

The Feres Doctrine: Defense Policy in Need of Change

Imagine two men, specifically twin brothers, who have led exceptionally different lives. The first brother went to Yale, received a degree in finance, and by the time he was 30, had amassed a fortune in the tens of millions of dollars. At 31, his conspicuously extravagant lifestyle was curtailed when he went to federal prison for fraud. The second brother joined the Army at 18, and spent his formative years training and deploying into hostile environments. By the age of 31, the second brother has earned a Bronze Star with Valor and two Purple Hearts over the course of five deployments to Iraq and Afghanistan. At the age of 32, government doctors, through which the brothers receive their medical care (one in the federal prison, one in military hospitals), misdiagnosed an easily treatable side effect of their Type 2 diabetes, and both brothers lost their left leg. The first brother, the ex-Wall Street baron and felon, is able to file a medical malpractice suit against the government. The second brother cannot file a suit against the government, even though the situation is exactly the same. How is it possible that a prisoner in a federal prison has more rights than an Army soldier serving their country?

To fully understand how that is possible as well as potential solutions, one must first consider the historical concepts of sovereign immunity and the system of laws the government has put in place to allow that sovereign immunity to be breached. Then, it is critical to consider the last 70 years of jurisprudence and legislative actions that started after passage of the Federal Torts Claim Act in 1946, followed by the seminal Supreme Court case, *Feres vs. US*¹. Only then will we explore the current state of affairs and how opponents of the “Feres Doctrine” might possibly overturn that Supreme Court precedence.

History of Claims against the US

According to American University law professor, Paul Figley, the doctrine of sovereign immunity,

*“as it is understood in American jurisprudence, provides that a sovereign state can be sued only to the extent that it has consented to be sued and that such consent can be given only by its legislative branch. Unless Congress has enacted an applicable waiver of the United States’ sovereign immunity, the federal government cannot be sued for damages.”*²

Until 1946, the Congress dealt with specific instances of waiving the government’s immunity on an ad hoc basis by the introduction of private bills for specific circumstances. For example, if an errant pilot crash landed his plane in a farmer’s field, the farmer could petition the Congress for individual reimbursement through a private bill, introduced and passed on its own merits.

1. *Feres vs. US*, 340 U.S. 135 (1950)

2. Paul Figley, *In Defense of Feres: An Unfairly Maligned Opinion*, *American University Law Review*, Am. U. L. Rev. 393 (2010-2011), pg. 397.

This system significantly impacted Congress's ability to focus on its other duties, and so, the Federal Torts Claim Act (FTCA) was created in 1946. The purpose of this bill was to create a logical system for consideration of claims against the government. Built within this new law were 13 exceptions to this waiver of sovereignty, three of which could be considered to apply to service members:

1. *Any claim 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 is 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 abuse.*
2. *Any claim arising out of the combatant activities of the military or naval forces, or the Coast Guard, during time of war.*
3. *Any claim arising in a foreign country*³

At least on face value, many legal scholars believe that these exceptions were meant to ensure that the government would not be sued for matters relating to military training, combat, or discipline. This immediately becomes a contentious issue for the courts to consider.

Court Cases

In 1949, in *Brooks vs. US*, the US Supreme Court reviewed the case of a soldier who was hit by an Army truck driven by a civilian, while the soldier was on leave. The exceptions just mentioned came into play in the Supreme Court's reasoning. Responding to the request of the government to dismiss the case, the court stated:

*"We are not persuaded that 'any claim' means 'any claim but that of servicemen.' The statute does contain twelve exceptions. 421 (now 28 USCA 2680). None exclude petitioners' 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."*⁴

3. Federal Torts Claim Act, 28 USC 2680, 1346(b) retrieved from <http://www.law.cornell.edu/uscode/text/28/2680>

4. *Brooks vs. US*, 337 U.S. 49 (1949), pg. 51.

With the war having ended just a year prior to the original FTCA being passed, the Supreme Court notes the absurdity to think that servicemen hadn't been considered in the discussion and that the exceptions listed should already cover them.

The Court reversed this position significantly just a year later, in 1950, when the Supreme Court reviewed the FTCA again in *Feres vs. US* (which was actually three trial cases combined into one). In *Feres*, the court came to a different conclusion than in *Brooks vs. US*, primarily due to the duty status (leave vs. not on leave), to come to the conclusion that the government had not waived its sovereign immunity in these cases. The court came to its conclusion based on three primary reasons:

1. *“One obvious shortcoming in these claims is that 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. [Footnote 10] Nor is there 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.*
2. *It is not without significance as to whether the Act should be construed to apply to service-connected injuries that it makes " . . . the law of the place where the act or omission occurred" govern any consequent liability....But a soldier on active duty has no such choice, and must serve anyplace or, under modern conditions, any number of places in quick succession in the forty-eight states, the Canal Zone, or Alaska, or Hawaii, or any other territory of the United States. That the geography of an injury should select the law to be applied to his tort claims makes no sense...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.”*
3. *This Court, in deciding claims for wrongs incident to service under the Tort Claims Act, cannot escape attributing some bearing upon it to enactments by Congress which provide systems of simple, certain, and uniform compensation for injuries or death of those in armed services. We might say that the claimant may (a) enjoy both types of recovery, or (b) elect which to pursue, thereby waiving the other, or (c) pursue both, crediting the larger liability with the proceeds of the smaller, or (d) that the compensation and pension remedy excludes the tort remedy. There is as much statutory authority for one as for another of these conclusions. 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.”⁵

This decision in *Feres vs. US* has come to be called the “Feres Doctrine”. It is this decision which has created such peculiar outcomes as the one which introduced this paper.

Four years later, the Supreme Court again tweaked its interpretation, adding a fourth reason in *Brown vs. US*. Though the Supreme Court actually found for the veteran in this case, it noted that, had Brown not been a veteran,

“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.”⁶

This ambiguous addition of “discipline” was, like much of the *Feres* decision, the Supreme Court strongly interpreting the FTCA in favor of the government.

Over the course of the next forty years, a variety of cases came before district and appellate courts, only to be denied on the basis of the *Feres* Doctrine. It was not until 1987, in *Johnson vs. US*, that a serious threat was made to the underlying rationale of *Feres vs. US*.

LCDR Johnson was a Coast Guard helicopter pilot that was killed when the FAA allegedly flew him into a mountain. The primary differentiator between Johnson and other cases was that the FAA is a civilian agency, with civilian air traffic controllers. The specific chain of events and causation which led to LCDR Johnson’s death had nothing to do with the military chain of command or military orders, and the original Court of Appeals agreed with that assessment. However, when heard at the Supreme Court, the court found 5-4 in favor of the government’s request for dismissal. The court stated,

“In every respect, the military is, as this Court has recognized, "a specialized society." [T]o accomplish its mission, the military must foster instinctive obedience, unity, commitment, and esprit de corps. 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 service members against the Government for service-related injuries could

5. *Feres vs. US*, 340 U.S. 135, 141 (1950), pg 141-143.

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

*undermine the commitment essential to effective service, and thus have the potential to disrupt military discipline in the broadest sense of the word.”*⁷

The result of this Supreme Court decision and follow-on cases has been to expand the “incident to service” test to consider all service-related injuries and indicated that everything a service person did was related to their service, whether on leave or not. The dissent offered by the then relatively new Associate Justice Scalia was compelling. Regarding the FTCA, he stated,

*“Read as it is written, this language renders the United States liable to all persons, including servicemen, injured by the negligence of Government employees. Other provisions of the Act set forth a number of exceptions, but none generally precludes FTCA suits brought by servicemen. One, in fact, excludes “[a]ny claim arising out of the combatant activities of the military or naval forces, or the Coast Guard, during time of war,” § 2680(j) (emphasis added), demonstrating that Congress specifically considered, and provided what it thought needful for, the special requirements of the military. There was no proper basis for us to supplement -- i.e., revise -- that congressional disposition.”*⁸

Commenting on the original Feres opinion, Scalia notes

*“Feres was wrongly decided, and heartily deserves the widespread, almost universal criticism it has received. Had Lieutenant Commander Johnson been piloting a commercial helicopter when he crashed into the side of a mountain, his widow and children could have sued and recovered for their loss. But because Johnson devoted his life to serving in his country's Armed Forces, the Court today limits his family to a fraction of the recovery they might otherwise have received. If our imposition of that sacrifice bore the legitimacy of having been prescribed by the people's elected representatives, it would (insofar as we are permitted to inquire into such things) be just. But it has not been, and it is not. I respectfully dissent.”*⁹

Justice Scalia’s scathing dissent lays out the ground work from which to consider further actions by opponents of the Feres Doctrine and their analysis of where to push the Congress to take action.

Congressional Inaction

Congress has in fact considered the repeal of the Feres Doctrine a number of times. To date, there has never been the will in both Houses of Congress simultaneously to see repeal through to the end. Each time Congress considers the Feres Doctrine, it is in response to a horrific outcome that the people’s representatives can’t quite come to terms with as being fair.

7. United States v. Johnson. 481 US 681, 690 (1987), pg.690-91.

8. United States v. Johnson. 481 US 681, 693 (1987).pg. 693.

9. United States v. Johnson. 481 US 681, 693 (1987).pg. 703.

Congressional hearings have been held and bills filed over the course of the last seventy some odd years, usually in response to outrageous cases of military medical malpractice.

In the 98th Congress, HR 1942 was introduced and subcommittee hearings were held. Congressman Barney Frank, in what would become a two decade effort, introduced HR 1161(later changed to HR 3174) in the 99th Congress. After subsequent hearings and a floor vote (passed 317-90), the bill was sent to the Senate Judiciary Committee, where it failed to even be considered.

In 1998 (and 1999), subsequent to the 1994 friendly fire shooting down of two Blackhawk helicopters, hearings were held in the House Judiciary Committee to consider new inconsistencies related to the Feres Doctrine. In the incident, foreign nationals were killed alongside US military personal. The investigation of the incident determined that a chain of incompetence and avoidable mistakes led to the shoot down of the helicopters. For what he called humanitarian reasons, then Defense Secretary William Perry authorized \$100,000 compensation for the foreign nationals killed, but no similar funds were paid to survivors of the US military personnel. Secretary Perry stated that the Feres Doctrine was the basis upon which he relied not to pay the same to the families of the US military personnel. Georgia Representative Mac Collins, in testimony before the committee noted,

*"I believe it is unconscionable that our American government, particularly the Department of Defense, would provide benefits to foreign nationals that are not even offered to our own U.S. service members who have made the ultimate sacrifice for our country."*¹⁰

H.R. 456, a private bill, was finally passed by the Congress in 1999 authorizing the payments to the survivors of the US service members killed.

In 2002, the Senate Judiciary Committee held hearings on the Feres Doctrine issue. This was in response to the murder of Ensign Kerry O'Neil, then a recent Naval Academy grad, who was killed by a psychotic classmate, who the Navy failed to screen appropriately. Again, no legislative change was made.

A number of high profile incidents occurred over the subsequent years. In 2003, Air Force SSgt Dean Witt went into surgery for a routine appendectomy. A series of mistakes, including trying to intubate him with pediatric equipment, led the SSgt to go without oxygen for an extended period of time and left him in a persistent vegetative state. His family eventually took him off life support and he passed away. In 2006, a scarily similar incident occurred to Marine Cpl. Yuriy Zmysly, when his breathing tube was taken out prematurely after a routine appendectomy. In 2006, Petty Officer Nathan Hafterson died during a routine medical

10. Representative Mac Collins (GA-3), " H.R. 4061 and H.R. 2986: Justice for U.S. Victims of the Black Hawk Shootdown." <http://judiciary.house.gov/legacy/6133.htm>, 1998.

procedure when the staff failed to administer medicine properly. In 2009, Airman Colton Read lost both his legs after military doctors accidentally sliced open his aorta during a routine gallbladder removal.

Of all these, perhaps the one which had the most impact was that of Sgt. Carmelo Rodriguez, USMC. Over the course of a number of years, including in his entrance physical, military doctors noted but did nothing about Sgt. Rodriguez's skin cancer. What was diagnosed on his entrance physical as a melanoma was first ignored, then misdiagnosed, treated as a wart, and then finally treated properly as cancer almost 8 years later. By then, it was too late, as his melanoma has grown too large and aggressive. He passed away in November of 2007. A year and a half later, the House Judiciary Committee, at the behest of Representative Maurice Hinchey (NY-22 and Sgt. Rodriguez's representative), held hearings on the Feres Doctrine. In that hearing, they played the CBS Evening News report where Byron Pitts had come out to interview Sgt. Rodriguez (now retired) and his family. In a dramatic interview, Sgt. Rodriguez and the family met with Byron Pitts, and then eight minutes later Sgt. Rodriguez passed away.¹¹ Representative Hinchey, over the course of 110th and 111th Congress, introduced two bills in the House (HR 6093 and HR 1478), titled the Carmelo Rodriguez Military Medical Accountability Act. The purpose of HR 1478 was,

*"To amend chapter 171 of title 28, United States Code, to allow members of the Armed Forces to sue the United States for damages for certain injuries caused by improper medical care, and for other purposes..... this section does not apply to any claim arising out of the combatant activities of the Armed Forces during time of armed conflict."*¹²

Senator Schumer introduced a companion bill in the 111th Congress, S 1347, where it died. HR 1478 passed out of committee by a vote of 14-12, but was never considered in the full House.

Proponents of the Feres Doctrine and Rebuttal Arguments

At the most recent hearing held on 24th of March, 2009, proponents of the Feres Doctrine were given an opportunity to make their case, however neither DoD or DoJ appeared as witnesses. Consistent with hearings over the past three decades, the two primary institutions in favor of maintaining the Feres Doctrine are the Department of Defense and the Department of Justice.

In the 2002 hearing, four individuals represented DoD and DoJ; Department of Justice Deputy Associate Attorney General Paul Harris, retired Major General Nolan Sklute, USAF and retired Major General John Altenburg, United States Army, both representing the Judge Advocate General's Office and Rear Admiral Christopher E. Weaver, Commandant, Naval District

11 Byron Pitts, "A Question Of Care: Military Malpractice?" CBS News, February 11, 2009, http://www.cbsnews.com/8301-18563_162-3776580.html

12. HR 1478, 111TH CONGRESS, Second Session. "Government Publishing Office." April 10, 2010. <http://www.gpo.gov/fdsys/pkg/BILLS-111hr1478rh/pdf/BILLS-111hr1478rh.pdf>.

Washington. The following attorneys represented the opponents of the Feres Doctrine; Eugene Fidell, Daniel Joseph, and Richard Sprague.

In the 2009 hearing, DoD and DoJ did not participate (though they were invited) but Major General Alterburger testified again as the primary for the government. Eugene Fidell testified alongside fellow lawyer, Stephen Saltzburg, in presenting the opposing viewpoint before the House.

Over the course of the two hearings, seven years apart, a number of consistent themes were sounded by the participants. Many were in keeping with the original Feres court decision and the 5-4 decision by the Supreme Court in the Johnson case in 1987. The following is an attempt to better lay out the argument and counter by the opponents, something not easily accomplished in a hearing room.

Uniformity of Outcome Concern

In the 2009 hearing, Major General Altenburg laid out his first argument,

“The proposed bill creates a narrow category of persons in the military who will be favored over all others injured in the line of duty. This bill’s unfairness is starkly apparent when you consider the following example: two Marines, same unit, same hometown, deploy to Afghanistan leaving their families behind.

During deployment, one Marine is medically evacuated to a hospital in Germany for severe stomach pains. They are properly diagnosed as a burst appendix, but a military doctor breaches the standard of care by failing to administer antibiotics properly. The Marine develops an infection and he dies. His family is outraged, and they are able to bring—under this bill, if it passes—a wrongful death action against the government to recover lost economic compensation and mental and physical pain and suffering. About the same time, though, tragic news arrives that the other Marine family in the same town has lost their loved one following an engagement in battle. A command investigation concludes that this Marine was killed, accidentally, by a fellow squad member in a fire fight. This Marine’s death is a result of negligence that may have been prevented.

Unlike the first family, this family is told they are limited to the benefits provided by the Navy and the VA even though their loved one died on the battlefield and not in a hospital bed. Both Marines died in service, in line of duty, and both families suffer similar monetary hardships. But because of the proposed bill, one family could sue and the other cannot.”¹³

13. United States. Committee on the Judiciary, Subcommittee on Commercial and Administrative Law. House of Representative. CARMELO RODRIGUEZ MILITARY MEDICAL ACCOUNTABILITY ACT OF 2009. Hearing. 24 Mar.

Responding to the following written question submitted by the Judiciary Committee after the hearing, “5.What is your response to the argument...that H.R. 1478 proposes a “discriminatory favoritism among service members?”, attorney Eugene R. Fidell wrote,

“The risk of injury and death in combat is clearly something military personnel know to expect, it is the heart of the matter and why we honor our service personnel. But medical malpractice is not part of the mission. It is something that happens (unfortunately) in civilian life and when it does, our systems of tort law permits recovery for, among other things, pain and suffering. To the extent that there is nothing peculiarly military to medical malpractice, the better analogy is to the treatment afforded to all Americans, rather the quite different treatment the law provides to serving personnel for combat-related injuries. No system of laws achieves perfect fairness, and the FTCA is no exception. The fact that we do not afford a damage remedy for death or injury for death at the hands of the enemy is not a reason to deny such a remedy to GIs who have no effective choice of medical providers.”¹⁴

Locality Issue

In the original Feres decision, one of the primary rationales was that Congress could not have intended to subject service members to disparate outcomes because the FTCA follows the rules of the state in which the incident occurs. In the 2009 hearing, Representative Trent Franks (AZ-8th) stated the following in his opening:

“What is more, Mr. Chairman, because the Federal Tort Claims Act bases liability on state law, recovery will depend upon the local tort laws where the service member is stationed. Thus, a service member stationed in California will be subject to one set of rules while one stationed in North Carolina will be subject to another. Selective compensation based on duty station falls short of the even-handed fairness and justice needed to preserve military morale.”¹⁵

Justice Scalia dealt with this argument persuasively in his 1987 Johnson dissent,

“The unfairness to servicemen of geographically varied recovery is, to speak bluntly, an absurd justification, given that, as we have pointed out in another context, nonuniform recovery cannot possibly be worse than (what Feres provides) uniform nonrecovery. We have abandoned this peculiar rule of solicitude in allowing federal prisoners (who

2009. 107th Cong. 1st sess. Washington: Government Printing Office, 2009, http://judiciary.house.gov/hearings/printers/111th/111-7_48232.PDF, pg.123.

14. 2009 House Judiciary Hearing, pg 233-234.

15. 2009 House Judiciary Hearing, pg 7.

have no more control over their geographical location than servicemen) to recover under the FTCA for injuries caused by the negligence of prison authorities.”¹⁶

VA System of Benefits

In the 2002 Judiciary Committee hearing, Deputy Associate Attorney General Paul Harris stated that the system of no-fault benefit programs set up by the Congress is meant to ameliorate the need for service members to file against the government for medical malpractice. Mr. Harris cited the military’s free medical care, its disability retirement package, the VA’s system of disability compensation, and subsidized life insurance as part of what he called a “comprehensive statutory compensatory scheme”. He quoted the Feres decision, stating that the FTCA,

*“should be construed to fit....into the entire statutory system of remedies against the government [and thereby create] a workable, consistent, and equitable whole”.*¹⁷

The problem with this logic is that this “system of benefits” point was an entirely made-up reason by the Supreme Court in the Feres decision. Again, as Justice Scalia notes in his Johnson dissent,

*“credibility of this rationale is undermined severely by the fact that, both before and after Feres , we permitted injured servicemen to bring FTCA suits, even though they had been compensated under the VBA.”*¹⁸

In the Johnson opinion, Justice Scalia then quotes Hunt vs. United States, (204 U.S.App.D.C. 308, 326, 636 F.2d 580, 598 (1980)).

*“the presence of an alternative compensation system [neither] explains [n]or justifies the Feres doctrine; it only makes the effect of the doctrine more palatable.”*¹⁹

While not considered by the courts, it is notable that civilian employees, who might have any number of other benefits provided by both their workplace and government programs, are not kept from filing under the FTCA because of them.

16. United States v. Johnson. 481 US 681 (US Supreme Court, 1987), pgs. 696-697.

17. United States. Committee on the Judiciary. United States Senate. THE FERES DOCTRINE: AN EXAMINATION OF THIS MILITARY EXCEPTION TO THE FEDERAL TORT CLAIMS ACT Hearing. 8 Oct. 2002. 107nd Cong., 2nd sess. Washington: Government Printing Office, 2002, <http://www.gpo.gov/fdsys/pkg/CHRG-107shrg88833/pdf/CHRG-107shrg88833.pdf>, pg. 62.

18. United States v. Johnson. 481 US 681 (US Supreme Court, 1987), pg 697.

19. United States v. Johnson. 481 US 681 (US Supreme Court, 1987), pg 698

Another issue with this analysis is that this “scheme” is many times just that. The military disability retirement system as well as the VA disability claims process has been brought under contemptuous scorn this past decade of war. Backlogs lasting years and inequitable findings of disability for the same exact injury have called into question just how equitable this system is and the efforts by Congress to fix them have constantly run into legislative and bureaucratic inertia. All of this for a disability system which still treats officers significantly better than similarly injured enlisted men and women (disability retirement is based on basic pay).

Richard Sprague, a trial lawyer who testified in the 2002 Senate hearing, put it this way

*“The simple fact is the Feres doctrine saves the Government some money, but it is money saved at the expense of our servicemen and women who have been injured or killed as a result of acts or omissions of the Federal Government. We spend billions of dollars on military machinery and equipment. We should not be so parsimonious when it comes to providing proper redress to the most important resource of our military, the men and women who serve our country.”*²⁰

In the end, many suspect that this is the real reason DoD and DoJ are so loathe to change the law; it will cost the DoD and DoJ more time and money to properly consider these claims. Unlike the DoD and DVA’s disability system, it is much harder to drag one’s bureaucratic feet when a federal judge is ordering you to pay after a trial.

Military Discipline

The last reason given by proponents of the Feres Doctrine relates to military discipline and the negative impact overruling the Feres decision might have on such discipline. In the 2002 Senate hearing, Rear Admiral Weaver noted,

*“Military effectiveness and readiness are based on cohesiveness, obedience, discipline, putting the interest of the service ahead of the interest of the individual, and an inherent, unencumbered and unfettered trust and confidence up and down the chain of command. This degree of trust and confidence cannot exist in an adversarial legal environment.”*²¹

In the same hearing, Major General (retired) Nolan Sklute, a former Judge Advocate General of the Air Force, stated,

“The elements that make up unit cohesiveness—and they have been set out by the Congress in statute in many respects—these elements are integral to the unique and special relationship that exists within military organizations and that exists among and between its members, and these elements are absolutes; they can’t be compromised.

20. 2002 Senate Judiciary Hearing, pg. 14.

21. 2002 Senate Judiciary Hearing, pg 4.

They include such things as strict obedience to orders; total loyalty to one's organization, one's service, and our Nation; total loyalty up and down the chain of command; complete trust among and between members of the organization; and, finally, discipline."²²

Both the Admiral and General then provided examples where they were concerned that, if service members were allowed to file under the FTCA, the military's readiness would be undermined. In his following testimony, the trial attorney, Richard Sprague noted,

*"Dealing with the argument I just heard made to you, Senator Specter, by the military personnel, I notice that they focus on training. I think that in the event the Congress were to recognize the error in the present interpretation of the Feres doctrine, you will find the military using as a basis of an exception the discretionary function [one of the exceptions listed in the FTCA] when it comes to training, and I think the issue of training is being used as a red herring here."*²³

In his written testimony to the committee, attorney Eugene Fidell noted,

*"What happens when a ship runs aground or experiences a collision? Or a tank overturns? Or a new kind of aircraft experiences a problem, with property damage and/or injuries and loss of life? Those matters are investigated. The investigation may be time consuming and on some level a distraction, but the services have certainly accommodated themselves to the need for investigation – because it is a time-tested way of preventing recurrences"*²⁴

Justice Scalia finished his dissent with a stinging rebuke of this "military discipline" doctrine in the Johnson decision,

"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 Congress did not mean what it plainly said in the statute before us. It is strange that Congress; "obvious" intention to preclude Feres suits because of their effect on military discipline was discerned neither by the Feres Court nor by the Congress that enacted the FTCA (which felt it necessary expressly to exclude recovery for combat injuries). Perhaps Congress recognized that the likely effect of Feres suits

22. 2002 Senate Judiciary Hearing, pg. 9.

23. 2002 Senate Judiciary Hearing, pg. 12.

24. 2002 Senate Judiciary Hearing, pg. 56.

upon military discipline is not as clear as we have assumed, but in fact has long been disputed. Or perhaps Congress assumed that the FTCA's explicit exclusions would bar those suits most threatening to military discipline, such as claims based upon combat command decisions, claims based upon performance of "discretionary" functions, arising in foreign countries, intentional torts, and claims based upon the execution of a statute or regulation. Or perhaps Congress assumed that, since liability under the FTCA is imposed upon the Government, and not upon individual employees, military decision making was unlikely to be affected greatly. Or perhaps -- most fascinating of all to contemplate -- Congress thought that barring recovery by servicemen might adversely affect military discipline.[emphasis added] After all, the morale of Lieutenant Commander Johnson's comrades-in-arms will not likely be boosted by news that his widow and children will receive only a fraction of the amount they might have recovered had he been piloting a commercial helicopter at the time of his death....In sum, neither the three original Feres reasons nor the post hoc rationalization of "military discipline" justifies our failure to apply the FTCA as written."²⁵

When looked at with a cynical eye, much of the testimony of the DoD and DoJ appears to be essentially “red herring” arguments, meant to muddy the waters about the impact of repealing the Feres doctrine. Similarly, many of the court rulings provide undue difference to the DoD’s position regarding military discipline. In a 2010 Case Western Law Review article, the author, Nicole Melvani, notes

*“The desire to avoid intrusion into military discipline is so pervasive that courts have consistently held that the status of the injured plaintiff at the time of his injury strictly governs in medical malpractice claims, rather than inquiring on a case-by-case basis whether such interference will actually occur, or even after the determination that such interference will actually not occur.”*²⁶

That quote followed with an explanation of *Henninger vs. US*, in which a service member, who was waiting to be discharged, was told he must receive a hernia surgery in order to be allowed to exit the service, even though *Henninger* requested that he be allowed to have the surgery after his discharge. *Henninger* was on terminal leave when the surgery was conducted and when the medical malpractice occurred. That the surgery had virtually no connection to this chain of command or military discipline in any regards didn’t stop the court from finding for the DoD. Quoting the judge,

25. *United States v. Johnson*. 481 US 681 (US Supreme Court, 1987), pg. 700 .

26. Nicole Melvani, "The Fourteenth Exception: How the Feres Doctrine Improperly Bars Medical Malpractice Claims of Military Service Members." *California Western Law Review*, 2009-2010: 395-436, pg. 422.

“To determine the effect that a particular type of suit would have upon military discipline would be an exceedingly complex task [I]t is the suit, not the recovery, that would be disruptive of discipline and the orderly conduct of military affairs.”²⁷

It is clear to the military members and the families involved in situations such as this that the executive and judicial branches, while lauding military service and sacrifice, have no intention of backing away from the Feres doctrine no matter how ridiculous a position they have to take. In the final analysis, the various Supreme Court rulings over the last seventy years makes one thing exceptionally clear; unless Congress acts, this is decided law. Under the principle of stare decisis, the strong precedent set over this period of time makes it highly unlikely that the Supreme Court will change its mind, even in the most ludicrous circumstances, barring legislative changes to the FTCA. Without a significant change in position, it is also apparent the executive branch’s position is driven by DoD and DoJ lawyers. For this reason, it is obvious that it will take the Congress revisiting the FTCA and changing the terms under which service members can file suit if Feres is ever to be expunged from the history books. The question is, “how best to accomplish this?”.

Solutions

Like so many things related to the care of service members and their families, when there is a problem and funds are at risk, many times it takes significant embarrassment of the DoD for action to be taken. The Walter Reed scandal comes directly to mind. While senior leadership knew about the problems for a number of years, it wasn’t until the Washington Post ran a series on the conditions at Walter Reed that things started to change. After water contamination at Camp LeJeune, NC for almost forty years, it took significant grassroots efforts and Congress passing legislation last year to ensure the service members and their families received appropriate medical care. Going forward, it is without a doubt going to continue to be critical to highlight these atrocities visited on military men and women by the Feres Doctrine. A media presence in grass roots efforts like this is an essential effort for organizers to consider.

The next step will be chipping away at the brass’s position on military discipline. Sometimes, it sadly takes years for the DoD to see that their position was wrong. There are so many examples throughout history, it’s not hard to make the connection. There was significant opposition (based on military discipline) to the integration of African-Americans into all military units. Women weren’t allowed into the service academies until 1976 and women were considered to be unfit to fly fighter airplanes until a little over a decade ago, all based on the vague notions of military discipline. The recent discussion regarding the “Don’t Ask, Don’t Tell (DADT)” legislation comes to mind when we are considering impact on military discipline. For almost two decades after passage of the legislation in 1994, the service chief’s best advice

27. Nicole Melvani, pg. 423.

to the Congress and the President was that allowing homosexuals to serve openly would cause significant military discipline issues in the military. To date, the repeal of DADT has been a non-event. The truth is this, the military and the service chiefs sometimes get it wrong. Placing the Feres Doctrine in this context and making the case that this is a similar situation will be critical to overturning the Feres decision.

Related to this point, there are a couple of basic points that need deconstructing. First, most if not all medical malpractice issues are dealt with outside the chain of command. A commander has very little interaction with the decisions made by doctors at a military hospital. In those cases where medical malpractice occurs, the chain of command should in fact be a trusted agent to ensure the injured party knows how and where to get help, but has no bearing on the care the service member receives (except in the field). One particularly telling example relates to the prenatal care of female military member's and their unborn fetus. Though prenatal care provided to the service members impacts both, in the event of malpractice, the child can file a claim but the parent cannot. And then to say that there is a blanket connection between the female service member, the care she receives, and military discipline is a farce at best, grossly fraudulent at worst. Finally, as a number of the retired JAG officers noted, military discipline is contingent on trust up and down the chain of command. When that chain is broken, as it has been in numerous cases related to sexual assault, we are making a mockery of the chain of command and military discipline by not allowing them to file suit against the government because of the Feres doctrine.

The Sexual Assault Connection

The issues relating to the Feres Doctrine have popped up every so often, as another case is heard and military members and families shake their heads and realize how hard it is to hold the DoD accountable. But in general, thankfully this is a relatively small population. Each case is a window into the issue and many times exceptionally compelling. However, generally, most people not affected shake their head and say "There but for the grace of God, go I", and move on with their lives. There simply aren't enough families impacted for this issue to gain the traction necessary or to have the pull on the Hill necessary to overcome DoD and DoJ objections. Unfortunately, the issue of sexual assault has once again reared its ugly head. Sadly, there are numbers here, with one in five military women reporting being the victim of some form of unwanted sexual contact.²⁸ (some reports are much higher). Sexual assault in the military has been rightly acknowledged as a prevalent problem in the military world. If we want it to stop, one method of incentivizing that all parties understand would be to allow military members to file suit to recover for their injuries.

Previous proponents of repealing the Feres Doctrine for medical malpractice need to realize the connection between their issue, medical malpractice, and these service members' inability to file under Feres for issues related to sexual assault. Those pushing for greater accountability

²⁸ Zoroya, Gregg. www.usatoday.com. April 22, 2013.
<http://www.usatoday.com/story/news/nation/2013/04/22/women-military-sexual-assault/2103075/>.

related to sexual assault need to understand that their position is even stronger when paired with those that have been harmed by medical malpractice.

Medical malpractice and sexual assault hold a number of things in common in regards to the military; neither should but continue to happen and both are linked by the inability of the service members to hold DoD accountable for what happened to them.

As noted by attorney Steven Saltzburg in the 2009 House Judiciary hearing,

“there is a basic point here, I think. If Sergeant Rodriguez were here and he were asked the question the congressman asked about what would he say about why it is important to be able to sue and why the right should be there and why justice requires it, it is because one of the things that every soldier who enlists in the military should be entitled to is to know that when they are sent to a hospital, and when they are sent to a doctor, they will get at least as good care as they would get if they weren’t serving their country and putting themselves in harm’s way.”²⁹

Similarly, women and men serving our nation have a right not to be sexually assaulted while in the military. And just like a civilian medical doctor can be held liable in civilian courts for medical malpractice, so should DoD be held accountable for failure to properly address the sexual assault issue in the military, just like civilian employers are under our civil rights laws.

To explore for a moment this issue further, it is instructive to read the opinion of US District Judge, Amy Berman Jackson, in a February 2013 ruling,

“The issue before the Court is not whether the culture described in the complaint exists, whether it is deplorable, or whether plaintiffs suffered harm at the hands of the perpetrators of these criminal acts and those who sheltered them from justice or further victimized plaintiffs. The factual recitations, which the Court must accept as true at this juncture, describe brutal and criminal assaults, compounded by a degrading and humiliating institutional response, and they depict an unacceptable environment in need of repair from the top down. But the question posed by the defense motion is whether a court has the power to provide the particular sort of remedy sought here for the specific injustices alleged in the complaint. That is a purely legal question, and its answer is no.

...Plaintiffs oppose the motion to dismiss, and they protest that being victimized by a sexual assault cannot possibly be considered to be an “activity” incident to military service.

But whether being raped is an “activity” incident to military service is not the relevant inquiry; the question is: what is the source of the alleged injury? Here, the plaintiffs’

29. 2009 House Judiciary Hearing, pg 165-166.

injuries had everything to do with their military service, and at bottom, the case is about nothing else but ‘life on the military reservation.’”³⁰ [Emphasis added]

“Life on the military reservation”...really? This quote should be repeated again and again and again. It should be posted literally everywhere. It is only by outrage that Feres will ever be overturned. While perhaps legally defensible, this judge’s comment is outrageous. The question is “for how long?” Review of the Feres doctrine comes in cycles, with policy windows open for a short period of time in which to accomplish something. We are in an off year election cycle, with the 1st session of the 113th Congress almost half done. It is critical to move the legislative ball this year, while the iron is hot, the outrage is deep, and election year politics haven’t slowed everything to an absolute crawl.

The next step is pairing the above strategy with the right advocates. In the second session of the 112th Congress, the Service Women's Action Network (SWAN) was successful in having H.R. 1517, the Holley Lynn James Act, introduced. Besides a number of steps associated with improving sexual assault policy in the DoD, Sec 4 of the bill made a change to Chapter 171 of title 28 (“Torts Claim Procedure”), allowing,

“a claim may be brought against the United States under this chapter for damages or other appropriate relief for any act or omission related to or arising out of covered assaultive conduct or failure to prevent or properly investigate or prosecute covered assaultive conduct.”³¹

The bill was referred to the House Armed Services and Judiciary Committees where it died.

If a bill with these particulars were married with a bill similar to HR 1478, I think it could be a powerful bill for finally overturning the Feres doctrine, at least on these two issues. The same champions could be utilized in the House, but the best chance of passage lies if an original bill starts in the Senate. The Senate Armed Services Subcommittee for Personnel, newly led by New York Senator Kristin Gillibrand, recently held hearings on the topic of sexual assault in the military. Alongside her in the subcommittee are three women, Senators Kay Hagan (NC) and Senator Mazie Hirono (HI) on the Democrat side and Kelly Ayotte (NH) on the Republican side. On the overall committee are two additional women Democrats, Jeanne Shaheen (NH) and Claire McCaskill (MO). On the Judiciary Committee, the chairman, Senator Patrick Leahy (VT), has been a champion of eliminating the Feres Doctrine for a number of years. With 20 female Senators (16 Democrats, 4 Republicans) in this Congress and the topic of sexual assault such a hot topic for the Congress, a bill combining both parties has a fighting chance of being passed out of the Senate. Once passed there, significant pressure will need to be brought to bear

³⁰ Klay vs. Panetta. Civil Action No. 12-0350 (ABJ) (UNITED STATES DISTRICT COURT, February 7, 2013),

https://ecf.dcd.uscourts.gov/cgi-bin/show_public_doc?2012cv0350-14

31. 112TH Congress, First Session. "Holley Lynn James Act." H.R.1517. <http://thomas.loc.gov/cgi-bin/query/z?c112:H.R.1517>, Apr 13, 2011

to encourage House members to vote for military victims of sexual assault and medical malpractice. Coordination between groups like SWAN and the American Bar Association and the American Association for Justice (the trial lawyers' association), as well as groups representing military members and their families will be critical.

The way to ensure accountability is to hold not only commanders responsible for sexual assault but the government who is supposed to be ensuring these individual's safety as well. While military members are not prisoners, who the government has a duty to protect because the government is involuntarily incarcerating them, military service members are a close second. While military members may not rise to the level of "constitutionally protected" while in the military (like prisoners), don't we owe it to them to provide at least as much protection and accountability as prisoners? Certainly if the judicial and executive branch will not, the legislative branch should.

Summary

In the end, it is essential to the underlying fairness of our country to overturn the Feres Doctrine. The Feres Doctrine is a judicially created atrocity which should not be allowed to continue. A quote many times attributed to George Washington,

"Government is not reason, it is not eloquence, it is force; like fire, a troublesome servant and a fearful master. Never for a moment should it be left to irresponsible action."

The Feres Doctrine is at the intersection of all three branches of our government; it is without reason, it is not eloquent, it is irresponsible, and it must change.

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