

**A Look at the *Feres* Doctrine as It Applies to Medical Malpractice Lawsuits:
Challenging the Notion that Suing the Government Will Result in a Breakdown of Military Discipline**

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*Don't let this be it. Don't let this be it. Fight!*¹

I. Introduction

In January 2009, CBS Evening News aired a story about the death of Marine Sergeant (Sgt.) Carmelo Rodriguez.² Sergeant Rodriguez was first diagnosed with melanoma when he enlisted in the Marine Corps in 1997.³ The medical doctor who performed the examination noted on Sgt. Rodriguez's medical chart that his skin looked "abnormal" and that Sgt. Rodriguez had melanoma on his right buttocks.⁴ Unfortunately, the doctor never informed Sgt. Rodriguez of the diagnosis.⁵ Furthermore, the doctor made no recommendation for further treatment.⁶

In 2005, Sgt. Rodriguez, who was serving in Operation Iraqi Freedom, as a platoon leader, went to seek medical treatment for puss seeping out of a wound.⁷ Medical personnel misdiagnosed the skin cancer as a wart and advised Sgt. Rodriguez to have it looked at on his redeployment.⁸ Five months later, Sgt. Rodriguez saw a different physician in the United States.⁹ The doctor diagnosed and informed Sgt. Rodriguez that he had stage III melanoma.¹⁰ Sergeant Rodriguez died of stage IV malignant melanoma on 16 November 2007.¹¹

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¹ *CBS Evening News with Katie Couric: A Question of Care: Military Malpractice?* (CBS television broadcast Jan. 31, 2007), available at <http://www.cbsnews.com/stories/2008/01/31/eveningnews/main3776580.shtm> (last visited Mar. 1, 2010) [hereinafter *CBS Evening News*]. These are the final words of Sgt. Carmelo Rodriguez moments before he died.

² *CBS Evening News with Katie Couric: Marine's Cancer Misdiagnosed?* (CBS television broadcast Aug. 6, 2008), available at <http://www.cbsnews.com/video/watch?id=3776975n&tag=related;photovid eo> (last visited Mar. 1, 2010). See also *Eye to Eye with Katie Couric: Misdiagnosed?* (CBS television broadcast Aug. 6, 2008), available at <http://www.cbsnews.com/video/watch?id=3777186n&tag=related;photovid eo> (last visited Mar. 1, 2010) [hereinafter *Eye to Eye*].

³ *CBS Evening News*, *supra* note 2; *Eye to Eye*, *supra* note 2.

⁴ *Eye to Eye*, *supra* note 2.

⁵ *Id.*

⁶ *Id.*

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*

The story of Sgt. Rodriguez has revitalized the national debate over the fundamental fairness of the *Feres*¹² doctrine and the sweeping effect the Supreme Court's 1950 ruling has had on military personnel. In *Feres*, the Court ruled that the Federal Tort Claims Act (FTCA) prohibited servicemembers from filing suit against the United States for any type of injuries suffered incident to their service. The Court provided a three-part rationale for its holding: (1) generally speaking, the Federal Government and private individuals do not share equal degrees of tort liability; (2) allegations of Government negligence are controlled by state tort law—Congress could not have meant for the FTCA to apply to servicemembers because they have no control over their place of duty; and (3) a statutory scheme in the Veteran's Benefits Act (VBA) already provided a means for servicemembers to receive compensation for injuries suffered incident to their service.

Current legislation pending before the 111th United States Congress seeks to overturn *Feres* as it applies to military servicemembers suing for substandard military medical care. This article suggests that the best way to overturn the *Feres* doctrine as it relates to military medical malpractice claims is to focus the national debate on the detrimental impact, if any, such suits will have on military discipline and decision making. Also discussed are the second- and third-order effects that the Army must anticipate if *Feres* is repealed.

II. Emergence of the Federal Tort Claims Act

As a general principle, the United States enjoys the protection of sovereign immunity from lawsuits filed against it by private citizens.¹³ One cannot sue the United States for injury caused by agents of the United States unless the Federal Government has waived its sovereign immunity. During the 1940s, two significant tragedies took place that triggered the U.S. Congress to pass legislation partially relinquishing the Government's sovereign immunity.

On 28 July 1945, Lieutenant Colonel (LTC) William Franklin Smith, a graduate of the U.S. Military Academy and a decorated veteran with 100 combat missions, took off in a B-25 Mitchell bomber from his home in Bedford, Massachusetts, to rendezvous with his commanding officer in Newark, New Jersey. The two men were then to fly to

¹² *Feres v. United States*, 340 U.S. 135 (1950).

¹³ *Cohens v. Virginia*, 19 U.S. 264, 411–12 (1821).

their home base in South Dakota. While flying over New York City, LTC Smith encountered heavy fog over the Manhattan skyline. Because of the dense fog, LTC Smith became disorientated and crashed into the 79th floor of the Empire State Building, killing fourteen people.¹⁴

Less than two years later, the Texas City Disaster of 1947, occurred in the port town of Texas City, fourteen miles north of Galveston, Texas.¹⁵ On 16 April 1947, the SS *Grandcamp*, a French-registered cargo vessel, was docked at Texas City. During the early morning hours, the crew noticed a small fire had broken out near the hull of the ship. The ship's cargo included 2300 tons of ammonium nitrate. Internal temperatures eventually reached approximately 850 degrees Fahrenheit, causing the ammonium nitrate to explode. Fireballs from the explosion could be seen from miles away, and the blast created a fifteen-foot tall tidal wave that flooded the surrounding area. The sheer force of the explosion lifted a nearby cargo ship out of the water and tossed it 100 feet. The shock itself was felt as far away as Louisiana, and Denver, Colorado, was able to pick up the blast on its seismograph. Between 500 and 600 people lost their lives in the blast.¹⁶

In light of these two events, the U.S. Congress passed the FTCA, which waived sovereign immunity for torts committed by agents of the United States acting within the scope of their duties, permitting those who were injured to seek compensation from the Federal Government.¹⁷ However, Congress carved out thirteen exceptions, thus retaining sovereign immunity as it relates to certain torts.¹⁸ Of the thirteen exceptions, only a few relate to the negligent acts of the military: (1) claims arising from the military's exercise or performance of, or the failure to exercise or to perform, a discretionary function; (2) any claim arising out of combat activities during time of war; and (3) any claim arising in a foreign country.¹⁹ Congress's intent in waiving sovereign immunity and creating the thirteen exceptions has

been the subject of great debate over the past six decades.²⁰ Opponents of the *Feres* doctrine have spilled an enormous amount of ink arguing that Congress sought to limit servicemembers' ability to file suit against the Federal Government only with regards to the three exceptions listed above.

III. The U.S. Supreme Court's Interpretation of the Federal Tort Claims Act

As stated earlier, the Supreme Court's decision in *Feres v. United States*, effectively placed a moratorium on the ability of a servicemember to sue the Federal Government for tortious conduct committed by its agents if the injury suffered was incident to the servicemember's service in the military.²¹ The Supreme Court first introduced the language "incident to service" in *Brooks v. United States*.²² The case involved two brothers who were on active duty status but on leave at the time of the accident. The brothers were injured when the privately owned car they were riding in was struck by a military truck driven by a civilian employee of the Army.²³ The issue in the case was whether members of the Armed Forces could recover under the FTCA for injuries sustained not "incident to their service" in the military.²⁴ The Court addressed the issue by stating

We are not persuaded that "any claim" means "any claim but that of servicemen." The statute does contain twelve exceptions. None exclude petitioner's claims. One is for claims arising in a foreign country. A second excludes claims arising out of combatant activities of the military or naval forces, or the Coast Guard, during time of war. These and other exceptions are too lengthy, specific, and close to the present problem to take away petitioners' judgments. Without resorting to an automatic maxim of construction, such exceptions make it clear to us that 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. The overseas and combatant activities exceptions make this plain.²⁵

¹⁴ See Empire State Building Tourism, http://www.esbnvc.com/tourism_facts_esbnews_mar1996.cfm?CFID=37168863&CFTOKEN=92435881 (last visited Mar. 1, 2010).

¹⁵ See Moore Memorial Public Library's Texas City Disaster 1947 Online Exhibition, <http://www.texascity-library.org> (last visited Mar. 1, 2010) [hereinafter Moore Memorial Public Library's Texas City Disaster 1947 Online Exhibition]. See also HUGH W. STEPHENS, *THE TEXAS CITY DISASTER, 1947* (1997).

¹⁶ Moore Memorial Public Library's Texas City Disaster 1947 Online Exhibition, *supra* note 15.

¹⁷ Federal Tort Claims Act, 60 Stat. 843 (1946), as amended by 28 U.S.C. § 921, 60 Stat. 842, now 28 U.S.C. §§ 1346(b), 2671–2680 (2006).

¹⁸ 28 U.S.C. § 2680 (2006).

¹⁹ *Id.* The Government will also not be responsible for any intentional torts committed by a service member to include assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights. *Id.* § 2680.

²⁰ See, e.g., *Kosak v. United States*, 465 U.S. 848 (1984).

²¹ 340 U.S. 135, 146 (1950).

²² 337 U.S. 49 (1949).

²³ *Id.* at 50.

²⁴ *Id.*

²⁵ *Id.* at 51.

It is important to note that the Court took great pain to emphasize that it did not view the FTCA as having blanket exclusion against servicemembers. The Court believed that Congress did in fact have servicemembers in mind when it crafted the FTCA. It would have been difficult for Congress to neglect these men and women, who only a year prior were fighting in World War II.²⁶ The Court went on to state

But we are dealing with an accident which had nothing to do with the Brooks' army careers, injuries not caused by their service except in the sense that all human events depend upon what has already transpired. Were the accident incident to the Brooks' service, a wholly different case would be presented. We express no opinion as to it .

...²⁷

Although the Court carved out this "incident to service" test, it nonetheless made clear that it believed servicemembers could file a tort claim under the FTCA so long as the injury was not caused by their service in the Army.²⁸

Two years later, the Supreme Court issued its opinion in *Feres v. United States*.²⁹ *Feres* was actually a combination of three separate tort suits filed against the Government. The first case was *Feres v. United States*, which was on appeal from the Second Circuit.³⁰ First Lieutenant (1LT) Rudolph J. Feres was on active duty when he died in a barracks fire at Pine Camp, New York. The executrix of Feres's estate argued that the military was negligent in housing 1LT Feres in unsafe barracks that was serviced by a defective heating plant. Furthermore, the executrix argued that the Government was negligent because it failed to have an adequate fire watch. The second case was *Jefferson v. United States*, which was on appeal from the Fourth Circuit.³¹ In *Jefferson*, the plaintiff underwent abdominal surgery while on active duty. Eight months later, the plaintiff, who was no longer in the Army, underwent a second abdominal surgery. Medical personnel performing the second surgery found a towel marked "Medical Department U.S. Army" inside the plaintiff's abdomen. The plaintiff filed suit alleging negligence on the part of the Army surgeon. The third case was *United States v. Griggs* which was on appeal from the Tenth Circuit.³² In *Griggs*, the executrix of decedent's estate alleged that while Griggs

²⁶ World War II officially ended in 1945. See The National World War II Museum, <http://www.nationalww2museum.org> (last visited Mar. 1, 2010).

²⁷ *Brooks*, 337 U.S. at 52.

²⁸ *Id.*

²⁹ 340 U.S. 135 (1950).

³⁰ *Id.* at 136–37.

³¹ *Id.* at 137.

³² *Id.*

was on active duty, he was negligently treated by Army surgeons, who caused his death.

The Court distinguished the plaintiffs in *Feres* from the plaintiffs in *Brooks* based on their duty status. Although both plaintiffs were active duty Soldiers, the plaintiffs in *Brooks* were on leave at the time of their injury, whereas the plaintiffs in *Feres* were not.³³ The Court stated that such facts were the "wholly different case" not addressed in the *Brooks* decision.³⁴ Thus, the Court held that the injuries suffered by the latter group were incident to their service in the Army.³⁵ In its holding, the Court concludes

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. 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 the Act, created a new cause of action dependent on local law for service-connected injuries or death due to negligence. We cannot impute to Congress such a radical departure from established law in the absence of express congressional command.³⁶

The Court provided three reasons to justify its holding. First, the Court said it made sense to prohibit recovery for injuries received incident to service. The Court stated that when one looks at the statutory scheme of the FTCA, Congress must have meant to exclude servicemembers from being able to sue the Government.³⁷ Under § 2674 of the FTCA, the United States is liable only "to the same extent as a private individual under like circumstances."³⁸ The Court felt that the limitation in § 2674 meant it had to exclude service-related injuries because

plaintiffs can point to no liability of a "private individual" even remotely analogous to that which they are asserting against the United States. We know of no American law which ever has permitted a soldier to recover for negligence, against either his superior officers or the Government he is serving. Nor is there

³³ *Id.* at 138.

³⁴ *Id.*

³⁵ *Id.* at 146.

³⁶ *Id.*

³⁷ *Id.* at 141–42.

³⁸ *Id.* at 141.

any liability “under like circumstances,” for no private individual has power to conscript or mobilize a private army with such authorities over persons as the Government vests in echelons of command.³⁹

Second, the Court reasoned that under the FTCA, “the law of the place where the act or omission occurred”⁴⁰ will determine liability but in the situation of a soldier who must live where he is ordered, the belief “[t]hat the geography of an injury should select the law to be applied to his tort claims makes no sense.”⁴¹ “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.”⁴²

Lastly, the Court stated that Congress already provided “systems of simple, certain, and uniform compensation for injuries or death of those in armed services.”⁴³ The Court noted that Congress remained silent on how the FTCA would affect the comprehensive system of benefits already in place through the VBA for these servicemembers. The fact that Congress was silent indicated that it had no intention of servicemembers falling within the authority of the FTCA.⁴⁴

And so the Supreme Court in *Feres* clarified the “incident to service” language it first introduced in *Brooks* to unequivocally state that servicemembers were exempt from filing suit under the FTCA for injuries suffered on account of their relation to the military.

Four years later, in the case of *United States v. Brown*,⁴⁵ the Supreme Court fashioned a new rationale for prohibiting tort suits by servicemembers: such suits would have a negative impact on military discipline. *Brown* was a discharged veteran who sued the Veterans Affairs hospital for negligent treatment of his injured knee. In its decision, the Court stated

The peculiar and special relationship of the soldier to his superiors, the effects of the maintenance of such suits on discipline, and the extreme results that might obtain if suits under the 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.⁴⁶

It would be another twenty-three years before the Court would elect to revisit its reasoning in *Feres* and *Brown*. In 1977, the Court heard oral arguments in the case of *Stencel Aero Eng'g Corp. v. United States*.⁴⁷ On 9 June 1973, Captain (Capt.) John Donham, an Air National Guard officer, was permanently injured when the egress life-support system found in his F-100 fighter aircraft failed to properly engage. Captain Donham brought suit against the manufacturer of the egress life-support system—Stencel Aero Engineering Corporation who in turn brought an indemnification suit against the United States. The Court reaffirmed its reasoning in *Feres* and *Brown*:

In reaching this conclusion, the Court considered two factors: First, the relationship between the Government and members of the Armed Forces is “distinctively federal in character,” (citation omitted); it would make little sense to have the Government’s liability to members of the Armed Services dependent on the fortuity of where the soldier happened to be stationed at the time of the injury. Second, the Veterans’ Benefits Act establishes, as a substitute for tort liability, a statutory “no fault” compensation scheme which provides generous pensions to injured servicemen, without regard to any negligence attributable to the Government. A third factor was articulated in *United States v. Brown*, (citation omitted), namely, “(t)he peculiar and special relationship of the soldier to his superiors, the effects of the maintenance of such suits on discipline, and the extreme results that might obtain if suits under the Tort Claims Act were allowed for negligent orders or negligent acts committed in the course of military duty”⁴⁸

Eight years later, the Court again issued an opinion tying the *Feres* doctrine to the negative impact such suits have on military discipline. Shearer was an Army Private (PVT), who, while off duty at Fort Bliss, Texas, was kidnapped and murdered by another Soldier. The perpetrator already had a criminal past—a conviction for murder by a New Mexico court and a conviction for manslaughter by a German court.

³⁹ *Id.* at 141–42.

⁴⁰ *Id.* at 142.

⁴¹ *Id.* at 143.

⁴² *Id.*

⁴³ *Id.* at 144.

⁴⁴ *Id.*

⁴⁵ 348 U.S. 110 (1954).

⁴⁶ *Id.* at 112.

⁴⁷ 431 U.S. 666 (1977).

⁴⁸ *Id.* at 671–72.

Suit was filed by PVT Shearer's mother alleging that the Army's negligence in failing to control the perpetrator, failing to warn the community of his violent past, and failing to remove him from the military caused her son's death. In *United States v. Shearer*,⁴⁹ the Court reaffirmed its belief that suits brought by servicemembers for injuries they received incident to their service are barred by *Feres* because they are the "type[s] of claims that, if generally permitted, would involve the judiciary in sensitive military affairs, at the expense of military discipline and effectiveness."⁵⁰

The concern over military discipline is again addressed by the Court in the case of *United States v. Johnson*.⁵¹ On 7 January 1982, Lieutenant Commander (LCDR) Horton W. Johnson, a U.S., Coast Guard helicopter pilot, was sent on a rescue mission. During the course of the flight, LCDR Johnson requested radar assistance from the Federal Aviation Administration (FAA). Soon after FAA flight controllers assumed radar control, LCDR Johnson's helicopter crashed into a mountain. The crash killed LCDR Johnson and his crew.⁵² Lieutenant Commander Johnson's widow filed suit alleging negligence by the FAA. The Court held that the *Feres* doctrine bars an FTCA suit on behalf of a servicemember killed during the course of an activity incident to the member's military service. In the case at hand, LCDR Johnson's death came about "because of his military relationship with the Government."⁵³ Lieutenant Commander Johnson was executing a mission considered a "primary duty of the Coast Guard."⁵⁴ The Court went on to provide further clarification on how such suits have an effect on military discipline by saying:

In every respect the military is, as this Court has recognized, "a specialized society." (citation omitted). "To accomplish its mission the military must foster instinctive obedience, unity, commitment, and esprit de corps." (citation omitted). Even if military negligence is not specifically alleged in a tort action, a suit based upon service-related activity necessarily implicates the military judgments and decisions that are inextricably intertwined with the conduct of the military mission. Moreover, military discipline involves not only obedience to orders, but more generally duty and loyalty to one's service and to

one's country. Suits brought by servicemembers against the Government for service-related injuries could undermine the commitment essential to effective service and thus have the potential to disrupt military discipline in the broadest sense of the word.⁵⁵

In short, the Court feared that allowing Johnson to sue the FAA would call into question the decision of the Coast Guard to send LCDR Johnson on the rescue mission and its decision to cede flight control to the FAA. The Court felt that such intrusion into the military's decision making could affect military discipline in future cases.⁵⁶ These fears of the Government were earlier mentioned in *Brooks*: "[t]he Government envisages dire consequences . . . [a] battle commander's poor judgment, an army surgeon's slip of hand, a defective jeep which causes injury, all would ground tort actions against the United States."⁵⁷

IV. Analysis

A. Judicial Activism and Judicial Dissent

In several of its opinions, the Supreme Court passed comment regarding the language of the FTCA and whether Congress meant to exclude servicemembers from filing suit against the Government. There is little harmony among the Justices with regards to the FTCA and the *Feres* doctrine.⁵⁸

In *Feres*, the Court observed that "[t]here are few guiding materials for our task of statutory construction. No committee reports or floor debates disclose what effect the statute was designed to have on the problem before us, or that it even was in mind."⁵⁹ However, the fact that there is very little in terms of legislative history has not prevented the Court from being proactive in its interpretation of the FTCA.

In fact, the Court has engaged in an exercise of lawmaking with regards to the FTCA.⁶⁰ The Court in *Brooks* created the "incident to service" test whereby the Court believed servicemembers could file a tort claim under the FTCA so long as the injury was not caused by their service in the Army.⁶¹ This "incident to service" language is absent from the FTCA. The Court in *Feres* conceded that

⁴⁹ 471 U.S. 52 (1985).

⁵⁰ *Id.* at 59.

⁵¹ 481 U.S. 681 (1987).

⁵² *Id.* at 683.

⁵³ *Id.* at 689.

⁵⁴ *Id.* at 691.

⁵⁵ *Id.*

⁵⁶ *Id.* at 692.

⁵⁷ *Brooks v. United States*, 337 U.S. 49, 52 (1949).

⁵⁸ *See* Appendix.

⁵⁹ *Feres v. United States*, 340 U.S. 135, 138 (1950).

⁶⁰ Deirdre G. Brou, *Alternatives to the Judicially Promulgated Feres Doctrine*, 192 MIL.L.REV. 1, 34 (2007).

⁶¹ *Id.* at 52.

the FTCA does not explicitly contain any language excluding servicemembers from filing suit for injuries sustained incident to service.⁶² Nevertheless, the Court “judicially promulgated”⁶³ the *Feres* doctrine and barred servicemembers from filing any type of tort claim against the Government. Finally, the Court in *Brown* came up with another rationale for its decision in *Feres*—that allowing servicemembers to file tort suits against the Government would affect military discipline.⁶⁴

Nowhere in the FTCA are servicemembers explicitly excluded from filing suit against the Government. In fact, the only language within the FTCA that directly impacts servicemembers is the enumerated exceptions. Congress listed thirteen exceptions to the general waiver of sovereign immunity.⁶⁵ Of those thirteen exceptions, only a few relate to a servicemember’s ability to file suit: (1) claims arising out of the government’s exercise of discretionary function;⁶⁶ (2) claims arising out of combatant activities;⁶⁷ and (3) claims arising in a foreign country.⁶⁸ Allowing servicemembers to file suit based on any of these three exceptions would certainly have an impact on military discipline—a cause of concern for the Court in *Brown*. For instance, suits based on the Government’s exercise of a discretionary function would call into question the tactical, operational, or strategic decisions made by military leaders. Permitting claims arising out of combatant activities would call into question the decision of the President to send servicemembers into combat. Finally, suits arising in a foreign country would call into question our Government’s foreign and defense policies. It is for these reasons that Congress fashioned these three exceptions that directly impact servicemembers. However, none of the exceptions place a complete moratorium on a servicemember’s ability to sue the Government for any form of tort actions, much less for military medical malpractice.

B. Congressional Response to the *Feres* Doctrine

The Court repeatedly invites Congress to correct any mistake the Court has made with regards to the *Feres* doctrine.⁶⁹ As Justice Scalia penned in his dissenting

opinion in *Johnson*, “*Feres* was wrongly decided and heartily deserves the “widespread, almost universal criticism” it has received.”⁷⁰ Therefore, it may serve Congress well to pass legislation that would bring resolution to the issue of whether Congress originally intended to allow servicemembers to file suit against the Government for tort claims.⁷¹

There is legislation pending before both houses of Congress that, if passed and signed by the President, would allow for servicemembers to file a tort claim/suit against the Federal Government but only for medical malpractice. On 12 March 2009, U.S. Representative Maurice D. Hinchey (D-N.Y.), introduced the Carmelo Rodriguez Military Medical Accountability Act of 2009 before the U.S. House of Representatives.⁷² On 24 June 2009, U.S. Senator Charles E. Schumer (D-N.Y.), introduced similar legislation before the U.S. Senate.⁷³

On 7 October 2009, the House Judiciary Committee voted in favor of presenting the bill in its amended form to the entire body of the House of Representatives.⁷⁴ The amended version of the bill would add § 2681 to chapter 171 of title 28. The following are select provisions found in the text of the bill:

(a) IN GENERAL – Chapter 171 of title 28, United States Code, is amended by adding at the end of the following: “§ 2681. **Certain claims by members of the Armed Forces of the United States**

“(a) A claim may be brought against the United States under this chapter for damages relating to the personal injury or death of a member of the Armed forces of

⁶² *Feres*, 340 U.S. at 139.

⁶³ Brou, *supra* note 60, at 1.

⁶⁴ *United States v. Brown*, 348 U.S. 110, 112 (1954).

⁶⁵ 28 U.S.C. § 2680 (2006).

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ See *Feres v. United States*, 340 U.S. 135, 138 (1950) (“Under these circumstances, no conclusion can be above challenge, but if we misinterpret the Act, at least Congress possesses a ready remedy.”); see also *id.* at 139 (“These considerations, it is said, should persuade us to cast upon Congress, as author of the confusion, the task of qualifying and clarifying its language if the liability here asserted should prove so depleting of the public treasury

as the Government fears.”); *Rayonier, Inc. v. United States*, 352 U.S. 315, 320 (1957) (“If the Act is to be altered that is the function for the same body that adopted it.”); *United States v. Johnson*, 481 U.S. 681, 687 (1987) (“Nor has Congress changed this standard (of *Feres*) in the close to 40 years since it was articulated, even though, as the court noted in *Feres*, Congress ‘possesses a ready remedy’ to alter a misinterpretation of its intent.”).

⁷⁰ *United States v. Johnson*, 481 U.S. 681, 700 (1987).

⁷¹ Recent attempts have been made by Congress to amend the FTCA to allow service members to sue the government for military medical malpractice. See H.R. 1161, 99th Cong. (1st Sess. 1985); H.R. 1942, 98th Cong. (1st Sess. 1983).

⁷² Carmelo Rodriguez Military Medical Accountability Act of 2009, H.R. 1478, 111th Cong. (1st Sess. 2009). The bill is named in honor of Marine Sgt. Carmelo Rodriguez.

⁷³ Carmelo Rodriguez Military Medical Accountability Act of 2009, S. 1347, 111th Cong. (1st Sess. 2009). The bill is named in honor of Marine Sgt. Carmelo Rodriguez.

⁷⁴ The next step is to convince House Majority Leader Steny Hoyer to bring the bill to the floor of the House of Representatives for consideration and vote before the entire House members. The bill in the Senate remains with the Senate Judiciary Committee.

the United States arising out of a negligent or wrongful act or omission in the performance of medical, dental, or related health care functions (including clinical studies and investigations) that is provided by a person acting within the scope of the office or employment of that person by or at the direction of the Government of the United States, whether inside or outside the United States.

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

“(d) (2) In the case of an act or omission occurring outside the United States, the ‘law of the place where the act or omission occurred’ shall be deemed to be the law of the place of domicile of the plaintiff.

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

C. Criticism of the Carmelo Rodriguez Military Medical Accountability Act of 2009

On 24 March 2009, the U.S. House of Representatives Subcommittee on Commercial and Administrative Law invited five witnesses⁷⁵ to testify before the committee regarding their positions on House Bill 1478. One of the witnesses was Mr. Stephen A. Saltzburg, a member of the American Bar Association’s (ABA) House of Delegates, who provided the ABA’s position on the pending legislation.

⁷⁵ The five witnesses were U.S. Representative Maurice Hinchey (D-NY); Major General (Ret.) John D. Altenburg, Jr., Former Deputy Judge Advocate General, United States Army; Mr. Stephen A. Saltzburg, member of the American Bar Association’s House of Delegates and Co-Chair of the Military Justice Committee of the Criminal Justice Section; Mr. Eugene R. Fidell, Visiting Lecturer, Yale Law School and President, National Institute of Military Justice; and Ms. Ivette Rodriguez, sister of Marine Sgt. Carmelo Rodriguez.

Mr. Saltzburg testified that the *Feres* doctrine should at the very least be repealed as applied to military medical malpractice claims⁷⁶ and that the legislation should be enacted into law.⁷⁷ However, Mr. Saltzburg argued in favor of repealing the entire doctrine on the principle that (1) the only limits on servicemembers found in the FTCA are those laid out in the exceptions; (2) the “incident to service” argument created by the Supreme Court should be rejected; and (3) “the exception for conduct that occurs during military action extends to all armed conflict and not only wars.”⁷⁸

In addressing the Court’s concern over the impact on military discipline, Mr. Saltzburg found it “especially difficult to see how repealing *Feres* in medical malpractice cases could have any negative impact on the chain of command.”⁷⁹ Nonetheless, in an effort to assuage any such concerns, he added that “the current exceptions in the FTCA provide ample protection to any actions which challenge discretionary command decisions or any tortious acts resulting therefore, or acts that arise out of combatant activities.”⁸⁰

The ABA encouraged Congress to “act expeditiously to end the current separate and unequal status and treatment of members of our Armed Forces regarding medical malpractice injuries.”⁸¹

Testimony also came from Major General (MG) (Ret.) John D. Altenburg, Jr.,⁸² former Deputy Judge Advocate General, U.S. Army. Major General Altenburg testified in favor of the *Feres* bar and provided several reasons for his opinion.

First, MG Altenburg acknowledged that although there may be a need for Congress to reassess and possibly increase the amount of benefits currently in place for injured servicemembers and their families, the benefits system as a

⁷⁶ *Carmelo Rodriguez Military Medical Accountability Act of 2009: Hearing Before the Subcomm. on Commercial and Administrative Law of the H. Comm. on the Judiciary*, 111th Cong. 114 (2009) (statement of Stephen A. Saltzburg, member of the American Bar Association’s House of Delegates and Co-Chair of the Military Justice Committee of the Criminal Justice Section).

⁷⁷ *Id.* at 99.

⁷⁸ *Id.* at 104, 112, 115.

⁷⁹ *Id.* at 114.

⁸⁰ *Id.*

⁸¹ Letter from Thomas M. Susman, Dir. of Governmental Affairs Office, Am. Bar Ass’n, to The Honorable John Conyers, Jr., Chairman, Comm. on the Judiciary, U.S. House of Representatives (July 28, 2009), available at <http://www.abanet.org/poladv/letters/tortlaw> (on file with author).

⁸² Major General Altenburg has previously testified before Congress on the *Feres* doctrine. See *The Feres Doctrine: An Examination of this Military Exception to the Federal Tort Claims Act: Hearing Before the S. Committee on the Judiciary*, 107th Cong. 2d Sess. 24 (2002) (statement of Major General John D. Altenburg, Jr.).

whole provided the necessary financial and rehabilitative support needed by the injured parties.⁸³ These benefits include a “broad system of workers’ compensation-like benefits administered by the military Services and the Veterans Administration.”⁸⁴ He estimated that these benefits to include “continued medical care, medical disability, vocational training and job placement services, survivor benefits, and potential pay and entitlements (among others like life and injury insurance)” were valued in the hundreds of thousands of dollars.⁸⁵

Second, MG Altenburg took issue with the underlying purpose of the bill—holding the medical community accountable for their negligence.⁸⁶ He believed that systems were already in place “to prevent medical wrongs and to make sure the same medical error is not repeated, or at the very least, the possibility of making the same mistake is minimized.”⁸⁷

Lastly, MG Altenburg argued that allowing servicemembers to file lawsuits with the likelihood of some receiving varying awards for similar injuries would result in a breakdown in good order and discipline:

The current military disability and compensation system is designed to ensure servicemembers receive similar compensation for similar injuries under all circumstances experienced in the line of duty, and the *Feres* Doctrine “incident to service” test directly supports this design. Yet, H.R. 1478 proposes a discriminatory favoritism among servicemembers and will harm morale by undermining the equities of the benefit system and the justice system.⁸⁸

⁸³ *Carmelo Rodriguez Military Medical Accountability Act of 2009: Hearing Before the Subcomm. on Commercial and Administrative Law of the H. Comm. on the Judiciary*, 111th Cong. 129–30 (2009) [hereinafter *Altenburg Statement*] (statement of Major General (Ret.) John D. Altenburg, Jr.).

⁸⁴ *Id.* at 132.

⁸⁵ *Id.* at 137.

⁸⁶ *Id.* at 134–36. It should be noted that under the current law, the Federal Employees Liability Reform and Tort Compensation Act (“Westfall Act”) does protect medical personnel from being sued in their individual capacity if it is determined that they were acting in the scope of their employment at the time of the alleged negligence. When medical personnel are sued in their individual capacity by non-service members for alleged torts that occur in the scope of their employment, the United States will often substitute itself in place of the service member. This would defeat any goal a service member plaintiff would have of holding medical personnel financially liable. See U.S. DEP’T OF ARMY, REG. 27-40, LITIGATION para. 4-4 (19 Sept. 1994).

⁸⁷ *Altenburg Statement*, *supra* note 83, at 134.

⁸⁸ *Id.* at 139.

This claim of military good order and discipline, first introduced by the Court in *Brown* (1954), and further advocated in *Stencel* (1977), *Shearer* (1985), and *Johnson* (1987), has in many ways evolved into a nebulous argument. Proponents of the *Feres* doctrine has been too quick to claim that all suits brought by servicemembers will result in a breakdown of good order and discipline; the Supreme Court, and to a greater extent, lower courts have failed to challenge the Government to specifically prove the nexus between the two. This has caused great angst among opponents to the *Feres* doctrine—especially in light of servicemembers being harmed by negligent medical treatment, such as the case with Sgt. Rodriguez.

D. The Argument Over Military Discipline

The future of the *Feres* doctrine as it applies to military medical malpractice lawsuits is contingent upon whether proponents can demonstrate the military discipline nexus or whether opponents can debunk this rationale. The time has come, however, to bring final resolution to the issue.

Justice Scalia’s scathing dissent in *Johnson* is clear indication that the Court’s “latter-conceived-of ‘military discipline’ rationale”⁸⁹ is in flux.⁹⁰ Scalia, a strict constructionist, stated that the *Feres* bar was nowhere to be found in the FTCA. “We realized seven years too late that ‘there is no justification for this Court to read exemptions into the Act beyond those provided by Congress. If the Act is to be altered that is a function for the same body that adopted it.’”⁹¹ In terms of military discipline, he stated:

I cannot deny the possibility that some suits brought by servicemen will adversely affect military discipline, and if we were interpreting an ambiguous statute perhaps we could take that into account. But 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

⁸⁹ *United States v. Johnson*, 481 U.S. 681, 698.

⁹⁰ It is interesting to note that Justice Scalia assumed office as an Associate Justice of the United States Supreme Court on 26 September 1986 and therefore was only on the bench for eight months before filing his dissent in *Johnson*. However, three senior members of the Court, of differing political philosophies, chose to join Scalia in his dissent. They included Justice Brennan who was already on the Court for thirty-one years; Justice Thurgood Marshall who was already on the Court for twenty years; and Justice John Paul Stevens who was already on the Court for twelve years. See *Members of the Supreme Court of the United States*, <http://www.supremecourtus.gov/about/members.pdf> (last visited Mar. 1, 2010).

⁹¹ *Johnson*, 481 U.S. at 702 (Scalia, J., dissenting) (quoting *Rayonier, Inc. v. United States*, 352 U.S. 315, 320 (1957) (footnote omitted)).

Congress did not mean what it plainly said in the statute before us.⁹²

Scalia provided several logical reasons why military discipline was not addressed in the *Feres* decision or by Congress itself when it passed the FTCA: (1) perhaps it was unclear to Congress the affect such suits would have on military discipline; (2) perhaps Congress thought that the exclusions listed in the FTCA (*e.g.*, claims based upon combat command decisions; claims based upon performance of discretionary functions; claims arising in foreign countries; intentional torts; and claims based upon the execution of a statute or regulation) would automatically bar those types of suits that threatened military discipline; (3) perhaps Congress assumed that because the Government, and not the individual, will normally be liable in such suits, it was not worried about the affect such suits will have on military discipline; or (4) perhaps Congress believed that prohibiting such suits would have a negative affect military discipline.⁹³

Scalia summed up his argument by stating that “neither the three original *Feres* reasons nor the *post hoc* rationalization of “military discipline” justifies our failure to apply the FTCA as written.”⁹⁴

Subsequent to the *Johnson* opinion, several appellate court decisions were issued that addressed servicemember tort litigation, and in particular, how such suits would cause federal courts to question military decisions, and moreover, affect military discipline. Lacking in any of these opinions, however, is a clear articulation of the nexus between medical malpractice suits and good order and discipline.

*Atkinson v. United States*⁹⁵ (*Atkinson I*) is by all accounts the first appellate court case to challenge the notion that all military medical malpractice suits are inherently *Feres* barred on the basis that they upset military discipline. In this case, *Atkinson* was an active duty Soldier alleging negligent prenatal care against the Government. In reversing the district court’s decision to grant the Government’s motion for summary judgment, the Court of Appeals for the Ninth Circuit put into context the lacking nexus it found between such a suit and any adverse impact it would have on military discipline:

we fail to see how *Atkinson*’s suit for negligent care administered in a non-field military hospital incident to her pregnancy can possibly undermine “the need for unhesitating and decisive action by

military officers and equally disciplined responses by enlisted personnel” (citation omitted). At the time *Atkinson* sought treatment, she was “not subject in any real way to the compulsion of military orders or performing any sort of military mission.” (citation omitted). 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. Thus, in seeking treatment for complications of her pregnancy, *Atkinson* “was subject to military discipline only the very remotest sense.” (citations omitted). . . . We are not dealing with a case “where the government’s negligence occurred because of a decision requiring military expertise or judgment.” (citation omitted).⁹⁶

In light of the Supreme Court’s *Johnson* opinion issued six months after *Atkinson I*, the Ninth Circuit withdrew its opinion in *Atkinson I* and issued a new opinion in *Atkinson v. United States (Atkinson II)*, holding now that *Atkinson* was *Feres* barred.⁹⁷ However, the basis for the court’s decision in *Atkinson II* was the fact that “*Johnson* appears to breathe new life into the first two *Feres* rationales, which until that time had been largely discredited and abandoned.”⁹⁸ The two rationales referenced were the federal relationship between Government and servicemembers and the benefits already provided to servicemembers through the VBA. It is significant to note though that the court did not base its reversal on the military discipline rationale.⁹⁹ The court distinguished the facts in *Atkinson* from the facts in *Johnson* by pointing out that *Johnson*’s helicopter crash was incident to his service in the Coast Guard whereas the harm suffered by *Atkinson* was a result of negligent prenatal medical treatment.¹⁰⁰ In essence, the court again felt that the military discipline rationale was too far-reaching to apply in *Atkinson*’s case. The *Atkinson* court, however, is the only appellate court to have such reservations about automatically connecting the military discipline rationale to military medical malpractice cases.

Less than a month after the *Atkinson II* opinion, the Court of Appeals for the Eleventh Circuit heard the case of *Del Rio*

⁹² *Id.* at 699.

⁹³ *Id.* at 699–700.

⁹⁴ *Id.* at 700.

⁹⁵ 804 F.2d 561 (9th Cir. 1986), *withdrawn*, 825 F.2d 202 (9th Cir. 1987).

⁹⁶ *Id.* at 564–65.

⁹⁷ 825 F.2d 202 (9th Cir. 1987).

⁹⁸ *Id.* at 206.

⁹⁹ *Id.*

¹⁰⁰ *Id.*

v. United States.¹⁰¹ Del Rio was an active duty Navy sailor who alleged that negligent prenatal care administered by the military caused premature delivery of her twin sons. The premature delivery caused one son to die and the other to suffer bodily injury. The court concluded that military discipline was part of the reason for barring a suit under the *Feres* doctrine. However, the court provided no substantial analysis as to how military discipline would be detrimentally influenced other than to say:

[t]he district court correctly concluded that the medical malpractice case would require the court to second-guess the medical decisions of the military physicians. The malpractice suit would require the officers to “testify in court as to each other’s decisions and actions.” (citations omitted). Obviously the suit “might impair essential military discipline” because her position as a navy hospital corpsman places the discipline, supervision and control of her working group at issue.¹⁰² (citations omitted).

Twenty five days later, the Court of Appeals for the Tenth Circuit issued its own post-*Johnson* opinion in *Madsen v. United States*.¹⁰³ Madsen was an Air Force captain who suffered injuries from a motorcycle accident and received treatment at an Army hospital. Appellant brought suit against the Government alleging medical malpractice. Holding that appellant was barred from filing suit under all three prongs of the *Feres* doctrine, the court addressed the military discipline prong by simply stating that appellant “was not free from the military command structure during his hospitalization, but was assigned to a medical holding company and was subject to orders from the hospital commander.”¹⁰⁴

Nearly a year after the *Johnson* opinion, the Court of Appeals for the Sixth Circuit issued a decision with regards to military medical malpractice cases and the *Feres* doctrine. In *Irvin v. United States*,¹⁰⁵ the court followed suit and barred a former active duty appellant from filing a cause of action against the Government for negligent prenatal care. The court quoted the Supreme Court’s decision in *Stencel* with regards to military discipline:

Turning to the third factor, it 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. The litigation would take virtually the identical form in either case, and at issue would be the degree of fault, if any, on the part of the Government’s agents and the effect upon the serviceman’s safety. The trial would, in either case, involve second-guessing military orders, and would often require members of the Armed Services to testify in court as to each other’s decisions and actions. This factor, too, weighs against permitting any recovery by petitioner against the United States.¹⁰⁶

These appellate court holdings overly simplify the military discipline argument. They conclude that military medical malpractice suits negatively impact good order and discipline but fail to articulate what government evidence, if any, was offered to prove the impact. This point is best made by a federal district court when it properly challenged the Government to articulate the nexus.

In *C.R.S. v. United States*,¹⁰⁷ plaintiff D.B.S. was attending basic training at Fort Benning, Georgia when he had to undergo surgery at the local Army community hospital for abdominal bleeding. During the course of the surgery, D.B.S. received blood that was contaminated with HIV. D.B.S. contracted the virus and subsequently passed it along to his wife N.A.S. The two conceived a child, C.R.S., who was born with the virus. The district court denied the Government’s motion for summary judgment. As part of its rationale, the court stated that plaintiffs’ claims had little connection to military discipline. More importantly, the court found that the Government failed to prove the impact such a case would have on military discipline:

The government fails to demonstrate how permitting this claim to go forward would imperil decisions about national security and the military mission. Allowing a suit by a former member of the military for acts unrelated to the military mission does not, on these facts, threaten the integrity of military decision making. Furthermore, *some* inquiry into military activities and decision making is not a sufficient rationale for barring all suits. The same, or even greater, level of inquiry may result when a civilian sues the government for conduct related to military activities.

¹⁰¹ 833 F.2d 282 (11th Cir. 1987).

¹⁰² *Id.* at 286.

¹⁰³ 841 F.2d 1011 (10th Cir. 1987).

¹⁰⁴ *Id.* at 1014.

¹⁰⁵ 845 F.2d 126 (6th Cir. 1988).

¹⁰⁶ *Id.* at 129 (quoting *Stencel Aero Eng’g Corp. v. United States*, 431 U.S. 666, 672–73 (citations omitted)).

¹⁰⁷ 761 F.Supp. 665 (D. Minn. 1991).

(citations omitted). Finally, these claims do not present the treat of a [S]oldier haling his superior into court. (citations omitted).¹⁰⁸

In reality, federal courts do in fact scrutinize the military's role in committing torts. This is illustrated in FTCA causes of action brought by civilian plaintiffs against the military, whether the alleged injury was caused by medical malpractice, negligent personal injury, property damage, or ultra-hazardous activities. Furthermore, servicemembers often provide sworn testimony as to how such torts were committed during depositions or at trial.

In settings outside of servicemember tort litigation, it is not uncommon for courts to pass judgment on military decisions. For instance, the Supreme Court issued opinions on military decisions that impacted the First Amendment of the U.S. Constitution.¹⁰⁹ Likewise, in military court-martials, commanders provide testimony regarding command decisions while servicemembers testify against each other and against their commanders.

Military negligent malpractice lawsuits rarely, if ever, question policy decisions made by Army Medical Corps officers in their capacity as a commander or staff officer.¹¹⁰ Instead, they question the diagnosis and medical care rendered by physicians, physician assistants, and nurses to the servicemember, and whether such decisions/treatment met the standard of care – nothing more. Such claims do not fall into any of the exceptions articulated by Congress in the FTCA to include questioning military decisions that are made during a time of war or decisions made during the military's exercise or performance or the failure to exercise or perform a discretionary function.¹¹¹

Simply put, the Supreme Court's military discipline rationale, first articulated in *Brown*, has added another layer of confusion to the already confusing *Feres* doctrine. This confusion has only been propounded by courts failing to require a showing of proof of the negative impact such suits would have on military discipline. Congress has also contributed to the uncertainty by failing to legislatively settle the issue of whether the FTCA was intended to encompass suits filed by servicemembers. An up or down vote on the Carmelo Rodriguez Military Medical Accountability Act

would help bring resolution to this contentious issue that has been alive for over five decades.

E. Allowing Soldiers to File Medical Malpractice Claims: What Should the Army Expect

As discussed above, there is a serious push within Congress and the general public to have the *Feres* doctrine repealed, at least as it applies to medical malpractice lawsuits. Nonetheless, *Feres* minimized the amount of claims and litigation that the Army handles on a daily basis. If this bill becomes law, it will undoubtedly cause the Army to face a tidal wave of administrative claims and malpractice suits from the vast potential pool of active and reserve component personnel who are injured on a yearly basis due to military treatment.

Under the current framework, those seeking to file suit against the Army must first file an administrative claim with the claims office at a local military installation. Once filed, the local installation and U.S. Army Claims Service (USARCS) both have a combined total of six months within which to investigate and settle the claim. In accordance with Army Regulation 27-20,¹¹² the area claims office has authority to settle claims for up to \$50,000 while the Commander of USARCS retains authority to settle claims for up to \$200,000.

If six months elapse and the claim has neither been settled nor denied, the claimant may then file a civil suit in federal district court.¹¹³ Although a great deal of claims are resolved at the administrative level, many claims, especially those with a settlement value of greater than \$200,000, end up in litigation.¹¹⁴

Granting Soldiers the ability to file a civil suit against the United States will bring about a tremendous challenge for Government attorneys, paralegals, investigators, and support staff to handle this potential increase in workload.¹¹⁵ The Army's current legal personnel structure will become greatly strained with the potential volume of new cases. In Fiscal Year (FY) 2008 and FY 2009, the Army received 251 claims¹¹⁶ and 196 claims,¹¹⁷ respectively. Furthermore, in calendar year 2009, twenty-nine new medical malpractice lawsuits were filed against the Army in federal district

¹⁰⁸ *Id.* at 668.

¹⁰⁹ See *Greer v. Spock*, 424 U.S. 828, 896 (1976) (holding that military installations are not public forums for civilian political activity. Commanders have the "historically unquestioned power" to prevent civilians from accessing a military post. "There is nothing in the Constitution that disables a military commander from acting to avert what he perceives to be a clear danger to the loyalty, discipline, or morale of troops on the base under his command.").

¹¹⁰ Brou, *supra* note 60, at 56.

¹¹¹ 28 U.S.C. § 2680 (2006).

¹¹² U.S. DEP'T OF ARMY, REG. 27-20, CLAIMS para. 4-6 (8 Feb. 2008).

¹¹³ 28 U.S.C. § 2675.

¹¹⁴ Attorneys are entitled to collect twenty-five percent in attorney fees for cases that resolve in federal district court as opposed to the twenty percent allowed in the administrative phase. See *id.* § 2678.

¹¹⁵ Altenburg Statement, *supra* note 83, at 140-42.

¹¹⁶ E-mail from Jeffrey Raeber, Attorney, Tort Claims Div., U.S. Army Claims Serv., to author (Jan. 13, 2010, 12:42 EST) (on file with author).

¹¹⁷ E-mail from Jeffrey Raeber, Attorney, Tort Claims Div., U.S. Army Claims Serv., to author (Jan. 13, 2010, 12:43 EST) (on file with author).

court.¹¹⁸ It stands to reason that if Soldiers are no longer barred from filing claims for medical malpractice, the likelihood of these numbers increasing is substantial.

The Congressional Budget Office (CBO) estimates that enactment of H.R. 1478 would increase medical malpractice claims by 750 claims per year and of these, 250 claims would settle out of court or receive an award from the court.¹¹⁹ The CBO further estimates that awards for 4100 medical malpractice claims would be paid over the 2010-2019 period¹²⁰ and that this would increase direct spending from the Judgment Fund by \$2.7 billion.¹²¹

In terms of administrative claims, there will likely be a need for an increase in the number of tort attorneys and investigators assigned to the local installation Office of the Staff Judge Advocate (OSJA) as well as USARCS. The Army may also need to study the benefits of maintaining this two tier settlement authority structure within the administrative phase, and consider the possibility of investing the area claims office with full \$200,000 settlement authority.

In terms of litigation, the U.S. Department of Justice defends the Army in all suits brought against it in federal court. Attorneys assigned to U.S. Army Litigation Division, Torts Branch, and to a lesser extent the local installation's OSJA, are tasked with assisting the Assistant U.S. Attorneys during all stages of litigation. This includes drafting motions to dismiss and motions for summary judgment; answers; responses to interrogatories; litigation reports; and obtaining all forms of discovery. If *Feres* is repealed, the Army will undoubtedly need to increase the number of attorneys, paralegals, and support staff currently assigned to the Torts Branch.

The other unresolved question is whether the bill should be made retroactive to as early as 1997 when Rodriguez had his military entrance physical and was diagnosed with melanoma. If this bill were made retroactive, it would mean that all servicemembers who had a potential suit from as far back as thirteen years ago would now be eligible to file a claim. This poses a host of legal issues predominantly in the area of discovery to include retrieving old patient medical

charts, hospital records, test results, and locating witnesses who are no longer in the military and whose memories have faded with time. Other issues that would need to be resolved are courts having personal jurisdiction over those no longer in the military; how to handle claims filed by relatives of deceased soldiers; and whether settlement awards should be valued at present dollar value or the worth of the dollar at the time of the injury. There will also be a need to figure out the issue of statute of limitations as it relates to when the servicemember was made aware of the injury (e.g., assuming 1997 is the cut-off date, will the statute of limitations apply to when the injury took place or when the servicemember discovered the injury). All these issues should caution policymakers to think long and hard about the Government's ability to handle such retroactive claims.

V. Conclusion

The *Feres* doctrine has survived repeated assaults over the course of sixty years. The real battle over *Feres* needs to center around the issue of military discipline. If proponents are unable to demonstrate the nexus, then *Feres* should be overturned in the limited sense of medical malpractice claims.

Permitting servicemembers to file suit against the military will not be a complete panacea for their misfortune. Even with a partial repeal of *Feres*, stories similar to that of Marine Sgt. Carmelo Rodriguez will continue to unfold within the military. Many will continue to suffer from the ill effects of military medical malpractice. But partially repealing *Feres* will provide some level of compensation to the servicemembers and their family for the military's negligence. It will hold the Government accountable for its failure to meet the proper standard of care.

The *Feres* Court and other courts have invited Congress to repeal the *Feres* doctrine if Congress felt the decision was wrong.¹²² Even if Congress were not inclined to accept the invitation, it should at the very least pass new FTCA legislation to clear up the years of confusion otherwise created by an overly active Supreme Court.

¹¹⁸ E-mail from Kelly Williams, Paralegal, U.S. Army Litigation Div., to author (Feb. 23, 2010, 10:41 EST) (on file with author).

¹¹⁹ Congressional Budget Office, *Cost Estimate for H.R. 1478 Carmelo Rodriguez Military Medical Accountability Act of 2009*, available at <http://cbo.gov/ftpdocs/106xx/doc10670/hr1478.pdf> (last visited Mar. 1, 2010).

¹²⁰ *Id.*

¹²¹ *Id.*

¹²² See *Feres v. United States*, 340 U.S. 135, 138 (1950) ("Under these circumstances, no conclusion can be above challenge, but if we misinterpret the Act, at least Congress possesses a ready remedy."); see also *id.* at 139 ("These considerations, it is said, should persuade us to cast upon Congress, as author of the confusion, the task of qualifying and clarifying its language if the liability here asserted should prove so depleting of the public treasury as the Government fears."); *Rayonier, Inc. v. United States*, 352 U.S. 315, 320 (1957) ("If the Act is to be altered that is the function for the same body that adopted it."); *United States v. Johnson*, 481 U.S. 681, 687 (1987) ("Nor has Congress changed this standard (of *Feres*) in the close to forty years since it was articulated, even though, as the court noted in *Feres*, Congress 'possesses a ready remedy' to alter a misinterpretation of its intent.")

Appendix

The *Feres* Doctrine Timeline

Case	Factual Summary	Legal Holding	Voting by USSC
<i>Brooks (1949)</i>	Two brothers, who were active duty Soldiers on leave at the time of the accident, were riding in a privately owned vehicle when a military truck driven by a civilian employee of the Army struck them.	“Incident to service” language introduced.	Opinion written by Justice Murphy. Justices Frankfurter and Douglas, dissenting.
<i>Feres (1950)</i>			
<i>a. Feres</i>	Plaintiff was an active duty Soldier who died in a barracks fire.	Plaintiffs cannot sue because their injuries were incident to their service.	Opinion written by Justice Jackson with whom Chief Justice Vinson, and Justices Black, Reed, Frankfurter, Burton, Clark and Minton joining. Justice Douglas, concurring
<i>b. Jefferson</i>	Plaintiff was an active duty Soldier who underwent abdominal surgery performed by the military. Subsequent abdominal surgery revealed a towel was left behind during the first abdominal surgery.	Rationale: 1. Liability: Federal ≠ State 2. State tort law controls; FTCA could not apply to the military because they lack choice as to which state to live in. 3. Benefits already provided through VBA.	
<i>c. Griggs</i>	Plaintiff was an active duty Soldier who died because of the negligent, careless and unskillful acts of members of the Army Medical Corps.		
<i>Brown (1954)</i>	A discharged veteran sued the VA hospital for negligent treatment of his injured knee.	Court raises a new concern: impact of such suits on military discipline.	Opinion written by Justice Douglas. Justice Black, with whom Justices Reed and Minton join, dissenting.

<p><i>Stencel Aero Eng'g Corp.</i> (1977)</p>	<p>Air National Guard Captain permanently injured when the egress life-support system failed on his fighter aircraft.</p>	<p>Court reaffirms principles laid out in <i>Feres</i> and <i>Brown</i>.</p> <p>Rationale:</p> <ol style="list-style-type: none"> 1. Relationship between government and servicemembers distinctively federal in character. 2. Benefits already provided through VBA. 3. Military discipline. 	<p>Opinion written by Chief Justice Burger.</p> <p>Justice Marshall, with whom Justice Brennan joins, dissenting.</p>
<p><i>Shearer</i> (1985)</p>	<p>Army Private, while off duty, was kidnapped and murdered by another Soldier. Army aware that perpetrator was previously convicted by a German court for manslaughter.</p>	<p>Court states that the first two <i>Stencel</i> factors are “no longer controlling”: (1) relationship between the government and servicemembers; and (2) VBA benefits.</p> <p>Court states such suits would involve the judiciary in sensitive military affairs, at the expense of military discipline and effectiveness.</p> <p>Reaffirms the three factors cited in <i>Stencel</i>. Emphasis on military discipline.</p>	<p>Opinion written by Chief Justice Burger.</p> <p>Justice Brennan, with whom Justices Blackmun and Stevens join, concurring in part and concurring in judgment.</p> <p>Justice Marshall concurring in judgment.</p> <p>Justice Powell took no part in the decision. Opinion written by Justice Powell, with whom Justices Rhnquist, White, Blackmun, and O'Connor, joining.</p> <p>Justice Scalia, with whom Justices Brennan, Marshall, and Stevens join, dissenting.</p>