



Center for Justice & Democracy's
Public Policy Clinic
New York Law School
185 West Broadway
New York, NY 10013

MEMORANDUM IN SUPPORT OF BILL TO OVERTURN FERES DOCTRINE FOR MEDICAL MALPRACTICE VICTIMS

Bill would allow recourse for military servicemembers injured by medical malpractice

Introduction and Summary

For the past 69 years, servicemembers who are the victims of sexual assault, toxic poisoning, medical negligence, or any other non-combat related harm, have been blocked from any legal resource in court. This is a result of a doctrine, known as the “Feres Doctrine,” which was created by the U.S. Supreme Court in a misguided 1950 decision that expanded governmental immunity in ways that Congress never intended.¹ The Court left it to Congress to fix the law,² and indeed, for many years, Congress has tided. However, bills has never reached a vote. We hope the 116th Congress is different.

While we would support Congress completely overturning the Feres Doctrine entirely, we support any legislation that would restore at least some legal rights to servicemembers. Past bills have focused specifically on medical malpractice victims harmed or killed in military hospitals, and we understand that this will be approach in the 116th Congress. This legislation would allowing the servicemen who suffer medical malpractice in military hospitals to file a claim under the Federal Tort Claims Act (FTCA). We strongly support this bill.

What is the Feres Doctrine?

The 1946 Federal Tort Claims Act (FTCA) allows injured or harmed individuals to sue the United States for negligence, and lays out precise procedures for doing so.³ However, mindful of the need to protect the government from certain kinds of lawsuits, Congress

¹ *Feres v. United States*, 340 U.S. 135(1950).

² Melissa Feldmeier, [At War with the Feres Doctrine: The Carmelo Rodriguez Military Medical Accountability Act of 2009](#), 60 Cath. U.L. Rev. 145 (2011); [“It’s a Scandal”- Inside The Fight To Hold the Military Accountable For Medical Malpractice](#), Task and Purpose, (November 16, 2018, 1:03 PM), <https://taskandpurpose.com/feres-doctrine-military-medical-malpractice>

³ Richard S. Lehmann, [The Effect of the Feres Doctrine on Tort Actions Against the United States by Family Members of Servicemen](#), 50 Fordham L. Rev. 1241, (1982); Nick Schwellenbach, [House Committee Moves to Allow Suits for Military Medical Malpractice](#), The Center for Public Integrity, (May 19, 2014, 12:19 PM), <https://publicintegrity.org/national-security/house-committee-moves-to-allow-suits-for-military-medical-malpractice/>

enumerated 13 exceptions in the FTCA.⁴ Among them was the combatant exception, which Congress intended to prohibit combatant-related claims during war.⁵ Congress made no mention of exempting claims arising from noncombatant activities.

However, in the 1950 *Feres* case, the U.S. Supreme Court greatly broadened the combatant exception.⁶ The Court held that the FTCA did not waive sovereign immunity with respect to injuries incurred by servicemen incident to their military service, and barred servicemembers from suing the government for their injuries incurred incident to their service.⁷

As a result of this decision, servicemembers lost important rights. For example, when it comes to medical negligence, the even federal prisoners and undocumented immigrants have rights to sue the federal government, but military servicemembers cannot.⁸

Feres has been condemned as being one of the most unjust and unprincipled decisions in American jurisprudence.⁹ *Feres* opponent, the late U.S. Supreme Court Justice Antonin Scalia, in a case reaffirming the decision, dissented stating that “*Feres* was wrongly decided, and heartily deserves the ‘wide spread, almost universal criticism’ it has received.”¹⁰

Impact of *Feres* on Service Members Injured by Medical Malpractice

Imagine that a servicemember who is willing to die for their country, makes it out of war alive, only to come home and be severely and permanently injured at the hands of negligent military doctors. Under *Feres*, that servicemember has no recourse.

A good illustration is the case of the late Marine, Carmelo Rodriguez, in whose name the 111th Congress’ legislation was named. In 1997, U.S. military staff screened Rodriguez for skin cancer, found a melanoma, but did nothing. He saw many doctors over the next several years, none of whom diagnosed his growing cancer. In 2006, nine years after his initial diagnosis, a

⁴ Federal Tort Claims Act (Codified at 28 U.S.C. § 1346(b), 2680(2006)).

⁵ 28 U.S.C. § 1346(b), 2680 (j).

⁶ See, Popper, Andrew F., *Rethinking Feres* (January 25, 2019). Boston College Law Review, Vol. 60, No. 6, 2019. Available at SSRN: <https://ssrn.com/abstract=3322838>; Nick Schwellenbach, *House Committee Moves to Allow Suits for Military Medical Malpractice*, The Center for Public Integrity, (May 19, 2014, 12:19 PM), <https://publicintegrity.org/national-security/house-committee-moves-to-allow-suits-for-military-medical-malpractice/>; Richard S. Lehmann, *The Effect of the Feres Doctrine on Tort Actions Against the United States by Family Members of Servicemen*, 50 Fordham L. Rev. 1241, (1982).

⁷ Richard S. Lehmann, *The Effect of the Feres Doctrine on Tort Actions Against the United States by Family Members of Servicemen*, 50 Fordham L. Rev. 1241, (1982); Melissa Feldmeier, *At War with the Feres Doctrine: The Carmelo Rodriguez Military Medical Accountability Act of 2009*, 60 Cath. U.L. Rev. 145 (2011).

⁸ Maurice Hinchey, *The Carmelo Rodriguez Military Medical Accountability Act of 2007*, Vote Smart, (July 9, 2008), <https://votesmart.org/public-statement/359208/the-carmelo-rodriguez-military-medical-accountability-act-of-2007#.XH1fu4hKjIV>

⁹ Melissa Feldmeier, *At War with the Feres Doctrine: The Carmelo Rodriguez Military Medical Accountability Act of 2009*, 60 Cath. U.L. Rev. 145 (2011).

¹⁰ *United States v. Johnson*, 481 US 681, 700 (1987) (Scalia dissenting).

doctor finally diagnosed stage III melanoma. By then, the cancer had spread throughout his body. He died at age 29, leaving behind his family, including his 7-year-old son.¹¹

Under Feres, Rodriguez's family was provided no meaningful recourse for repeated medical negligence. Because of situations such as this, medical malpractice in military hospitals goes completely unchecked. Allowing medical malpractice cases to be filed would force better practices in military medical care, reduce risky behavior, expose problems in the military medical system, and drive the government to improve its standard of medical care.¹²

What We Support

We support the reintroduction of legislation similar to the "Carmelo Rodriguez Military Medical Accountability Act" which would allow suits for "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...provided by a person acting...by or at the direction" of the United States Government.¹³ This language would allow members of the military some recourse for military medical malpractice.¹⁴

Why Opponents to This Legislation are Incorrect

Opponents to the bill may argue that if servicemembers are permitted to bring FTCA claims against negligent military doctors, military order and discipline may be disrupted due to the peculiar and special relationship of the soldier to their superiors. But when it comes to negligent health care in a military hospital, such an argument makes no practical sense, nor is there any actual evidence to support this notion. This is no connection between military discipline or orders from a superior, and providing legal recourse to a servicemember as a result of harm caused by medical malpractice, which is only incident to military service.¹⁵

Opponents may also argue that there is already compensation available for military personnel and their families for injury or death, such as disability compensation and life insurance programs, which do not require proof of fault and remove the uncertain nature of tort litigation. However, this is inadequate and not comparable to compensation available from a

¹¹ Maurice Hinchey, *The Carmelo Rodriguez Military Medical Accountability Act of 2007*, Vote Smart, (July 9, 2008), <https://votesmart.org/public-statement/359208/the-carmelo-rodriguez-military-medical-accountability-act-of-2007#.XH1fu4hKjIV>

¹² "It's a Scandal"- Inside The Fight To Hold the Military Accountable For Medical Malpractice, Task and Purpose, (November 16, 2018, 1:03 PM), <https://taskandpurpose.com/feres-doctrine-military-medical-malpractice/>; Nick Schwellenbach, *House Committee Moves to Allow Suits for Military Medical Malpractice*, The Center for Public Integrity, (May 19, 2014, 12:19 PM), <https://publicintegrity.org/national-security/house-committee-moves-to-allow-suits-for-military-medical-malpractice/>

¹³ Carmelo Rodriguez Military Medical Accountability Act of 2009, H.R. 1478, 111th Congr. (2010).

¹⁴ Maurice Hinchey, *The Carmelo Rodrigues Military Medical Accountability Act of 2007*, Vote Smart, <https://votesmart.org/public-statement/359208/the-carmelo-rodriguez-military-medical-accountability-act-of-2007#.XHq8AYhKjIU>

¹⁵ Richard S. Lehmann, *The Effect of the Feres Doctrine on Tort Actions Against the United States by Family Members of Servicemen*, 50 Fordham L. Rev. 1241, (1982).

medical malpractice FTCA claim.¹⁶ If a judge encountered the rare case where a servicemember already collected compensation, the judge would likely offset that amount from their reward and avoid “double dipping.”

There is no evidence that frivolous suits would be filed, or excessive damages would be awarded if this bill were to pass. The FTCA already provides restrictions such as a ban on punitive damages, limitations on the right to a jury trial, caps on attorneys’ fees, a requirement for an exhaustion of administrative remedies, a bar for claims stemming from injuries sustained abroad, and a bar on claims stemming from injuries sustained in combat or armed conflict.¹⁷ Allowing servicemembers to sue for the medical malpractice under the FTCA would be subject to these restrictions and would act as a bar on frivolous claims and excessive damages.

Bill Supporters

It is likely this bill will have widespread support among military and veterans groups, including Veterans Equal Rights Protection Advocacy and the Military Officers Association of America.¹⁸

Conclusion

For nearly 70 years, the Feres Doctrine has had unfair and unjust results on servicemembers who are are injured in non-combatant activities. It is time for Congress to start fixing the Feres decision, beginning with restoring rights to those injured by negligent military medical care. By barring claims against negligent military doctors, this doctrine not only harms individuals servicemembers, but also allows substandard medical care to proliferate in military hospitals. To maintain a bar for such suits from people who fight for our country is against all principles of fairness and justice.

For more information, please contact student Rachel Tarzia, Rachel.Tarzia@law.nyls.edu or Adjunct Professor and Executive Director of the Center for Justice & Democracy at βNew York Law School, joanned@centerjd.org.

¹⁶ “It’s a Scandal”- Inside The Fight To Hold the Military Accountable For Medical Malpractice, Task and Purpose, (November 16, 2018, 1:03 PM), <https://taskandpurpose.com/feres-doctrine-military-medical-malpractice>; Melissa Feldmeier, *At War with the Feres Doctrine: The Carmelo Rodriguez Military Medical Accountability Act of 2009*, 60 *Cath. U.L. Rev.* 145 (2011).

¹⁷ 28 U.S.C. §§ 1346(b), 2671-2680 (2006).

¹⁸ <http://www.moaa.org/takeaction/>

APPENDIX VICTIM STORIES

Carmelo Rodriguez

In 1997, Marine Carmelo Rodriguez was screened during a physical performed by U.S. military staff which concluded that Rodriguez had melanoma present on his right buttock; the military staff took no action. Again in 2003, during a prescreening for a foot surgery, a military doctor noted a “birthmark” on Rodriguez, but again, no action was taken. In 2005, while deployed in Iraq, Rodriguez saw a doctor for the growth; he was told to keep it clean and see a doctor when he returned to the states. In 2005 he saw the same doctor and was referred to a dermatologist to have the “birthmark” removed. In 2006, nine years after the military doctors initially discovered Rodriguez’s melanoma, his “birthmark” began bleeding and pussing, a doctor finally told him he had stage III melanoma. By then, the cancer had spread to his lymph nodes, liver, kidney, stomach, and throughout his body. It was too late. At the age of 29, the once young, strong, dedicated member of the Armed Forces died from a skin cancer that could have been treatable had it been caught much earlier. Rodriguez left behind his family, including his 7-year-old son. They were blocked from filing a claim for medical malpractice due to the Feres Doctrine.¹⁹

Captain Heather Ortiz

Captain Heather Ortiz was admitted to the Evans Army Community hospital for a scheduled C-section. The staff negligently administered a drug that she was allergic to. To stop the allergic reaction, the staff gave her Benadryl. The Benadryl caused a drop in her blood pressure and hypotension that caused the baby to be deprived of oxygen in utero, leading to severe injuries including brain trauma and cerebral palsy. The Captain’s husband brought suit for compensation for the child’s injuries, long-term medical care, and life needs. The lower court ruled Feres Doctrine blocked his lawsuit because the child’s injuries were derivative of the injury to the mother, the Captain.²⁰ The case ultimately settled before the U.S. Supreme Court could hear the case.

Airforce Staff Sargent Dean Patrick Witt

Sargent Witt underwent a routine surgery for acute appendicitis. A series of errors occurred: they moved Witt to the pediatric area where undersized devices could not fit a grown adult, the nursing staff mistakenly administered a double dose of a powerful stimulant, and the staff improperly inserted Witt’s breathing tube. Witt was left with severe brain damage. Three months later he was taken off life support, leaving behind his family and two children. Despite medical negligence, the family could not bring a claim because of the Feres Doctrine.²¹

¹⁹ Statement by Rep. Maurice Hinchey, U.S. House of Representatives, The Carmelo Rodriguez Military Medical Accountability Act of 2007, Vote Smart, (July 9, 2008), <https://votesmart.org/public-statement/359208/the-carmelo-rodriguez-military-medical-accountability-act-of-2007#.XH1fu4hKjIV>

²⁰ Ortiz v. United States Evans Army Community Hospital, 786 F.3d 817 (2015).

²¹ “It’s a Scandal”- Inside The Fight To Hold the Military Accountable For Medical Malpractice, Task and Purpose, (November 16, 2018, 1:03 PM), <https://taskandpurpose.com/feres-doctrine-military-medical-malpractice>