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# AT WAR WITH THE *FERES* DOCTRINE: THE CARMELO RODRIGUEZ MILITARY MEDICAL ACCOUNTABILITY ACT OF 2009

Melissa Feldmeier<sup>+</sup>

“We don’t promise you a rose garden.”<sup>1</sup>

A plane crashes into a New York City skyscraper. A giant fireball surges away from the wreck consuming those in its path, as large, sharp pieces of metal and machinery careen through the offices inside. Flames and smoke billow out of the building, to the dismay and horror of the New Yorkers below. For most Americans today, and perhaps much of the world as well, the indelible image of a fiery and smoke-filled Manhattan skyline brings to mind the awful tragedy of September 11, 2001. But this was not that terrorist attack on the World Trade Center. Rather, it was a densely foggy and rainy July 28, 1945, when a B-25 bomber, transporting servicemen from Bedford, Massachusetts, to Newark, New Jersey, crashed into the seventy-ninth floor of the Empire State Building.<sup>2</sup> The pilot, highly decorated Army Lieutenant Colonel William F. Smith, Jr., was a combat veteran of World War II.<sup>3</sup> He lost visibility in the fog and the ensuing accident occurred, killing him, two other

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1. United States Marine Corps recruiting poster, available at <http://www.grose.us/pics/taliano.jpg> (last visited Sept. 27, 2010); see Jennifer Brofer, *We Don’t Promise You a Rose Garden* (Feb. 21, 2006), <http://www.grose.us/rosegarden/article.htm> (noting that this poster was part of a recruiting campaign that ran from 1971 to 1984).

2. Joe Richman, *The Day a Bomber Hit the Empire State Building*, NPR (July 28, 2008), <http://www.npr.org/templates/story/story.php?storyId=92987873>; William Roberts, *July 28, 1945—Plane Hits Building—Woman Survives 75-Story Fall*, ELEVATOR WORLD (Mar. 1, 1996), [www.elevator-world.com/magazine/archive01/9603-002.htm](http://www.elevator-world.com/magazine/archive01/9603-002.htm) (explaining that the Empire State Building was the tallest building in the world at that time); Jennifer Rosenberg, *The Plane that Crashed into the Empire State Building*, <http://history1900s.about.com/od/1940s/a/empirecrash.htm> (last visited Sept. 27, 2010).

3. Roberts, *supra* note 2; Rosenberg, *supra* note 2. Lieutenant Colonel Smith was a decorated World War II veteran who had flown over one hundred combat missions. Roberts, *supra* note 2.

military crewmen, and eleven civilians who worked inside the building.<sup>4</sup> To compensate the families of the victims, the United States government offered money.<sup>5</sup> Unwilling to accept the amount offered, some of the victims sued the government.<sup>6</sup>

The lawsuit was the impetus for “landmark legislation” in the form of the Federal Tort Claims Act of 1946 (FTCA).<sup>7</sup> In the FTCA, the United States partially waived its sovereign immunity, thereby giving American citizens, for the first time,<sup>8</sup> the right to sue the federal government for “negligent or wrongful act[s] or omission[s].”<sup>9</sup> Since its enactment, the FTCA has been an important mechanism for allowing citizens to redress injuries caused by the government and its employees.<sup>10</sup>

Over the years, the Supreme Court has decided many FTCA cases,<sup>11</sup> but not all of those decisions have been as well-received as the Act itself.<sup>12</sup> One interpretation of the FTCA that has received “widespread, almost universal criticism”<sup>13</sup> is *Feres v. United States*, decided by the Court in 1950.<sup>14</sup> The *Feres* Court held that the FTCA bars active-duty members of the military from suing the government for injuries sustained incident to their service.<sup>15</sup> This

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4. See Rosenberg, *supra* note 2; see also Roberts, *supra* note 2. Fortunately, the crash occurred on a Saturday morning when there were many thousands fewer people in the building. Roberts, *supra* note 2.

5. Richman, *supra* note 2.

6. *Id.*

7. *Id.* (explaining that the crash was the catalyst for the FTCA); see Federal Tort Claims Act, ch. 753, tit. IV, 60 Stat. 812, 842–47 (1946) (codified as amended at 28 U.S.C. §§ 1346(b), 2671–2680 (2006)). The 1946 FTCA was originally codified in 28 U.S.C. §§ 921, 922, 931–934, 941–946 (1940). In 1948, Congress made minor changes to the 1946 Act. It is this 1948 Act that is codified at 28 U.S.C. §§ 1346(b), 2671–2680.

8. See Paul F. Figley, *Understanding the Federal Tort Claims Act: A Different Metaphor*, 44 TORT TRIAL & INS. PRAC. L.J. 1105, 1107–09 (2009) (providing a history of the sovereign immunity doctrine and an overview of how redress worked before the FTCA).

9. 28 U.S.C. § 1346(b)(1).

10. See Figley, *supra* note 8, at 1138 (“The FTCA succeeds at the task Congress set for it. It generally waives the United States’ sovereign immunity for the torts of federal employees and provides an effective mechanism to resolve claims against the government administratively or . . . judicially.”). But see Howard Ball, *Federal Tort Claims Act*, <http://www.answers.com/topic/federal-tort-claims-act> (last visited Sept. 27, 2010) (“[T]he FTCA has not been a major benefit to persons injured or killed because of negligent actions of federal employees.”).

11. See, e.g., *Ali v. Fed. Bureau of Prisons*, 552 U.S. 214, 215, 227 (2008); *Molzof v. United States*, 502 U.S. 301, 303, 312 (1992); *United States v. Shannon*, 342 U.S. 288, 290 (1952).

12. See *infra* Part I.

13. *United States v. Johnson*, 481 U.S. 681, 700 (1987) (Scalia, J., dissenting) (quoting *In re “Agent Orange” Prod. Liab. Litig.*, 580 F. Supp. 1242, 1246 (E.D.N.Y. 1984)). According to Justice Scalia, *Feres v. United States* “heartily deserves” its negative criticism. *Id.*

14. *Feres v. United States*, 340 U.S. 135 (1950). Justice Robert H. Jackson delivered the opinion of a unanimous Court. *Id.* at 136.

15. *Id.* at 146.

principle, known as the “*Feres* Doctrine,” has been applied expansively and consistently upheld in its sixty years of existence.<sup>16</sup> For almost as long, critics have condemned *Feres* as one of the most unjust and unprincipled decisions in American jurisprudence.<sup>17</sup>

In applying the *Feres* Doctrine, courts have barred suits against the government by servicemen and their families in vastly varying situations. For instance, a widow could not sue for the death of her husband in a barracks fire resulting from the negligent maintenance of a heating system.<sup>18</sup> Similarly, the Court held that a widow could not sue for the death of her husband in a Coast Guard helicopter crash where the Federal Aviation Administration (FAA) had taken control of the helicopter’s radar.<sup>19</sup> The executor of a sailor’s estate could not sue for the sailor’s death from falling off a pier on return to his ship,<sup>20</sup> and an off-duty marine could not sue for injuries received when he was run over on base by an on-duty military policeman.<sup>21</sup> The estates of sailors who drowned while participating in a Navy-led rafting trip also were barred from suing,<sup>22</sup> as was the mother of an off-duty soldier who was murdered by a fellow soldier.<sup>23</sup> Under *Feres* jurisprudence, it is practically certain that the families of the servicemen killed by the crash of the B-25 bomber into the Empire State Building would have been unable to sue for Lieutenant Colonel Smith’s piloting error, though that error would have allowed the families of the civilians killed in the same accident to recover.<sup>24</sup>

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16. See *infra* Part I.B.3.

17. See, e.g., *Johnson*, 481 U.S. at 700–01 (Scalia, J., dissenting); *Costo v. United States*, 248 F.3d 863, 869 (9th Cir. 2001) (“[W]e apply the *Feres* doctrine here without relish. Nor are we the first to reluctantly reach such a conclusion under the doctrine. . . . [W]e join the many panels of this Court that have criticized the inequitable extension of this doctrine . . . .”); 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, 2, 71 (2003) (“Both academics and lower courts have condemned the [*Feres*] doctrine as unfounded, unfair, and even un-American. . . . [It] can be accurately described as one of the Supreme Court’s most ill-conceived, inequitable, and unjustifiable creations.”).

18. *Feres*, 340 U.S. at 137, 146.

19. *Johnson*, 481 U.S. at 682–83, 692.

20. *Morey v. United States*, 903 F.2d 880, 881 (1st Cir. 1990).

21. *Millang v. United States*, 817 F.2d 533, 534–36 (9th Cir. 1987).

22. *Costo*, 248 F.3d at 869.

23. *United States v. Shearer*, 473 U.S. 52, 53, 59 (1985).

24. See *Feres v. United States*, 340 U.S. 135, 146 (concluding that “the Government is not liable under the [FTCA] for injuries to servicemen where the injuries arise out of or are in the course of activity incident to service”); see also 28 U.S.C. § 2671 (2006) (including United States military personnel in the definition of “employee[s] of the government,” and thus making their actions subject to lawsuit). It is likely that the service members in the B-25 bomber were riding in the plane “incident to their service.” See, e.g., *Feres*, 340 U.S. at 137, 146 (holding that an injury received by an active-duty serviceman in a barracks fire was incident to his service). In determining whether the injury occurred incident to service, courts review the injured service member’s activities at the time of the injury, his duty status, and the place of the injury. See, e.g., *Parker v. United States*, 611 F.2d 1007, 1008, 1013–15 (5th Cir. 1980) (examining the nature of

The *Feres* Doctrine also bars service members from suing for injuries arising from the negligence of military medical personnel.<sup>25</sup> These medical malpractice cases are as tragic as any that occur in the civilian world. A sailor, for example, could not recover for a bungled fallopian tube surgery that left her infertile,<sup>26</sup> nor could an airman recover for a botched gallbladder removal surgery that required partial amputation of both of his legs.<sup>27</sup> Furthermore, under *Feres*, a marine sergeant named Carmelo Rodriguez could not sue for untreated skin cancer, even though military doctors observed and recorded the potentially cancerous tumors on his body during numerous physicals over the course of eight years, yet never informed him.<sup>28</sup> When Sergeant Rodriguez died from skin cancer in November 2007, the *Feres* Doctrine barred his family from suing the government for medical malpractice.<sup>29</sup>

The Carmelo Rodriguez Military Medical Accountability Act of 2009 (Rodriguez Act) proposes to allow members of the military to recover for medical and dental malpractice lawsuits against the government for non-combat related injuries or deaths.<sup>30</sup> Introduced in the House of Representatives as House Bill 1478 and in the Senate as Senate Bill 1347, the Act is the latest legislative attempt to partially overrule *Feres*.<sup>31</sup> Over the years, members of Congress have proposed several nearly identical bills, but all have failed to pass.<sup>32</sup> Thus, despite continuing

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the activities, duty status, and location of injury for a service member who was killed in a government vehicle on a military base). This test, generally applied using a totality-of-the-circumstances analysis, has garnered widely disparate results, even for similar cases. See, e.g., *Costo*, 248 F.3d at 867 ("Rather than seizing on any particular combination of factors, we have focused on 'the totality of the circumstances.' . . . [W]e have reached the unhappy conclusion that the cases applying the *Feres* doctrine are irreconcilable . . ."); Major Deirdre G. Brou, *Alternatives to the Judicially Promulgated Feres Doctrine*, 192 MIL. L. REV. 1, 29–30 (2007). The negative consequence, of course, is that the meaning of "incident to service" is amorphous in *Feres* jurisprudence. *Id.* at 26–30.

25. See *Feres*, 340 U.S. at 137–38, 146.

26. See Linda Greenhouse, *On Allowing Soldiers to Sue*, N.Y. TIMES, Dec. 16, 1986, at B12; see also 134 CONG. REC. 1597 (1988) (statement of Rep. Daniel Glickman) (summarizing the negligent treatment rendered by the Navy hospital and criticizing the paltry compensation the sailor received for being left infertile at a young age).

27. See Mary McGuirt, *Airman Loses Legs After Gall Bladder [sic] Surgery*, ABC NEWS (July 22, 2009), <http://www.abcnews.go.com/US/story?id=8150409&page=1>.

28. *Carmelo Rodriguez Military Medical Accountability Act of 2009: Hearing on H.R. 1478 Before the Subcomm. on Commercial and Admin. Law of the H. Comm. on the Judiciary*, 111th Cong. 119–21 (2009) [hereinafter *Rodriguez Hearing*] (statement of Ivette Rodriguez, sister of Sergeant Carmelo Rodriguez).

29. *Id.* at 121.

30. Carmelo Rodriguez Military Medical Accountability Act of 2009, H.R. 1478, 111th Cong. (2009); Carmelo Rodriguez Military Medical Accountability Act of 2009, S. 1347, 111th Cong. (2009).

31. H.R. 1478; S. 1347; see *infra* Part I.C.2.

32. See *infra* Part I.C.

“widespread”<sup>33</sup> hostility toward the *Feres* Doctrine, Congress has not legislatively overruled it.<sup>34</sup> Whether the Rodriguez Act will meet the same fate as its predecessors remains to be seen.<sup>35</sup>

This Comment examines and analyzes the relative merits of the Rodriguez Act and the *Feres* Doctrine. First, it provides a brief factual and historical overview of the FTCA and discusses how it functions. Next, this Comment reviews the history of the Supreme Court’s jurisprudence in applying the FTCA to claims made by service members. It does so by examining *Feres* and its progeny and the continued judicial justifications for upholding *Feres* as well as, in contrast, those proposed for overturning it. Next, this Comment introduces the legislative predecessors to the Rodriguez Act, and follows with previous congressional arguments for and against the *Feres* Doctrine. Then, it explores the ramifications of the Rodriguez Act’s passage, and alternatively, of its failure. Here, this Comment focuses on the technical deficiencies of the Rodriguez Act as written. In the third part, this Comment rejects the Rodriguez Act and presents two previously suggested but never adopted alternative solutions to the *Feres* problem and then espouses one of the solutions in an effort to create a workable remedy to the embattled doctrine. This Comment concludes with an alternate legislative proposal that is more practical and equitable than the Rodriguez Act.

## I. THE MARCH TO *FERES* AND BEYOND

### A. A Brief Overview of the FTCA

The Founding Fathers adopted the English common law principle of sovereign immunity, which holds that citizens may only sue the government for that which the government has consented to be sued.<sup>36</sup> Thus, “no action

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33. *United States v. Johnson*, 481 U.S. 681, 700 (1987) (Scalia, J., dissenting) (quoting *In re “Agent Orange” Prod. Liab. Litig.*, 580 F. Supp. 1242, 1246 (E.D.N.Y. 1984)).

34. See *infra* Part I.C.

35. As of August 27, 2010, S. 1347 had been referred to the Senate Committee on the Judiciary. 155 CONG. REC. S6993 (daily ed. June 24, 2009); see also *Bill Summary & Status 111th Congress* (2009–2010) S. 1347, THE LIBRARY OF CONGRESS, <http://thomas.loc.gov/cgi-bin/bdquery/z?d111:SN01347>: (last visited Sept. 27, 2010). H.R. 1478 was reported and amended by the House Committee on the Judiciary and placed on the Union Calendar, Calendar No. 267, on April 26, 2010. 155 CONG. REC. H2876 (daily ed. Apr. 26, 2010); see also *Bill Summary & Status 111th Congress* (2009–2010) H.R. 1478, THE LIBRARY OF CONGRESS, <http://thomas.loc.gov/cgi-bin/bdquery/z?d111:HR01478:@@L&summ2=m&> (last visited Sept. 27, 2010).

36. *Feres v. United States*, 340 U.S. 135, 139 (1950) (“While the political theory that the King could do no wrong was repudiated in America, a legal doctrine derived from it that the Crown is immune from any suit to which it has not consented was invoked on behalf of the Republic and applied by our courts as vigorously as it had been on behalf of the Crown.”); see also THE FEDERALIST NO. 81, at 446 (Alexander Hamilton) (E.H. Scott ed., 1898) (“It is inherent in the nature of sovereignty, not to be amenable to the suit of an individual, *without its consent*.”); Louis L. Jaffe, *Suits Against Governments and Officers: Sovereign Immunity*, 77 HARV. L. REV.

lies against the United States unless the legislature has authorized it.”<sup>37</sup> For almost 150 years, a person injured by the federal government or its employees had no remedy but to petition Congress for redress of his grievances.<sup>38</sup> One can imagine the inherent inefficiency of this practice.<sup>39</sup> Indeed, complaints about grievances overwhelming the congressional workload are as old as the Republic.<sup>40</sup> Improvements came slowly, as Congress passed legislation that provided remedies for many of those claims.<sup>41</sup> Tort claims against the government, however, were repeatedly excluded from these legislative enactments.<sup>42</sup> As this responsibility became increasingly burdensome on

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1, 1 (1963). Nowhere is the rule of sovereign immunity invoked in the Constitution; however, it is implied. *See Monaco v. Mississippi*, 292 U.S. 313, 321 (1934) (“[T]here is no express provision that the United States may not be sued in the absence of consent. . . . But by reason of the established doctrine of the immunity of the sovereign from suit except upon consent, the provision of Clause one of § 2 of Article III does not authorize the maintenance of suits against the United States.”).

37. *Dalehite v. United States*, 346 U.S. 15, 30 (1953).

38. The First Amendment of the Constitution states “Congress shall make no law . . . abridging . . . the right of the people . . . to petition the Government for a redress of grievances.” U.S. CONST. amend. I. The result of these petitions, if considered worthy, would be a private bill granting special relief to the individual. 1 *Handling Federal Tort Claims* (MB) § 2.01, 2-5 to -6 (June 2010).

39. The Supreme Court noted that this process was “notoriously clumsy.” *Dalehite*, 346 U.S. at 24–25. In some years, there were over 2000 private relief bills introduced before Congress. *See United States v. Muniz*, 374 U.S. 150, 154 (1963). “Because the claimants could only seek relief through private legislation, it was not long before petitions for relief became so numerous that Congress found itself under an intense and time-consuming burden of attempting to adjudicate, to the detriment of its duty to legislate.” 1 *Handling Federal Tort Claims*, *supra* note 38, § 2.02, at 2-6.

40. Figley, *supra* note 8, at 1108 (“John Quincy Adams complained about the inordinate time Congress spent on claims matters. Millard Fillmore urged that a tribunal be established to handle private claims. Abraham Lincoln called for such a change in his first annual message to Congress.” (internal citations omitted)).

41. *Id.* In 1855, Congress passed the Court of Claims Act. Court of Claims Act, ch. 122, 10 Stat. 612 (1855). This Act created an “administrative or advisory body” consisting of three judges whose purpose was to “hear and determine certain claims against the government of the United States, and also all claims which might be referred to the court by either House of Congress.” *Williams v. United States*, 289 U.S. 553, 562, 565 (1933). Though called a “court,” the Court of Claims functioned only to prepare bills for congressional review. *United States v. Klein*, 80 U.S. 128, 144 (1871). It did little to relieve Congress of the heavy burden presented by private claims. Even after Congress increased the number of judges and gave the court the power to enter final judgments, appealable only to the Supreme Court, Court of Claims Act Amendments of 1863, ch. 92, 12 Stat. 765 (1863), private claims bills continued to overload Congress. 1 *Handling Federal Tort Claims*, *supra* note 38, § 2.04, at 2-14.

42. Figley, *supra* note 8, at 1108. Because the jurisdictional provisions of the Court of Claims Act and its amendments did not seem to include tort claims, and because the Supreme Court rejected any such interpretation, private bills for tort relief continued to burden Congress. 1 *Handling Federal Tort Claims*, *supra* note 38, §§ 2.03–.04, at 2-11 to -14. In 1887, Congress passed the Tucker Act, which was originally a general tort claims act, but which the Senate modified before passage to exclude tort claims. *Id.* § 2.04, at 2-16 to -17. This modified version

congressional claims committees, “pressure grew for enactment of a comprehensive law to more efficiently handle tort claims against the government.”<sup>43</sup> In the twenty-five years before the FTCA was passed, over thirty bills were proposed to address the problem.<sup>44</sup> The 1945 crash of the B-25 bomber in New York City provided a late surge of momentum for that effort.<sup>45</sup>

Congress finally passed the FTCA on August 2, 1946, allowing citizens to file suit against the government for tort claims.<sup>46</sup> As the *Feres* Court noted, “[t]he primary purpose of the [FTCA] was to extend a remedy to those who had been without [one].”<sup>47</sup> To file a claim against the government under the FTCA, a person must first exhaust the requisite administrative remedies with the appropriate federal agency.<sup>48</sup> If the agency denies the claim in writing, the plaintiff has six months to file suit under the FTCA.<sup>49</sup> Subject to thirteen exceptions,<sup>50</sup> the FTCA made the United States liable 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

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of the bill, enlarging the Court of Claims’ jurisdiction to “include all cases for damages not sounding in tort,” became law. *Dalehite*, 346 U.S. at 25 n.10.

43. Figley, *supra* note 8, at 1108–09.

44. *Id.* at 1109.

45. Brou, *supra* note 24, at 9–10. Congress drafted the FTCA to cover any claims arising on or after January 1, 1945, thus enabling the victims of the crash to benefit. 28 U.S.C. § 1346(b) (2006).

46. Federal Tort Claims Act, ch. 753, tit IV, 60 Stat. 812, 842–47 (1946) (codified as amended at 28 U.S.C. §§ 1346(b), 2671–2680 (2006)). The FTCA was passed as Title IV of the Legislative Reorganization Act. *Id.* As the Supreme Court noted, “[t]he Seventy-ninth [Congress], which passed the Act, held no relevant hearings [on the Act]. Instead, it integrated the language of the Seventy-seventh Congress” into the Act. *Dalehite*, 346 U.S. at 26.

47. *Feres v. United States*, 340 U.S. 135, 140 (1950).

48. 28 U.S.C. § 2675(a). The agency must receive the claim within two years of the date of accrual or the claim will be barred. *Id.* § 2401(b). For active-duty military members, the Soldiers’ and Sailors’ Civil Relief Act provides that the two-year statute of limitations will not toll until completion of military service. 50 U.S.C. app. § 526 (2006). Some courts have held that medical malpractice claims are an exception to the accrual provision of the FTCA. *See, e.g., Wehrman v. United States*, 830 F.2d 1480, 1483 (8th Cir. 1987) (holding that a medical malpractice tort claim accrues when the plaintiff knows, or should know, the existence and cause of the injury).

49. 28 U.S.C. § 2401(b).

50. *See* 28 U.S.C. § 2680. Three of the thirteen exceptions are relevant to this Comment. First, the discretionary-function exception exempts from liability “[a]ny claim based upon an act or omission of an employee of the Government, exercising due care . . . or perform[ing] a discretionary function or duty . . .” *Id.* § 2680(a). Second, an exception for claims “arising in a foreign country” exists. *Id.* § 2680(k). Finally, and most specific to service members, there is an exception for “[a]ny claim arising out of the combatant activities of the military or naval forces, or the Coast Guard, during time of war.” *Id.* § 2680(j).



private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.<sup>51</sup>

The FTCA's definition of "employee[s] of the government" includes servicemen and women.<sup>52</sup> Further, "[a]cting within the scope of his office or employment', in the case of a member of the military or naval forces of the United States . . . means acting in [the] line of duty."<sup>53</sup> Thus, citizens may sue the government under the FTCA for negligent acts or omissions by service members. Notably, the plain language of the FTCA does not preclude members of the Armed Forces from bringing suit against the government.<sup>54</sup> The only exception specific to members of the Armed Forces is § 2680(j), which bars "[a]ny claim arising out of the combatant activities of the military or naval forces, or the Coast Guard, during time of war."<sup>55</sup> Nevertheless, the Supreme Court interpreted the FTCA to bar service members' claims just a few years after Congress passed the Act.<sup>56</sup>

### *B. The Supreme Court Weighs in on the Application of the FTCA to Members of the Armed Forces*

Professor Henry Abraham once remarked that "[Justice Robert Jackson] was no friend of legislative forays by judges; he was a demonstrable devoté of judicial restraint . . . judicial activism was for him irreconcilable with representative democracy."<sup>57</sup> How then, does one explain *Feres*, penned by Justice Jackson, which some critics have denounced as "willful" judicial activism?<sup>58</sup> Despite the criticism, Justice Jackson's *Feres* opinion has survived

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51. 28 U.S.C. § 1346(b). It is worth noting, however, that "[b]ecause the jurisdictional grant is for torts arising from a 'negligent or wrongful act or omission,' the FTCA does not support claims for strict or absolute liability." Figley, *supra* note 8, at 1111 (quoting 28 U.S.C. § 1346(b)).

52. 28 U.S.C. § 2671 ("Employee of the government' includes . . . members of the military or naval forces of the United States . . .").

53. *Id.*

54. *See* 28 U.S.C. §§ 1346(b), 2671–2680.

55. 28 U.S.C. § 2680(j).

56. *Feres v. United States*, 340 U.S. 135, 146 (1950); *see also infra* Part I.B.

57. Henry Abraham, Mr. Justice Robert H. Jackson (1892–1954) An Attempt to Place Him into Some Historical Perspective, Remarks at the Robert H. Jackson Center (Mar. 18, 2003), available at <http://www.roberthjackson.org/the-man/speeches-articles/speeches/speeches-related-to-robert-h-jackson/mr-justice-robert-h-jackson-1892-1954-an-attempt-to-place-him-into-some-historical-perspective/>.

58. *See, e.g.,* *Taber v. Maine*, 67 F.3d 1029, 1039 (2d Cir. 1995) (stating that *Feres* had "willful and arguably misguided origins"); Turley, *supra* note 17, at 7 ("Given the absence of historical or legal support, the *Feres* doctrine appears to be the product of little more than judicial lawmaking."). *Contra The Feres Doctrine and Military Med. Malpractice: Hearing on S. 489 and H.R. 3174 Before the Subcomm. on Admin. Practice and Procedure of the S. Comm. on the Judiciary*, 99th Cong. 64 (1986) [hereinafter *Feres Hearing*] (statement of Michael F. Noone, Jr., Associate Dean of the Columbus School of Law, Catholic University of America) ("I think it is

sixty years of judicial and congressional review.<sup>59</sup>

### *I. Brooks v. United States: The Origin of the "Incident to Service" Test*

*Brooks v. United States* provided the Supreme Court its first opportunity to address the application of the FTCA to military personnel.<sup>60</sup> A father and his two sons were involved in a fatal accident when an Army truck, driven by a civilian employee, collided with their car.<sup>61</sup> One son died, and the other son and the father were severely injured.<sup>62</sup> Both sons were in the Armed Forces at the time of the accident.<sup>63</sup> The surviving son and the deceased son's estate brought suit against the United States.<sup>64</sup> The Fourth Circuit held that service members were excluded from recovery under the FTCA, thus barring the claim.<sup>65</sup> The Supreme Court reversed, declaring that "[t]he statute's terms are clear" and "[w]e are not persuaded that 'any claim' means 'any claim but that of servicemen.'"<sup>66</sup> Continuing with an analysis of the legislative history of the FTCA, the Court concluded, "[i]t would be absurd to believe that Congress did not have the servicemen in mind in 1946, when this statute was passed."<sup>67</sup> In

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important also to note, sir, that the *Feres* decision is really a decision involving judicial self restraint [sic].").

59. See *infra* Parts II.B–C.

60. *Brooks v. United States*, 337 U.S. 49, 50 (1949).

61. *Id.*

62. *Id.*

63. *Id.*

64. *Id.*

65. See *United States v. Brooks*, 169 F.2d 840, 846 (4th Cir. 1948), *rev'd*, 337 U.S. 49 (1949).

66. *Brooks*, 337 U.S. at 51, 54. The Supreme Court's holding in *Brooks* that Congress did not intend to exclude servicemen has some support from a representative who was involved in the enactment of the FTCA. He disagreed strongly with the Fourth Circuit's conclusion before the Supreme Court reversed it:

The opinion of the Fourth Circuit is utterly erroneous when it says that it was the intent of Congress to exclude a member of the Armed Forces from the benefits of the Tort Claims Act. . . . I had more to do with [the Act] than any other member. I never intended to preclude a suit by a soldier. . . . [T]he government deliberately removes the defense of sovereignty, except in cases where the Act specifically makes an exception. The exception cannot be implied; it must be expressed. The court cannot read the exceptions into law.

Note, *Military Personnel and the Federal Tort Claims Act*, 58 YALE L.J. 615, 621 n.26 (1949) (quoting Representative Emmanuel Celler, who drafted the FTCA, in an interview he gave to *Yale Law Review* on November 26, 1948); see also Richard W. Kelly, Jr., Recent Decision, *Torts—Federal Torts Claims Act—Feres Doctrine—Post-Discharge Failure to Warn Theory—Heilman v. United States*, 731 F.2d 1104 (3d Cir. 1984), 24 DUQ. L. REV. 309, 316 n.56 (1985).

67. *Brooks*, 337 U.S. at 51. The *Brooks* Court noted that in the years prior to the FTCA's enactment, several of the tort reform bills contained a military exception, but the FTCA, as enacted, did not. *Id.* at 51–52. The Court believed that the exclusion of a military exception was intentional. *Id.*

response to the government's contention that allowing the suit would have "dire consequences" for the United States,<sup>68</sup> the Court was careful to highlight that the cause of action was not "incident to the Brooks' service."<sup>69</sup> Such a situation, the Court explained, would present a "wholly different case."<sup>70</sup> Thus, under *Brooks*, the FTCA allowed suits by members of the Armed Forces if (1) the facts of the case did not fall under any of the FTCA exceptions, and (2) the service member was off duty, off base, and the injury did not occur in relation to his military service.<sup>71</sup>

## 2. *Feres v. United States: A Judicially Created Exception to the FTCA*

Only a year after the *Brooks* decision, the Court read an exception for servicemen into the FTCA when it decided *Feres v. United States*.<sup>72</sup> The *Feres* opinion combined three separate cases on appeal under its name.<sup>73</sup> *Feres v. United States*, a Second Circuit case, involved a widow who brought suit against the United States for her husband's death in a barracks fire at Pine Camp, New York.<sup>74</sup> She alleged negligence in the maintenance of the heating plant at the barracks and in the failure to keep a proper fire watch.<sup>75</sup> The district court dismissed her action, and the Second Circuit affirmed.<sup>76</sup> In *Jefferson v. United States*,<sup>77</sup> after the plaintiff was discharged from the Army, doctors discovered a thirty-inch by eighteen-inch towel marked "Medical Department U.S. Army" inside his stomach during an operation.<sup>78</sup> Jefferson

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68. *Id.* at 52.

69. *Id.*

70. *Id.* Although the Supreme Court in *Brooks* asserted that the language of the FTCA was clear, it managed to expand the FTCA by distinguishing the Brooks' situation from that which would be "incident to service." See Turley, *supra* note 17, at 8–9. The FTCA is subject to an exception for "[a]ny claim arising out of the combatant activities of the military or naval forces, or the Coast Guard, during time of war." 28 U.S.C. § 2680(j) (2006); see *supra* note 50. Beyond this specific characterization of military activity, the FTCA does not mention any other obstacle that military personnel must overcome to bring suit under the Act and contains no language referencing activity "incident to service." See 28 U.S.C. §§ 1346(b), 2671–2680. One may question why, then, the *Brooks* Court made this distinction, when the "most obvious interpretation of the FTCA [would be] to confine the exemption to combat injuries." Turley, *supra* note 17, at 9.

71. See *Brooks*, 337 U.S. at 51–52.

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

73. *Id.* at 136–37.

74. *Feres v. United States*, 177 F.2d 535, 536 (2d Cir. 1949), *aff'd*, 340 U.S. 135 (1950).

75. *Feres*, 340 U.S. at 136–37.

76. *Id.* The district court dismissed the complaint based on the holding in *Brooks*, and the Second Circuit affirmed: "If more than the pension system had been contemplated to recompense soldiers engaged in military service we think that Congress would not have left such relief to be implied from the general terms of the Tort Claims Act, but would have specifically provided for it." *Feres*, 177 F.2d at 537.

77. *Jefferson v. United States*, 178 F.2d 518 (4th Cir. 1949), *aff'd sub nom. Feres v. United States*, 340 U.S. 135 (1950).

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

alleged that an Army surgeon had negligently left the towel inside of him during an operation eight months earlier.<sup>79</sup> The district court dismissed the case after trial,<sup>80</sup> and the Fourth Circuit affirmed.<sup>81</sup> *Griggs v. United States*, a Tenth Circuit case, also involved a widow who sued the government for the death of her husband, alleging negligence by Army surgeons.<sup>82</sup> The trial court similarly dismissed the case, but the Tenth Circuit reversed.<sup>83</sup>

Justice Jackson began *Feres* where *Brooks* left off, declaring that it was the “wholly different case” foreseen in *Brooks*.<sup>84</sup> The issue before the *Feres* Court was whether the FTCA applied to injuries to servicemen incident to their service.<sup>85</sup> For three reasons discussed below, the Court found that it did not.<sup>86</sup>

First, the Court found that service members could not meet the test for allowable claims because the Act required the United States to be liable “in the same manner and to the same extent as a private individual under like circumstances.”<sup>87</sup> The Court reasoned that private individuals do not have the “power to conscript or mobilize a private army with such authorities over persons as the Government vests in echelons of command.”<sup>88</sup> Additionally, the Court found “no American law which ever has permitted a soldier to recover for negligence, against either his superior officers or the Government.”<sup>89</sup> The Court concluded that these factual dissimilarities between a private individual and the government meant that Congress intended to exempt military personnel from the benefits of the FTCA.<sup>90</sup>

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79. *Id.*

80. *Jefferson v. United States*, 77 F. Supp. 706, 708, 716 (D. Md. 1948), *aff’d*, 178 F.2d 518 (4th Cir. 1949), *aff’d sub nom. Feres v. United States*, 340 U.S. 135 (1950). The district court judge dismissed the case, holding that the FTCA was not intended to extend to service-connected injuries of members of the Armed Forces. *Id.* at 714. Around the same time, the Supreme Court decided *Brooks*. *Brooks v. United States*, 337 U.S. 49, 49 (1949).

81. *Jefferson*, 178 F.2d at 520. The Fourth Circuit, likewise, found it “unreasonable” to conclude that Congress intended the FTCA to apply to injuries incurred by service members in the performance of their military duties. *Id.*

82. *Griggs v. United States*, 178 F.2d 1, 2 (10th Cir. 1949), *rev’d sub nom. Feres v. United States*, 340 U.S. 135 (1950).

83. *Id.* at 2–3. Under *Feres*, “[a] motion to dismiss . . . is treated as a motion to dismiss for lack of subject-matter jurisdiction.” *Schnitzer v. Harvey*, 389 F.3d 200, 202 (D.C. Cir. 2004). The district court in *Griggs* sustained a motion to dismiss the complaint because it believed no relief could be granted under the FTCA. *Griggs*, 178 F.2d at 2. The Tenth Circuit, however, relied heavily on the *Brooks* case, and “fail[ing] to find anything in the context of the Act or its legislative history justifying judicial limitation upon the claims of serviceman,” it reversed the district court. *Id.* at 3.

84. *Feres*, 340 U.S. at 138.

85. *Id.*

86. *Id.* at 141–46.

87. *Id.* at 141 (quoting 28 U.S.C. § 2674 (2006)).

88. *Id.* at 141–42.

89. *Id.* at 141.

90. *Id.* at 142.

Second, the Court noted that the relationship between members of the Armed Forces and the United States was “distinctively federal in character.”<sup>91</sup> Service members are stationed throughout the country (and the world) and often must move from state to state.<sup>92</sup> Hence, their presence in a particular state is more the consequence of their military orders rather than the outcome of their choice.<sup>93</sup> Under the FTCA, the “law of the place where the act or omission occurred” governs the liability,<sup>94</sup> and “claim[s] arising in a foreign country” are exempted.<sup>95</sup> The Supreme Court did not believe that Congress intended to subject members of the Armed Forces to the diverse tort laws of the random states where they were assigned when they were injured incident to service.<sup>96</sup> Thus, the Court used the lack of uniformity in state laws as an additional factor to bar all claims by service members under the FTCA.<sup>97</sup>

The final reason the Supreme Court offered to support its belief that the FTCA was not intended to extend to suits by service members was the comprehensive system of veterans’ benefits and compensation already available to military personnel and their families.<sup>98</sup> To the Court, Congress could not have purposely anticipated collateral recovery by service members under the FTCA when they were already protected by such an extensive statutory scheme of benefits and compensation.<sup>99</sup> Based on this framework,

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91. *Id.* at 143.

92. *See id.*

93. *See id.*

94. 28 U.S.C. § 1346(b)(1) (2006).

95. *Id.* § 2680(k).

96. *Feres*, 340 U.S. at 143; *see infra* note 197 and accompanying text (discussing the *lex loci delicti* implications in the *Rodriguez* Act).

97. *See Feres*, 340 U.S. at 143.

98. *Id.* at 145–46. The Court found the compensation system “compare[d] extremely favorably with those provided by most workmen’s compensation statutes.” *Id.* at 145. The Federal Employees’ Compensation Act (FECA) established the United States government’s workmen’s compensation program for federal civilian employees. 5 U.S.C. §§ 8101–8152 (2006). The majority of workers in the United States, however, are subject to the workmen’s compensation programs of individual states. *See generally* Workers’ Compensation—Rules and Statutes by State, <http://www.workerscompensation.com/stateregs.php> (last visited Sept. 27, 2010) (listing the workers’ compensation statutes and rules by state). Though the programs vary from state to state, most states’ statutes, like the FECA and Military Claims Act, *see infra* Part III, limit the available damages, but the tradeoff is that employees do not have to prove fault in order to recover for their injuries. *See, e.g.*, CAL. LAB. CODE § 3600 (West 2003); MD. CODE ANN., LAB. & EMPL. § 9-501 (LexisNexis 2008); N.Y. WORKERS’ COMP. LAW § 10 (McKinney 2005 & Supp. 2010); 77 PA. STAT. ANN. § 431 (West 2002). Service members actually have broader coverage under the military system of compensation and benefits than do federal employees under FECA. Under FECA, federal employees may recover only for injuries sustained while performing work. 5 U.S.C. § 8102(a). In contrast, service members may recover for injuries as long as they were sustained while the service member was engaged in lawful activity. 38 U.S.C. § 1110 (2006).

99. *Feres*, 340 U.S. at 144. But Representative Emmanuel Cellers, who worked on the FTCA, would have disagreed with the Court’s conclusion: “Despite the fact that [servicemen]

the Supreme Court announced what would become the notorious *Feres* Doctrine: “We conclude that the Government is not liable under the [FTCA] for injuries to servicemen where the injuries arise out of or are in the course of activity incident to service.”<sup>100</sup>

### 3. *The World of Military Tort Claims After Feres*

Just four years after *Feres*, the Supreme Court added considerations of military discipline to the reasons why Congress could not have intended for the FTCA to apply to service-related injuries of members of the Armed Forces.<sup>101</sup> In *United States v. Brown*, the plaintiff sued for malpractice after a knee surgery at a veterans hospital left him permanently injured.<sup>102</sup> The *Brown* Court narrowed *Feres* by holding that veterans no longer on active duty could bring suit under the FTCA.<sup>103</sup> To the Court, the interest that the *Feres* Doctrine protected was “[t]he peculiar and special relationship of the soldier to his superiors, the effects of the maintenance of such suits on discipline, and the extreme results that might obtain if suits under the [FTCA] were allowed for negligent orders given or negligent acts committed in the course of military duty.”<sup>104</sup> The Court reasoned that, because former members of the military posed no threat to the institution of military discipline, they were free to sue.<sup>105</sup> Accordingly, the “military discipline” rationale was invented, essentially shielding the *Feres* Doctrine behind what would become an impenetrable cloud of judicial deference to discretionary military decisions.<sup>106</sup>

Both *Stencel Aero Engineering Corp. v. United States*<sup>107</sup> and *Chappell v. Wallace*<sup>108</sup> advanced the concept of protecting military discipline. *Stencel* was

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might have various and sundry remedies for compensation, pensions, hospitalization, preferences, etc., these benefits had nothing whatsoever to do with, and are utterly unrelated to the right to sue under the [FTCA].” Note, *supra* note 66, at 621 n.26.

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

101. See *United States v. Brown*, 348 U.S. 110, 112 (1954).

102. *Id.* at 110–11. The veteran was honorably discharged from active-duty service seven years earlier. *Id.* at 110.

103. *Id.* at 112–13.

104. *Id.* at 112.

105. *Id.* The Supreme Court recognized the importance of public and judicial deference to considerations of military discipline as far back as 1890:

An army is not a deliberative body. It is the executive arm. Its law is that of obedience. No question can be left open as to the right to command in the officer, or the duty of obedience in the soldier. . . . So, unless there be in the nature of things some inherent vice in the existence of the relation, or natural wrong in the manner in which it was established, public policy requires that it should not be disturbed.

*In re Grimley*, 137 U.S. 147, 153 (1890).

106. See *infra* text accompanying notes 109–21.

107. *Stencel Aero Eng'g Corp. v. United States*, 431 U.S. 666, 673 (1977).

108. *Chappell v. Wallace*, 462 U.S. 296, 304 (1983).

a third-party (non-military) indemnification case.<sup>109</sup> *Chappell* involved a claim by sailors against the government for constitutional torts.<sup>110</sup> The Supreme Court barred these suits because “[t]he need for special regulations in relation to military discipline” requires civilian courts to “at the very least, hesitate long before entertaining a suit which asks the court to tamper with the established relationship between enlisted military personnel and their superior officers.”<sup>111</sup> Thus, the Supreme Court extended the *Feres* Doctrine to bar third-party indemnification claims and certain constitutional claims from suit.

Thirty-five years after the Supreme Court announced *Feres*, the Court formally stated its preference for the military discipline rationale as the “best” explanation for the doctrine in *United States v. Shearer*.<sup>112</sup> Reviewing

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109. *Stencel*, 431 U.S. at 667. *Stencel* was a products liability case arising against the manufacturer of an ejection seat that malfunctioned and caused the plaintiff, a Missouri Air National Guard pilot, multiple injuries. *Id.* at 667 & n.1. *Stencel*, the manufacturer, sought indemnification from the United States. *Id.* at 668. The Supreme Court reaffirmed its reasoning in *Feres* and *Brown* and held that *Feres* limited the right of a third party to recover in an indemnity action under the FTCA against the United States when the injured party was a serviceman. *Id.* at 671. To the Supreme Court, it made no difference who brought the lawsuit; because a service member was injured in a service-related incident, *Stencel*’s indemnity action against the United States could still negatively impact military discipline. *Id.* at 673.

110. *Chappell*, 462 U.S. at 297. In *Chappell*, five sailors accused their superior officers of violating their constitutional rights. *Id.* Although the *Chappell* claim did not arise under the FTCA, the Supreme Court concluded that *Feres* principles applied and barred the enlisted men’s claims. *Id.* at 299, 305. The Court relied partially on the *Feres* Doctrine’s “military discipline” rationale, concluding that to allow these claims would negatively impact “the need for unhesitating and decisive action by military officers and equally disciplined responses by enlisted personnel.” *Id.* at 304.

The plaintiffs in *Chappell* sought non-statutory damages under *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*. *Id.* at 297. In *Bivens*, the Supreme Court held that in the absence of a federal statutory remedy there is an implied private cause of action for monetary damages for violations of constitutional rights by federal employees. *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 397 (1971); *id.* at 399 (Harlan, J., concurring).

111. *Chappell*, 462 U.S. at 300.

112. *United States v. Shearer*, 473 U.S. 52, 57 (1985) (quoting *United States v. Muniz*, 374 U.S. 150, 162 (1963)). The Court rejected two of its original rationales for barring suit by members of the Armed Forces: the existence of non-uniform state tort laws and the existence of the veterans’ benefits and compensation system. *Id.* at 58 n.4. These justifications were considered “no longer controlling.” *Id.*

*Shearer* was an Army private who was kidnapped and murdered by another Army private, Andrew Heard, who previously was jailed for manslaughter during an earlier tour of duty. *Id.* at 53–54. *Shearer*’s estate alleged that the government was negligent in failing to control the murderer and for failing to warn others about Heard’s dangerous nature. *Id.* The Court stated that “[t]o permit this type of suit would mean that commanding officers would have to stand prepared to convince a civilian court of the wisdom of a wide range of military and disciplinary decisions.” *Id.* at 58.

“professional military judgments” was considered outside the competence of the Court and outside the intentions of Congress when it passed the FTCA.<sup>113</sup>

Soon after *Shearer*, in *United States v. Johnson*, the Supreme Court applied the military-discipline rationale to bar a claim by a widow for the death of her husband in a helicopter crash.<sup>114</sup> Lieutenant Commander Horton Johnson, a helicopter pilot in the United States Coast Guard, fatally crashed into the side of a mountain while on a rescue mission in Hawaii.<sup>115</sup> When the helicopter crashed, civilian FAA controllers were in positive control of its radar.<sup>116</sup> After summarizing the three broad rationales behind *Feres*,<sup>117</sup> the Court determined that despite the *civilian status* of the FAA controllers, “the potential that this suit [w]ould implicate military discipline [was] substantial.”<sup>118</sup> Finding further

113. *Id.* at 58–59 (quoting *Chappell*, 462 U.S. at 302). The Supreme Court’s holding here further expanded the *Feres* Doctrine by allowing a command decision, not incident to service, to change the requirements of a successful *Brooks* claim. See *supra* note 71 and accompanying text. Despite the fact that *Shearer*’s murder occurred off-base, off-duty, and not in relation to military service, the Supreme Court held that “the situs of the murder is not nearly as important as whether the suit requires the civilian court to second-guess military decisions and whether the suit might impair essential military discipline.” *Shearer*, 473 U.S. at 57 (internal citations omitted).

114. *United States v. Johnson*, 481 U.S. 681, 682–83, 691–92 (1987). The Court also reestablished favor with the two rationales it had found were no longer controlling in *Shearer*, though it emphasized the military-discipline concerns. See *id.* at 688–91.

115. *Id.* at 682–83.

116. *Id.* at 683. Essentially, the inclement weather had rendered visual control of the helicopter impossible. The pilot requested assistance from the FAA. The FAA controller in Honolulu used the helicopter’s radar signal to locate the helicopter and then guided the pilot through the severe weather straight into a mountain. See Brief for the Respondent at 3, *United States v. Johnson*, 481 U.S. 681 (1987) (No. 85-2039).

117. *Johnson*, 481 U.S. at 688–91. First, because the relationship between the serviceman and the government is distinctly federal in character, “it ‘makes no sense to permit the fortuity of the situs of the alleged negligence to affect the liability of the Government to [the] serviceman.’” *Id.* at 689 (quoting *Stencel, Aero Eng’g Corp. v. United States*, 431 U.S. 666, 672 (1977)). Second, the existing veterans benefits and compensation system is the “upper limit of liability for the Government as to service-connected injuries.” *Id.* at 690 (quoting *Stencel*, 431 U.S. at 673). Finally, the claim should be barred because it is “the ‘type of claim[] that, if generally permitted, would involve the judiciary in sensitive military affairs at the expense of military discipline and effectiveness.’” *Id.* (quoting *Shearer*, 473 U.S. at 59).

118. *Id.* at 692. Indeed, the status of the tortfeasors provided the central question to the case: did their civilian status (as members of the FAA) preclude the application of the *Feres* Doctrine? No, according to the Supreme Court. See *id.* at 686–88. Though the *Feres* opinion twice mentioned the military status of the tortfeasors, see *Feres v. United States*, 340 U.S. 135, 138, 143 (1950), the broad language of the opinion advanced the federal government’s immunity from suit by military personnel. *Id.* at 144 (“We know of no American law which ever has permitted a soldier to recover for negligence, against either his superior officers or the Government he is serving.” (emphasis added)). The Court determined that military discipline was still at stake: “[M]ilitary 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 . . . could undermine the commitment essential to effective service and thus have the potential to disrupt military discipline . . . .” *Johnson*, 481 U.S. at 691. This reversed the findings of the Eleventh Circuit, which held that there was “absolutely no hint . . . that the conduct of any alleged



that Johnson's widow was already receiving statutory compensation, the Supreme Court reversed the Eleventh Circuit and remanded the case.<sup>119</sup> *Johnson*—the last case in which the Supreme Court examined the boundaries of the *Feres* Doctrine<sup>120</sup>—therefore extended the military discipline rationale to include civilian negligence.<sup>121</sup>

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tortfeasor even remotely connected to the military will be scrutinized if this case proceeds to trial," and thus, that *Feres* did not bar the claim. *Johnson v. United States*, 749 F.2d 1530, 1539 (11th Cir. 1985), *rev'd*, 481 U.S. 681 (1987).

119. *Johnson*, 481 U.S. at 691–92.

120. *See id.* at 681. *But cf.* *United States v. Stanley*, 483 U.S. 669, 671–72 (1987). Stanley barred suit by a former soldier who, without his knowledge or consent, had been administered the hallucinogenic drug LSD during a series of secret government tests while he was still on active duty. Alleging substantial psychological and personal injury, Stanley brought suit under the FTCA and *Bivens*. *Id.* He attempted to distinguish his case from *Chappell*, arguing first that concern for military discipline was inapplicable because the people administering the LSD were not his superior officers and, second, that there was no proof that his injury occurred incident to his service. *Id.* at 679–80. The FTCA claim was dismissed quickly due to a procedural deficiency related to jurisdiction in the lower court. *Id.* at 676–78. The majority of the opinion focused on the merits of the *Bivens* claim in the context of the *Chappell* precedent. *See id.* at 678–86. Reaffirming *Chappell*, the Supreme Court held, just one month after *Johnson*, that "no *Bivens* remedy is available for injuries that 'arise out of . . . activity incident to service'" and denied Stanley his requested relief. *Id.* at 684 (quoting *Feres*, 340 U.S. at 146). Interestingly, Justice Scalia authored the opinion. *See infra* note 126 and accompanying text. "*Stanley* is significant because it sanctioned a straightforward application of the incident to service test, without resort to the rationales enunciated in *Feres*." Brou, *supra* note 24, at 24 (internal citation omitted).

121. *Johnson*, 481 U.S. at 686–88. A glance at the Court's *Feres* jurisprudence shows that veterans and dependants of service members may sue the United States in tort for personal injury, but active-duty military personnel generally may not. The Brooks "incident to service" test is still good law; however, in practice, "incident to service" generally means "active duty" status, and therefore most claims by service members are barred. *See Feres v. United States*, 177 F.2d 535, 537 (2d Cir. 1949) ("The only exception to this interpretation of the statute which seems to have been recognized by the Supreme Court in the Brooks case applied to situations where military personnel were not on active duty."). The Supreme Court has relied on three rationales for holding that service men and women may not bring suit against the government under the FTCA for claims arising incident to their service. *Johnson*, 481 U.S. at 688–71. First, "the relationship between the Government and members of the armed forces is 'distinctively federal in character,'" and thus exposure to random state tort laws is unfair to military personnel. *Feres*, 340 U.S. at 143 (quoting *United States v. Standard Oil Co.*, 332 U.S. 301, 305 (1947)); *see also Johnson*, 481 U.S. at 689. Second, there already exists an expansive statutory system of compensation and benefits available to service members such that relief under the FTCA would be duplicative and could not have been intended by Congress. *See Johnson*, 481 U.S. at 689–90. Finally, and most compellingly, to allow active-duty military personnel to sue the United States would disrupt the ancient and essential convention of military discipline and command discretion—a disruption whose review is considered utterly outside the competence of the judiciary. *Shearer*, 473 U.S. at 59.

4. *Justice Scalia's Johnson Dissent: The Feres Doctrine as "Unauthorized Rationalization Gone Wrong"*<sup>122</sup>

Despite its sometimes fractured status on other issues,<sup>123</sup> the Supreme Court, throughout the lifespan of the *Feres* Doctrine, has stood fairly united behind it. Only Justice Antonin Scalia (joined by Justices William J. Brennan, Thurgood Marshall, and John Paul Stevens) ever mounted an assault against the principles of the doctrine.<sup>124</sup> The attack came in a derisive dissent in *Johnson*. Justice Scalia emphasized the plain meaning of the FTCA, noting that the *Feres* Doctrine is a judicially created exception to the Act, one that Congress "not only failed to provide . . . but quite plainly excluded."<sup>125</sup> His dissent systematically destroyed the various rationales the majority used to sustain the doctrine.<sup>126</sup> For Justice Scalia, if he could not overturn *Feres* (because the respondent did not request such relief), he preferred to "leave bad enough alone" rather than to extend the doctrine to bar service members from relief based on the negligence of civilians.<sup>127</sup>

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122. *Johnson*, 481 U.S. at 702 (Scalia, J., dissenting).

123. For a statistical breakdown of how the Supreme Court Justices voted in each term since 1995, see Supreme Court Statistics, SCOTUSWIKI, [http://www.scotuswiki.com/index.php?title=Supreme\\_Court\\_Statistics](http://www.scotuswiki.com/index.php?title=Supreme_Court_Statistics) (last visited Sept. 27, 2009).

124. *Johnson*, 481 U.S. at 692–703 (Scalia, J., dissenting).

125. *Id.* at 692.

126. See *id.* at 692–700. For example, Justice Scalia noted that the "distinctively federal" relationship between the government and service members originally focused on the unfairness of the applicability of random tort laws to the service member, while subsequent judicial interpretations focused instead on the military's need for uniformity: "[t]he unfairness to servicemen of geographically varied recovery is, to speak bluntly, an absurd justification, given that, as we have pointed out in another context, nonuniform recovery cannot possibly be worse than (what *Feres* provides) uniform nonrecovery." *Id.* at 695–96 (citing *United States v. Muniz*, 374 U.S. 150, 162 (1963); *Feres*, 340 U.S. at 142–43). Further, Justice Scalia noted that the "parallel private liability" and "veterans' benefits and compensation" justifications were "no longer controlling." *Id.* at 694–95, 697 (citing *Shearer*, 473 U.S. at 58 n.4). Additionally, he stressed that the Court had made clear that "because 'Congress had given no indication that it made the right to compensation [under the Veterans Benefits Act] the veteran's exclusive remedy, . . . the receipt of disability payments . . . did not preclude recovery under the Tort Claims Act.'" *Id.* at 698 (quoting *United States v. Brown*, 348 U.S. 110, 113 (1954)). As far as the military-discipline rationale was concerned, Justice Scalia noted that the other justifications for the *Feres* Doctrine "are so frail that it is hardly surprising that we have repeatedly cited the later-conceived-of 'military discipline' rationale as the 'best' explanation for that decision." *Id.* at 698–99 (citing *Shearer*, 473 U.S. at 57). But, he noted, "[i]t is strange that Congress' 'obvious' intention to preclude *Feres* suits because of their effect on military discipline was discerned neither by the *Feres* Court nor by the Congress that enacted the FTCA (which felt it necessary expressly to exclude recovery for combat injuries)." *Id.* at 699.

127. *Id.* at 703. The unfairness of the judicially created *Feres* Doctrine seemed to weigh heavily on Justice Scalia:

Had Lieutenant Commander Johnson been piloting a commercial helicopter when he crashed into the side of a mountain, his widow and children could have sued and recovered for their loss. But because Johnson devoted his life to serving in his country's Armed Forces, the Court today limits his family to a fraction of the recovery

### C. *The Rodriguez Act and Its Predecessors*

Interestingly, at the very beginning of the *Feres* opinion, Justice Jackson offered a disclaimer for what the Court was about to publish. Acknowledging that the Court had little material before it to understand congressional intent on the matter, he stated, "no conclusion can be above challenge, but if we misinterpret the Act, at least Congress possesses a ready remedy."<sup>128</sup> Congress has never remedied *Feres*, which suggests it either accepted the Court's reasoning in 1950 and the expansive *Feres* jurisprudence that followed, or that it was never able to agree upon an appropriate remedy in response to calls to amend the Doctrine.<sup>129</sup> Despite *Feres*'s endurance, there have been many legislative challenges to it over the years.

#### 1. *Legislative Attempts to Limit Feres over the Last Thirty Years*

In the summer of 1986, the Senate Subcommittee on Administrative Practice and Procedure held a hearing on proposed legislation that would amend the FTCA to allow military personnel to sue for medical malpractice.<sup>130</sup> At the hearing, Senator Charles Grassley reflected on the quandary presented in limiting the *Feres* Doctrine: "I must say that I find this to be an extremely difficult and troubling issue. Difficult, because any easy legislative response raises thorny legal questions and potentially unlimited governmental liability. Troubling, because we're faced with instances of great personal tragedy, caused by government neglect."<sup>131</sup> Weighing these two options, Congress has historically avoided the uncertainty of opening the Federal Reserve to tort claims by members of the Armed Forces.

In 1985, Congress attempted to limit *Feres* by introducing House Bill 3174 and Senate Bill 489.<sup>132</sup> The House of Representatives passed House Bill 3174 in October 1985, but Senate Bill 489 stalled and the Ninety-Ninth Congress

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they might otherwise have received. If our imposition of that sacrifice bore the legitimacy of having been prescribed by the people's elected representatives, it would (insofar as we are permitted to inquire into such things) be just. But it has not been, and it is not.

*Id.*

128. *Feres*, 340 U.S. at 138.

129. Professor Turley has stated

One of the great ironies of the past few decades is that the conditions of military life have been a constant political issue for both parties while the *Feres* Doctrine has magnified inequities for service members. Most politicians have adopted the standard line that they want what is best for our men and women in uniform. When it comes to the legal rights and treatment of service members, however, Congress is manifestly absent without leave.

Turley, *supra* note 17, at 70.

130. *Feres Hearing*, *supra* note 58, at 1-2 (statement of Sen. Charles E. Grassley, Chairman).

131. *Id.* at 2.

132. *Id.* at 12-14 (statement of Sen. Jim Sasser). The bills were sponsored by Representative Dan Glickman from Kansas and Senator Jim Sasser from Tennessee, respectively. *Id.* at 13-14.

adjourned before the legislation was ever passed.<sup>133</sup> Congress introduced similar bills again in 1987,<sup>134</sup> 1991,<sup>135</sup> 2001,<sup>136</sup> and 2008,<sup>137</sup> but each bill ultimately failed to pass.<sup>138</sup> The bills shared essentially the same purpose: to amend the FTCA explicitly to allow medical-malpractice claims against the government by military personnel.<sup>139</sup> The justifications for and against passing each piece of proposed legislation were also similar.<sup>140</sup>

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133. See Greenhouse, *supra* note 26 (“The bill . . . passed the House in the last Congress by a large bipartisan majority of 317 to 90. In the Senate, it never got out of the Judiciary Committee because of the strong opposition of Senator Strom Thurmond . . . the committee’s chairman.”).

134. H.R. 1054, 100th Cong. (1987); S. 347, 100th Cong. (1987).

135. H.R. 3407, 102d Cong. (1991).

136. H.R. 2684, 107th Cong. (2001).

137. H.R. 6093, 110th Cong. (2008).

138. It is worth noting that historically, Democrats have been the main advocates in Congress for amending the FTCA to allow lawsuits by members of the Armed Forces. For example, Democratic Senators Edward Kennedy and Jim Sasser, and Representatives Daniel Glickman, Barney Frank, and Maurice Hinchey have each supported one or more of the above-mentioned bills. See *supra* notes 134–37. One explanation for their support of such lawsuit-friendly litigation is the dividends it pays with respect to the plaintiff’s bar. The American Association for Justice (AAJ) (formerly the Association of Trial Lawyers of America) is one of the country’s most generous group contributors to Democratic political campaigns. *Plaintiff Bar Gone Too Far*, FOUNDATION FOR FAIR CIVIL JUSTICE, [http://www.foundationforfairciviljustice.org/issues/plaintiffs\\_bar/](http://www.foundationforfairciviljustice.org/issues/plaintiffs_bar/) (last visited Sept. 27, 2010) (“The [A]ssociation favors Democrats, who oppose most attempts to initiate tort reform.”); see also Editorial, *No Special Tax Cuts for Wealthy Trial Lawyers*, WASH. EXAMINER, July 15, 2010, at 2 (“[T]his tax change could be the most odious favor yet to this overwhelmingly Democratic donor group . . . .”); Opinion, *A Bill Lerach Tax Cut*, WALL ST. J., July 15, 2010, at A16 (“Taxes are going up in January for millions of Americans, but that means it’s even more important to have friends in Washington. And nobody has friends in higher places than the plaintiffs bar.”); Kimberly A. Strassel, *Tort Tribute: How Democrats Repay the Plaintiffs Bar*, WALL ST. J., Apr. 27, 2007, at A16 (calling the trial bar “huge [Democratic] campaign bankrollers” and noting that “[a] Democratic Congress means far more regulation, and any new regulation is an opportunity to insert a line or two giving the tort bar greater rights to sue”); John O’Brien, *Sources: Trial Lawyers Expect Tax Break from Treasury Department*, LEGAL NEWSLINE (July 13, 2010), <http://www.legalnewsline.com/news/227944-sources-trial-lawyers-expect-tax-break-from-treasury-department> (reporting that the AAJ recently revealed it is expecting a tax break on contingency-fee litigation to the proposed legislation introduced in Congress in 2009 by Senator Arlen Specter, a Democrat from Pennsylvania).

139. See *supra* notes 134–37. Conscious of resistance to what may be perceived as double-dipping in the government’s pocketbook, drafters of the legislation often limited recovery. Frequently, the bills proposed to amend the FTCA for this purpose deducted from the amount recoverable in the lawsuit the amount the service member would receive from disability compensation and veterans’ benefits. House Bill 2684 from the 107th Congress, for example, included a provision in the proposed amendment to the FTCA stating that

[t]he payment of any claim of a member of the Armed Forces under this section shall be reduced by the present value of other benefits received by the member and the member’s estate, survivors, and beneficiaries . . . that are attributable to the physical injury or death from which the claim arose.

H.R. 2684, 107th Cong. § 2681(d) (2001).

140. See *infra* Parts II.A–B.

## 2. The Rodriguez Act of 2009

Marine Sergeant Carmelo Rodriguez died of melanoma in 2007, allegedly due to malpractice by military doctors.<sup>141</sup> In 2009, Representative Maurice Hinchey and Senator Charles Schumer, both from New York, introduced House Bill 1478 and Senate Bill 1347,<sup>142</sup> respectively, to amend the FTCA to

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141. *Rodriguez Hearing*, *supra* note 28, at 116. Carmelo Rodriguez, a fit, 190-pound occasional actor and artist, enlisted in the United States Marine Corps in 1997. *Id.*; Byron Pitts, *A Question of Care: Military Malpractice?*, CBSNEWS.COM (Jan. 31, 2007), <http://www.cbsnews.com/stories/2008/01/31/eveningnews/main3776580.shtml>. In his entrance physical, the presence of melanoma on his right buttocks was noted in his medical record; however, the doctor did not inform Sergeant Rodriguez of the potentially cancerous tumor and did not recommend follow-up testing or treatment. *Rodriguez Hearing*, *supra* note 28, at 116; Pitts, *supra*. Sergeant Rodriguez marked “no” on a medical-history report question about cancer in March of 2000 because he was unaware of his diagnosis. *Rodriguez Hearing*, *supra* note 28, at 116. Eight years later, while Sergeant Rodriguez was deployed to Iraq, he complained of the sore to a military doctor who recommended that they see each other again when Sergeant Rodriguez returned to the United States. *Id.* Five months later, Sergeant Rodriguez returned home from Iraq and visited the same doctor, who recommended that he get the “so-called birthmark removed for cosmetic purposes.” *Id.* After five months and several failed referrals to military doctors, Sergeant Rodriguez made an appointment without a referral; the “birthmark” had been “bleeding and pussing” the entire time. *Id.* Soon after this appointment, doctors informed Sergeant Rodriguez that he had stage-three malignant melanoma. *Id.* The cancer had spread throughout his entire body; chemotherapy and three surgeries proved futile in saving his life. *Id.* at 117. At twenty-nine years old, Sergeant Rodriguez died in November 2007, an eighty-pound sickly, skeletal shadow of his former self. *Id.* at 116–17; *see also* Pitts, *supra*.

A cancer misdiagnosis was also at issue in *Hamilton v. United States*. In *Hamilton*, an active-duty serviceman’s cancerous tumor was negligently misdiagnosed as a skin lesion. *Hamilton v. United States*, 564 F. Supp. 1146, 1147 (D. Mass.), *aff’d*, 719 F.2d 1 (1983). Several years after his discharge he died, following a correct diagnosis. *Id.* His widow’s claim of misdiagnosis and inadequate treatment was barred by *Feres*. *Id.* at 1147, 1149.

142. Carmelo Rodriguez Military Medical Accountability Act of 2009, H.R. 1478, 111th Cong. (2009); Carmelo Rodriguez Military Medical Accountability Act of 2009, S. 1347, 111th Cong. (2009). The full text of House Bill 1478 (which is, as amended, identical to Senate Bill 1347) reads:

### A Bill

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.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

### 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

allow for service members to bring medical-malpractice claims against the military.<sup>143</sup> There are some notable provisions in House Bill 1478 and Senate Bill 1347 that were not included in prior bills. One is the separate and specific provision that claims under this amendment “shall not be reduced by the amount of any benefit received under . . . Servicemembers Group Life Insurance.”<sup>144</sup> Another is the provision allowing causes of action that might arise in a foreign country.<sup>145</sup> Although there are some noteworthy technical differences between the Rodriguez Act and its predecessors, in scope and

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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 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.

H.R. 1478; S. 1347.

143. Press Release, Maurice Hinchey, Representative, Hinchey Unveils Bill to Reverse Military Medical Malpractice Injustice (May 19, 2008), *available at* [http://www.house.gov/hinchey/newsroom/press\\_2008/051908MilitaryMedicalMalpracticeBillIntro.html](http://www.house.gov/hinchey/newsroom/press_2008/051908MilitaryMedicalMalpracticeBillIntro.html); Press Release, Charles Schumer, U.S. Senator Schumer: Our Men and Women in Uniform Should Not Be Denied Restitution if They Are the Victims of Negligence by Government Doctors (June 24, 2009), *available at* [http://schumer.senate.gov/new\\_website/record\\_print.cfm?id=314997](http://schumer.senate.gov/new_website/record_print.cfm?id=314997). Representative Hinchey introduced an identical bill, H.R. 6093, also titled the “Carmelo Rodriguez Military Medical Accountability Act,” in 2008, which was referred to the House Committee on the Judiciary in May of 2008, but a vote on this bill was never held. *H.R. 6093—Carmelo Rodriguez Military Medical Accountability Act of 2008*, OPEN CONGRESS (May 20, 2008), <http://www.opencongress.org/bill/110-h6093/show>.

144. H.R. 1478, 111th Cong. § 2681(b) (2009); S. 1347 § 2681(b) 111th Cong. (2009). This is the exception to the provision that reduces compensation available under this legislation by other veterans’ benefits.

145. H.R. 1478 § 2681(d)(1); S. 1347 § 2681(d)(1).

purpose, the Rodriguez Act is substantially similar to prior legislative attempts to partially repeal the *Feres* Doctrine.

## II. THE *FERES* BATTLEFIELD

### A. Arguments Supporting Legislative Reform by Partially Repealing *Feres*

#### 1. Fairness

In general, the proponents of allowing military medical malpractice claims have centered their arguments on basic principles of fairness. They claim the *Feres* Doctrine makes service members second-class citizens,<sup>146</sup> or in the words of a prominent *Feres* detractor, “discount citizens.”<sup>147</sup> According to some estimates, active-duty service members make up only about one-third of the patients treated at military hospitals.<sup>148</sup> The other two-thirds are dependants and retirees, who are eligible to sue the government for malpractice under the FTCA.<sup>149</sup> On this level, critics argue that there exists an inequity in denying active-duty personnel the right to sue when everyone else serviced at a military hospital may sue if the need arises.<sup>150</sup> Additionally, the Supreme

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146. *Feres Hearing*, *supra* note 58, at 17 (statement of Rep. Daniel Glickman); Greenhouse, *supra* note 26 (quoting Senator Jim Sasser); *see also Rodriguez Hearing*, *supra* note 28, at 167 (statement of Stephen A. Saltzburg, Professor, The George Washington University Law School).

147. Jonathan Turley, *The Feres Doctrine: What Soldiers Really Need Are Lawyers* (Aug. 18, 2007), <http://jonathanturley.org/2007/08/18/the-feres-doctrine-what-soldiers-really-need-are-lawyers/#comments>.

148. 134 CONG. REC. 1593 (1988) (statement of Rep. Hughes).

149. *Id.* (statement of Reps. William J. Hughes and Barney Frank).

150. *Id.* (statement of Rep. Frank). Representative Frank argued  
[W]e do not think it is fair to say we will have one right for every citizen of the United States except members of the armed services who are on active duty, that anybody else, prison inmates, private citizens, Federal employees, retirees, they can use the [FTCA], but no procedure [in tort] at all will be available to those who serve in the armed services.

*Id.* But should members of the military be treated the same as every other citizen of the United States? George Washington famously said, “[w]hen we assumed the Soldier, we did not lay aside the Citizen.” Letter from General George Washington, Commander of Continental Forces, to the New York Legislature (June 26, 1775), *available at* <http://www.loc.gov/teachers/classroommaterials/presentationsandactivities/presentations/timeline/amrev/contarmy/newyork.html>. Since 1890, however, the Supreme Court has recognized a distinction between civilians and members of the Armed Forces: “By enlistment the citizen becomes a soldier. His relations to the State and the public are changed. He acquires a new *status*, with correlative rights and duties . . . .” *In re Grimley*, 137 U.S. 147, 152 (1890). Eighty-four years later, the Supreme Court noted the “significant differences between military law and civilian law and between the military community and the civilian community.” *Parker v. Levy*, 417 U.S. 733, 752 (1974). Commenting on the “different relationship of the Government to members of the military,” the Court stated:

[U]nlike the civilian situation, the Government is often employer, landlord, provisioner, and lawgiver rolled into one. That relationship also reflects the different purposes of the two communities . . . . [T]he military ‘is the executive arm’ whose ‘law is that of

Court in *Brooks* rebuffed the government's assertion that the language of the FTCA was intended to exclude servicemen;<sup>151</sup> *Feres* reaffirmed *Brooks*.<sup>152</sup> As courts have expanded the *Feres* Doctrine, however, the practical effect has been that *Feres* stands for what *Brooks* (which is still good law) rejected: the FTCA essentially bars tort claims by active-duty military personnel.<sup>153</sup>

## 2. *Allowing Suits Would Improve Military Medical Care*

Proponents of amending the FTCA to limit the *Feres* Doctrine also argue that allowing military members to sue the government for medical malpractice will improve military medical care, which is often perceived as substandard.<sup>154</sup>

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obedience.' While members of the military community enjoy many of the same rights and bear many of the same burdens as do members of the civilian community, within the military community there is simply not the same autonomy as there is in the larger civilian community.

*Id.* at 751 (quoting *Grimley*, 137 U.S. at 153).

Cases like *Parker* are relevant in the context of *Feres* jurisprudence. The *Parker* Court noted that when it comes to constitutional protections, "the different character of the military community and of the military mission requires a different application of those protections. The fundamental necessity for obedience, and the consequent necessity for imposition of discipline, may render permissible within the military that which would be constitutionally impermissible outside it." *Id.* at 758. The Court's recognition of the unique status of the service member within the government-citizen relationship explains its deference to military-command discretion and the caution incumbent upon courts during judicial review of military decisions. When Congress attempts to address the issue of the government's responsibilities to its service members, that special status, so long recognized, must necessarily color the debate. Thus, to begin an argument decrying how military members are treated differently from every other citizen misses the point, for members of the military are unavoidably different from every other citizen within the framework of the government-citizen relationship.

151. See *supra* note 67.

152. *Feres v. United States*, 340 U.S. 135, 146 (1950) (distinguishing the facts in *Brooks* from those in *Feres*).

153. Brou, *supra* note 24, at 40 ("The *Feres* doctrine has amounted to an almost total bar to service members' claims."); cf. VETERANS BENEFITS MANUAL § 3.1.4.1 (Barton F. Stichman & Ronald B. Abrams eds., 2009) ("The VA and the courts have long interpreted the 'in line of duty' [requirement to receive compensation under 38 U.S.C. §§ 1110, 1131] to cover literally *anything* that occurred during the period beginning with induction into military service and ending with discharge from military service."). The expansive application of the *Feres* Doctrine has produced "bizarre results," further demonstrating its unfairness. Turley, *supra* note 17, at 28. In *Kohn v. United States*, for example, the Second Circuit barred a lawsuit brought by parents to recover for their son's death, but it allowed them to sue for emotional distress on their own behalf. *Kohn v. United States*, 680 F.2d 922, 922, 926 (2d Cir. 1982), *aff'd*, 760 F.2d 253 (2d Cir. 1985). Professor Jonathan Turley called non-sequiturs such as these that stem from the *Feres* Doctrine's broad treatment "confused, inequitable, [and] counterintuitive." Turley, *supra* note 17, at 28.

154. Much of the debate on the House and Senate floors as well as in congressional committee hearings focused on the quality of medical care within the military. See, e.g., 131 CONG. REC. 3028 (1985) (statement of Sen. Jim Sasser). After reviewing several audits of military hospitals and medical records, the senator found that "serious problems exist at military medical facilities that need to be corrected." *Id.* In the senator's view, the problem was not that there were not appropriate regulations in place for safeguarding patients, but rather, that those



As Senator Sasser stated, “[t]he white light of the courtroom would expose for all to see any problems in our military medical system,” and thus drive the government to improve its standard of medical care.<sup>155</sup>

### 3. *The Current Compensation System Is Inadequate*

The final justification that proponents of limiting *Feres* offer is that the system of compensation and benefits available to military personnel for injury is not adequate.<sup>156</sup> Representative Glickman offered the story of the young active-duty service woman who, as the result of malpractice during a surgery, was left infertile.<sup>157</sup> She received less than \$100 per month as compensation for no longer being able to bear children.<sup>158</sup> Representative Glickman’s argument implied that although it was difficult to calculate how much money would compensate for such a loss, \$1200 per year was certainly inadequate,<sup>159</sup>

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regulations were not being enforced. *Id.*; see also OFFICE OF THE INSPECTOR GEN., DEP’T OF DEF., EVALUATION REPORT: DOD IMPLEMENTATION OF THE NATIONAL PRACTITIONER DATA BANK GUIDELINES (1998), available at <http://www.DODig.mil/Audit/reports/fy98/98-168.pdf> (showing continued problems in military reporting of healthcare providers involved in adverse malpractice payments); Philip M. Boffey, *Defects Reported in Military Care*, N.Y. TIMES, Jan. 18, 1985, at A1 (detailing “serious deficiencies in appointing and evaluating doctors” in the military); Daniel H. Johnson, Jr., *After Walter Reed: How to Fix Military Medicine*, HERITAGE FOUND. (Mar. 8, 2007), <http://www.heritage.org/Research/HealthCare/wm1388.cfm> (discussing ways to improve military medicine on the premise that the system is flawed and “Congress must move quickly to fix [it]”).

155. *Feres Hearing*, *supra* note 58, at 13 (statement of Sen. Jim Sasser). Senator Sasser believed that “the *Feres* doctrine was being used as a shield by some in military medicine. They were hiding behind the *Feres* doctrine to prevent complete military medicine investigations.” *Id.* at 12–13.

156. Proponents of partially repealing *Feres* argue that if service members were permitted to bring lawsuits against the government, their recovery would better compensate for their actual injuries than the system of uniform compensation that is available to service members now. See, e.g., *United States v. Johnson*, 481 U.S. 681, 700 (1987) (Scalia, J. dissenting) (“[T]he morale of Lieutenant Commander Johnson’s comrades-in-arms will not likely be boosted by news that his widow and children will receive only a fraction of the amount they might have recovered had [the *Feres* Doctrine not barred the lawsuit].”). To learn what compensation is available for veterans, visit the Department of Veterans Affairs website. United States Department of Veterans Affairs, <http://www.vba.va.gov/VBA> (last visited Sept. 27, 2010). Benefits include education, compensation and pension, vocational rehabilitation, home loans, survivor’s benefits, and life insurance, among others. *Id.*; see VETERANS BENEFITS MANUAL, *supra* note 153, §§ 3.1–3.3 (discussing compensation for service-related injuries).

157. 134 CONG. REC. 1597 (1988) (statement of Rep. Daniel Glickman).

158. *Id.*; see also Greenhouse, *supra* note 26 (noting that the woman received sixty-six dollars per month in disability pay).

159. 134 CONG. REC. 1597. Another case that was frequently cited by Congress was that of a twenty-two year old sailor who went to the hospital on his birthday to have a cyst removed from his arm. *Feres Hearing*, *supra* note 58, at 15 (statement of Rep. Daniel Glickman). As a result of malpractice, the sailor was left severely brain-damaged and became a quadriplegic requiring continuous care. *Id.* The compensation he receives from the government is \$600 to \$800 less each month than what his twenty-four-hour care costs. *Id.*

and she would likely recover much more money if she were allowed to bring a successful case under the FTCA.<sup>160</sup>

### *B. Arguments Opposing Legislative Reform of the Feres Doctrine*

#### *1. Fairness*

Supporters of the *Feres* Doctrine,<sup>161</sup> just like their opponents, also focus their arguments on the concept of fairness; specifically, the unfairness in limiting proposed legislation only to medical or malpractice claims.<sup>162</sup> The General Counsel for the Department of Defense (DOD) rejected this approach.<sup>163</sup> The DOD argued that fairness demanded the maintenance of the existing system of compensation, rather than “creating a special class of claimants whose rights to claim depend upon where and how they were injured and not on the injury they suffered.”<sup>164</sup>

#### *2. Allowing Suit Would Not Improve Military Medical Care*

Supporters of *Feres* go further to argue that even if military discipline was not affected, the cumulative proposed amendments to the FTCA would actually do very little, if anything, to solve the problems for which they were

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160. See 134 CONG. REC. 1597.

161. The supporters are usually the Department of Justice and the Department of Defense. See 134 CONG. REC. 1593.

162. When asked why the bills excluded other forms of negligence claims, Senator Sasser and Representative Glickman replied that it was a matter of assumption of the risk. *Feres Hearing*, *supra* note 58, at 19 (statement of Rep. Daniel Glickman). From this perspective, injuries that arose out of negligence during the regular course of a serviceman’s employment were distinct from injuries at the hands of a doctor because in the former case, the serviceman assumed the risk and in the latter he did not. *Id.* (statement of Sen. Jim Sasser and Rep. Daniel Glickman). Under the FTCA, the United States can assert any defenses that would be available to the federal employee whose act or omission gave rise to the claim under the law of the state where the injury occurred. See 28 U.S.C. § 2674 (2006). Assumption of risk, therefore, could be included in the available defenses.

In contrast, Representative Frank argued that this narrow medical malpractice exception to the *Feres* Doctrine would prevent “imping[ing] on command decisions . . . [o]nce you get out of that fixed medical facility where you have voluntarily gone in and there is a doctor there . . . you get into very difficult questions of command discretion.” 134 CONG. REC. 1595 (statement of Rep. Barney Frank).

163. Mr. Garrett, the General Counsel for the DOD, argued that

If a soldier loses a leg on field maneuvers, on the base in a driving accident, or in the hospital at the hands of a surgeon, he or she has the same injury. To provide special dispensation for one medical injury while denying it for another equally painful and debilitating loss will not promote either the appearance or the reality of fairness.

*Feres Hearing*, *supra* note 58, at 41 (statement of H. Lawrence Garrett, General Counsel, Department of Defense).

164. *Id.*

drafted.<sup>165</sup> They argue that allowing members of the Armed Forces to sue the government for medical malpractice will have no effect on improving military medicine.<sup>166</sup> This is because the government would be the entity that is sued and forced to pay the damages awarded in the lawsuits, not the doctors.<sup>167</sup> Thus, deterrence based on the concept as it exists in the civilian world of tort liability is inapplicable.<sup>168</sup> Therefore, *Feres* supporters argue, this system does little to prevent military medical malpractice.<sup>169</sup>

### 3. *The Current Compensation System Is Adequate*

Finally, supporters of the *Feres* Doctrine argue that the compensation system available to service members is wholly adequate and fair, and even more generous than what is available to the general public.<sup>170</sup> This contention stems from the fact that military members are compensated for their injuries without having to prove fault.<sup>171</sup> A military person who sustains an injury will receive

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165. See, e.g., *id.* at 51 (“[The] ‘deterrence’ theory is suspect for two reasons . . . the punitive feature of tort law was expressly made inapplicable to the United States in the FTCA [and] when malpractice claims are filed against military physicians, they are immunized from suit . . .”).

166. *Id.*; see also *id.* at 64 (statement of Michael F. Noone, Jr., Associate Dean of the Columbus School of Law, Catholic University of America) (arguing that passage of the Small Tort Claims Act of 1927, which waived sovereign immunity for government automobile accidents, did nothing to improve the driving habits of government drivers, so it is unlikely that waiving sovereign immunity for military medical malpractice will improve military health care).

167. *Id.* at 51 (statement of H. Lawrence Garrett, General Counsel, Department of Defense); see Military Medical Malpractice Act of 1976, 10 U.S.C. § 1089 (2006) (granting immunity from individual liability to military medical personnel).

168. See *Feres Hearing*, *supra* note 58, at 51 (statement of H. Lawrence Garrett, General Counsel, Department of Defense) (“[T]he traditional purpose of tort law in our jurisprudence has been to compensate, and to make whole. The punitive feature of tort law expressly was made inapplicable to the United States in the FTCA itself.”).

169. *Id.* Incongruously, the government usually follows this argument first with a denial that military medicine is substandard to civilian medicine and then with an explanation of the measures currently being taken to improve the system. See *id.*

170. *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. 3 (2002) [hereinafter *Examination Hearing*] (statement of Paul Harris, Deputy Associate Att’y Gen., Department of Justice) (“[T]he *Feres* doctrine is an adjunct to the 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 worker’s compensation schemes . . .”).

171. *Feres Hearing*, *supra* note 58, at 31 (statement of Robert L. Willmore, Department of Justice) (“While . . . the compensation may be somewhat less than what might be available [to a successful plaintiff in] a medical malpractice lawsuit . . . the fact is that all . . . servicemen are eligible for . . . compensation rather than only a small handful who . . . can show a causal link between their condition and substandard medical care.”).

compensation for it.<sup>172</sup> Civilians, in contrast, may be eligible to sue for their injuries, but there is no guarantee that they will receive compensation if they cannot prove fault on the part of the government.<sup>173</sup> Thus, “the arbitrariness and uncertainty associated with tort litigation is . . . eliminated,” and thus, proponents claim, the military system of compensation is fairer than what is available to civilians.<sup>174</sup>

### *C. Military Command Discretion as the Vanguard of the Debate*

Despite their opposing positions regarding the equitable merits of the *Feres* Doctrine, on both sides of the argument exists a pervasive reluctance to interfere with military decision-making. This fear of affecting command authority is why on one hand, the legislation has been limited to medical malpractice and not other negligence claims, and why, on the other hand, opponents argue against any legislative reform.<sup>175</sup> In fact, the military discipline rationale commands the debate today.<sup>176</sup>

### *D. Inspecting the Rodriguez Act*

Because the last thirty years have seen bill after bill fail to pass, one may infer that Congress has been more persuaded by the government’s argument for leaving the *Feres* Doctrine alone than by the arguments presented for partially repealing it.<sup>177</sup> Nevertheless, the Rodriguez Act, with its adjustments

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172. 38 U.S.C. § 1110 (2006). There are three fundamental requirements for obtaining compensation for injuries sustained incident to service: a medical diagnosis of current disability, incurred or aggravated during service, and a nexus between the two. *Id.*

173. *Feres Hearing*, *supra* note 58, at 31 (statement of Robert L. Willmore, Department of Justice).

174. *Examination Hearing*, *supra* note 170.

175. *Feres Hearing*, *supra* note 58, at 45–46 (statement of H. Lawrence Garrett, General Counsel, Department of Defense).

176. See *supra* Part I.B. This rationale, first expressly established in *Brown*, has sounded the death knell for legislation to overturn *Feres* for many years. According to this rationale, “the unique nature of the military” requires a different remedy than that available to civilians. *Feres Hearing*, *supra* note 58, at 45 (statement of H. Lawrence Garrett, General Counsel, Department of Defense). In an ironic cry for judicial restraint, courts have refused to allow tort claims by service members under the FTCA because they maintain that doing so may second-guess the judgment of military commanders—an undertaking that the courts believe is wholly outside their competence. See, e.g., *Chappell v. Wallace*, 462 U.S. 296, 300 (1983). The irony is that in making this decision, the courts reinforce and expand the *Feres* Doctrine, which was already a judicial extension of the plain language of the FTCA. In any case, supporters of the *Feres* Doctrine remind Congress that “the notion of military personnel suing in tort runs counter to the accumulated wisdom and experience of all three branches of Government.” *Feres Hearing*, *supra* note 58, at 45 (statement of H. Lawrence Garrett, General Counsel, Department of Defense).

177. Concern for the cost of such legislation unquestionably influenced the debates. See, e.g., 134 CONG. REC. 1591 (1988) (statement of Rep. Robert Latta) (“While the estimated cost of this bill is \$25 million per year . . . it is very difficult to predict the cost of medical malpractice awards. It would not surprise me if the actual cost of this legislation turned out to be a major budget figure.”). The Congressional Budget Office projects that, assuming the Rodriguez Act is

to previously proposed legislation, could convince Congress otherwise. But should this be the legislation to finally limit the *Feres* Doctrine?

### 1. *Ramifications of the Passage of the Rodriguez Act*

The Rodriguez Act's<sup>178</sup> technical deficiencies undermine its laudable goals. To begin, it is unclear who exactly is "a member of the Armed Forces of the United States."<sup>179</sup> Courts have applied the *Feres* Doctrine to cadets and midshipmen,<sup>180</sup> as well as reservists.<sup>181</sup> Did the drafters intend to include these groups within the amendment in addition to active-duty military personnel?

Secondly, both House Bill 1478 and Senate Bill 1347 prohibit claims "arising out of the combatant activities of the Armed Forces during time of armed conflict."<sup>182</sup> How should a court interpret that clause? Traditionally, under the FTCA, courts have interpreted the term "combatant activities" to mean "the actual engaging in the exercise of physical force."<sup>183</sup> The bills direct that section 2680(j), excepting "any claim arising out of the combatant activities of the military or naval forces, or the Coast Guard, during time of war," shall not apply to section 2681.<sup>184</sup> This begs the question whether there is an intended difference between "during time of armed conflict"<sup>185</sup> and

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enacted within fiscal year 2010, it will cost the government \$2,700,000,000 billion within the next ten years with an average award of \$450,000 to successful claimants. CONGRESSIONAL BUDGET OFFICE, COST ESTIMATE: H.R. 1478 CARMELO RODRIGUEZ MILITARY MEDICAL ACCOUNTABILITY ACT OF 2009 2-3 (2009).

178. According to Representative Hinchey, the purpose of the Rodriguez Act is not "about members of the military being compensated fairly for medical negligence, [but rather is] about holding our military accountable for its actions and for its responsibility to its members." *Rodriguez Hearing*, *supra* note 28, at 92 (statement of Rep. Maurice Hinchey). The family of Carmelo Rodriguez added, "[w]hat service men and women and their families want and deserve is equal protection under the law." *Id.* at 121 (statement of Ivette Rodriguez, sister of Sergeant Carmelo Rodriguez).

179. Carmelo Rodriguez Military Medical Accountability Act of 2009, H.R. 1478, 111th Cong. (2009); Carmelo Rodriguez Military Medical Accountability Act of 2009, S. 1347, 111th Cong. (2009).

180. See, e.g., *Wake v. United States*, 89 F.3d 53, 58-59 (2d Cir. 1996) (holding that a claim based on injuries to a Naval Reserve Officer Training Corps midshipman was barred by *Feres*).

181. See, e.g., *United States v. Carroll*, 369 F.2d 618, 620 (8th Cir. 1966) (applying the *Feres* Doctrine to bar a claim made by a reservist).

182. H.R. 1478 § 2681(c); S. 1347 § 2681(c).

183. *Skeels v. United States*, 72 F. Supp. 372, 374 (W.D. La. 1947) ("If it had been intended that all activities of the armed forces in furtherance or preparation for war were to be included, the use of the words 'war activities', it seems, would have been more appropriate, but instead, the exception or exemption from liability for torts was restricted to 'combat activities,' which as indicated by the definitions, means the actual engaging in the exercise of physical force.").

184. H.R. 1478 § 2681(d)(1); S. 1347 § 2681(d)(1); see 28 U.S.C. § 2680(j) (2006).

185. The Geneva Conventions established the phrase "armed conflict," a term of art in the law of war; it refers either to an international armed conflict between states or an internal armed conflict, such as a civil disturbance. See, e.g., *Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field* arts. 2-3, opened for signature Aug. 12, 1949, 75 U.N.T.S. 32.

“during time of war.”<sup>186</sup> Legal and historical precedent hold that armed conflict is a necessary but not sufficient element of war.<sup>187</sup> Therefore, the most plausible reading of the provision is that the drafters of the Rodriguez Act intended to expand the number of situations in which a service member could be barred from suing under the FTCA.<sup>188</sup> The practical effect, then, would be to limit the *Feres* Doctrine by allowing medical malpractice claims against the government, while at the same time expanding the situations that would bar such claims under the FTCA—an effect that appears facially incongruous. Representative Hinchey indicated that the armed conflict clause was intended to incorporate

situation[s] [that are] very difficult and very dangerous, and the medical attention that has to be given there has to be immediate, and it has to be in ways that are designed to save the life of that person. And it is a very dramatic and very, very strong action that has to be taken on behalf of those who are injured or wounded, whatever the circumstances might be.<sup>189</sup>

Believing the implication in Representative Hinchey’s remarks to be broader than the traditional understanding of combatant engagement, a retired general said, “[I]t seems to encompass any dangerous and difficult situation requiring immediate life saving measures . . . that could occur in locations [far] from battle. This suggests that the nature of the medical emergency rather than the nature of the external circumstances is the important factor.”<sup>190</sup> Thus, the language of the provision read together with Representative Hinchey’s explanation suggests yet another increase in the number of situations in which service members could be barred from suit, which was likely not the drafters’ intention.<sup>191</sup>

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186. In *Hamdan v. Rumsfeld*, Justice Anthony Kennedy noted that the law of war is “the body of international law governing armed conflict.” *Hamdan v. Rumsfeld*, 548 U.S. 557, 641 (2006) (Kennedy, J., concurring). Additionally, war is “for legal purposes . . . more properly referred to as armed conflict.” HELEN DUFFY, *THE “WAR ON TERROR” AND THE FRAMEWORK OF INTERNATIONAL LAW* 83 (2005).

187. See *United States v. Prosperi*, 573 F. Supp. 2d 436, 451–52 (D. Mass. 2008) (exploring the definitions of “war,” and finding that they “rather emphasize the element of armed conflict”).

188. This is likely an acknowledgement that in modern times, the United States is frequently (some might argue constantly) engaged in armed conflict, but not technically at war. For example, “[t]he United States has not declared war in any conflict since World War II, despite prolonged engagements in Korea, Vietnam, Kosovo, Afghanistan, and Iraq (twice) and shorter deployments in Panama, Grenada, Haiti, and Somalia, among others.” *Id.* at 447.

189. *Rodriguez Hearing*, *supra* note 28, at 92 (statement of Rep. Maurice Hinchey).

190. *Id.* at 201 (statement of Major General (Retired) John D. Altenburg, Jr., United States Army).

191. As General Altenburg noted, “[w]hat Representative Hinchey described is a situation where medical judgment or ability is impaired by combat activities, which is different than combatant activities causing injury.” *Id.* at 196.

In addition, this ostensibly expansive language, taken together with the Rodriguez Act's allowance of overseas torts,<sup>192</sup> makes it appear that the drafters intended to allow claims arising in fixed United States military medical centers in foreign countries where service members are often deployed.<sup>193</sup> Prior bills precluded such interpretations by restricting malpractice claims to "fixed medical treatment facilit[ies] [operated by] the United States."<sup>194</sup> But if that was the drafters' intention, the language of the Rodriguez Act is far from clear.

The overseas-tort provision raises choice-of-law concerns as well. The FTCA commands that "the law of the place where the act or omission occurred"<sup>195</sup> shall be applied in court. The Rodriguez Act deems that if a claim arises in a foreign country, the law to be applied shall be "the law of the place of domicile of the plaintiff."<sup>196</sup> Many states' choice of law provisions, however, will apply the law of the country where the tort occurred,<sup>197</sup> which would defeat the apparent intent of the drafters of the Act to avoid the application of foreign law. Furthermore, the law of domicile of military members is far from straightforward.<sup>198</sup> If the Rodriguez Act passes, this provision could provoke complicated choice-of-law analyses for the courts.

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192. See Carmelo Rodriguez Military Medical Accountability Act of 2009, H.R. 1478, 111th Cong. § 2681(d)(2) (2009); Carmelo Rodriguez Military Medical Accountability Act of 2009, S. 1347, 111th Cong. § 2681(d)(2) (2009).

193. A common criticism of the prior proposed legislation to repeal *Feres* partially was the lack of allowance of claims arising in U.S. military hospitals around the world. See, e.g., *Feres Hearing*, *supra* note 58, at 75 (statement of Michael F. Noone, Jr., Associate Dean, Columbus School of Law, Catholic University of America). It is thus plausible to assume, in the absence of clear language to the contrary, that the Rodriguez Act's sponsors were attempting to address this criticism. The language of H.R. 1478 and S. 1347, however, is ambiguous on this issue.

194. See, e.g., H.R. 2684 § 2681(b), 107th Cong. (2001).

195. 28 U.S.C. § 1346(b)(1) (2006).

196. H.R. 1478 § 2681(d)(2); S. 1347 § 2681(d)(2).

197. See *Rodriguez Hearing*, *supra* note 28, at 197–98 (statement of Major General (Retired) John D. Altenburg, Jr., United States Army). For example, Maryland follows the *lex loci delicti* rule for torts: "[W]hen an accident occurs in another state substantive rights of the parties, even though they are domiciled in Maryland, are to be determined by the law of the state in which the alleged tort took place." *Philip Morris, Inc. v. Angeletti*, 752 A.2d 200, 230 (Md. 2000). This is true for most American jurisdictions, even if the injury occurred in a foreign country. See, e.g., *Abad v. Bayer Corp.*, 563 F.3d 663, 669–70 (7th Cir. 2009) (holding that even if plaintiffs brought suit in Illinois, the law of Argentina would apply, as that country was the origin of the injury).

198. Members of the Armed Forces are frequently compelled by military orders to relocate to new duty stations around the country and world. This kind of constant mobility can complicate the determination of their domiciles. But a service member's domicile will not change simply because military orders oblige a move to a new state. See, e.g., *Torrington Co. v. Stutzman*, 46 S.W.3d 829, 849 n.17 (Tex. 2000). If the service member wishes to establish domicile at the duty station, however, she may, if she can establish particular factors showing her residence and intent to return there after completion of her military obligations. See, e.g., *Teague v. Dist. Court of the Third Judicial Dist.*, 289 P.2d 331, 333 (Utah 1955) (listing elements that may help to prove a service member's intent to change domicile). There are certain advantages for a service member

Finally, there is no guarantee, even if the Rodriguez Act passes, that the *Feres* Doctrine would not simply be supplanted by the FTCA's powerful discretionary-function exception.<sup>199</sup> The FTCA prohibits "[a]ny claim . . . 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, whether or not the discretion involved be abused."<sup>200</sup> Of the thirteen enumerated exceptions to the FTCA, the discretionary function exception is the broadest and most criticized.<sup>201</sup> In order for this exception to be triggered, the Supreme Court has applied a two-step test.<sup>202</sup> The first step concerns the character of the behavior and asks whether it was a judgment or a choice.<sup>203</sup> A "federal statute, regulation, or policy specifically prescrib[ing] a course of action for an employee to follow" is neither a judgment nor a choice.<sup>204</sup> The second step then questions whether the sort of judgment the exception was intended to protect was present in the case.<sup>205</sup> In *Gaubert v.*

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changing her domicile: in some states, military income is exempt from state taxes; other states have no state income tax at all. See Legal Residence/Domicile, Brooks City Base, [www.brooks.af.mil/library/factsheets/factsheet.asp?id=6248](http://www.brooks.af.mil/library/factsheets/factsheet.asp?id=6248) (last visited Aug. 27 2010); Legal Residence and Domicile, [www.robins.af.mil/shared/media/document/AFD-090317-037.pdf](http://www.robins.af.mil/shared/media/document/AFD-090317-037.pdf) (last visited Aug. 27, 2010) ("Taxation is often a service member's primary consideration in choosing their domicile.").

The Rodriguez Act raises other questions related to domicile. First, should or could a service member select her domicile after the injury, or must it be the domicile the service member had upon entering the service? Must married service members share a joint domicile? These questions and complications are avoided in the existing system of compensation and veterans' benefits.

199. For an excellent analysis of the Supreme Court's jurisprudence with respect to the discretionary-function exception to the FTCA, see Brou, *supra* note 24, at 61–66.

200. 28 U.S.C. § 2680(a) (2006).

201. See, e.g., Mark C. Niles, "Nothing but Mischief": *The Federal Tort Claims Act and the Scope of Discretionary Immunity*, 54 ADMIN. L. REV. 1275, 1300 (2002) ("[W]ith the possible exception of an express limitation on claims arising out of intentional torts, the broadest and most consequential of the FTCA's specific shields is the so-called 'discretionary function exception.'"); James R. Levine, Note, *The Federal Tort Claims Act: A Proposal for Institutional Reform*, 100 COLUM. L. REV. 1538, 1541 (2000) ("The most gaping and frequently litigated of the FTCA's exceptions is the 'discretionary function exception.'"); see also *id.* at 1547 ("There is wide scholarly agreement on the failings of the FTCA caused by the discretionary function exception.").

202. See *United States v. Gaubert*, 499 U.S. 315, 324 (1991) (affirming the two-pronged test set out in *Berkovitz v. United States*, 486 U.S. 531, 536–37 (1988)).

203. *Id.* at 322.

204. *Id.*

205. *Id.* at 322–23; see also *United States v. Varig Airlines*, 467 U.S. 797, 814 (1984) ("Congress wished to prevent judicial 'second-guessing' of legislative and administrative decisions grounded in social, economic, and political policy through the medium of an action in tort. By fashioning an exception for discretionary governmental functions, including regulatory activities, Congress took 'steps to protect the Government from liability that would seriously handicap efficient government operations.'" (quoting *United States v. Muniz*, 374 U.S. 150, 163 (1963))).



*United States*, the leading case on the discretionary-function exception, the Supreme Court added a presumption to the second-step analysis: "[I]f a regulation allows the employee discretion, the very existence of the regulation creates a strong presumption that a discretionary act authorized by the regulation involves consideration of the same policies which led to the promulgation of the regulations."<sup>206</sup> Thus, "[i]f Congress intended to protect the conduct or if the conduct involved policy considerations, the discretionary function exception generally bars recovery under the [FTCA]."<sup>207</sup> The first prong of the two-step test seems to relieve the concern that the discretionary-function exception could be applied against military medical-malpractice claims because the exception disqualifies mandatory regulations, guidelines, and procedures from the exception.<sup>208</sup> However, there is much in the practice of medicine that is based on the doctor's discretion and judgment that might not fall into one of those categories. In that case, the problem becomes that

to prevail on this prong, the plaintiff *must* demonstrate such a violation. In the absence of such a violation, courts find an employee's actions to be "discretionary in nature." Then, the plaintiff's only chance is to demonstrate that the conduct was not "susceptible to policy analysis" under the second prong. This is extremely difficult . . . . Moreover, if the first-prong analysis indicates that a regulation actually confers discretion on a government employee, this creates a "strong presumption" that the second prong is satisfied. As a result, the plaintiff's ability to show a violation of a mandatory procedure or guideline is frequently outcome-determinative.<sup>209</sup>

Even so, the possibility of the discretionary-function exception overwhelming medical-malpractice claims is slight, at best: "[T]he discretionary function exception is intended to shield the government from liability for the exercise of governmental discretion, not to shield the government from claims of garden-variety medical malpractice."<sup>210</sup> Generally, professional malpractice does not fall within the discretionary-function exception's immunity.<sup>211</sup> But it is also not explicitly precluded by the

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206. *Gaubert*, 499 U.S. at 324.

207. Brou, *supra* note 24, at 65–66; *see also*, Niles, *supra* note 201, at 1279 (arguing that the Supreme Court has interpreted the FTCA "to allow for a restriction on federal tort liability that is, in most instances, essentially identical to that applicable before the law was passed").

208. *Gaubert*, 499 U.S. at 322.

209. Levine, *supra* note 201, at 1542–43.

210. *Sigman v. United States*, 208 F.3d 760, 770 (9th Cir. 2000).

211. *See, e.g., Collazo v. United States*, 850 F.2d 1, 3 (1st Cir. 1988) ("[W]here only professional, nongovernmental discretion is at issue, the 'discretionary function' exception does not apply."); *see also Fang v. United States*, 140 F.3d 1238, 1241–42 (9th Cir. 1998) (holding that the United States is not immune from claims related to the "actual administration of medical care by its employees" but is immune from claims related to discretionary policy decisions involving the allocation of medical personnel and resources); *Martinez v. Maruszczak*, 168 P.3d 720, 729

exception. Under the *Gaubert* two-part test, government-employed physicians serving the military would

enjoy immunity from medical malpractice liability only when their allegedly negligent acts involve elements of judgment or choice, and the judgment or choice made is of the kind that the discretionary-function exception was designed to shield, that is, a judgment or choice involving social, economic, or political policy considerations.<sup>212</sup>

Although it is likely that, in most cases, courts could not apply the discretionary-function exception to bar service members' claims of medical malpractice, even a slight chance of over-application is troublesome.<sup>213</sup>

In sum, the Rodriguez Act leaves many questions unanswered, which likely will lead to confusion in the courts if Congress passes the Act. Furthermore, the drafters failed to consider the powerful discretionary-function exception of the FTCA, which potentially could render the Act completely impotent.

## 2. *Ramifications of the Rodriguez Act Failing*

If the Rodriguez Act fails, then the status quo survives. The status quo, however, seems to be increasingly less tolerant of the inequities of the *Feres* Doctrine.<sup>214</sup> All of the existing objections to the *Feres* Doctrine will linger, and the lower courts will continue their assault on it. Because of the harsh nature of *Feres* jurisprudence and the heartbreaking stories that constituents will keep raising with their congressional representatives, it is certain that legislation proposing to overturn or limit *Feres* will continue to be introduced in the halls of Congress. Allegations that the *Feres* Doctrine and perceived deficiencies in medical care and compensation schemes negatively affect morale and discipline in the military will persist. Even if the Rodriguez Act fails, action still must be taken to rectify these concerns. As the Ninth Circuit

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(Nev. 2007) (applying Nevada's FTCA-like waiver of sovereign immunity and finding that "while a physician's diagnostic and treatment decisions involve judgment and choice, thus satisfying the [*Gaubert*] test's first criterion, those decisions generally do not include policy considerations, as required by the test's second criterion.").

212. *Martinez*, 168 P.3d at 722.

213. If one wonders how the slip of a surgeon's knife could possibly trigger the discretionary-function exception, consider that the military must make decisions about training, staffing, and equipping its medical centers. A consequence of those decisions could be a less-experienced surgeon performing surgery while more-experienced surgeons are deployed. Another consequence could be that money was appropriated for one command purpose over another. Although this consideration is, admittedly, far-fetched, one should not, in light of the expansive *Feres* and discretionary-function exception jurisprudence, underestimate the lengths to which the discretionary-function exception could be stretched. See *Fang*, 140 F.3d at 124 (finding that the government is immune from suits regarding the allocation and deployment of resources); see also Brou, *supra* note 24, at 3-4 (arguing that the *Feres* Doctrine has been expanded beyond its original purpose of protecting military decision-making and discipline).

214. See *supra* Part II.A.

once noted, “until Congress, the Supreme Court, or an en banc panel of this Court reorients the [*Feres*] doctrine, we are bound to follow this well-worn path.”<sup>215</sup>

### III. COUNTERATTACK: A POSSIBLE SOLUTION TO THE *FERES* PROBLEM

#### A. *Alternatives to the Rodriguez Act*

Despite its good intentions, the Rodriguez Act is fatally flawed.<sup>216</sup> The *Feres* Doctrine could benefit from some revision,<sup>217</sup> which the Supreme Court is unlikely to provide.<sup>218</sup> These concerns suggest that legislative action is the necessary remedy, though not in the form that the Rodriguez Act proposes. Two prior alternatives have been proposed to remedy the problems inherent in the *Feres* Doctrine, both of which are more persuasive than the Rodriguez Act.

##### 1. *Restoring the FTCA to Its Original Function*

In a 2007 article published in the *Military Law Review*, Major Deirdre Brou proposed a solution to the FTCA-*Feres* problem:<sup>219</sup> she would simply substitute the existing exceptions to the FTCA for the “overly-broad” *Feres* Doctrine.<sup>220</sup> In particular, Major Brou argued that the FTCA’s discretionary-function exception would protect judicial interference with military command and discipline “while also preserving service members’ rights under the [FTCA].”<sup>221</sup> The American Bar Association has espoused this solution as well.<sup>222</sup> Although very compelling and, arguably, completely faithful to the intent of the original drafters of the FTCA and a plain-language reading of the statute, this recommendation fails to consider the demonstrated over-application of the discretionary-function exception.<sup>223</sup> It is possible that, even if Congress were to amend the FTCA to overrule the *Feres* Doctrine legislatively, the courts could apply the discretionary-function exception to

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215. *Costo v. United States*, 248 F.3d 863, 869 (9th Cir. 2001).

216. *See supra* Part II.D.1.

217. *See supra* Part II.D.2.

218. *See supra* Part I.B.

219. Brou, *supra* note 24, at 72 (“The *Feres* Doctrine protects military decision making and discipline from . . . judicial second-guessing at the expense of service members’ rights under [the] Federal Tort Claims Act. This doctrine is too broad in scope and should be supplanted by the Federal Tort Claims Act’s enumerated exceptions.”).

220. *Id.* Major Brou emphasized the arguments expounded by Justice Scalia in his dissent in *Johnson*. *Id.* at 73.

221. *Id.* at 66–67 (“Courts can apply this two-part discretionary function test to protect the military’s decision making process and its discipline.”).

222. *Rodriguez Hearing*, *supra* note 28, at 212 (statement of Stephen A. Saltzburg, Professor, The George Washington University Law School).

223. *See supra* Part II.D.1 (discussing the discretionary-function exception to the FTCA).

achieve the same undesired results.<sup>224</sup> Taken together with the Rodriguez Act, this would not be an overarching concern.<sup>225</sup> But allowing the FTCA's discretionary-function exception to stand alone is far more worrisome, given the expansive treatment it has received in the courts.<sup>226</sup>

## 2. *Amending the Military Claims Act*

In his testimony before the Senate Subcommittee on Administrative Practice and Procedure in 1986, Dean Michael Noone proposed a different solution to the FTCA-*Feres* problem.<sup>227</sup> In his view, military victims of injuries sustained incident to service could be compensated adequately using the Military Claims Act.<sup>228</sup> As written, the Military Claims Act,<sup>229</sup> like the *Feres* Doctrine, bars injuries incident to service,<sup>230</sup> but it could easily be amended to "permit the adjudication of personal injury and death claims of personnel presently barred by the *Feres* Doctrine."<sup>231</sup> A year after this testimony, the Subcommittee on Military Personnel and Compensation held a hearing addressing the prospect

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224. See Niles, *supra* note 201, at 1353 ("[T]he Supreme Court's current interpretation of the [discretionary-function] exception expands the provision's limitations well beyond their intended scope, undermining the central purpose of the provision.").

225. See *supra* Part II.D.1 (discussing the vague possibility of the discretionary-function exception limiting service member medical-malpractice claims).

226. See Harold J. Krent, *Preserving Discretion Without Sacrificing Deterrence: Federal Governmental Liability in Tort*, 38 UCLA L. REV. 871, 871-72 (1991) ("The discretionary function exception presents a substantial obstacle for tort claimants to surmount . . . unquestionably preventing many of those injured from receiving compensation."); see also *Rosebush v. United States*, 119 F.3d 438, 444 (6th Cir. 1997) (Merritt, J., dissenting) (criticizing the court's application of the discretionary function as having "swallowed, digested, and excreted the liability-creating sections of the [FTCA]"); Levine, *supra* note 201, at 1546 (arguing that "wherever the courts draw the line between discretion and plain negligence, the 'discretion' ambit includes many acts that would be subject to the regular negligence calculus if committed by private defendants").

227. *Feres Hearing*, *supra* note 58, at 76-79 (statement of Michael F. Noone, Jr., Associate Dean of the Columbus School of Law, Catholic University of America).

228. *Id.* at 77-78.

229. 10 U.S.C. § 2733 (2006). The Military Claims Act provides an administrative remedy for damage to or loss of property, personal injury, or death caused by a civilian employee or member of the Army, Navy, Air Force, Marine Corps, or Coast Guard. Recovery is permitted whether or not there is any indication of negligence or fault on the part of the military. *Id.* § 2733(b)(4). There are two categories of claims recognized by the Military Claims Act. First are "those claims that involve military personnel acting within the scope of their employment"; second are "those incident to so-called 'noncombat activities.' The former . . . require negligence before recovery is permitted, while the latter do not." *Poindexter v. United States*, 777 F.2d 231, 235 (5th Cir. 1985). The latter simply require a showing of causation and damages. 1 Handling Federal Tort Claims, *supra* note 38, § 1.04[2][9], at 1-19. Recovery is also permitted if the claim arises in a foreign country. 10 U.S.C. § 2733 (2006).

230. 10 U.S.C. § 2733(b)(3).

231. *Feres Hearing*, *supra* note 58, at 78 (statement of Michael F. Noone, Jr., Associate Dean of the Columbus School of Law, Catholic University of America).

of this amendment.<sup>232</sup> The DOD, historically a reliable proponent of the *Feres* Doctrine, supported this proposal.<sup>233</sup>

The benefit of allowing the claim under the Military Claims Act, if amended, is that the claims are adjudicated by the individual services, thus eliminating concerns of civilian judicial interference with military-command discretion.<sup>234</sup>

Additionally, the Military Claims Act already allows for claims for injuries that arise in foreign countries, unlike the FTCA: "[F]or over [thirty] years the Military Claims Act has been a vehicle for [the] claimants overseas who are not barred by *Feres* to recover for malpractice. This is a system already in place with a proven record for handling malpractice claims."<sup>235</sup> Thus, the transition to implementing a program for military members recovering from the government for tortious injury would be more efficient under the Military Claims Act. Unlike the Rodriguez Act, "which would increase the burdens of an already saturated judicial system,"<sup>236</sup> an amendment to the Military Claims Act would build upon an already established administrative remedy that could "readily accommodate the additional cases that would arise."<sup>237</sup>

Finally, amending the Military Claims Act to allow for injuries sustained incident to service could provide satisfactory compensation to military victims of government negligence. Under the Military Claims Act, the Secretary of the applicable department may settle and pay claims up to \$100,000.<sup>238</sup> If the Secretary believes a claim merits compensation in excess of \$100,000, the Secretary can forward the claim to the Secretary of the Treasury so the excess can be paid subject to 31 U.S.C. § 1304.<sup>239</sup>

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232. *Compensation for Victims of Military Malpractice: Hearing Before the Military Pers. and Comp. Subcomm. of the H. Comm. on Armed Servs.*, 100th Cong. 1 (1987) [hereinafter *Compensation Hearing*] (statement of Rep. G.V. (Sonny) Montgomery).

233. *Id.* at 65 (statement of H. Lawrence Garrett III, General Counsel, Department of Defense) ("The Department believes that amendment of the Military Claims Act . . . may very well provide . . . a solution.").

234. *Feres Hearing*, *supra* note 58, at 77 (statement of Michael F. Noone, Jr., Associate Dean of the Columbus School of Law, Catholic University of America). The Military Claims Act also precludes judicial review of Department action. See 10 U.S.C. § 2733(g) ("A decision of the officer or employee who makes a final settlement decision under this section may be appealed by the claimant to the Secretary concerned or an officer or employee designated by the Secretary for that purpose."). Additionally, the Military Claims Act, which functions much like the FTCA, does not contain a discretionary-function exception like the FTCA, so there does not exist the corresponding concern of the exception defeating the legitimate claims of service members. See 10 U.S.C. § 2733.

235. *Compensation Hearing*, *supra* note 232, at 66 (statement of H. Lawrence Garrett III, General Counsel, Department of Defense).

236. *Id.* at 87.

237. *Id.*

238. 10 U.S.C. § 2733(a).

239. *Id.* § 2733(d).

Congress has not addressed the possibility of amending the Military Claims Act for this purpose since the 1980s. But the inequities of the *Feres* jurisprudence have persisted, making legislative action necessary; thus, this solution should be revisited. Amending the Military Claims Act is the best compromise to concerns raised by *Feres*'s supporters and its detractors. It provides a simple vehicle to provide compensation for service members injured incident to their service while addressing the necessary balance of military discipline and discretion.

#### *B. Proposed Amendment to the Military Claims Act*

Section (b) of the Military Claims Act currently reads: A claim may be allowed under subsection (a) only if— . . . (3) it is not for personal injury or death of such a member or civilian officer or employee whose injury or death is incident to his service.<sup>240</sup> In order to achieve the goal of allowing military personnel to file claims against the government for injuries sustained incident to service, this section should be amended by simply deleting provision (b)(3).<sup>241</sup>

### IV. CONCLUSION

Like private citizens, members of the Armed Forces have sometimes suffered substantial injury at the hands of the government. Unlike private citizens, service members are precluded from suing the government because of the extensive and widely criticized *Feres* Doctrine, a judicially created

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240. *Id.* § 2733(b)(3).

241. A proposed amendment to the Military Claims Act could read:

#### A BILL

To Amend chapter 163 of title 10, United States Code, to allowing claims by members of the Armed Forces for injuries incurred incident to their service.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

#### SECTION 1. SHORT TITLE.

This Act may be cited as the "Military Claims Act of 2009".

#### SEC. 2. ALLOWANCE OF CLAIMS BY MEMBERS OF THE ARMED FORCES, FOR INJURIES INCURRED INCIDENT TO THEIR SERVICE.

(a) IN GENERAL.—Chapter 163 of title 10, United States Code, is amended by deleting § 2733(b) (3): §2733. PROPERTY LOSS; PERSONAL INJURY OR DEATH: INCIDENT TO NONCOMBATANT ACTIVITIES OF DEPARTMENT OF ARMY, NAVY, OR AIR FORCE

"(b) (3) it is not for personal injury or death of such a member or civilian officer or employee whose injury or death is incident to his service."

(b) TECHNICAL AND CONFORMING AMENDMENT.—The table of sections for chapter 163 of title 10, United States Code, is amended by renumbering (b)(4) and (b)(5) to (b)(3) and (b)(4), respectively, and by adjusting the language of § 2733 to the following:

"§2733. Property loss; personal injury or death."

(c) EFFECTIVE DATE.—The amendments made to this section shall apply with respect to a claim arising on or after January 1, 2009, 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."

exception to the FTCA that has survived sixty years of congressional review, despite near-universal agreement that some form of modification is required. Unfortunately, the Carmelo Rodriguez Military Medical Accountability Act of 2009 is a partial and inadequate attempt at solving the problems raised by the *Feres* Doctrine. This legislation is ineffective and inequitable. Rather than combating unfairness with unfairness, Congress should amend the Military Claims Act to allow tort claims by members of the Armed Forces for injuries incurred incident to their service, without limiting those injuries to medical and dental malpractice claims. Such an action may, once and for all, defeat the inequities of the controversial *Feres* Doctrine, but not at the expense of military discipline and command discretion—the overriding justifications in barring service members’ claims against the government under the FTCA.