

Copyright © 2010 Ave Maria Law Review

THE CARMELO RODRIGUEZ MILITARY MEDICAL
ACCOUNTABILITY ACT OF 2009:
AN OPPORTUNITY TO OVERTURN THE *FERES*
DOCTRINE AS IT APPLIES TO MILITARY MEDICAL
MALPRACTICE

Kenneth R. Wiltberger[†]

INTRODUCTION

When Carmelo Rodriguez joined the United States Marine Corps in 1997, he underwent a routine physical where military medical staff concluded that he had melanoma present on his right buttock. Despite the diagnosis, the doctors took no action. On February 5, 2003, during a prescreening for foot surgery, a military doctor noted a strange looking birthmark on Rodriguez's right buttock, but he also took no action. In March of 2005, while Rodriguez was stationed in Iraq, he visited yet another military doctor after he became concerned about a sore or growth on the same buttock. The military doctor told Rodriguez merely to keep the area clean and to visit the doctor again upon Rodriguez's return to the United States, which would be more than five months later. On November 11, 2005, Rodriguez acted on this advice and, during a checkup, was directed to the dermatology unit to have the birthmark removed for cosmetic purposes. The prescribed surgery never occurred and, by April 2006, after several referrals for the surgery had been lost in the system, Rodriguez's

[†] Juris Doctor, Ave Maria School of Law, 2009. I would like to express my gratitude to the members of my family who have sacrificed so much for the cause of freedom through their service in the United States Armed Forces: My grandfather Richard E. Wiltberger, father Stephen J. Wiltberger, brothers Steven A. and Robert J. Wiltberger, brother-in-law William T. Patrick, uncles Richard A. Wiltberger, Terrence M. Welsch, Andrew J. MacVie, III, and Kenneth R. Combs, and cousins Andrew J. MacVie, IV and Joshua D. Britzalaro.

I would also like to thank my wife Alex and my daughter Charlotte who inspire me in so many ways. Finally, I would like to thank my father, Stephen J. Wiltberger, and Leonard A. Leo, James P. Kelly, III, Richard W. Stimson, and James J. Carroll, all of whom have been instrumental in shaping my legal career.

birthmark was bleeding and expelling pus constantly. By the time Rodriguez succeeded in seeing an “appropriate doctor,” he was told he had stage III malignant melanoma. After the diagnosis, Rodriguez underwent three surgeries and, though he received the appropriate radiation and chemotherapy treatments, the cancer had already spread throughout his body, making recovery impossible. The doctors informed Rodriguez that if it had been caught earlier, it would have made a big difference. When Carmelo Rodriguez died at the age of twenty-nine in 2007, he weighed less than eighty pounds and “left behind a loving family, including a 7-year-old son.”¹

If Sergeant Rodriguez were a civilian and had been treated in a civilian hospital, his family would have had standing to sue for medical malpractice. However, because Sergeant Rodriguez was an active member of the military at the time the alleged malpractice occurred, under the Federal Tort Claims Act² and the Supreme Court precedent set in *Feres v. United States*³ in 1950, his family was precluded from filing suit against the military to recover for his loss. The Court’s decision in *Feres* stated that the “Government is not liable under the Federal Tort Claims Act for injuries to servicemen where the injuries arise out of or are in the course of activity incident to service.”⁴ The “incident to service” test, commonly referred to as the “*Feres* doctrine,” has been much-discussed and long-criticized since its genesis sixty years ago, prompting numerous calls for it to be overruled by the Supreme Court.⁵ However, despite decades of harsh criticism and questioning, the federal courts continue to abide by this

1. *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. 85–87 (2009) [hereinafter *Rodriguez Act Hearing*] (testimony of Rep. Maurice Hinchey); *id.* at 116–17 (testimony of Ivette Rodriguez); Press Release, Congressman Maurice Hinchey, Hinchey Calls for Congressional Hearings on Military Medical Malpractice (June 5, 2008), http://www.house.gov/hinchey/newsroom/press_2008/060508CarmeloRodriguezBillHearingRequest.html.

2. Pub. L. No. 79-601, §§ 401–424, 60 Stat. 842, 842–43 (1946) (codified as amended at 28 U.S.C. §§ 1346(b), 2671–2680 (2004)).

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

4. *Id.* at 146.

5. See, e.g., Brian P. Cain, Note, *Military Medical Malpractice and the Feres Doctrine*, 20 GA. L. REV. 497 (1986); Jennifer L. Carpenter, Comment, *Military Medical Malpractice: Adopt the Discretionary Function Exception as an Alternative to the Feres Doctrine*, 26 U. HAW. L. REV. 35 (2003); John B. Wells, Comment, *Providing Relief to the Victims of Military Medicine: A New Challenge to the Application of the Feres Doctrine in Military Medical Malpractice Cases*, 32 DUQ. L. REV. 109 (1993).

decision rendered during the early years of the Cold War.⁶ With this long, unbending history in the courts, it is unlikely that the *Feres* doctrine as applied to military medical malpractice will be overturned any time soon without Congressional action.

Congressman Maurice Hinchey, a Democrat from New York, initiated such action after hearing the plight of Carmelo Rodriguez and his family. He reintroduced a bill to the 111th Congress on March 12, 2009, a bill he had first presented to the 110th Congress in 2008,⁷ that would “allow members of the Armed Forces to sue the United States for damages for certain injuries caused by improper medical care.”⁸ The bill, commonly known as the Carmelo Rodriguez Military Medical Accountability Act of 2009 (“Rodriguez Act”), would amend of Title 28, Chapter 171, of the United States Code by adding Section 2681 to the end, providing in part:

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

6. In a five-page ruling filed on February 10, 2009, in the U.S. District Court, Eastern District of California, U.S. District Judge John A. Mendez called the *Feres* doctrine “unfair and irrational” and strongly urged the Supreme Court to reconsider it. *Witt v. United States*, No. 2:08-CV-02024 JAM-KJM, slip op. at 5 (E.D. Cal. Feb. 9, 2009). The ruling dismissed the case of Alexis Witt, the widow of an Air Force Staff Sergeant who suffered permanent brain damage resulting from a number of medical errors after a routine appendectomy. *Id.* at 1–2. Reports filed in the case show that Sgt. Witt was improperly given a powerful drug after the surgery and then was left in the care of a student nurse. Walter F. Roche, Jr., *Judge Calls Military Lawsuit Ban “Unfair,”* PITTSBURGH TRIB.-REV., Feb. 14, 2009, http://www.pittsburghlive.com/x/tribune/review/news/nation/s_611691.html. When Sgt. Witt stopped breathing, he was wheeled into a *pediatric recovery unit* where medical personnel tried to resuscitate him with *pediatric equipment*. *Id.* After going without oxygen for seven to ten minutes, Sgt. Witt suffered extensive brain damage and died shortly after being removed from life support. *Id.* Judge Mendez wrote, “A 25 year old man who devoted his life to serving his country is dead through no fault of his own and his widow cannot sue to recover for her loss.” *Witt*, slip op. at 4. Judge Mendez dismissed the case reluctantly, concluding that “as wrong-headed as it may seem, this Court is duty-bound to follow precedent and abide by the decision of the Ninth Circuit and Supreme Court.” *Id.* at 5. Sgt. Witt’s widow described her painful experience in a letter to Congress urging them to pass the 2009 Rodriguez Act. Letter from Alexis Witt to Congressmen John Conyers & Steve Cohen (Mar. 23, 2009), in *Rodriguez Act Hearing*, *supra* note 1, at 242.

7. Congressman Hinchey introduced H.R. 6093, the “Carmelo Rodriguez Military Medical Accountability Act of 2008,” to the 110th Congress on May 20, 2008. Sessions of Congress last two years, and at the end of each session all proposed bills and resolutions that have not passed are cleared from the books. Members often reintroduce bills that did not come up for debate under new numbers in the next session. H.R. 6093: Carmelo Rodriguez Military Medical Accountability Act of 2008, <http://www.govtrack.us/congress/bill.xpd?bill=h110-6093> (last visited May 14, 2010). The 2008 version did not pass, and Congressman Hinchey reintroduced the bill in 2009. H.R. 1478: Carmelo Rodriguez Military Medical Accountability Act of 2009, <http://www.govtrack.us/congress/bill.xpd?bill=h111-1478> (last visited May 14, 2010).

8. H.R. 1478, 111th Cong. (2009).

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

(b)(1) The payment of any claim of a member of the Armed Forces under this section shall be reduced by the present value of other benefits received by the member or the estate, survivors, and beneficiaries of the member under title 10, title 37, or title 38 that are attributable to the physical injury or death from which the claim arose.

(2) A claim under this section shall not be reduced by the amount of any benefit received under Servicemembers Group Life Insurance under subchapter III of chapter 19 of title 38, including any benefit under—

(A) section 1980A of title 38 (commonly know [sic] as Traumatic Servicemembers' Group Life Insurance); and

(B) section 1967 of title 38 (commonly known as Family Servicemembers' Group Life Insurance).

(c) This section shall not apply to any claim arising out of the combatant activities of the Armed Forces during time of armed conflict.⁹

Congressman Hinchey's bill would provide Carmelo Rodriguez's family and other victims of military medical malpractice and their families an immediate opportunity to seek relief in the courts. Despite this fact, the members of the 110th Congress, like their counterparts at the Supreme Court, missed the chance to correct an outdated doctrine that "has expanded far beyond its original purpose."¹⁰ No action was taken on the bill in the 110th Congress, and the session ended.

Although the Rodriguez Act failed in the last Congress, it nonetheless served as the most recent reminder to all three branches of the American government that it is time to overturn the *Feres* doctrine, at least as it applies to military medical malpractice. With the Rodriguez Act as the starting point, this Note examines the establishment of the *Feres* doctrine and the historical justifications for

9. *Id.* § 2(a).

10. Carpenter, *supra* note 5, at 36.

limiting medical malpractice actions by military personnel. This Note also critiques the doctrine and proposed alternatives to it.¹¹ Finally, this Note urges that the new Congress, with support from the Obama Administration, acknowledge that the use of the *Feres* doctrine to bar military medical malpractice claims is no longer supportable. Moreover, it must recognize such a necessary change will not come through the court system—despite decades of criticism and confusion—but rather must come through the legislative process with a Rodriguez-type act.

I. BACKGROUND

A. *The Federal Tort Claims Act and Brooks v. United States*

The *Feres* doctrine grew out of the common law doctrine of sovereign immunity, which bars suits against the government unless Congress consents to them.¹² The Federal Tort Claims Act (“FTCA”) was passed by Congress in 1946 in response to the increased number of injurious incidents attributed to the federal government’s involvement in the private sector.¹³ Prior to the FTCA’s passage, Congress dealt with the rising number of claims simply by introducing private bills of relief to the House Judiciary Committee. These bills would go through a complicated, lengthy, and often expensive legislative process until they were passed or defeated.¹⁴ The FTCA relieved this process by allowing plaintiffs to sue the United States directly for personal injuries when the injuries were

caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a

11. This Note does not argue that the *Feres* doctrine as it applies to *all* torts should be overturned. Any such discussion exceeds the scope of this Note and has been discussed at length in other articles. This Note is limited to a discussion of why it will take legislative action, not a ruling by the Supreme Court, for the *Feres* doctrine to be overturned in the context of military medical malpractice.

12. See *United States v. McLemore*, 45 U.S. (4 How.) 286, 288 (1846) (“[T]he government is not liable to be sued, except with its own consent, given by law.”).

13. See Cain, *supra* note 5, at 500.

14. *Id.* 500 & n.11.

private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.¹⁵

Despite the seemingly broad waiver of the government's sovereign immunity for negligent conduct performed by government employees, Congress "specified several exceptions in which liability pursuant to the FTCA does not extend to the United States."¹⁶ Furthermore, regarding liability involving military personnel, an exception in the FTCA specifically precludes "claim[s] arising out of the combatant activities of the military or naval forces, or the Coast Guard, during time of war."¹⁷

Three years after the passage of the FTCA, the U.S. Supreme Court had its first opportunity to interpret its language as it applied to military plaintiffs, in *Brooks v. United States*.¹⁸ In *Brooks*, an off-duty serviceman was fatally injured when a civilian defense employee driving an Army truck on an off-base public highway struck the serviceman's vehicle.¹⁹ The Court held that an injured military service member could sue the federal government unless his or her injury was "incident to . . . service."²⁰ Because the plaintiff was not engaged in military activities at the time of the accident, the Court found her claim to be well-founded.²¹ However, despite the FTCA's specific preclusion of claims by military personnel involving combatant activities alone, the *Brooks* Court broadened the language of prohibition by including injuries "incident to service" and further confused the text by not defining the phrase. Thus began the Court's "confused and continuing struggle to justify the military's immunity from service members' FTCA claims for non-combat injuries."²²

15. 28 U.S.C. § 1346(b)(1) (2006).

16. Christopher G. Froelich, Comment, *Closing the Equitable Loophole: Assessing the Supreme Court's Next Move Regarding the Availability of Equitable Relief for Military Plaintiffs*, 35 SETON HALL L. REV. 699, 710 (2005).

17. 28 U.S.C. § 2680(j) (2006).

18. 337 U.S. 49 (1949).

19. *Id.* at 50.

20. *Id.* at 52.

21. *Id.* at 52-54.

22. Jonathan Turley, *Pax Militaris: The Feres Doctrine and the Retention of Sovereign Immunity in the Military System of Governance*, 71 GEO. WASH. L. REV. 1, 9 (2003).

B. *Feres v. United States and the Rationales of the Eponymous Doctrine*

In 1950, the Supreme Court had an opportunity to clarify the “incident to service” language when it heard *Feres v. United States*,²³ a consolidated case involving three claims of negligence—two related to medical malpractice—brought by servicemen for injuries they had received from their military activities.²⁴ The Court held that all three cases were barred under the “incident to service” holding in *Brooks*.²⁵ The Court found that the common denominator among the three cases was that each claimant was on active duty when another service member committed a tort against them.²⁶ As a result, the injuries were deemed to be incidental to their military service, and thus not compensable under the FTCA.²⁷

Justice Jackson, who delivered the opinion for the Court, articulated three specific reasons why the military plaintiffs could not recover. First, Justice Jackson explained, there was no American precedent that “permitted a soldier to recover for negligence, against either his superior officers or the Government he is serving.”²⁸ Justice Jackson drew a comparison to state militias and noted that the

23. 340 U.S. 135 (1950).

24. The first consolidated case, *Feres v. United States*, involved the death of a serviceman who had died in a fire in a military barracks that had a defective heating system. *Id.* at 136–37. The second case, *Jefferson v. United States*, involved a serviceman who, when he was in the Army, was “required to undergo an abdominal operation. About eight months later, in the course of another operation after plaintiff was discharged, a towel 30 inches long by 18 inches wide, marked ‘Medical Department U.S. Army,’ was discovered and removed from his stomach.” *Id.* at 137 (emphasis added). The third case, *Griggs v. United States*, involved a serviceman who died while undergoing surgery allegedly from the “negligent and unskillful medical treatment by army surgeons.” *Id.*

25. *Id.* at 146.

26. *Id.* at 138.

27. *Id.* at 146; see also Deirdre G. Brou, *Alternatives to the Judicially Promulgated Feres Doctrine*, 192 MIL. L. REV. 1 (2007).

In adopting this Federal Tort Claims Act exception, the Court first recognized that ‘few guiding materials [exist] 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.’ When analyzing the Federal Tort Claims Act’s applicability to service members, the Court concluded that the Act ‘should be construed to fit, so far as will comport with its words, into the entire statutory system of remedies against the Government to make a workable, consistent and equitable whole.’

Id. at 14 (alteration in original) (footnote omitted) (quoting *Feres*, 340 U.S. at 138–39).

28. *Feres*, 340 U.S. at 141.

plaintiffs did not present any analogous cases, and the Court could not think of any, where a state militia had ever allowed its members to maintain tort actions against the state for service-related injuries.²⁹ Second, Justice Jackson recognized that although the relationship between members of the military and the Government was “distinctively federal in character,” any liability action brought under the FTCA would be controlled primarily by state tort law.³⁰ Subjecting military plaintiffs to different state laws was hardly rational, Justice Jackson noted, because it left them “dependent upon geographic considerations over which they have no control and to laws which fluctuate in existence and value.”³¹ Therefore, it was more appropriate that federal law govern any tort actions, not state law as provided in the FTCA.³² Finally, Justice Jackson stressed that “Congress did not intend the FTCA to apply to military personnel because it had already created a comprehensive scheme of benefits to compensate for service-related injuries,”³³ and these benefits were favorably compared to state workers’ compensation statutes.³⁴

After *Feres*, the Supreme Court provided a fourth rationale that expanded the *Feres* doctrine, in *United States v. Brown*.³⁵ *Brown* involved a discharged veteran who had injured his knee while he was still on active duty, eventually leading to an honorable discharge.³⁶ The veteran underwent a knee operation at a Veterans Administration hospital, but since his knee continued to dislocate frequently, he underwent another operation.³⁷ During this second operation at the Veterans Administration hospital, an allegedly defective tourniquet was used, “as a result of which the nerves in [the veteran’s] leg were seriously and permanently injured.”³⁸ The Court allowed the veteran

29. *Id.* at 141–42. Thus, the parallel private liability required by the FTCA was absent.

30. *Id.* at 142–43 (internal quotation marks omitted) (quoting *United States v. Standard Oil Co. of Cal.*, 332 U.S. 301, 305 (1947)).

31. *Id.* at 143.

32. *Id.* at 143–44.

33. See Cain, *supra* note 5, at 507; *Feres*, 340 U.S. at 144 (“If Congress had contemplated that this Tort Act would be held to apply in cases of this kind, it is difficult to see why it should have omitted any provision to adjust these two types of remedy to each other. The absence of any such adjustment is persuasive that there was no awareness that the Act might be interpreted to permit recovery for injuries incident to military service.”).

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

35. 348 U.S. 110 (1954).

36. *Id.* at 110.

37. *Id.*

38. *Id.* at 110–11.

to recover damages because, unlike the plaintiffs in *Feres*, the injury occurred *after* the veteran was discharged, and thus the injury was not incident to service.³⁹ Nevertheless, Justice Douglas, delivering the opinion for the Court, noted a concern about the potentially damaging effect that future tort actions would have on military discipline, specifically on the “peculiar and special relationship of the soldier to his superiors . . . and the extreme results that might obtain if suits under the [FTCA] were allowed for negligent orders given or negligent acts committed in the course of military duty.”⁴⁰

C. *Feres Questioned and Reaffirmed*

Justice Douglas’s concern in *Brown* about the potential negative effects of tort actions on military discipline was affirmed in a number of subsequent cases,⁴¹ all of which generally called into question the original rationales behind the *Feres* doctrine and focused primarily on a military discipline justification for applying the doctrine. Importantly, in one of these subsequent decisions, *United States v. Shearer*, Chief Justice Burger, focusing primarily on the military

39. *Id.* at 112–13.

40. *Id.* at 112.

41. See *United States v. Shearer*, 473 U.S. 52 (1985); *Chappell v. Wallace*, 462 U.S. 296, 300 (1983) (“[C]enturies of experience have developed a hierarchical structure of discipline and obedience to command, unique in its application to the military establishment and wholly different from civilian patterns. Civilian courts must, at the very least, hesitate long before entertaining a suit which asks the court to tamper with the established relationship between enlisted military personnel and their superior officers; that relationship is at the heart of the necessarily unique structure of the Military Establishment.”); *Stencel Aero Eng’g Corp. v. United States*, 431 U.S. 666, 673 (1977) (“[A]t 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.”); *United States v. Muniz*, 374 U.S. 150, 162 (1963) (finding that “[i]n the last analysis, *Feres* seems best explained” by the military discipline rationale from *Brown*, and extending that rationale to the facts of the case at bar).

In *Shearer*, an Army private was kidnapped and murdered off base by another serviceman who had a previous conviction for manslaughter. *Shearer*, 473 U.S. at 53–54. The mother of the murder victim brought suit against the Government, claiming that the Army knew that the serviceman was dangerous but failed to exert sufficient control over him, failed to warn others that he was at large, and failed to remove him from active military duty. *Id.* at 54, 58. Chief Justice Burger, writing for the Court, found against the plaintiff, relying not on the original three-pronged *Feres* analysis, but instead noting that the “sit[e] 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.” *Id.* at 57 (citation omitted).

discipline rationale, indicated that the original three *Feres* rationales were “no longer controlling.”⁴² Despite the Court’s singular emphasis on the military discipline rationale in its decisions since *Brown*, it eventually revisited the three original reasons given for the *Feres* doctrine and reaffirmed them all in its 1987 decision *United States v. Johnson*.⁴³

1. *United States v. Johnson: Feres Reaffirmed*

Johnson involved a U.S. Coast Guard helicopter pilot stationed in Hawaii. The Coast Guard, after receiving a distress call, dispatched the pilot to locate the call’s origin.⁴⁴ Due to bad weather, the pilot requested radar assistance from the Federal Aviation Administration (“FAA”), a federal civilian agency.⁴⁵ Although the FAA “assumed positive radar control over the helicopter,” the pilot and his crew crashed into the side of a mountain on the island of Molokai.⁴⁶ The pilot’s wife filed suit against the Government, claiming that the FAA flight controllers’ negligence resulted in the death of her husband.⁴⁷ The Court held that the wife’s claim was barred under *Feres*, relying primarily on the facts that the pilot’s death occurred while he was on active duty and that his wife was entitled to some compensation through the Veterans’ Benefits Act.⁴⁸

Of note, in his lengthy dissent in *Johnson*, Justice Scalia argued that there had never been any basis in the FTCA for the Court to exclude tort-related actions against the Government for activities other than “*combatant activities . . . during time of war.*”⁴⁹ As a result,

42. *Shearer*, 473 U.S. at 58 n.4.

43. 481 U.S. 681 (1987).

44. *Id.* at 682–83.

45. *Id.* at 683.

46. *Id.*

47. *Id.*

48. *Id.* at 689, 691–92.

49. *Id.* at 692–93 (Scalia, J., dissenting) (internal quotation marks omitted) (quoting 28 U.S.C. § 2680(j) (emphasis added)). Scalia, a well-known statutory textualist, based his dissent on the fact that the four rationales behind the *Feres* doctrine were not supported by the text of the FTCA. *Id.* at 694–99. Scalia also offered a hypothetical situation to illustrate the confusion of the *Feres* doctrine:

A serviceman is told by his superior officer to deliver some papers to the local United States Courthouse. As he nears his destination, a wheel on his Government vehicle breaks, causing the vehicle to injure him, his daughter (whose class happens to be touring the courthouse that day), and a United States marshal on duty. Under our case law and federal statutes, the serviceman may not sue the Government (*Feres*); the

Justice Scalia laid the groundwork for the Court to overturn the *Feres* doctrine, particularly as it applies to military medical malpractice. Justice Scalia wrote, “The [three original *Feres*] rationales—the only ones actually relied upon 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.”⁵⁰ Still, the military discipline rationale is the rationale least supportable in the military medical context.

III. RATIONALES AGAINST THE *FERES* DOCTRINE IN MEDICAL MALPRACTICE CASES

Justice Scalia’s argument in *Johnson* that the rationales behind the *Feres* doctrine are not supported by the text of the FTCA is only one of many arguments against *Feres*’s continued application, especially in the context of military medical malpractice. First, the doctrine has caused severe confusion among the federal circuits and has resulted in highly disparate outcomes for both service members and their families. Second, military personnel and their families have often suffered atrocious injuries or death without the recourse mechanisms that are available to their civilian counterparts. Third, claims of

guard may not sue the Government (because of the exclusivity provision of the Federal Employees’ Compensation Act (FECA), 5 U.S.C. § 8116); the daughter may not sue the Government for the loss of her father’s companionship (*Feres*), but may sue the Government for her own injuries (FTCA). The serviceman and the guard may sue the manufacturer of the vehicle, as may the daughter, both for her own injuries and for the loss of her father’s companionship. The manufacturer may assert contributory negligence as a defense in any of the suits. Moreover, the manufacturer may implead the Government in the daughter’s suit (*United States v. Yellow Cab Co.*, 340 U.S. 543 (1951)) and in the guard’s suit (*Lockheed Aircraft Corp. v. United States*, 460 U.S. 190 (1983)), even though the guard was compensated under a statute that contains an exclusivity provision (FECA). But the manufacturer may *not* implead the Government in the serviceman’s suit (*Stencel Aero Engineering Corp. v. United States*, 431 U.S. 666 (1977)), even though the serviceman was compensated under a statute that does *not* contain an exclusivity provision (VBA).

Id. at 701–02.

50. *Id.* at 698. Scalia went on to write, “*Feres* was wrongly decided and heartily deserves the ‘widespread, almost universal criticism’ it has received.” *Id.* at 700 (quoting *In re “Agent Orange” Product Liability Litigation*, 580 F. Supp. 1242, 1246 (E.D.N.Y. 1984)). In a footnote, Scalia cited several Court of Appeals cases where that sentiment was shared. *Id.* at 701 n.* (citing examples, including *Sanchez v. United States*, 813 F.2d 593, 595 (2d Cir. 1987); *Bozeman v. United States*, 780 F.2d 198, 200 (2d Cir. 1985); *Hinkie v. United States*, 715 F.2d 96, 97 (3d Cir. 1983); *Mondelli v. United States*, 711 F.2d 567, 569 (3d Cir. 1983); *Scales v. United States*, 685 F.2d 970, 974 (5th Cir. 1982); *Labash v. U.S. Dep’t of Army*, 668 F.2d 1153, 1156 (10th Cir. 1982); *Veillette v. United States*, 615 F.2d 505, 506 (9th Cir. 1980)).

overcompensation or “double recovery” for medical malpractice actions because of statutory military benefits have little merit, and any increased litigation costs could be limited by administrative or judicial action. Finally, the relationship between military medical personnel and other service members is only tangentially related to decision making and military discipline, if at all. As will be discussed below, the Supreme Court’s apprehension to overturning the *Feres* doctrine despite the numerous arguments against its continued application in the context of military medical malpractice is another reason why a Rodriguez-type act is necessary at this time.

A. *Confusing Standards and Disparate Outcomes Among the Circuits*

In *United States v. Stanley*,⁵¹ the Supreme Court suggested that *Feres*’s “incident to service” test was relatively straightforward, saying that it “provides a line that is relatively clear and that can be discerned with less extensive inquiry into military matters.”⁵² Despite this suggestion, there has been an inconsistent application of this test among the federal circuits, leading to confusing standards and disparate outcomes. The Supreme Court’s unwillingness to acknowledge the ambiguity of the test (and decades of inconsistent decisions in the circuit courts) is perhaps the most important reason why Congress should acknowledge that *Feres* continues to pose a problem for service members and their families as it applies to medical malpractice actions. This is why the problem must be immediately corrected through Rodriguez-type legislative action.⁵³ These inconsistent applications are illustrated by examining two lines of cases in the circuit courts: those involving negligent care before conception

51. 483 U.S. 669 (1987).

52. *Id.* at 683.

53. See generally Brou, *supra* note 27, at 73–79, for a discussion of why it is highly unlikely that, even with the new conservatives on the Court, Chief Justice John Roberts and Justice Samuel Alito, the Supreme Court will overturn *Feres* any time soon. While circuit courts have criticized the Supreme Court’s unwillingness to overturn *Feres*, they acknowledge that a judicial modification for military medical malpractice can only come from the Court. In *Peluso v. United States*, 474 F.2d 605 (3d Cir. 1973), for example, the Third Circuit declared:

If the matter were open to us we would be receptive to appellants’ argument that *Feres* should be reconsidered, and perhaps restricted to injuries occurring directly in the course of service. But the case is controlling. Only the Supreme Court can reverse it. While we would welcome that result we are not hopeful in view of the number of recent instances in which, having been afforded the opportunity, it declined to grant certiorari. Possibly the only route to relief is by an application to Congress.

Id. at 606.

or during pregnancy, and those regarding injuries sustained during temporary disability retirement leave.

1. *Negligent Care Before Conception or During Pregnancy*

In order to resolve the *Feres* doctrine problem as it applies to military medical malpractice *as a whole*, the Rodriguez Act should include language concerning injuries not only to the service members, but also to their families. No one will argue that the spouses or children of service members are less deserving of compensation for military medical malpractice than the service members themselves. Unfortunately, the Rodriguez Act, as it is written, does not address the problem of negligent medical care of persons other than active duty service members, as it is limited to “damages relating to the personal injury or death of a member of the Armed Forces of the United States arising out of a negligent or wrongful act or omission in the performance of medical, dental, or related health care functions (including clinical studies and investigations).”⁵⁴ Nevertheless, the *Feres* doctrine has been applied to bar claims of families of service members for medical malpractice. To date, “[t]he most difficult [of these non-service member] situations occur when the victim’s injuries can be tenuously linked to military service.”⁵⁵ Therefore, whether the *Feres* doctrine applies in the context of children that are harmed due to the negligent medical care of their fathers before conception or the prenatal care of their servicewomen mothers while pregnant is much less certain. In fact, the *Feres* doctrine has been applied very differently among the courts, even when the underlying fact situations were relatively similar.

For instance, in 1992, the Fourth Circuit decided *Romero v. United States*,⁵⁶ where an active duty servicewoman was treated by military medical employees in anticipation of her son’s birth.⁵⁷ The servicewoman alleged that her doctor failed to prescribe a medical treatment plan for her incompetent cervix where sutures should have been put in place to prevent expansion of the cervix during premature labor.⁵⁸ As a result, her son was born prematurely with cerebral palsy.⁵⁹ The court

54. H.R. 1478, 111th Cong. § 2(a) (2009).

55. Carpenter, *supra* note 5, at 50.

56. 954 F.2d 223 (4th Cir. 1992).

57. *Id.* at 224.

58. *Id.* at 224–25.

59. *Id.* at 224.

held that the *Feres* doctrine did not bar the suit brought by the child for his injuries because they were not “incident to military service.”⁶⁰ The court reasoned that it was not the mother who had been injured by the improper treatment but rather her child, and any “proper prenatal treatment would [necessarily] have involved his mother’s body.”⁶¹

Similarly, in *West v. United States*,⁶² decided by the Seventh Circuit in 1984, the court held that *Feres* did not bar the claims of a serviceman’s twin daughters who had been born with birth defects, one of whom died within a week of being born, allegedly stemming from the Army’s failure to record the father’s blood type in a pre-induction physical.⁶³ The court reasoned that the threat to military discipline was minimal if the daughter’s claims survived and that none of the other *Feres* rationales were implicated by the claim.⁶⁴ The court added that “[w]hile the doctrine has withstood the test of time, *Feres* and its progeny do not require us to broaden the doctrine beyond the scope of the policies which are its foundation—particularly when we are confronted with purely civilian injuries.”⁶⁵

Other circuits hold contrary views regarding claims for injuries to civilians stemming from medical malpractice suffered by their service member parent. For example, in *Scales v. United States*,⁶⁶ decided by the Fifth Circuit in 1982, the court held that the *Feres* doctrine barred a suit brought by a boy who was born with congenital rubella syndrome resulting from the negligent medical care his mother, an Air Force servicewoman, had received during basic training while pregnant with him.⁶⁷ The claim alleged that medical personnel had been negligent on three different occasions, which taken as a whole, resulted in his condition.⁶⁸ The first act of negligence allegedly occurred when the Air Force medical staff administered a rubella vaccination to his mother without having determined first whether she was pregnant.⁶⁹ The second negligent act was the failure again to ascertain

60. *See id.* at 225.

61. *Id.*

62. 729 F.2d 1120 (7th Cir. 1984).

63. *Id.* at 1121.

64. *Id.* at 1128.

65. *Id.*

66. 685 F.2d 970 (5th Cir. 1982).

67. *Id.* at 971.

68. *Id.*

69. *Id.*

whether she was pregnant when the servicewoman later contracted rubella.⁷⁰ Finally, the Air Force allegedly failed to send for the mother's medical records, which indicated that she was diagnosed with "probable rubella," after they finally discovered she was pregnant.⁷¹

In contrast to the courts in *Romero* and *West*, the *Scales* court reasoned that *Feres* barred the child's claim because the treatment given to the child's mother was "inherently inseparable from the treatment accorded [the child] as a fetus in his mother's body" and the treatment to the mother occurred incident to her service.⁷² The court added that because a suit brought by the child's mother for her *own* treatment would be barred under the military discipline rationale, "then it is impossible to see how the result should be different if [the child] sues the government instead."⁷³ Because the court did not want to second-guess military judgment in a way that was inconsistent with the military discipline rationale, it chose to avoid the issue altogether.⁷⁴

Likewise, in *Irvin v. United States*,⁷⁵ decided by the Sixth Circuit in 1988, an Army servicewoman became pregnant while on active duty and was provided prenatal care by military medical personnel.⁷⁶ Four days after birth, her child died, allegedly as a result of negligent prenatal treatment. The mother brought a suit against the Government for both harm to herself and to her deceased child.⁷⁷ Her complaint incorporated numerous allegations of negligence, including that the Army had prescribed contraindicated medication, had failed to treat and diagnose the pregnancy condition assertively, had treated her as a routine patient despite her medical history to the contrary, and had failed to reclassify her medical situation as urgent when it should have been.⁷⁸

Regarding the mother's individual claim, the court found that, under a "straightforward reading of *Feres*" and its accompanying rationales, the claim was barred because the injuries to her had

70. *Id.*

71. *Id.*

72. *Id.* at 973-74.

73. *Id.* at 974.

74. *Id.*

75. 845 F.2d 126 (6th Cir. 1988).

76. *Id.* at 127.

77. *Id.*

78. *Id.*

occurred “in the course of activity incident to service.”⁷⁹ The court turned next to the child’s claim and held that it too was barred under the so-called “genesis test,”⁸⁰ which had been gaining traction in the circuit courts.⁸¹ Under this test, the claim of a service member’s dependent is barred under *Feres* where the claim “has its ‘genesis’ in an injury to a serviceperson incident to military service.”⁸² Like the court in *Scales*, the *Irvin* court feared that allowing the child’s claim would undermine military authority, and it did not want to second-guess the “Government’s activity in relation to military personnel on active duty.”⁸³

2. *Medical Malpractice-Related Injuries to Military Servicepersons*

Generally, the effect of the *Feres* doctrine is clear: it bars most service members’ claims, including those for medical malpractice.⁸⁴ Still, like claims for negligent prenatal treatment, the courts have been unable to establish consistent interpretive standards when deciding whether claims by service members themselves are barred by *Feres*. This inconsistency is largely the result of confused interpretations of “active duty” and is most obvious in the case of service members who are granted temporary disability retirement leave (“TDRL”). In at least one circuit, TDRL is not considered active duty, and military medical malpractice incident to TDRL is not considered “incident to service” for purposes of the *Feres* bar. Specifically, the Fifth Circuit has concluded in multiple cases including *Cortez v. United States*⁸⁵ and *Harvey v. United States*⁸⁶ that “TDRL status [is] not equal to active duty status because active duty service requires that a service member meet certain health and fitness standards not required of a service member on TDRL.”⁸⁷ In *Cortez*, the court held that a

79. *Id.* at 130.

80. *Id.*

81. *Id.* The court cited three cases where the “genesis test” had been applied: *Lombard v. United States*, 690 F.2d 215, 226 (D.C. Cir. 1982); *Mondelli v. United States*, 711 F.2d 567 (3d Cir. 1983); and *Monaco v. United States*, 661 F.2d 129 (9th Cir. 1981). *Irvin*, 845 F.2d at 130.

82. *Irvin*, 845 F.2d at 130.

83. *Id.* (quoting *Monaco*, 661 F.2d at 134).

84. See, e.g., *Molnar v. United States*, No. 99-3261, 2000 U.S. App. LEXIS 6417 (6th Cir. Mar. 23, 2000); *Jones v. United States*, 112 F.3d 299 (7th Cir. 1997); *Cutshall v. United States*, 75 F.3d 426 (8th Cir. 1996).

85. 854 F.2d 723 (5th Cir. 1988).

86. 884 F.2d 857 (5th Cir. 1989).

87. *Id.* at 860.

negligence claim brought by the wife of a serviceman who committed suicide while on TDRL was not barred by *Feres*.⁸⁸ The serviceman had jumped out of an eighth-floor window when he was left by himself following a failed suicide attempt.⁸⁹ The court found that “the distinction between TDRL status and active duty is maintained throughout the relevant statutes and in the Army regulations,” and thus the injury was not incident to service.⁹⁰

Other circuits, however, have reached the opposite conclusion in cases involving TDRL or terminal leave. For example, in *Kendrick v. United States*⁹¹ military physicians continued to prescribe a toxic drug for a service member on TDRL who suffered from a seizure disorder without proper monitoring, resulting in permanent brain damage.⁹² The Fourth Circuit held that even though the malpractice occurred during the service member’s time on TDRL, he had *also* been misdiagnosed during his time on active duty *before* placement on TDRL, and thus his treatment was incident to service and *Feres*-barred.⁹³

Such inconsistent interpretation of *Feres* among the circuits should encourage the Supreme Court to clarify this decades-old doctrine once and for all, at least as it applies to medical malpractice injuries to service members and their families. Nevertheless, the Court has maintained its position on *Feres* for sixty years, and inconsistent rulings among the circuits will likely continue.⁹⁴ Thus, men and women in military service will continue to suffer the indignity of dying or being injured in circuits where they cannot recover unless Congress passes a Rodriguez-type act to clarify the applicable rule.

88. *Cortez*, 854 F.2d at 724.

89. *Id.*

90. *Id.* at 726.

91. 877 F.2d 1201 (4th Cir. 1989); *see also* *Ricks v. United States*, 842 F.2d 300, 300–01 (11th Cir. 1998) (holding that the medical malpractice suffered by the plaintiff, who was on TDRL but “was subject to . . . a possible return to duty pending the outcome of future physical exams,” was incident to service); *Madsen v. United States ex rel. U.S. Army, Corps of Eng’rs*, 841 F.2d 1011, 1012–13 (10th Cir. 1987) (holding that a service member, who was on terminal leave during the alleged medical malpractice, was nevertheless considered to be on active duty and was therefore barred by the *Feres* doctrine from bringing a suit).

92. *Kendrick*, 877 U.S. at 1201–02.

93. *Id.* at 1203–04.

94. This ambiguity has even caused inconsistent results for *cadets* at the U.S. Air Force Academy. *Compare* *Collins v. United States*, 642 F.2d 217 (7th Cir. 1981) (barring a cadet’s suit for military medical malpractice), *with* *Fischer v. United States*, 451 F.Supp. 918, 921 (E.D.N.Y. 1978) (permitting a cadet’s suit for military medical malpractice).

B. *Military Medical Care*

It was not until 1988 that the Department of Defense began to require all military medical personnel to have a medical license to practice.⁹⁵ Nonetheless, even though military medical personnel are currently required to be licensed, the treatment they provide is often substandard when compared to the treatment received by civilians—a problem exacerbated by the *Feres* doctrine.⁹⁶ For example, a female Army sergeant visited a military hospital complaining of intense abdominal cramps.⁹⁷ Without the sergeant's consent, the attending physician removed one of her ovaries and a fallopian tube.⁹⁸ After the surgery, the doctor denied removing the ovary and told her falsely that she probably never had a second ovary, even though her medical records clearly showed she had both of her ovaries before the procedure.⁹⁹ At the time of the surgery, the sergeant was unaware that the surgeon had been sued as a civilian doctor at least eight times in fifteen years, and in three of the cases, patients had died.¹⁰⁰ Unlike her female civilian counterparts, though, the sergeant was barred from suing to recover damages for these egregious injuries and was limited to standard statutory compensation for military personnel.

95. Department of Defense Authorization Act, 1986, Pub. L. 99-145, § 653, 99 Stat. 583, 657–58 (1985) (codified as amended at 10 U.S.C. § 1094 (2006)). The statute states that “[a] person under the jurisdiction of the Secretary of a military department may not provide health care independently as a health-care professional under this chapter unless the person has a current license to provide such care.” 10 U.S.C. § 1094(a)(1).

96. “[A] person serving on active-duty in peacetime can be subject to grossly negligent medical malpractice by those hired by the Government to maintain his physical health and well-being—yet he cannot seek redress in the courts of this land or in the courts of the military.” 135 CONG. REC. 1029 (1989) (statement of Sen. Sasser). According to Congressman Barney Frank (D-Mass.), this result “effectively gives military doctors, clinics and hospitals license to do less than their best [and] never have to face the consequences.” Editorial, *The Right to Sue*, NAVY TIMES, Mar. 23, 1992, at 35, reprinted in 138 CONG. REC. 7328 (1992).

97. Turley, *supra* note 22, at 63 n.430 (citing Russell Carollo & Jeff Nesmith, *Laws and Rulings Shield Doctors*, DAYTON DAILY NEWS, Oct. 11, 1997, at 1).

98. *Id.* (citing Carollo & Nesmith, *supra* note 97).

99. *Id.* (citing Carollo & Nesmith, *supra* note 97); see also Letter from U.S. Army Colonel Adele Connell to Reps. John Conyers & Steve Cohen (Mar. 24, 2009), in *Rodriguez Act Hearing*, *supra* note 1, at 236, 236–39 (describing how Colonel Connell, who had cancer in her left breast, underwent corrective surgery and was later told that her military doctors had operated on her right breast, removing sixteen lymph nodes from that side and causing permanent burning and tingling in her right arm).

100. Turley, *supra* note 22, at 63 n.430.

In another instance, a military doctor, who delivered pizza and was a telemarketer in addition to his medical duties, failed the standard state medical license exam *eighteen times in five different states* yet was responsible for the health and well-being of service members.¹⁰¹ Yet another example is the *top surgeon* at the Bethesda Naval Hospital, who was charged with five counts of involuntary manslaughter in patients' deaths and twenty-eight other counts of dereliction of duty.¹⁰² He had been hired by the hospital even though he had been dismissed from two previous jobs and suffered from *20/400 vision* in his right eye.¹⁰³

While these examples of the medical care in the military system are horrific and provide motive for reform, no one can deny that there are thousands of men and women currently serving in the military medical field who strive to provide the highest degree of medical care for our soldiers and their families.¹⁰⁴ Nonetheless, that should not take away from the fact that when military service personnel and their families *do* suffer injuries from medical malpractice, they are not afforded an opportunity to recover damages like their civilian counterparts. A 1992 report indicates that, in the military system, there are seven malpractice claims for every 100 physicians, a statistic, that, on its face, would suggest that the military has fifty percent fewer claims than in the civilian system.¹⁰⁵ However, most malpractice claims filed by military personnel are dismissed early pursuant to *Feres*, thus reducing "the liability pressure on military decision-making."¹⁰⁶ The lack of accountability for military hiring practices virtually ensures that the occurrence of medical malpractice will stay at the current level. A Rodriguez-type act from Congress is a needed step toward *reducing* that level and still providing relief to those who will suffer medical malpractice thereafter.

101. *Id.* at 63 n.431 (citing Russell Carollo & Jeff Newsmith, *Special Licenses for Some Doctors*, DAYTON DAILY NEWS, Oct. 8, 1997, at 1).

102. Cain, *supra* note 5, at 524 n.116 (citing Jamie Murphy, *A Naval Surgeon in the Dock*, TIME MAG., Mar. 3, 1986, at 68).

103. *Id.* (citing Murphy, *supra* note 102).

104. Including the author's brother, Second Lieutenant Robert J. Wiltberger, who serves our family and our country proudly in the United States Army.

105. Turley, *supra* note 22, at 60.

106. *Id.* at 61, 65.

C. *Military Compensation and Costs of Litigation*

One of the rationales the Supreme Court has consistently upheld in barring most military medical malpractice claims is the potentially high costs associated with them, both in terms of damage payouts and expensive litigation.¹⁰⁷ Primarily, the prospect of such lawsuits has caused a fear of “double recovery” by service members should their claims be successful.¹⁰⁸ According to the Court in *Johnson*, “[T]he existence of . . . generous statutory disability and death benefits is an independent reason why the *Feres* doctrine bars suit for service-related injuries.”¹⁰⁹ The “double recovery” concern, however, has been consistently attacked as unfounded¹¹⁰ and would be limited by statute under the Rodriguez Act.¹¹¹ Language similar to the Rodriguez Act has been discussed by Major Deirdre G. Brou, a Judge Advocate serving in the U.S. Army, who argues that “[t]he Government can avoid double recovery by establishing the amount of damages through the administrative or judicial process. The Government can then off-set the amount of damages by the value of the veterans benefits the service member or his estate will receive.”¹¹²

Major Brou argues that, despite the fact that in certain cases disability compensation is tax-free and service members receive free or subsidized medical care and prescriptions, injury while on active duty financially imperils many service members and their families.¹¹³ According to Major Brou, this situation arises largely because military entitlements do not take into consideration economic damages, meaning that there is no calculation that accounts for an increased earning potential as a service member ages.¹¹⁴ Moreover, veterans’ benefits do not compensate for noneconomic damages, and thus there is no recovery for physical disfigurement, loss of consortium,

107. *See id.* at 61–67.

108. Brou, *supra* note 27, at 45.

109. *United States v. Johnson*, 481 U.S. 681, 689 (1987).

110. *See, e.g.*, Brou, *supra* note 27, at 45–53; Carpenter, *supra* note 5, at 57–59. For an explanation of how disability retirement benefits are computed and how small these “generous benefits” actually are when stretched over the life of an injured service member, see Wells, *supra* note 5, at 122–24.

111. H.R. 1478, 111th Cong. § 2681(b)(1) (2009) (providing that “[t]he payment of any claim . . . under this section shall be reduced by the present value of other benefits received by the [service] member or the estate, survivors, and beneficiaries of the [service] member”).

112. Brou, *supra* note 27, at 53.

113. *Id.* at 48 & n.312.

114. *Id.* at 49.

emotional distress, or the like.¹¹⁵ Only in the case of a wrongful *death* of a service member are the decedent's survivors allowed to recover damages, limited to the amount of \$500,000.¹¹⁶ However, unless service members, who automatically qualify for this coverage, opt out of it, they have their already low base pay deducted to pay the premiums.¹¹⁷

Coupled with the fear of "double recovery" is the fear of increased litigation costs.¹¹⁸ While litigation, especially with contingency lawyers, would obviously necessitate increased costs for the government, it has been argued that this fear stems largely from the increased public awareness of billion-dollar windfalls coming in highly publicized and disturbing cases in certain industries, most notably in the tobacco sector.¹¹⁹ However, increased costs can be mitigated by an offset mechanism as prescribed in the Rodriguez Act and as suggested by Major Brou. Consequently, the only claims that could benefit financially from litigation would be those involving severely debilitating injuries or death, because only then would the service member or his family recover more than what veteran's benefits provide.¹²⁰ In any case, as some have argued, increasing litigation can actually prove to be positive for the military system, as increased payouts would force the military to reevaluate its medical personnel hiring practices and reduce negligence in its hospitals.¹²¹ With an effective offset mechanism like the one prescribed in the Rodriguez Act, the government's high-cost rationale again overturning *Feres* would no longer be supportable.

115. *Id.*

116. *See id.* at 49–50 & n.321. A huge disparity between families of civilians and military personnel arises in the case of death. While civilian families could potentially recover both life insurance for a decedent *and* damages in civil court for his or her death, military families of deceased military personnel can only recover the military life insurance and statutory dependency compensation, which can be a difference of thousands of dollars. *See id.* at 50; *see also Rodriguez Act Hearing, supra* note 1, at 192 (statement of John D. Altenburg, Jr., Major General (Ret.), U.S. Army) (providing a case study).

117. Brou, *supra* note 27, at 50.

118. Carpenter, *supra* note 5, at 59.

119. *See* Turley, *supra* note 22, at 65.

120. Carpenter, *supra* note 5, at 59.

121. Turley, *supra* note 22, at 65–67.

D. *Military Discipline Rationale*

Despite Justice Scalia's comment in *Johnson* that he believed the military discipline rationale is the best explanation for the *Feres* doctrine,¹²² this rationale is the least supportable in the context of military medical malpractice and, as a result, has been called into question by critics for decades.¹²³ One of the main criticisms is that the "command function" that medical officers have over service persons in their care is extremely limited and even nonexistent in some cases.¹²⁴ Although the Third Circuit, in *Bailey v. DeQuevedo*,¹²⁵ held that military medical officers are in command of service persons in military hospitals,¹²⁶ the occurrence of a military physician serving in a commanding or leadership role over patients is actually very rare.¹²⁷ This "command function" argument put forth by the courts also wrongly assumes that the doctor always outranks the patient.¹²⁸ Moreover, "[t]he patient is under no obligation to follow the 'doctor's orders,' regardless of the rank of the patient or the care provider, any more than a civilian patient would be."¹²⁹ Thus, a patient is not put

122. *United States v. Johnson*, 481 U.S. 681, 698–99 (1987) (Scalia, J., dissenting); see also Robert Cooley, Note, *Method to This Madness: Acknowledging the Legitimate Rationale Behind the Feres Doctrine*, 68 B.U. L. REV. 981, 1001–02 (1988) (arguing the original three rationales of *Feres* fail to justify the decision and thus the military discipline rationale is the only one that does).

123. See Brou, *supra* note 27, at 55–57; Cain, *supra* note 5, at 519–24; Wells, *supra* note 5, at 124–26.

124. In the Navy, for example, medical officers are specifically "precluded from taking command of naval bases, shipyards, ships, submarines or air activities." Wells, *supra* note 5, at 126; see also 32 C.F.R. §§ 700.1054–1058 (2007).

125. 375 F.2d 72 (3d Cir. 1967).

126. *Id.* at 73.

127. Brou, *supra* note 27, at 56.

128. Carpenter, *supra* note 5, at 54.

[N]ot all patients are low-ranking service members. All service members, including high-ranking officers, are treated in military hospitals. If the military discipline rationale could justify the government's immunity, it would preclude only junior service member-patients from suing, but not an officer who outranks the doctor. A service member who outranked the doctor could sue because questioning the actions of the junior doctor would not upset the military discipline system. This rationale, as applied, cannot legitimately justify the government's immunity in *all* medical malpractice cases.

Id. (footnote omitted).

129. *Id.* at 53.

in a situation where he or she “is required to respond to discipline and authority” from their military doctor.¹³⁰

Another criticism of the military discipline rationale is that it is not justifiable in the context of military medical malpractice. The intent behind the rationale, as discussed in *Shearer*, is to protect military policy and administration from being called into question,¹³¹ because allowing claims by military personnel would “allow civil courts to second-guess military decisions.”¹³² However, medical malpractice suits do not call into question military commands, orders, or policies.¹³³ Rather, they call into question the *medical* judgment of the medical personnel only.¹³⁴ Furthermore, it is a rare occurrence when a military medical officer makes a decision on an important military policy that a civil court could call into question, because medical officers usually serve in only one of two roles: either as a staff officer who advises the command staff on medical matters affecting the command, or as a physician whose sole role is to provide medical services.¹³⁵

Despite the criticisms of the military discipline rationale in the context of military medical malpractice, the Supreme Court has repeatedly maintained it.¹³⁶ Although the fear that civil courts might undermine important military decisions on policy is justified outside the realm of medical care, it is highly unlikely that the Court will make an exception for military malpractice cases any time soon, if only because it would open a door for arguments justifying lawsuits in other contexts as well. However, the Rodriguez Act would alleviate the Court’s fears because it provides a legislative exception for medical malpractice cases only.¹³⁷

IV. OTHER PROPOSED SOLUTIONS TO *FERES*

In addition to the Rodriguez Act, other options have been proposed that would either reduce or eliminate the application of the *Feres* doctrine as it applies to medical malpractice cases. One of the

130. Cain, *supra* note 5, at 521.

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

132. Cain, *supra* note 5, at 519.

133. *Id.*

134. *Id.* at 520.

135. Brou, *supra* note 27, at 56.

136. See *supra* note 41 and accompanying text.

137. H.R. 1478, 111th Cong. § 2681(a) (2009).

most widely discussed of these options is the adoption of a narrow, case-by-case application of the discretionary function exception of the FTCA in place of the broad restrictive reading imposed by *Feres*.¹³⁸ This exception bars recovery for claims arising from the discretionary conduct of military personnel.¹³⁹

The Supreme Court, in interpreting the discretionary function exception of the FTCA, has established a two-part test to determine whether this exception precludes a claim against the United States for its employee's negligence.¹⁴⁰ It considers first "whether the challenged actions [are] discretionary, or whether they [are] instead controlled by mandatory statutes or regulations."¹⁴¹ Second, it considers whether the challenged actions are under the rubric of those Congress intended to protect with the FTCA discretionary function exception.¹⁴² Although the circuit courts have allowed medical malpractice suits against the government to proceed in nonmilitary personnel contexts,¹⁴³ they resist doing so for military personnel

138. See Brou, *supra* note 27, at 60–72; Carpenter, *supra* note 5, at 59–67.

139. The discretionary function exception states that the FTCA waiver of immunity does not apply to

claim[s] based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.

28 U.S.C. § 2680(a) (2006).

140. Brou, *supra* note 27, at 65.

141. *United States v. Gaubert*, 499 U.S. 315, 328 (1991).

142. Brou, *supra* note 27, at 65. Major Brou simplifies the test by stating:

Part one of the test requires a court to determine whether statutes, regulations, or policies require certain action. If a statute, regulation or policy requires certain action, government employees have no discretion to act; therefore, when a government employee violates such a law, regulation, or policy, the United States is generally liable for the employee's action. If an employee had the discretion to act, part two of the test requires a court [to] determine whether Congress intended to protect the conduct or the conduct is based upon or susceptible to public policy considerations. If Congress intended to protect the conduct or if the conduct involved policy considerations, the discretionary function exception generally bars recovery under the Federal Tort Claims Act.

Id. at 65–66 (footnotes omitted).

143. See, e.g., *Keir v. United States*, 853 F.2d 398, 408–09 (6th Cir. 1988) (holding that because a government doctor failed to follow standard procedure and refer a patient to an eye specialist, who would have discovered the patient had a tumor, the suit was not barred); *Rise v. United States*, 630 F.2d 1068 (5th Cir. 1980) (holding that a military doctor's decision to send the spouse of an active duty serviceman to a civilian doctor who failed to diagnose a carotid aneurysm surgery was not discretionary but simply part of the care required of the military

simply because of the blanket bar provided by *Feres*.¹⁴⁴ However, because of the case-by-case flexibility provided by the discretionary function exception, courts would be allowed to look at every claim individually, thus helping to alleviate the plague of inconsistent results for military personnel and their families.¹⁴⁵ Nonetheless, while the discretionary function exception is a step in the right direction toward eventually overturning *Feres* in the military medical malpractice context, its problem lies in the fact that it is up to the discretion of the courts to apply it. Unlike a Rodriguez Act, nothing at this point would force either the Supreme Court or the circuit courts to open the exception to military personnel. Given the Supreme Court's decades of unwillingness to overturn or at least make an exception to *Feres* for military medical malpractice, it is highly unlikely that the Supreme Court will allow the discretionary function exception to be applied in military medical malpractice cases in the near future.

Congress has had many opportunities to implement legislation to force the Supreme Court to reduce or eliminate the application of *Feres* to military personnel for medical malpractice, but it has always resisted doing so. Though ultimately unsuccessful, a Rodriguez-type act was proposed in 1985 to allow an active-duty service member to bring claims for injury or death "if the claim arises out of medical or dental care furnished [to] the member in a Department of Defense hospital."¹⁴⁶ Similar bills were proposed in the 1980s as well, including two that passed the House of Representatives but died in the

doctor in providing nonnegligent medical services); *Supchak v. United States*, 365 F.2d 844 (3d Cir. 1966) (allowing a claim against a military hospital for the death of a veteran because the veteran was prematurely discharged when the medical service was not performed with reasonable care).

144. See Carpenter, *supra* note 5, at 66.

145. *Id.* Carpenter adds:

Due to the special nature of medical malpractice suits, the *Feres* doctrine must be eliminated to produce consistent results across jurisdictions. Cases decided using the discretionary function exception would provide uniformity and predictability, which are necessary in [the military medical malpractice] context because of the nation-wide interest at stake and the required mobility of the armed forces. The federal government can protect vital decision-making processes when necessary and maintain [the] protection for individual doctors without eliminating the legitimate claims of medical malpractice victims. By using the discretionary function exception analysis, courts would apply a uniform national standard to medical malpractice claims under the FTCA, and provide a remedy to victims not currently available in certain jurisdictions.

Id. at 66–67 (footnote omitted).

146. Turley, *supra* note 22, at 85 n.576.

Senate.¹⁴⁷ Despite repeated pleas by the Supreme Court for Congress to alter *Feres* because the Court feels its hands are tied on the issue,¹⁴⁸ Congress has repeatedly ignored the issue until the Rodriguez Act was reintroduced in 2009, with the United States embroiled in two foreign wars where the exit strategy has not been determined and complete departure seems unlikely in the near future.

V. CONCLUSION

Medical malpractice, whether in the civilian or military context, is inevitable. However, thousands of service members and their families currently face the real possibility of military medical negligence without clear recourse in the courts and with compensation severely limited by statute—a conundrum that their civilian counterparts do not have to endure. Furthermore, as has been discussed, the military discipline rationale behind the *Feres* doctrine, the supposedly only remaining explanation for *Feres* according to Justice Scalia, is the least supportable in the military medical malpractice context. This Note has not argued that *Feres* should be completely overturned by Congress, because the doctrine as a whole “serves the important function of preserving military decision making and preventing legal liability considerations from tainting the military decision making process.”¹⁴⁹ Rather, Congress should—with support from the Obama Administration—recognize that military personnel and their families have been subjected to vastly inequitable treatment for medical malpractice for sixty years, acknowledge that the solution to this problem will not come from the Supreme Court, and pass legislation that affords service members like Carmelo Rodriguez and their families an opportunity to recover for their losses that is on par with their civilian

147. H.R. 536, 101st Cong. (1989); H.R. 1054, 100th Cong. (1988). Legislative history for both bills can be found at www.thomas.gov.

148. See *United States v. Shearer*, 473 U.S. 52, 59 (1985) (“We hold that Congress has not undertaken to allow a serviceman or his representative to recover from the Government for negligently failing to prevent another serviceman’s assault and battery.”); *Chappell v. Wallace*, 462 U.S. 296, 304 (1983) (“Congress, the constitutionally authorized source of authority over the military system of justice, has not provided a damages remedy for claims by military personnel Any action to provide a judicial response by way of such a remedy would plainly be inconsistent with Congress’ authority in this field.”).

149. Brou, *supra* note 27, at 80.

Spring 2010]

MILITARY MEDICAL MALPRACTICE

499

counterparts.¹⁵⁰ With how much sacrifice they have had to make for us, that is the least we can do for them.

150. On March 24, 2009, the Subcommittee on Commercial and Administrative Law of the House Judiciary Committee held a hearing on H.R. 1478, where Congressman Hinchey and others were invited to voice their opinions on Hinchey's bill. Of note, Major General John D. Altenburg, Jr., U.S. Army (Ret.), testified that, while in his belief the Rodriguez Act would lead to disparate results in compensation, undue burdens on the military and the government, and would negatively impact military readiness, increased compensation for medical malpractice in some form would be a positive step toward helping military servicemen and their families recover for their medical malpractice-related injuries. *Rodriguez Act Hearing, supra* note 1, at 138–40, 142–44 (statement of John D. Altenburg, Jr., Major General (Ret.), U.S. Army). General Altenburg stated, "To the extent Congress believes current Department of Defense and Veterans Administration compensation is inadequate, that system should be modified immediately to provide the kind of compensation the family of Staff Sergeant Rodriguez and others deserve." *Id.* at 145. Further, Congressman Barney Frank, a member of the House Armed Services Committee, who is against passage of the Rodriguez Act, nevertheless noted, "[I]f the current no-fault military compensation program needs to be improved, if additional funding or other reform is needed, then we should improve that program. There is not excuse [sic] for providing our troops less compensation than they deserve." *Id.* at 7 (statement of Rep. Frank). If Congress is hesitant to pass tort-based legislation such as H.R. 1478, then Congress must immediately find some other way to compensate the members of the U.S. Armed Forces and their families for their medical malpractice-related injuries. Finally, as Congressman Frank mentioned at the hearing, "one of my greatest responsibilities as a Member of Congress is [to look after] the needs and the interests of those men and women who put their lives on the line for the sake of this country." *Id.* It is now the time for Congressman Frank and his colleagues on Capitol Hill to fulfill that responsibility.