

NOTE

Fighting *Feres*: Creating a VA Benefits Program for the Children of Servicemembers Injured by Parental Exposure

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ABSTRACT

In 1948 Congress enacted the FTCA, finally cracking open courthouse doors to private individuals injured by the negligent or wrongful acts of federal government employees. A mere two years later, however, the Supreme Court decided Feres v. United States and significantly cut back on this privilege by barring servicemembers from suing the United States for injuries suffered incident to service. The Court later reasoned that servicemembers have a distinctively federal relationship with the government, that they are already able to receive compensation through the Veterans Benefits Administration, and that lawsuits brought by servicemembers would implicate military discipline. Courts have since extended the Feres doctrine to reach claims brought by children of servicemembers. They have almost unanimously allowed children to sue for injuries caused by medical malpractice at birth or in utero, but have dismissed claims for injuries resulting from a military parent's exposure to radiation or toxins prior to the child's conception.

Children may suffer from parental exposure injuries in a wide variety of situations—intentional exposure, chemical weapons incidents, contact with radiation, or water contamination. Despite this, courts have dismissed exposure

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claims brought by children, creating asymmetry between these children and their peers injured by medical malpractice. In addition, courts have engendered confusion by applying several different tests when deciding whether to apply *Feres* to these claims. Finally, dismissing these claims under *Feres* has created severe injustice for children who oftentimes have no other path to recovery.

This Note argues that Congress should address this issue and create a VA benefits program for all children of servicemembers injured by parental exposure at any time. It should model this program after the existing programs available to children of Vietnam and Korean War veterans born with spina bifida, children of women Vietnam veterans born with certain birth defects, and children of Camp Lejeune veterans. The proposed Act would provide comprehensive healthcare and a monthly monetary allowance to child claimants based on their level of disability. The Act would not require claimants to prove fault, but it would require proof of a causal nexus between the exposure and the child's injury. Congress should implement this benefits program because none of the previously suggested solutions adequately provide a remedy for children harmed by parental exposure and the proposed Act would not implicate any of the *Feres* rationales.

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INTRODUCTION

Casey Minns, Jena Walsh, Katelyn Blake, and Melody Brown were all born to military parents within the same decade, and all suffer from severe birth defects. Casey, Jena, and Katelyn have Goldenhar syndrome,¹ a condition that can result in “asymmetry of the face and body, a partially developed or lopsided ear, internal fistulas, and, in some cases . . . esophageal malformations and the absence of an anal opening.”² Melody has spina bifida,³ a neural tube defect causing incomplete brain or spinal cord development.⁴ All four injuries occurred preconception or in utero at the hands of military personnel.⁵ Only Melody, however, was able to sue for damages because she was injured while in utero when her mother’s military doctor negligently told her to stop taking vitamins containing folic acid.⁶ In contrast, the court dismissed Casey’s, Jena’s, and Katelyn’s claims because their injuries resulted from the military’s practice of exposing its servicemembers to toxins and pesticides in preparation for the Gulf War.⁷

Prior to 1946 sovereign immunity would have protected the federal government from lawsuits brought by all four children. That year, however, Congress passed the Federal Tort Claims Act (“FTCA”),⁸ creating a limited waiver of sovereign immunity and allowing private individuals to sue the United States for injuries caused by the negligence or wrongful acts of government employees.⁹ Four years later the Supreme Court significantly cut back on this privilege

1 See generally *About Goldenhar Syndrome*, CHILD. HOSP. PHILADELPHIA, http://www.chop.edu/conditions-diseases/goldenhar-syndrome/about#.VPnY1kJTs_s (last visited Mar. 6, 2015) (providing background information about Goldenhar syndrome and common treatment options at The Children’s Hospital of Philadelphia). Although treatment varies based on the patient, some children with Goldenhar syndrome may require orthopedic surgery, plastic surgery, or spinal surgery. *Id.*

2 Minns v. United States, 155 F.3d 445, 447 (4th Cir. 1998).

3 Brown v. United States, 462 F.3d 609, 610 (6th Cir. 2006).

4 NINDS Spina Bifida Information Page, NAT’L INST. NEUROLOGICAL DISORDERS & STROKE, http://www.ninds.nih.gov/disorders/spina_bifida/spina_bifida.htm (last visited Mar. 6, 2015). Children with spina bifida suffer from physical, mobility, and learning disabilities. *Id.* There is no cure for spina bifida but treatment includes surgery, medication, physiotherapy, and the use of assistive devices. *Id.*

5 See Brown, 462 F.3d at 611; Minns, 155 F.3d at 447.

6 Brown, 462 F.3d at 610–11, 616.

7 Minns, 155 F.3d at 446–47.

8 Federal Tort Claims Act, ch. 753, tit. IV, 60 Stat. 842 (1946) (codified as amended in scattered sections of 28 U.S.C.).

9 28 U.S.C. § 1346(b) (2012).

in the landmark case of *Feres v. United States*.¹⁰ It held “that the Government is not liable under the [FTCA] for injuries to servicemen where the injuries arise out of or are in the course of activity incident to [military] service.”¹¹ The *Minns v. United States*¹² and *Brown v. United States*¹³ cases exemplify a larger trend in which courts allow the claims of military children whose injuries arise from medical malpractice in utero or at birth (hereinafter “malpractice cases”) to proceed, but apply the *Feres* doctrine to bar the claims of children whose injuries are the result of radiation or toxin exposure suffered by a military parent prior to the child’s conception (hereinafter “exposure cases”).

Although *Feres* has received widespread criticism,¹⁴ both the Supreme Court and lower federal courts have upheld its validity and reaffirmed the basic principles underlying the decision.¹⁵ By applying *Feres* differently to malpractice cases and exposure cases, however, courts have created severe asymmetry between similar plaintiffs—the children of servicemembers. In addition, this disparity has engendered both confusion and harsh injustice for children suffering from exposure injuries who have no other path to recovery.

To address this issue, Congress should create a U.S. Department of Veterans Affairs (“VA”) benefits program that includes both healthcare and monetary compensation for the children of servicemembers whose injuries are the result of radiation or toxin exposure suffered by an active duty military parent (hereinafter “parental exposure”). Although Congress has taken steps to provide compensation and care for the children of Vietnam War veterans,¹⁶ Korean War veterans,¹⁷ and Camp Lejeune veterans,¹⁸ it should create a more expansive no-fault VA benefits program that covers all children injured by parental exposure modeled after these existing programs. Estab-

¹⁰ *Feres v. United States*, 340 U.S. 135 (1950).

¹¹ *Id.* at 146. This holding is known as the *Feres* doctrine.

¹² *Minns v. United States*, 155 F.3d 445 (4th Cir. 1998).

¹³ *Brown v. United States*, 462 F.3d 609 (6th Cir. 2006).

¹⁴ *See infra* note 110.

¹⁵ *See, e.g., United States v. Johnson*, 481 U.S. 681, 686–88 (1987) (declining to modify the *Feres* doctrine).

¹⁶ 38 U.S.C. §§ 1802–1805 (2012) (providing benefits for children of Vietnam War veterans born with spina bifida); *id.* §§ 1811–1816 (providing benefits for female Vietnam War veterans’ children who were born with certain birth defects).

¹⁷ 38 U.S.C. § 1821 (providing benefits for children of Korean War veterans born with spina bifida).

¹⁸ *Id.* § 1787 (providing benefits for children who lived at Camp Lejeune or who were in utero at the time). Congress created this benefits system after volatile organic compounds were discovered in the drinking water at Camp Lejeune, a Marine Corps base in North Carolina. *See infra* notes 133–37 and accompanying text.

lishing such a program would remedy the fundamental unfairness that has resulted from dismissing exposure claims under *Feres* and would create symmetry with children harmed by medical malpractice. Furthermore, it would not run afoul of any of the *Feres* rationales.

Part I of this Note explains the FTCA, the *Feres* decision, the modern rationales used to support the *Feres* doctrine, and current caselaw considering claims brought by the children of servicemembers. Part II explores the prevalence of toxin and radiation exposure in the military and the asymmetry, confusion, and injustice that has resulted from treating exposure cases differently from medical malpractice cases. Finally, Part III advocates a legislative solution. It first explains why previously proposed solutions—codifying *Feres*, using the discretionary function exception, and restoring the military combatant exception—do not adequately solve the problem. It then argues that Congress should address this issue because of the Court's reluctance to do so and because of the fact that Congress is functionally more adept. This Note proposes that Congress should create a no-fault VA benefits program, modeled after the existing programs available to children of Vietnam War veterans, Korean War veterans, and Camp Lejeune veterans, for any child of a servicemember who suffers from an injury as a result of parental exposure.

I. DEVELOPMENT OF THE *FERES* DOCTRINE AND ITS EFFECT ON CLAIMS BROUGHT BY THE CHILDREN OF SERVICEMEMBERS

Two years after the FTCA created a limited waiver of sovereign immunity, the Supreme Court decided the *Feres* case and reinstated immunity in suits brought by servicemembers for injuries suffered incident to service.¹⁹ Although the original rationales supporting the *Feres* doctrine have eroded or shifted, the Court has clarified the three rationales that persist today: the federal relationship between servicemembers and the government, the existence of the Veterans Benefits Administration ("VBA"), and the need for military discipline.²⁰ Application of *Feres* and these rationales has led courts to dismiss the claims of children in exposure cases, while allowing the claims of children in malpractice cases to proceed.²¹

¹⁹ *Feres v. United States*, 340 U.S. 135, 146 (1950).

²⁰ See *infra* Part I.B.2.

²¹ See *infra* Part I.C.

A. *The FTCA Creates a Limited Waiver of Sovereign Immunity*

Historically, the U.S. government, following English common law, was immune from tort liability.²² If injured by a government employee, individuals had to petition Congress for a remedy.²³ In 1946, Congress, prompted by the inefficiency of hearing private bills,²⁴ enacted a dramatic change by passing the FTCA, which created a limited waiver of sovereign immunity.²⁵ As noted by the *Feres* Court, “[t]he primary purpose of the Act was to extend a remedy to those who had been without.”²⁶ Under the FTCA individuals can sue the United States

for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.²⁷

B. *The Feres Doctrine and the Rationales That Support It*

1. *Feres v. United States Reinstates Sovereign Immunity for Injuries That Occur Incident to Service*

In 1950, the Supreme Court, in the landmark case of *Feres v. United States*, addressed whether servicemembers could recover under the FTCA in a consolidation of three cases. *Feres v. United States*²⁸ involved an active duty soldier who died in a barracks fire.²⁹ *Jefferson v. United States*³⁰ concerned a soldier who underwent an abdominal operation in which a towel was left inside his stomach for eight months.³¹ *Griggs v. United States*³² involved an allegation that the negligence and unskillfulness of army surgeons caused the death of the

²² William S. Myers, Comment, *The Feres Doctrine: Has It Created Remediless Wrongs for Relatives of Servicemen?*, 44 U. PITT. L. REV. 929, 930–31 (1983).

²³ Melissa Feldmeier, Comment, *At War with the Feres Doctrine: The Carmelo Rodriguez Military Medical Accountability Act of 2009*, 60 CATH. U. L. REV. 145, 150 (2010).

²⁴ *Id.* at 150–51.

²⁵ 28 U.S.C. § 1346(b) (2012); *see also* Myers, *supra* note 22, at 932–33.

²⁶ *Feres v. United States*, 340 U.S. 135, 140 (1950).

²⁷ 28 U.S.C. § 1346(b)(1) (2012).

²⁸ *Feres v. United States*, 177 F.2d 535 (2d Cir. 1949), *aff'd sub nom. Feres*, 340 U.S. 135.

²⁹ *Feres*, 340 U.S. at 137.

³⁰ *Jefferson v. United States*, 178 F.2d 518 (4th Cir. 1949), *aff'd sub nom. Feres*, 340 U.S. 135.

³¹ *Feres*, 340 U.S. at 137.

³² *Griggs v. United States*, 178 F.2d 1 (10th Cir. 1949), *rev'd sub nom. Feres*, 340 U.S. 135.

plaintiff,³³ an active duty Army Lieutenant Colonel admitted to the Army Hospital at Scott Field Air Base.³⁴ In all three cases the plaintiffs claimed that the negligence of members of the armed forces caused their injuries.³⁵

The Court famously held that the servicemembers did not have claims under the FTCA because “the Government is not liable under the [FTCA] for injuries to servicemen where the injuries arise out of or are in the course of activity incident to service.”³⁶ The Court advanced three general arguments in support of its holding.³⁷ First, the Court found that the purpose of the FTCA was to “extend a remedy to those who had been without,”³⁸ and it emphasized the fact that servicemembers already enjoyed a system of benefits.³⁹ Second, the Court focused on the fact that Congress enacted the FTCA to make the United States liable in the same circumstances as private individuals, not to create new causes of action.⁴⁰ It found that lawsuits brought by servicemembers against the government had no parallel to lawsuits brought against private individuals.⁴¹ Finally, the Court found that servicemembers have a “distinctively federal” relationship with the government,⁴² which should be governed by federal law.⁴³ The Court reasoned that it made little sense to impose state law in these circumstances, especially because servicemembers do not choose where to reside.⁴⁴

2. *The Court Clarifies the Modern Feres Rationales: The Distinctively Federal Relationship Between Servicemembers and the Government, Recovery Under the VBA, and Military Discipline*

After *Feres* the Court continued to refine the rationales for upholding the doctrine, eventually abandoning the second rationale and

³³ *Feres*, 340 U.S. at 137.

³⁴ *Griggs*, 178 F.2d at 2.

³⁵ *Feres*, 340 U.S. at 138.

³⁶ *Id.* at 146.

³⁷ *See id.* at 140–43. Although the Court explained these rationales in much greater detail, they are no longer completely controlling and will thus not be as fully discussed here. *See infra* notes 45–58 and accompanying text.

³⁸ *Feres*, 340 U.S. at 140.

³⁹ *Id.*; *see also* Deirdre G. Brou, *Alternatives to the Judicially Promulgated Feres Doctrine*, 192 MIL. L. REV. 1, 15 (2007).

⁴⁰ *Feres*, 340 U.S. at 141.

⁴¹ *Id.* at 141–42.

⁴² *Id.* at 143 (internal quotation marks omitted).

⁴³ *See id.* at 142–44.

⁴⁴ *Id.* at 142–43.

revising the third.⁴⁵ It rejected the analogous private cause of action rationale in *Rayonier Inc. v. United States*,⁴⁶ stating that “the very purpose of the [FTCA] was to waive the Government’s traditional all-encompassing immunity from tort actions and to establish novel and unprecedented governmental liability.”⁴⁷ The Court also seemed to reject the third rationale when it decided *United States v. Muniz*,⁴⁸ finding insufficient examples of how the application of various states’ laws would hamper another nationwide governmental system—the federal prisons.⁴⁹

The Court, in *United States v. Johnson*,⁵⁰ articulated three rationales for the *Feres* doctrine that persist today (hereinafter the “*Feres* rationales”). First, the distinctively federal relationship between members of the military and the government necessitates uniform compensation.⁵¹ The *Johnson* Court, similar to the *Feres* Court, found that when servicemembers are injured incident to service, it would make little sense to base liability and recovery on the “fortuity of the situs [i.e., location] of the alleged negligence.”⁵² Second, servicemembers receive compensation under the VBA, and Congress enacted the FTCA to give a remedy to those who did not have one.⁵³ The Court found that the VBA is the “upper limit of liability for the Government as to service-connected injuries.”⁵⁴

Finally, the Court has put the greatest emphasis on the rationale of military discipline.⁵⁵ In *Johnson* it concluded, somewhat vaguely, that allowing claims for injuries suffered incident to service “would involve the judiciary in sensitive military affairs at the expense of military discipline and effectiveness.”⁵⁶ It found that these cases would implicate military judgments and decisions and would affect the sol-

⁴⁵ See Jonathan Turley, *Pax Militaris: The Feres Doctrine and the Retention of Sovereign Immunity in the Military System of Governance*, 71 GEO. WASH. L. REV. 1, 10 (2003).

⁴⁶ *Rayonier Inc. v. United States*, 352 U.S. 315 (1957).

⁴⁷ *Id.* at 318–19 (holding that the government could be liable under the FTCA for the U.S. Forest Service’s negligence in fighting a forest fire).

⁴⁸ *United States v. Muniz*, 374 U.S. 150 (1963).

⁴⁹ See *id.* at 158–61 (holding that federal prisoners could bring suit under the FTCA).

⁵⁰ *United States v. Johnson*, 481 U.S. 681 (1987).

⁵¹ *Id.* at 689.

⁵² *Id.* (internal quotation marks omitted).

⁵³ *Id.* at 689–90.

⁵⁴ *Id.* at 690 (internal quotation marks omitted).

⁵⁵ *Id.* at 690–91; *Chappell v. Wallace*, 462 U.S. 296, 299 (1983) (“*Feres* seems best explained by . . . the effects on the maintenance of such suits on [military] discipline.” (internal quotation marks omitted)).

⁵⁶ *Johnson*, 481 U.S. at 690 (internal quotation marks omitted).

dier's duty and loyalty to his or her service.⁵⁷ For these reasons, courts often state the military discipline rationale as the primary reason for barring FTCA claims brought by servicemembers.⁵⁸

C. *The Courts Use Feres to Dismiss Claims Brought by Children in Exposure Cases, but Allow Malpractice Claims to Proceed*

In the sixty-four years since *Feres*, federal courts have extended and expanded the doctrine significantly,⁵⁹ using it to dismiss the claims of children of servicemembers who suffered injuries preconception, in utero, or at birth. In several early cases, courts applied *Feres* to dismiss the claims of children in all cases, regardless of how the injury occurred. For example, in *Scales v. United States*,⁶⁰ the Fifth Circuit dismissed the claim of Charles Lewis Scales, an infant, whose parents alleged that he was born with congenital rubella syndrome as a result of the military's negligent administration of a rubella vaccine to his mother, an active duty Air Force member.⁶¹ The court held that the *Feres* rationales necessitated dismissal of the suit because the treatment of Charles and the treatment of his mother were "inherently inseparable" and the court would have to question "the propriety of decisions or conduct of fellow members of the Armed Forces."⁶² Similarly, in *Irvin v. United States*,⁶³ the plaintiffs alleged that the negligent medical care of U.S. Army employees caused the death of Quintessa Irvin four days after her birth.⁶⁴ The Sixth Circuit adopted the genesis test and affirmed dismissal of the case.⁶⁵ Under the genesis test, *Feres* bars the claims of children when the injury "has its 'genesis' in an injury to a serviceperson incident to military service."⁶⁶ In other words, "if the non-serviceman's suit is based on essentially the same facts as the potential serviceman's suit or the non-serviceman's suit could not have happened 'but for' the serviceman's cause of action,

⁵⁷ *Id.* at 691.

⁵⁸ Peggy L. Miller, *An Ounce of Immunity Prevents a Pound of Lawsuits: Medical Malpractice and Military Mothers*, 70 U. DET. MERCY L. REV. 327, 337 (1993); Kelly L. Dill, Comment, *The Feres Bar: The Right Ruling for the Wrong Reason*, 24 CAMPBELL L. REV. 71, 75-76 (2001).

⁵⁹ Feldmeier, *supra* note 23, at 147-48.

⁶⁰ *Scales v. United States*, 685 F.2d 970 (5th Cir. 1982).

⁶¹ *Id.* at 971.

⁶² *Id.* at 974.

⁶³ *Irvin v. United States*, 845 F.2d 126 (6th Cir. 1988).

⁶⁴ *Id.* at 127.

⁶⁵ *Id.* at 131.

⁶⁶ *Id.* at 130.

then under the genesis principle the *Feres* doctrine precludes the suit.”⁶⁷

After *Scales* and *Irvin*, the claims brought by children have generally fallen into two categories: medical malpractice cases and exposure cases. In the medical malpractice context, almost every court has found that *Feres* does not bar claims brought by children of servicemembers.⁶⁸ In *Graham v. United States*,⁶⁹ Patricia Graham, an active duty member of the Navy receiving care at Pease Air Force Base Hospital, alleged that the military physician committed malpractice by failing to recognize danger signs during labor, inappropriately using forceps, and failing to perform a Cesarean section, all of which led to the birth of a brain-damaged child.⁷⁰ The court found that *Feres* did not bar the claims of the plaintiff child because she did not have a distinctively federal relationship with the government,⁷¹ she could not receive compensation under the VBA,⁷² and her suit would not severely implicate military discipline because she brought a claim for an injury distinct to herself.⁷³

Later, in *Romero v. United States*,⁷⁴ the Fourth Circuit held that *Feres* did not bar the claim of Joshua Romero, who alleged that his cerebral palsy resulted from the negligent prenatal care given to his mother, an active duty member of the military.⁷⁵ The court found that the doctor directed the treatment at Joshua, not his mother, and therefore characterized his claim as one brought by a dependent who directly sustained an injury.⁷⁶ In *Smith v. Saraf*,⁷⁷ the Smiths claimed that Mrs. Smith, an active duty Air Force member receiving treatment paid for by the United States at Walson Army Hospital, did not receive proper prenatal testing due to Dr. Saraf’s negligence, which pre-

⁶⁷ *Minns v. United States*, 155 F.3d 445, 449 (4th Cir. 1998).

⁶⁸ See Nicole Melvani, Comment, *The Fourteenth Exception: How the Feres Doctrine Improperly Bars Medical Malpractice Claims of Military Service Members*, 46 CAL. W. L. REV. 395, 428–29 (2010). Although almost every court has allowed these claims to proceed, at least one has found them barred by *Feres*. See *Ortiz v. United States*, No. 12-cv-01731-PAB-KMT, 2013 WL 5446057, at *1 (D. Colo. Sept. 30, 2013) (finding that *Feres* barred the claim of a child born to an active duty member of the Air Force at an army hospital who alleged that the negligence of the hospital led to injuries including cerebral palsy).

⁶⁹ *Graham v. United States*, 753 F. Supp. 994 (D. Me. 1990).

⁷⁰ *Id.* at 995.

⁷¹ *Id.* at 997–98.

⁷² *Id.* at 998.

⁷³ *Id.* at 999.

⁷⁴ *Romero v. United States*, 954 F.2d 223 (4th Cir. 1992).

⁷⁵ *Id.* at 224.

⁷⁶ *Id.* at 225.

⁷⁷ *Smith v. Saraf*, 148 F. Supp. 2d 504 (D.N.J. 2001).

vented them from discovering that their child, Elijah Smith, suffered from spina bifida cystica.⁷⁸ The court concluded that Mrs. Smith's wrongful birth claim was barred as an injury incident to service resulting from the negligence of the Army hospital,⁷⁹ but allowed Elijah Smith's wrongful birth claim to proceed because his injury was independent and nonderivative of his mother's injury and his case did not implicate any of the *Feres* rationales.⁸⁰

Most recently, the Sixth Circuit distinguished and moved away from its previous holding in *Irvin* and allowed Melody Brown, the daughter of an active duty member of the Navy, to bring a medical malpractice claim against a Navy doctor alleging that the doctor's negligence resulted in spina bifida.⁸¹ The court noted that the *Feres* rationales do not apply "to suits for negligent prenatal care affecting only the health of the fetus" because courts routinely handle medical malpractice claims and the courts need not interfere with sensitive military affairs.⁸²

Although the courthouse doors have opened for children suffering from medical malpractice injuries, they remain closed to children suffering from injuries associated with parental exposure. In *Monaco v. United States*⁸³ the Ninth Circuit affirmed the dismissal of Denise Monaco's claim that she was born with an arterio-venous anomaly in her brain, which caused brain hemorrhages and aphasia, as a result of her military father's exposure to radiation in connection with the Manhattan Project.⁸⁴ The court focused on the time of the alleged negligent act—when Denise's father was in the military—and concluded that if it did not affirm the dismissal, the claim it would have to "examine the Government's activity in relation to military personnel on active duty."⁸⁵ One year later the D.C. Circuit heard another Manhattan Project case where the children of a servicemember claimed they had developed genetic defects as a result of their father's exposure to radiation.⁸⁶ Applying the genesis test, the court concluded that

⁷⁸ *Id.* at 507, 509.

⁷⁹ *Id.* at 508, 515.

⁸⁰ *Id.* at 521.

⁸¹ See *Brown v. United States*, 462 F.3d 609, 610–11, 614–15 (6th Cir. 2006).

⁸² *Id.* at 614–15.

⁸³ *Monaco v. United States*, 661 F.2d 129 (9th Cir. 1981).

⁸⁴ *Id.* at 130.

⁸⁵ *Id.* at 134.

⁸⁶ *Lombard v. United States*, 690 F.2d 215, 216–17 (D.C. Cir. 1982).

the cause of action was derivative of their father's injury and affirmed the dismissal of the claims.⁸⁷

In *Mondelli v. United States*,⁸⁸ the Third Circuit addressed the claim of Rosemarie Mondelli who suffered from retinal blastoma as a result of her father's exposure to massive doses of radiation while testing nuclear devices on active duty.⁸⁹ The court reversed the denial of a motion to dismiss the action under *Feres* after finding that her lawsuit would raise the same issues as a lawsuit brought by her father, therefore implicating military discipline.⁹⁰ Then, in *Hinkie v. United States*,⁹¹ the Third Circuit again reversed the denial of a motion to dismiss the claims of Paul Hinkie, who suffered from birth defects, and Timothy Hinkie, who died soon after birth.⁹² The Hinkies claimed that their injuries were caused by their father's exposure to radiation while in the army thirty years earlier.⁹³ The Third Circuit reluctantly applied the genesis test and found that although the result was unfair, Paul and Timothy's claims should be dismissed.⁹⁴

Child plaintiffs in exposure cases enjoyed brief success in the early 1980s with *In re "Agent Orange" Product Liability Litigation*.⁹⁵ The District Court for the Eastern District of New York heard claims brought by Vietnam War veterans and their families who sustained injuries as a result of the servicemembers' exposure to Agent Orange⁹⁶ in Vietnam.⁹⁷ The court found that *Feres* did not bar the claims of the family members even though *Feres* necessitated dismissal of the servicemembers' claims.⁹⁸ The court reasoned that none of the *Feres* rationales applied because the children of servicemembers cannot recover under the VBA, the children do not have a federal relationship with the government, and hearing their claims would not undermine

⁸⁷ *Id.* at 223–26.

⁸⁸ *Mondelli v. United States*, 711 F.2d 567 (3d Cir. 1983).

⁸⁹ *Id.* at 568.

⁹⁰ *Id.* at 569.

⁹¹ *Hinkie v. United States*, 715 F.2d 96 (3d Cir. 1983).

⁹² *Id.* at 98.

⁹³ *Id.* at 97.

⁹⁴ *Id.* at 98–99.

⁹⁵ *In re "Agent Orange" Prod. Liab. Litig.*, 580 F. Supp. 1242 (E.D.N.Y. 1984).

⁹⁶ "Agent Orange is a blend of tactical herbicides the U.S. military sprayed from 1962 to 1971 during Operation Ranch Hand in the Vietnam War to remove trees and dense tropical foliage that provided enemy cover." *Facts About Herbicides*, U.S. DEPARTMENT VETERANS AFF., <http://www.publichealth.va.gov/exposures/agentorange/basics.asp> (last visited Mar. 6, 2015).

⁹⁷ *In re "Agent Orange"*, 580 F. Supp. at 1244.

⁹⁸ *Id.* at 1248.

military discipline.⁹⁹ Unfortunately, appeals followed,¹⁰⁰ and in 1987 the Second Circuit found that *Feres* did in fact bar the derivative claims of the children as not meaningfully separable from issues of military discretion.¹⁰¹

In 1998, the Fourth Circuit heard a case involving the U.S. military's practice of exposing its servicemembers to toxins and pesticides before Operation Desert Storm.¹⁰² One of the servicemembers exposed was Sergeant Brad Minns, who later fathered a child born with Goldenhar syndrome.¹⁰³ Minns's child, along with two other children, brought claims under the FTCA against the United States alleging negligence.¹⁰⁴ The court first noted that the most important *Feres* rationale is military discipline.¹⁰⁵ This consideration prohibited the derivative claims of children because such claims "would require courts to engage in exactly the same intrusion into military decisions as would service[member]s' suits, such as by requiring military personnel to testify against their commanding officers."¹⁰⁶ The court then adopted the genesis test and affirmed the dismissal of the claims because the negligence directed at the servicemembers was the "but for" cause of the injuries to the children, and in any analysis of the negligence, the court would have to second-guess military decisions.¹⁰⁷ Finally, in 2006, the District Court for the Southern District of New York dismissed the claims of a child whose injuries resulted from her parents' exposure to radioactive depleted uranium while on active duty in Iraq¹⁰⁸ because they had their "genesis in injuries incurred by service members incident to their service."¹⁰⁹ In sum, courts have allowed the claims of children in malpractice cases to proceed, but have dismissed the claims of children in exposure cases.

⁹⁹ *Id.* at 1250–54.

¹⁰⁰ Gregory T. Higgins, Note, *Persian Gulf War Genetic Birth Defects and Inherited Injustice in Minns v. United States*, 34 WAKE FOREST L. REV. 935, 948 (1999) (citing *In re "Agent Orange" Prod. Liab. Litig.*, 818 F.2d 145 (2d Cir. 1987); *In re "Agent Orange" Prod. Liab. Litig.*, 818 F.2d 201 (2d Cir. 1987)).

¹⁰¹ *In re "Agent Orange" Prod. Liab. Litig.*, 818 F.2d at 204, 207 (2d Cir. 1987). Congress has since created benefits programs for children injured by Agent Orange parental exposure. See *infra* notes 155–57 and accompanying text.

¹⁰² *Minns v. United States*, 155 F.3d 445, 446 (4th Cir. 1998).

¹⁰³ *Id.* at 447.

¹⁰⁴ *Id.* The wives of the servicemen, i.e., the children's mothers, were also plaintiffs in this case, and the court affirmed the dismissal of their claims under *Feres* as well. *Id.* at 447, 449–51.

¹⁰⁵ *Id.* at 448.

¹⁰⁶ *Id.* at 449.

¹⁰⁷ *Id.* at 449–50.

¹⁰⁸ *Matthew v. United States*, 452 F. Supp. 2d 433, 435–36, 446 (S.D.N.Y. 2006).

¹⁰⁹ *Id.* at 442.

II. THE DISPARITY BETWEEN EXPOSURE CASES AND MEDICAL MALPRACTICE CASES CREATES ASYMMETRY, CONFUSION, AND INJUSTICE

The *Feres* doctrine, one of the most widely criticized judicial decisions,¹¹⁰ has given rise to the problem of dismissing parental exposure claims and prohibiting these children from recovering in court. The injuries to these children may occur when their military parents are intentionally or unintentionally exposed to radiation or toxins in a wide variety of service-related activities.¹¹¹ Because the courts have not allowed these claims to proceed, however, this has resulted in asymmetry among similarly situated plaintiffs, as well as confusion over the justifications for these decisions.¹¹² Most notably, dismissal has left many of these children without a remedy both in court and under any statutory schemes.¹¹³

A. *The Children of Servicemembers May Be Injured by Parental Radiation or Toxin Exposure in Many Ways*

Although incidences of serious radiation or toxin exposure may not occur as often as medical malpractice, the U.S. military has a long history of intentionally exposing its soldiers to, or allowing its soldiers to be exposed to, radiation and toxins. As a result, the future children of these servicemembers face the possibility that radiation or toxin exposure damage will pass genetically on to them. During World War II the military conducted human experiments using mustard gas and Lewisite¹¹⁴—a chemical warfare agent that causes blistering of the skin and problems with the eyes, respiratory tract, digestive tract, and

¹¹⁰ Turley, *supra* note 45, at 71–72 (“It is safe to say that no doctrine has generated more open contempt or confusion among courts and commentators as the *Feres* doctrine.”); *see also* United States v. Johnson, 481 U.S. 681, 694–98, 702 (1987) (Scalia, J., dissenting) (harshly criticizing the original *Feres* rationales and noting the inconsistencies within *Feres* caselaw); Costo v. United States, 248 F.3d 863, 864, 869 (9th Cir. 2001) (affirming the dismissal of the claims of soldiers who died in a Navy-led rafting trip but joining “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”); Edward G. Bahdi, *A Look at the Feres Doctrine As It Applies to Medical Malpractice Lawsuits: Challenging the Notion that Suing the Government Will Result in a Breakdown of Military Discipline*, ARMY LAW, Nov. 2010, at 56, 60–61 (criticizing *Feres* as judicial legislating); Brou, *supra* note 39, at 34 (same); Higgins, *supra* note 100, at 936 (“The *Feres* doctrine is an incorrect legal proposition that stubbornly persists, sustained not by justice but by past judges’ prestige and Congressional apathy.”).

¹¹¹ *See infra* Part II.A.

¹¹² *See infra*, Part II.B.

¹¹³ *See infra*, Part II.C.

¹¹⁴ *Is Military Research Hazardous to Veterans’ Health? Lessons from World War II, The Persian Gulf, and Today: Hearing Before the S. Comm. on Veterans’ Affairs*, 103d Cong. 124

cardiovascular system¹¹⁵—“to ascertain the physiological effects of these compounds, to explore potential treatments, and to develop new measures of protection.”¹¹⁶ Other soldiers were used in “Man Break” experiments to determine “how long a human can function” in a gas chamber under tropical conditions.¹¹⁷ Still more were subjected to hallucinogens and psychoactive agents in the 1960s out of fear of mind control.¹¹⁸

Decades later, in preparation for the Gulf War, the military used the investigational drugs pyridostigmine and botulinum toxoid “to protect U.S. personnel against the potential use of biological and chemical warfare agents suspected to be in the Iraqi arsenal.”¹¹⁹ Although these drugs were not necessarily used in experiments as mustard gas and Lewisite were, exposure to them could still cause serious health effects.¹²⁰ Thus, these programs, along with the military’s “use of depleted uranium in artillery shells and on the armor of tanks” and “the destruction of Iraqi weapons arsenals, which were possibly stocked with chemical and biological weapons,” led to the development of Gulf War Syndrome (“GWS”).¹²¹ GWS then passed on to the children of the exposed soldiers, leading to birth defects and health problems such as “respiratory problems, vomiting, diarrhea, high fevers, and blood disorders.”¹²² Although these programs ended in the early 1990s, young men exposed at that time could potentially still father children to this day.

In addition to programs involving intentional exposure, U.S. soldiers may face the risk of exposure to toxins through the use of chemical weapons by enemy combatants. Chemical weapons were in-

(1994) [hereinafter *Senate Hearing on Military Research*] (statement of Edward Martin, M.D., Acting Principal Assistant Secretary of Defense, Health Affairs).

¹¹⁵ *Facts About Lewisite*, CENTERS FOR DISEASE CONTROL & PREVENTION, <http://www.bt.cdc.gov/agent/lewisite/basics/facts.asp> (last updated Mar. 14, 2003).

¹¹⁶ *Senate Hearing on Military Research*, *supra* note 114, at 124 (statement of Edward Martin, M.D., Acting Principal Assistant Secretary of Defense, Health Affairs).

¹¹⁷ *Id.* at 209 (statement of John W. Allen, Mustard Gas-Exposed Veteran).

¹¹⁸ *Id.* at 119 (statement of Arthur L. Caplan, Ph.D., Center for Bioethics, University of Pennsylvania).

¹¹⁹ *Id.* at 127 (statement of Edward Martin, M.D., Acting Principal Assistant Secretary of Defense, Health Affairs).

¹²⁰ *See id.* at 87–89 (statement of Neil R. Tetzlaff, Lieutenant Colonel, U.S. Air Force (retired)) (testifying that since taking pyridostigmine during Operation Desert Storm, he suffered from “intolerable pain,” fatigue, palsy, and other physical and mental disabilities).

¹²¹ Kevin J. Dalton, Comment, *Gulf War Syndrome: Will the Injuries of Veterans and Their Families Be Redressed?*, 25 U. BALT. L. REV. 179, 182 (1996).

¹²² *Id.* at 185.

troduced during World War I,¹²³ and their use continues today, as evidenced by recent suspicion that Syria used chemical weapons against its own people.¹²⁴ Although roughly ninety-eight percent of the global population has entered into the Chemical Weapons Convention and agreed on chemical weapon disarmament,¹²⁵ “fear that biological and chemical weapons will fall into the hands of terrorist groups that are unconnected with state governments—and are unafraid to risk massive international devastation—still looms large.”¹²⁶

Even if soldiers are safe from exposure to drugs, chemical weapons, or other toxins, they still face potential radiation exposure. During World War II, “[t]he fear of nuclear weapons led to the exposure of thousands of unconsenting military personnel to radiation during atomic bomb testing in the Pacific.”¹²⁷ Today, the danger of global nuclear war has receded, but servicemembers may still suffer radiation exposure in “limited nuclear exchanges, terrorist actions with improvised nuclear devices, conventional explosives employed as a means of disseminating radioactive materials, or nuclear power plant accidents.”¹²⁸ For example, U.S. forces used depleted uranium against Iraq in recent years,¹²⁹ and at least one case has been brought—and dismissed under *Feres*—alleging that this exposure caused injuries to the children of servicemembers.¹³⁰ In addition, some servicemembers have duties that force them to be near radiation such as “maintaining radioactive commodities (e.g., ammunition containing depleted uranium and luminescent sights containing tritium), flying at high altitudes, and administering radiation for medical diagnosis and

¹²³ *Brief History of Chemical Weapons Use*, ORG. FOR PROHIBITION CHEMICAL WEAPONS, <http://www.opcw.org/about-chemical-weapons/history-of-cw-use/> (last visited Mar. 6, 2015).

¹²⁴ Sharon Jacobs, *Chemical Warfare, From Rome to Syria. A Time Line*, NAT’L GEOGRAPHIC (Aug. 22, 2013), <http://news.nationalgeographic.com/news/2013/08/130822-syria-chemical-biological-weapons-sarin-war-history-science/>.

¹²⁵ *Chemical Weapons*, UNITED NATIONS OFFICE FOR DISARMAMENT AFFAIRS, <http://www.un.org/disarmament/WMD/Chemical/> (last visited Mar. 10, 2014).

¹²⁶ Jacobs, *supra* note 124.

¹²⁷ *Senate Hearing on Military Research*, *supra* note 114, at 118–19 (statement of Arthur L. Caplan, Ph.D., Center for Bioethics, University of Pennsylvania).

¹²⁸ FRED A. METTLER, JR., COMM. ON BATTLEFIELD RADIATION EXPOSURE CRITERIA, INST. OF MED., POTENTIAL RADIATION EXPOSURE IN MILITARY OPERATIONS: PROTECTING THE SOLDIER BEFORE, DURING, AND AFTER 16 (Susan Thaul & Heather O’Maonaigh eds., 1999), available at http://books.nap.edu/openbook.php?record_id=9454.

¹²⁹ SOUAD N. AL-AZZAWI, DEPLETED URANIUM RADIOACTIVE CONTAMINATION IN IRAQ: AN OVERVIEW 1–2, 16 (2006), available at users.physics.harvard.edu/~wilson/soundscience/Al-Azzawi.pdf.

¹³⁰ See *Matthew v. United States*, 452 F. Supp. 2d 433, 435–36, 441 (S.D.N.Y. 2006).

therapy.”¹³¹ Because servicemembers must follow all orders despite risk of death or disability, they cannot refuse to come into contact with radiation.¹³²

Finally, servicemembers and their children may face completely unintentional exposure while on military bases. For example, in 1980 volatile organic compounds (“VOCs”) were discovered in the drinking water at Camp Lejeune, a Marine Corps base in North Carolina.¹³³ Further testing in subsequent years revealed the presence of trichloroethylene (“TCE”), a metal degreaser, and perchloroethylene (“PCE”), a dry cleaning solvent, in the Hadnot Point and Terawa Terrace base housing areas of Camp Lejeune.¹³⁴ The National Research Council concluded there were multiple sources of pollutants that appeared to have been contaminating the Tarawa Terrace area water supply for roughly thirty years.¹³⁵ The Agency for Toxic Substances and Disease Registry found that “drinking water contaminated with VOCs may be associated with decreased average birth weight-for-gestational-age births” and that “health outcomes linked to exposure to PCE and TCE include eye defects, miscarriages, fetal death, leukemia, and many forms of cancer.”¹³⁶ For example, “Jerry Ensminger, a retired Marine Corps Master Sergeant, testified that his daughter, who was conceived, carried, and born at Camp Lejeune, died at age nine after she was diagnosed with acute lymphoblastic leukemia.”¹³⁷

B. Dismissing Exposure Claims Under Feres Creates Both Asymmetry and Confusion

Although the children of servicemembers may be injured by parental exposure in a variety of ways, a severe asymmetry exists between these children and those injured by medical malpractice because courts continually dismiss exposure claims under *Feres* but allow malpractice claims to proceed.¹³⁸ This asymmetry, however, represents only part of the issue. First, even within the category of exposure cases courts may reach different results. Although almost every court has dismissed exposure claims brought by the children of

¹³¹ METTLER, *supra* note 128, at 29.

¹³² *See id.* at 21.

¹³³ S. COMM. ON VETERANS’ AFFAIRS, CARING FOR CAMP LEJEUNE VETERANS ACT OF 2011, S. REP. NO. 112-42, at 3 (2011).

¹³⁴ *Id.*

¹³⁵ *Id.*

¹³⁶ *Id.* at 4.

¹³⁷ *Id.* at 5.

¹³⁸ *See supra* Part I.C.

servicemembers, at least one court has noted the possibility of allowing these claims to proceed. In 1981 the District Court for the Western District of Missouri heard a case in which the children of deceased servicemember Charles G. Laswell claimed that they suffered from a high risk of disease and cellular damage stemming from their father's exposure to massive doses of radiation on Eniwetok Atoll in the late 1940s.¹³⁹ The court dismissed the claims because the children only alleged a future risk of injury but, in dicta, stated that "the decedent's children could bring suit against the United States under the FTCA for any injuries they have sustained."¹⁴⁰

In addition, courts hearing these claims have not even applied the same test to determine whether the child can recover, creating confusion regarding the justification for dismissal. Some merely use the *Feres* rationales and ask whether they warrant dismissal of the claim.¹⁴¹ Other courts ask whether the injury to the child was independent and nonderivative of any injury suffered by the service member.¹⁴² When the Ninth Circuit hears *Feres* cases it uses a four factor test, considering

- (1) the place where the negligent act occurred, (2) the duty status of the plaintiff when the negligent act occurred, (3) the benefits accruing to the plaintiff because of the plaintiff's status as a servicemember, and (4) the nature of the plaintiff's activities at the time the negligent act occurred.¹⁴³

Finally, several courts have applied the genesis test¹⁴⁴ to the claims of children.¹⁴⁵

¹³⁹ *Laswell v. Brown*, 524 F. Supp. 847, 848 (W.D. Mo. 1981), *aff'd*, 683 F.2d 261 (8th Cir. 1982).

¹⁴⁰ *Id.* at 850.

¹⁴¹ *See, e.g., Del Rio v. United States*, 833 F.2d 282, 287–88 (11th Cir. 1987); *Mondelli v. United States*, 711 F.2d 567, 568–70 (3d Cir. 1983) (explaining that an action brought by the child would raise the same issues as an action brought by her father for injuries stemming from his exposure to radiation).

¹⁴² *See, e.g., Brown v. United States*, 462 F.3d 609, 614–16 (6th Cir. 2006) (allowing the child's claim to proceed because her injury resulted from negligence directed at her in utero and was not derivative of any injury to her mother); *Romero v. United States*, 954 F.2d 223, 226 (4th Cir. 1992) (allowing the child's claim to proceed because his injury "did not derive from any injury suffered by a service member, but was caused when the government breached an affirmative duty of care owed directly to him").

¹⁴³ *Ritchie v. United States*, CIV. No. 10–00209 JMS–BMK., 2011 WL 1584353, at *5 (D. Haw. Apr. 26, 2011) (internal quotation marks omitted); *see also* Jennifer L. Carpenter, Case-note, *Latchum v. United States: The Ninth Circuit's Four-Factor Approach to the Feres Doctrine*, 25 U. HAW. L. REV. 231, 239 (2002).

¹⁴⁴ *See supra* notes 66–67 and accompanying text.

¹⁴⁵ *See, e.g., Minns v. United States*, 155 F.3d 445, 449–50 (4th Cir. 1998); *Hinkie v. United*

C. *Using Feres to Dismiss Exposure Claims Creates Severe Injustice for Children Who Have No Other Path to Recovery*

Not only does dismissing exposure claims under *Feres* lead to asymmetry and confusion, it is also inherently unjust.¹⁴⁶ As previously discussed, courts continually bar these children from recovering,¹⁴⁷ but many still note the injustice of dismissal. In *Mondelli*, the Third Circuit reluctantly reversed the denial of a motion to dismiss the claim of a child whose retinal blastoma stemmed from the fact that her father was exposed to radiation in the military, but the court “acknowledge[d] the result to be a harsh one” and “sense[d] the injustice to Rosemarie Mondelli.”¹⁴⁸ The same court reiterated this position when it reversed the denial of a motion to dismiss similar claims in *Hinkie*, stating “[w]e are forced once again to decide a case where we sense the injustice of the result.”¹⁴⁹ In addition, the D.C. Circuit in *Lombard v. United States*¹⁵⁰ noted its “very considerable sympathy” for the children the dismissal of whose claims it felt compelled to affirm.¹⁵¹

Even more troubling, the FTCA specifically intended to “extend a remedy to those who had been without,”¹⁵² not to limit liability.¹⁵³ By dismissing exposure claims, however, the courts have left many of these children with no path to recovery because children of servicemembers generally only receive dependency and indemnity compensation from the VBA after the death of or injury to a parent.¹⁵⁴ In recent decades, Congress has taken limited steps to address this issue by compensating some children directly for parental exposure. Responding to injuries stemming from exposure to Agent Orange, Con-

States, 715 F.2d 96, 98 (3d Cir. 1983); *Lombard v. United States*, 690 F.2d 215, 226 (D.C. Cir. 1982).

¹⁴⁶ Higgins, *supra* note 100, at 936.

¹⁴⁷ See *supra* Part I.C.

¹⁴⁸ *Mondelli v. United States*, 711 F.2d 567, 568, 569 (3d Cir. 1983).

¹⁴⁹ *Hinkie*, 715 F.2d at 97 (alterations omitted) (internal quotation marks omitted).

¹⁵⁰ *Lombard v. United States*, 690 F.2d 215 (D.C. Cir. 1982).

¹⁵¹ *Id.* at 227.

¹⁵² *Feres v. United States*, 340 U.S. 135, 140 (1950) (creating the *Feres* doctrine in part because the VBA already allowed servicemembers to recover).

¹⁵³ See Patricia O. Jungreis, Comment, *Pushing the Feres Doctrine a Generation Too Far: Recovery For Genetic Damage to the Children of Servicemembers*, 32 AM. U. L. REV. 1039, 1069 (1983).

¹⁵⁴ See 38 U.S.C. § 1310(a) (2012). Children could conceivably also bring claims against the United States under the Military Claims Act but only for injuries caused by a civilian employee or a member of the military or for injuries incident to noncombat activities. See 10 U.S.C. § 2733(a) (2012). Therefore this provides no remedy for children injured by parental exposure that occurs by accident, as a result of interaction with enemy forces, or as a result of other combat activities.

gress created benefits programs for the following classes of children: children of Vietnam veterans born with spina bifida,¹⁵⁵ children of female Vietnam veterans born with certain birth defects,¹⁵⁶ and children of Korean War veterans suffering from spina bifida.¹⁵⁷

In addition, in August, 2012 President Obama signed the Honoring America's Veterans and Caring for Camp Lejeune Families Act of 2012¹⁵⁸ after the National Research Council released its report on contaminated drinking water at Camp Lejeune.¹⁵⁹ The Act provides healthcare benefits for family members of servicemembers who lived at Camp Lejeune or who were in utero during a specified time period.¹⁶⁰ Significantly, the Act only provides benefits to a narrow class of children, excluding those who were conceived *after* their parents left Camp Lejeune.¹⁶¹ Unfortunately, "[e]ven evidence of a causal link between a veteran-parent's exposure to contaminated drinking water and a child's disability would not warrant VA compensation benefits for that child unless legislative action were taken to authorize VA to do so."¹⁶² Furthermore, even if a child is eligible for benefits under the Act, it only provides hospital and other medical services, not compensation.¹⁶³

Most recently, Representative Michael Honda (D-CA) introduced a bill titled the Toxic Exposure Research and Military Family Support Act of 2014.¹⁶⁴ Although this marks an effort by at least some members of Congress to address this issue, this bill is not an adequate remedy for several reasons. First, the bill only provides healthcare for the injured children of servicemembers, not compensation.¹⁶⁵ Compensation is necessary, however, to put children injured by parental exposure on equal ground with those who can recover for medical malpractice injuries and those who receive monthly compensation

¹⁵⁵ 38 U.S.C. § 1805(a).

¹⁵⁶ *Id.* §§ 1812, 1815.

¹⁵⁷ *Id.* § 1821(a).

¹⁵⁸ Honoring America's Veterans and Caring for Camp Lejeune Families Act of 2012, Pub. L. No. 112-154, 126 Stat. 1165 (codified in part at 38 U.S.C. § 1787).

¹⁵⁹ *Supra* notes 133–36 and accompanying text.

¹⁶⁰ 38 U.S.C. § 1787(a).

¹⁶¹ See Bridgid Cleary & Michael Tooshi, *Camp Lejeune Revisited: Strategies for Implementing a Program of Benefits for Veterans' Dependents*, 5 VETERANS L. REV. 201, 215–16 (2013).

¹⁶² *Id.* at 216.

¹⁶³ 38 U.S.C. § 1787(a).

¹⁶⁴ Toxic Exposure Research and Military Family Support Act of 2014, H.R. 4816, 113th Cong.

¹⁶⁵ See *id.* § 3(b)(1).

from programs available to children of Vietnam and Korean War veterans.¹⁶⁶ Moreover, the only healthcare the bill provides for is diagnosis and treatment.¹⁶⁷ This may be inadequate for children with lifelong injuries who require extensive rehabilitation, home care, preventative care, and respite care.¹⁶⁸ The bill is also an insufficient remedy because it only covers children injured by “toxic substances,” thereby excluding those injured by radiation.¹⁶⁹ This would leave a large class of children remediless, such as those injured by parental exposure to depleted uranium in Iraq.¹⁷⁰ Finally, eligibility for healthcare under the bill is conditioned on the presence of certain health conditions as established by an advisory board.¹⁷¹ This bill therefore excludes children suffering from unlisted conditions.¹⁷²

Thus, although Congress has taken some steps to provide benefits for specific children injured by exposure, it still has not created a comprehensive benefits program that includes both healthcare and compensation for all children in similar circumstances, such as those injured by radiation, the children of Camp Lejeune veterans conceived after residence on the base, the children of Gulf War veterans,¹⁷³ or any child injured in the future. It therefore appears that certain children are essentially punished, or at least disadvantaged, because of their parents’ military status even though the law “[r]arely . . . visit[s] upon a child the consequences of actions attributed to the parents.”¹⁷⁴

¹⁶⁶ See 38 U.S.C. §§ 1805(a), 1815(a), 1821(a); *supra* Part I.C.

¹⁶⁷ H.R. 4816, § 3(b)(1)(A).

¹⁶⁸ For example, individuals with spina bifida may require lifelong therapy. See *NINDS Spina Bifida Information Page*, *supra* note 4.

¹⁶⁹ See H.R. 4816.

¹⁷⁰ See *supra* notes 129–30 and accompanying text.

¹⁷¹ H.R. 4816, § 3(b)(1)(A)(iii)–(B).

¹⁷² It is also important to note that this is a single bill with unknown chances of success. At this time the bill has been referred to the Subcommittee on Military Personnel for consideration, but more than seven months have passed and no hearings have been scheduled. See *H.R. 4816—Toxic Exposure Research and Military Family Support Act of 2014*, CONGRESS.GOV, <https://www.congress.gov/bill/113th-congress/house-bill/4816/all-actions> (last visited Mar. 15, 2015).

¹⁷³ See *Benefits for Survivors of Gulf War Veterans*, U.S. DEPARTMENT VETERANS AFF., <http://www.publichealth.va.gov/exposures/gulfwar/benefits/survivors.asp> (last visited Mar. 6, 2015) (indicating that the VA provides benefits for children as survivors of Gulf War veterans but not for injuries suffered directly by the children).

¹⁷⁴ *Mondelli v. United States*, 711 F.2d 567, 569 (3d Cir. 1983).

III. CONGRESS SHOULD CREATE A COMPREHENSIVE NO-FAULT VA BENEFITS PROGRAM FOR CHILDREN OF SERVICEMEMBERS INJURED BY PARENTAL EXPOSURE

Even though nearly all children of servicemembers may face some risk of parental exposure, courts dismiss their cases, which creates asymmetry and confusion, and the children often cannot recover under the VBA, which creates injustice. Although several commentators have presented proposals to remedy the injustice of *Feres*, none effectively provide a remedy for children harmed by parental exposure.¹⁷⁵ Congress should therefore create a VA benefits program—modeled after those that exist for the children of Vietnam War veterans, Korean War veterans, and Camp Lejeune veterans—to provide comprehensive healthcare and compensation for all children harmed by parental exposure.¹⁷⁶ The proposed act would only require proof of a causal nexus, not proof of fault, and would therefore not disrupt any of the *Feres* rationales.¹⁷⁷

A. *The Proposed Solutions Do Not Create Adequate Remedies for Children Harmed by Parental Exposure*

1. *Codifying and Overhauling the Feres Doctrine is Unlikely to Occur and May Not Aid Children Harmed by Parental Exposure*

First, commentators have argued that Congress should codify and overhaul the entire *Feres* doctrine.¹⁷⁸ Under this approach Congress would declare that the enumerated exceptions of the FTCA are the only barriers to a servicemember's ability to bring suit.¹⁷⁹ Therefore, courts could consider whether a claim affects military discipline on a case-by-case basis, instead of completely barring almost all claims brought by servicemembers.¹⁸⁰ Those advocating for this solution also propose that Congress should, at minimum, legislatively repeal the *Feres* doctrine with regard to medical malpractice claims.¹⁸¹

¹⁷⁵ See *infra* Part III.A.

¹⁷⁶ See *infra* Part III.B.2.

¹⁷⁷ See *infra* Part III.B.4.

¹⁷⁸ See, e.g., Melvani, *supra* note 68, at 433–35.

¹⁷⁹ *Id.* The enumerated exceptions to the FTCA are: the discretionary function exception, the postal exception, the tax or customs exception, the admiralty exception, the war and national defense exception, the quarantine exception, the intentional tort exception, the treasury exception, the combatant activities exception, the foreign country exception, the TVA exception, the Panama Canal Company exception, and the bank exception. 28 U.S.C. § 2680(a)–(n) (2012).

¹⁸⁰ Melvani, *supra* note 68, at 434.

¹⁸¹ *Id.* at 434–35.

Although the Supreme Court itself has noted that Congress can change the *Feres* doctrine if it chooses,¹⁸² the practical likelihood of comprehensive congressional overhaul is very low. Sixty-four years have now passed since the Court decided *Feres* and Congress has not acted.¹⁸³ Furthermore, critics identify failure to recover for medical malpractice as the major problem with *Feres*,¹⁸⁴ and Congress has explicitly declined to amend the FTCA to allow recovery in these situations.¹⁸⁵ Members of Congress attempted to pass legislation allowing servicemembers to recover for medical malpractice in 1983,¹⁸⁶ twice in 1985,¹⁸⁷ and in 1991,¹⁸⁸ but none of the bills made it through both Houses.

Most recently, in 2009 Congressman Maurice Hinchey (D-NY) introduced the Carmelo Rodriguez Military Medical Accountability Act,¹⁸⁹ which would “allow members of the Armed Forces to sue the United States for damages for certain injuries caused by improper medical care.”¹⁹⁰ The Rodriguez Act, however, would have specifically exempted claims arising from combatant activities during times of armed conflict,¹⁹¹ which would exclude the claims of children suffering from parental exposure injuries. Additionally, Congress did not take action on the bill.¹⁹² Thus, not only is it very unlikely that Congress would codify and change *Feres*, but codification would likely not effectively address the problem of parental exposure injuries.

¹⁸² *Feres v. United States*, 340 U.S. 135, 138 (1950) (stating that if the Court had “misinterpret[ed] the Act, at least Congress possesses a ready remedy”).

¹⁸³ See Miller, *supra* note 58, at 339.

¹⁸⁴ See generally *id.* at 335–36; see also Melvani, *supra* note 68, at 434 (“The rationales behind the *Feres* doctrine are especially weak when concerning medical malpractice claims, and the outcome of the *Feres* bar on those claims seems particularly terrible under the circumstances.”).

¹⁸⁵ Miller, *supra* note 58, at 342; Kenneth R. Wiltberger, Note, *The Carmelo Rodriguez Military Medical Accountability Act of 2009: An Opportunity to Overturn the Feres Doctrine As It Applies to Military Medical Malpractice*, 8 AVE MARIA L. REV. 473, 497–98 (2010).

¹⁸⁶ H.R. 1942, 98th Cong. (1983).

¹⁸⁷ H.R. 1054, 100th Cong. (1985); H.R. 3174, 99th Cong. (1985).

¹⁸⁸ H.R. 3407, 102d Cong. (1991).

¹⁸⁹ Carmelo Rodriguez Military Medical Accountability Act of 2009, H.R. 1478, 111th Cong.

¹⁹⁰ *Id.* pmb1.

¹⁹¹ *Id.* sec. 2(a), § 2681(c).

¹⁹² Wiltberger, *supra* note 185, at 476.

2. *The Discretionary Function Exception Is Inherently Problematic and Courts Could Use It to Dismiss Exposure Claims*

Other commentators have argued that Congress should legislatively overrule *Feres* and direct courts to analyze the claims of servicemembers and their families under the discretionary function exception.¹⁹³ The discretionary function exception is an enumerated exception to sovereign immunity under the FTCA for “[a]ny claim based . . . upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.”¹⁹⁴ If a government employee has discretion to act and the action involves policy considerations, the discretionary function exception generally protects him from FTCA liability.¹⁹⁵

One commentator, discussing the specific context of medical malpractice claims, argues that the discretionary function exception gives courts enough flexibility to make decisions on a case-by-case basis as opposed to the complete bar that occurs under *Feres*.¹⁹⁶ In addition, “the discretionary function exception would provide uniformity and predictability, which are necessary in this context because of the nation-wide interest at stake and the required mobility of the armed forces.”¹⁹⁷ Major Deirdre G. Brou argues that using the discretionary function exception would not implicate military decisionmaking because military officers delegate authority to other commanders who then make the actual decisions that could lead to liability.¹⁹⁸

Although using the discretionary function exception would not force Congress to take the unlikely step of amending the FTCA, it is also not an adequate solution. First, one commentator noted that the Court’s broad interpretation of the discretionary function exception undermines congressional intent by essentially reinstating sovereign immunity.¹⁹⁹ Congress intended to allow liability for “at least some of the negligent acts of [federal government] employees,” and an expan-

¹⁹³ Brou, *supra* note 39, at 72; Jennifer L. Carpenter, Comment, *Military Medical Malpractice: Adopt the Discretionary Function Exception as an Alternative to the Feres Doctrine*, 26 U. HAW. L. REV. 35, 59–60 (2003).

¹⁹⁴ 28 U.S.C. § 2680(a) (2012).

¹⁹⁵ Brou, *supra* note 39, at 65–66.

¹⁹⁶ Carpenter, *supra* note 193, at 66.

¹⁹⁷ *Id.*

¹⁹⁸ Brou, *supra* note 39, at 66.

¹⁹⁹ See Andrew Hyer, Comment, *The Discretionary Function Exception to the Federal Tort Claims Act: A Proposal for a Workable Analysis*, 2007 BYU L. REV. 1091, 1109–10.

sive reading of the discretionary function exception eviscerates this purpose.²⁰⁰ Furthermore, the Court's interpretation of the discretionary function exception does not adequately deter negligent action and creates an adverse incentive "to delegate discretionary decisions to lower-level employees" in order to shield those decisions from FTCA liability.²⁰¹

In addition, courts could still use the discretionary function exception to dismiss parental exposure claims brought by the children of servicemembers. Courts have identified military decisions as "perhaps the most clearly marked for judicial deference,"²⁰² which indicates that courts applying the discretionary function exception would defer to military decisions to expose soldiers to toxins or radiation or to send them into situations that entail a risk of exposure. Furthermore, the Fourth Circuit in *Minns* addressed this issue and, concurrent with its decision to bar the children's claims under *Feres*, found that the discretionary function exception precluded the plaintiffs' claims as well.²⁰³ Specifically, the court found that even if the military used improper or damaged drugs, "someone in the military nevertheless made the decision to use them, and that decision, with all its alleged flaws, amounted to a judgment that the risk of using these drugs was less than the risk of exposing unprotected soldiers to potential biological and chemical attack."²⁰⁴ Thus, the discretionary function exception is not a viable solution.

3. *Restoring the Military Combatant Exception Would Allow Courts to Dismiss Many Exposure Claims*

Finally, the FTCA contains a specific exception for "[a]ny claim arising out of the combatant activities of the military or naval forces, or the Coast Guard, during time of war."²⁰⁵ At least one commentator has argued that the Court in *Feres* "deemed the combatant activities exception unwise, substituted its own judgment for that of Congress, and then strained to justify its holding."²⁰⁶ Congress should therefore act to restore the original combatant activities exception by allowing

²⁰⁰ *Id.*

²⁰¹ *Id.* at 1112–13.

²⁰² *Tiffany v. United States*, 931 F.2d 271, 277 (4th Cir. 1991).

²⁰³ *Minns v. United States*, 155 F.3d 445, 451–52 (4th Cir. 1998).

²⁰⁴ *Id.* at 452.

²⁰⁵ 28 U.S.C. § 2680(j) (2012).

²⁰⁶ Jennifer L. Zyznar, Comment, *The Feres Doctrine: "Don't Let This Be It. Fight!"*, 46 J. MARSHALL L. REV. 607, 626 (2013).

servicemembers to recover for personal injuries unless the injury arose as a result of “active fighting with enemy forces.”²⁰⁷

Although this proposal would certainly expand the number of servicemembers who could bring claims under the FTCA, it is not an adequate solution because many parental exposure injuries occur in combat situations. For example, the plaintiffs’ injuries in *In re “Agent Orange”* stemmed from exposure to Agent Orange suffered by their military parents while fighting in Vietnam.²⁰⁸ More recently, the plaintiffs in *Matthew v. United States*²⁰⁹ claimed that their injuries occurred after their military parents were exposed to radioactive uranium while on active duty in Iraq.²¹⁰ In these situations, and in possible future scenarios involving chemical weapons or other combat-related injuries, the combatant activity exception still precludes the claims of children.

B. Congress Should Create a No-Fault Compensation and Healthcare Benefits Program for Children of Servicemembers Injured by Parental Exposure

1. Congress, Not the Courts, Is More Likely and Better Suited to Address This Problem

Some may argue that because the Supreme Court created *Feres*, and continues to interpret it, only the Court should destroy or limit it.²¹¹ In the past sixty-four years, however, the Supreme Court has allowed lower courts to expand *Feres* into areas seemingly far removed from core military issues such as the exposure cases at issue here,²¹² recreational activities,²¹³ accidents occurring in on-base housing,²¹⁴ and car accidents on military bases.²¹⁵ Furthermore, the Supreme Court has explicitly declined to address exposure cases by

²⁰⁷ *Id.* at 627.

²⁰⁸ *In re “Agent Orange” Product Liability Litigation*, 580 F. Supp. 1242, 1244 (E.D.N.Y. 1984).

²⁰⁹ *Matthew v. United States*, 452 F. Supp. 2d 433 (S.D.N.Y. 2006).

²¹⁰ *Id.* at 435–36.

²¹¹ *Miller*, *supra* note 58, at 327.

²¹² *See, e.g., Minns v. United States*, 155 F.3d 445, 445 (4th Cir. 1998).

²¹³ *See, e.g., Costo v. United States*, 248 F.3d 863, 864 (9th Cir. 2001) (finding that *Feres* barred the claims of sailors who died during a Navy-led rafting trip).

²¹⁴ *See, e.g., Ruggiero v. United States*, 354 F. Supp. 2d 543, 545 (M.D. Pa. 2005) (applying *Feres* to dismiss the claim of a serviceman who died after falling from his window at the United States Naval Academy).

²¹⁵ *See, e.g., Shaw v. United States*, 854 F.2d 360, 363 (10th Cir. 1988) (finding that *Feres* barred the claim of a serviceman injured when his private vehicle was struck by a truck driven by another serviceman while driving on a military base).

denying certiorari in five different petitions.²¹⁶ Therefore, it seems highly unlikely that any change to the *Feres* doctrine will come from the Court.²¹⁷

The Supreme Court in *Feres* stated that if it was misinterpreting the FTCA, “at least Congress possesses a ready remedy.”²¹⁸ It therefore passed the onus onto Congress to deal with *Feres*, and Congress should accept this responsibility for several reasons. First, because of the Court’s reluctance to address this problem, many children suffering from parental exposure injuries have no remedy.²¹⁹ Second, Congress could implement uniform and institutional relief, whereas the Court could only provide relief on a case-by-case basis. Third, Congress has committees dedicated exclusively to military issues—the House Armed Services Committee²²⁰ and the Senate Committee on Armed Services²²¹—that could hold hearings and promulgate legislation based on information not limited to the facts of one specific case. In contrast, the Court may only hear the case before it.²²² Finally, Congress has demonstrated its ability and willingness to confront similar issues by creating benefits programs for the children of Vietnam War veterans,²²³ Korean War veterans,²²⁴ and Camp Lejeune veterans.²²⁵

2. *Congress Should Create a VA Benefits Program for All Children of Servicemembers Injured by Parental Exposure, Modeled After the Programs Available to the Children of Vietnam Veterans, Korean War Veterans, and Camp Lejeune Veterans*

A congressional solution is necessary and proper to address the problem of children injured by parental exposure. The proposed Act

²¹⁶ *Minns v. United States*, 525 U.S. 1106 (1999) (mem.); *Hinkie v. United States*, 465 U.S. 1023 (1984) (mem.); *Mondelli v. United States*, 465 U.S. 1021 (1984) (mem.); *Lombard v. United States*, 462 U.S. 1118 (1983) (mem.); *Monaco v. United States*, 456 U.S. 989 (1982) (mem.).

²¹⁷ See Wiltberger, *supra* note 185, at 477 (arguing that Congress must address the issue of using *Feres* to bar military malpractice claims because a change will not come from the courts).

²¹⁸ *Feres v. United States*, 340 U.S. 135, 138 (1950).

²¹⁹ See *supra* notes 152–74 and accompanying text.

²²⁰ See *Committee Jurisdiction & Rules*, ARMED SERVICES COMMITTEE, <http://armedservices.house.gov/index.cfm/committee-rules> (last visited Mar. 6, 2015).

²²¹ See *History*, U.S. SENATE COMMITTEE ON ARMED SERVICES, <http://www.armed-services.senate.gov/about/history> (last visited Mar. 6, 2015).

²²² See U.S. CONST. art. III, § 2; *Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc.*, 454 U.S. 464, 476 n.13 (1982) (“Article III obligates a federal court to act only when it is . . . called upon to resolve an actual case or controversy.”).

²²³ 38 U.S.C. §§ 1802–1805, 1811–1816 (2012).

²²⁴ *Id.* § 1821.

²²⁵ *Id.* § 1787(a).

would compensate children and provide them comprehensive health-care for any injuries stemming from parental exposure, without assigning fault to the military or any military personnel. It would be codified within the VBA—Title 38 of the U.S. Code.²²⁶ Specifically, the proposed Act would be located in Part II of the VBA, “General Benefits,” in Chapter 18, which provides “Benefits for Children of Vietnam Veterans and Certain Other Veterans.”²²⁷ Congress should model this program after the existing programs available to children of Vietnam War veterans,²²⁸ the children of Korean War veterans,²²⁹ and the children of Camp Lejeune veterans.²³⁰ The VA and the Secretary of Veterans Affairs would therefore oversee implementation.²³¹

The first part of the proposed Act would provide children with comprehensive healthcare, including any necessary home care, hospital care, nursing home care, outpatient care, preventive care, habilitative and rehabilitative care, case management, and respite care.²³² The second part of the proposed Act would create the core compensation scheme—a monthly allowance system that would compensate children for parental exposure-related injuries.²³³ The amount paid to each child claimant would depend on the level of disability they suffered, as determined by a schedule promulgated by the Secretary of Veterans Affairs.²³⁴ The schedule would consist of three disability levels and each child claimant would fall into one level,²³⁵ although the claimant could petition for a change of his or her classification by sub-

²²⁶ See generally *id.* §§ 101–8528.

²²⁷ See generally *id.* §§ 1802–1834.

²²⁸ See generally *id.* §§ 1802–1805 (providing healthcare, vocational training, and a monetary allowance to children of Vietnam War veterans born with spina bifida); *id.* §§ 1811–1816 (providing healthcare, vocational training, and a monetary allowance to children of women Vietnam veterans born with certain birth defects).

²²⁹ See *id.* § 1821 (providing healthcare, vocational training, and a monetary allowance to children of Korean War veterans born with spina bifida).

²³⁰ See *id.* § 1787 (providing healthcare to certain children of veterans who were in utero when their parents resided at Camp Lejeune).

²³¹ See *id.* § 303 (explaining that the Secretary of Veterans Affairs oversees the execution and administration of laws that the Department of Veterans Affairs promulgates).

²³² Cf. *id.* § 1803(a), 1803(c)(1)(A) (providing healthcare for the children of Vietnam War veterans).

²³³ Cf. *id.* § 1805(a) (providing compensation for the children of Vietnam War veterans).

²³⁴ Cf. *id.* § 1805(b)(1) (providing that the allowance amount for children of Vietnam War veterans depends on the disability suffered). Under the benefits programs for children of Vietnam and Korean War veterans, claimants are classified into levels based on their need for mobility support, sensory or motor impairment, IQ level, continence, and other disabilities. 38 C.F.R. § 3.814(d)(1) (2013).

²³⁵ Cf. 38 U.S.C. § 1805(b)(2) (establishing three disability levels for children of Vietnam War veterans).

mitting new medical evidence.²³⁶ Each disability level would correspond to a monetary allowance value, subject to increase or decrease.²³⁷ Although the Secretary would have the power to change the allowance values, the initial amounts would be as follows: \$300 per month for the lowest level of disability, \$1,000 per month for the intermediate level of disability, and \$1,700 per month for the highest level of disability. These figures are based on the most current disability rates for the children of Vietnam War veterans.²³⁸ The monthly allowance would continue for as long as the child's disability continued.

Finally, the last section of the proposed Act would address the issues of causation and fault. It would provide that children are eligible for healthcare and a monthly allowance after submitting evidence of a causal nexus between injury and parental exposure. Compensation and healthcare would not be available if something other than the alleged exposure caused the child's injury.²³⁹ Claimants would not, however, need to prove fault; they would not have to show any negligence, recklessness, or intentional wrongdoing. Similarly, the VA benefits programs that serve as the inspiration for this proposed Act are conditioned on criteria such as veteran status and lists of eligible injuries, not on whether the military was negligent or at fault.²⁴⁰

The child claimants would, however, have to show causation. Because these children would submit claims outside of the litigation context, they would not have to prove the familiar, and sometimes challenging,²⁴¹ toxic tort concepts of general and specific causation.²⁴²

²³⁶ Cf. 38 C.F.R. § 3.814(d)(6) ("VA will reassess the level of payment whenever it receives medical evidence indicating that a change is warranted. For individuals between the ages of one and twenty-one, however, it must reassess the level of payment at least every five years.").

²³⁷ See 38 U.S.C. § 5312 (governing the adjustment of benefits rates).

²³⁸ See *Birth Defect Rates—Effective 12/1/12*, U.S. DEPARTMENT VETERANS AFF., <http://www.benefits.va.gov/COMPENSATION/sb2012.asp> (last visited Mar. 6, 2015) (listing the current disability rates at \$303 for Level I, \$1,038 for Level II, and \$1,769 for Level III).

²³⁹ Cf. 38 U.S.C. § 1787(b)(2) (providing that claimants under the Camp Lejeune Act are not eligible for benefits if their injuries resulted from a cause other than residence at Camp Lejeune); *id.* § 1812(b)(2) (providing that children of female Vietnam War veterans are not eligible for benefits if their injuries resulted from something other than military service in Vietnam).

²⁴⁰ See *id.* § 1805(a) (providing a monthly allowance to "any child of a Vietnam veteran for any disability resulting from spina bifida," not just those who have proven negligence or fault (emphasis added)); *id.* § 1815(a) (providing a monthly allowance "to any eligible child for any disability resulting from the covered birth defects of that child"); *id.* § 1812 (authorizing benefits for children of Korean War veterans suffering from spina bifida in the same manner as children of Vietnam War veterans); *id.* § 1787 (authorizing benefits for children who were in utero while their parents resided at Camp Lejeune without addressing the issue of fault).

²⁴¹ See Lisa C. Toohey, *Compensation for Agent Orange Damage in Vietnam*, 13 WILLAMETTE J. INT'L L. & DISP. RESOL. 287, 292 (2005) (explaining that even in the Agent Orange

Rather, they would have to meet the same evidentiary requirements as adult members of the military who bring claims for latent exposure injuries. Courts considering claims for VA benefits for latent diseases “have held that claimants must establish a causal ‘nexus’ between their current diseases and some incident or exposure during military service.”²⁴³ Although the VA has decided that “[w]hen . . . a reasonable doubt arises regarding service origin, the degree of disability, or any other point, such doubt will be resolved in favor of the claimant,”²⁴⁴ establishment of a causal nexus still generally requires four pieces of evidence.²⁴⁵ Claimants must have (1) scientific or medical evidence that the radiation or toxin exposure at issue is associated with the injury; (2) evidence that the exposure occurred during active military duty; (3) evidence that the injury or illness occurred during active military duty; and (4) evidence of exposure magnitude, meaning that the claimant must show “evidence of an unusually large or prolonged exposure to support the conclusion that the *exposure was at least as likely as not to have been the specific cause* of their illnesses or injuries, in comparison to all other potential causes of those illnesses experienced before and after military service.”²⁴⁶ Requiring proof of a causal nexus, instead of conditioning eligibility on a specific list of diseases, would allow any child suffering from any exposure-related injury to claim benefits.

The children of Vietnam and Korean War veterans generally have less of an evidentiary burden under the existing benefits programs²⁴⁷ because benefits are automatically provided to those who suffer from

context, “there remains a host of diseases for which causation can be neither proved nor disproved, particularly in birth defects in the offspring of veterans”).

²⁴² General causation requires that the claimant prove the toxin or substance is capable of causing the injury suffered; specific causation requires that the claimant prove the toxin or substance actually caused the injury. 1 JAMES T. O'REILLY, *TOXIC TORTS PRACTICE GUIDE* § 15:2.50 (2d ed. Supp. 2013).

²⁴³ Mark Brown, *The Role of Science in Department of Veterans Affairs Disability Compensation Policies for Environmental and Occupational Illnesses and Injuries*, 13 J.L. & POL'Y 593, 596 (2005).

²⁴⁴ 38 C.F.R. § 3.102 (2013).

²⁴⁵ Brown, *supra* note 243, at 597.

²⁴⁶ *Id.* (emphasis added). The VA can bypass these four requirements by establishing a presumptive service connection, such as the presumption afforded to Vietnam veterans exposed to Agent Orange. *See id.* at 598–600.

²⁴⁷ *See Birth Defects*, U.S. DEPARTMENT VETERANS AFF., http://www.benefits.va.gov/COMPENSATION/claims-special-birth_defects.asp (last visited Mar. 6, 2015) (stating children must submit evidence that their parent served in Vietnam or Korea, evidence that they are the biological child of such parent, a birth certificate, and medical evidence of spina bifida or other covered birth defects).

a specific list of diseases and whose parents served at a specific time in a specific geographic location.²⁴⁸ Therefore they need not show causation. The proposed Act, however, would cover *all* children of *any* active duty military parent suffering from *any* injuries associated with *any* type of exposure. The causal nexus test thus gives them a procedure for obtaining benefits, but still ensures that the government is not subject to unlimited claims.

Operation of the proposed Act is best illustrated by a hypothetical using the plaintiffs from the *Minns* case. Casey Minns, Jena Walsh, and Katelyn Blake would submit claims to the VA²⁴⁹ to recover for injuries relating to their Goldenhar syndrome by alleging that their injuries resulted from the Army's practice of inoculating their fathers with drugs and exposing their fathers to toxins in preparation for the Gulf War. Although Casey, Jena, and Katelyn would not have to prove fault, they would have to submit evidence of a causal nexus between their injuries and the alleged exposures.²⁵⁰ First they would provide evidence that the pesticides or drugs used are associated in some way with Goldenhar syndrome, possibly through the use of affidavits from doctors or scientists. Then, they would show that the exposure occurred while their fathers were active duty members of the military. The third requirement, that the injury occurred during active military duty, is less applicable in the cases of children who never served in the military, but the claimants could argue that the toxins were "stored in the servicemen's semen and passed on to their wives, where the toxins were stored in fatty tissue and ultimately were released during pregnancy to the fetus."²⁵¹ Finally, Casey, Jena, and Katelyn would have to show that their fathers were either subjected to large amounts of exposure or were exposed for a long period of time to prove that the exposure "was at least as likely as not to have been

²⁴⁸ See 38 U.S.C. § 1805(a) (2012) (providing a monetary allowance for children of Vietnam veterans suffering from spina bifida); *id.* § 1811 (conditioning the child's eligibility on the mother's status as a Vietnam veteran and on a designated list of covered birth defects); *id.* § 1821 (providing healthcare and a monetary allowance for children of Korean War veterans who served near the Korean demilitarized zone during a specified time period and who suffer from spina bifida).

²⁴⁹ Claimants can apply for benefits by using an eBenefits account, by mailing a claim to a VA regional office, by going directly to a VA regional office, or by working with an accredited representative or agent. *How to Apply*, U.S. DEPARTMENT VETERANS AFF., <http://www.benefits.va.gov/COMPENSATION/apply.asp> (last visited Mar. 6, 2015). Claimants must submit all relevant evidence with their application, including medical evidence from doctors and/or hospitals. *Id.*

²⁵⁰ See *supra* notes 241–46 and accompanying text.

²⁵¹ *Minns v. United States*, 155 F.3d 445, 447 (4th Cir. 1998).

the specific cause of their illnesses or injuries.”²⁵² If, after submission of this evidence, the government raised a reasonable doubt as to any factual issue, the conflict would be resolved in favor of the children.²⁵³ Therefore, unless the government conclusively disproved a causal nexus, the VA would provide Casey, Jena, and Katelyn with ongoing comprehensive healthcare as well as a monthly monetary allowance of \$300, \$1,000, or \$1,700 based on their levels of disability.

3. *The Proposed Act Would Remedy the Asymmetry and Injustice that Has Persisted Under the Feres Doctrine*

The proposed benefits program would adequately address the problems inherent in current *Feres* caselaw. First, providing benefits for children suffering from parental exposure injuries, whose cases have been dismissed under *Feres*,²⁵⁴ would create symmetry with other similarly situated plaintiffs. In particular, providing compensation would allow these children to recover monetarily for their injuries. Similarly, children who bring medical malpractice claims may receive damages, and children who qualify for benefits under the existing programs are awarded monthly compensation.²⁵⁵ In addition, the proposed Act would consist of one test to determine whether a child qualifies for compensation and healthcare—the causal nexus test.²⁵⁶ The VA would only need to consider whether the claimant has sufficiently met the four familiar evidentiary requirements in order to prove a causal nexus. This would eliminate the problem of courts using different tests to determine whether these children should be allowed to pursue recovery.²⁵⁷

The proposed Act would also provide a remedy for children who do not have one, accomplishing the goal of the FTCA “to extend a remedy to those who had been without.”²⁵⁸ Congress has already taken steps to provide for some of these children by extending benefits to the children of Vietnam and Korean War veterans²⁵⁹ and to those injured in utero by toxic drinking water at Camp Lejeune.²⁶⁰ It

²⁵² Brown, *supra* note 243, at 597.

²⁵³ See *supra* note 244 and accompanying text.

²⁵⁴ See *supra* notes 83–109 and accompanying text.

²⁵⁵ Currently, the children of Camp Lejeune veterans do not receive compensation. See *supra* note 163 and accompanying text. The proposed act, however, would provide them with compensation as well as healthcare.

²⁵⁶ See *supra* notes 243–46 and accompanying text.

²⁵⁷ See *supra* notes 141–45 and accompanying text.

²⁵⁸ *Feres v. United States*, 340 U.S. 135, 140 (1950).

²⁵⁹ See 38 U.S.C. §§ 1802–1805, 1811–1815, 1821 (2012).

²⁶⁰ *Id.* § 1787.

has not, however, created widespread relief for children harmed by parental radiation exposure,²⁶¹ children of Gulf War veterans,²⁶² children conceived after their military parents were exposed to toxic drinking water at Camp Lejeune,²⁶³ or any others harmed by parental exposure, including future claimants. The proposed Act would provide all of them with a remedy without distinguishing among classes of children based on the location or timing of their parents' exposures. In addition, it would provide both comprehensive healthcare and compensation to child claimants, therefore filling in the gaps of the Camp Lejeune Act, which does not provide compensation.²⁶⁴

4. *The Proposed Act Would Not Disturb Any of the Feres Rationales*

Finally, the proposed Act would still uphold the *Feres* rationales enumerated by the Court. First, the Court has stated that servicemembers cannot recover under the FTCA for injuries incident to service because of the distinctively federal relationship between them and the government.²⁶⁵ Children of servicemembers, however, do not have the same relationship with the government as do their military parents.²⁶⁶ They do not choose to enter the military and they do not choose where to live.²⁶⁷ It makes little sense to deny the children of military parents an opportunity to recover when they have the same relationship with the government as the children of civilian government employees who are not barred by *Feres*.²⁶⁸ In addition, courts constantly apply state law under the FTCA, and a civilian's claim could rest on the location of a government office, just as a servicemember's claim would rest on where they were stationed.²⁶⁹ Most importantly, the proposed act would not even rely on state tort law, but rather would focus on the VA's own principle of causal nexus, thus

²⁶¹ See *supra* notes 83–90 and accompanying text.

²⁶² See Dalton, *supra* note 121, at 216.

²⁶³ See Cleary & Tooshi, *supra* note 161, at 216.

²⁶⁴ *Supra* note 163 and accompanying text.

²⁶⁵ United States v. Johnson, 481 U.S. 681, 689 (1987).

²⁶⁶ See Jungreis, *supra* note 153, at 1067, 1085.

²⁶⁷ John B. Wells, Comment, *Providing Relief to the Victims of Military Medicine: A New Challenge to the Application of the Feres Doctrine in Military Medical Malpractice Cases*, 32 DUQ. L. REV. 109, 121 (1993).

²⁶⁸ Jungreis, *supra* note 153, at 1067.

²⁶⁹ R. Matthew Molash, Note, *If You Can't Save Us, Save Our Families: The Feres Doctrine and Servicemen's Kin*, 1983 U. ILL. L. REV. 317, 328–29; see also Johnson, 481 U.S. at 696 (Scalia, J., dissenting) (finding that it makes little sense to consider uniformity of recovery only in the military context when it is not considered when other federal departments with nationwide functions are sued).

eliminating the concern that liability would be based on the “fortuity of the situs of the alleged negligence.”²⁷⁰

The second *Feres* rationale espoused by the Court is that the VBA already provides remedies for servicemembers.²⁷¹ The proposed Act would not conflict with this rationale for three reasons. First, the availability of benefits has not necessarily precluded the courts themselves from providing a further remedy under the FTCA to servicemembers.²⁷² Servicemembers may still bring claims under the FTCA regardless of the existence of VA benefits.²⁷³ Second, the VBA does *not* provide a remedy for all children injured by parental exposure. The major forms of compensation for children under the VBA are dependency and indemnity compensation for the death of a parent.²⁷⁴ This does not, however, reach children who are themselves injured, so many of the “genetically injured children of servicemembers have no statutory claim for benefits or pensions.”²⁷⁵ Third, and most significantly, Congress itself has already created benefits programs for children of Vietnam veterans,²⁷⁶ children of Korean War veterans,²⁷⁷ and children of Camp Lejeune veterans.²⁷⁸ This indicates that it is not fundamentally opposed to providing relief for children in these situations and an additional benefits program would not undermine the Court’s rationale.

Finally, the courts have relied most heavily on the third *Feres* rationale—military discipline.²⁷⁹ Enacting the proposed benefits program would not undermine this principle for several reasons. First, the military discipline rationale may not even be applicable to a servicemember’s claim. One commentator argues that “there is no logical relationship between an unwillingness to obey orders and the chance of tort recovery for injuries consequently incurred.”²⁸⁰ He ex-

²⁷⁰ *Johnson*, 481 U.S. at 689 (majority opinion) (internal quotation marks omitted).

²⁷¹ *See id.* at 689–90.

²⁷² *See Wells*, *supra* note 267, at 122.

²⁷³ *Johnson*, 481 U.S. at 697–98 (Scalia, J., dissenting) (noting that the VBA is not an exclusive remedy); *see also* Carpenter, *supra* note 193, at 57.

²⁷⁴ 38 U.S.C. § 1310 (2012); *see also* Molash, *supra* note 269, at 331.

²⁷⁵ Jungreis, *supra* note 153, at 1068; *see also* Molash, *supra* note 269, at 331 (“Thus, a family member suffering a derivative physical injury, such as a child afflicted with birth defects, receives nothing for the pain, suffering, loss of earnings, or other damage incurred.”).

²⁷⁶ 38 U.S.C. §§ 1802–1805, 1811–1815.

²⁷⁷ *Id.* § 1821.

²⁷⁸ *Id.* § 1787.

²⁷⁹ *See, e.g., Johnson*, 481 U.S. at 690–91; *see also Feres v. United States*, 340 U.S. 135, 141–42 (1950).

²⁸⁰ Molash, *supra* note 269, at 339.

plains that if a soldier disobeyed a dangerous order, thus implicating military discipline, the soldier would suffer no injury and therefore have no claim.²⁸¹ If the soldier obeyed the order and later brought suit, military discipline would still not be implicated because the soldier did not disobey.²⁸² In addition, another commentator argues that lawsuits do not undermine military discipline; military discipline is undermined when the government is not held accountable for negligent conduct because it sends the message that officers do not care about the well-being of their soldiers.²⁸³ Courts also routinely examine military discipline when hearing cases brought by civilians based on the conduct of servicemembers or when servicemembers have to testify.²⁸⁴

The argument that civil suits undermine military discipline is further weakened when considering tort actions brought by children of servicemembers. Generally, injuries to children of servicemembers that result from toxin or radiation exposure are remote in time from the actual order given to the soldier.²⁸⁵ The servicemember who suffered the initial exposure may have retired from service, and the program that resulted in exposure may have ended long before the child seeks recovery.²⁸⁶ Consider the following hypothetical: an eighteen-year-old soldier is exposed to high doses of radiation while on active duty. Fifteen years later he fathers a child who suffers from birth defects as a result of her father's exposure. If the child sought recovery under the proposed Act, it would be highly unlikely that the circumstances that led to her father's exposure would be still ongoing or that questioning a command given fifteen years prior would undermine current military discipline.

At least one court has questioned the relevance of the military discipline rationale in an exposure case. In *In re "Agent Orange,"* the District Court for the Eastern District of New York found that the military discipline rationale did not apply to claims brought by children whose military parents were exposed to Agent Orange.²⁸⁷ First, the court found that civilians still do bring suits under the FTCA that

²⁸¹ *Id.*

²⁸² *Id.*

²⁸³ Zyznar, *supra* note 206, at 621.

²⁸⁴ See *Johnson*, 481 U.S. at 700 (Scalia, J., dissenting) ("To the extent that reading the FTCA as it is written will require civilian courts to examine military decisionmaking and thus influence military discipline, it is outlandish to consider that result 'outlandish,' since in fact it occurs frequently, even under the *Feres* dispensation." (internal citation omitted)); Bahdi, *supra* note 110, at 66; Jungreis, *supra* note 153, at 1069.

²⁸⁵ Jungreis, *supra* note 153, at 1069; Molash, *supra* note 269, at 340-41.

²⁸⁶ Molash, *supra* note 269, at 340-41.

²⁸⁷ *In re "Agent Orange" Prod. Liab. Litig.*, 580 F. Supp. 1242, 1251-52 (E.D.N.Y. 1984).

question the judgment of military officers.²⁸⁸ Second, the court found the idea that an officer might not give an order to a soldier out of fear that a civilian would later sue the United States “ephemeral and far-fetched.”²⁸⁹ Third, the military orders in that case were given twenty years prior to the filing of suit, making the military discipline argument very tenuous.²⁹⁰

Finally, and most importantly, the proposed Act would not undermine military discipline because it would be a no-fault system. The claimant would only need to show a causal nexus between the exposure and the injury and not prove that the military acted negligently, recklessly, or wrongfully. The government could provide the child with compensation for his or her injuries without ever questioning whether the military should have given the orders. For example, the existing programs for the children of Vietnam and Korean War veterans and the children of Camp Lejeune veterans do not ask the claimants to prove fault. As previously discussed, they merely condition eligibility on timing, geography, and certain injuries.²⁹¹ Furthermore, the fact that these programs exist indicates that Congress was not overly concerned with how compensating these children would affect military decisionmaking. Therefore, expanding compensation and healthcare to all children injured by parental exposure, regardless of where or when it occurred, would not disturb military discipline.

CONCLUSION

Currently, Casey Minns, Jena Walsh, Katelyn Blake, and many others like them have no way to recover for their serious injuries caused by parental exposure. They cannot sue the United States in court under the *Feres* doctrine, and the VA does not provide them with benefits. Implementing a no-fault VA benefits program that extends healthcare and compensation to all children of servicemembers who suffer as a result of parental exposure injuries would put Casey, Jena, and Katelyn on equal footing with their similarly situated peers injured by medical malpractice. It would also remedy the inherent injustice created when courts dismiss these cases under *Feres* by extending a remedy to those who are without one. Finally, the proposed Act would not implicate any of the *Feres* rationales. Congress should therefore act now to provide this necessary remedy.

²⁸⁸ *Id.* at 1250.

²⁸⁹ *Id.*

²⁹⁰ *Id.* at 1253.

²⁹¹ See *supra* note 240 and accompanying text.

APPENDIX

The following proposed statute is modeled after the programs available to the children of Vietnam veterans, Korean War veterans, and Camp Lejeune veterans:

(a) Healthcare

(1) The Secretary shall provide healthcare to any child of a veteran who is suffering from injuries as a result of radiation or toxin exposure experienced by his or her active duty or active duty for training military parent or parents.²⁹²

(2) The term “healthcare” means home care, hospital care, nursing home care, outpatient care, preventive care, habilitative and rehabilitative care, case management, and respite care.²⁹³

(b) Monthly Allowance

(1) The Secretary shall pay a monthly allowance to any child of a veteran who is suffering from injuries as a result of radiation or toxin exposure experienced by his or her active duty or active duty for training military parent or parents.²⁹⁴

(2) The amount of the allowance paid to a child under this section shall be based on the degree of disability suffered by the child, as determined by a schedule prescribed by the Secretary.²⁹⁵ Claimants may be eligible for different rates after submitting new medical evidence of disability.²⁹⁶

²⁹² Cf. 38 U.S.C. § 1803(a) (2012) (“In accordance with regulations which the Secretary shall prescribe, the Secretary shall provide a child of a Vietnam veteran who is suffering from spina bifida with health care under this section.”). The word “Secretary” refers to the Secretary of Veterans Affairs. § 101.

²⁹³ Cf. *id.* § 1803(c)(1)(A) (“The term ‘health care’ . . . means home care, hospital care, nursing home care, outpatient care, preventive care, habilitative and rehabilitative care, case management, and respite care . . .”).

²⁹⁴ Cf. *id.* § 1805(a) (“The Secretary shall pay a monthly allowance under this section to any child of a Vietnam veteran for any disability resulting from spina bifida suffered by such child.”).

²⁹⁵ Cf. *id.* § 1805(b)(1) (“The amount of the allowance paid to a child under this section shall be based on the degree of disability suffered by the child, as determined in accordance with such schedule for rating disabilities resulting from spina bifida as the Secretary may prescribe.”).

²⁹⁶ Cf. 38 C.F.R. § 3.814(d)(6) (2013) (“VA will reassess the level of payment whenever it receives medical evidence indicating that a change is warranted. For individuals between the ages of one and twenty-one, however, it must reassess the level of payment at least every five years.”).

(3) The Secretary shall, in prescribing the rating schedule for the purposes of this section, establish three levels of disability upon which the amount of the allowance provided by this section shall be based.²⁹⁷

(4) The initial amounts of the allowance shall be \$300 per month for the lowest level of disability prescribed, \$1,000 per month for the intermediate level of disability prescribed, and \$1,700 per month for the highest level of disability prescribed. Such amounts are subject to adjustment under Section 5312 of this Title.²⁹⁸

(c) Causation

(1) Claimants shall be eligible for healthcare and a monetary allowance after submitting evidence showing a causal nexus between the alleged exposure suffered by a military parent and the child's injuries.²⁹⁹

(2) Claimants shall not be eligible for healthcare if it is shown that the injury or illness resulted from something other than the parent's exposure.³⁰⁰

(3) Claimants need not prove fault to be eligible for benefits.

²⁹⁷ Cf. 38 U.S.C. § 1805(b)(2) ("The Secretary shall, in prescribing the rating schedule for the purposes of this section, establish three levels of disability upon which the amount of the allowance provided by this section shall be based.").

²⁹⁸ Cf. *id.* § 1805(b)(3) ("The amounts of the allowance shall be \$200 per month for the lowest level of disability prescribed, \$700 per month for the intermediate level of disability prescribed, and \$1,200 per month for the highest level of disability prescribed. Such amounts are subject to adjustment under section 5312 of this title."); *Birth Defect Rates—Effective 12/1/12*, *supra* note 238 (stating the current disability rates at \$303 for Level I, \$1,038 for Level II, and \$1,769 for Level III). Section 5312 governs the adjustment of benefit rates. 38 U.S.C. § 5312.

²⁹⁹ Cf. *id.* § 1812(a)(1) ("The Secretary shall identify the birth defects of children of women Vietnam veterans that . . . are associated with the service of those veterans in the Republic of Vietnam during the Vietnam era . . .").

³⁰⁰ Cf. *id.* § 1787(b)(2) ("Hospital care and medical services may not be furnished under subsection (a) for an illness or condition of a family member that is found, in accordance with guidelines issued by the Under Secretary for Health, to have resulted from a cause other than the residence of the family member described in that subsection."); *id.* § 1812(b)(2) ("In any case where affirmative evidence establishes that a covered birth defect of a child of a woman Vietnam veteran results from a cause other than the active military, naval, or air service of that veteran in the Republic of Vietnam during the Vietnam era, no benefits or assistance may be provided the child under this subchapter.").