

## THE WOUNDED WARRIOR'S FAMILY AND *Feres*: A CONVERSATION VERSUS AN ARGUMENT

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Normally, speaker papers are heavily cited and focus on the law, transitions in the law, and potential practice pointers. They are, essentially, blueprints for winning legal arguments. In the instant case, however, I will assume the readership is more than intimately familiar with the *Feres* bar—we all know that with very narrow exceptions (whittled out by courageous federal tort litigators), it is a uniform bar to litigation for civil actions by service members for any service-connected injury. We are also more than minimally aware of the utter failure of our profession (litigators and judges alike) to provide a comprehensive solution. Having said that, this paper will focus on what I believe to be the point of exposure of *Feres*. It is not a legal *argument*—it is an invitation to a conversation. Part of being an attorney is being involved in our communities, and the bar expects it of each of us. Our role should be that of informed informant to our communities. We must make every effort to reach out to commanders in the services and military families to inform them of the inequities of the system, but be rational and fair about our representations. When and if Congress calls this issue to the forefront again, it is imperative that there is an educated constituency. We are in a unique position to ensure this education, and realize that our advocacy for this issue cannot stop at the courthouse steps with a shoulder shrug. It is in that vein of thought that I hope to pique your interest in a new discussion of *Feres*. The global war on terrorism has created stressors in the *Feres* bar that cannot be ignored, but they will be ignored if we allow them to be. So if your opinion as a lawyer and advocate against *Feres* does not seem to move the bar, whose opinion does?

### I. A Recent Model Case of Inequity

Earlier this year, CBS ran one of the longest segments in its history on a victim of military medical negligence. The interview was captured on CBS Nightly News and sparked a new debate about *Feres*. Although not necessarily the model case for *Feres* reform, the case does expose the cracks that have long existed in the equities of the bar in the place you would not immediately think to look. It is this area of education that should be a point of refocusing our efforts. I interviewed four individuals for this speaker paper,

and each have a piece of the puzzle; they all agreed to share their thoughts on this subject. The ultimate conclusion is that in order to change the *Feres* bar, we must understand its center of gravity, and why it is our job, as advocates for our client base, to sit down with the one person who is ultimately responsible for the soldier and the soldier's family welfare and well-being—the commander.

## II. A Wounded Warrior's Story

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When Sergeant Carmelo Rodriguez entered the United States Marine Corps in 2003, the physician annotated on his records an unexplained melanoma—a raised portion of his skin that appeared to be a birthmark. It was annotated that there should be follow-up analysis, but there was none. The CBS interview that spotlighted Sergeant Rodriguez's video shows him emaciated, lying in a bed weighing less than 90 pounds, diagnosed with terminal skin cancer. The "birthmark" would mark his death. Ten months prior to his death, when Sergeant Rodriguez was in Iraq, his "birthmark" was open and pussing, and had expanded dramatically, but he was told that he would have to wait until he returned from his tour to have a biopsy conducted. When he returned five months later, it was too late, and he was terminal. This case, many argued, is an example of exactly why *Feres* was wrongly decided—two distinct and separate instances of medical negligence, easily provable in a civilian court of law. The focus in this case was not on the failure to treat in a combat zone, but rather in the failure to conduct a proper follow-up at entry to duty at a fixed military hospital. This is an important distinction not lost on those seeking *Feres* reform.

Military e-mails show that Sgt. Rodriguez's commanding officer, Lt. Col. B.W. Barnhill, quotes a military nurse who called Rodriguez case "a major screw-up."

An e-mail also reads: "He should have been immediately seen and the Wart removed and we may not have gotten to where we are now."

Pitts said to Fidell: "When he's in Iraq, the doctor says we'll have someone look at it when you get back to the states in five months."

He shook his head. "If I had a comparable condition myself, or a member of my family had, and somebody would have said, 'sorry, no one can see you for five months,' I would have fired the doctor!"

But Rodriguez didn't have that option.

"No, he didn't. I hope members of Congress are watching this show," Fidell said.

*CBS Nightly News* (CBS television broadcast Jan. 3, 2008).

### III. And Congress Says?

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The following interview occurred prior to the Sgt. Rodriguez story breaking; however, the insights are still pertinent to this discussion. Below are notes from my January, 2007 interview with a high-ranking policy official from the office of Congressman Barney Frank (D-Mass.), author of H.R. 2128, 108th Congress (2003), which was introduced “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.”

Q: So Congressman Barney Frank has submitted legislation regarding *Feres* three times; each time it has failed, but each time it has gained more cosponsors. Why do you think that this legislation has never gained footing?

A: Well, to be honest with you, it comes down to choosing a side. A lot of people see this issue as attacking the Armed Services, not defending soldier rights. So the conversation tends to be very one-sided when you have senior leadership active duty folks saying that this is a command and discipline issue.

Q: So has this become a wrongfully perceived “trial lawyers trying to get rich” fight?

A: On the hill, that is the perception to a great extent. Plainly, the stories are horrific, but at the end of the day, you have people like the Surgeon General saying that there is no more medical negligence in the Army than there is in the civilian community, and that military physicians are uniformly disciplined when they do commit malpractice. Couple that with the statements from people like the Chief of Staff of the Army that they will meet the medical needs of any soldier hurt at the hands of military care provider—a “we take care of our own” kind of argument—and you have an uphill battle.

Q: Well, your office introduced the legislation, so you must think that they are wrong; why?

A: I think they are wrong because we keep getting the same stories of horrific care over and over again, and our constituents who have been victims of clear medical negligence are saying that they are not, in fact, being “taken care of.” So who do you believe?

Q: Sounds like “who do you believe, me or your lying eyes . . .”

A: Something like that.

Q: OK, so if the time is not right now, with Walter Reed in the news, and the

apparent limitations of the military health care system being exposed by the influx of wounded warriors from Iraq and Afghanistan, then when is the time right?

A: Well first of all, this has become a party-line issue. The Republicans are nearly uniformly staunchly against any type of legislative reform that seemingly increases the scope of tort litigation, which is how many of them perceive this, not as a caring for soldier issue.

Q: Well, the statutory cap on FTCA suits is already 25%, which is already about 30-50% reduction off of what counsel in a nonmilitary suit would recover, so doesn't that seem a bit of a stretch?

A: I think so, not many attorneys are taking these cases anyway, and there is a delicate balance that has to be struck to incentive counsel to take these cases, and defending soldiers' rights, while staying true to the cause.

Q: OK, so if not now, when?

A: There has to be a push from the constituent base, and there has to be the political will to push through any reform. Right now, we don't have it. There is a kind of resignation to the 50 years of second-class status for soldiers and their families in these kinds of situations.

I called this senior advisor back a month prior to printing this story to see if the office felt the political will had changed since we spoke given the shift of political power in Congress. I also asked if his office was planning on reintroducing the legislation any time soon. The source was unable to comment prior to the printing of this story.

#### IV. A Department of Justice Perspective (Kinda)

The following is a January 2007 interview with a former DOJ Civil Division trial attorney, "*Feres* doctrine" instructor, and official DOJ "subject matter expert." This is a man who many consider to be the architect of the modern *Feres* bar precedent. For many years he held the reins of the bar in his able hands, directing various Assistant United States Attorneys to and fro, preserving the edges of the doctrine where it appeared most vulnerable. (The United States Department of Justice prefers the term "*Feres* doctrine.")

Q: So we worked on quite a few of these briefs together, and I have to say that as I look back, I was uncomfortable making the argument on one or two of them, but I made them and I won them—that was my job. Now that you are not wearing the *Feres* doctrine hat anymore in an official capacity, how do you personally feel? Was there ever a *Feres* case that you regretted having to argue?

A: No, I am a true believer. Soldiers receive many benefits that compensate them for any injury they incur—whether by negligence or otherwise. There is a level

playing field, and that is why the system works, and morale and welfare remain untainted by soldiers suing soldiers.

Q: What do you say to the soldier who falls in the cracks? The soldier who is medically retired due to a horrific act of medical negligence, and has, in very real terms, a quantifiable diminishment in not only his quality of life, but the quantity of his life?

A: There are few cases, but they do occur. Where we can give more to soldiers, we should give more, but lawsuits are not the answer.

Q: OK, but why are they not the answer—every other federal employee of the United States has the right to recover against the United States for acts of negligence, after the FTCA was implemented, why not those holding the tip of the American spear?

A: Well, first of all, this is really more akin to workers' compensation, and as you know, FECA [Federal Employees Compensation Act] bars suits for negligence. Employees are compensated for injuries under a comprehensive administrative scheme. But this is really more of a parallel in the same way that the military reimburses soldiers who are injured by providing them free medical care for their injuries, regardless of fault.

Q: I agree with that premise, but you are suggesting that free medical care for an injury adequately compensates a soldier for an act of medical negligence that, for instance, results in the loss of limb?

A: I am, but that is not just it—it is that coupled with the fact that upon retirement (most likely a medical retirement), that soldier will receive compensation benefits through the VA for the rest of his life. This can be a great deal of money—directly to the soldier, versus a portion to attorneys under a civil award.

Q: You are assuming a seamless transition from the military determination of disability, and the VA determination of disability, and that the soldier will not have to hire an attorney to fight for his disability award?

A: Well, the United States Armed Forces and the Veterans Administration are making great strides working towards continuity from what I understand.

Q: You are also assuming that the VA will make the right determination, and that the compensation offered will be commensurate with similar verdicts, and awards of recovery?

A: Well, when people disagree with the system, they are most always disagreeing with the outcome. The point is that it is a uniform system. It may not be equal or fair all of the time when you compare it to civil judgments, but what measuring stick are you using?

- Q: So you think that the uniformity of *application* of the system is more important than getting comparable compensation?
- A: I do. In addition, how can anyone argue that the morale and welfare of the armed services would not be affected if you have two soldiers lying in the same hospital ward—similar injury, or dissimilar injury, it really does not matter, but one had lost a hand in combat, and one has lost a leg due to medical negligence. The soldier who lost the leg tells the soldier next to him that he sued and is now a millionaire. How is that fair, and how can that not affect morale and welfare?
- Q: Well, doesn't the current system create disparities as well? I mean the decision making on disability rating is hardly uniform.
- A: Yes, but they are not active duty service members—it is different.
- Q: So the premise of the argument is that the disparities created in civil judgments and/or awards for medical negligence would deteriorate the morale and welfare of troops?
- A: I think so, and so does senior military leadership. In addition, lawsuits are distracting from the mission.
- Q: Let me ask you about the distraction argument. Any soldier, right now, can file claims for all kinds of relief, and they certainly are not barred from suing anybody else in their personal capacity, or being sued for that matter—so it really sounds like what you are saying is that the soldier on soldier suit is what is distracting—is that what you believe?
- A: I do. Look, at the inception of *Feres*, there was a great deal of discussion about legislative intent, and the bottom line is that nowhere in our jurisprudence can anyone point to a soldier being allowed to sue his fellow soldier, or commander for that matter, civilly. It just does not happen, the slippery slope is too dangerous. You don't want a soldier suing his commander for poor judgment, or for things like “emotional distress” because they yelled at him. I think that it can be a tool for soldiers to punish their command and abuse the system if they are unhappy with them for any number of reasons. That is a real command and control concern.
- Q: OK, but in reality, that is not what most FTCA reformers are talking about though, are they? Most people who want to reform the FTCA want to reform it to allow soldiers to be made whole due to acts of medical negligence of military health care providers here in the United States. No one is seriously talking about suing the medic on the field of battle, or suing the Sergeant Major for emotional distress—that is not any argument that anybody I have spoken with is making.
- A: I know, but I really don't see the value in carving out a small exception for medical negligence suits. Again, that creates inequities. There may be an

argument for doing away with it completely, but carving out a small exception for a small area of law does not make sense to me. You have to have uniformity, otherwise you run the risk of appearing unfair. I am looking at you, and you don't look convinced.

Q: No, I understand your arguments, but you have to start somewhere. There is clear a gap between the rights of service members who are injured due to medical negligence, and their civilian counterparts, and I have not seen an answer to that that question. Soldiers are not being made whole—that is the entire point of civil litigation. A catastrophically injured soldier will absolutely not have the same quality of life, life expectancy, or emotional well-being as a normal person. In addition, their family suffers and their relationships with their family suffers. Right now, not only can a soldier not sue for injuries incident to service, but their family members cannot sue either if their damages are secondary to the soldiers' injury. That seems unfairly punitive to not only the soldier, where there is a gap of compensability, but the family as well. That is the point. Giving that soldier free medical care for life from the same system that injured him or her, and then fighting for a disability award that is not commensurate with his or her injuries also seems a bit unfair to me—actually kind of cruel.

A: Listen, there is no doubt that there is a gap as you describe it, but it is minimal, taking into consideration the fact that the vast part of the awards in civilian cases are directed toward medical care costs. In addition, I think that the VA system has problems, it is not perfect, and we can do more, we should do more for our soldiers, but we can do in the construct of the reforming the current system, and giving more money to soldiers injured in this way, not by lawsuits. You are right to point to the problem with compensating families, but that is the current state of affairs, and I think it is a good system.

Q: OK, I can see you are a true believer!

A: I most certainly am, but let me end by saying that the United States has done a lot to increase benefits entitled to soldiers who are injured in this way, and I think they can always do more.

I was unable to get the permission of the interviewee to use his name prior to this publication, so I have declined to identify the source of this interview.

## V. The Command Says?

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Q: Sir, thank you for talking with me about this issue, I know that you are intimately familiar with allegations of medical negligence against military health care practitioners for a number of reasons, not the least of which was your own personal story. So when I heard about Sgt. Rodriguez, I wanted to hear from the “horse's mouth,” so to speak, about your own thought. General Arnold Bray is a

Brigadier General in the United States Army, he commanded the 2nd Brigade Combat Team, 82nd Airborne Division in Operation Iraqi Freedom I.

A: Well first of all, these are all my own personal opinions, and not official positions of the Army, I have to get that out upfront. I understand that this is for educational purposes, and that is why I am granting the interview. Second, I have to say that when I read the Sgt. Rodriguez story, the first thing I thought was that if that was an Army soldier, we would take care of that guy, so he would never have to sue anybody. I think that is true of the Marines as well. Soldiers like Sgt. Rodriguez will get taken care of by their command. They should never sue—it is unnecessary.

Q: OK, I can appreciate that, but what about he leaves the Army—in this case, he was medically retired, and by that time it was too late for him—he was terminal.

A: Well that poses an interesting question, what was his rating?

Q: From my understanding, he was given a 100% impairment rating, and that his son would receive 50% of his disability pay for the rest of his life.

A: That is not a lot, but is something. I have to say that does not sound right to me, and it shows a problem in the system. I can't agree that the soldier does not get appropriate benefits, and awards for injuries he incurs on duty, but the family, that is a different matter. Injuries like that have a way of devastating an entire family unit.

Q: So from your perspective it is more about the family?

A: Yes, it has to be. The families already sacrifice so much, they are not asked to be a part of the military, but when they are victims of the military, we have to go above and beyond to make it right.

Q: Well, you know the current state of the system prevents a family member from bringing an action if the injury is to the service member. For instance, in the case of Sgt. Rodriguez, although the family clearly suffered greatly, both in terms of emotional stress and monetarily, none of them would have been able to fully recover what they lost due to his injury, unless you consider 50% of his disability pay adequate compensation.

A: I agree with that, it is something that sounds unfair. I have to tell you that having gone through a situation myself with my son who was injured with a lifelong injury, the stress that it places on the family is enormous. Some families don't make it. I can't say that the system is fair right now.

Q: Do you think allowing a family member to bring a civil action would impair command and discipline, or morale and welfare?

A: Well, I have to say that the family is generally an extension of the service member, so I can see an argument that a soldier could use his family as a surrogate to frustrate the underlying rationale behind *Feres*, which I think is sound.

Q: I sense a “but” there?

A: But, that is still not fair to the family—they have their own voice, and their own stresses, and in cases of a family member who is injured for life, they have real heartbreak about the fairness of the system.

Q: So do you think that by barring these kinds of suits, it can have an equally detrimental effect on command and discipline, or morale and welfare?

A: I think that needs to be looked at. Today’s military family is already under a great deal of stress, as you know. The deployments are too long, the Secretary of the Army has said as much, and the rotations are really hard on a family unit. To add an event like what Sgt. Rodriguez’s family had to go through on top of that is something that could easily push a family over the edge.

Q: Military families talk to military families . . .

A: Absolutely, so I think the idea that perpetuating a system that disenfranchises military families, when other American families are made whole, is not only demoralizing, it will eventually have a negative synergy of sorts. It increases the class gap that has existed between military families and the rest of the American working class.

Q: So the current stresses of the war simply amplify the inequities that were, perhaps, bearable to a military family as just another cost of sacrifice?

A: That sounds right.

What these conversations show is what many of the members of this bar have lost sight of in their pursuit of the *Feres* revolution, that the focus has been on the inequities, on the injustice, and on the unfairness of this doctrine to soldiers. But at every chance to speak up for the soldier through legislation, the military leadership has sided with the status quo. Will they continue to do so when the families continue to suffer? By focusing on the families and recovery for their losses, which *Feres* was never intended to prevent, we can refocus the discussion on *Feres*. A courtroom coup is not likely, but for the right case, it is worth a shot.