

Is the *Feres* doctrine fair?

The 50 year-old Feres *doctrine relegates members of the U.S. armed forces to a tort-free zone, even in non-combat situations. Relief is needed, but is it coming?*

Donna Bader

If you've ever tried to sue a branch of the United States armed forces on behalf of a plaintiff who is in the military, you know you are facing an uphill battle. The *Feres* doctrine has been successfully applied as an exception to the Federal Tort Claims Act without any clear uniformity for almost 60 years and continues to bar plaintiffs' actions, both on and off the battlefield.

In practical terms, the *Feres* doctrine bars service members from obtaining damages from the United States for personal injuries in many circumstances. It also deprives their families from pursuing claims for wrongful death or loss of consortium, leaving them to rely solely on benefits from the armed services.

While the application of the doctrine has been criticized for many years, recent efforts have been made to dismantle this doctrine by H.R. 1478, known as the "Carmelo Rodriguez Military Medical Accountability Act," which was introduced by U.S. Rep. Maurice Hinchey, D-N.Y. This measure would permit lawsuits on behalf of service members who are injured or killed by medical malpractice. It would, however, continue to prohibit



claims arising from combatant activities during armed conflicts.

Carmelo Rodriquez was a 29-year-old former U.S. Marine who died from skin cancer. Upon entering the Marines in 1997, Rodriguez was examined and the doctor noted a "melanoma on the right buttocks." Rodriguez was never informed of these findings and nothing was done. He was sent to Iraq and the cancer continued to spread throughout his body. Rodriguez was interviewed for a story that was aired on *60 Minutes*. He had shrunk to 80 lbs. and died about eight minutes after the interview was completed. Other stories have surfaced about the negligence practiced upon returning vets in medical facilities such as Walter Reed Army Medical Center.

On March 24, 2009, the Subcommittee on Commercial and Administrative Law held hearings on H.R. 1478. Rep Hinchey noted, "Joining the military should not mean that one has to give up his or her right to hold medical providers accountable. The Carmelo Rodriquez Military Medical Accountability Act of 2009 will finally bring accountability into the military medical system and afford our service members and their families the same rights that the rest of us have when it comes to medical malpractice."

Eugene Fidell, a visiting lecturer for Yale Law School and president of the National Institute of Military Justice, testified at the hearing:

> Congress has to bite the bullet and enact legislation that will prevent the unfairness that can result from the *Feres* Doctrine. . . The [United States Supreme] Court created the *Feres* Doctrine and it has long been clear that the Justices believe that if that doctrine is mistaken, Congress can easily fix it. . . . It is, and you should.

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Carmelo's sister Ivette Rodriquez also spoke in support of H.R. 1478:

> When the medical personnel failed to provide the basic care that would have saved my brother, they hid behind the military. Now that the military failed to live up to their oath, they hid behind a nearly 60 year-old precedent called the *Feres* Doctrine.

Two months later, the subcommittee approved the bill and the full House Judiciary Committee is expected to consider the bill by the end of July. The ABA has also sponsored a resolution supporting the measure.

The right to sue the federal government for injuries sustained in an accident was created by statute in the Federal Tort Claims Act, which is set forth in 28 U.S.C. § 1346(b). 28 U.S.C. § 2674 also provides that the United States "shall be liable . . . in the same manner and to the same extent as a private individual under like circumstances." 28 U.S.C. § 2680(j) sets forth an exception to the Federal Tort Claims Act:

> The provisions of this chapter and section 1346(b) of this title shall not apply to –
>
> . . .
>
> (j) Any claim arising out of the combatant activities of the military or naval forces, or the Coast Guard, during time of war.

Seems clear enough, doesn't it? And yet, despite this seemingly unambiguous language, the courts have expanded this exception to bar plaintiffs' claims arising out of both combatant *and* non-combatant activities, such as recreational and social activities, that have occurred during times of peace and war.

In *Brooks v. United States* (1949) 337 U.S. 49 [69 S.Ct. 918], three male members of the same family were hit in their vehicle by a United States Army truck, which was driven by a civilian employee. The United States Supreme Court was presented with the issue whether a member of the Armed Services can recover under the Federal Tort Claims Act for injuries sustained that were not incident to the plaintiff's military service. It concluded the Federal Tort Claims Act provides for jurisdiction for "any claim" brought against the United States. (*Id.* at p. 51.)

The United States in *Brooks* argued there would be "dire consequences" if such suits were allowed, giving examples of injuries during military service. (*Id.* at p. 52.) The Court rejected such reasoning, finding the accident had nothing to do with military service "except in the sense that all human events depend upon what has already transpired." (*Ibid.*) It held "the language, framework and legislative history of the Tort Claims Act required it to conclude the plaintiffs had a claim." (*Id.* at p. 54.)

One year later, the United States Supreme Court again addressed this issue in *Feres v. United States* (1950) 340 U.S. 135 [71 S.Ct. 153], setting forth what has now become known as the "*Feres* doctrine."

In *Feres,* the district court dismissed an action by Feres's executrix for injuries the decedent sustained in a fire in his barracks while he was on active duty. The complaint alleged that the United States was negligent in quartering Feres in barracks with a defective heating plant. The district court dismissed the action and its decision was affirmed by the Second Circuit Court of Appeals.

Even though 28 U.S.C. 2680(j) provides an exception for claims arising out of "combatant activities of the military or naval forces, or the Coast Guard, during time of war," the Court found it was encouraged to broaden the scope of the exception to include claims for injuries from noncombatant activities in a time of peace. (*Id.* at p. 138.)

The United States Supreme Court held:

> We conclude that the Government is not liable under the Federal Tort Claims Act for injuries to servicemen when the injuries arise out of or are in the course of activity incident to service.

(*Id.* at p. 146.)

The Court refused to apply its earlier decision in *Brooks,* finding it was a "wholly different case." (*Id.* at p. 138.) The Court noted there were few records to guide its statutory construction. It acknowledged, however, that Congress could remedy the situation if its holding proved wrong. (*Ibid.*)

Some courts have followed *Brooks v. United States* (1949) 337 U.S. 49 [69 S.Ct. 918], narrowing the definition of "incident to service," while others have enlarged the definition, far beyond that envisioned by Congress in enacting 28 U.S.C. § 2680(j), to include recreational activities that seemingly have no connection to "service."

In *Lutz v. Secretary of Air Force* (9th Cir. 1991) 944 F.2d 1477, the court stated, "Although this circuit has accepted *Feres,* albeit grudgingly, as 'an ineradicable feature of our legal landscape,'. . . we have also recognized that 'even *Feres* concatenations must come to an end.' . . .When a soldier commits an act that would, in civilian life, make him liable to another, he should not be allowed to escape responsibility for his act *just because those involved were wearing military uniforms at the time of the act.* When military personnel are engaged in distinctly nonmilitary acts, they are acting, in effect, as civilians and should be subject to civil authority." (*Id.* at p. 1487.) (Italics in original.)

In another Ninth Circuit case, *Dreier v. United States* (9th Cir. 1997) 106 F.3d 844, a serviceman's widow filed an action for injuries sustained by her husband when he fell into an on-base wastewater drainage channel after an off-duty afternoon of relaxation and drinking. The court concluded the action was not barred by the *Feres* doctrine.

The court in *Dreier* noted the broad reach of *Feres's* "incident to service" test, finding that "[P]ractically any suit that 'implicates the military judgments and decisions' ... runs the risk of colliding with *Feres.*" (*Id.* at p. 848.) It further found that:

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> In cases where the existence of a *Feres* bar is not clear, we have looked to four factors to determine whether an activity is incident to military service:
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> (1) the place where the negligent act occurred;
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> (2) the duty status of the plaintiff when the negligent act occurred;
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> (3) the benefits accruing to the plaintiff because of his status as a service member; and
>
> (4) the nature of the plaintiff's activities at the time the negligent act occurred.

(*Id*. at p. 848.)

The *Dreier* court also recognized the difficulty in applying a precise rule to cases dealing with the *Feres* doctrine, and a "comparison of fact patterns to outcomes in cases that have applied the *Feres* doctrine is the most appropriate way to resolve *Feres* doctrine cases." (*Id.* at p. 848.) Thus, to determine how their cases will be treated under this doctrine, litigants simply look for cases that have similar fact patterns, especially in the circuit where their case is pending, and anticipate the reviewing court will reach a similar result.

In *United States v. Johnson* (1987) 481 U.S. 681 [107 S.Ct. 2063], the United States Supreme Court applied the *Feres* doctrine to the death of a helicopter pilot for the U.S. Coast Guard while performing a rescue mission on the high seas. In a dissent written by Justice Scalia, and joined in by Justices Brennan, Marshall, and Stevens, they rejected all four reasons as providing a rationale for the continued application and expansion of *Feres*. (*Id.* at pp. 692-700.)

Over 50 years after the *Feres* doctrine was first articulated, the Ninth Circuit Court of Appeals decided *Costo v. United States* (9th Cir. 2001) 248 F.3d 863. In that case, two servicemen drowned during an employer-sponsored rafting trip. The district court applied *Feres* with reservation because it was "bound by circuit precedent to apply this doctrine to yet another case that seems far removed from its original purposes." (*Id.* at p. 864.)

The court in *Costo* reiterated the four-factor test set forth above, noting this test was not dispositive and concluded it must look to the totality of the circumstances. (*Id.* at p. 867.) It concluded that the cases applying the *Feres* doctrine were irreconcilable and the most appropriate way of deciding these cases was to refer to previously decided cases with a similar fact pattern. *(Ibid.)* The *Costo* court made the following comments in its Conclusion:

> As we noted at the outset, we apply the *Feres* doctrine here without relish. Nor are we the first to reluctantly reach such a conclusion under the doctrine. Rather, in determining this suit to be barred, we join the many panels of this Court that have criticized the inequitable extension of this doctrine to a range of situations that seem far removed from the doctrine's original purposes. (See, e.g., *McAllister, 942 F.2d at 1480; Persons,* 925 F.2d at 299; *Atkinson,* 825 F.2d at 206; *Monaco v. United States* (9th Cir. 1981) 611 F.2d 129, 134.) But until Congress, the Supreme Court, or an en banc panel of this Court reorients the doctrine, we are bound to follow this well-worn path.

(*Id.* at p. 869.)

In his dissent in *Costo*, Circuit Judge Ferguson opined the *Feres* doctrine was unconstitutional and violated the equal protection rights of military service men and women, and the constitutional doctrine of separation of powers. (*Id.* at pp. 869-871.) He noted *Feres* expanded the original exception to the Federal Tort Claims Act in 28 U.S.C. § 2680(j), broadening the Government's right of sovereign immunity from a time of war to a time of peace, and going beyond combatant activities, as described in 28 U.S.C. 2680(j) to include other activities, such as recreational activities. (*Id.* at p. 870, fn. 1.)

Circuit Judge Ferguson concluded the explanation for such a broadening of the doctrine was due to judicial rewriting of an "unambiguous and constitutional statute," resulting in a "judicially created exception to the Federal Tort Claims Act." (*Id.* at p. 871.)

In his concluding remarks, Judge Ferguson mirrored the pleas of the majority in its Conclusion:

> We have, in short, abandoned any pretense that there is a rational basis for the classifications drawn in the original *Feres* opinion, and yet we have continued to apply the 'incident to service' test with little thought to the constitutional principles at stake. . . This blind adherence has proved virtually unworkable, a result that only underscores the wisdom of our founding fathers and the fragile complexities of our system of government. (*See* THE FEDERALIST NO. 78 (Alexander Hamilton) ('[L]iberty can have nothing to fear from the judiciary alone, but would have every thing to fear from its union with either of the other departments')) . . . It is time for the Supreme Court to revisit the *Feres* doctrine. If it is to be applied, the equal protection issues it raises must be reconciled with the constitutional principles that courts have so often articulated.

(*Id.* at p. 876; citations omitted.)

While attorneys might understand that a decision to bar suits for injuries sustained during wartime combat serves a legitimate government purpose, barring liability for activities beyond those described in 28 U.S.C. § 2680(j) is questionable under U.S. Constitution. The doctrine, which rises to the level of a judicially created exception and prohibits suits resulting from injuries sustained in peacetime for recreational activities does not pass constitutional muster as failing to be rationally related to a legitimate government interest. (*Vacco v. Quill* (1997) 521 U.S. 793, 799-801 [117 S.Ct. 2293].

As discussed in Judge Ferguson's dissent in *Costo,* relying heavily on Judge Scalia's dissent in *United States v. Johnson, supra,* the four factors historically applied to support the application of *Feres* doctrine have been discredited. (*Costo,*

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supra, at p. 872; *United States v. Johnson, supra,* at pp. 692-703.) He noted the "articulated 'rational bases' for the *Feres* doctrine lead in this case, as in many cases, to inconsistent results that have no relation to the original purpose of *Feres*." (*Id.* at p. 875.)

In *Costo, supra,* less than half of the rafters were service men or women. A civilian rafter could sue for injuries while a serviceman could not. Had Costo participated in a civilian-operated rafting trip, he could have sued. As Judge Ferguson concluded, "I cannot find a rational basis for the court to engage in such line-drawing on the basis of an 'incident to service' test." (*Id.* at p. 876.)

Ignoring the plain language of Section 2680(j) and rewriting it has led to unfair, absurd, and inconsistent results. In maintaining the *Feres* doctrine, service members are relegated to a tort-free zone, treated differently than the rest of us, and can only obtain small amounts of compensation for their injuries. H.R. 1478 provides some relief in medical malpractice cases, but the application of the *Feres d*octrine needs to be reined by Congress and limited to the express exception set forth in Section 2680(j).


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