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HOUSE OF REPRESENTATIVES
REPORT
111–466

CARMELO RODRIGUEZ MILITARY MEDICAL ACCOUNTABILITY ACT OF 2009

APRIL 26, 2010.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

Mr. CONYERS, from the Committee on the Judiciary, submitted the following

R E P O R T

together with

DISSENTING VIEWS

[To accompany H.R. 1478]

[Including cost estimate of the Congressional Budget Office]

The Committee on the Judiciary, to whom was referred the bill (H.R. 1478) to amend chapter 171 of title 28, United States Code, to allow members of the Armed Forces to sue the United States for damages for certain injuries caused by improper medical care, and for other purposes, having considered the same, report favorably thereon with an amendment and recommend that the bill as amended do pass.

CONTENTS

89–006

THE AMENDMENT

The amendment is as follows:

Strike all after the enacting clause and insert the following:

SECTION 1. SHORT TITLE.

This Act may be cited as the "Carmelo Rodriguez Military Medical Accountability Act of 2009".

SEC. 2. ALLOWANCE OF CLAIMS BY MEMBERS OF THE ARMED FORCES AGAINST THE UNITED STATES FOR CERTAIN INJURIES CAUSED BY IMPROPER MEDICAL CARE.

(a) IN GENERAL.—Chapter 171 of title 28, United States Code, is amended by adding at the end the following:

"§ 2681. Certain claims by members of the Armed Forces of the United States

"(a) A claim may be brought against the United States under this chapter for damages relating to the personal injury or death of a member of the Armed Forces of the United States arising out of a negligent or wrongful act or omission in the performance of medical, dental, or related health care functions (including clinical studies and investigations) that is provided by a person acting within the scope of the office or employment of that person by or at the direction of the Government of the United States, whether inside or outside the United States.

"(b) A claim under this section shall not be reduced by the amount of any benefit received under subchapter III (relating to Servicemembers' Group Life Insurance) of chapter 19 of title 38.

"(c) This section does not apply to any claim arising out of the combatant activities of the Armed Forces during time of armed conflict.

"(d) For purposes of claims brought under this section—

"(1) subsections (j) and (k) of section 2680 do not apply; and

"(2) in the case of an act or omission occurring outside the United States, the 'law of the place where the act or omission occurred' shall be deemed to be the law of the place of domicile of the plaintiff.

"(e) As used in this section, the term 'a negligent or wrongful act or omission in the performance of medical, dental, or related health care functions (including clinical studies and investigations)' has the same meaning given that term for purposes of section 1089(e) of title 10.".

(b) TECHNICAL AND CONFORMING AMENDMENT.—The table of sections for chapter 171 of title 28, United States Code, is amended by adding at the end the following:

"2681. Certain claims by members of the Armed Forces of the United States.".

(c) EFFECTIVE DATE.—The amendments made by this section shall apply with respect to a claim arising on or after January 1, 1997, and any period of limitation that applies to such a claim arising before the date of enactment of this Act shall begin to run on the date of that enactment.

PURPOSE AND SUMMARY

H.R. 1478 would amend the Federal Tort Claims Act (FTCA),[1] by adding a new section 2681 to chapter 171 of title 28 of the United States Code, to allow service members to sue for damages when they are harmed by medical malpractice committed by government-employed or -directed healthcare providers. This will ensure accountability in the military medical system, extending to active-duty military service members and their families rights that civilians currently possess.

Section 2681 would not apply to "any claim arising out of the combatant activities of the Armed Forces during time of armed conflict."[2] Under current law, the FTCA already prohibits claims "arising out of the combatant activities . . . during time of *war*."[3] But this exclusion has been interpreted to apply only to combatant ac-

[1] 28 U.S.C. §§ 1346(b)(1), 2671–2680.
[2] Id. (amendment to FTCA adding 28 U.S.C. § 2681(c)).
[3] 28 U.S.C. § 2680(j).

tivities undertaken pursuant to a formal declaration of war.[4] The exclusion provided under proposed section 2681 is intended to encompass a broader range of combat activity, so that a formal declaration of war is not a prerequisite.

BACKGROUND AND NEED FOR THE LEGISLATION

FEDERAL TORT CLAIMS ACT

The doctrine of sovereign immunity holds that the government may not be sued without its consent. The Federal Tort Claims Act (FTCA) waives the sovereign immunity of the United States, in part, by rendering the United States liable for damages in Federal court—and Federal court only—"for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred." [5]

State law provides the substantive rule of decision in FTCA suits, with some notable exceptions. For example, the FTCA bars the award of punitive damages or pre-judgment interest.[6] However, in wrongful death cases, the FTCA authorizes the substitution of compensatory damage awards in circumstances where State law provides only for punitive damages.[7]

The FTCA includes over a dozen exceptions that preserve the government's sovereign immunity in specified circumstances. One of particular relevance to H.R. 1478 covers "[a]ny claim arising out of the combatant activities of the military or naval forces, or the Coast Guard, during time of war." [8] Other exceptions relevant to H.R. 1478 include: "[a]ny claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation . . . , or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a Federal agency or an employee of the Government"; [9] "[a]ny claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights" [10]; and "[a]ny claim arising in a foreign country." [11]

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[4] See H.R. 1478, the Carmelo Rodriguez Military Medical Accountability Act of 2009: Hearing Before the Subcomm. on Com. and Admin. Law of the H. Comm. on the Judiciary, 111th Cong. 114, 172–73 (2009) (hereinafter "2009 Subcommittee Hearings") (written statement and answers to questions for record of Stephen A. Saltzburg).

[5] 28 U.S.C. § 1346(b)(1). This is the section of title 28 U.S.C. that confers exclusive jurisdiction on the Federal courts to hear suits arising in tort against the United States, subject further to the FTCA. The FTCA itself provides that the "United States shall be liable, respecting . . . tort claims, in the same manner and to the same extent as a private individual under like circumstances. . . ." 28 U.S.C. § 2674.

[6] 28 U.S.C. § 2674; 2009 Subcommittee Hearings at 235 (letter from Stephen A. Saltzburg).

[7] 28 U.S.C. § 2674.

[8] Id. § 2680(j).

[9] Id. § 2680(a).

[10] Id. § 2680(h).

[11] Id. § 2680(k).

THE *FERES* DOCTRINE: A JUDICIALLY RECOGNIZED EXCLUSION

Since the 1950 Supreme Court decision in *Feres v. United States,*[12] the FTCA has been interpreted generally to preclude all suits by members of the military against the United States for injuries sustained incident to their service. *Feres* involved injuries suffered by three active-duty servicemen as a result of the negligence of other servicemen. Two of the claims alleged medical malpractice arising from the negligence of Army doctors. The Court concluded that none of the claims were actionable, holding that the FTCA does not render the government liable "for injuries to servicemen where the injuries arise out of or in the course of activity incident to service."[13] This expansive limitation on FTCA liability has come to be known as the "*Feres* doctrine."[14]

The *Feres* Court enunciated three reasons in support of its conclusion that Congress intended to exclude claims arising from actions incident to military service:

First, the FTCA imposes government liability only "under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred."[15] There is no "parallel" private liability when it comes to the military, "for no private individual has power to conscript or mobilize a private army."[16]

Second, the Court noted that liability under the FTCA depends on where the service member was injured. Hence, a service member injured in one State might recover under the FTCA, but a service member injured in another State might not.[17] Congress could not have intended to subject the "relationship between the Government and members of its armed forces," which is "distinctively Federal in character," to geographically diverse liability standards.[18]

Third, the Court found persuasive that service members injured or killed incident to their service are entitled to various benefits under the Veterans' Benefits Act (VBA)[19] on a no-fault basis—that is, without regard to whether the government was at fault. "If Congress had contemplated that . . . [the FTCA] would be held to apply in cases of this kind, it is difficult to see why it should have omitted any provision to adjust these two types of remedy to each other."[20]

The Supreme Court has consistently reaffirmed *Feres*.[21] Over time, the *Feres* doctrine has evolved to include other rationales as a basis for denying service members relief under the FTCA. The Court has dropped the parallel-private-liability rationale,[22] but

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[12] 340 U.S. 135 (1950).
[13] Id. at 146.
[14] See generally Jonathan Turley, Pax Militaris: The Feres Doctrine and the Retention of Sovereign Immunity in the Military System of Governance, 71 Geo. Wash. L. Rev. 1 (2003).
[15] 28 U.S.C. § 1346(b)(1).
[16] Feres, 340 U.S. at 141–42.
[17] Id. at 142.
[18] Id. at 143.
[19] 72 Stat. 1118 (1958) (as amended at 38 U.S.C. § 301 et seq.).
[20] Feres, 340 U.S. at 144. In subsequent decisions, the Court presumed that Congress intended the VBA to provide the "'the sole remedy for service-connected injuries.'" Johnson v. United States, 481 U.S. 681, 690 (1987) (quoting Hatzlachh Supply Co. v. United States, 444 U.S. 460, 464 (1980)).
[21] For a summary of the cases, see Henry Cohen, Federal Tort Claims Act: Current Legislative and Judicial Issues, CRS Rpt. No. 95–717, at 4–9 (2008); Deirdre G. Brou, Alternatives to the Judicially Promulgated Feres Doctrine, 192 Mil. L. Rev. 1 (2007).
[22] See United States v. Muniz, 374 U.S. 150, 159 (1963).

adopted another: Suits by service members might unduly interfere with "military discipline and effectiveness"[23] and require courts to "second-guess military decision[making]."[24] The Court has characterized this post-hoc rationale for the *Feres* doctrine as the strongest of the three surviving rationales.[25] In its most recent decision on the subject, *Johnson v. United States,*[26] the Court applied these rationales and extended the *Feres* doctrine to bar suits by service members arising from the negligent actions of civilian government employees.

Four Justices dissented in *Johnson*, contending that *Feres* was "clearly wrong."[27] Writing for the dissenters, Justice Scalia argued that Congress "quite plainly excluded" the service-member exception recognized in *Feres*.[28] In particular, Justice Scalia wrote, the FTCA's express exclusion of "'[a]ny claim arising out of the combatant activities of the military . . . during time of war' . . . demonstrat[es] that Congress specifically considered, and provided what it thought needful for, the special requirements of the military."[29] Justice Scalia criticized the Court for "supplement[ing]—i.e., revis[ing]—that congressional disposition"[30] and relying on its own belief as to what Congress must have intended.

The *Johnson* dissenters further stated that none of the "three disembodied estimations of what Congress *must* (despite what it enacted) have intended" reflect Congress's expressed intent.[31] The dissent offered the following critique of those rationales.

(1) Need for Uniformity. The dissenters stated three reasons why this rationale could not support the *Feres* doctrine. First, Congress addressed the areas in which it deemed uniformity to be important by exempting certain activities from liability (e.g., the "regulation of the monetary system"[32]). In the case of the military, Congress exempted only claims arising from combatant and overseas military activities.[33] Second, the Court itself has undercut the uniformity rationale by permitting civilians to sue under the FTCA

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[23] United States v. Shearer, 473 U.S. 52, 59 (1985); see also Johnson, 481 U.S. at 690. The Court has explained the "military discipline" rationale as follows: "[T]o accomplish its mission the military must foster instinctive obedience, unity, commitment, and esprit de corps. . . . [A] suit based upon service-related activity necessarily implicates the military judgments and decisions that are inextricably intertwined with the conduct of the military mission. Moreover, military discipline involves not only obedience to orders, but . . . duty and loyalty to one's service and to one's country. Suits brought by service members against the Government for service-related injuries could undermine the commitment essential to effective service and thus have the potential to disrupt military discipline in the broadest sense of the word." Id. at 691 (modification in original) (internal quotations and citations omitted).

[24] Shearer, 473 U.S. at 57. See also, 481 U.S. at 699 (Scalia, J., joined by Brennan, Marshall, and Stevens, JJ., dissenting).

[25] See, e.g., United States v. Shearer, 473 U.S. 52, 57 (1985); Chappell v. Wallace, 462 U.S. 296, 299 (1983); see also Johnson, 481 U.S. at 698 (Scalia, J., joined by Brennan, Marshal, and Stevens, JJ., dissenting) (noting that the Court has "repeatedly cited the later-conceived-of 'military discipline' rationale as the 'best explanation'" for Feres). In a case decided just 2 years before Johnson, the Court described the two other rationales supporting Feres as "no longer controlling." Shearer, 473 U.S. at 58 n.4. But in Johnson the Court recited those two other rationales without suggesting that they were no longer controlling. See 481 U.S. at 688–692.

[26] 481 U.S. 681 (1987).

[27] Id. at 703 (Scalia, J., joined by Brennan, Marshall, and Stevens, JJ., dissenting).

[28] Id. at 692.

[29] Id. at 693.

[30] Id.

[31] Johnson, 481 U.S. at 699 (Scalia, J., joined by Brennan, Marshall, and Stevens, JJ., dissenting) (emphasis in original).

[32] 28 U.S.C. § 2680(I).

[33] Johnson, 481 U.S. at 693–94 (Scalia, J., joined by Brennan, Marshal, and Stevens, JJ., dissenting).

when they are injured by military personnel.[34] Third, it is "difficult to explain why uniformity . . . is indispensable for the military, but not for the many other Federal departments and agencies that can be sued under the FTCA for the negligent performance of their unique national functions," including, for example, the administration of the Federal prison system.[35]

(2) Availability of Veterans' Benefits. The dissenters rejected this rationale as inconsistent with the Court's prior FTCA case law. Twice the Court had allowed certain injured service members to recover damages under the FTCA even though they were entitled to veterans benefits under the VBA—in one case a serviceman hit by an Army truck while off duty,[36] and in the other a veteran who suffered malpractice at a veterans hospital.[37] The Court had noted in one of those two cases that "nothing in the Tort Claims Act or the veterans' laws . . . provides for exclusiveness of remedy," and the Court refused to "call either remedy . . . exclusive . . . when Congress has not done so."[38] The Court had "noted further that Congress had included three exclusivity provisions in the FTCA, . . . but had said nothing about servicemen plaintiffs."[39] The VBA the dissenters stated, "is not, as *Feres* assumed, identical to Federal and State workers' compensation statutes in which exclusivity provisions almost invariably appear.[40] The VBA provides less generous and more easily terminable benefits.[41]

(3) Military Discipline. While the dissenters agreed that there may be times when FTCA suits involving the military "will adversely affect military discipline . . . the effect upon military discipline is [not] so certain, or so certainly substantial," to justify recognizing a blanket exemption for conduct incident to military service.[42] It is by no means clear that Congress considered FTCA suits by service members to be inconsistent with military discipline. Congress may have "recognized that the likely effect of *Feres* suits upon military discipline is not as clear as" the Court has assumed; or "perhaps Congress assumed that the FTCA's explicit exclusions would bar those suits most threatening to military discipline" (e.g., "claims based on combat command decisions, 28 U.S.C. § 2680(j)"; "claims based upon performance of 'discretionary' functions, § 2680(a)"; and "claims arising in foreign countries, § 2680(k)"); or "perhaps . . . Congress thought that *barring* recovery by servicemen might" lower morale and thereby "adversely affect military discipline."[43]

SUPPORT FOR AND OPPOSITION TO THE *FERES* DOCTRINE

Support for the *Feres* doctrine is largely confined to the Department of Defense, some retired high-ranking military officers (among them retired Major General John Altenburg, Jr., who testi-

[34] Id. at 696.
[35] Id.
[36] See Brooks v. United States, 337 U.S. 49 (1949).
[37] See United States v. Brown, 348 U.S. 110 (1954). The Court made clear in Brown that Brooks survived Feres. See id. at 113; see also Johnson, 481 U.S. at 698 (Scalia, J., joined by Brennan, Marshall, and Stevens, JJ., dissenting).
[38] Id. at 697 (quoting Brooks, 337 U.S. at 53) (modifications in original).
[39] Id. (citing Brooks, 337 U.S. at 53).
[40] Id. at 698.
[41] Id.
[42] Id. at 699.
[43] Id. at 699–700 (emphasis in original).

fied at the Subcommittee hearing), and what appears to be a minority of Members of Congress.[44] The George W. Bush Administration supported the *Feres* doctrine. The Obama Administration has not taken a public position on the issue.

Supporters of the *Feres* doctrine defend it on two grounds. The first and predominant ground is identical to the principal rationale that sustains *Feres* in the Supreme Court's case law: that barring suit is necessary to maintain "good order and discipline in the military."[45] Supporters claim that lawsuits based on challenges by one service member to the conduct of another service member will erode the key features of military discipline—"cohesiveness, obedience, discipline, putting the interest of the service ahead of the interest of the individual, and an inherent, unencumbered and unfettered trust and confidence up and down the chain of command."[46] "This degree of trust and confidence," explained a Department of Defense spokesperson who testified before the Senate Judiciary Committee, "cannot exist in an adversarial legal environment."[47] A retired general similarly testified that the introduction of litigation into the military would harm "unit cohesiveness" and with it "combat effectiveness."[48] And at our Subcommittee hearing, retired Major General Altenburg warned about the potential adverse consequences of subjecting sensitive military "decisionmaking" to scrutiny by civilian courts.[49]

The second ground advanced by supporters of the *Feres* doctrine is that an alternative, no-fault compensation scheme (of which the VBA is the main component) already exists to compensate service members who are injured or killed as a result of medical malpractice while serving. Although most supporters of *Feres* concede that the benefits available under this scheme are not as generous as tort-law remedies—and perhaps should be made more generous—they maintain that, unlike the tort system, the current scheme is at least even-handed and predictable in its distribution of benefits.[50]

Criticism of the *Feres* doctrine by lower courts and legal commentators has been, according to Justice Scalia, "widespread, al-

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[44] The last time a bill came before the House that would have narrowed the Feres doctrine, H.R. 1054, 100th Cong. (1987), it passed by a vote of 312 to 61. Compare 2009 Subcommittee Hearings at 178 (answers to questions for record of John D. Altenburg, Jr.) (contending that the "longevity [of Feres] reflects an essential principle of fundamental agreement among the generations of Americans as to the rightness of the Feres doctrine") with Johnson, 481 U.S. at 702–03 (1987) (Scalia, J., joined by Brennan, Marshall, and Stevens, JJ., dissenting) (rejecting argument that Congress's failure to overturn Feres reflects Congressional acquiescence).

[45] The Feres Doctrine: An Examination of this Military Exception to the Federal Tort Claims Act: Hearing Before the S. Comm. on the Judiciary, 107th Cong. 4 (2002) (statement of Christopher E. Weaver, Rear Admiral and Commandant, Naval District of Washington); see also id. at 2 (statement of Paul Harris, Deputy Associate Attorney General, Department of Justice).

[46] Id. at 4 (statement of Christopher Weaver, Rear Admiral and Commandant, Naval District of Washington).

[47] Id.

[48] Id. at 9. (statement of Nolan Sklute, Major General (Retired), Former Judge Advocate General, U.S. Air Force).

[49] 2009 Subcommittee Hearings at 123, 140–41 (testimony and written statement of John D. Altenburg, Jr.).

[50] See, e.g., id. at 138–40 (written statement of John D. Altenburg, Jr.); The Feres Doctrine: An Examination of this Military Exception to the Federal Tort Claims Act: Hearing before the S. Comm. on the Judiciary, 107th Cong. 5 (2002) (statement of Christopher Weaver, Rear Admiral and Commandant, Naval District of Washington).

most universal."[51] Opponents include veterans' advocacy groups,[52] many lawyers who have worked in the military justice system[53] (including some active duty military lawyers[54]), the National Institute of Military Justice's Commission on the Fiftieth Anniversary of the Uniform Code of Military Justice (known as the Cox Commission),[55] and the American Bar Association (ABA). In 2008, the ABA issued an unopposed resolution calling on Congress to repeal the *Feres* doctrine altogether.[56]

Opponents emphasize two related points. First, that *Feres* unfairly discriminates against service members by treating them less favorably than other citizens injured or killed as a result of government negligence. Second, that *Feres* leaves service members harmed by the negligence of the military inadequately compensated for economic damages and, contrary to well-established tort law principles, entirely uncompensated for non-economic damages (e.g., pain and suffering).[57]

Opponents say neither of the two rationales advanced to support *Feres* are persuasive. They reject the military-discipline rationale for much the same reasons as the dissenters in *Johnson* did. They emphasize that the FTCA's existing exceptions already ban the types of claims that are most likely to threaten military discipline.[58] At the Subcommittee hearing, attorney and legal scholar Eugene Fidell also responded to the military-discipline rationale by noting that several statutes already permit service members to bring suits in Federal district courts challenging certain personnel actions by the military.[59]

As for the argument that the existing no-fault compensation scheme under the VBA should provide the exclusive remedy for service-related harms, *Feres* doctrine opponents say that the benefits available under this scheme are inadequate to redress most torts.[60] Key limitations include its failure to account for future increases in pay when calculating benefits and, more importantly, its failure to provide any compensation for the types of non-economic harms regularly awarded in tort suits.[61]

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[51] Johnson, 481 U.S. at 700 (1987) (Scalia, J., joined by Brennan, Marshal, and Stevens, JJ., dissenting) (citation omitted).

[52] See, e.g., 2009 Subcommittee Hearings at 102 (letter from Veterans Equal Rights Protection Advocacy, Inc.).

[53] See id. at 14, 55 (testimony and written statement of Eugene R. Fidell).

[54] See, e.g., Deirdre G. Brou, Alternatives to the Judicially Promulgated Feres Doctrine, 192 Mil. L. Rev. 1 (2007).

[55] See Walter T. Cox, III., et al., Report of the Commission on the 50th Anniversary of the Uniform Code of Military Justice § IV.C (May 2001), available at http://www.wcl.american.edu/nimj/documents/cox—comm—report2.pdf?rd=1.

[56] See American Bar Association Res. 10(b) (Aug. 11–12, 2008).

[57] See, e.g., 2009 Subcommittee Hearings at 146–47, 233 (testimony and answers to questions for record of Eugene R. Fidell); The Feres Doctrine: An Examination of this Military Exception to the Federal Tort Claims Act: Hearing before the S. Comm. on the Judiciary, 107th Cong. 1 (2002) (statement of Senator Arlen Specter); American Bar Association Res. 10(b) (Aug. 11–12, 2008); Deirdre G. Brou, Alternatives to the Judicially Promulgated Feres Doctrine, 192 Mil. L. Rev. 1, 49–50 (2007).

[58] See, e.g., 2009 Subcommittee Hearings at 97, 172 (testimony and answers to questions for the record of Stephen A. Saltzburg).

[59] Id. at 232 (answers to questions for the record of Eugene R. Fidell).

[60] Deirdre G. Brou, Alternatives to the Judicially Promulgated Feres Doctrine, 192 Mil. L. Rev. 1, 48 (2007).

[61] See, e.g., 2009 Subcommittee Hearings at 146–47, 233 (testimony and answers to questions for the record of Eugene R. Fidell).

THE *FERES* DOCTRINE AS APPLIED TO MILITARY PERSONNEL CLAIMS OF MEDICAL MALPRACTICE

Lower courts have consistently interpreted *Feres* to bar FTCA claims by service members—including reservists and members of the national guard[62]—arising from medical malpractice by government (usually military) healthcare providers.[63] Generally, no significance has been attached to whether the service member was on- or off-duty when harmed.[64] Only claims arising from post-discharge medical care—usually at veterans' hospitals—have escaped the *Feres* bar.[65]

The preclusive effect of *Feres* on medical malpractice claims has drawn especially strong criticism. The reasons include: (1) the relative prevalence of medical malpractice at medical facilities operated by the Department of Defense;[66] (2) the status of military medical care (at least outside the combat context) as an activity largely "collateral" to the military's core functions;[67] (3) the apparent unfairness of allowing the dependants of service members to sue under the FTCA when they receive negligent medical care by military healthcare providers, but denying service members themselves the same right;[68] and (4) the absence of any compelling military justification to preclude FTCA suits involving malpractice.[69]

With respect to the last point, supporters of legislation like H.R. 1478 emphasize that whatever the persuasiveness of the military-discipline argument as a general matter, it has no application in the context of medical malpractice—with the possible exception of where the malpractice arises from combat-related medical care. H.R. 1478 recognizes this exception by including an express provision in the bill making such combat-related claims non-action-

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[62] See, e.g., Gremlich v. U.S. Dep't of Army, Civ. A. No. 89–8292, 1990 WL 204245, at 3–4 (E.D. Pa. Dec. 11, 1990), and cases cited therein.

[63] See, e.g., Brown v. United States, 415 Fed. App. 411, 413–14 (2006); France v. United States, 225 F.3d 658 (table), 2000 WL 1033020 (6th Cir. July 18, 2000); Sloan v. United States, 208 F.3d 218 (table), 2000 WL 307264 (8th Cir. Mar. 27, 2000); Matthew v. United States, 452 F. Supp. 2d 433, 439 (S.D.N.Y. 2006). Courts have split as to the ability of service members to sue under the FTCA under some types of military status—for example, those on a "temporary disability retired list" (TDRL). See, e.g., Bradley v. United States, 161 F.3d 777, 782 (4th Cir. 1998).

[64] See, e.g., Borden v. Veterans Admin., 41 F.3d 763, 763–64 (1st Cir.1994) (holding that Feres barred suit arising from malpractice suffered by active-duty member of armed services while "off duty").

[65] See United States v. Brown, 348 U.S. 110 (1954). The line between pre- and post-discharge acts of malpractice is easily drawn in most cases. But see Brown, 451 Fed. App. at 415–16 (addressing allegations of both pre- and post-discharge negligence by military doctors). A few cases deal with pre-induction malpractice. See, e.g., Bowers v. United States, 904 F.2d 450, 452 (8th Cir. 1990) (suit to redress malpractice during pre-induction physical held barred by Feres).

[66] See, e.g., Jonathan Turley, The Feres Doctrine: What Soldiers Really Need Are Lawyers, USA Today, Aug. 18, 2007; see also Jonathan Turley, Pax Militaris: The Feres Doctrine and the Retention of Sovereign Immunity in the Military System of Governance, 71 Geo. Wash. L. Rev. 1, 43–47 (2003). The case of Carmelo Rodriguez, after whom H.R. 1478 is named, was addressed at the hearing. See, e.g., Byron Pitts, Case Sheds Light on Military Law, CBS News, May 19, 2008, http://www.cbsnews.com/stories/2008/05/19/eveningnews/main4109454.shtml. For other disturbing examples appearing in the hearing record, see 2009 Subcommittee Hearings at 236–41 (letter from Adele Connell, Colonel, United States Army, dated March 24, 2009) (documenting a botched operation at Walter Reed Army Medical Center that resulted in removal of the wrong breast); id. at 242–43 (letter from Alexis Witt, wife of SSGT Dean Patrick Witt, dated March 23, 2009) (describing a routine appendix removal at Travis Air Force base that, because of medical malpractice, resulted in the patient being deprived of oxygen for over 15 minutes and ultimately rendered him brain dead).

[67] Jonathan Turley, Pax Militaris: The Feres Doctrine and the Retention of Sovereign Immunity in the Military System of Governance, 71 Geo. Wash. L. Rev. 1, 43–47 (2003).

[68] See, e.g., 2009 Subcommittee Hearings at 152, 233 (written statement and answers to questions for record of Eugene R. Fidell).

[69] See, e.g., id. at 100–04 (written statement of Stephen Saltzburg).

able.[70] During the legislative hearing on H.R. 1478, Professor Stephen Saltzburg testified on behalf of the ABA that "no one seriously makes an argument that military discipline is somehow going to be adversely affected if *Feres* is modified by the Congress so that military members can bring the same kind of malpractice claims as ordinary civilians can."[71] Mr. Fidell testified similarly at an earlier congressional hearing that "issues of malpractice . . . have nothing whatever to do with military discipline or any notions of command or unit cohesion."[72] Mr. Fidell added in his response to questions for the record following the Subcommittee's hearing that military physicians are already subject to oversight by State medical licensing authorities.[73]

Nonetheless, supporters of the *Feres* doctrine generally oppose any exception for medical malpractice claims. At the Subcommittee hearing, retired Major General Altenburg explained that his opposition to legislation like H.R. 1478 rests largely on his belief that it would be unfair to provide FTCA remedies for service members harmed as a result of medical malpractice, while denying them to service members harmed during combat (and in the performance of other military related activities).[74] He called this disparate treatment a form of "discriminatory favoritism."[75] Mr. Fidell countered that

> [t]he risk of injury and death in combat is clearly something military personnel know to expect. . . . But medical malpractice is not part of the mission; it is something that happens (unfortunately) in civilian life, and when it does, our system of tort law permits recovery. . . . To the extent that there is nothing peculiarly military to medical malpractice, the better analogy is to the treatment afforded to all Americans, rather than the quite different treatment the law provides to serving personnel for combat-related injuries. . . . The fact that we do not afford a damage remedy for death or injury . . . at the hands of the enemy is not a reason to deny such a remedy to GIs who have no effective choice of medical providers.[76]

HEARINGS

The Subcommittee on Commercial and Administrative Law held a legislative hearing on H.R. 1478 on March 24, 2009.[77] Testimony was received from the following five witnesses: retired Major General John D. Altenburg, Jr., a former Deputy Judge Advocate General of the United States Army and of counsel at Greenberg Traurig, LLP; Eugene R. Fidell, the Florence Rogatz Visiting Lecturer at Yale Law School, the President of the National Institute of Military Justice, and of counsel to the law firm of Feldesman

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[70] See, e.g., id. at 102 (written statement of Stephen Saltzburg).
[71] Id. at 97 (testimony of Stephen A. Saltzburg).
[72] The Feres Doctrine: An Examination of this Military Exception to the Federal Tort Claims Act: Hearing before the S. Comm. on the Judiciary, 107th Cong. 15 (2002) (statement of Eugene R. Fidell).
[73] See 2009 Subcommittee Hearings at 233 (answers to questions for record of Eugene R. Fidell).
[74] Id. at 123 (testimony of John D. Altenburg, Jr.).
[75] Id. at 139 (written statement of John D. Altenburg, Jr.).
[76] Id. at 234 (answers to questions for record of Eugene R. Fidell).
[77] H.R. 1478, the Carmelo Rodriguez Military Medical Accountability Act of 2009: Hearing Before the Subcomm. on Com. and Admin. Law of the H. Comm. on the Judiciary, 111th Cong. (2009).

Tucker Leifer Fidell LLP; Ivette Rodriguez, the sister of Carmelo Rodriguez, the deceased Marine sergeant after whom H.R. 1478 is named; and Stephen A. Saltzburg, the Wallace and Beverley Woodbury Professor of Law at the University of Virginia Law School, a member of the House of Delegates of the American Bar Association, and the co-chair of the ABA's Military Justice Committee of the Criminal Justice Section. Professor Saltzburg testified on behalf of the ABA. The sponsor of H.R. 1478, Representative Maurice Hinchey (D-NY), testified on a separate panel.

Since the 1980's, there have been four Congressional hearings [78] and several bills introduced regarding the *Feres* doctrine.[79] In 1987, legislation similar to H.R. 1478 passed the House by vote of 312–61.[80]

COMMITTEE CONSIDERATION

On May 19, 2009, the Subcommittee on Commercial and Administrative Law met in open session and ordered the bill H.R. 1478 favorably reported, as amended, by a rollcall vote. On October 7, 2009, the Committee met in open session and ordered the bill H.R. 1478 favorably reported as amended by the Subcommittee, by a rollcall vote of 14 to 12, a quorum being present.

COMMITTEE VOTES

In compliance with clause 3(b) of rule XIII of the Rules of the House of Representatives, the Committee advises that the following rollcall votes occurred during the Committee's consideration of H.R. 1478:

1. An amendment offered by Mr. King to limit attorney's fees to 15% of any judgement rendered, and 10% of any settlement. Defeated 18 to 13.

ROLLCALL NO. 1

	Ayes	Nays	Present
Mr. Conyers, Jr., Chairman		X	
Mr. Berman		X	
Mr. Boucher			
Mr. Nadler		X	
Mr. Scott		X	
Mr. Watt		X	
Ms. Lofgren		X	
Ms. Jackson Lee		X	
Ms. Waters		X	
Mr. Delahunt			
Mr. Wexler			
Mr. Cohen		X	
Mr. Johnson		X	
Mr. Pierluisi		X	

[78] See The Feres Doctrine: An Examination of this Military Exception to the Federal Tort Claims Act: Hearing before the S. Comm. on the Judiciary, 107th Cong. (2002); Claims for Negligent Medical Care Provided Members of the Armed Forces: Hearing Before the Subcomm. on Admin. Law and Gov't Rel. of the H. Comm. on the Judiciary, 102nd Cong. (1991); Medical Malpractice Suits for Armed Services Personnel: Hearings Before the Subcomm. on Courts and Admin. Practice of the S. Comm. on the Judiciary, 100th Cong. (1988); Military Medical Malpractice: Hearing Before the Subcomm. on Admin. Law and Gov't Rel. of the H. Comm. on the Judiciary, 99th Cong. (1985).

[79] See Carmelo Rodriguez Military Medical Accountability Act of 2008, H.R. 6093, 110th Cong. (2008); H.R. 2684, 107th Cong. (2001); H.R. 1054, 100th Cong. (1987).

[80] H.R. 1054, 100th Cong. (1987).

ROLLCALL NO. 1—Continued

	Ayes	Nays	Present
Mr. Quigley		X	
Mr. Gutierrez			
Mr. Sherman		X	
Ms. Baldwin			
Mr. Gonzalez		X	
Mr. Weiner		X	
Mr. Schiff		X	
Ms. Sánchez			
Ms. Wasserman Schultz		X	
Mr. Maffei		X	
Mr. Smith, Ranking Member	X		
Mr. Sensenbrenner, Jr.	X		
Mr. Coble			
Mr. Gallegly	X		
Mr. Goodlatte	X		
Mr. Lungren	X		
Mr. Issa	X		
Mr. Forbes	X		
Mr. King	X		
Mr. Franks	X		
Mr. Gohmert	X		
Mr. Jordan			
Mr. Poe	X		
Mr. Chaffetz			
Mr. Rooney	X		
Mr. Harper	X		
Total	13	18	

2. An amendment offered by Mr. Franks to strike the proposed section 2681 and insert a GAO study on the currently available benefits for service members injured or killed as a result of medical malpractice, the medical malpractice claims against the Department of Defense in the last 5 years brought under the FTCA, and the current procedures to evaluate and discipline medical providers whose care falls below the minimum standard of care. Defeated 16 to 11.

ROLLCALL NO. 2

	Ayes	Nays	Present
Mr. Conyers, Jr., Chairman		X	
Mr. Berman		X	
Mr. Boucher		X	
Mr. Nadler		X	
Mr. Scott		X	
Mr. Watt			
Ms. Lofgren		X	
Ms. Jackson Lee		X	
Ms. Waters			
Mr. Delahunt			
Mr. Wexler			
Mr. Cohen		X	
Mr. Johnson		X	
Mr. Pierluisi		X	
Mr. Quigley		X	
Mr. Gutierrez			
Mr. Sherman		X	
Ms. Baldwin			
Mr. Gonzalez		X	
Mr. Weiner		X	
Mr. Schiff		X	

ROLLCALL NO. 2—Continued

	Ayes	Nays	Present
Ms. Sánchez			
Ms. Wasserman Schultz			
Mr. Maffei		X	
Mr. Smith, Ranking Member	X		
Mr. Sensenbrenner, Jr.	X		
Mr. Coble			
Mr. Gallegly	X		
Mr. Goodlatte	X		
Mr. Lungren	X		
Mr. Issa	X		
Mr. Forbes			
Mr. King	X		
Mr. Franks	X		
Mr. Gohmert			
Mr. Jordan			
Mr. Poe	X		
Mr. Chaffetz			
Mr. Rooney	X		
Mr. Harper	X		
Total	11	16	

3. On reporting the bill as amended, approved 14 to 12.

ROLLCALL NO. 3

	Ayes	Nays	Present
Mr. Conyers, Jr., Chairman	X		
Mr. Berman	X		
Mr. Boucher			
Mr. Nadler			
Mr. Scott	X		
Mr. Watt	X		
Ms. Lofgren	X		
Ms. Jackson Lee	X		
Ms. Waters			
Mr. Delahunt			
Mr. Wexler			
Mr. Cohen	X		
Mr. Johnson	X		
Mr. Pierluisi	X		
Mr. Quigley	X		
Mr. Gutierrez			
Mr. Sherman			
Ms. Baldwin			
Mr. Gonzalez	X		
Mr. Weiner	X		
Mr. Schiff	X		
Ms. Sánchez			
Ms. Wasserman Schultz			
Mr. Maffei	X		
Mr. Smith, Ranking Member		X	
Mr. Sensenbrenner, Jr.		X	
Mr. Coble		X	
Mr. Gallegly		X	
Mr. Goodlatte		X	
Mr. Lungren		X	
Mr. Issa		X	
Mr. Forbes			
Mr. King		X	
Mr. Franks		X	
Mr. Gohmert			
Mr. Jordan			

ROLLCALL NO. 3—Continued

	Ayes	Nays	Present
Mr. Poe		X	
Mr. Chaffetz			
Mr. Rooney		X	
Mr. Harper		X	
Total	14	12	

COMMITTEE OVERSIGHT FINDINGS

In compliance with clause 3(c)(1) of rule XIII of the Rules of the House of Representatives, the Committee advises that the findings and recommendations of the Committee, based on oversight activities under clause 2(b)(1) of rule X of the Rules of the House of Representatives, are incorporated in the descriptive portions of this report.

NEW BUDGET AUTHORITY AND TAX EXPENDITURES

Clause 3(c)(2) of rule XIII of the Rules of the House of Representatives is inapplicable because this legislation does not provide new budgetary authority or increased tax expenditures.

CONGRESSIONAL BUDGET OFFICE COST ESTIMATE

In compliance with clause 3(c)(3) of rule XIII of the Rules of the House of Representatives, the Committee sets forth, with respect to the bill, H.R. 1478, the following estimate and comparison prepared by the Director of the Congressional Budget Office under section 402 of the Congressional Budget Act of 1974:

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, DC, October 20, 2009.

Hon. JOHN CONYERS, Jr., *Chairman,*
Committee on the Judiciary,
House of Representatives, Washington, DC.

DEAR MR. CHAIRMAN: The Congressional Budget Office has prepared the enclosed cost estimate for H.R. 1478, the Carmelo Rodriguez Military Medical Accountability Act of 2009.

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contact is Matthew Schmit, who can be reached at 226–2840.

Sincerely,

DOUGLAS W. ELMENDORF,
Director.

Enclosure.

cc: Honorable Lamar S. Smith.
Ranking Member

H.R. 1478—Carmelo Rodriguez Military Medical Accountability Act of 2009

SUMMARY

H.R. 1478 would amend the Federal Tort Claims Act (FTCA) to allow members of the Armed Forces to bring suit against the Federal Government for damages related to malpractice by government medical personnel. CBO estimates that enacting H.R. 1478 would increase direct spending from the Judgment Fund by $2.7 billion over the 2010–2019 period. Enacting H.R. 1478 would not affect revenues and would have an insignificant effect on spending subject to appropriation.

Pursuant to section 311 of the Concurrent Resolution on the Budget for Fiscal Year 2009 (S. Con. Res. 70), CBO estimates H.R. 1478 would increase projected deficits by more than $5 billion in at least one of the four consecutive 10-year periods starting in 2020.

H.R. 1478 contains no intergovernmental or private-sector mandates as defined in the Unfunded Mandates Reform Act (UMRA) and would not affect the budgets of State, local, or tribal governments.

ESTIMATED COST TO THE FEDERAL GOVERNMENT

The estimated budgetary impact of H.R. 1478 is shown in the following table. The costs of this legislation fall primarily within budget function 800 (general government).

By Fiscal Year, in Millions of Dollars

	2010	2011	2012	2013	2014	2015	2016	2017	2018	2019	2010–2014	2010–2019
CHANGES IN DIRECT SPENDING												
Estimated Budget Authority	90	290	430	430	360	260	200	190	200	220	1,600	2,670
Estimated Outlays	90	290	430	430	360	260	200	190	200	220	1,600	2,670

BASIS OF ESTIMATE

H.R. 1478 would amend the FTCA to allow members of the Armed Forces to bring suit against the Federal Government for damages related to malpractice by government medical personnel. Servicemembers are currently blocked from pursuing such claims as a result of a 1950 Supreme Court decision *(Feres v. United States)*. This amendment to the FTCA would apply retroactively to claims arising on or after January 1, 1997. CBO estimates that enacting H.R. 1478 would increase direct spending from the Judgment Fund (a permanent indefinite appropriation) by $2.7 billion over the 2010–2019 period. This estimate assumes that H.R. 1478 will be enacted early in fiscal year 2010.

While *Feres v. United States* effectively blocks servicemembers from filing malpractice claims against the Department of Defense (DoD) for care received during the course of active duty, others who use military health facilities and physicians (primarily dependents, military retirees, and survivors) are not prohibited from doing so. Using claims data from those other populations, and adjusting for the fact that active-duty members utilize DoD health facilities for

a larger portion of their overall health care, CBO estimates that H.R. 1478 would increase the number of medical malpractice claims against DoD by about 750 per year. Based on those same data, we estimate that about one-third, or 250 claims, would result in monetary settlements or awards.

Because H.R. 1478 would allow servicemembers to file malpractice claims for care received while on active duty on or after January 1, 1997, CBO expects there would be a surge of claims in the first several years after enactment. However, CBO assumes the probability that former members would file and pursue malpractice claims decreases proportionately with the amount of time between the medical care they received and the enactment date of this bill. Some claims would probably be settled by the government soon after they are filed, while CBO estimates others would take up to five years after the claims are filed before payments from the Judgment Fund would occur. This lag accounts for the time needed for litigation, and is based on an analysis of DoD data on malpractice claims for dependents and retirees. In total, CBO estimates that awards for 4,100 medical malpractice claims against DoD would be paid over the 2010–2019 period if H.R. 1478 is enacted. Of those, about half would be for incidents that occurred prior to fiscal year 2010.

Using data compiled by DoD on payments related to malpractice claims by military retirees and dependents, CBO estimates the average monetary award would be about $450,000 for payments that occur in 2010. While our analysis of the data indicate that most of the monetary settlements and awards would be substantially less than this, a small number of cases would result in settlements and awards in the millions of dollars each. Going forward, CBO estimates that average award amounts would increase by about 7 percent each year, based on an analysis of the growth of average medical malpractice payments since 1986.

The FTCA does allow Federal agencies to settle cases with monetary values less than $2,500. In those instances, the amounts would be paid from discretionary funds, although in the case of H.R. 1478, CBO estimates those amounts would total less than $500,000 annually.

IMPACT ON LONG-TERM DEFICITS

Pursuant to section 311 of the Concurrent Resolution on the Budget for Fiscal Year 2009 (S. Con. Res. 70), CBO estimates H.R. 1478 would increase projected deficits by more than $5 billion in at least one of the four consecutive 10-year periods starting in 2020.

INTERGOVERNMENTAL AND PRIVATE-SECTOR IMPACT

H.R. 1478 contains no intergovernmental or private-sector mandates as defined in UMRA and would not affect the budgets of State, local, or tribal governments.

Estimate prepared by: Federal Costs: Matthew Schmit. Impact on State, Local, and Tribal Governments: Burke Doherty. Impact on the Private Sector: Elizabeth Bass.

Estimate approved by: Theresa Gullo, Deputy Assistant Director for Budget Analysis.

PERFORMANCE GOALS AND OBJECTIVES

The Committee states that pursuant to clause 3(c)(4) of rule XIII of the Rules of the House of Representatives, H.R. 1478 amends the Federal Tort Claims Act to modify the government's sovereign immunity, allowing service members to sue the United States for damages when they are harmed by medical malpractice committed by government-employed or -directed healthcare providers, with an exception for claims arising out of combatant activities in times of armed conflict.

CONSTITUTIONAL AUTHORITY STATEMENT

Pursuant to clause 3(d)(1) of rule XIII of the Rules of the House of Representatives, the Committee finds authority for this legislation in article I, section 8, clause 16 of the Constitution.

ADVISORY ON EARMARKS

In accordance with clause 9 of rule XXI of the Rules of the House of Representatives, H.R. 1478 does not contain any congressional earmarks, limited tax benefits, or limited tariff benefits as defined in clause 9 of rule XXI.

SECTION-BY-SECTION ANALYSIS

The following discussion describes the bill as reported by the Committee.

Sec. 1. Short title. Section 1 sets forth the short title of the bill as the "Carmelo Rodriguez Military Medical Accountability Act of 2009."

Sec. 2. Allowance of Claims by Members of the Armed Forces Against the United States for Certain Injuries Caused by Improper Medical Care. Section 2(a) of the bill amends chapter 171 of title 28 of the United States Code by adding a new section 2681 ("Certain Claims by members of the Armed Forces of the United States").

Section 2681(a) authorizes suit against the United States under the FTCA for "claims arising out of a negligent or wrongful act or omission in the performance of medical, dental, or related health care functions . . . that is provided by a person acting within the scope of the office or employment of that person or by or at the direction of the Government of the United States, whether inside or outside of the United States."

Section 2681(b) provides that any damages award in an FTCA suit covered by section 2681(a) "shall not be reduced by the amount of any benefit received under subchapter III (relating to Servicemembers' Group Life Insurance) of chapter 19 of title 38" of the United States Code.

Section 2681(c) provides that section 2681(a) does "not apply to any claim arising out of the combatant activities of the Armed Forces during time of armed conflict."

Section 2681(d) provides that the exclusions in 28 U.S.C. § 2680(j) and (k) do not apply to any FTCA claim brought under 28 U.S.C. § 2681(a). Section 2680(j) excludes claims "arising out of the

combatant activities of the military or naval forces, or the Coast Guard, during time of war"; section 2680(k) excludes "any claim arising in a foreign country." These exclusions are replaced, for actions under section 2681(a), by the exclusion in section 2681(c).

Section 2681(d) also provides that a claim arising from acts or omissions that occur outside of the United States is governed by the substantive "law of the place of domicile of the plaintiff."

Section 2681(e) defines the phrase "negligent or wrongful act or omission in the performance of medical, dental, or related healthcare functions" (as used in 28 U.S.C. 2681(a)) to have the same meaning given to the term under 10 U.S.C. § 1089(e). Section 1089 governs medical malpractice claims against military, defense, or intelligence personnel. The phrase appears in section 1089(e), which makes 28 U.S.C. § 2680(h) inapplicable to claims under the FTCA. Section 2680(h) is the exception to the FTCA for suits based on intentional torts, including assault and battery. By incorporating the phrase from section 1089(e) and referencing that section, section 2681(e) allows malpractice suits notwithstanding the intentional tort exception to the FTCA found in section 2680(h).

Section 2(b) of the bill makes a technical and conforming amendment, adding section 2681 to the table of sections for chapter 171 of title 28 U.S.C.

Section 2(c) of the bill provides that the amendments made by section 2(a) will apply to claims arising on or after January 1, 1997, and that any period of limitation on such a claim arising before the date of enactment shall begin to run on that date of enactment.

CHANGES IN EXISTING LAW MADE BY THE BILL, AS REPORTED

In compliance with clause 3(e) of rule XIII of the Rules of the House of Representatives, changes in existing law made by the bill, as reported, are shown as follows (new matter is printed in italic and existing law in which no change is proposed is shown in roman):

TITLE 28, UNITED STATES CODE

* * * * * * *

PART VI—PARTICULAR PROCEEDINGS

* * * * * * *

CHAPTER 171—TORT CLAIMS PROCEDURE

Sec.
2671. Definitions.

* * * * * * *

2681. Certain claims by members of the Armed Forces of the United States.

* * * * * * *

§ 2681. Certain claims by members of the Armed Forces of the United States

(a) A claim may be brought against the United States under this chapter for damages relating to the personal injury or death of a member of the Armed Forces of the United States arising out of a negligent or wrongful act or omission in the performance of medical, dental, or related health care functions (including clinical studies and investigations) that is provided by a person acting within the scope of the office or employment of that person by or at the direction of the Government of the United States, whether inside or outside the United States.

(b) A claim under this section shall not be reduced by the amount of any benefit received under subchapter III (relating to Servicemembers' Group Life Insurance) of chapter 19 of title 38.

(c) This section does not apply to any claim arising out of the combatant activities of the Armed Forces during time of armed conflict.

(d) For purposes of claims brought under this section—

(1) subsections (j) and (k) of section 2680 do not apply; and

(2) in the case of an act or omission occurring outside the United States, the "law of the place where the act or omission occurred" shall be deemed to be the law of the place of domicile of the plaintiff.

(e) As used in this section, the term "a negligent or wrongful act or omission in the performance of medical, dental, or related health care functions (including clinical studies and investigations)" has the same meaning given that term for purposes of section 1089(e) of title 10.

* * * * * * *

DISSENTING VIEWS

It is unquestionable that Congress has a duty to ensure that the members of this country's armed forces receive the highest quality medical care possible. However, because H.R. 1478 will not make any significant contribution towards improving the quality of military medicine and will undermine military morale and effectiveness, we must oppose this bill.

The issue this bill presents is not whether service members should receive compensation for injuries resulting from medical malpractice. They already receive no-fault compensation through the Departments of Defense and Veterans Affairs. The issue also is not whether military medical personnel will be held accountable for medical malpractice. They already are held accountable up to and including the possibility of court martial. Rather, the issue this bill presents is whether any flaws in the current system for compensating service members for malpractice related injuries should be addressed by forcing the men and women of the armed services to resort to litigation. Litigation, however, is not the answer.

First, there appears to be no correlation between medical malpractice damage awards in the civilian sector and improvements in the quality of care provided. In fact, the litigation-created malpractice crisis is one of the major problems facing the practice of medicine in this country. The major beneficiaries of the civilian malpractice crisis are not this nation's patients, but the trial lawyers who garner large contingency fees. The same results can be expected for the military medical system if this legislation is enacted.

What is more, H.R. 1478 would create the anomaly of offering a tort remedy to a service member who is injured through a medical mistake, while denying the same compensation to one who is injured in combat. This could demean injuries suffered in combat by providing the soldier injured on the battlefield with administrative compensation, while allowing the soldier injured in a military hospital to seek a multi-million dollar damage award in federal court. Such a result is fundamentally unfair to those injured in combat.

Furthermore, under this legislation, recovery will depend on the local tort laws where the service member is stationed. Thus, a service member stationed in California will be subject to one set of rules, while one stationed in North Carolina will be subject to another. Selective compensation based on duty station falls short of the even-handed fairness needed to preserve military morale. One of the chief benefits of the existing statutory compensation system is that comparable injuries are treated uniformly throughout the military.

This legislation, moreover, will inject tort litigation and defensive medicine into military medical readiness and health assessment determinations. Because of the nature of the military, the medical

system interacts with the individual patient to a much greater extent than in the civilian world. Health screenings and assessments, limitations on duty, eligibility for deployment, annual physicals, fitness for duty determinations, specialized evaluations for pilots, indigenous disease vaccinations, biological defense countermeasures, mental health evaluations, and other interactions are the everyday work of the military medical system. And while these medical interactions are usually far removed from the battlefield, they are essential to effective military operations. Every such interaction would be a potential tort claim for which defenses would need to be planned and defensive medicine practiced, threatening to re-delegate military medical readiness from medical professionals and military commanders to civilian lawyers and judges.

There are many more problems with this legislation, but the bottom-line is that if Congress believes that the current military compensation system is inadequate or is producing unfair results, we should work to correct that system. We should increase funding and make needed reforms. There is no excuse for providing our troops less compensation than they deserve. However, repealing the *Feres* doctrine for medical malpractice injuries is not the solution. This country can provide our service members with the meaningful benefits they need without making the brave men and women that serve resort to litigation. In short, our focus should not be on allowing litigation, but on improving the overall military disability compensation system for all of this country's service members.

BACKGROUND

The Federal Tort Claims Act (FTCA)[1] permits the government to be sued for injuries caused by the negligence of government employees, acting within the scope of their employment, to the same extent that a private individual would be liable for such negligence.[2] For members of the armed services who are injured "incident to service," however, the government's liability under the FTCA is subject to an exception carved out in *Feres v. United States*.[3] In *Feres,* a unanimous Supreme Court held 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."[4] This exception is known as the *Feres* doctrine.[5] Although the FTCA contains no explicit exclusion for injuries sustained by military personnel incident to service, such an exclusion results from construing the FTCA "to fit, so far as will comport with its words, into the entire statutory scheme of

[1] 28 U.S.C. §§ 1346(b), 2671–2680.

[2] *See* 28 U.S.C. § 1346(b). The doctrine of sovereign immunity protects the United States government from liability for the tortious acts of its agents or employees. Under this doctrine, the federal government is immune from liability unless it consents to be sued, *United States v. Sherwood,* 312 U.S. 584 (1941), and it may define the terms and conditions upon which it may be sued, *Soriano v. United States,* 352 U.S. 270 (1957).

[3] 340 U.S. 135 (1950).

[4] *Id.* at 146.

[5] In addition to the *Feres* doctrine, there are two other major exceptions under which the United States may not be held liable under the FTCA: the discretionary function exception, which immunizes the United States for acts or omissions of its employees that involve policy decisions, and the intentional tort exception, which precludes suits against the United States for assault, battery, and other intentional torts, unless they are committed by federal law enforcement or investigative officials.

remedies against the Government to make a workable, consistent and equitable whole."[6]

In *Feres* and its progeny, the Supreme Court has provided four principal rationales for the doctrine:

1) The existence and availability of a separate, uniform, comprehensive, no-fault compensation scheme for injured military personnel;
2) The effect upon military order, discipline, and effectiveness if service members were permitted to sue the government and each other;
3) The distinctly federal relationship between the government and members of its armed services and the corresponding unfairness of permitting service-connected claims to be determined by non-uniform local law; and
4) The absence of parallel private liability. Rather than creating new causes of action, the FTCA was designed to make the government liable to the same extent as private individuals under like circumstances. No cause of action had existed prior to the FTCA permitting a serviceman to sue his superior officers for negligence. Moreover, because private individuals cannot maintain armies, the Court determined that there were no "like circumstances" under which private individuals could be deemed liable.

The holding of *Feres* has been continually and persuasively applied by the courts and has now stood for 59 years without either legislative or judicial alteration.[7] H.R. 1478 would narrow the *Feres* doctrine so that it would not apply to suits for "damages relating to personal injury or death of a member of the Armed Forces of the United States arising out of a negligent or wrongful act or omission in the performance of medical, dental, or related health care functions (including clinical studies and investigations) [by a person working for or at the direction of the United States]."

DISCUSSION

Although it is sometimes argued that the *Feres* doctrine is unfair to service members who are the victims of medical malpractice, there are several sound reasons for maintaining the *Feres* bar, even in military medical malpractice cases:

- **Eliminating the *Feres* Doctrine Will Erode Uniformity.** H.R. 1478 will create a privileged class of claimants within the armed services whose right to recover depends upon where they were injured and not on the injury they suffered. Selective special compensation falls short of the even-handed fairness that must be exercised to preserve military morale. As the Supreme Court has noted, "to accomplish its mission the military must foster instinctive obedience, unity, commitment, and esprit de corps."[8] Accordingly, the Court has held that,

[6] 340 U.S. at 139.
[7] *See United States v. Johnson,* 481 U.S. 681 (1987); *United States v. Stanley,* 483 U.S. 669 (1987); *Chappell v. Wallace,* 462 U.S. 296 (1983); *Stencel Aero Engineering Corp. v. United States,* 431 U.S. 666 (1977).
[8] *Goldman v. Weinberger,* 475 U.S. 503, 507 (1986).

Even if military negligence is not specifically alleged in a tort action, a suit based upon service-related activity necessarily implicates the military judgments and decisions that are inextricably intertwined with the conduct of the military mission. Moreover, military discipline involves not only obedience to orders, but more generally duty and loyalty to one's service and to one's country. Suits brought by service members against the Government for service-related injuries could undermine the commitment essential to effective service and thus have the potential to disrupt military discipline in the broadest sense of the word.[9]

- **Medical malpractice injuries versus combat injuries.** This bill would create a situation in which service members who lose a limb through medical malpractice will receive extra, and in some cases quite substantial, tort compensation whereas service members who lose a limb in combat will receive only administrative compensation. This could demean injuries suffered in combat by providing the soldier injured on the battlefield with administrative compensation, while the soldier injured in a military hospital could seek a multi-million dollar damage award in federal court.
- **Soldiers will receive different compensation depending upon where they are stationed.** Because the FTCA bases liability on state law, a marine stationed in California might recover, but another marine, subject to a different body of law in North Carolina, might not. Both marines, however, would have one thing in common: their duty stations are the result of military orders, not their personal choice.

- **Litigation process will be disruptive to military operations.** Superimposing the adversarial process of civil litigation onto the Armed Forces, even in the limited area of medical malpractice, will have a disruptive influence on military operations. The litigative process itself assures this result: military plaintiffs and witnesses will be summoned to attend depositions and trials, they will have to take time away from their regularly assigned duties to confer with counsel and investigators, and they may have to be recalled from distant posts. As the Ninth Circuit has noted, "it is the suit, not the recovery, that would be disruptive of discipline and the orderly conduct of military affairs."[10]

  Moreover, allowing medical malpractice suits to be filed by service members is likely to disrupt military operations by injecting tort litigation and defensive medicine into all matters of military medical readiness and health assessment. Because of the nature of the military enterprise, the medical system interacts with the individual patient to a much greater extent than in the civilian world. Health screenings

[9] *United States v. Johnson,* 481 U.S. 681, 691 (1987).
[10] *Henniger v. United States,* 473 F.2d 814, 815–16 (9th Cir. 1973).

and assessments, limitations on duty, eligibility for deployment, annual physicals, fitness for duty determinations, specialized evaluations for certain members (such as pilots and nuclear program personnel), indigenous disease vaccinations, biological defense countermeasures, protection from environmental exposures, mental health evaluations, and other interactions are the everyday work of the military medical system and, while usually far removed from the battlefield, are essential to effective military operations. Every such interaction would be a potential tort claim for which defenses would need to be planned and readied and defensive medicine practiced, threatening to re-delegate military medical readiness from medical professionals and military commanders to civilian lawyers and judges.

- **The military compensation program provides a comprehensive, no-fault system.** One of the primary reasons that members of the armed services are not permitted to sue under the FTCA for service related injuries is because of the military's no-fault, administrative compensation programs. The statutory compensation scheme has three components:
  - First, service members serving on active duty receive free medical care when injured or ill and they receive unlimited sick leave with full pay and allowances until well or released from active duty. Survivors of service members are entitled to death gratuity benefits, as well as subsidized life insurance.
  - Second, there is a comprehensive disability retirement system for service members permanently injured in the line of duty.
  - Third, the Veterans Administration provides yet another system of medical care, disability, and death benefits for service-disabled veterans and their families.
- **Repeal of the *Feres* doctrine would destroy the premise of the no-fault compensation system currently applicable to all workers' compensation programs, including military compensation programs.** All State and Federal workers' compensation laws provide a no-fault compensation system as the exclusive remedy for work-related injuries. Employees may not sue the employer to seek larger recoveries, but employees will be compensated even if there was no negligence or the injured employee was negligent. Federal civilian employees and all private sector employees are covered by such no-fault workers' compensation systems; they cannot sue their employer for injuries covered by workers' compensation. The military disability compensation system has the same premise, except that military members are considered to be "on duty" 24-hours a day. Their no-fault compensation applies to virtually all injuries at work or at home, and they may not sue their employer (the United States) for any injuries. This legislation would destroy that premise, central to all employment-related compensation systems.

Moreover, as the Department of Justice pointed out in testimony before the Senate Judiciary Committee during the 107th Congress:

> While it is sometimes argued that the *Feres* doctrine is unfair to service members who are the victims of medical malpractice, as we have seen, the *Feres* doctrine is an adjunct to a military disability compensation package available to service members which, on the whole, is far more generous, even-handed, and fair than compensation available to private citizens under analogous state workers' compensation schemes. This is because service members, unlike their civilian counterparts who suffer serious adverse consequences from medical care, generally are eligible for compensation whether or not those consequences are, or can be proven to be, the result of substandard medical care. While, in certain cases, the compensation may be somewhat less than what might be available to a successful plaintiff who endures a medical malpractice lawsuit (just as workers' compensation systems generally provide lower benefits for work-related injuries than what might be available through tort litigation), the fact is that all of these service members are eligible for such compensation rather than only a small handful who can show a causal link between their condition and substandard medical care. The arbitrariness and uncertainty associated with tort litigation is eliminated. Accordingly, from the perspective of all service members who suffer adverse consequences from medical care, the existing system of compensation is in many ways superior to what they would receive if they were private citizens.[11]

- **Lawsuits will not improve military medicine.** Some assert that allowing malpractice claims will improve military medicine because of the threat of suit. However, this proposition cannot withstand close analysis. First, FTCA suits are permitted for approximately 70 percent of the patient population at military medical facilities (e.g., retirees and dependents of active-duty personnel). It defies belief to assert that allowing tort claims by the remaining 30 percent would achieve any beneficial effect upon the quality of health care. Any argument that military physicians provide better care to those who may sue for malpractice is a gratuitous insult to military physicians. Second, medical malpractice liability would impose costs on the military medical system that would take away from the funding otherwise available to be put towards improved medical care. The Congressional Budget Office has given this legislation a preliminary score of $2.9 billion over the next 10 years—that is $2.9 billion that could be better spent by putting that money back into

[11] *The Feres Doctrine: An Examination of the Military Exception to the Federal Tort Claims Act: Hearing Before S. Comm. on the Judiciary,* 107th Cong. (2002) (statement of Paul Clinton Harris, Deputy Associate Attorney General).

the military medical system to make improvements for all patients.

- **Medical malpractice tort litigation has raised the cost of health care in the civilian setting.** Superimposing tort litigation on the military medical system will also impose excessive costs on military health care. According to Princeton University economist Uwe Reinhardt, a primary driver of American health care costs are "higher treatment costs triggered by our uniquely American tort laws."[12] The question this presents is whether service members would be better served by being allowed to file tort suits for malpractice claims or by increasing funding and making other improvements to the current comprehensive, no-fault system. It would seem that improving the current compensation system provided by the Departments of Defense and Veterans Affairs would be a better answer than introducing litigation into the military medical setting.
- **The cost to taxpayers of H.R. 1478 will be in the billions, with the trial bar being a principal beneficiary.** The Congressional Budget Office (CBO) has given H.R. 1478 a preliminary score of $2.9 billion over the next ten years. Additionally, the FTCA allows plaintiffs' attorneys to charge contingency fees of up to 25 percent of the amount awarded. As a result, based on CBO's score, up to $725 million of these awards will be going to the trial bar, not to service members.
- **H.R. 1478 has an unreasonable retroactive effective date of January 1, 1997.** Statutes of limitations help avoid circumstances in which evidence is incomplete, documents have disappeared and testimony relies on faded memories. Allowing military medical malpractice claims that date back to 1997 will clearly put in play all of these circumstances that statutes of limitations are designed to avoid. For instance, in many of these cases the armed services have likely already disposed of the medical records as part of normal document retention policies. Even if the medical records still exist, memories of the events and circumstances surrounding the alleged malpractice will often have faded.

REPUBLICAN AMENDMENTS

Republican Members offered three amendments to H.R. 1478 at the Committee markup. The first two Republican amendments were rejected and the third was withdrawn:

- **King Amendment.** Mr. King offered an amendment to adjust the current 25 percent cap on fees in litigated Federal Tort Claims Act cases down to 15 percent and the current 20 percent cap on fees in settled cases to 10 percent. The purpose of the amendment was to maximize the recoveries

[12] Uwe Reinhardt, *Why Does U.S. Health Care Cost So Much? (Part I), N.Y. Times* (November 14, 2008); *see also, e.g.,* Editorial, *Our View on 'Defensive' Medicine: Lawyers' Bills Pile High, Driving Up Health Care Costs, USA Today,* December 29, 2008 ("A study last month by the Massachusetts Medical Society found that 83% of its doctors practice defensive medicine at a cost of at least $1.4 billion a year. Nationally, the cost is $60 billion-plus, according to the Health and Human Services Department.").

that service members would receive in medical malpractice cases brought pursuant to H.R. 1478.

- **Franks Amendment.** Mr. Franks offered an amendment to require the General Accountability Office (GAO) to conduct a study of several issues related to medical malpractice by military medical personnel before repealing the *Feres* doctrine for medical malpractice claims. The Committee only held one subcommittee hearing on this legislation prior to markup and neither the Department of Defense nor the Department of Justice testified at that hearing. Mr. Franks' amendment would put a reasonable hold on H.R. 1478 so that GAO could conduct a study of the current system to provide Congress with at least some of the information needed to make an educated decision on whether to repeal the *Feres* doctrine for medical malpractice claims.
- **Rooney Amendment.** Mr. Rooney offered an amendment to make clear that the exclusion for "combatant activities" contained in the subcommittee amendment to H.R. 1478 also includes training activities. In many instances, the same factors that weigh in favor of excluding combatant activities from medical malpractice-related liability will also be present for training activities. Mr. Rooney withdrew his amendment with assurances that consideration for his concerns regarding training activities would be included in the bill before it reaches the floor.

CONCLUSION

A recent article in *Legal Times* noted that H.R. 1478 is the first "preview of the coming fight" in Congress on behalf of the trial lawyers "over proposals that would open new areas for civil litigation."[13] That article further surmises that the trial lawyers are "testing whether they can translate their newfound political capital into legislative victories."[14] However, the trial lawyers' interests in creating more lawsuits and service members' interests in receiving the best medical benefits possible almost certainly do not merge when it comes to modifying the *Feres* doctrine. As General John D. Altenburg, the former Deputy Judge Advocate General of the Army, reasoned at the subcommittee hearing on H.R. 1478, "creating a special right to sue is not what will improve medical benefits."[15] In other words, if military medical benefits and disability compensation are inadequate, allowing lawsuits is not the answer. Rather, Congress should be looking to improve the military medical benefits and compensation systems instead of turning matters over to the trial bar.

As General Altenburg stated in his written testimony from the subcommittee hearing on H.R. 1478,

> Congress can better serve our service members and their families by improving benefits, by eliminating disparities and in-

[13] David Ingram, *Plaintiffs Bar Pushes Capitol Hill Agenda, Legal Times,* March 31, 2009.
[14] *Id.*
[15] *H.R. 1478, the "Carmelo Rodriguez Military Medical Accountability Act of 2009": Hearing Before the Subcomm. on Commercial and Administrative Law of the H. Comm. on the Judiciary,* 111th Cong. (2009) (statement of General John D. Altenburg, Jr. USA (Retired)).

equities, and by increasing compensation to better approximate damage recoveries of civil lawsuits. . . . Lawsuits are not the answer to what is admittedly a problem. America's fighting men and women and their families need meaningful and responsible compensation benefits . . . that can be timely delivered in a non-adversarial administrative forum with appropriate checks and balances, without making our brave service members resort to litigation.[16]

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STEVE KING.
TRENT FRANKS.
TED POE.
TOM ROONEY.
GREGG HARPER.

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[16] *Id.*