ground, the DHA is charged with "policy execution, administration and management of MTFs" which are then staffed and equipped by the individual medical departments of each component branch.[169] The MTFs themselves are a statutorily defined class of facility that consist of full-

HEALTH CARE SYSTEM: CHANGES IN PUBLIC LAW AND DOD REGULATIONS 4–6 (2000) [hereinafter EVOLUTION OF MILITARY HEALTH CARE].

161. *See* Dependents' Medical Care Act § 102(b).

162. *Induction Statistics*, *supra* note 157.

163. Michael J. Jackonis, et al., *War, Its Aftermath, and U.S. Health Policy: Toward a Comprehensive Health Program for America's Military Personnel, Veterans, and Their Families*, 36 J.L. MED. & ETHICS 677, 679 (2008).

164. MICHELLE DOLFINI-REED & JENNIFER JEBO, *supra* note 160, at 14.

165. *See* 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, 46 (2003).

166. Jonathan Turley, *The Military Pocket Republic*, 97 NW. U. L. REV. 1, 129 (2002).

167. *See* U.S. DEP'T OF DEF., DIR. 5136.13, DEF. HEALTH AGENCY 2 (Sep. 30, 2013). The DHA's creation followed years of debate on how to modernize the military health system. *See generally* NAT'L DEF. RSCH. INST., RAND HEALTH, THE MILITARY HEALTH SYSTEM: HOW MIGHT IT BE REORGANIZED? (2002) (proposing a novel joint medical command structure overseeing all component branches and TRICARE).

168. Transitioning Military Hospitals & Clinics to the Defense Health Agency, Mil. Health Sys., https://health.mil/About-MHS/Military-Medical-History/Historical-Timelines/Transition-Timeline [https://perma.cc/FG3M-U2AQ] (last visited Nov. 2, 2025).

169. BRYCE H.P. MENDEZ, CONG. RSCH. SERV., R45399, MILITARY MEDICAL CARE: FREQUENTLY ASKED QUESTIONS 2 (2021).

service "medical centers" with up to level one trauma capabilities in "areas with a large [military] population," "hospitals" in areas where civilian healthcare facilities are insufficient, and "ambulatory care centers."[170] As of 2021, the DHA operated "721 MTFs and employ[ed] nearly 61,000 civilians and 78,000 military personnel across the United States and in overseas locations."[171]

B. Incident to Combat

Many *Feres* cases have acknowledged the distinction between battlefield and routine medical care when wrestling with the military discipline rationale.[172] That distinction is well founded. Battlefield care has been loosely defined as care provided in "battalion aid stations or other medical treatment locations deployed in an area of armed conflict,"[173] while routine care is arguably comparable to what one would obtain as a civilian but, because of the servicemember's compulsory TRICARE enrollment,[174] happens to be provided at an MTF.[175] Of critical importance is the fact that the DOD itself has made this same distinction internally when it *deliberately* omitted "care provided in support of the Combatant Commands and deployed operational forces" from a report to the Secretary of Defense on the state of the military health system because "the policies and organizational structures governing health care provided during military operations differ significantly enough from the nonoperational setting to warrant exclusion."[176]

Understanding that difference is vital when considering any solution to the *Feres* problem. Battlefield medical care is provided by individual operational units of the military branches that themselves sit outside the DHA command and control structure that oversees MTFs.[177] Unlike the DHA's mission of providing civilian-equivalent healthcare from fixed MTFs or contracted care networks,[178] battlefield casualty management used in deployed environments is classified by "Roles" that are themselves defined by the personnel and material assets available to any

170. 10 U.S.C. § 1073d(b)–(d).
171. MENDEZ, *supra* note 169, at 1.
172. *See, e.g.*, McMahon v. Presidential Airways, Inc., 502 F.3d 1331, 1351 (11th Cir. 2007).
173. *E.g.*, H.R. 2422, 116th Cong. (2019) § (e).
174. Jackonis et al., *supra* note 163, at 679.
175. *See* Daniel v. United States, 889 F.3d 978, 980–82 (9th Cir. 2018), *cert. denied*, 587 U.S. 1020 (2019) (describing routine maternity care at a Navy hospital).
176. U.S. DEP'T OF DEF., FINAL REPORT TO THE SECRETARY OF DEFENSE, MILITARY HEALTH SYSTEM REVIEW 12 (Aug. 29, 2014).
177. *Id.* at 26 fig. 2.2.
178. *See* sources cited *supra* note 168–69 and accompanying text.

given patient at any given time, and the patient's physical proximity to the point of injury and combat theater.[179]

"Role 1" encompasses "unit level" care focused on returning those casualties to duty who can be returned, and treating, stabilizing, and evacuating those who cannot.[180] Non-physicians, such as Army combat medics, can provide Role 1 care.[181] "Role 2" assets include dedicated medical units that can provide basic labs, imaging, dental care, and some "damage control surgery," but those capabilities are limited to "measures dictated by immediate necessities."[182] Role 2 assets are company-level and can be fixed or mobile depending on mission requirements.[183]

"Role 3" is better defined by the kind of facility it is, a fully equipped combat support field hospital or a hospital ship, than by identifying the personnel who staff it.[184] "Role 4" assets are bona-fide fixed hospitals that provide "the full range of preventive, acute, restorative, curative, rehabilitative, and convalescent care"[185] well outside active conflict zones, such as Germany's Landstuhl Regional Medical Center,[186] and stateside MTFs classified as a "Medical Center" that can also be designated "core casualty receiving facilities" for combat patients arriving from overseas.[187]

Those "core casualty receiving facilities" arguably are the only point in the continuum of care where a battlefield patient's path could conceivably intersect with a stateside servicemember undergoing routine, non-combat-related medical care. However, if *Feres* was overturned by the Court without any companion legislation, the FTCA's "combatant activities" exception that retains the United States' sovereign immunity on claims "arising out of the combatant activities of the [Armed Forces] during time of war"[188] is insufficient to shield the United States from exposure to claims arising from battlefield care provided by Role 1

179. *See* JOINT CHIEFS OF STAFF, JOINT PUB. 4-02, JOINT HEALTH SERVICES, at ch. 2 §§ 1–2 (Sep. 28, 2018) [hereinafter JOINT PUB. 4-02].

180. *Id.* at ch. 2 § 2(a).

181. *See* U.S. DEP'T OF ARMY, ARMY TECHS. PUBL'N 4-02.55, ARMY HEALTH SYSTEM SUPPORT PLANNING at 1–5 (Mar. 30, 2020) [hereinafter ATP 4-02.55]; *see also infra* note 205 and accompanying text (discussing Army medics). This Note largely uses Army regulations as an exemplar of the military's overall combat casualty care system.

182. JOINT PUB. 4-02, *supra* note 179, at ch. 2 § 2(b).

183. ATP 4-02.55, *supra* note 181, at 1–6.

184. *See* JOINT PUB. 4-02, *supra* note 179, at ch. 2 § 2(c).

185. *Id.* at GL-13.

186. *See* Marcy Sanchez, *LRMC Maintains TJC Gold Seal Accreditation*, LANDSTUHL REG'L MED. CTR. (Nov. 7, 2023), https://landstuhl.tricare.mil/News-Gallery/Articles/Article/3581997/lrmc-maintains-tjc-gold-seal-accreditation [https://perma.cc/8M79-PVU9].

187. 10 U.S.C. § 1073d(b)(5).

188. 28 U.S.C. § 2680(j).

through Role 3 assets because a formal declaration of war has not been made since 1942.[189]

Exposing the government to liability from the actions of non-physician first responders treating battlefield casualties at the point of injury, or military physicians operating in or directly adjacent to combat theater with resources less robust than a stateside MTF[190] defies the underlying purpose of the combatant activities exception.[191] Recent prior efforts to deal with *Feres* tried to serve that purpose by restricting courts' subject matter jurisdiction to cases arising from treatment provided only in MTFs as defined in 10 U.S.C. § 1073d, or by barring cases involving treatment provided in "battalion aid stations or other medical treatment locations deployed in an area of armed conflict."[192] While well intentioned, those classifications are insufficient to achieve that end.[193]

Fundamentally, this distinction between routine medical care and treating combat casualties in and near theater provides little support for the military discipline rationale of *Feres* and its progeny that has barred servicemember claims arising from *all* medical care provisioned by the military, regardless of the circumstances of that care or where it was rendered. Servicemembers injured by non-combat related medical malpractice argue "the only difference between a military provider and a civilian provider is the military provider wore fatigues to work that day, and his or her patients do not have the choice of accepting their services."[194] *Feres*'s failure to draw this distinction is self-evident in the decisions of courts constrained to apply it, which have disturbingly found what amounts to a dispositive political question in cases arising from preventable pregnancy complications, cancer misdiagnosis, and botched elective surgeries.[195]

189. *See* H.R. REP. NO. 111-466, at 3–4 (2010) (discussing the FTCA's combatant activities exception); *About Declarations of War by Congress*, U.S. SENATE, https://www.senate.gov/about/powers-procedures/declarations-of-war.htm [https://perma.cc/X5UK-USHE] (last visited Nov. 3, 2025).

190. *See supra* notes 180–84 and accompanying text (discussing Roles 1 to 3).

191. *See* H.R. REP. NO. 111-466, at 2 (discussing its wartime purpose).

192. *See* H.R. 2422, 116th Cong. § (e) (2019); H.R. 4334, 118th Cong. § (a)(2) (2023).

193. *See infra* Section IV.A (proposing a more specific scope of liability).

194. *Feres Hearing*, *supra* note 1, at 50:33.

195. *See supra* notes 1–6, 71, 79 and accompanying text.

IV. PROPOSALS

A. Scope of Liability

The Court's steadfast refusal to reconsider *Feres* has made plain that Congress is the only actor that can definitively abrogate the categorical bar on servicemember medical malpractice lawsuits.[196] Jurists have maintained for decades that *Feres* has no basis in the FTCA's text but is instead a judicial policy decision on what Congress may have thought had it considered the issue,[197] despite contemporary evidence to the contrary.[198] Because *Feres* purports to interpret the FTCA itself, that statute is both the source of and solution to the *Feres* problem.

Prior legislative efforts to amend the FTCA included language rendering the combatant activities and foreign country exceptions inapplicable and defining the government's exposure based on where the medical treatment was provided, usually by adopting § 1073d's definition of a "covered medical facility."[199] That definition is underinclusive and does not account for Role 4-capable facilities that possess all the assets and personnel of a traditional hospital but may be located outside the United States, are owned or operated by another country while staffed with American military medical personnel, or through any other statutory or regulatory gaps are not otherwise accounted for in § 1073d's definitional scheme.[200] That definition also ignores one of the most glaring differences between combat and routine medical care—that emergent combat treatment can be provided by unlicensed first responders at or near the point of injury[201]—a difference that is not fully captured by generic language such as "battalion aid stations or other medical treatment locations deployed in an area of armed conflict."[202]

The following italicized language inserted into a provision modeled after prior bills[203] aims to correct those deficiencies and provide a more

196. *See* Feres v. United States, 340 U.S. 135, 138 (1950) ("[I]f we misinterpret the Act, at least Congress possesses a ready remedy.").

197. *See* discussion *supra* Section II.A.

198. *See supra* note 19.

199. The 2023 HERO Act is the most recent example. *See* H.R. 4334, 118th Cong. § (a)(2) (2023). That bill was introduced following the backlash from the DOD's denial of Stayskal's § 2733a claim. *See* William Rhyne, *Flanking* Feres*: The Camp Lejeune Justice Act of 2022 and the Future of the Military's Sovereign Immunity*, 102 N.C. L. REV. 619, 658–59 (2024) (discussing the HERO Act).

200. *See supra* Section III.B (discussing Roles of battlefield care).

201. *See infra* note 206 and accompanying text (describing the credentialing of Army medics).

202. *See, e.g.*, H.R. 2422, 116th Cong. § (e) (2019).

203. *See* H.R. 2422; H.R. 4344.

specific exception for treatment rendered by non-physician Role 1 responders and all other Role 2 and 3 battlefield medical providers than has been previously offered:

> A claim may be brought against the United States under [the FTCA] for damages relating to the personal injury or death of a member of the Armed Forces arising out of a negligent or wrongful act or omission in the performance of medical, dental, or related health care functions (including clinical studies and investigations) by *a licensed health care professional as defined in 10 U.S.C. § 1094(d), (e), who, at all relevant times was an* employee or agent of the United States acting within the scope of their employment or agency, that was provided at a covered military medical treatment facility as defined by 10 U.S.C. § 1073d, *or at any medical facility not so designated that is no less than Role 4-capable*, *whether located in or outside the United States*.
>
> *Under this section, "Role 4" is defined as a fixed facility that provides the full range of preventive, acute, restorative, curative, rehabilitative, and convalescent care.*[204]

In addition to offering a more refined definition of *where* the actionable malpractice may occur, this language also identifies *who* can be classified as the underlying tortfeasor. A "licensed health care professional" is already defined by statute as an individual with a "[state] license to practice medicine, osteopathic medicine, dentistry, or another health profession."[205] That definition excludes Role 1 first responders, such as Army medics whose only civilian credential is through the National Registry of Emergency Medical Technicians, a "private, non-profit, certifying organization" that does not meet the statutory licensure definition.[206]

204. *Contrast* H.R. 2422 § (e) (excluding "battalion aid stations or other [deployed] medical treatment locations"), *with supra* notes 179–89 and accompanying text (describing Roles of care).

205. *See* 10 U.S.C. §§ 1094(d)(2)(A), (e)(1)(A).

206. *Legal Differences Between Certification and Licensure*, NAT'L REGISTRY OF EMERGENCY MED. TECHNICIANS, https://www.nremt.org/Document/certification_licensure [https://perma.cc/N3U5-NXUG] (last visited Nov. 4, 2025); *see* ATP 4-02.55, *supra* note 181, at 1–5; U.S. DEP'T OF ARMY, REG. 40-68, MEDICAL SERVICES, CLINICAL QUALITY MANAGEMENT para 4–3(a)(2)(a) (Feb. 26, 2004).

B. Constructive Exhaustion on the Merits

Directly amending the FTCA would open the courthouse doors to injured servicemembers for the first time, but their claims would still be subject to its exhaustion requirement that requires them to first present their claim to the DOD for an administrative decision and then caps any litigation recovery at the initial administrative demand amount.[207] Section 2733a's total bar on discovery,[208] together with the DOD's troubled transition to a centralized electronic health records database,[209] would likely make those initial demand amounts a best guess by a claimant asserting a complex claim that, in state court, would be afforded extensive discovery to fully investigate.[210] Further, because the potential verdict value of complex cases filed by still-living servicemembers like Stayskal can dramatically exceed the maximum payout cap,[211] for them, an obligatory post-*Feres* § 2733a claim would be nothing more than a performative, time wasting exercise.

The FTCA's existing constructive exhaustion provision[212] should be extended to allow constructive exhaustion on the *merits*. Such a process would allow servicemember victims of gross medical malpractice to file directly in district court when their complaint alleges any of a statutorily defined class of significant or complex injuries[213] and is filed with the

207. *See supra* notes 29–36, 132 and accompanying text.

208. 32 C.F.R. § 45.4(e) (2025).

209. There are significant gaps in the DHA's new "Genesis" records system that will continue to induce reliance on legacy paper and electronic records. *See* Patricia Kime, *Military Health System Beneficiaries Urged to Download Old Medical Records by April 1*, MILITARY.COM (Feb. 18, 2025, at 17:38 ET), https://www.military.com/daily-news/2025/02/18/military-health-system-beneficiaries-urged-download-old-medical-records-april-1.html [https://perma.cc/M9VA-YGEM] ("Genesis records do not contain information from previous electronic and paper health records . . . .").

210. *Compare* 32 C.F.R. § 45.4(e) (no discovery for § 2733a claims), *with* SYLVIA B. PRESSLER & PETER G. VERNIERO, RULES GOVERNING THE COURTS OF THE STATE OF NEW JERSEY, app. XII-B1 (2025) (Civil Case Information Statement showing 450 days of discovery allotted for malpractice actions). Causation in such cases "requires careful review by an expert." Thomas E. Albro & Thomas M. Hendell, *What Practitioners Can Teach Academics About Tort Litigation — The Plaintiff's Perspective in Medical Malpractice Litigation*, 13 J. TORT L. 273, 278–79 (2020).

211. *See* Morris James LLP, *Ten of the Largest Medical Malpractice Verdicts of 2022*, JD SUPRA (Jan. 17, 2023), https://www.jdsupra.com/legalnews/ten-of-the-largest-medical-malpractice-2980009/ [https://perma.cc/BF9L-WTEV] (summarizing nationwide verdicts in 2022 above $15 million for injuries such as brain damage, wrongful death, injury to a fetus, and a missed breast cancer diagnosis).

212. 28 U.S.C. § 2675(a).

213. *Cf.* N.J. STAT. ANN. § 39:6A-8 (West 2025). New Jersey's "limitation on lawsuit option" for automobile personal injury cases exempts defendants from tort liability when the plaintiff selected that limitation option on their insurance policy in exchange for a premium discount, *unless* the complaint alleges "death; dismemberment; significant

affidavit of an appropriate medical practitioner averring to those injuries being the probable result of a breach in the relevant standard of care.[214] This kind of case, with or without a corresponding derivative claim, would ordinarily be afforded extensive fact and expert discovery to fully investigate in state court,[215] and could ultimately verdict well above § 2733a's current $750,000 cap.[216]

Twenty-eight states already employ affidavit of merit statutes that could provide a template.[217] New Jersey's requires every professional malpractice plaintiff to present an affidavit at the outset of the case from a relevant licensed professional averring there is "a reasonable probability" that the applicable standard of care "fell outside acceptable professional or occupational standards or treatment practices."[218] New Jersey courts then hold an accelerated conference where the defense can object to the affidavit, and the plaintiff can seek to amend it, before a non-confirming cause of action is exposed to dismissal for failure to state a claim.[219] An affidavit of merit requirement would be relatively straightforward to adapt to federal servicemember malpractice cases because federal courts sitting in states that require them in other contexts already do so under diversity and supplemental jurisdiction.[220]

The more egregious *Feres* cases provide examples of what injuries could qualify for an enumerated list, such as medical acts or omissions causing harm to a fetus, death to the patient,[221] or cancer misdiagnosis and lost chance cases, such as Stayskal's.[222] The Federal Rules of Civil Procedure already require the parties to confer "as soon as practicable" at the outset of a case where objections to the affidavit can be addressed

disfigurement or significant scarring; displaced fractures; loss of a fetus; or [other] permanent injury." *Id; see* N.J. STAT. ANN. § 39:6A-8.1(a) (West 2025) (requiring the insurance carrier to disclose "the percentage difference in the premium rates or the dollar savings" with and without the limitation option on a prospective policy).

214. *Cf.* N.J. STAT. ANN. § 2A:53A-27 (West 2025) (requiring same).

215. *See supra* note 210 and accompanying text.

216. *See supra* note 133 and accompanying text.

217. *See* Heather Morton, *Medical Liability/Malpractice Merit Affidavits and Expert Witnesses*, NAT'L CONF. OF STATE LEGISLATURES (Aug. 11, 2021), https://www.ncsl.org/financial-services/medical-liability-malpractice-merit-affidavits-and-expert-witnesses [https://perma.cc/5FPB-AFJ2].

218. N.J. STAT. ANN. § 2A:53A-27 (West 2025). The affidavit generally must be served on the defendant within sixty days of the filing of the answer. *Id.*

219. *See* Ferreira v. Rancocas Orthopedic Assocs., 836 A.2d 779, 785 (N.J. 2003); N.J. STAT. ANN. § 2A:53A-29 (West 2025).

220. *E.g.*, Jackson v. Miller, No. 21-cv-09404, 2024 U.S. Dist. LEXIS 220166, at *11 n.2 (D.N.J. Dec. 5, 2024).

221. *See supra* notes 1-6, 79 and accompanying text.

222. *See supra* Section II.C (discussing Stayskal's case).

before motion practice.[223] Exposing a non-conforming cause of action to dismissal would arguably deter abuses and preserve the underlying purpose of the administrative exhaustion requirement by immediately placing the United States on notice of serious claims,[224] and "weeding out frivolous lawsuits early."[225] Further, this process would give injured servicemembers a faster pathway to litigation and its advantages of establishing causation and damages with enforceable discovery.[226] And for terminal plaintiffs, avoiding the delays of performative § 2733a claim process could be decisive in whether a resolution can be reached while they are still alive.

C. Jury Trials

The Seventh Amendment right to a jury trial does not apply to suits against the United States absent an "unambiguous" expression of Congressional intent to confer that right.[227] Medical malpractice jury trials are available in state court,[228] but the FTCA categorically prohibits jury trials in all cases cognizable under it except, strangely, in suits to recover taxes and penalties from the IRS.[229] The "advisory jury" provision of the Federal Rules[230] has occasionally been used in FTCA cases as an "optional aid to an independent court," but they are uncommon, and judges' authority to do so is murky at best given the plain language of § 2402.[231]

In 2022, Congress attempted, poorly, to carve out an additional exception in the FTCA with the Camp Lejeune Justice Act ("CLJA") that created a federal toxic tort cause of action for individuals exposed to contaminated water at a North Carolina Marine Corps installation from

223. FED. R. CIV. P. 26(f).

224. *See* FTCA: A LEGAL OVERVIEW, *supra* note 22, at 33.

225. *Cf.* Ferreira v. Rancocas Ortho. Assocs., 836 A.2d 779, 780 (N.J. 2003) (discussing New Jersey's policy rationale behind affidavits of merit).

226. *See infra* notes 243–56 and accompanying text.

227. Lehman v. Nakshian, 453 U.S. 156, 160–61 (1981).

228. Neil Vidmar, *Juries and Medical Malpractice Claims: Empirical Facts Versus Myths*, 467 CLINICAL ORTHOPEDICS & RELATED RSCH. 367, 367–68 (2009) (discussing jury trials in state courts).

229. 28 U.S.C. § 2402 (cross-referencing § 1346(a)(1)).

230. Advisory juries are permissive and can be requested by a party or ordered by the court sua sponte. FED. R. CIV. P. 39(c). While the Rule does allow for the parties to consent to a binding jury verdict in an action where there is no right to a jury trial, there is an explicit exception when "the action is against the United States and a federal statute provides for a nonjury trial," such as FTCA cases. *Id.* at (c)(2).

231. Matthew L. Zabel, *Advisory Juries and Their Use and Misuse in Federal Tort Claims Act Cases*, 2003 BYU L. REV. 185, 188, 198 (2003). *See supra* Part III (discussing the FTCA's legislative intent as it relates to advisory juries).

the 1950s through the 1980s.[232] The CLJA provides that "[n]othing in this subsection shall impair the right of *any* party to a trial by jury,"[233] but it did not amend the FTCA itself with a cross-reference to codify that exception.[234] That tension led one trial court to grant the government's motion to strike the jury trial demand[235] of over two thousand CLJA plaintiffs.[236] It held the CJLA did not comport with precedent to "unequivocally, affirmatively, and unambiguously provide" the right to a jury trial, and the statute's legislative history did not justify reading an exception into the FTCA.[237] While the Supreme Court denied certiorari in May 2025, [238] the friction that case exemplified between the FTCA and other statutory private rights of action for servicemembers is instructive.

The threat of a jury trial can be used strategically by both parties. Plaintiffs with significant or complex injuries will seek to present the emotional and psychological side of their claim to the lay juror, while the defense can leverage the cost of a trial and appeal to induce settlement.[239] Juries also humanize the factfinding system because they, unlike judges, are "in an ideal position to incorporate the community's views and attitudes about responsibility and the valuation of injuries in its legal judgments."[240]

Congress should amend the FTCA to allow parties to request a jury trial in servicemember malpractice cases. That amendment, paired with an explicit provision in the enabling legislation itself, would preclude the kind of detailed analysis the *In re Camp Lejeune* court was forced to perform to determine whether such a right existed against the "general presumption . . . that a plaintiff would not get a jury trial against the United States in an action under the FTCA."[241] Military plaintiffs should be afforded the same opportunity to present their case to a jury that they would have had if their claim arose from the malpractice of a civilian

232. Sergeant First Class Heath Robinson Honoring our Promise to Address Comprehensive Toxics Act of 2022, Pub. L. No. 117-168, § 804(d), 136 Stat. 1759, 1803 (2022) (codified in scattered sections of the U.S. Code) [hereinafter CLJA]. *See generally* Rhyne, *supra* note 199, at 620–28 (discussing the statute's background).

233. CLJA, *supra* note 233, at § 804(d) (emphasis added).

234. *See* 28 U.S.C. § 2402 (containing no cross-reference to the CLJA).

235. *In re* Camp Lejeune Water Litig., 715 F. Supp. 3d 761, 762–63 (E.D.N.C. 2024).

236. Petition for Writ of Certiorari at ii, McBrine v. United States, 145 S. Ct. 2682 (2025) (No. 24-685) (identifying 2,182 actions pending under the master complaint).

237. *In re Camp Lejeune Water Litig.*, 715 F. Supp. 3d at 763, 774–82 (relying on *Lehman*).

238. McBrine v. United States, 145 S. Ct. 2682 (2025).

239. *See* Vidmar, *supra* note 229, at 371–73.

240. *See* Richard L. Jolly, Valerie P. Hans & Robert S. Peck, *The Civil Jury: Reviving an American Institution*, UC BERKELEY SCH. L., CIV. JUST. RSCH. INITIATIVE, Sept. 2021, at 22–25 (discussing the advantages of civil juries over bench trials in fact finding).

241. *See In re Camp Lejeune Water Litig.*, 715 F. Supp. 3d at 766–82.

doctor in a civilian hospital, or if they were merely suing the government to recover improperly collected taxes and penalties.

D. Offsets and § 2733a Discovery

Prior attempts to legislatively abrogate *Feres* also fall short with respect to collateral offsets on recovery.[242] Most are limited to barring only the deduction of life insurance payments from the recovery,[243] which would only apply if the malpractice resulted in death. If *Feres* was abrogated, the government would almost certainly seek to tamp down potential verdicts by borrowing from its § 2733a regulations that allow for a collateral offset on administrative recoveries tied to no fewer than fourteen types of military benefits.[244] Some of those benefits, such as the value of housing allowances and college scholarships[245] are attenuated, at best, from the actual incident of medical malpractice giving rise to the claim. If anything approaching a § 2733a offset structure were adopted for litigated FTCA claims, the hypothetical case of a young servicemember with an even partial lifetime VA disability rating giving rise to monthly payments could result in a significantly reduced or completely nullified recovery.[246] Any legislation addressing *Feres* should bar the use of any offsets connected to service-derived entitlements in litigation, and should also strongly consider the fairness of the DOD's use of those offsets in its § 2733a regulations.[247]

Lastly, the "no discovery" provision of § 2733a's implementing regulations[248] should be eliminated by way of a statutory command to the DOD requiring the immediate and compulsory disclosure of a servicemember's complete medical records that are already in the DOD's possession[249] upon initiation of a § 2733a claim. Unlike a traditional lawsuit where a plaintiff could serve a discovery request on an adverse

242. States widely adopted collateral source offsets following the 1970s tort reform movement to reduce the size of claims and private insurance premiums. *See* Leonard J. Nelson III et al., *Damages Caps in Medical Malpractice Cases*, 85 MILBANK Q. 259, 262–63, 268–69 (2007). The premium rationale arguably does not apply to the government absent a strained analogy to the nationally distributed tax burden, leaving reducing claim amounts as the only plausible justification.

243. *See* H.R. 1478, 111th Cong. § 2(a) (2009).

244. *See* 32 C.F.R. § 45.11(e)(1) (2025) (non-inclusive list of offsets).

245. *See id*.

246. *See* 32 C.F.R. § 45.11(e)(1)(i), (ii) (allowing offsets for VA disability pay).

247. *Cf. Military Personnel and the FTCA*, *supra* note 19, at 619 (rejecting the concept of service-derived benefits and entitlements negatively affecting a servicemember's standing to sue).

248. 32 C.F.R. § 45.4(e) (2025).

249. *See supra* note 209 and accompanying text (discussing medical records).

party who possesses discoverable material,[250] and where options to enforce that request exist,[251] § 2733a claimants only "may" obtain their own records through a patchwork of existing disclosure statutes and regulations.[252] This burden is placed on claimants while the DOD is then permitted to demand an expert report from those claimants[253] that would undoubtedly require a full review of their complete medical records to prepare.[254] While the entire regulatory scheme underlying § 2733a would likely need to be revised following any *Feres* legislation,[255] the "no discovery" provision is facially prejudicial, inequitable, and should be considered as a starting point.

CONCLUSION

The *Feres* doctrine remains despite the "near-universal consensus that . . . [it] is wrong on the law, incoherent in justification, and unjust in practice."[256] Its supporters offer what purport to be historically grounded arguments as to why it was and remains correct.[257] Trial courts often find those arguments unpersuasive despite being bound by them.[258] Servicemembers and their families injured by military medical malpractice are caught in the middle, unable to persuade Congress to address the issue directly, and without any redress in the courts.[259]

This Note seeks to honor the FTCA's underlying policy rationales and the military's justifiable need for freedom from judicial interference when carrying out its core mission, while at the same time recognizing the daily reality uniformed servicemembers experience away from the front lines. The modern military "now governs over a larger population than the population the Framers governed through their new Constitution," and its "largely uncontested expansion" into routine, non-combat related healthcare[260] has rendered the military health system functionally

250. *E.g.*, FED. R. CIV. P. 34(a)(1)(A) (document discovery).

251. *E.g.*, *id.* at 37(a)(3), (b)(2) (discovery orders and sanctions).

252. *See* 32 C.F.R. § 45.4(e).

253. *See id.* § 45.4(d). There is no reciprocal provision for a claimant to demand a rebuttal expert report from the DOD justifying its decision.

254. *See* Albro & Hendell, *supra* note 210, at 279 (discussing use of medical experts).

255. *E.g.,* 32 C.F.R. § 45.14(a) (2025) (barring judicial review).

256. Carter v. United States, 145 S. Ct. 519, 524 (2025) (Thomas, J., dissenting in denial of certiorari); *see also* Monaco v. United States, 661 F.2d 129, 134 (9th Cir. 1981) ("The Feres doctrine today stands on shaky ground with its precise justification somewhat confused.").

257. *See generally* Figley, *supra* note 12 (arguing in favor of *Feres*).

258. *See supra* Section II.A.

259. *See supra* Part II.

260. Turley, *supra* note 166, at 7–8.

indistinguishable from its civilian counterparts[261] that are themselves exposed to the same kind of tort liability *Feres* prohibits when the plaintiff happens to wear a United States uniform.[262] While the full universe of *Feres*'s downstream effects are outside the scope of this Note, the servicemember medical malpractice space is a targeted, reasonable, and deserving one to begin addressing the *Feres* problem.

261. *See supra* Section III.B.
262. *See supra* notes 96–102 and accompanying text.