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MED-MAL MATTERS

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rior to 1946, a person injured by the negligence of a federal employee could not recover against the United States government because of the doctrine of sovereign immunity. To ameliorate the harsh effects of this doctrine — and to end the many requests for private bills of relief — Congress passed the Federal Tort Claims Act (FTCA) in 1946. The FTCA is a limited waiver of sovereign immunity and, subject to a number of exceptions, makes the U.S. liable for injuries or death caused by the negligence of federal employees while acting within the scope and course of their employment.

The FTCA made the U.S. liable for personal injury or death under circumstances where the U.S., if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred. Thus, the FTCA made the country liable for the torts of its employees to the same extent a private employer would be liable under state law for the torts of its employees.

In 1950, however, the U.S. Supreme Court read into the FTCA an exclusion that Congress did not, explicitly or implicitly, include in the Act. In *Feres v. United States*, the court held that active duty military service members were barred from suing the U.S. for injuries received “incident to service.” The court has offered a number of different rationales for shutting the courthouse doors to military personnel, but the most often cited relates to 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.”

Few would argue that service members injured in combat or even in training should be able to sue the U.S. for the negligence of their commander or fellow soldiers. But in many opinions over the years, the high court has expanded the exception to essentially swallow the rule. Indeed, the modern *Feres* doctrine goes so far as to bar a service member from suing the government for any injury caused by the medical malpractice of a federal employee. This is akin to barring a nurse from suing a hospital for injuries received during non-work-related care at that hospital merely because she is employed by the hospital.



ON THE PATH

Active-duty members start to make tort claims

By **THOMAS A. DEMETRIO** and **KENNETH T. LUMB**

With the passage of the National Defense Authorization Act (NDAA) for fiscal year 2020, however, Congress took an incomplete but significant step to balance the scales for the women and men serving in the armed forces. The NDAA allows the Secretary of Defense to settle and pay claims for injuries to active duty members of the uniformed services caused by the medical negligence of a Department of Defense (DOD) health care provider.

The most immediate impetus behind the Act was the dogged lobbying of a Sgt. 1st Class Richard Stayskal — an Army green beret with 17 years of service. In 2017, he went to Womack Army Medical Center at Fort Bragg complaining of shortness of breath. Though a CT scan showed a mass in his lung and the radiologist apparently recommended a biopsy, SFC Stayskal was told he had pneumonia and sent home. When he was eventually able to see a civilian pulmonologist, SFC Stayskal was diagnosed with stage IV lung cancer with metastases to multiple sites. The portion of the NDAA which allows a claim under these circumstances is called the SFC Richard Stayskal Military Medical Accountability Act, where SFC Stayskal filed the first claim.

The Act is not perfect, however. It did not repeal *Feres*, but rather amended the Military Claims Act (MCA) to include a claims process for active duty members injured by medical negligence at covered military treatment facilities. The MCA is like the FTCA but covers torts committed overseas and does not allow any judicial recourse. It contains an administrative claim process with only limited rights to appeal to the Secretary of Defense. Active duty members of the armed forces are thus still barred from filing suit and still barred from any judicial oversight over specific claim determinations.

Don't we owe them more? CL

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