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FEATURE

Friendly Fire: New Bill Aims to Fix 69-Year Bar to Medical Malpractice Lawsuits by Military

By Brian K. Findley

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Rebekah Daniel was 33 years old when she delivered her first child, Victoria. Victoria was born in the same naval hospital in Washington where Rebekah worked as a labor and delivery nurse. Rebekah was active duty military in the most technical sense of the term—she worked for a

government hospital, providing care to servicemembers and their families. Her rank was lieutenant. But the Washington naval hospital was a far cry from any combat zone.

The year before, when Rebekah and her husband, Walter, learned they were pregnant, Rebekah made plans to leave military service. Rebekah put in for family leave and scheduled her resignation so that she would not have to return to her post after Victoria was born.

Rebekah's pregnancy was classified as "low risk" by her naval doctors. Her prenatal care was routine. But within hours of Victoria's birth, Rebekah was dead on a hospital bed, having bled out internally from postpartum hemorrhaging.

Walter wanted answers. When the hospital provided none—"There was no timeline, no records of what steps were taken," he told the *Seattle Times*—Walter took legal action to find out what went wrong. Because the naval hospital was under the purview of the U.S. government, Walter's only recourse was to file an administrative claim under the Federal Tort Claims Act, 28 U.S.C. § 1346 et seq. (FTCA). When the claim was denied, Walter filed suit in federal court, as the FTCA requires.

But Walter would not get his answers. The government moved to dismiss Walter's lawsuit before discovery commenced, and the federal judge granted the motion. Walter's medical malpractice and wrongful death lawsuit was over, essentially before it began.

The reason for the dismissal: Active duty servicemembers cannot sue the U.S. government for injuries related to military service. Neither can their families sue for injuries to the servicemember. The *Feres* doctrine, as it is known from the U.S. Supreme Court case that established it, has stopped such lawsuits in their tracks for nearly 70 years. *See Feres v. United States*, 340 U.S. 135 (1950).

The Right to Question

The logic underlying the *Feres* doctrine was an intent to protect the government from lawsuits for injuries to active duty military, many of whom have volunteered for extremely dangerous service on foreign battlefields. The effect has been broader, barring claims by servicemembers for all types of negligence, including medical malpractice here at home.

For civilian Americans, civil lawsuits for medical malpractice are their way to attain compensation when a health care provider misdiagnoses them, makes a surgical mistake, or commits another

error that has life-changing consequences. Given the stakes of health and life, the financial consequences of medical malpractice can be severe: lost income, staggering medical bills, or an inability to care for one's self—not to mention the pain and suffering that accompanies these injuries.

But as Rebekah Daniel's story illustrates, the ability to sue is about more than the pursuit of money damages. It is also about the right to *question* those in power, to get answers, to hold accountable those responsible for harm.

Nearly every other American has the power to use the courts to seek truth and compensation from our government when those in its employ make medical mistakes. This includes civilians, federal employees, ex-cons, and even our prisoners. But not our active duty military. Even a servicemember's civilian spouse, if she or he is the victim of malpractice at the same military hospital, has a right to sue, while the servicemember does not.

A New Bill

Proposed legislation that is now making its way through Congress aims to change all of this. On April 30, Congresswoman Jackie Speier (D–CA) introduced the Sergeant First Class Richard Stayskal Military Medical Accountability Act of 2019 (H.R. 2422) in the House of Representatives. The legislation would carve out an exception to the *Feres* doctrine to allow servicemembers and their families the ability to sue government health care providers for injuries to active duty military personnel. Lawsuits for medical errors in areas of armed conflict would remain barred.

"The *Feres* doctrine is a travesty," says Rep. Speier, chair of the House Armed Services Committee. Co-sponsor of the bill, Congressman Ted Lieu (D–CA), adds, "The bottom line is this: we have asked our men and women in uniform to sacrifice more than most than imagine. The last thing we should do is deny them their day in court." Press Release, *Rep. Speier Introduces Bipartisan Bill to Restore Military Servicemembers' Rights to Sue for Medical Malpractice*, Congresswoman Jackie Speier, Apr. 30, 2019.

Army Green Beret Sfc. Richard Stayskal, the bill's namesake, testified to Congress about his experience of being misdiagnosed by government doctors, which gave his cancer time to grow to a terminal stage. "My children are the true victims. They now will grow up without a father. Someone that will teach them how to drive, walk them down the aisle when they get married. They seek counseling and special treatment at school. One of the biggest things they try to

understand is how this happened." James Laporta, *Dying of Cancer, a Green Beret Delivers an Emotional Statement to Congress on Medical Malpractice in the Military*, Newsweek, May 2, 2019, *available at* www.newsweek.com/special-forces-soldier-feres-doctrine-congress-1412119.

But like Walter Daniel, under *Feres*, neither Stayskal nor his children will find their answers through the courts.

A Different View

In denying Walter Daniel's appeal, the Ninth Circuit noted, "[Rebekah] Daniel served honorably and well, ironically professionally trained to render the same type of care that led to her death. If 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." *Daniel v. United States*, No. 16-35203 (9th Cir. 2018), at 8.

Accepting that invitation, Walter asked the Supreme Court to take up Rebekah's case, and reconsider *Feres*, via a *writ of certiorari*. The government's opposition brief cited budget and morale concerns, in addition to simple *stare decisis*, as reasons to leave *Feres* undisturbed. Servicemembers are already entitled to death and disability benefits, the government argued, and the military has undertaken a vast expansion of its health care system in the years since *Feres*. Opening up malpractice liability to servicemembers would squeeze funds the government is counting on to provide these benefits and services. They could be curtailed, or stopped.

Moreover, the government argued that allowing non-combat military greater rights to sue than those in combat would create an inequality and dip in morale for those called upon to serve in battle.

On May 20, 2019, the Supreme Court sided with the government. Justices Ginsberg and Thomas disagreed with the Court's denial of Walter's writ, the latter writing in his dissent: "[D]enial of relief to military personnel. . . will continue to ripple through our jurisprudence as long as the Court refuses to reconsider *Feres*."

With the Supreme Court out of play, focus has returned to Rep. Speier's bill, still winding its way through committee. Asked before the decision about Walter Daniel's case, she told *Newsweek*, "This should not be handled case by case and arguably the Supreme Court could fix the horrible decision making that went on 69 years ago, but short of that, Congress just has to act, roll up our sleeves and create fair equity." Laporta, Newsweek, *supra*.

A vote on the bill is planned for later this year.

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