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The Fourteenth Exception: How the Feres Doctrine Improperly Bars Medical Malpractice Claims of Military Service Members

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**THE FOURTEENTH EXCEPTION: HOW THE *FERES* DOCTRINE
IMPROPERLY BARS MEDICAL MALPRACTICE CLAIMS OF MILITARY
SERVICE MEMBERS**

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I. THE PRESENT SITUATION OF MILITARY MEDICAL MALPRACTICE
CLAIMS UNDER THE FEDERAL TORT CLAIMS ACT

Staff Sergeant Dean Witt was dying. There were no bullet wounds, no trauma from an explosive device; the airman was not on a battlefield in a foreign land. Rather, the twenty-five-year-old patriot lay helpless and gasping for breath on a hospital gurney. Only minutes earlier Witt had undergone routine appendix surgery at the medical center on Travis Air Force Base in October 2003.¹ Following the operation, Witt's nurse had removed his airway too soon, causing the muscles in his throat to constrict, cutting off his ability to breathe and depriving him of oxygen.² This same nurse then inexplicably abandoned her post in the recovery room, leaving Witt without care.³ An understaffed anesthesia team frantically wheeled him into a pediatric area, where they attempted to use life-saving devices intended for children to revive the 175-pound airman.⁴ Someone then tried to insert a breathing tube and failed; the misplaced tube pumped much-needed oxygen into Witt's stomach.⁵ By the time he was properly intubated, Witt had been without oxygen for nearly fifteen minutes.⁶ As a result, he was massively and permanently brain damaged.⁷

Witt's wife, Alexis, knew that her husband would never want to live dependent solely on a machine – confined to a bed, capable only of reflex action, and knowing nothing of the world around him.⁸ She requested that doctors cease his care.⁹ It took two months for the

1. Walter F. Roche, Jr., *Military Medical Malpractice: Seeking Recourse*, L.A. TIMES, Apr. 20, 2008, at A2.

2. *The Carmelo Rodriguez Military Medical Accountability Act of 2009: Hearing on H.R. 1478 Before the Subcomm. on Commercial and Administrative Law of the H. Comm. on the Judiciary*, 111th Cong. 243 (2009) [hereinafter *Hearing on H.R. 1478*] (statement of Alexis Witt, wife of Staff Sgt. Dean Witt).

3. *Id.*

4. Roche, *supra* note 1.

5. *Id.*

6. *Hearing on H.R. 1478*, *supra* note 2.

7. *Id.*

8. *Id.* at 243-44.

9. *Id.* at 243.

hospital ethics board to grant the request.¹⁰ In the meantime, Witt's family watched helplessly as his body atrophied to less than a hundred pounds, his hands held rigid and twisted against his chest, and his face contorted in an expression of pain.¹¹ When he finally passed away, Witt left behind a devastated wife and two small, and now fatherless, children.¹²

Staff Sergeant Dean Witt's story appears to be a straightforward and horrendous case of negligence on the part of the medical professionals entrusted with his care. However, even more horrific is that, unlike most other Americans who have suffered from the horrors of medical malpractice, the Witt family has no avenue through which to bring those responsible to justice. Where most Americans would find recourse in the court system for such appalling injuries, medical malpractice claims of active duty service members like Witt against government doctors are completely barred from suit. This bar is the direct result of the 1950 Supreme Court case *Feres v. United States*.¹³

In its opinion, the Court pronounced the rule that became known as the *Feres* doctrine: "The government is not liable under the Federal Tort Claims Act for injuries to servicemen where the injuries arise out of or are in the course of activity incident to service."¹⁴ In later cases, courts have held that receiving medical treatment in a government facility, even treatment such as an elective surgery, constitutes an activity that is "incident to service."¹⁵ The *Feres* doctrine thereby effectively bars active duty service members from collecting damages for injuries, like those resulting from medical malpractice, whether or not the injury actually occurred in the performance of their duties.¹⁶ It

10. *Id.*

11. *Id.*

12. *Id.* at 244.

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

14. *Id.* at 146.

15. *See, e.g.*, *Harten v. Coons*, 502 F.2d 1363 (10th Cir. 1974); *Lowe v. United States*, 440 F.2d 452 (5th Cir. 1971); *Shults v. United States*, 421 F.2d 170 (5th Cir. 1969); *Briggs v. United States*, 617 F. Supp. 1399 (D.R.I. 1985), *aff'd without op.*, 787 F.2d 578 (1st Cir. 1986); *Kinsey v. United States*, 528 F. Supp. 1 (E.D. Okla. 1978).

16. *See Jackson v. United States*, 110 F.3d 1484, 1489 (9th Cir. 1997) ("*Feres* bars suits for medical malpractice even when the treatment was not for military-related injuries."); HENRY COHEN & VANESSA K. BURROWS, CRS REPORT FOR

also bars families of service members from filing wrongful death or loss of consortium actions when a service member is killed or injured.¹⁷

The *Feres* doctrine inflicts a gross injustice upon military members and their families. By denying military members the right to sue for medical malpractice, the Supreme Court has relegated them to second-class citizens, whose rights fall below even those of the nation's criminals.¹⁸ Furthermore, the *Feres* bar undermines the quality of healthcare provided to the nation's military forces by preventing accountability for egregious mistakes and shortcomings in medical treatment.¹⁹ Congress possesses the surest remedy to secure

CONGRESS: FEDERAL TORT CLAIMS ACT 8 (Dec. 11, 2007) (“[T]he *Feres* doctrine stands and contains no exception for medical malpractice cases.”).

17. See, e.g., *Hata v. United States*, 23 F.3d 230, 235 (9th Cir. 1994); *Persons v. United States*, 925 F.2d 292, 297 (9th Cir. 1991). The *Feres* doctrine bars third-party claims against the United States for indemnification, where the underlying claim would be barred. *Stencel Aero Engineering v. United States*, 431 U.S. 666, 673 (1977) (“[I]t seems quite clear that where the case concerns an injury sustained by a soldier while on duty, the effect of the action upon military discipline is identical whether the suit is brought by the soldier directly or by a third party.”). Although *Stencel* involved a derivative claim, some circuits have expanded the *Stencel* rationale to bar derivative injury where the dependent’s injury had its “genesis” in a service-related injury to a service member. See, e.g., *Mondelli v. United States*, 711 F.2d 567 (3d Cir. 1983) (holding that a dependent child’s claim for injuries sustained as a result of serviceman’s exposure to radioactivity was barred by *Feres*); *Lombard v. United States*, 690 F.2d 215 (D.C. Cir. 1982) (holding that dependent children’s claims for injuries sustained as a result of serviceman’s exposure to radiation during an atomic bomb project were barred by *Feres*); *Monaco v. United States*, 661 F.2d 129 (9th Cir. 1981) (holding that dependent child’s claim for injuries caused by genetic damage to serviceman exposed to radiation was barred by *Feres*).

18. See *United States v. Muniz*, 374 U.S. 150 (1963) (applying the rationale used in *Feres* and determining that federal prisons are not barred from suit under the Federal Tort Claims Act).

19. *Hearing on H.R. 1478, supra* note 2, at 84-88 (statement of Rep. Maurice D. Hinchey). See also *Hearing on H.R. 1478, supra* note 2, at 104 (statement of Stephen A. Saltzburg, presented on behalf of the American Bar Association) (“[A] bar to damage actions insulates the military from investigation and accountability for negligent and incompetent medical care and undermines confidence in the quality of healthcare provided to non-combat military service personnel.”); *Richards v. United States*, 180 F.3d 564, 565 (1999) (Rendell, J., dissenting from denial of rehearing *en banc*) (“*Feres* . . . is also being employed by many courts on a regular basis . . . to prevent the government’s accountability, of injuries sustained in

service members' right to quality medical care and should do so confidently, because the rationales behind the *Feres* doctrine do not logically support a bar on medical malpractice claims brought by active duty service members.

Although the *Feres* doctrine has received "widespread, almost universal criticism" in the federal courts and in legal journals,²⁰ scholarly criticism has significantly diminished over the last two decades, causing one circuit judge to lament, "Everyone seems to have given up."²¹ This Comment is a response to that call to action. It explores the rationales behind the *Feres* doctrine and explains why these rationales do not logically support a bar upon medical malpractice claims by service members. Part II of this Comment provides the necessary background to understand the development of the *Feres* doctrine and offers several examples of cases barred from suit by the doctrine. Part III examines in detail the arguments supporting the bar on active duty claims and offers counter-arguments which support a repeal of that bar. Part IV presents alternatives to the *Feres* doctrine and argues for Congress to adopt legislation that clarifies the scope of the Federal Tort Claims Act to include claims of service members for medical malpractice.

II. THE EVOLUTION OF THE *FERES* DOCTRINE AND ITS EFFECT ON MILITARY MEDICAL MALPRACTICE CLAIMS

A. *The Federal Tort Claims Act*

The United States, as sovereign, is immune from suit unless it consents to being sued,²² and may determine the limitations and conditions of that consent.²³ Prior to the enactment of the Federal Tort Claims Act in 1946, individuals who were injured by a negligent federal employee had to either recover from the employee directly or

connection with essentially civilian activities wholly unrelated to military service.").

20. *In re* "Agent Orange" Product Liability Litigation, 580 F. Supp. 1242, 1246 (E.D.N.Y. 1984).

21. *O'Neill v. United States*, 140 F.3d 564, 566 (3d Cir. 1998) (Becker, C.J., dissenting from denial of rehearing *en banc*).

22. *United States v. Sherwood*, 312 U.S. 584, 586 (1941).

23. *Soriano v. United States*, 352 U.S. 270, 276 (1957).

petition Congress for relief in the form of a private bill.²⁴ As the scope of government activity increased, so did the number of private bills, and Congress soon found itself overwhelmed and ill-equipped to handle the volume of claims.²⁵ Congress submitted to the demand that tort claims be subject to adjudication and passed the Federal Tort Claims Act,²⁶ which constitutes a waiver of sovereign immunity with thirteen specified limitations.²⁷ Under the Federal Tort Claims Act, the United States is liable “in the same manner and to the same extent as a private individual under like circumstances.”²⁸ Specific exceptions to the United States’ liability include claims based on a discretionary function of government employees or agencies,²⁹ claims arising in a foreign country,³⁰ and claims arising out of the combatant activities of the armed forces during times of war.³¹

The Federal Tort Claims Act requires claimants to utilize the administrative process before bringing suit.³² A claimant must first present his claim of injury to the appropriate federal agency and allow that agency the opportunity to settle with him.³³ Only if the agency denies the claim or fails to settle the claim within six months may the claimant file suit in federal district court against the United States.³⁴

Congress revised the Federal Tort Claims Act in 1988 when it passed the Federal Employees Liability Reform and Tort Compensation Act.³⁵ As amended, the Federal Tort Claims Act makes recovery against the government the sole remedy for claimants, meaning that plaintiffs cannot sue the negligent government employee directly.³⁶ Instead, the United States stands in as the defendant.³⁷

24. *Hunt v. United States*, 636 F.2d 580, 584 n.6 (D.C. Cir. 1980).

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

26. *Id.*

27. Federal Tort Claims Act, 28 U.S.C. §§ 1346(b), 2671-80 (2006).

28. *Id.* § 2674.

29. *Id.* § 2680(a).

30. *Id.* § 2680(k).

31. *Id.* § 2680(j).

32. *Id.* § 2675.

33. *Id.* § 2675(a).

34. *Id.*

35. *See id.* §§ 2674, 2679, 2680.

36. *Id.* § 2679(b)(1).

B. The Development of the Feres Doctrine

Although there was no specific limitation against particular classes of persons, questions remained in the courts as to who could and could not bring suit against the United States. The Supreme Court first encountered the issue of whether servicemen were exempted from suit under the Federal Tort Claims Act in 1949 in *Brooks v. United States*.³⁸ The Court determined that the Federal Tort Claims Act did not preclude recovery against the United States for one soldier's death and another's injuries when the automobile in which they were riding while on furlough was struck by a negligently operated army truck driven by a civilian employee of the Army.³⁹ The Supreme Court held: "The statute's terms are clear We are not persuaded that any claim means 'any claim but that of servicemen.' The statute does contain twelve exceptions. None exclude petitioners' claims."⁴⁰ The Court went on to say that it would be "absurd" to think that Congress intended to exclude claims by servicemen.⁴¹

Based on the legislative history of the Act, the Court believed that Congress did not intend to preclude recovery by service members. The Court gave particular weight to the fact that eighteen tort claims bills were introduced in Congress between 1925 and 1935, and all but two of those bills contained exceptions denying recovery to members of the armed forces.⁴² That exception was notably dropped by the time the Act was adopted, implying that Congress specifically decided not to bar service members from bringing suit.⁴³ Further, the Court determined that the presence of provisions in other statutes providing for disability payments to servicemen and gratuity payments to their

37. *Id.* ("The remedy against the United States . . . resulting from the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment is exclusive . . .").

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

39. *Id.* at 50.

40. *Id.* at 51 (citation omitted).

41. *Id.*

42. *Id.* at 51-52.

43. *Id.* ("Congress knew what it was about when it used the term 'any claim.' It would be absurd to believe that Congress did not have the servicemen in mind in 1946, when this statute was passed.").

survivors did not preclude recovery.⁴⁴ The Court limited its holding though, by stating if the accident causing injury was incident to service, “a wholly different case would be presented.”⁴⁵

The “wholly different case” appeared a year later. In 1950, the Supreme Court granted certiorari in and consolidated three cases.⁴⁶ In each case, recovery was sought for injury to an active-duty serviceman not on leave who was injured through the negligence of others in the Armed Forces.⁴⁷ One of the cases involved a fire in the barracks, and the other two involved medical malpractice claims. The Court concluded that the government is not liable under the Federal Tort Claims Act for injuries to servicemen where the injuries arise out of or are in the course of activity “incident to service.”⁴⁸ The *Feres* Court provided three rationales for its decision. First, no parallel private liability exists as required under 28 U.S.C. § 2674 because no private individual has the power to conscript or mobilize a private army.⁴⁹ Second, the distinctly federal relationship between the government and its armed forces should not be governed by state law.⁵⁰ Third, a simple, certain, and uniform compensation scheme for injuries or death of those in the armed services was already in place.⁵¹

The *Feres* doctrine has a fourth rationale, which was provided four years later by the Supreme Court in *Brown v. United States*.⁵² In *Brown*, the Court held that the Federal Tort Claims Act did not

44. *Id.* at 53. (“There is nothing in the Tort Claims Act or the veterans’ laws which provides for exclusiveness of remedy. . . . We will not call either remedy in the present case exclusive, nor pronounce a doctrine of election of remedies, when Congress has not done so.”).

45. *Id.* at 52.

46. *Feres v. United States*, 177 F.2d 535 (2d Cir. 1949) (service member died in fire in the barracks resulting from defective heating plant); *Jefferson v. United States*, 178 F.2d 518 (4th Cir. 1949) (army surgeon left towel, measuring 30 inches long by 18 inches wide, in soldier’s stomach causing abdominal problems); *Griggs v. United States*, 178 F.2d 1 (10th Cir. 1949) (soldier died after treatment by army surgeons).

47. *Feres v. United States*, 340 U.S. 135, 138 (1950).

48. *Id.* at 146.

49. *Id.* at 141.

50. *Id.* at 143-44.

51. *Id.* at 144.

52. *United States v. Brown*, 348 U.S. 110 (1954).

preclude recovery for negligent injury to a veteran during an operation in the Veterans Administration Hospital.⁵³ Recovery was allowed because the negligent act which caused the injury was not incident to military service.⁵⁴ While the Court held that *Brooks* governed this particular case, it expanded on the earlier rationales underlying the *Feres* doctrine by holding that the bar in *Feres* was necessary to prevent interference with military discipline.⁵⁵

The Supreme Court most recently affirmed the *Feres* doctrine in *United States v. Shearer*⁵⁶ and *United States v. Johnson*.⁵⁷ In *Shearer*, the mother of a serviceman murdered by a fellow serviceman while off-duty and off-base brought suit asserting that military superiors negligently failed to prevent the murder.⁵⁸ Relying primarily on the potential effect on military discipline, the Court held that the *Feres* doctrine barred recovery.⁵⁹ The Court stated that *Feres*' claims must be decided on a case-by-case basis⁶⁰ and suggested that *Feres*' original rationales were "no longer controlling."⁶¹ However, only two years later, the Supreme Court changed its assessment of the *Feres* rationales. In *Johnson*, the Court examined whether the *Feres* doctrine barred the claim of a service member killed during activity incident to service due to the negligence of a civilian employee of the federal government.⁶² The majority determined that such a claim was barred based on three of the *Feres* factors. Thereby, the Court breathed new life into the following *Feres*' rationales: (1) the distinctly federal relationship; (2) the existence of statutory compensation; and (3) the

53. *Id.* at 110, 113.

54. *Id.* at 113.

55. *Id.* at 112 ("[T]he effects of the maintenance of such suits on discipline . . . if suits under the Tort Claims Act were allowed for negligent orders given or negligent acts committed in the course of military duty, led the Court to read that Act as excluding claims of that character.").

56. *United States v. Shearer*, 473 U.S. 52 (1985).

57. *United States v. Johnson*, 481 U.S. 681 (1987) (5-4 decision).

58. *Shearer*, 473 U.S. at 53.

59. *Id.* at 57 (citation omitted) ("[T]he 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 . . .").

60. *Id.*

61. *Id.* at 58 n.4.

62. *Johnson*, 481 U.S. at 682.

possibility for interference in military discipline.⁶³ By reaffirming the foregoing rationales, the Supreme Court effectively set aside the case-by-case approach it had just espoused in *Shearer* and made recovery under the Federal Tort Claims Act by service members virtually impossible.

Over the nearly sixty years since the Supreme Court first introduced the *Feres* doctrine, district courts have used the various rationales to determine that “activity incident to service” includes any circumstance in which an active duty personnel is treated in a government facility, regardless of the reason for that treatment.⁶⁴ In *Shults v. United States*, a serviceman was injured in an automobile accident occurring off-base and while he was on approved leave.⁶⁵ He was taken to a military hospital for treatment, where he died the next morning.⁶⁶ The administrator of Shults’ estate filed a medical malpractice suit under the Federal Tort Claims Act.⁶⁷ The court held that the suit was precluded by *Feres*, even though Shults was technically still on leave, because he would never have been admitted for treatment in a government hospital but for his status as a service member, and therefore “whatever happened to him in that hospital and during the course of that treatment had to be ‘in the course of activity incident to service.’”⁶⁸ Courts have repeatedly used this “but for” test to bar all medical malpractice claims by active duty service members, because treatment in a government hospital, whether elective or not, always constitutes activity incident to military service.⁶⁹ Thus, there is

63. *Id.* at 689-90. Justice Scalia, joined by Justice Brennan, Justice Marshall, and Justice Stevens, wrote a scathing dissent of the *Feres* doctrine, calling it a “clearly wrong decision” which has bred “unfairness and irrationality.” *Id.* at 703 (Scalia, J., dissenting).

64. *See, e.g.*, *Harten v. Coons*, 502 F.2d 1363 (10th Cir. 1974); *Lowe v. United States*, 440 F.2d 452 (5th Cir. 1971); *Shults v. United States*, 421 F.2d 170 (5th Cir. 1969); *Briggs v. United States*, 617 F. Supp. 1399 (D.R.I. 1985), *aff’d without op.*, 787 F.2d 578 (1st Cir. 1986); *Kinsey v. United States*, 528 F. Supp. 1 (E.D. Okla. 1978).

65. *Shults*, 421 F.2d at 171.

66. *Id.*

67. *Id.*

68. *Id.*

69. *See, e.g.*, *Harten*, 502 F.2d at 1363 (“Surgery, whether elective or required, is ‘incident to service’ when performed upon a serviceman on active duty because

currently no recognized or practical route to relief for medical malpractice claims brought under the Federal Tort Claims Act by active duty service members.⁷⁰

C. The Need for Accountability: The Carmelo Rodriguez Military Medical Accountability Act of 2009

Sergeant Carmelo Rodriguez's story is another shocking example of a military medical malpractice claim currently barred by the *Feres* doctrine. Rodriguez tragically died in November 2007, leaving behind a young son and a family full of grief, anger, and disbelief.⁷¹ Once a strapping young Marine at 190 pounds, the twenty-nine-year-old platoon leader had wasted to less than eighty pounds by the time of his death, the result of skin cancer that was repeatedly misdiagnosed as a wart or birthmark by military doctors.⁷²

When Rodriguez enlisted in the Marine Corps in 1997, he underwent a routine physical check-up.⁷³ During the physical, the military doctor documented that the then nineteen-year-old had melanoma on his right buttocks, but never informed Rodriguez or anyone else of the condition, and gave no recommendation for further treatment.⁷⁴ Seven years later, while serving in Iraq, Rodriguez visited another military doctor for a growth on his buttocks that concerned him.⁷⁵ He was told to see that doctor again when he returned to the

the serviceman is taking advantage of medical privileged granted only to military personnel.”); *Lowe*, 440 F.2d at 452 (holding that elective surgery is “activity incident to service” and barring suit for medical malpractice brought by soldier); *Briggs*, 617 F. Supp. at 1399 (barring suit for medical malpractice claim brought by airman because he would not have received treatment at military medical facility “but for his active duty military status”), *aff’d without op.*, 787 F.2d 578 (1st Cir. 1986); *Kinsey*, 528 F. Supp. at 2 (“The courts have typically taken the position that the serviceman received government medical treatment solely because of his military status, and that accordingly injuries received therein must be deemed incident to service, for which government liability is precluded.”).

70. COHEN & BURROWS, *supra* note 16.

71. *Hearing on H.R. 1478*, *supra* note 2, at 119 (statement of Ivette Rodriguez, sister of Sgt. Carmelo Rodriguez).

72. *Id.* at 119-20.

73. *Id.* at 119.

74. *Id.*

75. *Id.*

United States from deployment, which would be five months later.⁷⁶ In November 2005, Rodriguez saw the same military doctor from Iraq in the United States.⁷⁷ After an examination, he was directed to dermatology to have a “birthmark” removed for cosmetic purposes.⁷⁸ By April of 2006, while several referrals were “lost in the system,” Rodriguez’s “birthmark” began bleeding and leaking pus.⁷⁹ Out of desperation, Rodriguez finally made an appointment to see a dermatologist without a referral. The dermatologist delivered devastating news. Rodriguez was suffering from stage three malignant melanoma.⁸⁰ Rodriguez had three surgeries and received radiation and chemotherapy, but it was too late. The cancer had spread to his lymph nodes, liver, kidney, and stomach, and Sergeant Rodriguez only had a year left to live.⁸¹ Rodriguez’s doctors informed him that if the cancer had been diagnosed earlier, it probably would have saved his life.⁸²

Enlisted personnel are not the only ones susceptible to military medical malpractice—even high-ranking officers can become victims. Colonel Adele Connell, a soldier with thirty-four years of military service, believes she was the victim of medical malpractice during an operation at Walter Reed Army Medical Center in December 2008.⁸³ When Connell learned in November 2008 that she had breast cancer in her left breast, she elected to have a double mastectomy to avoid possible future cancer.⁸⁴ When she awoke after surgery, Connell was shocked to learn that doctors had accidentally removed sixteen lymph nodes from the right side of her body (rather than the left side where the cancer was located).⁸⁵ The surgeon appeared unaware that she had operated on the wrong side until Connell’s daughter informed her of

76. *Id.* at 119-20.

77. *Id.* at 120.

78. *Id.*

79. *Id.*

80. *Id.*

81. *Id.*

82. *Id.* at 117.

83. *Hearing on H.R. 1478, supra* note 2, at 236-37 (statement of Col. Adele Connell).

84. *Id.* at 237-38.

85. *Id.* at 239.

her mistake.⁸⁶ As a result of the “wrong-sided” surgery, Colonel Connell suffers from a devastating condition called lymphedema, which causes severe and constant pain in her right arm and brings an increased risk of infection due to a deficient immune system.⁸⁷

The recent examples of Witt, Rodriguez and Connell show that although scholarly criticism of the doctrine has died down over the last decade or so, the devastating effects of the *Feres* doctrine continue to accumulate.⁸⁸ Rodriguez’s story, which was featured on *CBS Evening News*, provided renewed vigor for opponents to the *Feres* doctrine. In March 2009, Representative Maurice Hinchey (D-N.Y.) introduced H.R. 1478, the Carmelo Rodriguez Military Medical Accountability Act of 2009, to the House of Representatives.⁸⁹ The bill would allow service members injured or killed as a result of military medical malpractice to bring suit under the Federal Tort Claims Act, excepting suits “arising out of the combatant activity of the armed forces during times of armed conflict.”⁹⁰ Since the bill is retroactive and would apply to any claim arising on or after January 1, 1997,⁹¹ Rodriguez, Witt, Connell, and many other service members would be directly and positively impacted by the legislation.

As indicated by its title, accountability is the major objective of

86. *Id.*

87. *Id.*

88. In his dissent to a denial of rehearing en banc in *O’Neill v. United States*, Chief Judge Becker noted that scholarly criticism has receded since the late 1980s. 140 F.3d 564, 566 (3d Cir. 1998).

89. Carmelo Rodriguez Military Medical Accountability Act of 2009, H.R. 1478, 111th Cong. § 2 (2009), *available at* , <http://www.govtrack.us/congress/bill.xpd?bill=h111-1478> (last visited Mar. 27, 2010). Senator Charles Schumer introduced similar legislation, S. 1347, into the Senate on June 24, 2009. Carmelo Rodriguez Military Medical Accountability Act of 2009, S. 1347, 111th Cong. (2009), *available at* <http://www.govtrack.us/congress/bill.xpd?bill=s111-1347> (last visited Mar. 27, 2010). Rep. Hinchey had previously introduced H.R. 6093, the Carmelo Rodriguez Military Medical Accountability Act of 2008, on May 20, 2008. Carmelo Rodriguez Military Medical Accountability Act of 2008, H.R. 6093, 110th Cong. (2008), *available at* <http://www.govtrack.us/congress/bill.xpd?bill=h110-6093> (last visited Mar. 27, 2010). The bill died at the end of the last Congress and was reintroduced as H.R. 1478. *Id.*

90. Carmelo Rodriguez Military Medical Accountability Act of 2009, H.R. 1478, 111th Cong. § 2 (2009).

91. *Id.*

the proposed Act.⁹² Many of the victims of military medical malpractice, as well as members of the military community, believe that such accountability is lacking under the current system.⁹³ For example, the nurse anesthetist who treated Staff Sergeant Dean Witt had also been on duty when twenty-two-year-old airman Christopher White died after routine surgery on his shoulder from complications during post-operative care.⁹⁴ White's family did not try to take legal action because lawyers advised them that his claim was barred under the *Feres* doctrine.⁹⁵ If disciplinary or corrective action is taken against the offending doctor, it is not necessarily reported to the victim's family or the general public. Sergeant Cindy Wilson died less than twelve hours after giving birth to a healthy baby boy via cesarean section on February 20, 2007, at the First Fighter Wing Hospital at Langley Air Force Base.⁹⁶ Doctors cut a uterine artery during the delivery, causing substantial internal bleeding, and then left two sponges in Wilson's abdomen during the surgery to repair the damage.⁹⁷ The lead obstetrician, Dr. Michael Carozza, reported no disciplinary action to the Virginia Board of Medicine's web-based directory of licensed Virginia doctors.⁹⁸ Advocates against the *Feres* doctrine believe that these types of cases demonstrate how the *Feres* doctrine contributes to substandard care in the military healthcare system.⁹⁹

92. *Hearing on H.R. 1478*, *supra* note 2, at 84-88 (statement of Rep. Maurice D. Hinchey). "This bill isn't about members of the military being compensated fairly for medical negligence; it is about holding our military accountable for its actions and for its responsibility to its members, thereby making them more accountable." *Id.* at 87-88.

93. *See Roche*, *supra* note 1; Bill Sizemore, *Service Members Have Little Recourse Against Malpractice*, THE VIRGINIAN-PILOT, May 17, 2009.

94. *Roche*, *supra* note 1.

95. *Id.* The nurse's license was finally revoked by the State of California "for negligence and/or incompetence" after Witt's death. *Id.*

96. *Sizemore*, *supra* note 93.

97. *Id.*

98. *Id.* Information in the directory is self-reported by doctors. *Id.*

99. *Id.* One advocate, Jonathan Turley, a law professor at George Washington University, noted that malpractice cases involving sponges left inside patients persist in military medicine, although that type of malpractice is now rare in civilian medicine. *Id.* Turley attributed this trend to civilian doctors, in response to fear of malpractice suits, coming up with the simple solution of requiring a count of all

Ensuring high-quality healthcare is an essential element of maintaining a superior military force.¹⁰⁰ Allowing suits for medical malpractice serves an important preventative function because tort law serves the dual purpose of compensating victims and holding defendants accountable for their negligent actions, thereby promoting institutional reform.¹⁰¹ Under the *Feres* doctrine, negligent government doctors remain, for the most part, publicly unaccountable for malpractice against active duty service members.¹⁰² This lack of accountability for negligent or incompetent medical professionals is particularly difficult to accept because the *Feres* rationales do not provide adequate justification for barring medical

sponges before and after surgery. *Id.* Because military doctors are not under the same pressure, this type of malpractice persists in military medicine. *Id.*

100. Indeed, Congress recognized that the purpose of providing medical and dental care to active duty service members and their dependents is to “create and maintain high morale in the uniformed services.” 10 U.S.C. § 1071. “The military health system helps to maintain the health of military personnel so they can carry out their military missions In addition, recruitment and retention are supported by the provision of health benefits to military retirees and their dependents.” DON J. JANSEN, CRS REPORT FOR CONGRESS: MILITARY MEDICAL CARE: QUESTIONS AND ANSWERS 1-2 (May 14, 2009).

101. Deirdre G. Brou, *Alternatives to the Judicially Promulgated Feres Doctrine*, 192 MIL. L. REV. 1, 33 (2007) (citing W. KEETON, D. DOBBS, R. KEETON, & D. OWEN, PROSSER AND KEETON ON TORTS 20 (5th ed. 1984)). “Because Federal Tort Claims Act suits can focus judicial and public attention on an organization’s shortcomings, government organizations facing suit for negligence under the Federal Tort Claims Act may be more inclined to take measures to prevent recurrences of such negligence. This could improve the efficient and safe operation of the agency.” *Id.* See also *Hearing on H.R. 1478, supra* note 2, at 87 (2009) (statement of Rep. Maurice D. Hinchey) (“In addition to . . . hold[ing] the military accountable for the wrongful death and injuries of loved ones, [The Carmelo Rodriguez Military Medical Accountability Act] helps ensure that the military, like any other health care institution, takes steps to improve care”).

102. Negligent military doctors may face adverse performance reports, administrative action, and disciplinary proceedings under the Uniform Code of Military Justice, and some *Feres* advocates believe that this is sufficient. See *Hearing on H.R. 1478, supra* note 2, at 135-36 (statement of Maj. Gen. John D. Altenburg, Jr., former Deputy Judge Advocate General, U.S. Army). However, this system only holds the doctor (and his governmental employer) accountable to the military itself, not to the public at large and not specifically to the injured victim. This reasoning is akin to determining that a corporation whose delivery driver negligently injures another driver has been held accountable for that negligence if the delivery driver suffers internal disciplinary action.

malpractice claims.¹⁰³

III. JUSTIFYING THE UNJUSTIFIABLE: *FERES*' RATIONALES FACE SCRUTINY

A. Congress Did Not Intend to Bar Service Members' Claims

In deciding *Feres*, the Supreme Court created an exemption to the Federal Tort Claims Act that was never intended by Congress.¹⁰⁴ Indeed, this type of exemption had already been contemplated and ultimately rejected by the legislature. Members of Congress introduced eighteen different versions of the Tort Claims Act between 1925 and 1935.¹⁰⁵ Sixteen of those versions contained exceptions barring service members from suit.¹⁰⁶ The version of the Act adopted does not include this limitation.¹⁰⁷

The current version of the Federal Tort Claims Act includes several exceptions that impact potential claims of military members. The Federal Tort Claims Act precludes recovery for claims "arising out of the combatant activities of the military or naval forces, or the Coast Guard, during time of war"¹⁰⁸ and any claim "arising in a foreign country."¹⁰⁹ The Act also precludes claims based upon the performance of a discretionary function.¹¹⁰ These exceptions demonstrate that "Congress specifically considered, and provided what it thought needful for, the special requirements of the military. There was no proper basis . . . to supplement - *i.e.* revise - that

103. See *infra* Part III.

104. See, e.g., *Atkinson v. United States*, 825 F.2d 202, 204 (9th Cir. 1987) ("[T]he Supreme Court created a judicial exception to Congress's general rule of governmental liability."); *Hunt v. United States*, 636 F.2d 580, 588 (D.C. Cir. 1980) ("[T]he *Feres* doctrine . . . appeared to be nothing more than a court-made exception to Tort Claims Act liability . . .").

105. *Brooks v. United States*, 337 U.S. 49, 51 (1949).

106. *Id.*

107. *Id.* at 51-52.

108. Federal Tort Claims Act, 28 U.S.C. § 2680(j) (2000).

109. *Id.* § 2680(k).

110. *Id.* § 2680(a).

congressional disposition.”¹¹¹

Furthermore, although Congress established a compensation system for service members permanently injured in the line of duty, it did not include a provision declaring that the compensation is exclusive.¹¹² This absence is especially revealing in light of the fact that Congress enacted the Federal Employees’ Compensation Act, which specifically contained a provision declaring it to be the exclusive remedy for civilian employees injured in the course of employment.¹¹³ This also suggests that Congress did not intend to limit service members’ ability to recover under the Federal Tort Claims Act beyond the limitations on liability expressly established in the provisions of the Act.

For some reason, the Court ignored the historical development of the Federal Tort Claims Act in *Feres* but found this same information very persuasive when deciding *United States v. Muniz*.¹¹⁴ In *Muniz*, the Court encountered the issue of whether federal prisoners could bring suit under the Federal Tort Claims Act for injuries sustained while incarcerated due to the negligence of a government employee.¹¹⁵ After analyzing the case under the same rationales employed in *Feres*, the Court held that prisoners were not precluded from suit because “the reasons for [the *Feres*] decision are not compelling here.”¹¹⁶ The Court found congressional intent as shown by the Federal Tort Claims Act’s development to be decisive.

In a similar fashion to the possible exemption of claims by service members, Congress had contemplated barring claims of federal

111. *United States v. Johnson*, 481 U.S. 681, 693 (1987) (Scalia, J., dissenting). *See also* *Brooks v. United States*, 337 U.S. 49, 51 (1949) (“It would be absurd to believe that Congress did not have the servicemen in mind in 1946, when this statute was passed. The overseas and combatant activities exceptions make this plain.”).

112. 10 U.S.C. §§ 1201-22, 1401-14 (2000).

113. *See* 5 U.S.C. §§ 8101-29 (2000). “The liability of the United States . . . with respect to the injury or death of an employee is exclusive . . . under a workmen’s compensation statute or under a Federal tort liability statute.” *Id.* § 8116(c).

114. *United States v. Muniz*, 374 U.S. 150 (1963).

115. *Id.* at 150.

116. *Id.* at 159.

prisoners.¹¹⁷ Six of the thirty-one bills introduced to Congress between 1925 and 1946 contained such exceptions, but this exemption was absent from the final version.¹¹⁸ The Court stated, “We therefore feel that the want of an exception for prisoners’ claims reflects a deliberate choice, rather than an inadvertent omission.”¹¹⁹ The *Muniz* Court went on to say that reading such an exemption into the Act would be unjustified. “We should not, at the same time that state courts are striving to mitigate the hardships caused by sovereign immunity, narrow the remedies provided by Congress’ If the Act is to be altered that is a function for the same body that adopted it.”¹²⁰ Unfortunately, the Court did not exercise this same restraint in regards to service members.

B. The Supreme Court Strained To Find Justifications For “The Fourteenth Exception”

Through the development of the *Feres* doctrine, the Supreme Court effectively created a fourteenth exception to the Federal Tort Claims Act when it determined that service members could not recover for injuries sustained during activity incident to military service. Given the blatant disregard for the plain language of the statute and Congress’ original intent, it is no wonder then that the Supreme Court had to strain to find viable reasons for its decision in *Feres*. Those four rationales have faced much scrutiny over the last few decades.

1. The Lack of Parallel Private Liability

Under the Federal Tort Claims Act, the United States is liable “in the same manner and to the same extent as a private individual under like circumstances.”¹²¹ The *Feres* Court reasoned that since no private individual has the power to conscript a private army and since no state

117. *Id.* at 155-56.

118. *Id.* at 156.

119. *Id.*

120. *Id.* at 165-66 (footnotes omitted) (quoting *Rayonier, Inc. v. United States*, 352 U.S. 315, 320 (1957)).

121. Federal Tort Claims Act, 28 U.S.C. § 2674 (2000). See *United States v. Johnson*, 481 U.S. 681, 694 (1987) (Scalia, J., dissenting).

has ever let members of its militia bring suit against it, there was no requisite parallel private liability.¹²² Therefore service members are exempted from bringing claims against the government.¹²³ This analysis serves as the only instance in *Feres* where the Court attempted to interpret the actual text of the Federal Tort Claims Act for its determination of congressional intent.¹²⁴

Because there was no analogous private liability, the Court reasoned that Congress would not have intended to allow soldiers to recover. The Court admitted that in the usual doctor-patient relationship, there is liability for malpractice, but in this instance, the status of those involved is controlling.¹²⁵ The Court stated, “We know of no American law which has ever permitted a soldier to recover for negligence, against either his superior officers or the Government he is serving.”¹²⁶

According to the *Feres* Court, the purpose of the Federal Tort Claims Act was to “waive immunity from recognized causes of action and was not to visit the Government with novel and unprecedented liabilities.”¹²⁷ As with many of *Feres*’ rationales, the Supreme Court completely contradicted itself in later cases, asserting that “the very purpose of the Tort Claims Act was to waive the Government’s traditional all-encompassing immunity from tort actions and to establish novel and unprecedented governmental liability.”¹²⁸ The Supreme Court would subsequently reject the “lack of parallel liability” argument altogether in *Indian Towing Co. v. United States*, where it held the Federal Tort Claims Act did not exclude “liability in the performance of activities which private persons do not perform.”¹²⁹

122. *Feres v. United States* 340 U.S. 135, 141-42 (1950).

123. *Id.* at 142.

124. *See* *United States v. Johnson*, 481 U.S. 681, 694 (1987) (Scalia, J., dissenting).

125. *Feres*, 340 U.S. at 142.

126. *Id.* at 141 (footnote omitted).

127. *Id.* at 142.

128. *Rayonier, Inc. v. United States*, 352 U.S. 315, 319 (1957) (imposing liability on the United States for the negligent actions of government firefighters in failing to fight a fire).

129. *Indian Towing Co. v. United States*, 350 U.S. 61, 64 (1955) (holding the government liable for failure of lighthouse light that was negligently operated by the

2. *The Distinctly Federal Relationship*

The second rationale in *Feres* involves the distinct and special relationship that exists between members of the military and the government they serve. The *Feres* Court could not accept that Congress would have intended state law to interfere in this traditionally federal connection.¹³⁰ The Court stated, “Without exception, the relationship of military personnel to the Government has been governed exclusively by federal law. We do not think that Congress, in drafting this Act, created a new cause of action dependent on local law for service-connected injuries or death due to negligence.”¹³¹ Military families do not always have a choice in the location of where they serve. For this reason, the *Feres* Court believed that allowing members of the Armed Forces to bring suit against other government employees would be patently unfair to the service members because they would be subject to the tort law of a place where they were not necessarily voluntary residents.¹³² “It would hardly be a rational plan of providing for those disabled in service by others in service to leave them dependent upon geographic considerations over which they have no control and to laws which fluctuate in existence and value.”¹³³ Under this line of thinking, barring all recovery would be fairer to service members than allowing for non-uniform recovery.¹³⁴

In his scathing dissent in *United States v. Johnson*, Justice Scalia called this justification “absurd” and responded, “There seems to me nothing ‘unfair’ about a rule which says that, just as a serviceman

Coast Guard). *See also* *United States v. Muniz*, 374 U.S. 150, 159 (1963) (holding federal prisoners were not barred from suit under the Federal Tort Claims Act even though parallel private liability did not exist).

130. *Feres*, 340 U.S. at 146. When a plaintiff brings a claim against the United States under the Federal Tort Claims Act, the controlling law is that of the “place where the act or omission occurred.” Federal Tort Claims Act, 28 U.S.C. § 1346(b) (2000).

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

132. *Id.* at 143.

133. *Id.*

134. “[N]onuniform recovery cannot possibly be worse than (what *Feres* provides) uniform nonrecovery.” *United States v. Johnson*, 481 U.S. 681, 695-96 (1987) (Scalia, J., dissenting).

injured by a negligent civilian must resort to state tort law, so must a serviceman injured by a negligent Government employee.”¹³⁵ Such a justification seems illogical in light of the fact that servicemen may recover under the Federal Tort Claims Act for injuries that occur during activity not incident to service, and civilians may recover for injuries caused by the negligence of military personnel.¹³⁶

Federal prisoners have no control over their geographical location, and yet they may recover under the Federal Tort Claims Act for injuries caused by the negligence of prison authorities.¹³⁷ In *Muniz*, the Supreme Court was unconvinced that varying state law would improperly impact a federal establishment.¹³⁸ Rather, the Court recognized that imposing uniform non-recovery at the expense of potentially non-uniform recovery would be unfairly prejudicial to federal prisoners. “[T]hough the Government expresses some concern that the nonuniform right to recover will prejudice prisoners, it nonetheless seems clear that no recovery would prejudice them even more.”¹³⁹ That such prejudice is permitted when it comes to the nation’s military but not to the nation’s criminals is incomprehensible.¹⁴⁰

135. *Id.* at 696 (Scalia, J., dissenting). In *Johnson*, the Court examined whether the *Feres* doctrine barred the claim of a service member killed during activity incident to service due to the negligence of a civilian employee of the federal government. *Id.* A majority of five justices upheld three of the rationales in *Feres* and held that such a claim was barred. *Id.* at 688-92.

136. *Id.* at 696. *See, e.g.*, *Brooks v. United States*, 337 U.S. 49 (1949); *Indian Towing Co. v. United States*, 350 U.S. 61 (1955).

137. *See* *United States v. Muniz*, 374 U.S. 150 (1963).

138. *Id.* at 161. The Court specifically considered medical malpractice claims in its analysis. “Even a matter such as improper medical treatment can be judged under the varying state laws of malpractice without violent dislocation of prison routine.” *Id.* at 162.

139. *Id.*

140. Perhaps recognizing the lack of credibility in *Feres*’ second rationale, the Supreme Court had deemed the distinctly federal relationship argument to be “no longer controlling.” *United States v. Shearer*, 473 U.S. 52, 58 (1985). *See also* *United States v. Johnson*, 481 U.S. 681, 695-96 (1987) (Scalia, J., dissenting). However, subsequently, a majority of the Court in *Johnson* appeared to re-recognize this rationale. *United States v. Johnson*, 481 U.S. 681, 689 (1987).

3. *The Existence of Comprehensive Compensation Scheme*

Congress has established a comprehensive disability retirement system for service members permanently injured in the line of duty.¹⁴¹ If a service member is injured from medical malpractice and is unable to continue to serve, his compensation package will depend upon his disability rating.¹⁴² Members with a disability rating of less than thirty percent receive Department of Defense Disability Severance Pay upon discharge (which is calculated on pay grade and years in service at the time of discharge)¹⁴³ and continued healthcare for six months.¹⁴⁴ The discharged veteran may then seek a disability rating and determination of eligibility for veteran benefits from the Department of Veterans Affairs, which may entitle the veteran to monthly disability compensation and continued medical care.¹⁴⁵ Members with a disability rating of thirty percent or more are entitled to retired pay (which is based on years in service and pay grade or disability percentage, whichever is higher)¹⁴⁶ and continued healthcare.¹⁴⁷ Retired service members may also be eligible for monthly disability compensation from the Department of Veterans Affairs,¹⁴⁸ which is offset by the Department of Defense retired pay.¹⁴⁹ In addition, if a service member voluntarily leaves the military without seeking

141. 10 U.S.C. §§ 1201-22, 1401-14 (2000); 38 U.S.C. §§ 1101-63 (2000).

142. INTREPID FALLEN HEROES FUND & WOUNDED WARRIOR PROJECT, A HANDBOOK FOR INJURED SERVICE MEMBERS 29 (July 2007) [hereinafter HANDBOOK FOR INJURED SERVICE MEMBERS], available at <http://www.fallenheroesfund.org/Family-Resources.aspx> (follow "A Handbook for Injured Service Members and Their Families" hyperlink). Service members who are retired or separated from service receive a disability rating from both the Department of Defense and from the Department of Veterans Affairs. *Id.* This rating may be different for each Department. *Id.* at 36.

143. 10 U.S.C. §§ 1203, 1212 (2000). See comment below.

144. *Id.* § 1145.

145. 38 U.S.C. §§ 1110, 1115, 1710 (2009). This compensation is offset by the Department of Defense Disability Severance Pay. 10 U.S.C. § 1212(d)(1) (2008).

146. 10 U.S.C. § 1201, 1401 (2006).

147. *Id.* § 1074(b)(1).

148. 38 U.S.C. § 1110 (1998). The amount of basic benefit paid ranges from \$123 to \$2,673 per month, with additional money paid depending on the number of dependents and on the severity of the injury. *Id.* §§ 1114-15.

149. 10 U.S.C. § 1212(d)(1) (2008).

disability retirement, he may later request it and demonstrate that he suffers from a permanent disability as the result of a service-related injury.¹⁵⁰

Congress has also provided a comprehensive system of benefits for survivors of deceased active duty service members.¹⁵¹ The survivors of service members who die while serving on active duty in the Armed Forces automatically receive a tax-exempt death gratuity of \$100,000.¹⁵² All service members are automatically insured for \$400,000 against death through Service Members' Group Life Insurance (SGLI),¹⁵³ and for \$100,000 against traumatic injury through Traumatic Injury Protection Under Service Members' Group Life Insurance (TSGLI).¹⁵⁴ Following death, the government will reimburse burial costs of up to \$8,800, depending on the type of arrangements, plus travel costs for next-of-kin.¹⁵⁵ Survivors receive

150. The secretary of a military department may correct any military records when he "considers it necessary to correct an error or remove an injustice." *Id.* § 1552. However, in reality, seeking compensation for a disability claim with the Department of Veterans Affairs is not always an easy process and can take up to several years. James Dao, *Troubled VA Agency Will Get a New Chief*, N.Y. TIMES, Nov. 21, 2009, at A13 [hereinafter Dao, *Troubled VA Agency*]. If a service member is injured while serving on active duty and is declared fit to continue duty, the service member receives no compensation for his injury. HANDBOOK FOR INJURED SERVICE MEMBERS, *supra* note 142, at 28. If, at the end of his enlistment, the service member chooses to withdraw from service, he then has to petition the Department of Veterans Affairs for disability compensation. *Id.* On average, the Department of Veterans Affairs takes six months to decide on a new disability claim. Dao, *Troubled VA Agency*. If that claim is denied, the appellate process can take up to five years. *Id.*

151. See 10 U.S.C. §§ 1475-91 (2006); 38 U.S.C. §§ 1101-63, 1301-23, 1781-85, 1965-80A, 2301-08 (2000).

152. 10 U.S.C. §§ 1475-78 (2006). Generally, this benefit is only paid if the service member dies while on active duty or within 120 days after release from active duty if the death is due to a service-related disability. *Id.* § 1476(a).

153. 38 U.S.C. § 1967 (2008). A service member can elect not to be covered or may reduce the coverage amount. *Id.* § 1967(a)(2)(A), § 1967(a)(3)(B).

154. *Id.* § 1980A. However, the service members' traumatic injury protection (TSGLI) is specifically not payable for injuries resulting from medical or surgical treatment of an illness or disease. 38 C.F.R. § 9.20(e)(3)(i)(C) (2008).

155. Department of Defense, A Survivor's Guide to Benefits 8-9 (2010), available at <http://www.vba.va.gov/survivors/agencies.htm>. [hereinafter *Survivor's Guide*].

rent-free government housing for up to one year or the tax-free Basic Allowance for Housing appropriate to the member's pay grade.¹⁵⁶ The Department of Veterans Affairs pays Dependency and Indemnity Compensation (DIC), a tax-free flat monthly rate, to a surviving spouse and dependent children of a service member who dies on active duty from a service-connected disability.¹⁵⁷ If the spouse remarries before age fifty-seven, the DIC annuity is suspended, but it can be reinstated if the remarriage ends by death or divorce.¹⁵⁸ A surviving spouse may receive a taxed annuity under the Survivor Benefits Plan (SBP) through the Department of Defense, if the service member elected coverage, which is reduced by the non-taxable DIC amount received.¹⁵⁹ If the spouse remarries before age fifty-five, the SBP annuity is suspended, but it can be reinstated if the remarriage ends.¹⁶⁰ The surviving spouse and dependants may also qualify for education benefits from the Department of Veterans Affairs.¹⁶¹ Additionally, a spouse and minor dependants maintain healthcare coverage through TRICARE for three years after the member's death.¹⁶²

The Supreme Court has followed a wavering line in determining whether these statutory benefits provide an exclusive remedy and thus place an upper limit of liability on the government for service-related injuries.¹⁶³ The *Feres* Court held that the existence of a "simple,

156. *Id.* at 16.

157. 38 U.S.C. §§ 1301-23 (2006). The 2010 spouse DIC rate is \$1154. *Survivor's Guide*, *supra* note 155, at 12. The amount is adjusted annually for cost of living increases. *Id.* This monthly payment is increased by \$286 for each child under the age of eighteen. *Id.* If there is no surviving spouse, DIC will be paid in equal shares to the service member's children at varying rates depending on the number of children. *Id.* The Department of Veterans Affairs also adds a transitional benefit of \$250 to the surviving spouse's monthly DIC for two years if there are children under age eighteen. *Id.* at 14.

158. *Survivor's Guide*, *supra* note 155, at 12.

159. *Id.* at 11.

160. *Id.*

161. *Id.* at 14.

162. *Id.* at 15.

163. *Compare* United States v. Johnson, 481 U.S. 681, 690 (1987), and *Feres v. United States*, 340 U.S. 135, 144 (1950), with *United States v. Brown*, 348 U.S. 110, 113 (1954), and *Brooks v. United States*, 337 U.S. 49, 53 (1949).

certain, and uniform compensation” system was persuasive evidence that Congress did not intend for the Federal Tort Claims Act to permit recovery for injuries incident to military service.¹⁶⁴ Further, the Court found that the recovery granted under the military compensation system compares “extremely favorably with those provided by most workmen’s compensation statutes.”¹⁶⁵ This rationale contradicted the Supreme Court’s previous holding in *Brooks v. United States* that “there is nothing in the Tort Claims Act or the veterans’ laws which provides for exclusiveness of remedy.”¹⁶⁶ Following *Feres*, the Court again noted the lack of exclusivity in *United States v. Brown* and adhered to its previous determination in *Brooks*.¹⁶⁷ Still later, the majority in *Johnson v. United States* reinstated its reasoning in *Feres*.¹⁶⁸

Regardless of whether Congress intended it as an exclusive remedy, the existence of a comprehensive compensation scheme for service members is certainly what makes the *Feres* doctrine palatable for most supporters.¹⁶⁹ Unfortunately, while the list of benefits

164. *Feres*, 340 U.S. at 144. The Supreme Court did not find the presence of a compensation system a persuasive enough reason to deny prisoners the right to recover. “[T]he presence of a compensation system, persuasive in *Feres*, does not of necessity preclude a suit for negligence.” *United States v. Muniz*, 374 U.S. 150, 160 (1963).

165. *Feres*, 340 U.S. at 145.

166. *Brooks*, 337 U.S. at 53.

167. *Brown*, 348 U.S. at 113.

168. *Johnson*, 481 U.S. at 689-90. In support of this determination, the Court cited language in *Stencel Aero Engineering Corp. v. United States*, 431 U.S. 666, 673 (1977) (holding that veterans’ benefits “provid[e] an upper limit of liability for the Government as to service-connected injuries”), and *Hatzlachh Supply Co. v. United States*, 444 U.S. 460, 464 (1980) (holding that Congress intended the Veterans’ Benefits Act to be the “sole remedy for service-connected injuries”). In his dissent in *Stencel*, Justice Marshall, joined by Justice Brennan, noted that the Veterans’ Benefits Act does not contain an explicit declaration that it is the exclusive remedy for service members’ injuries, although the comparable compensation program for civilian federal employees does explicitly contain such a limitation. *Stencel*, 431 U.S. at 675 (Marshall, J., dissenting).

169. *Hunt v. United States*, 636 F.2d 580, 598 (1980) (“The presence of an alternative compensation system [neither] explains [nor] justifies the *Feres* doctrine; it only makes the effect of the doctrine more palatable”). See also *Henninger v. United States*, 473 F.2d 814, 816 n.2 (9th Cir. 1973) (stating the availability of benefits “tips the scales in favor of a strict reading of *Feres*”); *Mattos v. United*

appears good on paper, this does not always translate so readily into practical application. The Supreme Court labeled the compensation system to be “simple, certain, and uniform.”¹⁷⁰ In reality, however, establishing eligibility and determining the amounts of applicable benefits is a long, frustrating, and confusing process that is subject to many variables.¹⁷¹ Indeed, both the adequacy and the accessibility of the veteran compensation system have been the subject of heated debate in recent years.¹⁷² Also, benefits are not automatic; the veteran or the survivors apply for them and submit all necessary documentation or risk forfeiture.¹⁷³

The compensation benefits are lacking in several other significant aspects. First, the value of compensation awarded to the victim of medical malpractice is determined by the very entity which caused the victim’s injury, and it is certainly in the government’s financial interest to set disability ratings as low as possible.¹⁷⁴ Second, it is

States, 412 F.2d 793, 794 (9th Cir. 1969) (*per curiam*) (“It is judicial intrusion into the area of military performance that is sought to be avoided. As in *Feres* the availability of compensation for injuries incurred in military service renders such intrusion unnecessary.”).

170. *Feres v. United States*, 340 U.S. 135, 144 (1950).

171. See RICHARD BUDDIN & KANNIKA KAPUR, RAND Nat’l Def. Res. Inst., AN ANALYSIS OF MILITARY DISABILITY COMPENSATION, at xxii (RAND Corp. 2005) available at http://prhome.defense.gov/docs/rand_disability_sum_1005.pdf; Dao, *Troubled VA Agency, supra* note 150; James Dao, *Veterans Affairs, Already Struggling With Backlog, Faces Surge of Disability Claims*, N.Y. TIMES, July 13, 2009 at A10; *Disability Rating System Ill-serves GIs, Officer Says*, THE SEATTLE TIMES, Apr. 13, 2007, available at http://seattletimes.nwsourc.com/html/nationworld/2003664805_disablity13m.html.

172. See, e.g., Erik Eckholm, *Veterans Benefits System Needs Overhaul, Panel Says*, N.Y. TIMES, June 8, 2007, at A25; *Disability Rating System Ill-serves GIs, Officer Says, supra* note 171; Ian Urbina & Ron Nixon, *Veterans Face Vast Inequities Over Disability*, N.Y. TIMES, Mar. 9, 2007, at A1.

173. *Survivor’s Guide, supra* note 155, at 12.

174. *Disability Rating System Ill-serves GIs, Officer Says, supra* note 171. For example, take the case of a sergeant with eighteen years of active duty service who underwent surgery at Walter Reed Army Medical Center for cancer in his stomach and lymph nodes. The Army’s physical evaluation board declared the soldier unfit for duty but assigned him a disability rating of zero percent. The Army only adjusted the rating to forty percent after the soldier’s state senator intervened. Jim Rutenberg & David S. Cloud, *Bush Panel Seeks Upgrade in Military Care*, HERALD TRIBUNE, July 26, 2007.

important to note that the continuation of free healthcare is an important component of the compensation package awarded to service members who are injured during active duty. For victims of medical malpractice, this aspect of the compensation scheme hardly seems comforting in light of the fact that service members will be sent back into the same healthcare system that failed them in the first place. Third, many survivor death benefits, such as DIC and SBP, only remain in effect while the surviving spouse remains unmarried. This policy forces a surviving spouse to choose between compensation she is fairly due for her loss and the ability to personally progress from that loss. Fourth, several aspects of the compensation system, such as the education benefits, commissary/exchange privileges, housing allowance, and medical care do not stem from death or injury but rather are merely a continuation of eligibility for benefits that would otherwise be received had no injury occurred. Fifth, certain portions of the compensation system, such as SGLI and SBP, are dependent on the service member opting into coverage. This does not protect those who did not opt in or had to use their discretionary income for other purposes.

In *Feres*, the Supreme Court was concerned with permitting active duty service members to bring suit under the Federal Tort Claims Act because it would allow for dual recovery.¹⁷⁵ However, this argument makes little sense because the Supreme Court has already determined, and district courts have repeatedly upheld, that veterans may bring such claims.¹⁷⁶ Like active duty service members, veterans are eligible for and/or may already be receiving many of the benefits outlined above. It is unclear, then, why active duty service members are entitled to less compensation for medical malpractice than former service members. Therefore, the existence of statutory compensation does not appear to fully justify the *Feres* doctrine, and likely explains why the Supreme Court felt it necessary to validate its reasoning through the later-conceived military discipline rationale.¹⁷⁷

175. *Feres v. United States*, 340 U.S. 135, 144-45 (1950).

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

177. *United States v. Johnson*, 481 U.S. 681, 698 (1987) (Scalia, J., dissenting).

4. *The Need to Prevent Interference with Military Discipline*

The keystone of the *Feres* doctrine is certainly its fourth rationale: Barring recovery for negligence claims brought by service members against the government is necessary to prevent interference with military discipline.¹⁷⁸ This rationale supposes that allowing these types of claims would require the judiciary to intrude in sensitive military affairs, which would in turn weaken military discipline and effectiveness.¹⁷⁹ The Supreme Court noted that military discipline “involves not only obedience to orders, but more generally duty and loyalty to one’s service and to one’s country.”¹⁸⁰ Therefore, allowing service members to sue the government for service-related injuries brings the potential “to disrupt military discipline in the broadest sense of the word.”¹⁸¹ The desire to avoid intrusion into military discipline is so pervasive that courts have consistently held that the status of the injured plaintiff at the time of his injury strictly governs in medical malpractice claims, rather than inquiring on a case-by-case basis whether such interference will actually occur, or even after the determination that such interference will actually *not* occur.¹⁸²

178. *Brown*, 348 U.S. at 112. Although added later, *Feres*’ fourth rationale is widely recognized as the true basis of the doctrine. See *Chappell v. Wallace*, 462 U.S. 296, 299 (1983) (stating that *Feres* is “best explained by” the military discipline rationale (*quoting* *United States v. Muniz*, 374 U.S. 150, 162 (1963)); *Atkinson v. United States*, 825 F.2d 202, 204 (9th Cir. 1987) (calling the military discipline rationale “determinative”); *Mondelli v. United States*, 711 F.2d 567, 568 (9th Cir. 1983) (calling the military discipline rationale the “soundest” of *Feres*’ grounds); *Monaco v. United States*, 661 F.2d 129, 132 (9th Cir. 1981) (“While [the military discipline rationale] is not fully convincing . . . it does provide a consistent foundation for the decided cases.”); *Hunt v. United States*, 636 F.2d 580, 599 (D.C. Cir. 1980) (“[T]he protection of military discipline . . . serves largely if not exclusively as the predicate for the *Feres* doctrine . . . Only this factor can truly explain the *Feres* doctrine and the crucial line it draws . . .”).

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

180. *Johnson*, 481 U.S. at 691. Applying this definition as a justification to bar medical malpractice claims implies that service members dishonor or are disloyal to the country they serve when seeking accountability for egregious errors in medical treatment.

181. *Id.*

182. In *Shearer*, the Supreme Court appeared to propose a case-by-case approach to determining whether claims by active duty service members are barred under *Feres*. *Shearer*, 473 U.S. at 57. The Court stated, “The *Feres* doctrine cannot

The interference with military discipline rationales has been broadly applied to cover all phases of a service member's military career, from pre-induction through the discharge process.¹⁸³ In *Henninger v. United States*, the court held that a service member is barred from bringing suit for medical malpractice, even if he has already been processed for discharge from the Armed Forces at the time of his injury.¹⁸⁴ Henninger was scheduled for discharge from the Navy and underwent a physical examination as the last step in the release process.¹⁸⁵ During the examination, the doctor discovered that Henninger had a double hernia. Henninger wanted to have the condition treated by civilian doctors after his discharge, but was incorrectly told that his medical release would not be signed unless he submitted to surgery while still in the Navy.¹⁸⁶ Navy doctors were negligent during Henninger's operation, and he brought suit under the

be reduced to a few bright-line rules; each case must be examined in light of the statute as it has been construed in *Feres* and subsequent cases." *Id.* However, the Supreme Court subsequently set aside this approach in *Johnson*, when it reaffirmed *Feres'* original rationales. *Johnson*, 481 U.S. at 688-92. Therefore, even if district courts determine that a suit would not interfere with military discipline, they nonetheless must bar the claim under the other *Feres* factors. *See, e.g., Atkinson v. United States*, 825 F.2d 202 (9th Cir. 1987) (finding that the maintenance of a suit for negligent prenatal care would not interfere with military discipline, but recovery was nonetheless barred by *Feres*); *Hall v. United States*, 451 F.2d 353 (1st Cir. 1971) (holding that *Feres* requires no nexus between military discipline and the injury); *Kennedy v. Maginnis*, 393 F. Supp. 310 (D.C. Mass. 1975) (holding that a former service member could not bring suit for medical malpractice even though he was no longer a member of the military when he filed suit).

183. District courts have held that medical malpractice claims for the failure of military doctors to properly assess physical qualification for duty during the pre-induction process are barred by *Feres* notwithstanding the fact that the negligent act occurred while the service member was a civilian. *See, e.g., Joseph v. United States*, 505 F.2d 525 (7th Cir. 1974); *Thompson v. United States*, 493 F. Supp. 28 (W.D. Okla. 1980); *Southard v. United States*, 397 F. Supp. 409 (E.D. Pa. 1975); *Redmond v. United States*, 331 F. Supp. 1222 (N.D. Ill. 1971); *Glorioso v. United States*, 331 F. Supp. 1 (N.D. Miss. 1971); *Healy v. United States*, 192 F. Supp. 325 (S.D.N.Y. 1961). Likewise, claims for negligent medical treatment during the discharge process are also barred using the military discipline rationale, even if the plaintiff is no longer on active duty when the suit is filed. *See Henninger v. United States*, 473 F.2d 815 (9th Cir. 1973).

184. *Henninger*, 473 F.2d at 816.

185. *Id.* at 815.

186. *Id.*

Federal Tort Claims Act.¹⁸⁷ Henninger argued that because the operation which caused his injury was performed after he had been completely processed for discharge, his suit could not possibly interfere with military discipline.¹⁸⁸ The court determined that the proximity of discharge was not a relevant consideration under *Feres* and held that Henninger's claims were barred.¹⁸⁹ "To determine the effect that a particular type of suit would have upon military discipline would be an exceedingly complex task [I]t is the suit, not the recovery, that would be disruptive of discipline and the orderly conduct of military affairs."¹⁹⁰ The court asserted that it was more important to draw a "clear line" than to "justify, in every conceivable case, the exact point at which it is drawn."¹⁹¹

Proponents of the *Feres* doctrine believe the adversarial nature of a negligence suit would have a negative effect on military morale¹⁹² and would undermine operational readiness.¹⁹³ Of particular concern to discipline is the possibility that suits for negligence would allow a service member to question the decisions of a superior officer.¹⁹⁴

187. *Id.*

188. *Id.* Further, as Henninger pointed out, if the injury had occurred during surgery in a Veterans' hospital following his release from active duty, *Feres* would not block his suit. *Id.*

189. The court stated, "However close to discharge Henninger was at the time of his injury, he was still on active status, and may not bring this action." *Id.* at 816.

190. *Id.* at 815-16.

191. *Id.* at 816.

192. Deputy Associate Attorney General Paul Clinton Harris, Sr. used this argument before the Senate Committee of the Judiciary. "Permitting one soldier to sue another for the negligent performance of his duty is anathema to the teamwork, mutual trust, and discipline upon which our military system operates." *The Feres Doctrine: An Examination of This Military Exception to the Federal Tort Claims Act: Hearing Before the H. Comm. on the Judiciary*, 107th Cong. 67 (2002) [hereinafter *The Feres Doctrine*] (statement of Paul Clinton Harris, Sr., Deputy Associate Attorney General). Also available in *Hearing on H.R. 1478 supra* note 2, at 55.

193. *Id.* "Superimposing the adversarial process of civil litigation onto the Armed Forces will have a disruptive influence on military operations Military plaintiffs and witnesses will be summoned to attend depositions and trials They may have to be recalled from distant posts. Such disruptions are opposite to the interest of our national defense" *Id.*

194. "Absent this doctrine, opposing participants would often both be military members and include a member's commanding officer and military superiors." *The*

Protection of the rank structure seems like a weak argument though, when considered in conjunction with medical malpractice claims. In most cases, there is not an express command by a superior officer for a service member to receive medical treatment, and attending physicians are not necessarily higher on the chain of command than their patients.¹⁹⁵

Medical malpractice claims do not logically seem to implicate military command decisions in the same way or to the same extent as other negligence claims in the military setting, such as a claim that the negligent order of a commanding officer resulted in greater loss of life during a battle or a claim that the negligent operation of a field exercise resulted in injury.¹⁹⁶ However, district courts continue to apply the military discipline rationale to bar suit, if reluctantly. In *Atkinson v. United States*, a service woman brought suit under the Federal Tort Claims Act for medical malpractice, alleging that government doctors in a non-field military hospital failed to properly diagnose pre-eclampsia, resulting in stillbirth.¹⁹⁷ The court could find only the “remotest” connection between Atkinson’s medical treatment and the “decisional or disciplinary interest” protected by *Feres*.¹⁹⁸

Feres Doctrine, *supra* note 192, at 124 (statement of Rear Admiral Christopher E. Weaver, U.S. Navy Commandant). Also available in *Hearing on H.R. 1478*, *supra* note 2, at 58.

195. For instance, Colonel Adele Connell elected to have surgery to prevent the possibility of future cancer, and as an active-duty colonel, outranked every person in the operating room. *Hearing on H.R. 1478*, *supra* note 2, at 240 (statement of Col. Adele Connell).

196. See *Smith v. Saraf*, 148 F. Supp. 2d 504, 508 (D.C. N.J. 2001) (“The *Feres* doctrine was adopted to restrain courts from reviewing military decisions, particularly those made under stress of combat operations, and to avoid the detrimental effect that judicial review would have upon military discipline. The application . . . has, however, been extended to bar claims for injuries which, on their face, appear wholly unrelated to military service . . .”); *United States v. Lee*, 400 F.2d 558, 564 (9th Cir. 1968) (“The necessity of maintaining discipline while a soldier is asleep or on an operating table is far less clear than the necessity for maintaining discipline among soldiers being transported for military service in military aircraft under control of military authorities.”).

197. *Atkinson v. United States*, 825 F.2d 202, 203 (9th Cir. 1987).

198. *Id.* at 205. “No command relationship exists between Atkinson and her attending physician. No military considerations govern the treatment in a non-field hospital of a woman who seeks to have a healthy baby. No military discipline applies to the care a conscientious physician will provide in this situation.” *Id.*

Nonetheless, precedent compelled the court to apply the *Feres* bar to Atkinson's claims.¹⁹⁹

Similar to the argument that uniform non-recovery is better than non-uniform recovery is the contention that the *Feres* bar is essential to maintaining equity among military members injured or killed during military service.²⁰⁰ *Feres* advocates claim that legislation like the Carmelo Rodriguez Military Medical Accountability Act would create a special class of military plaintiffs.²⁰¹ A soldier who loses a limb in a negligent training exercise would still be barred from recovery, but a soldier who loses a limb due to medical malpractice would be allowed to recover. Proponents of the *Feres* doctrine believe such inequity would surely cause discord among the troops.²⁰² This line of reasoning fails to recognize that "inequity" already exists in the Federal Tort Claims Act. A plaintiff can sue the government for injuries sustained in certain circumstances and not in others. For example, a civilian can recover against the government for negligence but not for intentional torts.²⁰³

Feres supporters who want uniform treatment for service members injured in the field and those injured on the operating table ignore the fundamental difference between the two situations.²⁰⁴ Borrowing themes from civilian law, service members must expect that they could be injured in battle or training and thus assume that risk, making a bar on recovery rational. By contrast, the medical treatment facility of a permanent, stateside military base ought to be a place of exceptional safety. Service members should not

199. *Id.* at 206.

200. See *Hearing on H.R. 1478, supra* note 2, at 138-40 (statement of Maj. Gen. John D. Altenburg, Jr., former Deputy Judge Advocate General, U.S. Army).

201. *Id.* at 7 (statement of Rep. Trent Franks); *Id.* at 123 (statement of Maj. Gen. John D. Altenburg, Jr., former Deputy Judge Advocate General, U.S. Army).

202. Presumably, the soldier in the first example would prefer to have his comrade in arms suffer along with him.

203. Federal Tort Claims Act, 28 U.S.C. § 2680(h) (2000).

204. See *Hearing on H.R. 1478, supra* note 2, at 123 (statement of Maj. Gen. John D. Altenburg, Jr., former Deputy Judge Advocate General, U.S. Army) (comparing a Marine who dies as the result of medical malpractice in the treatment of a burst appendix to a Marine who dies as the result of friendly fire during combat in Afghanistan and concluding that allowing one to recover and not the other is "starkly" unfair).

be required to assume the risk of harm when undergoing medical treatment outside of field or combat conditions. The Carmelo Rodriguez Military Medical Accountability Act recognizes this fundamental difference by maintaining governmental immunity for claims that arise out of the “combatant activities of the Armed Forces during time of armed conflict.”²⁰⁵ The importance of this provision is not to be disregarded, as it would shield combat medics providing medical services during the imperfect conditions present in theatres of armed conflict.²⁰⁶

Proponents also warn that removing the *Feres*’ bar would require civilian courts to second-guess military decision-making.²⁰⁷ Malpractice suits for negligent prenatal care resulting in injuries to the children of pregnant servicewomen are particularly difficult for circuit courts when trying to apply *Feres*.²⁰⁸ The same negligent act results in

205. Carmelo Rodriguez Military Medical Accountability Act of 2009, H.R. 1478, 111th Cong. § 2 (2009).

206. See *Hearing on H.R. 1478, supra* note 2, at 87, 93 (statement of Rep. Maurice D. Hinchey).

207. *United States v. Johnson*, 481 U.S. 681, 699 (1987) (Scalia, J., dissenting). However, allowing active duty service members to bring suit under the Federal Tort Claims Act for medical malpractice claims does not automatically mean that civilian courts will be required to invade the military decision-making process. The Federal Tort Claims Act requires that claimants first present their claim to the offending federal agency and allow that agency the opportunity to settle. 28 U.S.C. § 2675 (2006). Therefore, the Department of Defense could adequately resolve many such claims through the administrative process.

208. The circuits disagree whether these types of claims interfere with military discipline and decision-making. Compare *Brown v. United States*, 462 F.3d 609 (6th Cir. 2006) (holding *Feres* does not bar claim of infant child for injuries sustained *in utero* when the injury is solely to the infant child because such a claim would not require judicial second-guessing of military decisions), *Romero v. United States*, 954 F.2d 223 (4th Cir. 1992) (holding *Feres* does not bar claim of infant child for inadequate prenatal care when the civilian child was the only one injured by the negligent care because such a claim would not require judicial second-guessing of military decisions), and *Del Rio v. United States*, 833 F.2d 282 (11th Cir. 1987) (holding *Feres* does not bar infant’s claim for negligent prenatal care because suit would not require second-guessing of military decisions) with *Irvin v. United States*, 845 F.2d 126 (6th Cir. 1988) (holding that the treatment given to a pregnant service member is inherently inseparable from that given to the fetus, and thus a claim for medical malpractice would require judicial intrusion into military decision-making and is barred by *Feres*) and *Scales v. United States*, 685 F.2d 970 (5th Cir. 1982) (holding *Feres* bars the claim of an infant alleging the government was negligent in

injuries to two different people. On the one hand, the mother's claim for injuries to herself is always barred due to the potential to threaten military discipline and second-guess military decision-making. On the other hand, the child has sometimes been able to recover because allowing the claim would not unjustifiably threaten military discipline and require courts to second-guess military decision-making.²⁰⁹ Such disparity in treatment seems illogical given that courts would be examining and questioning the same negligent actions by the same doctor.²¹⁰ Further, this reasoning ignores the fact that civilian courts already properly examine military decision-making under the Federal Tort Claims Act. A soldier who is injured not incident to service may

the vaccination and treatment of his mother for rubella, causing him to be born with congenital rubella syndrome because such claim would interfere with military discipline). *See also* Geoffrey G. Leder, Comment, *The Feres Doctrine, Negligent Prenatal Care, and Injuries to the Children of Pregnant Military Servicewomen: Brown v. United States*, 76 U. CIN. L. REV. 1043 (2008) (arguing for a more definite standard for the application of the *Feres* doctrine to prenatal injuries to children of service members).

209. *See Brown*, 462 F.3d at 613-14 (“[T]he question of whether a doctor should recommend that an expectant mother take prenatal vitamins with folic acid seems to have little, if any, bearing upon military discipline and would not require judicial scrutiny of the operations of the armed services.”); *Romero*, 954 F.2d at 226 (“[I]t is not likely that a suit alleging military medical negligence inflicted on a civilian child will impair the discipline necessary for effective service. This suit will not require the court to second-guess a decision of the military necessary to the accomplishment of a military mission.”).

210. Indeed, the requirement for unequal treatment of the injured parties requires the court to directly contradict itself when determining whether the claim will interfere with military discipline. In *Del Rio*, a service woman brought suit alleging negligent prenatal treatment which led to premature labor of her twins and resulted in bodily injury to one child and the death of the other. *Del Rio*, 833 F.2d at 284. The mother was denied recovery for herself under *Feres* and for the wrongful death of the second child because Florida tort law for a wrongful death claim would award the mother damages for an independent injury personal to her, in violation of the *Feres* doctrine. *Id.* at 288. The court held that the mother's claim and the wrongful death claim would “require the court to second-guess the medical decisions of the military physicians. *Id.* at 286. The malpractice suit would require the officers to ‘testify in court as to each other’s decisions and actions.’” *Id.* (quoting *Stencel Aero Eng’g Corp. v. United States*, 431 U.S. 666, 673 (1977)). However, the court found that the first child's suit “for the negligent administration of prenatal care need not impair the *esprit de corps* necessary for effective military service, nor will it require the court to second-guess a decision by military personnel unique to the accomplishment of a military mission.” *Id.* at 287.

bring suit under the Federal Tort Claims Act.²¹¹ A veteran who is injured in a Veterans Administration hospital may as well.²¹² A civilian injured by the negligence of military personnel is not barred.²¹³ Likewise, a dependent of a service member, such as a spouse or child, who is injured by a government doctor may sue for medical malpractice under the Federal Tort Claims Act.²¹⁴ All of these suits require a civilian court to “invad[e] the sanctity of military decision-making.”²¹⁵

In *United States v. Muniz*, the Supreme Court acknowledged that permitting federal prisoners to bring suit under the Federal Tort Claims Act could potentially damage prison discipline, but it remained

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

212. *See United States v. Brown*, 348 U.S. 110 (1954) (holding that the Federal Tort Claims Act did not preclude recovery for negligent injury to a veteran during an operation in the Veterans Administration Hospital).

213. *See Indian Towing Co. v. United States*, 350 U.S. 61 (1955) (holding the government liable for failure of lighthouse light that was negligently operated by the Coast Guard).

214. *See, e.g., Keir v. United States*, 853 F.2d 398 (6th Cir. 1988) (medical malpractice suit by child of service member for failing to properly diagnose and treat eye tumor); *Del Rio v. United States*, 833 F.2d 282 (11th Cir. 1987) (medical malpractice suit by child of service member for negligent prenatal care); *Burgess v. United States*, 744 F.2d 771 (11th Cir. 1984) (per curiam) (medical malpractice suit for service member’s newborn child at army hospital); *Portis v. United States*, 483 F.2d 670 (4th Cir. 1973) (medical malpractice suit for service member’s child treated in a military hospital); *Williams v. United States*, 435 F.2d 804 (1st Cir. 1970) (medical malpractice suit for service member’s child who was denied treatment at government hospital); *United States v. Grigaluskas*, 195 F.2d 494 (1st Cir. 1952) (medical malpractice suit by infant daughter of service member for negligent injection by an army doctor); *Costley v. United States*, 181 F.2d 723 (5th Cir. 1950) (medical malpractice suit for negligent treatment of service member’s wife during delivery at army hospital).

215. *United States v. Johnson*, 481 U.S. 681, 700 (1987) (Scalia, J., dissenting). *See also Persons v. United States*, 925 F.2d 292, 299 n.18 (9th Cir. 1991) (“Perhaps the most glaring anomaly of the doctrine . . . is that, had the naval hospital negligently treated a civilian[,] . . . then surely *Feres* could not bar her suit And yet, in that hypothetical case, ‘there would be the same chance that the trial would ‘involve second-guessing military orders.’”); *Hearing on H.R. 1478, supra* note 2, at 152 (statement of Eugene R. Fidell, Esq., Yale Law School, National Institute of Military Justice) (“There is simply no reason why a military dependent or a retiree should be able to recover under the Federal Tort Claims Act but not a GI, for identical care at the identical military treatment facility.”).

unconvinced that this justified barring recovery.²¹⁶ The Court observed that there was no evidence such interference had ever occurred as the result of permitting prisoners to sue for injuries sustained during confinement.²¹⁷ Furthermore, the exceptions contained within the Federal Tort Claims Act did not leave the government “without defenses.”²¹⁸ The Court emphasized its confidence that district judges “will be able to dispose of complaints intelligently without undue harm coming to our federal prisons.”²¹⁹

It is unclear why the Supreme Court does not possess this same confidence in the capabilities of district judges to dispose of suits which actually and unduly interfere with matters of military discipline. The government is similarly “not without defenses.” Many of the limitations expressly stated in the Federal Tort Claims Act already safeguard military discipline. The exceptions to liability included in the Act exclude claims based upon the execution of a statute or regulation,²²⁰ claims based upon performance of a discretionary function,²²¹ intentional torts,²²² claims arising out of combatant activities during war,²²³ and claims arising in foreign countries.²²⁴ Moreover, these explicit exclusions suggest that Congress conscientiously considered the possible effects of the Federal Tort Claims Act upon the military and attempted to preserve immunity in those areas where suits would potentially threaten military discipline.²²⁵

Although deemed the “best” rationale for *Feres*, the military discipline rationale is not nearly as powerful as it appears (at least in juxtaposition with the preceding rationales) in light of the foregoing

216. *United States v. Muniz*, 374 U.S. 150, 162-63 (1963).

217. *Id.* at 163.

218. *Id.*

219. *Id.* at 163-64 (footnote omitted).

220. Federal Tort Claims Act, 28 U.S.C. § 2680(a) (2000).

221. *Id.*

222. *Id.* § 2680(h).

223. *Id.* § 2680(j).

224. *Id.* § 2680(k).

225. *See United States v. Johnson*, 481 U.S. 681, 699-700 (1987) (Scalia, J., dissenting).

considerations.²²⁶ Even if suits brought by service members would interfere with military discipline, this does not necessarily justify the *Feres* doctrine, according to Justice Scalia in his dissent in *Johnson*. “I do not think the effect upon military discipline is so certain, or so certainly substantial, that we are justified in holding (if we can ever be justified in holding) that Congress did not mean what it plainly said in the statute before us.”²²⁷

IV. ONLY THIRTEEN EXCEPTIONS NEED APPLY: CONGRESS MUST REGAIN CONTROL OF THE FEDERAL TORT CLAIMS ACT

Many proponents of the *Feres* doctrine perceive the lack of congressional action in light of the widespread criticism the doctrine has received as tacit approval of its consequences.²²⁸ Indeed, the *Feres* Court itself first stated, “If we misinterpret the Act, at least Congress possesses a ready remedy.”²²⁹ The Supreme Court later noted in *Johnson* that Congress had never changed the standard articulated in *Feres*, although it had encountered many opportunities to do so, particularly regarding medical malpractice claims.²³⁰ Because the Court appears content to wait for Congress to correct any errors it might have made in statutory interpretation, it is unlikely that the Supreme Court will overrule *Feres* in the immediate future.²³¹ Therefore, the surest route to remedy, as stated by the Supreme Court, is through Congress. Federal judges across the nation have implored

226. Justice Scalia noted the other rationales in *Feres* “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. *See also* Monaco v. United States, 661 F.2d 129, 132 (9th Cir. 1981) (calling the military discipline rationale “unconvincing”).

227. *Johnson*, 481 U.S. at 699 (Scalia, J., dissenting).

228. *Id.* at 686. *See also* Glorioso v. United States, 331 F. Supp. 1, 3-4 (N.D. Miss. 1971) (“It is worthy of note that the Supreme Court in *Feres* invited Congress to amend the Federal Tort Claims Act, if its interpretation was erroneous, and in the twenty-one years which have elapsed since *Feres*, the Congress had made no change in the Act.”).

229. *Feres v. United States*, 340 U.S. 135, 138 (1950).

230. *Johnson*, 481 U.S. at 688 n.6.

231. *See* Brou, *supra* note 101, at 72-79 for a discussion of the judicial philosophies of Chief Justice John Roberts and Justice Samuel Alito and the likely position they would take if faced with the chance to overturn *Feres*.

Congress and the Supreme Court to reconsider the *Feres* doctrine.²³² The American Bar Association and the Commission on the Fiftieth Anniversary of the Uniform Code of Military Justice have recommended that the *Feres* doctrine be reformed.²³³ Given the “widespread, almost universal criticism” of the doctrine within the legal community,²³⁴ it is astonishing that Congress has yet to accept the challenge first asserted by the *Feres* Court sixty years ago.²³⁵

232. See, e.g., *Richards v. United States*, 180 F.3d 564, 564-65 (3d Cir. 1999) (Rendell, J., dissenting from denial of rehearing *en banc*) (“This case presents yet another compelling argument for the abandonment of the *Feres* doctrine . . . I urge the Supreme Court to grant certiorari . . .”); *Persons v. United States*, 925 F.2d 292, 299 (9th Cir. 1991) (footnote omitted) (“It would be tedious to recite, once again, the countless reasons for feeling discomfort with *Feres*, its direct offspring, or its more distant offshoots regarding derivative “non-military” claims.”); *Hinkie v. United States*, 715, F.2d 96, 97 (3d Cir. 1983) (quoting *Mondelli v. United States*, 711 F.2d 567, 569 (3d Cir.1983)) (“We are forced once again to decide a case where ‘we sense the injustice . . . of [the] result.’”); *Scales v. United States*, 685 F.2d 970, 974 (5th Cir. 1982) (applying *Feres* “reluctantly” and “regret[ting] the effects” of the conclusion); *Monaco v. United States*, 661 F.2d 129, 134 (9th Cir. 1981) (“The result in this case disturbs us . . . Unfortunately, we are bound”); *Hunt v. United States*, 636 F.2d 580, 589 (D.C. Cir. 1980) (footnote omitted) (noting that the theoretical bases in *Feres* “remain subject to serious doubt”); *Veillette v. United States*, 615 F.2d 505, 506 (9th Cir. 1980) (applying *Feres* “reluctantly”); *Peluso v. United States*, 474 F.2d 605, 606 (3d Cir. 1973) (“Possibly the only route to relief is by an application to Congress. Certainly the facts pleaded here, if true, cry out for a remedy.”).

233. See *Hearing on H.R. 1478*, *supra* note 2, at 98-115 (statement of Stephen A. Saltzburg, presented on behalf of the American Bar Association); REPORT OF THE COMMISSION ON THE FIFTIETH ANNIVERSARY OF THE UNIFORM CODE OF MILITARY JUSTICE 14 (May 2001). The Commission, commonly referred to as the “Cox Commission” after its Chair, Senior Judge Walter T. Cox, III, former Chief Judge of the Court of Appeals for the Armed Forces, did not intend to examine the *Feres* doctrine but found that a study of the doctrine was warranted because “many former service members have been frustrated by its constraints on their ability to pursue apparently legitimate claims against the armed forces, many of which bear little if any relation to the performance of military duties or obedience to orders on their merits” *Id.*

234. *In re “Agent Orange” Product Liability Litigation*, 580 F. Supp. 1242, 1246 (E.D.N.Y. 1984).

235. Indeed, the military is so convinced that Congress will not change the *Feres* doctrine that both the Departments of Justice and Defense declined an invitation to present testimony at the hearing on H.R. 1478. See *Hearing on H.R. 1478*, *supra* note 2, at 8, 68 (statements of Rep. Steve Cohen and Rep. Trent Franks,

The addition of a judicially-created exception to the Federal Tort Claims Act unduly restricted recovery and disregarded congressional intent. When it ignored the express provisions of the Federal Tort Claims Act, the Supreme Court committed an improper intrusion into Congress' legislative power.²³⁶ The *Feres* rationales do not stand up to even modest scrutiny when considering medical malpractice claims, and the consequences resulting from this bar to relief "cry out for a remedy."²³⁷ For those reasons, Congress should finally accept the invitation posed by the Supreme Court in *Feres* and retake control of the Federal Tort Claims Act.

*A. Congress Should Conduct a Comprehensive Overhaul
of the Feres Doctrine*

Congress should examine the "incident to service" exception created by the Supreme Court in *Feres* and clarify that the exceptions specifically enumerated in the Federal Tort Claims Act are the only limitations on active duty service members' ability to bring suit for injuries sustained from the negligence of government employees.²³⁸ The enumerated provisions of the Federal Tort Claims Act already supply the government with sufficient protection from undue interference in military discipline. The Federal Tort Claims Act precludes recovery for claims "arising out of the combatant activities of the military or naval forces, or the Coast Guard, during time of war"²³⁹ and any claim "arising in a foreign country."²⁴⁰ It also

respectively).

236. See Brou, *supra* note 101, at 34-40, for a discussion of how the *Feres* doctrine represents a violation of the separation of powers. "In promulgating the *Feres* doctrine, the Court overstepped its authority, acted as a legislative body, carved out a judicial exception to the Act, and violated the principles of separation of powers." *Id.* at 34.

237. *Peluso v. United States*, 474 F.2d 605, 606 (3d Cir. 1973).

238. This is the resolution proposed by the American Bar Association at its August 2008 annual House of Delegates meeting. See *Hearing on H.R. 1478*, *supra* note 2, at 104-05 (statement of Stephen A. Saltzburg, presented on behalf of the American Bar Association).

239. Federal Tort Claims Act, 28 U.S.C. § 2680(j) (2000). To reflect contemporary global and military conditions, Congress should amend this provision of the Federal Tort Claims Act to read "in times of armed conflict" to provide broader immunity to the United States for injuries arising out of combatant

precludes claims “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.”²⁴¹

By utilizing the express exceptions within the Federal Tort Claims Act, claims which actually and inappropriately affect military discipline considerations would be properly prohibited through a case-by-case determination, without a blanket embargo on service member claims in general.²⁴² This type of comprehensive overhaul of the *Feres* doctrine would provide a route to relief for service members who suffer from military medical malpractice because claims for injury would only be barred if they fall within one of the thirteen exceptions, rather than under a determination that the injury arises from activity that is incident to military service.

*B. At a Minimum, Congress Should Repeal the Feres Doctrine in
Regards to Military Medical Malpractice Claims*

If Congress is unprepared to completely abolish the *Feres* doctrine, it should at the very least rescind the doctrine for medical malpractice claims. The rationales behind the *Feres* doctrine are especially weak when concerning medical malpractice claims, and the outcome of the *Feres* bar on those claims seems particularly terrible under the circumstances. Active duty service members should be given the same right to quality healthcare as all other Americans who receive treatment under the government healthcare system. It is in the

activities, since most combatant activities arise in conflicts other than declared wars. See *Hearing on H.R. 1478*, *supra* note 2, at 114 (statement of Stephen A. Saltzburg, presented on behalf of the American Bar Association).

240. 28 U.S.C. § 2680(k).

241. *Id.* § 2680(a).

242. See Brou, *supra* note 101, at 60-72 (arguing that the Federal Tort Claims Act’s enumerated exceptions – particularly the discretionary function exception – should be used to determine the eligibility of service members’ claims rather than the *Feres* doctrine); Jennifer L. Carpenter, Comment, *Military Medical Malpractice: Adopt the Discretionary Function Exception as an Alternative to the Feres Doctrine*, 26 HAWAII L. REV. 35, 59-67 (2003) (arguing for the repeal of the *Feres* doctrine and proposing that courts apply the discretionary function exception to medical malpractice claims, thereby allowing service members to bring suit while retaining governmental immunity in other contexts).

military's best interest to provide high-quality medical care to service members, and it is in Congress' best interest to provide equal treatment under the law and adequate compensation for all Americans injured at the hands of negligent government doctors.

The *Feres* doctrine has restricted military members' rights to bring suit for medical malpractice for far too long. The government simply should not remain immune when providing inadequate or improper medical care to its military personnel. With legislation like the Carmelo Rodriguez Military Medical Accountability Act, Congress can directly cure a significant portion of the injustice created by the *Feres* doctrine by compensating victims, and more importantly, by requiring accountability for substandard medical care.

CONCLUSION

As part of healthcare reform, Congress needs to address and remedy the *Feres* doctrine. The "incident to service" test makes it virtually impossible for active duty service members to recover under the Federal Tort Claims Act for medical malpractice claims, although the very rationales for this test do not adequately explain why such a bar is necessary or justified. Because the reasons given by the Supreme Court for the *Feres* doctrine do not adequately relate to medical malpractice claims, it should no longer serve as a bar to recovery.

This judicially created "fourteenth exception" has caused untold and unwarranted grief for military members and their families, but Congress possesses a direct remedy. By allowing service members an avenue for redress for malpractice claims, Congress will restore the original intent of the Federal Tort Claims Act, compensate victims for their injuries, and promote accountability within the government healthcare system, which in turn will restore and improve confidence in that system. Legislation like the Carmelo Rodriguez Military Medical Accountability Act will not bring back Sergeant Carmelo Rodriguez, Staff Sergeant Dean Witt, or Sergeant Cindy Wilson, or any of the service members lost to medical malpractice. It will not erase the injuries sustained by Colonel Adele Connell and other patriots from improper medical care. However, it will provide those brave service members and their families with the knowledge that someone recognized their suffering and acknowledged their

fundamental right to relief. The *Feres* doctrine has wreaked havoc on military medical malpractice victims for sixty years. It is time for that injustice to end.

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