UIC Law Review

Volume 54 | Issue 3 Article 3

2021

Incident to Service: Continued Deprivation of Redress to Service Members at the Hands of the 2020 National Defense Authorization Act, 54 UIC L. Rev. 731 (2021)

Lindsay Wright

INCIDENT TO SERVICE: CONTINUED DEPRIVATION OF REDRESS TO SERVICE MEMBERS AT THE HANDS OF THE 2020 NATIONAL DEFENSE AUTHORIZATION ACT

LINDSAY WRIGHT*

I. INTRODUCTION 731
II. BACKGROUND 733
A. Federal Tort Claims Act 734
B. Leading Up to the *Feres* Doctrine 736
C. *Feres* Doctrine 737
D. Post-*Feres* v. United States 739
E. 2020 National Defense Authorization Act 741
III. ANALYSIS 742
A. Members of the Armed Forces 742
1. General Authorization of Claims Under the National Defense Authorization Act 742
2. Requirements for Claims Under the National Defense Authorization Act 744
3. Liability Under the National Defense Authorization Act 747
4. Payment of Claims Under the National Defense Authorization Act 748
5. Annual Report Under the National Defense Authorization Act 748
B. Civilians 749
IV. PROPOSAL 751
A. Addressing Due Process 751
B. Addressing the "Prescribed" Regulations 754
C. Addressing Payment of Claims 755
V. CONCLUSION 755

I. INTRODUCTION

Imagine – as a service member – you arrive at a United States Armed Forces hospital to undergo an abdominal operation. You walk up to the front desk, and the receptionist is on the phone holding up her index finger signaling you to wait. You look around, and there are only a handful of people in the waiting room. The receptionist interrupts your thoughts to check you in, and a nurse comes to take you back to your room. As instructed, you change into a hospital gown and slide your feet into the hospital socks. With a chill finding its way into your gown, you slip under the covers in the hospital bed and wait to be taken into surgery. The anesthesiologist arrives to put you under, you give your family members a hug and a kiss and are then rolled away to the operating room. While the Armed Forces' surgeons perform surgery, complications arise, and because of their negligent medical treatment, you die on the operating table. Your grieving family files suit to recover damages for your wrongful death, but the court finds for the government under the Federal Tort Claims Act, holding that suit cannot be

brought against the federal government for personal injury or wrongful death when such was incident to or arose out of service.[1]

Now imagine – as a civilian – you arrive at your local hospital to undergo a similar abdominal operation. Under the same circumstances as above, your doctor's negligent medical treatment causes your untimely death. Your grieving family files suit to recover damages for your wrongful death, and the court finds for your family. Your family is awarded damages for funeral expenses, emotional distress, loss of companionship, and consortium.

Prior to 2020, service members and their family members could not hold the government liable for personal injury "where the injuries arise out of or are in the course of activity incident to service."[2] The 2020 National Defense Authorization Act ("NDAA") now allows service members or their family members "to file claims for personal injury or death caused by negligence or wrongful acts by a Department of Defense employed health care provider in a military hospital or clinic."[3] Prior to the NDAA being signed into law, *Feres v. United States* barred service members from such redress under the Federal Tort Claims Act ("FTCA").[4] While the NDAA does not overrule *Feres,* it provides redress to service members denied to them since the ruling of *Feres* in 1950.[5]

---

*Lindsay R. Wright, Juris Doctor Candidate 2022, UIC School of Law. I sat in Torts my first year of law school and was baffled at the existence of the *Feres* Doctrine. I chose this topic to bring light to service members' small victory in the National Defense Authorization Act of 2020, but also to demonstrate how far we still need to go to protect the constitutional rights of those who serve.

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

2. *Id.* The Supreme Court held that "[w]ithout exception, the relationship of military personnel to the Government has been governed exclusively by federal law." *Id.* "We do not think that Congress, in drafting this Act, created a new cause of action dependent on local law for service-connected injuries or death due to negligence." *Id.* We cannot impute to Congress such a radical departure from established law in the absence of express congressional command." *Id.*

3. Patricia Kime, *Got a Military Medical Malpractice Claim? Here's How to File*, MILITARY TIMES (Jan. 10, 2020), www.militarytimes.com/pay-benefits/2020/01/10/got-a-military-medical-malpractice-claim-heres-how-to-file/ [perma.cc/384G-RNHJ]. "The law requires the Pentagon to establish a system for personnel to file malpractice claims and provide an update to Congress on the regulations required for implementation." *Id.* "The new law designates $400 million to the Pentagon to investigate claims and award compensation." *Id.* "It gives victims two years after the malpractice incident to file a claim, with the exception of this year." *Id.* "Those filing a claim in 2020 can seek redress for incidents dating to 2017." *Id.*

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

5. *See* Leo Shane III, *Military Medical Malpractice Victims Could see Payouts from Defense Department Under New Compromise*, MILITARY TIMES (Dec. 9, 2019), www.militarytimes.com/news/pentagon-congress/2019/12/10/military-medical-malpractice-victims-could-see-payouts-from-defense-department-under-new-compromise/ [perma.cc/NH9D-CHUN] (explaining that although the NDAA "'does not change or repeal the Feres doctrine, it authorizes the Secretary of Defense to allow, settle, and pay an administrative claim against the United States for personal injury or death . . .

However, as demonstrated above, the forms of redress available to service members compared to civilians was and still is, disproportionate. Service members should be offered equal forms of redress as civilians for personal injury or death caused by negligence. Disproportionate redress for service members places undue hardship on those serving their country from rightful compensation.

Part II of this Comment will explore the background of redress available to service members in the United States Armed Forces. It will first focus on the adoption of the FTCA, the first piece of legislation permitting suit to be brought against the federal government. Then, it will review pre- and post- *Feres* Doctrine jurisprudence. Lastly, it will provide a brief overview of the NDAA, the first piece of legislation since the adoption of the *Feres* Doctrine that provides service members some redress for medical malpractice.

Part III of this Comment will dive into the NDAA. It will break down the relevant subsections of the NDAA and the redress offered to service members. Then, it will analyze the disparities in redress between civilians and service members.

Part IV of this Comment will discuss the policy changes needed to combat the disproportionate redress offered to service members. It will begin by addressing service members' due process rights. Then, it will discuss the need for legislative changes in the prescribed regulations of the NDAA. Lastly, it will discuss proposals for payment of medical malpractice claims under the NDAA.

II. BACKGROUND

The forms of redress available to service members can be traced back to the doctrine of sovereign immunity, which "refers to the fact that the government cannot be sued without its consent."[6] Sovereign immunity, derived from English common law, is based on the premise that the King could do no wrong.[7] The doctrine of

---

that was the result of medical malpractice caused by a Department of Defense health care provider.'").

6. *Sovereign Immunity*, LEGAL INFO. INST., www.law.cornell.edu/wex/sovereign_immunity [perma.cc/X7DE-67T7] (last visited Aug. 15, 2021). "Sovereign immunity was derived from British common law doctrine based on the idea that the King could do no wrong." *Id.* "In the United States, sovereign immunity typically applies to the federal government and state government, but not to municipalities." *Id.* "Federal and state governments, however, have the ability to waive their sovereign immunity." *Id.* "The federal government did this when it passed the Federal Tort Claims Act, which waived federal immunity for numerous types of torts claims." *Id.*

7. *See* Nevada v. Hall, 440 U.S. 410, 415-16 (1979) (explaining that "sovereign immunity [is] based 'on the logical and practical ground that there can be no legal right as against the authority that makes the law on which the right depends'") (quoting Kawananakoa v. Polyblank, 205 U.S. 349, 353 (1907)).

sovereign immunity essentially prohibits "a suit against an unconsenting sovereign for money damages."[8]

Congress has waived such immunity in certain circumstances to provide individuals the opportunity for redress and to make the federal government more amenable to suits.[9] One such circumstance stems from the adoption of the FTCA where suit can be brought against the federal government for injury to a person or damage to property by a federal government employee acting within the scope of their employment.[10] The redress now available to service members for personal injury can be traced back to the adoption of the FTCA and the jurisprudence that followed.[11] To set the stage for scrutinizing the NDAA, it is crucial to unravel the adoption of the FTCA and how common law jurisprudence has impacted service members' compensation opportunities for personal injury.

A. Federal Tort Claims Act

Tort law aims to "provide relief to injured parties for harms caused by others, to impose liability on parties responsible for the harm, and to deter others from committing harmful acts."[12] Like civilians, employees of the federal government commit torts.[13] Before the FTCA was passed in 1946, a "suit could not be brought against the Federal Government for injury to a person or damage to property caused by an employee of the United States."[14] Relief for such injury or damage could only be obtained through

8. Katherine Florey, *Sovereign Immunity's Penumbras: Common Law, "Accident," and Policy in the Development of Sovereign Immunity Doctrine*, 43 WAKE FOREST L. REV. 765, 765 (2008).

9. *See id.* at 778 (stating that Congress "has permitted suits for monetary relief brought under the Federal Tort Claims Act.").

10. 8 Am. Juris. Trials § 3 (2020).

11. *See* 28 U.S.C. § 1346(b) (2021); *see also* Lanus v. United States, 570 U.S. 932 (2013) (Thomas, J., dissenting), *cert. denied*; *see also* United States v. Johnson, 481 U.S. 681 (1987); *see also* Daniel v. United States, 139 S. Ct. 1713 (2019) (Thomas, J., dissenting), *cert. denied*.

12. *Tort*, LEGAL INFO. INST., www.law.cornell.edu/wex/tort [perma.cc/W5UQ-P6MQ] (last visited Aug. 15, 2021). "Typically, a party seeking redress through tort law will ask for damages in the form of monetary compensation." *Id.* "Less common remedies include injunction and restitution." *Id.*

13. KEVIN M. LEWIS, CONG. RSCH. SERV., R45732, THE FEDERAL TORT CLAIMS ACT (FTCA): A LEGAL OVERVIEW (2019). "Until the mid-20th century, however, the principle of 'sovereign immunity' – a legal doctrine that bars private citizens from suing a sovereign government without its consent – prohibited plaintiffs from suing the United States for the tortious actions of federal officers and employees." *Id.* "Thus, for a substantial portion of this nation's history, persons injured by torts committed by the federal government's agents were generally unable to obtain financial compensation through the judicial system." *Id.*

14. 8 Am. Jur. Trials 635 § 3 (2020).

Congressional legislation to compensate a tort victim for their loss.[15] However, unlike civilians, sovereign immunity barred those harmed by employees or federal officers from filing suits against the United States.[16]

Thus, Congress passed the FTCA to prevent further injustice and to eliminate the burden previously placed on Congress to handle such claims.[17] Under the FTCA, "[i]ndividuals who are injured or whose property is damaged by the wrongful or negligent act of a federal employee acting in the scope of his or her official duties may file a claim with the government for reimbursement for that injury or damage."[18] To state a valid claim under the FTCA, an individual must demonstrate the following:

> (1) he was injured or his property was damaged by a federal government employee; (2) the employee was acting within the scope of his official duties; (3) the employee was acting negligently or wrongfully; and (4) the negligent or wrongful act proximately caused the injury or damage of which he complains.[19]

The FTCA provides for exclusive jurisdiction on matters against the United States, such as money damages, injury to an individual or property damage, or personal injury or death.[20] The FTCA serves to deter tortious acts by federal employees while encouraging the government to oversee the actions of their employees closer than before.[21] While the FTCA does not "create a new federal cause of action against the United States," it does waive the federal government's right to sovereign immunity for certain types of tort claims.[22] The FTCA "marks the culmination of a long effort to mitigate unjust consequences of sovereign immunity from

15. LEWIS, *supra* note 13. "For a substantial portion of this nation's history, the doctrine of sovereign immunity barred citizens injured by the torts of a federal officer or employee from initiating or prosecuting a lawsuit against the United States." *Id.* "Until 1946, 'the only practical recourse for citizens injured by the torts of federal employees was to ask Congress to enact private legislation affording them relief' through 'private bills.'" *Id.* (quoting Gray v. Bell, 712 F.2d 490, 506 (D.C. Cir. 1983)).

16. *Id.*

17. 8 Am. Jur. Trials 635 § 3 (2020). "Claimants could obtain relief only by the introduction of private bills in Congress." *Id.* As a result, many bills were introduced, but reviewing all of the bills began to impose a burden. *Id.* "Approximately 2,000 such bills were introduced in each Congress from the Sixty-eighth through the Seventy-eighth, and some 20 per cent of these bills were enacted." *Id.*

18. United States House of Representatives, *Federal Tort Claims Act*, www.house.gov/doing-business-with-the-house/leases/federal-tort-claims-act [perma.cc/97Q2-HUCC] (last visited Aug. 15, 2021).

19. *Id.* "The claimant must also provide documentation establishing that his claim satisfies all the elements of the FTCA." *Id.* "A person wishing to make a claim for reimbursement under the FTCA for damage or injury caused by a House employee must first file an administrative claim with the House." *Id.*

20. 28 U.S.C. § 1346(b)(1) (2021).

21. LEWIS, *supra* note 13.

22. *Id.*

suit."[23]

B. Leading Up to the Feres Doctrine

In 1949, the Supreme Court addressed the issue of the FTCA and military service for the first time.[24] In *Brooks v. United States*, the issue before the Court was "whether members of the United States armed forces can recover under that Act for injuries not incident to their service."[25] Arthur Brooks was driving along a highway on a rainy night with his father, James Brooks, and brother, Welker Brooks.[26] After stopping at an intersection, Arthur proceeded across the road and a civilian employee, driving a United States Army truck, struck him.[27] Both Arthur and Welker were service members at the time of the accident.[28] Arthur was killed on impact, and his father and brother were severely injured.[29]

Welker sued the United States, and the district court found for Welker and the decedent.[30] However, the court of appeals reversed on the grounds that the brothers' service at the time of the accident barred them from recovery.[31] The Supreme Court granted certiorari and found that the statutory language and history of the FTCA required a holding in favor of Welker and the administrator of Arthur's estate, but remanded to the court of appeals for reconsideration of reducing damages.[32] The Court noted, however, that:

> [W]e are dealing with an accident which had nothing to do with the Brooks' army careers, injuries not caused by their service except in the sense that all human events depend upon what has already transpired. Were the accident incident to the Brooks' service, a wholly different case would be presented.[33]

It was not until 1950 that the Court considered injuries incident to service in *Feres v. United States*.[34]

---

23. *Feres*, 340 U.S. at 139.

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

25. *Brooks*, 337 U.S. at 50.

26. *Id.*

27. *Id.*

28. *Id.*

29. Cooper T. Fyfe, *The Detrimental Pitfall of the FTCA: Overturning Feres & Endorsing the Sergeant First Class Richard Stayskal Military Medical Accountability Act of 2019,* 52 TEX. TECH. L. REV. 877, 883 (2020).

30. *Brooks*, 337 U.S. at 50.

31. *See* United States v. Brooks, 169 F.2d 840, 846 (4th Cir. 1948), rev'd, 337 U.S. 49 (1949) (explaining that "the Federal Tort Claims Act does not apply to claims by soldiers in the United States Army, even when those claims arise out of injuries or death which, as here, are not service-caused.").

32. *Brooks*, 337 U.S. at 54.

33. *Id.* at 52.

34. *Feres*, 340 U.S. at 135.

C. Feres Doctrine

While the Supreme Court found for the Brooks brothers, that holding was limited to such injuries that are not incident to nor in the course of their military or other government services.[35] However, this was not the case in *Feres,* where the Court considered three actions against the United States in one opinion under the FTCA: *Feres v. United States*, *Jefferson v. United States*, and *United States v. Griggs*.[36] "The three cases were related because each serviceman, while on active duty, sustained injury due to negligence of armed forces personnel."[37]

In *Feres*, Beatrice Feres, as executrix of Rudolph Feres, brought suit against the United States for damages under the FTCA.[38] A fire killed Rudolph in the barracks while he was on active duty as a lieutenant in the Army.[39] Beatrice Feres alleged negligence on behalf of Rudolph's fellow officers who required Rudolph to stay in the barracks, which they knew or should have known was unsafe because of a defective heating plant.[40]

In *Jefferson*, Arthur Jefferson sued the United States for negligence under the FTCA after injuries resulting from an abdominal operation by an army surgeon.[41] The surgery was performed at an Army hospital to remove one of his kidneys.[42] After the surgery, Arthur suffered many complications and underwent a subsequent surgery whereby the surgeon found a towel in his stomach that was beginning to work its way into his small intestine.[43] Arthur alleged that the negligent operation made him

35. *Id.* at 54.

36. *Feres*, 340 U.S. at 136-37.

37. Jeffrey R. Simmons, *Military Medical Malpractice*, 23 ARIZ. B.J. 22, 24 (1988). The *Feres* Court advanced three reasons for its holding. *Id.* The first reason was the absence of parallel private liability required by the FTCA. *Id.* Second, the Court rationalized that because liability under the FTCA depends upon 'the law of the place where the [negligent] act or omission occurred,' Congress could not have intended the varying local tort laws of each state to control important aspects of the 'distinctively federal' relationship between the United States and military personnel. *Id.* The third rationale was that Congress could not have intended to make FTCA suits available to servicemen who have already received payments under the Veterans' Benefit Act ('VBA') to compensate for injuries suffered incident to service." *Id.*

38. Feres v. United States, 177 F.2d 535, 536 (2d Cir. 1949).

39. *Id.* Rudolph Feres was stationed "in Pine Camp, New York, a military post of the United States in which he had been required to be quartered by superior officers." *Id.*

40. *Id.*

41. *See* Jefferson v. United States, 178 F.2d 518, 518-19 (4th Cir. 1949) (explaining that the district court found that "a towel used during an operation had been left in a surgical wound through the negligence of government employees at the hospital, and in consequence the plaintiff had suffered serious injuries.").

42. Jefferson v. United States, 77 F. Supp. 706, 708 (D. Md. 1948).

43. *Id.* at 709. "After the [removal of the towel, Jefferson] was subsequently

totally and permanently disabled.[44]

In *Griggs*, Edith Griggs, as executrix of Dudley Griggs, brought suit against the United States under the FTCA for the death of her husband.[45] Dudley was on active duty as a Lieutenant Colonel in the United States Army.[46] Dudley was admitted to an Army hospital under official orders for surgery, during which he met his untimely death.[47] Edith alleged "he met death because of negligent and unskillful medical treatment by army surgeons."[48]

The issue raised in front of the Supreme Court was whether the FTCA extended to individuals "sustaining 'incident to the service' what under other circumstances would be an actionable wrong."[49] The Court held that such relief under the FTCA did not extend to service members "whose activity at the time of the injury was incident to military service."[50] The Court in *Feres* argued that it was unaware of any law in the United States that would permit a service member to recover for negligence from their superiors or the government for which they serve.[51] The Court therefore found that "the FTCA barred all three claims" and "that each injury resulted from activities incident to service."[52] Such bar to relief

---

treated at the Marine Hospital in Baltimore, medically and surgically." *Id.* "He was later examined . . . and found to have sustained a serious hernia which was attributed . . . to the after effects of the operation … thought to have been caused by inflammation or infection as a post-operative result of the removal of the towel." *Id.* Jefferson "gets some relief from the effects of the hernia by wearing a corset." *Id.* "He is able to walk about and stand around but cannot well lean forward either standing or sitting in a chair." *Id.* Jefferson "is not employable industrially but could do clerical work if otherwise qualified therefor." *Id.* "As [Jefferson] is nearly 50 years of age and a mechanic by prior occupation, it is doubtful if he could engage in any gainful employable pursuit." *Id.*

44. *Id.* at 708.

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

46. *Id.*

47. *Id.*

48. *Feres*, 340 U.S. at 137.

49. *Id.* at 138. The Court noted that *Feres* was the "'wholly different case' reserved from our decision in *Brooks v. United States,* 337 U.S. 49 (1949)." *Id.* In *Brooks*, the Court addressed "whether members of the United States armed forces can recover under that Act for injuries not incident to their service." *Brooks,* 337 U.S. at 50. The Court in *Feres* found that "the *Brooks* case . . . interprets the Act to cover claims not incidental to service, and it is argued that much of its reasoning is as apt to impose liability in favor of a man on duty as in favor of one on leave." *Feres*, 340 U.S. at 139.

50. § 2:48. Feres doctrine, generally, 1 Civ. Actions Against the U.S. § 2:48. "The Feres doctrine applies to members of the National Guard and other reserve forces who are injured while engaged in their weekend drills or inactive duty training. The Feres doctrine also applies to cadets at United States military academies." *Id.*

51. *Feres*, 340 U.S. at 141.

52. Cornelia P. Weiss, *Exploring Military Medical Malpractice Actions: The Federal Tort Claims Act*, 25 COLO. LAW. 77, 78 (1996) ("Thus, under the *Feres* doctrine, all military personnel claims arising out of injuries incurred incident to service are barred. The term 'incident to service' has remained a stumbling block for the courts.").

became known as the *Feres* Doctrine.[53]

D. Post-Feres v. United States

The *Feres* Doctrine stripped the redress available to service members for personal injury in the course of or incident to service. The Doctrine "deprive[d] members of the military a right allowed to all other United States citizens."[54] A myriad of cases followed *Feres* in hopes of overruling the harsh effects of the doctrine.[55] One such case came in 1954; in *United States v. Brown*, an armed services veteran sought damages from the federal government under the FTCA "for negligence in the treatment of his left knee in a Veterans Administration hospital."[56] The veteran was discharged from service in 1944 because of an injury to his leg; he underwent two surgeries, during which "an allegedly defective tourniquet was used" that resulted in serious and permanent nerve damage to his leg.[57] Instead of seizing the opportunity to overrule *Feres*, the Court doubled down and "propelled the military discipline rationale . . . to the frontlines of the issue."[58] While the Court found that its holding in *Brooks* – not *Feres* – governed *Brown*, the Court noted that:

> The peculiar and special relationship of the soldier to his superiors, the effects of the maintenance of such suits on discipline, and the extreme results that might obtain if suits under the Tort Claims Act were allowed for negligent orders given or negligent acts committed in the course of military duty, led the Court to read that Act as

---

53. *See generally Feres*, 340 U.S. 135.

54. Simmons, *supra* note 37, at 23. "Although the FTCA expressly excludes a number of claims, it contains no provision excluding claims by military personnel that arise out of service-related activities during peacetime." *Id.* In *Feres*, the Supreme Court created an exception that denies recovery to members of the uniformed services, even when they are not in combat. *Id.*

55. *E.g.*, United States v. Brown, 348 U.S. 110 (1954); United States v. Johnson, 481 U.S. 681 (1987); Lanus v. United States, 570 U.S. 932 (2013) (Thomas, J., dissenting), *cert. denied*; Daniel v. United States, 139 S. Ct. 1713 (2019) (Thomas, J., dissenting), *cert. denied*.

56. *Brown*, 348 U.S. at 110.

57. *Id.* at 110-11.

58. Jennifer L. Zyznar, *Feres Doctrine: "Don't Let This Be It. Fight!"*, 46 J. MARSHALL L. REV. 607, 620 (2013). The *Feres* Court stated that the Federal Tort Claims Act "provided that the 'United States shall be liable . . . in the same manner and to the same extent as a private individual under like circumstances.'" *Id.* at 615 (quoting *Feres*, 340 U.S. at 141). However, in *Feres*,

> [t]he Court reasoned that the United States cannot be liable to members of its Armed Forces because no private individual can be held liable in the same manner. Since a private individual does not typically raise an army, a private individual cannot be sued by one of his or her service members. Thus, the United States remains immune in that manner as well.
>
> *Id.*

excluding claims of that character.[59]

As such, the Court argued that Congress did not intend to permit such suits in the course of or incident to service because "they would unduly interfere with military discipline."[60]

In 1987, in *United States v. Johnson*, the Court considered another issue under *Feres* regarding whether the Doctrine "bars an action under the Federal Tort Claims Act on behalf of a service member killed during the course of an activity incident to service, where the complaint alleges negligence on the part of civilian employees of the Federal Government."[61] Lieutenant Commander Johnson of the United States Coast Guard was a helicopter pilot.[62] His crew was dispatched to search for a missing vessel, whereby they had to request radar assistance from the Federal Aviation Administration due to low visibility; shortly after receiving assistance, the helicopter crashed, killing Johnson and the rest of his crew.[63] Johnson's wife filed suit under the FTCA seeking damages alleging negligence on the part of the Federal Aviation Administration for Johnson's death.[64] The Court drew from its ruling in *Brown*, stating that "'[s]uits . . . could undermine the commitment essential to effective service and thus have the potential to disrupt military discipline in the broadest sense of the word.'"[65] As such, the Court reaffirmed *Feres*.[66]

In the last decade, the Court declined to hear two cases that

---

59. *Brown*, 348 U.S. at 112.

60. Simmons, *supra* note 37, at 24. "This rationale was supported by 'the peculiar and special relationship of a soldier to his superiors, and effects of the maintenance of such suits on discipline, and the extreme results that might obtain if suits under the Torts Claim Act were allowed for negligent orders given or negligent acts committed in the course of military duty . . .'" *Id.*

61. *Johnson*, 481 U.S. at 682.

62. *Id.*

63. *Id.* at 683.

64. *Id.*

65. Zyznar, *supra* note 58, at 620 (quoting *Johnson*, 481 U.S. at 691). "In United States v. Johnson, the Court elaborated that 'military discipline involves not only obedience to orders, but more generally duty and loyalty to one's service and to one's country.'" *Id.* In upholding the military discipline rationale, the Court further preserved a system that allowed issues to be swept under the rug. The Court held that "[p]reservation of military discipline ensures the efficiency and order of military operations, and this interest outweighs the service member's right to tort recovery even if the injury arises from circumstances unrelated to his or her military rank or operations." *Id.* While military discipline ensures a smooth-running system, so too does holding service members accountable for their actions, which the Court failed to recognize or acknowledge.

66. *See Johnson*, 481 U.S. at 693 (Scalia, J., dissenting) (arguing that the FTCA, as written, "renders the United States liable to *all* persons, including servicemen, injured by the negligence of Government employees" and that the effects on military discipline cannot be wholly ascertained to justify the holding in *Feres*) (emphasis in original).

could have reconsidered *Feres*.[67] In *Daniel v. United States*, a naval officer died of a complication after giving birth; the officer's husband filed suit under the FTCA alleging wrongful death and medical negligence.[68] In *Lanus v. United States*, a Coast Guardsmen died in a fire in his assigned housing; his mother brought suit under the FTCA alleging negligence because of safety deficiencies in his assigned housing.[69] In both cases, Justice Thomas dissented from denial of certiorari on the grounds that "'*Feres* was wrongly decided and heartily deserves the widespread, almost universal criticism it has received.'"[70] Justice Thomas argued that the *Feres* Doctrine deprives service members any sort of relief when they suffer injury or damage "by the negligence of the Government or its employees."[71] The continued denial of relief to service members has led to unfortunate repercussions and will continue to do so until the Court reconsiders *Feres*.[72]

E. 2020 National Defense Authorization Act

On December 20, 2019, NDAA was signed into law.[73] The NDAA allows service members or their families "to file claims for personal injury or death caused by negligence or wrongful acts by a Department of Defense employed health care provider in a military hospital or clinic."[74] The Act permits the Secretary of Defense ("Secretary") to settle and pay claims against the United States "for personal injury or death incident to the service of a member of the uniformed services that was caused by the medical malpractice of a

67. *E.g.*, *Lanus*, 570 U.S. 932; *Daniel*, 139 S. Ct. 1713.

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

69. Lanus v. United States, 492 F. App'x 66, 67 (11th Cir. 2012).

70. *Lanus*, 570 U.S. at 933 (Thomas, J., dissenting), *cert. denied.* (quoting *Johnson*, 481 U.S. at 700. "While the [FTCA] contains a number of exceptions to this broad waiver of immunity, 'none generally precludes FTCA suits brought by servicemen.'" *Id.*

71. *Id.* "Nevertheless, in *Feres,* the Court held that 'the Government is not liable under the [FTCA] for injuries to servicemen where the injuries arise out of or are in the course of activity incident to service.'" *Id.* at 932-33 (quoting *Feres*, 340 U.S. at 146). "There is no support for this conclusion in the text of the statute, and it has the unfortunate consequence of depriving servicemen of any remedy when they are injured by the negligence of the Government or its employees." *Id.* at 933.

72. *See Daniel*, 139 S. Ct. at 1713 (Thomas, J., dissenting), *cert. denied* (stating that the district court found that *Feres* barred the suit, and that "[t]he Court of Appeals 'regretfully' reached the same conclusion and affirmed").

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

74. Kime, *supra* note 3. "The law requires the Pentagon to establish a system for personnel to file malpractice claims and provide an update to Congress on the regulations required for implementation." *Id.* "It gives victims two years after the malpractice incident to file a claim, with the exception of this year." *Id.*

Department of Defense health care provider."[75] While the NDAA does not overrule the *Feres* Doctrine, it provides relief denied to service members since *Feres* was decided in 1950.[76]

III. ANALYSIS

With respect to redress for medical malpractice, the forms of relief available to members of the armed forces varies greatly compared to civilians. To distinguish the disparities, this Comment will evaluate the current legislation and redress afforded to (A) members of the armed forces and (B) civilians.

A. Members of the Armed Forces

Pursuant to the NDAA, redress is now available to members of the armed forces.[77] This section will address the main components of the NDAA: (1) the general authorization of claims; (2) requirements for claims; (3) liability; (4) payment of claims; and (5) a required annual report on the progress of claims.

1. General Authorization of Claims Under the National Defense Authorization Act

The NDAA permits the Secretary to "allow, settle, and pay a claim against the United States for personal injury or death incident to the service of a member of the armed forces that was caused by the medical malpractice of a Department of Defense health care provider."[78] In addition to such power, subsection (a) leaves open the power of the Secretary to prescribe any regulations "as the Secretary considers appropriate" under subsection (f) of the NDAA.[79] While our military is civilian controlled, there is a chain of command that finds its way back to the military's independent

75. National Defense Authorization Act for Fiscal Year 2020, Pub. L. No. 116-92, § 731, 133 Stat. 1198, 1457-59 (2019).

76. *See* Shane III, *supra* note 5 (explaining that while the NDAA "'does not change or repeal the Feres doctrine, it authorizes the Secretary of Defense to allow, settle, and pay an administrative claim against the United States for personal injury or death … that was the result of medical malpractice caused by a Department of Defense health care provider'").

77. National Defense Authorization Act for Fiscal Year 2020 § 731.

78. *Id.*

79. § 731, 133 Stat. at 1459. Subsection (a) allows the Secretary to act pursuant to the powers granted in this section and "under such regulations as the Secretary of Defense shall prescribe under subsection (f)." § 731, 133 Stat. at 1457. Subsection (f)(1) provides that "The Secretary of Defense shall prescribe regulations to implement this section." § 731, 133 Stat. at 1458. While subsection (a) prescribes the Secretary specific powers to "allow, settle, and pay" claims, this section in conjunction with subsection (f) give the Secretary almost unlimited authority. § 731, 133 Stat. at 1457-59.

policing of issues.[80] The NDAA gives authorization to the Secretary to be the judge, the jury, and the executioner.[81] Such adjudication of medical malpractice claims pursuant to the NDAA prevents service members from filing claims in court; such claims are only permitted to be adjudicated administratively.[82]

Although it can be argued that the Secretary's exclusive jurisdiction over medical malpractice claims promotes military discipline and adherence to the chain of command to eliminate confusion, such hierarchy can be detrimental to uncovering or exposing the truth or negligence.[83] While the NDAA does not overrule the *Feres* Doctrine, the military discipline[84] rationale is a relevant factor in understanding the government's denial of redress to service members.[85] Since *Feres*, the Supreme Court has propelled the idea of military discipline as "the prevailing justification for the *Feres* Doctrine."[86] As such, it appears as though the *Feres* Doctrine has seeped into the NDAA, perpetuating the rationale of military discipline by giving the Secretary sole discretion.[87] While the chain

80. U.S. DEP'T OF VETERANS AFFAIRS, *Chain of Command & Authority*, www.va.gov/vetsinworkplace/docs/em_authority.asp [perma.cc/DB5L-ES6T] (last updated July 7, 2021). "The chain of command is the line of authority and responsibility along which orders are passed within a military unit and between different units." *Id*. "An individual's placement in the hierarchy determines his or her level of authority." *Id*. "In the military, it is considered bad form to challenge or question authority." *Id*. It is this structure that leads to the independent policing of issues and essentially forbids those lower in the chain of command from reporting things or speaking their mind.

81. National Defense Authorization Act for Fiscal Year 2020 § 731.

82. David P. Sheldon & Corey D. Bean, *Explainer: Can You Now Sue the Military for Medical Malpractice?*, NAVYTIMES (Dec. 26, 2019), www.navytimes.com/news/your-navy/2019/12/26/explainer-can-you-now-sue-the-military-for-medical-malpractice/ [perma.cc/7CVH-2NYY]. "Even for those who can file a claim, without the possibility of taking a case to federal court, the service member will have little recourse if he disagrees with the Defense Department's assessment of his case." *Id.* "Also, the Department of Defense has little institutional experience handling medical malpractice claims." *Id.*

83. Angela Halvorson, *Understanding the Military: The Institution, the Culture and the People*, SUBSTANCE ABUSE AND MENTAL HEALTH SERVICES ADMIN. 7-9 (2010), www.samhsa.gov/sites/default/files/military_white_paper_final.pdf [perma.cc/ZH48-B3ML].

84. Command Sgt. Maj. Shelton R. Williamson, *Standards and Discipline: An In-Depth Look at Where We Once Were and Where We Are Now*, ARMY U. PRESS (Nov. 10, 2017), www.armyupress.army.mil/Journals/NCO-Journal/Archives/2017/November/Standards-and-Discipline/ [perma.cc/K8CN-3PUY] (explaining that the military discipline is defined as "the state of order and obedience among personnel in a military organization and is characterized by the [service member's] prompt and willing responsiveness to orders and understanding compliance to regulation").

85. Zyznar, *supra* note 58, at 616.

86. *Id.*

87. National Defense Authorization Act for Fiscal Year 2020 § 731, 133 Stat. 1198, 1457-59 (2019). Subsection (a) in conjunction with subsection (f) of the NDAA grants the Secretary the power to decide, settle and pay claims filed by members of the uniformed services, in addition to allowing the Secretary to

of command fosters military discipline, providing such discretion solely within the confines of the military can lead to groupthink[88] and negatively impact a service member's chance of redress.

In the civilian world, a medical malpractice claim receives scrutiny from more than one individual from cradle to grave.[89] On the other hand, by concentrating the authority to the Secretary, "the chain of command can serve to suppress the uncovering of unethical behavior to the point of actually encouraging it."[90] In the civilian world, medical malpractice claims are brought by attorneys and adjudicated in court.[91] Limiting review and adjudication to the Secretary is contradictory to the representation and judicial review afforded to civilians.[92] Although the chain of command serves many positive functions in the day-to-day military, affording such authority and full discretion to the Secretary under the NDAA can prevent rightful compensation to service members.

2. Requirements for Claims Under the National Defense Authorization Act

Under subsection (b) of the NDA – Requirements for Claims – claims for medical malpractice by members of the armed forces can be "allowed, settled, and paid under subsection (a) only if" the following conditions are met:

(1) The claim is filed by the service member, or by an authorized person on behalf of the service member;

(2) The claim is for personal injury or death caused by medical malpractice by a Department of Defense health professional acting within the scope of employment;

(3) The medical malpractice took place in a covered military facility;

---

decide how to implement such measures. *Id.*

88. *Groupthink*, PSYCHOLOGY TODAY, www.psychologytoday.com/us/basics/groupthink [perma.cc/6T9V-BZHK] (last visited Aug. 29, 2021) ("Groupthink is a phenomenon that occurs when a group of well-intentioned people make irrational or non-optimal decisions spurred by the urge to conform or the belief that dissent is impossible.").

89. FindLaw Attorney Writers, *Stages of a Medical Malpractice Case*, THOMSON REUTERS (Feb. 8, 2017), www.corporate.findlaw.com/litigation-disputes/stages-of-a-medical-malpractice-case.html [perma.cc/UBE2-E3GM]. In a medical malpractice case in the civilian world, there are many stages: "consultation with an attorney, investigation, tribunal, discovery, settlement and trial." *Id.*

90. Charles Dominick, *Problems with the Textbook Chain of Command, And a Solution,* NLPA (May 23, 2018), www.certitrek.com/nlpa/blog/problems-textbook-chain-command-solution/ [perma.cc/HAH6-MSRJ] ("One of the reasons you should be concerned is that, in a chain of command, your subordinates' values appear to reflect *your* values whether they do or not.").

91. FindLaw Attorney Writers, *supra* note 89.

92. National Defense Authorization Act for Fiscal Year 2020 § 731; *see* FindLaw Attorney Writers, *supra* note 89.

(4) The claim is brought to the Department of Defense within two years after the claim arises;

(5) The claim cannot be settled and paid under any other law; and

(6) The claim is substantiated pursuant to the Secretary's discretion in subsection (f).[93]

Pursuant to 10 U.S.C. § 1073d – Military Medical Treatment Facilities – covered "military medical treatment facilities" under subsection (b) is defined as medical centers consisting of: "(A) Inpatient and outpatient tertiary care facilities that incorporate specialty and subspecialty care[;] (B) Graduate medical education programs[;] (C) Residency training programs[; and] (D) Level one or level two trauma care capabilities."[94] This also includes hospitals and ambulatory care centers where civilian health care facilities cannot meet the needs of service members and covered beneficiaries.[95]

---

93. National Defense Authorization Act for Fiscal Year 2020 § 731. Pursuant to subsection (f) – Regulations – the Act grants the Secretary the discretion to implement whatever regulations he deems appropriate or necessary. § 731, 133 Stat. at 1458. Such regulations are prescribed to include: (A) Procedures to "ensure the timely, efficient and effective" filing of such claims; and

> (B) Uniform standards consistent with generally accepted standards used … in adjudicating claims under [the Federal Tort Claims Act] to be applied to the evaluation, settlement, and payment of claims under this section without regard to the place of occurrence of the medical malpractice giving rise to the claim or the military department or service of the member of the uniformed services, and without regard to foreign law in the case of claims arising in foreign countries, including uniform standards to be applied to determinations with respect to – (i) whether an act or omission by a Department of Defense health care provider in the context of performing medical, dental, or related health care functions was negligent or wrongful, considering the specific facts and circumstances; (ii) whether the personal injury or death of the member was caused by a negligent or wrongful act or omission of a Department of Defense health care provider in the context of performing medical, dental or related health care functions, considering the specific facts and circumstances; (iii) requirements relating to proof of duty, breach of duty, and causation resulting in compensable injury or loss, subject to such exclusions as may be established by the Secretary of Defense; and (iv) calculation of damages; [and] (C) Such other matters as the Secretary considers appropriate."

Id. at 1458-59.

94. 10 U.S.C. § 1073d. Under § 1073d, hospitals "shall provide: (A) inpatient and outpatient health services to maintain medical readiness; and (B) such other programs and functions as the Secretary determines appropriate." *Id.* The hospitals under this title will include "limited specialty care that the Secretary determines – (A) is cost effective; or (B) is not available at civilian health care facilities in the area of the hospital." *Id.* Additionally, "[a]mbulatory care centers shall consist of outpatient care facilities with limited specialty care that the Secretary determines – (A) is cost effective; or (B) is not available at civilian health care facilities in the area of the ambulatory care center." *Id.*

95. *Id.*

Under subsection (b) of § 1073d, "covered military treatment facility" does not include those operated by the Secretary of Veterans Affairs, or civilians and contractors under the Department of Veterans Affairs.[96] While the NDAA provides recourse to service members in an area not previously afforded to them, denying relief to service members based on active, inactive, reserve, or veteran status perpetuates continued denial to those who have suffered incident to service. Additionally, as prescribed in subsection (a) of the NDAA, subsection (b) grants the Secretary overarching authority to define the regulations of medical malpractice claims under the NDAA.[97] Subsection (b)(6) essentially provides the claim be substantiated by non-existent regulations prescribed in subsection (f) of the NDAA.[98] The lack of prescribed regulations in the NDAA raises a vagueness issue.[99] The Supreme Court suggested in *Grayned v. City of Rockford*, that "if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them."[100] Such vagueness in the prescribed regulations of the NDAA would likely not hold in a civilian court.[101] While the NDAA is new and affords relief to service members in an unprecedented area, the military's lack of experience with such claims should not deprive service members of their due process to file such a claim in court.[102] In *Weiss v. United States*, "[t]he Supreme Court . . . recognized that the Due Process

96. Daniel Perrone, *The Feres Doctrine: Still Alive and well after the 2020 National Defense Authorization Act?*, JURIST (Mar. 14, 2020, 1:00 PM), www.jurist.org/commentary/2020/03/daniel-perrone-feres-doctrine-ndaa/ [perma.cc/9ZE5-HWW6]. The Act "either reflects an intention of the legislature to leave members of the uniformed services without recourse for harms suffered incident to their service … or demonstrates ignorance that 'VA health care facilities are available to active duty service members in emergency situations and upon referral by military treatment facilities[.]" *Id.*

97. National Defense Authorization Act for Fiscal Year 2020 § 731.

98. *Id.*

99. *Id.*

100. Grayned v. City of Rockford, 408 U.S. 104, 108 (1972). "It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined." *Id.* "Vague laws offend several important values." *Id.*

101. Philip A. Dynia, *Vagueness*, MIDDLE TENN. STATE U.: THE FIRST AMENDMENT ENCYCLOPEDIA (2009), www.mtsu.edu/first-amendment/article/1027/vagueness [perma.cc/6GEJ-3CEU].

102. *Grayned*, 408 U.S. 104. The Court in suggested the following for "why overly vague statutes are unconstitutional":

> First, due process requires that a law provide fair warning and provides a "persons of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly.' [And] [s]econd, the law must provide "explicit standards" to law enforcement officials, judges, and juries so as to avoid "arbitrary and discriminatory application."
>
> *Id.*

Clause applies to the military justice system."[103] Allowing the Secretary to handle all matters relating to medical malpractice and service members strips service members of the constitutional rights afforded to civilians.

3. Liability Under the National Defense Authorization Act

Pursuant to subsection (c) – Liability – "[t]he Department of Defense is liable for only the portion of compensable injury, loss, or damages attributable to the medical malpractice of a Department of Defense health care provider."[104] Additionally, it is not liable for the claimant's attorney's fees.[105] However, under subsection (g) of the NDAA, the Department of Defense limits fees payable to attorneys by the claimant to no more than 20% of any claim paid pursuant to the NDAA.[106]

Under the American Rule regarding allocation of attorneys' fees, the losing party does not pay the winning party's attorneys' fees absent a statutory authorization; each party pays his or her own fees.[107] The American Rule, like the Department of Defense's limit on attorneys' fees, is a deterrent to service members from filing claims: "The American Rule . . . makes it difficult or impossible to assert claims when the cost of litigation exceeds the probable recovery."[108] While the requirement of claims being adjudicated administratively under the NDAA prevents costly litigation, the regulations in subsection (f) are sparse and the sole discretion given to the Secretary brings about uncertainty of relief to service members; the benefit-cost ratio is a deterrence for service

---

103. *The Bill of Rights' Application in the Military Justice System*, CAAFLOG, www.caaflog.org/uploads/1/3/2/3/132385649/bill_of_rights_rev_3.pdf [perma.cc/RJW4-XJZ6] (last visited Aug. 31, 2021) (citing Weiss v. United States, 510 U.S. 163, 177 (1994)). "The due process test in the military context asks whether the 'factors militating in favor of' the challenged practice 'are so extraordinarily weighty as to overcome the balance struck by Congress.'" *Id.*

104. National Defense Authorization Act for Fiscal Year 2020, Pub. L. No. 116-92, § 731, 133 Stat. 1198, 1458 (2019).

105. *Id.*

106. § 731, 133 Stat. at 1459.

107. Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240, 247 (1975). "In the United States, the prevailing litigant is ordinarily not entitled to collect a reasonable attorneys' fee from the loser." *Id.* "At common law, costs were not allowed; but for centuries in England there has been statutory authorization to award costs, including attorneys' fees." *Id.* "Although the matter is in the discretion of the court, counsel fees are regularly allowed to the prevailing party." *Id.*

108. John Leubsdorf, *Does the American Rule Promote Access to Justice? Was that why it was Adopted?*, 67 DUKE. L.J. 257, 259 (2019). "The American Rule also provides less encouragement than the English Rule to assert claims almost certain to prevail, because the prospect of recovering damages minus litigation expenses is less enticing than that of recovering damages while having the defendant cover litigation expenses." *Id.* at 260.

members.[109]

4. Payment of Claims Under the National Defense Authorization Act

For the Determination and Payment of Claims under subsection (d), the Secretary may pay a claimant up to $100,000; any meritorious claim amount in excess of $100,000 must be reported to the Secretary of Treasury for payment.[110] In other words, a claim substantiated by the Secretary "under $100,000 will be paid directly to the service member or a surviving beneficiary by the Department of Defense," while the Treasury Department will review those claims in excess of $100,000.[111] Under subsection (d), service members are essentially limited to $100,000 in damages from the Secretary of Defense and anything beyond that amount, despite the amount of harm or damage done, will be subject to review.[112] While this does not mean service members will not be awarded more than $100,000, the initial amount is capped pending further review.[113] Although, in 2019, the average medical malpractice payment for civilians was $384,065.[114] As demonstrated, there is a gross difference in the relief afforded to civilians compared to service members.

5. Annual Report Under the National Defense Authorization Act

Additionally, the NDAA requires the Secretary to submit an Annual Report:

> to the Committees on Armed Services of the Senate and the House of

---

109. National Defense Authorization Act for Fiscal Year 2020 § 731, 133 Stat. at 1458.

110. *Id.* Additionally pursuant to subsection (d), "[e]xcept as provided in paragraph (1), no claim may be paid under this section unless the amount tendered is accepted by the claimant in full satisfaction." *Id.*

111. Sheldon & Bean, *supra* note 82.

112. National Defense Authorization Act for Fiscal Year 2020 § 731, 133 Stat. at 1458.

113. *Id.*

114. *2019 Medical Malpractice Payout Report*, LEVERAGERX, www.leveragerx.com/malpractice-insurance/2019-medical-malpractice-report/ [perma.cc/G4B9-4NSY] (last visited Aug. 16, 2021). The average payment amount for quadriplegic, brain damage, or lifelong care: $961,185. *Id.* The average payment amount for major permanent injury: $610,393. *Id.* The average payment amount for significant permanent injury: $450,356. *Id.* The average payment amount for death: $386,317. *Id.* The average payment amount for minor permanent injury: $242,524. *Id.* The average payment amount for major temporary injury: $227,063. *Id.* The average payment amount for emotional injury only: $128,821. *Id.* The average payment amount for minor temporary injury: $87,252. *Id.* The average payment amount for insignificant injury: $40,030. *Id.*

> Representatives a report – (1) indicating the number of claims processed under this section; (2) indicating the resolution of each such claim; and (3) describing any other information that may enhance the effectiveness of the claims process under this section.[115]

The Annual Report will help improve the system for members of the armed forces bringing medical malpractice claims and hopefully bring to light the limitations addressed above.[116] Though the NDAA provides for recognition of possible needed changes, the Act itself does not provide the much deserved relief to service members. The United States reveres service members – thanking them for their service, honoring them at sporting events, providing discounts, displaying American flags in their honor – yet the United States does not provide the same level of redress available to civilians. While such a report will address some limitations of the current system, there are many shortcomings in the NDAA's attempt at providing redress to service members.

B. Civilians

Redress available to civilians traditionally falls under the authority of the individual states.[117] With respect to medical malpractice claims in the civilian world, claims can be brought in a court of law, a right not afforded service members.[118] All states in the United States provide civilians the opportunity to file and litigate claims in court.[119] Additionally, "there is usually a system of appeals courts, with final judicial authority resting in the state supreme court."[120] Civilians are given their day in court while service members are confined to the administrative charge of an office pursuant to the NDAA.[121] While the filing of medical malpractice claims in the military requires a bureaucratic process, service members should not be stripped of the rights afforded to civilians simply because the government is their employer.

In the United States, a patient alleging medical malpractice must generally prove four elements or legal requirements to make a successful claim of medical malpractice:

---

115. National Defense Authorization Act for Fiscal Year 2020 § 731, 133 Stat. at 1459.

116. *Id.*

117. PETER P. BUDETTI & TERESA M. WATERS, THE HENRY J. KAISER FAMILY FOUNDATION, MEDICAL MALPRACTICE LAW IN THE UNITED STATES 1 (May 2005), www.kff.org/wp-content/uploads/2013/01/medical-malpractice-law-in-the-united-states-report.pdf.

118. *See* National Defense Authorization Act for Fiscal Year 2020 § 731 (stating that it is the Secretary of Defense – not a court of law – that "may allow, settle, and pay a claim against the United States").

119. B. Sonny Bal, *An Introduction to Medical Malpractice in the United States*, 467 CLINICAL ORTHOPAEDICS AND RELATED RSCH. 339, 341 (2009).

120. *Id.*

121. Sheldon & Bean, *supra* note 82.

> (1) the existence of a legal duty on the part of the doctor to provide care or treatment to the patient;(2) a breach of this duty by a failure of the treating doctor to adhere to the standards of the profession; (3) a causal relationship between such breach of duty and injury to the patient; and (4) the existence of damages that flow from the injury such that the legal system can provide redress.[122]

Civilian medical malpractice claims require a showing of duty, breach, causation, and damages, while the NDAA prescribes that the claim be "for personal injury or death caused by the negligent or wrongful act or omission of a Department of Defense health care provider."[123] The legal requirements for civilian medical malpractice claims are concise and straightforward, avoiding the vagueness issues presented in the NDAA.

The damages afforded to civilians who experience medical malpractice "take into account both actual economic loss such as lost income and cost of future medical care, as well as noneconomic losses, such as pain and suffering."[124] For personal injury, civilians can recover for the following damages: compensation for the cost of medical bills arising from all injuries caused by the defendant; lost wages; pain and suffering; emotional distress; wrongful death; loss of companionship/loss of consortium; and occasionally punitive damages.[125] While there are damages caps in some states, most states "place a 'cap' on non-economic damages only, which includes compensation for things like 'pain and suffering.'"[126] Comparatively speaking, civilians are afforded more forms of redress that the

---

122. Bal, *supra* note 119, at 342.

123. National Defense Authorization Act for Fiscal Year 2020 § 731.

124. Bal, *supra* note 119, at 340. "To win monetary compensation for injury related to medical negligence, a patient needs to prove that substandard medical care resulted in an injury." *Id.* "Once the injured person has established that negligence led to injury, the court calculates the monetary damages that will be paid in compensation." *Id.*

125. David Goguen, *Damages in Your Personal Injury Case*, ALLLAW, www.alllaw.com/articles/nolo/personal-injury/damages.html [perma.cc/ZMN7-RJLA] (last visited Aug. 16, 2021) [hereafter Goguen I]. "The medical bills/medical treatment component of damages will include the cost of care already received, and the cost of care that will be necessary in the future." *Id.* "Compensation for lost wages or lost income … includes payment for any work that a plaintiff had to miss because of the injury or to receive treatment for the injury." *Id.* "The other main component of damages in a personal injury case is 'non-economic' damages, which includes compensation for the injured person's 'pain and suffering.'" *Id.* Lastly, loss of companionship/loss of consortium "are damages suffered by the injured person's spouse, partner or close family member, in terms of their relationship with the injured person." *Id.*

126. David Goguen, *State-by State Medical Malpractice Damages Caps*, NOLO, www.nolo.com/legal-encyclopedia/state-state-medical-malpractice-damages-caps.html [perma.cc/9CLH-48BE] (last visited Aug. 16, 2021) [hereafter Goguen II]. "[A] few state legislatures have passed an umbrella cap on all forms of damages in medical malpractice cases, including compensation for the costs of long-term disability." *Id.* Currently, 35 states have some sort of statutory cap on damages. *Id.* If a state is not listed, "that means there is currently no statutory cap on damages." *Id.*

government fails to offer or provide to service members in the NDAA.[127]

IV. PROPOSAL

With respect to relief for medical malpractice, service members should be offered equal forms of redress like civilians for personal injury or death caused by negligence. When the NDAA was signed into law, it provided relief denied to service members since *Feres* in 1950.[128] This Act, however, fails to provide fair and just relief to service members for medical malpractice claims. The disproportionate redress for service members places undue hardship on those serving their country from rightful compensation. In a country that reveres service members, denying them rights and privileges offered to civilians fosters an unjust system under the law. There are three potential solutions to combat the shortcomings of the NDAA: (A) addressing due process; (B) addressing the "prescribed" regulations; and (C) addressing payment of claims.

A. Addressing Due Process

The first proposed solution to the NDAA is addressing due process. At present, subsection (a) gives the Secretary the authority to prescribe what the Secretary considers appropriate under subsection (f).[129] The NDAA therefore prevents the adjudication of medical malpractice claims in court.[130] Such denial violates service members' constitutional due process rights. "Throughout American history, the military justice system has been criticized as indifferent to the constitutional rights of members of the armed forces."[131] The NDAA prevents service members from having their day in court, whether it be in a federal court or a court-martial.[132]

---

127. *Compare* Goguen I, *supra* note 125 (exploring civil lawsuits and the "different types of damages that could come into play in a personal injury case"), *with* National Defense Authorization Act for Fiscal Year 2020 § 731 (limiting settlements for personal injury and death to criteria prescribed by the Secretary of Defense).

128. *Compare Feres*, 340 U.S. at 146 ("We conclude that the Government is not liable under the Federal Tort Claims Act for injuries to servicemen where the injuries arise out of or are in the course of activity incident to service") *with* National Defense Authorization Act for Fiscal Year 2020 § 731 (providing "Authorization of Claims by Members of the Uniformed Services Against the United States for Personal Injury or Death Caused by Medical Malpractice.").

129. National Defense Authorization Act for Fiscal Year 2020 § 731, 133 Stat. at 1457-59.

130. Sheldon & Bean, *supra* note 82 ("Service members will not be permitted to sue in federal court.").

131. Andrew M. Ferris, *Military Justice: Removing the Probability of Unfairness*, 63 U. CIN. L. REV. 439, 439 (1994).

132. Jim Absher, *What is a Military Court Martial?*, MILITARY.COM (July 30, 2021), www.military.com/benefits/military-legal-matters/courts-martial-

In the military justice system, it does not appear that medical malpractice claims have a place. Military medical malpractice claims would potentially fall under Special Court-Martial – "characterized as a misdemeanor court" – or General Court-Martial – "characterized as a felony court" – however, neither seem fitting for the claim.[133] While some may argue military related issues should be handled internally, within the government or Department of Defense, the current system strips service members of their constitutional rights and fails to provide redress for medical malpractice in the military justice system. With respect to ensuring fair and equal redress, "[n]o persons should be more entitled to protection of their constitutional rights than the servicemen engaged in protecting the sovereignty of the United States."[134]

To address due process, the NDAA – rather than provide the Secretary full discretion to manage and settle medical malpractice claims for service members – should allow service members to bring forth their claims in court, be that federal or court-martial. In the military, while only a select group of Judge Advocates[135] serve as legal counsel for individual clients,[136] entities such as Area Defense

explained.html [perma.cc/DDU9-3MAF]. "[A] court martial is a legal proceeding for military members that is similar to a civilian court trial." *Id.* There are three different types of courts-martial: (1) summary court-martial; special court-martial; and (3) general court-martial. *Id.* A summary court-martial is for less serious offenses that involve enlisted members of the uniform services. *Id.* Summary court-martials preside in front of "one commissioned officer who serves as judge and jury." *Id.* A special court-martial handles misdemeanor-type offenses. *Id.* Such court-martial subjects enlisted members, officers, and the like to the UCMJ. *Id.* A special-court martial presides in front "of a panel of not less than three members and a military judge." *Id.* The accused also has the discretion of choosing to preside in front of a military judge alone. *Id.* A general-court martial is for more serious, felony-type offenses. *Id.* "A general court-martial consists of a panel of not less than five members and a military judge, or an accused may be tried by military judge alone on their request." *Id.*

133. *Id.*

134. SUBCOMM. ON CONST. RTS. OF THE S. COMM. ON THE JUDICIARY, 88TH CONG., CONST. RTS. OF MILITARY PERSONNEL (Comm. Print 1963). "[T]he Subcommittee on Constitutional Rights has been concerned since its formation with the rights of military personnel and has made several studies in that connection." *Id.* "The subcommittee has followed closely the perceptible trend in the Federal courts toward greater judicial protection for the American serviceman." *Id.*

135. Stephen Ruiz, *What It Takes to Become a Member of the Military JAG Corps*, MILITARY.COM (June 22, 2021), www.military.com/join-military/what-it-takes-become-member-of-military-jag-corps.html [perma.cc/U7RH-KKPY] (explaining that "Judge Advocate" is the colloquial term for military attorneys in the Judge Advocate General's Corp).

136. *See* Staff Sergeant Luis Mario Hans, *How the Special Victims' Counsel Program Serves Joint Base San Antonio*, JOINT BASE SAN ANTONIO (June 4, 2018), www.jbsa.mil/News/News/Article/1540006/how-the-special-victims-counsel-program-serves-joint-base-san-antonio/ [perma.cc/R8PM-SJGY] (explaining that "Judge Advocate General attorneys . . . provide legal assistance to individual clients.").

Counsel[137] ("ADC") and Special Victims' Counsel[138] ("SVC") exist to provide for such representation. The system of representation for individual clients in the military already exists under the ADC and SVC; redress for medical malpractice for service members can be sought through representation by ADC or a similarly run entity specialized in medical malpractice claims.

"Pursuant to Article I of the Constitution, the United States Supreme Court has repeatedly held that Congress has the power to provide for the trial and punishment of military . . . offenses."[139] At present, the same individual or group of individuals in the military manage medical malpractice claims internally. Such independent policing in the military continues to deprive service members of their right to a trial. "The military justice system is composed of three tiers of courts established under Article I of the United States Constitution [:]" (1) the United States Court of Military Appeals; (2) the Judge Advocates General; and (3) military trial judges.[140] The infrastructure for hearing claims is already in place, however, it is not being used for medical malpractice claims in the military.

Service members should not be deprived of their due process rights for the benefit of the government to handle matters

---

137. *Area Defense Counsel*, Scott Air Force Base, www.scott.af.mil/Units/Area-Defense-Counsel/ [perma.cc/S2J8-QLKS] (last visited Aug. 29, 2021) ("The Area Defense Counsel (ADC) is an experienced judge advocate who provides legal defense services to active duty Service members in Uniform Code of Military Justice proceedings and adverse administrative actions.").

138. *See* United States Air Force Special Victims' Counsel Program, www.afjag.af.mil/Portals/77/documents/SVC/CLSV_Handout_2018.pdf?ver=2018-05-16-091142-727 [perma.cc/T56C-NBHX] (last visited Aug. 29, 2021) (explaining that Special Victims' Counsel "represent victims [of sexual assault] at every step of the military justice process to enforce their rights").

139. Ferris, *supra* note 131, at 443. "The power of a commissioned officer in the United States Armed Forces to convene a court-martial is derived from Article I of the Constitution, which specifies the powers granted to Congress." *Id.* at 442. "Clause 14 authorizes Congress 'to make Rules for the Government and Regulation of the land and naval Forces.'" *Id.* at 442-43 (quoting U.S. CONST. art. I, § 8, cl. 14). "In addition, Clause 18 empowers Congress to 'make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers.'" *Id.* at 443 (quoting U.S. CONST. art. I, § 8, cl. 18).

140. *Id.* at 452-55. The United States Court of Military Appeals "reviews cases from the Courts of Military Review. There are four Courts of Military Review, one each for the Army, Navy-Marine Corps, Coast Guard, and Air Force." *Id.* at 453. "The Courts of Military Review consider questions of both law and fact." *Id.* "Indirectly, through inferior judge advocates, the Judge Advocates General of each service oversee the selection, appointment, and evaluation of military trial judges, who are chosen from a pool of eligible commissioned officers in accordance with criteria established by Congress." *Id.* at 454. Lastly, "[m]ilitary trial judges are the equivalent of United States District Court Judges and Magistrate Judges who preside over Article III courts." *Id.* at 455. "The military trial judge has the power to rule on all questions of law raised during the court-martial and to instruct the members of the court-martial panel on questions of law and procedure." *Id.*

administratively. While the current system makes it easier for the government to hear and settle claims, it is not beneficial nor desirable for service members. It strips service members of rights afforded to civilians. Joining the military should not come at the cost of sacrificing one's life *and* constitutional rights.

B. Addressing the "Prescribed" Regulations

In addition to addressing due process, the second proposed solution is to modify the prescribed regulations of the NDAA so that there are specific regulations laid out. As subsection (f) of the NDAA currently reads, there are no prescribed regulations, only general topic areas that the Secretary has the discretion to implement or modify.[141] This again raises a due process issue of vagueness. The "void for vagueness doctrine addresses at least two connected but discrete due process concerns: first, that regulated parties should know what is required of them…; second, precision and guidance are necessary so that those enforcing the law do not act in an arbitrary or discriminatory way."[142] The NDAA does not prescribe specific procedures or standards, and the Act grants overarching discretion to the Secretary which could lead the Secretary to act in an arbitrary or discriminatory way.[143]

As the Secretary is the sole individual in charge of enforcing the NDAA,[144] the lack of oversight or involvement of the military justice system in filing and settling military medical malpractice claims appears antithesis to fairness and justice. To address the issue of the prescribed regulations, the NDAA, like any other regulation or statute, should prescribe specific regulations for implementation, such as how claims will be processed, the procedure for payment of claims, and the extent to which the Secretary will be using the FTCA to settle claims. While offering redress to service members for medical malpractice is a new policy, service members should know their rights under the NDAA. If laws can be void for vagueness in the civilian system because of the due process concerns listed above, then similarly written laws should not stand in matters relating to service members. Service members are United States citizens and are entitled to the same

141. National Defense Authorization Act for Fiscal Year 2020, Pub. L. No. 116-92, § 731, 133 Stat. 1198, 1458 (2019).

142. FCC v. Fox TV Stations, Inc., 567 U.S. 239, 253 (2012). "The void-for-vagueness doctrine is rooted in the Due Process Clause of the Fifth and Fourteenth Amendments." Little v. Dominion Transmission, Inc., 138 F. Supp. 3d 699, 704 (W.D. Va. 2015). "The Due Process Clause thus 'requires the invalidation' of a statute that 'fails to provide a person of ordinary intelligence fair notice of what is prohibited, or is so standardless that it authorizes or encourages seriously discriminatory enforcement.'" *Id.* at 705 (quoting United States v. Williams, 553 U.S. 285, 304 (2008)).

143. National Defense Authorization Act for Fiscal Year 2020 § 731.

144. *Id.*

constitutional rights and protections as civilians. Our military defends the rights and freedoms afforded to United States citizens, yet under this Act, service members are deprived of constitutional rights that they demand other countries give to their citizens.

C. Addressing Payment of Claims

A final proposed solution to the issue is addressing payment of claims under the NDAA. Under subsection (d) of the NDAA, the Secretary has the discretion to decide whether a claim is meritorious.[145] If a claim is determined to be meritorious, service members are limited to $100,000 in damages, and any excess amount will be sent to the Treasury for review.[146] While this may be standard practice in the government relating to principles of sovereign immunity, limiting service members' opportunities and abilities for redress widens the divide between justice offered to civilians and justice offered to service members.

To address the issue of payment of claims under the NDAA, the federal government should raise the amount the Secretary is permitted to pay the claimant to make the amount more comparable to the average medical malpractice payment for civilians. As called out above, the average medical malpractice payment for U.S. citizens in 2019 was $348,065.[147] The capped amount for service members under the NDAA demonstrates further disparity in the redress afforded to civilians versus members of the Armed Forces. The cap placed on recoverable damages under the NDAA is not equal to nor comparable to the relief afforded to civilians.

V. CONCLUSION

For too long, the *Feres* Doctrine has negatively impacted the military's trust in the justice system after years of their government denying redress. The NDAA attempts to make reparation to service members and/or their families. Although the NDAA provides service members monetary damage relief, it fails to provide service members the same constitutional rights and privileges afforded to their civilian counterparts. In a country founded on the tenet that

145. § 731, 133 Stat. at 1458. Subsection (d)(1) states:

> If the Secretary of Defense determines, pursuant to regulations prescribed by the Secretary under subsection (f), that a claim under this section in excess of $100,000 is meritorious, and the claim is otherwise payable under this section, the Secretary may pay the claimant $100,000 and report any meritorious amount in excess of $100,000 to the Secretary of the Treasury for payment under section 1304 of title 31.

Id.

146. *Id.*

147. *2019 Medical Malpractice Payout Report*, *supra* note 114.

"all men are created equal,"[148] the NDAA creates an unfair and unjust division between civilians and those who serve their country. To mitigate the divide in redress for civilians and service members, the government must address the NDAA's shortcomings of depriving service members of their constitutional rights and opportunity for justice and relief.

The NDAA reduces the inequities of the *Feres* Doctrine – "'one of the most ill-considered and harmful doctrines ever created by the Supreme Court'" – but leaves our service members exposed to the deleterious effects of medical malpractice.[149] While the military is no longer "shielded from responsibility for poor outcomes of care[,]" our service members continue to accrue the pain of being denied due process and adequate relief.[150] Denial of redress for injury incident to service equates to a lack of thanks and appreciation because of service. To be denied justice or redress incident to service compounds the sacrifice of our revered service members.

148. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

149. Steve Sternberg, *Military Can No Longer Avoid Medical Malpractice Claims*, U.S. NEWS (Dec. 19, 2019), www.usnews.com/news/health-news/articles/2019-12-19/military-can-no-longer-avoid-medical-malpractice-claims [perma.cc/3AQH-TZNW].

150. *Id.*