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MEMORANDUM IN SUPPORT OF LEGISLATION TO ALLOW CIVIL CLAIMS BY SEXUAL ASSAULT VICTIMS IN THE MILITARY

We urge support for a bill to circumvent the Feres Doctrine for active duty service members who are victims of sexual assault

Introduction

Sexual assault in the military is a pervasive and lingering problem, which the Department of Defense and Congress have tried to remedy. In remedying this problem, one facet that has been overlooked is the fact that survivors are precluded from suing their assailant and holding their perpetrator accountable, unlike any other sexual assault survivor. That is due to a 1950 Supreme court decision, *Feres v. United States*, which interpreted the Federal Tort Claims Act to bar all claims against the government by military members that “arise out of or are in the course of activity incident to service.”¹

Many believe this case was wrongly decided, including conservative justices such as the late Justice Antonin Scalia who wrote that “*Feres* was wrongly decided” and “deserves the ‘widespread, almost universal criticism’ it has received.”² Unless, *Feres* is overturned, which is unlikely, Congress has to fix this.

There is some recent precedent for Congress limiting *Feres*. In 2019, Congress passed the Sfc. Richard Stayskal Military Medical Accountability Act, which allows claims for medical malpractice for servicemembers harmed in military hospitals.³ We urge Congress to provide similar rights to sexual assault survivors.

Sexual Assault in the Military

According to the Department of Defense’s 2019 report, sexual assaults have risen 3% from the 2018 U.S. Department of Defense (“DOD”) report, recording 20,500 service members reported being sexually assaulted or raped and 25% of all active-duty women experiencing some form of

¹ *Feres v. U.S.*, 340 U.S. 135 (1950)

² *United States v. Johnson*, 481 U.S. 681, 700 (1987)(Scalia dissenting)

³ “Richard Stayskal Feres Doctrine Bill Included in Final Version of NDAA” <https://hudson.house.gov/in-the-news/richard-stayskal-feres-doctrine-bill-included-in-final-version-of-ndaa#:~:text=%E2%80%9CA%20the%20NDAA%20does%20not,that%20was%20the%20result%20of>

sexual assault.⁴ In response to the high numbers of reported sexual assaults, the DOD created the Prevention Plan of Action, which is a comprehensive approach to reducing and stopping sexual assault. The DOD has also introduced a new program called CATCH a Serial Offender which gives people making a Restricted Report an opportunity to and anonymously disclose suspect information to help the DOD identify serial offenders.⁵

The Biden Administration has vowed to address this issue, which has included a three-month review by an independent commission who would recommend “major shifts” in the handling of sexual assault and also review the proposal that would give specialized military prosecutors outside the chain of command authority to refer felony-type crimes to courts-martial, which include sex crimes.⁶ This suggestion may help with reporting sexual assaults. As former U.S. Senator Martha McSally (R-Ariz.) stated, when she was raped during her service in the Air Force, she did not report her assault because “she didn’t trust the system” and felt compelled to share her story after witnessing the military’s “wholly inadequate” responses to sexual assault reports.⁷

However, no amount of study, or changes within the military, or even criminal prosecution, is enough. Survivors need compensation and the right to sue perpetrators directly.

What is the Feres Doctrine

In the 1950 case *Feres v. United States*, the Supreme Court interpreted the “combat exception” to the Federal Torts Claims Act beyond anything contemplated by Congress at the time. It barred all claims against the government brought by military members that “arise out of or are in the course of activity incident to service,” whether arising during combat or not. This 70-year-old decision has left active military members vulnerable to injuries with no legal recourse or financial compensation for harms sustained.

This doctrine has had a severe impact on sexual assault victims because military members are aware that they cannot be sued. As described by Dr. Dwight Stirling, the CEO at Center for Law and Military Policy, has said, “it [*Feres*] gives a person whose potentially go[ing] to be a perpetrator a sense of being above the law, being able to function with impunity.”⁸ Victims have expressed feelings of distrust towards the military system because of their inability to file claims because of *Feres*. “It’s “impossible to get a fair investigation when you’re investigating yourself

⁴ “Department of Defense Annual Report on Sexual Assault in the Military”

<https://media.defense.gov/2020/Apr/30/2002291660/-1/-1/1/1 DEPARTMENT OF DEFENSE FISCAL YEAR 2019 ANNUAL REPORT ON SEXUAL ASSAULT IN THE MILITARY.PDF>

⁵ “Department of Defense Releases Fiscal Year 2019 Annual Report on Sexual Assault in the Military”
<https://www.defense.gov/Newsroom/Releases/Release/Article/2170913/departments-of-defense-releases-fiscal-year-2019-annual-report-on-sexual-assault/>

⁶ “Pentagon Leaders have opposed plans overhauling the military system for trying sexual assault for years. Has the time come for change?” https://www.washingtonpost.com/national-security/sexual-assault-military-reform-pentagon-resistance/2021/04/10/e5a98a92-96f7-11eb-8e42-3906c09073f9_story.html

⁷ “Sen. Martha McSally says She was Raped by a Senior Officer While in Air Force”
<https://abcnews.go.com/Politics/sen-martha-mcsally-raped-senior-officer-air-force/story?id=61513137>

⁸ Army officer says she was raped, but Supreme Court Ruling Blocks her from Justice
<https://abcnews.go.com/US/army-lieutenant-raped-supreme-court-ruling-blocks-justice/story?id=67473953>

[the military] because it is a family.”⁹ Dr. Stirling says that little will change until people can be held accountable. He contends that the programs the DOD has implemented will never work until a person who is a survivor, the victim, can file a claim directly, which requires repealing *Feres* or making an exception for sexual assault survivors.¹⁰

What We Support

We support Congress partially repealing *Feres* by amending the Federal Tort Claims Act combat exception to allow claims by sexual assault survivors. Legislation could include a pathway for survivors to file claims and allow investigations to be overseen by an independent third party. This could be done by amending the National Defense Authorization Act, analogous to the Medical Accountability Act, which allows servicemembers to file and receive compensation if they were subjected to “negligent or wrongful” medical treatment at a military facility. The same could be done for sexual assault victims.¹¹

What Opponents Say

Supporters of *Feres* have said that the doctrine relieves the government of tort claims while maintaining military command relationships and preserving disciplinary relationships. Opponents of this type of legislation believe that in order to preserve the chain of command and inter-disciplinary relationships, incidents that happen within the military, should stay within the military.¹² Other arguments may be that the DOD has already financed and introduced programs to help reduce sexual assaults in the military. This legislation would just add more costs to the DOD and to taxpayers without any concrete evidence to demonstrate that this route prevents sexual assaults from occurring.

However, as the recent DOD reports indicate, sexual assaults and rapes are still being reported at a higher rate than in previous years. The programs in place may not be sufficient for reductions in sexual assault and rape. Legislation that allows victims to circumvent *Feres* so that individual claims could be brought, would add more deterrence and hold perpetrators directly accountable to their victims.

Expected Supporters

This legislation would be expected to have widespread support from military and veteran organizations. For example, Service Women’s Action Network (SWAN) is a national non-profit

⁹ “‘That’s my justice’: Former Fort Bragg soldier, sexual assault survivor advocates for military oversight” <https://abc11.com/iamvanessaguillen-pfc-vanessa-guillen-vanesssa-erin-scanlon/6290432/>

¹⁰ “Army officer says she was raped, but Supreme Court Ruling Blocks her from Justice” <https://abcnews.go.com/US/army-lieutenant-raped-supreme-court-ruling-blocks-justice/story?id=67473953>

¹¹ “Richard Stayskal Feres Doctrine Bill Included in Final Version of NDAA” <https://hudson.house.gov/in-the-news/richard-stayskal-feres-doctrine-bill-included-in-final-version-of-ndaa#:~:text=%E2%80%9CA%20the%20NDAA%20does%20not,that%20was%20the%20result%20of>

¹² St. John’s Law Review Number 3 Volume 56 In Support of Feres Doctrine and a Better Definition of “incident to service” <https://scholarship.law.stjohns.edu/cgi/viewcontent.cgi?referer=https://www.google.com/&httpsredir=1&article=2283&context=lawreview>

organization that has advocated and been a voice for all military women.¹³ SWAN collaborated with producers for the documentary *The Invisible War* which brought the topic of military sexual assault into the national dialogue. Other supporters that might support this legislation include the organization Protect our Defenders, which is working to stop sexual assault in the military.

For more information, please contact student Megan Galloway, megan.galloway@law.nyls.edu, or Adjunct Professor and Executive Director of the Center for Justice & Democracy at New York Law School Joanne Doroshow, joanned@centerjd.org.

¹³ “Service Women’s Action Network” <https://www.servicewomensactionnetwork.org>

APPENDIX: VICTIM STORIES

Captain Erin Scanlon

Captain Erin Scanlon was captain for five years in the Army's elite 82nd Airborne Division. In September 2016, she was raped by another service member in Fayetteville, North Carolina. She reported the incident, and her assailant was arrested. Her case began in civil criminal court and was then removed and would be handled by the military because Cumberland county allegedly "didn't want the case." However, the court record stated that the dismissal and notice of reinstatement read that dismissal was granted because the case was going to be prosecuted by the military. A Trial happened on June 25, 2018. 653 after the alleged rape occurred. During the trial Scanlon recalled numerous mishandlings of her case by the military. A couple incidents include the fact that Scanlon had five different counselors, few of which would show up for pre-trial hearings or court dates. Additionally, one of her special victim's counselors, who is her advocate in the legal system, was ordered to testify against her about a witness Scanlon didn't disclose until late in the court martial process. Her assailant was later acquitted of counts and Scanlon denied access to seeing the court records. ¹⁴

In April 2019 she filed a \$10 million claim against the Army for alleged "negligent investigation and handling of sexual assault case by Fort Bragg." However, Captain Scanlon was unable to continue her case in federal court because of the *Feres* Doctrine. In December 2019, Scanlon left the military.

Ariana Klay

Lt Ariana Klay graduated with honors from the U.S. Navel Academy, joined the Marine Corps, and went on to serve in Iraq. In 2010, she was raped by two of her commanding officers on the U.S. Marine Barracks in Washington, D.C. Klay said that her commanding officer felt that she had "humiliated him in front of junior marines and he wanted to humiliate her back." Klay and seven other plaintiffs filed suit in the District Court, *Klay v. Panetta*, but the case was dismissed under the *Feres* Doctrine. ¹⁵

¹⁴ <https://abcnews.go.com/US/army-lieutenant-raped-supreme-court-ruling-blocks-justice/story?id=67473953>

¹⁵ <https://www.dailymail.co.uk/news/article-2111016/8-female-Marines-claim-gang-rape-sex-assault-Washington-D-C-barracks.html>