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THE FERES DOCTRINE: AN EXAMINATION OF THIS MILITARY EXCEPTION TO THE FEDERAL TORT CLAIMS ACT

HEARING

BEFORE THE

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

ONE HUNDRED SEVENTH CONGRESS

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THE FERES DOCTRINE: AN EXAMINATION OF THIS MILITARY EXCEPTION TO THE FEDERAL TORT CLAIMS ACT

TUESDAY, OCTOBER 8, 2002

U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The Committee met, pursuant to notice, at 2:05 p.m., in room SD–226, Dirksen Senate Office Building, Hon. Arlen Specter presiding.

Present: Senators Specter and Leahy.

OPENING STATEMENT OF HON. ARLEN SPECTER, A U.S. SENATOR FROM THE STATE OF PENNSYLVANIA

Senator SPECTER. The Committee on the Judiciary will now proceed with our hearing on proposed legislation to amend the Federal Tort Claims Act to reverse the so-called *Feres* doctrine.

This hearing has been scheduled on a particularly busy day with, as you doubtless know, arguments proceeding on the floor of the Senate on a resolution to authorize the President to use force in Iraq. I think we will probably have sparsely attended membership from the committee, but staff is here and the hearing will be followed.

I have introduced legislation to amend the so-called *Feres* doctrine because it seems to me that the doctrine has produced anomalous results which reflect neither the will of the Congress nor common sense.

There have been many examples where a soldier who is the victim of medical malpractice at an Army hospital cannot sue the Government for compensation, but a civilian who suffers the same treatment on an allegation of malpractice would be entitled to recover against the Government. Similarly, if a soldier driving home from work on an Army post is hit by a negligently driven Army truck, that soldier is barred from suing the Government, but a civilian in identical circumstances would not be so barred.

In the interest of brevity, my entire statement will be admitted, without objection, which sets forth the outlines and parameters of the pending legislation.

[The prepared statement of Senator Specter appears as a submission for the record.]

Senator SPECTER. I have long been concerned about the *Feres* doctrine, handed down in 1950. When I practiced law before coming to the Senate, I had serious questions about it, and I was especially

troubled by it when I noted the dissenting opinion of Chief Judge Becker, of the Court of Appeals for the Third Circuit, in the case of *O'Neill* v. *United States*, decided in 1998, when a claim was denied under the *Feres* doctrine, with Chief Judge Becker saying that the doctrine ought to be reversed.

That was particularly impressive for me. I have known Chief Judge Becker just about as long as the *Feres* doctrine has been in effect. The case was handed down in 1950 and Edward R. Becker and I started to ride the elevated subway train to the University of Pennsylvania in the same year—not duly relevant to the issue, but just a note as to the concerns which I have had.

In the interest of full disclosure, let me say that one of our witnesses today, a very distinguished Philadelphia lawyer, Richard A. Sprague, and I have been close friends and associates since we were assistant district attorneys together in the late 1950's. We worked together when I was district attorney of Philadelphia and he was first assistant.

With that relatively brief introduction, let's turn now to our first panel of witnesses: the Honorable Paul Harris, Deputy Associate Attorney General of the Department of Justice. We are going to try to stay pretty close within the time parameters. As I think all of you have been informed, our practice is to have 5 minutes. This light—and you have one on the desk—will start at 4 minutes and stop with the red light going on when it goes to five.

Mr. Harris, thank you for joining us and the floor is yours.

STATEMENT OF PAUL HARRIS, DEPUTY ASSOCIATE ATTORNEY GENERAL, DEPARTMENT OF JUSTICE, WASHINGTON, D.C.

Mr. HARRIS. Thank you, Senator Specter. I am very pleased to be before this committee this afternoon to present the views of the Department of Justice on the *Feres* doctrine and its importance to the United States.

I ask that my full written statement be entered into the record of this hearing.

Senator SPECTER. Without objection, it will be made part of the record.

Mr. HARRIS. Thank you, sir.

To begin, a brief explanation of the *Feres* doctrine and its underpinnings is in order. In *Feres* and its progeny, the Court has held that members of the armed services cannot sue the Federal Government or other service members or civilian Government employees in tort for injuries that arise out of or are incurred in the course of activity incident to military service.

The *Feres* Court relied upon three principal reasons in coming to its decision: First, the existence and availability of a separate, uniform, comprehensive, no-fault compensation scheme for injured military personnel; second, the effect upon military order, discipline, and effectiveness of its service members if service members were permitted to sue the Government or each other; and, third, the distinctively Federal relationship between the Government and the members of the armed services and the corresponding unfairness of permitting service-connected claims to be determined by non-uniform local tort law.

Case law today recognizes that the policy underpinnings of the *Feres* doctrine are as valid today as they were in 1950. Today, as in 1950, the military service does not leave those permanently injured in the line of duty uncompensated. Congress has attended to such injuries or death through the creation of an efficient and comprehensive compensation system.

The second consideration that has led to the broad application of the *Feres* doctrine by the courts through the years can be understood as an aspect of the traditional reluctance of American courts to intervene in military affairs and the reluctance of the Congress to force such intervention.

Simply put, *Feres*' prohibition of intra-military tort litigation derives from society's most elemental instinct—self-preservation through a strong military. This consideration comes into play even when the issue is not military discipline in the strictest sense. The *Feres* doctrine serves to avoid the general judicial intrusion into the area of military performance.

The third policy consideration—the Federal nature of the relationship in the absence of an analogous private liability—led the Supreme Court in *Feres* to conclude that a service member suit failed to state a claim under the Federal Tort Claims Act.

While it sometimes is argued that the *Feres* doctrine is unfair to service members who are victims of medical malpractice, it is worth noting that the *Feres* doctrine is an adjunct to the military disability compensation package available to service members which, on the whole, is far more generous, even-handed, and fair than compensation available to private citizens under analogous State worker's compensation schemes.

This is because service members, unlike their civilian counterparts who suffer serious adverse consequences from medical care, generally are eligible for compensation whether or not those consequences are or can be proven to be the result of substandard medical care.

The fact is that all of these service members are eligible for such compensation, rather than only a small handful who can show a causal link between their condition and substandard medical care. Thus, the arbitrariness and uncertainty associated with tort litigation is effectively eliminated.

The Department believes that the policy considerations outlined above are as valid today as they were when they were first articulated. Today, to allow soldiers to sue their Government for tort damages implies that the military has failed its own, and that only by taking the boss to court can justice be attained. Fostering that attitude within a community which demands uncompromising trust and teamwork would have dire consequences and implications for our national defense.

It is the view of the Department of Justice that the *Feres* doctrine continues to be a sound and necessary limit on the FTCA's waiver of sovereign immunity, essential to the accomplishment of the military's mission and to the safety of the Nation.

I will be pleased to answer any questions that you may have.

[The prepared statement of Mr. Harris appears as a submission for the record.]

Senator SPECTER. Thank you very much, Mr. Harris.

We now turn to the Commandant of the United States Naval Academy, Rear Admiral Christopher Weaver.

Thank you for joining us, Admiral, and we look forward to your testimony.

STATEMENT OF CHRISTOPHER E. WEAVER, REAR ADMIRAL, AND COMMANDANT, NAVAL DISTRICT WASHINGTON, WASHINGTON, D.C.

Admiral WEAVER. Thank you very much, sir. If I could correct a point there, I am the Commandant of the Naval District of Washington.

Senator SPECTER. Pardon me. Would it be a demotion or a promotion? That is my first question.

Admiral WEAVER. No, sir. Actually, there are only two commandants left in the Navy, and that is the two of us.

Good afternoon, sir, to you and to other members of the committee. My name is Rear Admiral Chris Weaver. I am the Commandant of the Naval District and the Navy's Regional Commander for the National Capital Region. I graduated from the U.S. Naval Academy and have been a Naval officer for 31 years.

I appreciate the opportunity to provide testimony to the committee on the views of the Department of Defense on the *Feres* doctrine. The Department of Defense believes the *Feres* doctrine is sound public policy and national defense policy that should not be disturbed.

To begin with, sir, I am not a lawyer. I am a surface warfare officer. My primary focus is on maintaining good order and discipline, providing support to our military members in the Washington, D.C., area, to those who are forward-deployed and prosecuting the war on terrorism, and sustaining the larger architecture of military readiness, our ability to fight and win our Nation's wars.

Before I go further, I want to express my condolences to the family of Kerryn O'Neill. Her murder several years ago was a terrible tragedy. Our hearts continue to go out to the O'Neill family. Although I do not question their sincere desire to seek redress, I am here to testify that allowing service members to bring suits in Federal court against each other and their chain of command will interfere with mission accomplishment and adversely affect our operational readiness.

With the challenges confronting our military and Nation today, I respectfully submit that the *Feres* doctrine should be preserved for the following three reasons. First, the *Feres* doctrine is important to maintaining good order and discipline in the military. In its current form, the doctrine is essential to maintaining military readiness. Litigation is inherently divisive and disruptive.

Absent this doctrine, opposing participants would often both be military members and include a member's commanding officer and military superiors. Military effectiveness and readiness are based on cohesiveness, obedience, discipline, putting the interest of the service ahead of the interest of the individual, and an inherent, unencumbered and unfettered trust and confidence up and down the chain of command. This degree of trust and confidence cannot exist in an adversarial legal environment.

Discipline, morale, and unit cohesion are the hallmarks of an effective fighting force. Everything the commander does is designed to embed these values throughout the organization. Litigation is based on allegations, compulsory process, and aggressively asserting the interests of the individual against the service. Because of the disruptive effect of litigation, the concept of sailors suing their shipmates and their Government is alien to our traditional philosophy of military discipline and U.S. jurisprudence.

Second, the *Feres* doctrine is not a bar to remedies because of the existence of the no-fault compensation system currently applicable to any disability or death incurred during military service. All State and Federal worker's compensation laws provide a no-fault compensation system as the exclusive remedy for work-related injuries.

Employees may not sue the employer to seek larger recoveries, but employees will be compensated even if there was no negligence or the injured employee was personally negligent. The military compensation system has the same premise, except that the military member is considered to be on the job 24 hours a day, 7 days a week. Their no-fault compensation applies to virtually all injuries at work or at home, in the U.S. or overseas, whether nobody was at fault or everybody was at fault. To be sure, the benefits available under the comprehensive no-fault compensation system are not extravagant, but the system is fair.

The third reason for preserving the *Feres* doctrine is that it is essential to maintaining equity among military members injured or killed during military service. If the *Feres* doctrine were repealed in whole or in part, disparities would exist, depending on whether the member's death or injury was based on negligence or combat. Other disparities would arise based on many variations in State tort law, the fact that the Federal Tort Claims Act does not apply outside the United States, and the vagaries of liability jurisprudence.

Military training would also be affected adversely if a commander or non-commissioned officer must focus on varying and multiple tort issues and State laws when conducting exercises and training evolutions instead of focusing on operational readiness.

In conclusion, the *Feres* doctrine is an important element of public policy and national defense policy. It is a necessary component of maintaining good order and discipline in the military and of enhancing the effectiveness and operational capability of our armed forces.

It is also a part of a comprehensive no-fault compensation system which, similar to worker's compensation laws, provides the exclusive remedy for deaths and injuries during military service. Preservation of this exclusive remedy is the only way to maintain equity for all of the military members and families who shoulder the sacrifices endured for our Nation's defense.

Thank you very much, and I ask that my full written testimony be made part of the record, sir.

Senator SPECTER. Your full statement will be made a part of the record, without objection.

[The prepared statement of Admiral Weaver appears as a submission for the record.]

Senator SPECTER. Admiral Weaver, you talk about not affecting military effectiveness, and I note your reference to the case of *O'Neill* v. *United States*. We have with us today Ms. Bonnie O'Neill, whose daughter, Ensign Kerryn O'Neill, was the victim in that case.

The essential facts were that Kerryn O'Neill was murdered by her former fiance, George Smith, a Naval ensign. The two of them had met at the Academy and had become engaged, and then Kerryn O'Neill broke off the engagement. She was then stalked by Mr. Smith. One night, while she was sitting in her on-base apartment watching a movie with a friend, Smith came to her building, killed her, her friend, and then himself.

As you know, after the murders, Kerryn O'Neill's family learned that Mr. Smith had scored in the 99.99th percentile for aggressive, destructive behavior in a Navy psychological test. Under Naval procedures, those results should have been forwarded to the department of psychiatry at the Naval hospital for a full psychological evaluation. Now, that, of course, is a case which isn't battlefield, isn't combat, isn't military duty.

Why should that kind of a case be barred, and do the rationales, the three reasons you say, have any applicability at all to that kind of a case?

Admiral WEAVER. Well, sir, in my judgment, it is a matter of equity. This was a terrible and tragic case, but to focus on this and use this as an element to create a new standard, which I would submit to you, sir, with respect, would create inequities in other parts of the system—I don't believe that that is the way to address it.

Senator SPECTER. What inequities, Admiral?

Admiral WEAVER. I am sorry, sir?

Senator SPECTER. What inequities?

Admiral WEAVER. The ability to afford, for instance, redress on the part of the O'Neill family as opposed to providing a similar circumstance under the Federal Tort Claims Act against an overseas incident of that kind. In other words, how would we provide the same type of treatment, regardless of the circumstances?

Senator SPECTER. If the incident had occurred overseas, you would apply the same law. It does not involve order and discipline. It is not a matter which involves the combat items which you mentioned in your opening statement.

Can you give me a factual situation where there would be an unfairness in allowing a lawsuit, if you could, as to Kerryn O'Neill? Why not as to others?

Admiral WEAVER. Sir, I cannot provide an answer to that at this moment. I will provide that to you, if I could.

Senator SPECTER. Well, I would appreciate it if you would do so. I don't see that the analogy is apt.

Mr. Harris, when you articulate the rationales and you talk about order and discipline, and Admiral Weaver makes a reference to combat, I can certainly see the need for order and discipline in combat. The comment was made about one sailor suing another, apparently, in the course of duty, but how would that affect a case like Kerryn O'Neill's horrendous murder?

Mr. HARRIS. Well, to begin with, I would like to also echo the Department's sympathies for the O'Neill family.

I would remind the committee that the Constitution provides the basis for the Congress having a special relationship with the military and establishing the rules and regulations that govern the military.

Within that rubric, under Article I, section 8, the Congress has deferred to the military a certain amount of authoritarian power that would be intolerable in civilian life. One of those powers in this case is the power and the authority of the military to govern its housing for military personnel.

Ensign O'Neill in this incident, as the Senator recognizes, was in military-provided housing when this took place. This is inescapably an area that is within the discretion of the military to provide for order and discipline—the regulations governing military housing are quite specific.

Senator SPECTER. Mr. Harris, what has the housing got to do with it? If it had been off-base, would you say that Kerryn O'Neill's parents would have been able to sue?

Mr. HARRIS. Well, of course, if it was off-base, the military still does provide for housing even off-base by providing a housing allowance to military members, for example.

Senator SPECTER. Is either relevant——

Mr. HARRIS. Very relevant, because these decisions are——

Senator SPECTER [continuing]. Whether you are on-base or an allowance is being provided?

Mr. HARRIS. I am sorry, Senator?

Senator SPECTER. Is either relevant to the underlying rationale? You talk about order and discipline, and I can see that, but order and discipline has nothing to do with the Kerryn O'Neill case. And whether she is on-base or off-base, housing allowance or not, or in an apartment which is more expensive than the housing allowance—what has that got to do with the facts of the case with respect to the underlying rationale of order and discipline?

Mr. HARRIS. Well, here, I think it is important to remember that the order and discipline fits within a broader context of a command structure in the military. The military has got to function in a manner in peacetime; that is, it operates on the command structure in peacetime so that it can effectively work in wartime.

Senator SPECTER. Tell me how the command structure is implicated in the O'Neill case.

Mr. HARRIS. If a commander, for example, had the choice of providing additional security at the barracks that a service member is living in and at which a service member is injured in a particular case, versus taking that amount of money and providing it to buy additional aircraft or providing additional security at some other place on the base, this decision that is made within the command structure of the military is one that should function independent of judicial intrusion. The Congress has recognized that for a long time and has deferred generally to the military to make these kinds of decisions.

But beyond that, in this case where we have the case of Smith, who had a psychological examination that allegedly revealed that there were perhaps some psychological problems associated with

the serviceman, clearly the military should not be in the position where commanders are hauled into court to justify why a command decision was made in this case to assign Smith to a submarine and that the assignment of Smith to a submarine had caused him to be distraught.

If we get into this kind of second-guessing of command decisions in the military, we will slowly grind down the efficiency and effectiveness of our military within the command structure.

Moreover, even if *Feres* didn't apply in this case, there are a number of exceptions articulated within the text of the FTCA that would bar a recovery, specifically the assault and battery exception and the discretionary function exception.

Senator SPECTER. Well, I am listening to you, but I don't see anything that has to do with the command structure.

One final question, Mr. Harris. You did not mention cost. I infer from that that it is not a relevant factor in the Government's position.

Mr. HARRIS. Cost?

Senator SPECTER. Cost, payment of damages.

Admiral WEAVER. If I may take that question, sir, if you don't mind.

Senator SPECTER. You may, after Mr. Harris does.

Mr. HARRIS. I think cost is always a concern.

Senator SPECTER. Well, never mind whether it is always a concern. You didn't mention it. Is it a concern in your opposition to a change in the *Feres* doctrine?

Mr. HARRIS. Well, the question that I answered was related to the command structure and that has nothing to do with the cost issue.

Senator SPECTER. I am aware of that.

Mr. HARRIS. As I would re-articulate, the Government, of course—the Department of Justice would be concerned about cost, which would be one other reason, the protection of the Federal public fisc, for not opening up the military to all sorts of lawsuits that are controlled by plaintiffs.

The FTCA does attempt to control cost by limiting attorney's fees, but we think that the overall compensation system that the military has in place, which is a very generous compensation system, is one that for the most part compensates those who are injured or killed in the line of duty in a fair and consistent manner.

Senator SPECTER. You testified to that, but this question is very different. This question is whether the Government contends that it would be very expensive if these lawsuits could be brought if the Government had to pay damages.

Mr. HARRIS. There is no question that it would be expensive, but the payment of damages is not our primary concern.

Senator SPECTER. Admiral Weaver, why don't you go ahead? Do you have an answer to it?

Admiral WEAVER. Sir, I can't address the specific impact of judgments. My intervention was simply to say that regardless of the financial cost, I think the greater risk is, again, on the good order and discipline and the relations that exist in a military organization one to another.

Senator SPECTER. OK, I think your positions are understood. Thank you very much, gentlemen.

Now, I would like to call the second panel: Major General Sklute, retired; Major General Altenburg, also retired; Mr. Sprague; Mr. Fidell; Mr. Joseph; and Ms. O'Neill.

Our first witness on panel two is listed as Major General Nolan Sklute, Former Judge Advocate General, United States Air Force. He received his bachelor's degree from Union College in 1962, his law degree from Cornell, and was the Judge Advocate General of the Air Force from 1993 to 1996.

I think you can see the timer there which has five on it, and the minutes go down and the red light comes on when time is up.

Thank you for joining us, General Sklute, and the floor is yours.

STATEMENT OF NOLAN SKLUTE, MAJOR GENERAL (RETIRED), FORMER JUDGE ADVOCATE GENERAL, U.S. AIR FORCE, BETHESDA, MARYLAND

Mr. SKLUTE. Thank you, Senator Specter. At the outset, I would like to ask that my complete written statement be entered into the record.

Senator SPECTER. Your statement will be made a part of the record in full, and everyone's written statement will be made a part of the record in full.

Mr. SKLUTE. First, let me apologize for my voice today. I seemed to have picked up a football cold over the weekend.

I do appreciate, sir, very much the opportunity to be here today and to share my thoughts with you and the committee concerning the proposed legislation to amend the Federal Tort Claims Act eliminating the effects of the *Feres* doctrine.

As indicated in my written statement, I submitted there and I submit here that the proposed legislation poses significant risks to the effectiveness of our Nation's armed forces, and I would like to take a few moments to explain why I and many others have reached this conclusion.

I don't intend to reiterate all of that have been discussed by the courts in formulating, applying, affirming, and expanding on the incident to service exception which has become known as the *Feres* doctrine. You already have sufficient information in this regard before you, both written and verbal.

What I would like to do is address the adverse impact the proposed legislation will have on those elements that are critical to the unit cohesiveness so very critical to the combat effectiveness of our armed forces.

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

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

The proposed legislation would attack the requirement for unit cohesion in certain respects. First of all, it will create a certain degree of divisiveness within an organization. It will create discord, it will create perceived and real unfairness, and it will create the not insignificant turmoil associated with civil lawsuits.

Such activities are far removed from the various internal accountability measures undertaken by the services within the structure of various departmental regulations and directives. There is no end to the type of decisions, actions, and activities which would become litigation targets with the abandonment of *Feres*.

One just has to visualize the impact on an organization from the following two examples which really just barely scratch the surface. A solider or airman injured during a training exercise seeks monetary damages, alleging his injuries resulted from the negligence of his commander and others within his organization during the planning and execution of the training event.

A maintenance crew chief bails out of an F–16 when it flames out during an incentive flight or a training flight and files a claim for his resulting injuries, alleging negligence on the part of the pilot, the maintenance crew that maintained that aircraft with whom he works, and the military air traffic controllers.

The services are already subject to lawsuits in a wide variety of circumstances. Superimposing the process of civil litigation in the manner proposed by abandoning *Feres* will impose an even greater disruptive influence upon military operations. The courts have recognized this and acknowledged their reluctance to intervene in military affairs.

The adverse impact upon unit cohesiveness inherent in these two examples and a million others that could be discussed must not be overlooked. Abandonment of *Feres* as proposed would pave the way for lack of uniformity, inconsistency, and unfairness in fact and in appearance. It promotes disparate treatment based on geographic location of the incident giving rise to the injury; i.e. stateside or overseas, since the FTCA doesn't apply overseas.

It promotes disparate treatment based upon the combat exclusion during wartime. A soldier alleging negligent medical treatment at a stateside military hospital will be allowed to proceed under the Federal Tort Claims Act. Yet, his buddy, a solider receiving medical treatment in combat, would not.

I share fully the concerns of the families of those whose lives are lost while serving their country. I remember very well accompanying my wing commander and advising various spouses that their husbands were killed in aircraft accidents. The loss is no less severe, regardless of how the injury or death is sustained.

The bottom line is the *Feres* doctrine has stood for over 50 years without legislative change and there should be tremendous hesitation to work a change at this point.

[The prepared statement of Mr. Sklute appears as a submission for the record.]

Senator SPECTER. Thank you very much, General.

We now turn to Major General John Altenburg (Retired), former Assistant Judge Advocate General, United States Army, currently with the Office of Ethics and Business Conduct, the World Bank Group. General Altenburg received his bachelor's degree from

Wayne State and his legal degree from the University of Cincinnati.

Thank you for joining us, Judge Altenburg, and I note in your resume you were born in Philadelphia.

Mr. ALTENBURG. Yes, sir.

Senator SPECTER. We look forward to your testimony.

STATEMENT OF JOHN ALTENBURG, MAJOR GENERAL (RETIRED), FORMER ASSISTANT JUDGE ADVOCATE GENERAL, U.S. ARMY, WASHINGTON, D.C.

Mr. ALTENBURG. Senator Specter, thank you for allowing me to appear before the committee. I understand that my written testimony will be submitted in the record.

Senator SPECTER. Without objection, your full statement will appear in the record.

Mr. ALTENBURG. Yes, sir.

There are several reasons to support the *Feres* doctrine, as General Sklute just mentioned, and I also am going to confine my remarks to the good order and discipline prong of the *Feres* doctrine. I am only going to discuss the effect upon military order, discipline, and effectiveness if service members are permitted to sue the Government or each other.

I think there are two aspects to the good order, discipline, and effectiveness argument. One is the uniqueness of the military setting and the military mission that produces the examples that several of us have provided for you, the examples of inherently dangerous equipment and inherently dangerous training and the missions that we have talked about.

But the second is one that we haven't talked about very often and I think it may be very significant, and that is the extraordinary regulation and control that the military exerts on itself directly related to the demands that have no civilian counterparts that we make on our soldiers that are different in kind and degree from the civilian sector. I think this is why the Supreme Court consistently defers to the military.

The words "good order and discipline" sort of flow off our tongue, but we don't look behind those words very often to see, well, what are we really talking about, what is the unique about the military culture and the military society that would justify this kind of treatment.

I think that the Supreme Court mainly works in favor of the military in this regard because of the disruption and the time-consuming nature the litigation would have on our commands.

Now, it is true that our own accountability systems frequently cause disruption and frequently demand time away from duties for our soldiers and our leaders. But the additional reason of civilian courts not having the expertise to address many of the issues inherent in these inquiries is why I believe the Supreme Court has upheld *Feres* for so long.

Soldiers die in training incidents, even though training is strictly controlled and regulated. Sometimes, training injuries and deaths are the result of negligence. The Congress provides compensation for these cases, and if compensation is the issue, then perhaps we

need to work together to increase the compensation that would be available.

If *Feres* did not apply to injured soldiers and families of dead soldiers, soon the military would, in my opinion, undermine our ability, No. 1, to maintain our combat readiness and, No. 2, to ensure accountability so that we can continue to conduct realistic training, while minimizing future incidents.

Page 7 of my written testimony refers to an infantry platoon in training that I think illustrates the potential far-reaching effects of allowing civil litigation. An infantry platoon is the essential building block of your and my Army in this country. A ready example of a platoon is the group of statues that comprise the Korean War Memorial here in the District of Columbia.

If a soldier on a platoon exercise were injured or killed in what is a common training event for such a platoon, to rehearse and execute a ground assault on a house or a hilltop or a cave, live fire, potential defendants would include two team leaders probably between the ages of 19 and 22 years old, three squad leaders, and a platoon sergeant, and that is before we even get to officers.

A concern of mine has been that it sounds like we are worried always about the chain of command and superior officers, when, in fact, the real divisiveness would come because of all the junior leaders that could eventually be involved in civil litigation in instances like this.

There are over 650 infantry platoons in this Army, sir, and when you think about how often they conduct this type of training—and that is just one sector of one arm of the service—I think it shows the far-reaching effects that civil litigation could have on our Army.

Thank you, sir.

[The prepared statement of Mr. Altenburg appears as a submission for the record.]

Senator SPECTER. Thank you very much, General Altenburg.

We now turn to Mr. Richard A. Sprague. He has a bachelor's degree from Temple in 1949 and a law degree from the University of Pennsylvania in 1953. He served as chief counsel to the House of Representatives Select Committee on the Kennedy Assassination and as first assistant district attorney in Philadelphia.

Welcome, Mr. Sprague, and we look forward to your testimony.

STATEMENT OF RICHARD A. SPRAGUE, COUNSEL, SPRAGUE AND SPRAGUE, PHILADELPHIA, PENNSYLVANIA

Mr. SPRAGUE. Thank you, Senator Specter, and I thank the committee for inviting me to speak here. I also ask that my complete statement be made part of the record.

Senator SPECTER. Without objection, it will be.

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

It is significant to me, Senator, that nobody has spoken about what it is that the Act specifically provides. There is no question

about it that the Federal Tort Claims Act in 1946 for the first time allowed suits against the Government for the negligent acts of governmental employees.

The *Feres* doctrine which has been applied arises from the words which nobody seems to deal with of precluding claims by servicemen for claims arising out of the combatant activities—the combatant activities, I stress—of the military or naval forces or the Coast Guard during time of war.

Notwithstanding that language, under the interpretation that the U.S. Supreme Court gave in *Feres*, we have these kinds of situations, as you yourself pointed out: A serviceman went into an Army hospital for having abdominal surgery. Eight months later, he has another surgery where a towel 30 inches long by 18 inches wide, marked "Medical Department, United States Army," from the earlier abdominal surgery was discovered within his stomach. No one can question in that situation there was negligence, and had he been a civilian or had it happened in a civilian hospital, appropriate litigation could be brought. Yet, that is the precise fact pattern in the *Feres* doctrine that was applied by the Supreme Court.

Another example—and there are hundreds of them—a Coast Guard rescue pilot is called out on a stormy night to rescue a boater in distress. The weather is so bad that the pilot requests radar guidance from the FAA, a civilian agency of the Federal Government. Following the FAA's direction, the pilot flies into the side of a mountain and is killed. If it were a civilian pilot, no question that his family and wife would be able to maintain a suit. Yet, under the *Feres* doctrine, no suit allowed. How you get it from the words of that exemption is beyond me.

I do point out, as I think you said earlier, Senator Specter, Judge Scalia in his dissent in the *Johnson* case, which I believe is very persuasive, states that *Feres* was wrongfully decided and heartily deserves the widespread, almost universal criticism it has received.

As for the local tort law rationale, he pointed out how, in *United States* v. *Muniz*, we allow Federal prisoners to sue the Federal authorities, depending on which State they are in and the various laws. We allow Federal prisoners to bring suit against the Government, but not our men in service. And we are not talking about in terms of combat and we are not talking about the kind of situation that they are dredging up in order to try to prevent the Congress from rectifying this wrong.

Feres now has been interpreted to bar all injuries suffered by military personnel that are even remotely connected to his status as a member of the military. Judge Becker's dissent in the *O'Neill* case, joined by Judges Sloviter and McKee—and you, Senator Specter, and I hope the Congress recognize what an esteemed member of the judiciary Judge Becker is. He received recently the prodigious Devitt Award. In that case, how in the world can anybody say that the killing of this officer by the other officer in some way is harming military discipline?

I notice that the caution light is coming up.

The simple fact, Senator Specter, is the *Feres* doctrine as it is being applied now, not in the way the Congress originally wrote it—and by the way, if you read the Supreme Court opinions, they are going further and further away from what was even the origi-

nal interpretations, being interpreted more broadly than ever, and they use as a basis that the Congress hasn't acted. Judge Higginbotham, a distinguished member of the Third Circuit, while he applied the *Feres* doctrine, decried it. He said it is unjust, it is not fair.

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

Thank you.

[The prepared statement of Mr. Sprague appears as a submission for the record.]

Senator SPECTER. Thank you very much, Mr. Sprague.

We now turn to Mr. Eugene Fidell, of the law firm of Feldesman, Tucker, Leifer, Fidell and Bank; a bachelor's degree cum laude from Queens College, a law degree from Harvard, active duty in the Coast Guard from 1969 to 1972.

Welcome, Mr. Fidell. We look forward to your testimony.

STATEMENT OF EUGENE R. FIDELL, COUNSEL, FELDESMAN, TUCKER, LEIFER, FIDELL AND BANK, LLP, WASHINGTON, D.C.

Mr. FIDELL. Thank you, Senator.

First, one of the points that was made a few moments ago had to do with the notion of unit cohesion. The reference, of course, is to the legislation that was passed some years ago, a few years ago, for the "don't ask, don't tell" policy. Without developing the point more broadly because of time constraints, I would only say that I sincerely doubt that the Congress had in mind the *Feres* doctrine when it enacted its comments concerning unit cohesion.

Now, is unit cohesion a potent factor? Obviously, it is. You don't want to do anything that will unduly generate friction within a military unit. Notwithstanding that, Congress obviously has to do some balancing and decide whether the game is worth the candle, and I think history teaches and experience teaches that the kinds of issues that may come up in *Feres* or Federal Tort Claims Act litigation are not the kind that really erode military discipline.

Let me be very specific. It is certainly the case that already, under current law in a variety of contexts, GIs have a right to go to court, they have a right to make allegations, and they have a right to a judicial determination, rather than have the courthouse door slammed in their face, which is what the *Feres* doctrine does, obviously. You never get into court with the *Feres* doctrine, or you are out as soon as you are in.

Let me give some illustrations. A GI can sue under the Tucker Act. A GI can sue to have his record corrected, for Administrative Procedure Act review of the decision of the boards for correction of military or naval records. These are the kinds of issues that may well bring into play command decisions of one kind or another.

Yet, our society has sufficient flex in it that we recognize that larger public interests are served by giving GIs resort to the same

kinds of judicial forums that other Americans have as well. I think civilian court proceedings arising out of those kinds of contexts may well be a nuisance to commanders, but without them civilian control of the military would be no more effective here than in a nondemocratic society.

Issues of malpractice, for example, to take the one that is so potent today and that many lawyers in private practice regularly get inquiries about, have nothing whatever to do with military discipline or any notions of command or unit cohesion.

If the simple duty to respond to legal process or produce documents, such as agency records, and in some cases even be subjected to the normal discovery process contemplated by the Federal Rules of Civil Procedure, or even a trial from time to time, is too much of an intrusion, then the result would be to bar actions by military personnel under a raft of other statutes where their right to sue has never been questioned.

[The prepared statement of Mr. Fidell appears as a submission for the record.]

Senator SPECTER. Thank you very much, Mr. Fidell.

Our next witness is Mr. Daniel Joseph from the firm of Akin, Gump, Strauss, Hauer and Feld; a bachelor's degree from Columbia in 1963, Harvard Law School, 1966, law clerk to Fifth Circuit Judge Irving Goldberg. He was with the Department of Justice from 1967 to 1971.

Thank you for joining us, Mr. Joseph, and we look forward to your testimony.

STATEMENT OF DANIEL JOSEPH, COUNSEL, AKIN, GUMP, STRAUSS, HAUER, AND FELD, LLP, WASHINGTON, D.C.

Mr. JOSEPH. Thank you, Senator Specter. On behalf of Bonnie O'Neill and my firm and myself, we really do appreciate this opportunity to appear before the committee. I would like to thank you for organizing and chairing this hearing and looking into this old Supreme Court decision that we think is having an unfair and an unnecessary impact.

I also would like to say that we represented, of course, Bonnie O'Neill all the way through her litigation. I want to stress that we did that without the payment of any fee, and this is the only Federal Tort Claims Act case in which I have represented a plaintiff. I represented the United States a little bit when I was at Justice. And I don't expect to be handling other such cases.

Although the Supreme Court originally claimed in the *Feres* decision that its holding was based on the language of the Act, it later altered that rationale and now it doesn't hold, and the United States doesn't argue either here or in court, that there is any language in the Act that supports the doctrine.

The *Feres* doctrine is therefore not a statutory, but a court-imposed restriction on a right that Congress gave to sue. The Court has taken back part of the right to sue that Congress intended to give members of the military. For three reasons, I think the Supreme Court had no power under the Constitution to impose the *Feres* doctrine.

First, as I said, the doctrine has no foundation in the text and it is a judicially imposed limitation on the right to sue. But the Su-

preme Court doesn't have any power to condition or to partially repeal legislation passed by Congress that is not unconstitutional.

Second, the subject matter of *Feres* is lawsuits by members of the military, and the Supreme Court says that the doctrine exists We have heard it justified today, on grounds of preventing threats to military decisionmaking and discipline. But it isn't the Supreme Court under the Constitution and it isn't the executive branch that gets to determine that.

Under the Constitution, Article I, section 8, clause 14, it is the Congress that has the power to govern the ground and naval forces, and the Court has no business second-guessing Congress on judgments made in this area. The fact that the Court did so in *Feres*, based on the request of the executive branch as a party in a lawsuit, makes it all the more important for Congress to act to restore the appropriate constitutional balance.

Finally, the Federal Tort Claims Act, of course, was a larger waiver of the sovereign immunity of the United States, and the Supreme Court has held many times, except in the *Feres* case itself, that it is only the Congress that gets to determine how large or how small a waiver of sovereign immunity should be.

A second extremely important point is that the *Feres* doctrine was not necessary. Congress did the job of crafting the Act to take account of the particular problems that might be raised by extending that Act to military activities, and there are some very important exceptions in the statute itself that show that.

Under Section 2680(j) of Title 28, there can't be any liability for combatant activities of the military in time of war. This represents Congress making a balance that the Court has not respected. It extended the ban far further than that. In addition, there can't be any liability for a cause of action arising in a foreign country. Again, that is a congressional balance that Congress struck that the Court has ignored.

Finally, and perhaps most importantly, as has been referred to, Congress said that there can't be any liability under the Federal Tort Claims Act based on performance or non-performance of a discretionary function, whether or not the discretion is abused. Thus, the examples that we have been told about this morning, such as choices on how much security to supply in a military context or training exercises that have gone awry, would all be covered under the discretionary function exception that Congress imposed without the unnecessary additional breadth of the *Feres* doctrine.

Now, one point I would like to make that I was kind of surprised to hear—I have heard repeatedly about the Veterans Benefits Act and this compensation system. The O'Neills did not receive any benefits at all under that system, which only applies to service people themselves and their dependents. If you are young and you are not married, as Kerryn O'Neill was not, you are not likely to have dependents. Thus, there is a tremendous difference between worker's compensation laws and the Veterans Benefits Act, and in many cases there are no benefits that are available.

The other point that I just wanted to mention briefly here that is mentioned at length in the statement that I have filed is that it is possible for civilians to sue in many of the same contexts in which military are barred from suing. The best example is a case

called *Sheridan* that involved at the Bethesda Naval Hospital a soldier who apparently at least was disorderly, who fired a rifle into the street there and hit a civilian passing in a car. The civilian successfully filed suit.

If that person had been in the Army or a member of the military, suit would have been barred. But a suit by a civilian is permitted, and that is irrational if the purpose is to bar possible potential interference with military matters.

So in our view, the *Feres* doctrine is both over-broad and doesn't cover things that purportedly arise out of the same concern. That is the reason why it needs comprehensive attention from the Congress.

Thank you.

[The prepared statement of Mr. Joseph appears as a submission for the record.]

Senator SPECTER. Thank you, Mr. Joseph.

We now turn to Ms. Bonnie O'Neill, from Kingston, Pennsylvania. Ms. O'Neill's daughter, Ensign Kerryn O'Neill, was the victim of the case which we have been talking about.

We know this is a difficult situation for you, Ms. O'Neill, but we appreciate your being here to tell us your views on this matter.

Chairman LEAHY. If I might, Mr. Chairman——

Senator SPECTER. Senator Leahy, let me welcome you to the hearing.

Chairman LEAHY. Thank you. I just want to thank you for taking on this hearing. I am in another hearing when I am not here, but I did also want to come over and thank Ms. O'Neill for being here. I can only imagine how difficult this must be for you being here. I appreciate you taking the time and it is very good of you to do that.

Senator SPECTER. Thank you.

Ms. O'Neill, we look forward to your testimony. The floor is yours.

STATEMENT OF BONNIE O'NEILL, KINGSTON, PENNSYLVANIA

Ms. O'NEILL. My following statements may seem like a plea for help, but how as a mother can I address you otherwise? I am overwhelmed to be here and my aim is one I have had in mind for 9 years.

I would like to thank you, Senator Specter and Senator Leahy, for doing all the work to hold this hearing. The issue is important to me and my family, and also to other members of the military and their families.

I was notified of my daughter Kerry's death in work December 1, 1993, an occurrence not imaginable previously even in my most horrible nightmares. Kerry was the youngest of my three children, with a brother, Ed, and a sister, Kristen, who is just 1 year older than Kerry.

Since our family had no military background, I found Kerry's desire to apply to the United States Naval Academy surprising. Her final selection possibilities included some extremely prestigious colleges. Kerry decided to combine some suspense with humor by waiting until May 1, the deadline for admission to the Naval Acad-

emy, to make her announcement of college selection to us. We were all on edge.

She designed a selection form with a box in front of each college, and on the morning of May 1 this form was hanging on my bedroom door with the United States Naval Academy checked. Kerry told me she had made her choice because she wanted the combination of academics with the opportunity of serving her country.

Although I had always let Kerry know I would accept any decision she made, internally I was quite apprehensive. I realized, as she did, her future would be very difficult and demanding. I knew I had to trust the military with Kerry's life. Her next 4 years constantly challenged her and yet she responded to all of the challenges, excelling in every aspect of her naval career. We were all so very proud of her accomplishments.

Kerry graduated in the top 5 percent of her class. In addition, she excelled in sports, receiving 12 varsity letters in 4 years. Although she was a walk-on at the track, she was the first female Division II All-American in women's cross-country and the first female athlete to qualify for NCAA Division I championships at the Academy.

She set Academy records in cross-country and other track events, and she was honored in her senior year by receiving the award of the top honor for a female athlete, the Vice Admiral William P. Lawrence Award. Kerry was selected to serve as a representative of the United States Naval Academy in the Australian Navy during her final summer at the Academy. But most important, Kerry was a kind, sincere, and loving woman with high aspirations. People whose lives she touched will always remember her.

Upon graduation from the Academy, Kerry received an appointment in the Civil Engineering Corps. After training in California, she was stationed at Coronado Naval Base and received the position of leader on a reconstruction project at the base. She loved the Navy and the naval base. She once said to me, I wake up with the sun in the morning and run with the sun going down at night, and I love my freedom.

I am presenting this background to you to emphasize the possibilities Kerry's life held. Then came December 1, 1993, and her life was abruptly ended by her ex-fiance, George Smith, who also graduated from the United States Naval Academy. They were serving at different naval installations, working in entirely different jobs near San Diego, California.

Smith seemed unable to deal with the ending of the engagement. As the time got closer to his serving his first tour of duty on a submarine, Smith's erratic behavior got more pronounced. He followed Kerry around and he appeared uninvited where she was socializing with other people. While this was disturbing, it did not seem all that unusual to people, considering Smith's situation.

But 2 days before Smith was to start his first submarine tour, Kerry was obviously concerned and asked a friend, John Dye, at the office at which she worked to visit her that evening. Unfortunately, he could not. Then, while working out at the gym, Kerry met Lieutenant Alton Grizzard, another friend from the Academy who was well known as having been the quarterback on the Acad-

emy's football team, and she asked for help. Grizzard agreed and paid her a visit, during which they watched a movie.

George Smith appeared uninvited and he and Kerry had a heated discussion in the lobby of the bachelor officer's quarters where she lived at the Coronado Naval Base. Smith went back to his apartment and, in fact, telephoned me at midnight, California time, which is 3 a.m. in Pennsylvania, as I was sitting up with a sick friend, to tell me that Kerry was dating another man asked what he could do. I told him to give her time to make up her mind. She is only 21. I have had to live with the memory of that phone call ever since.

George did not listen to me. He returned to Kerry's BOQ carrying two loaded handguns past the guard to her room. He fired seven shots, killing Kerry, Alton Grizzard, and Smith then killed himself. A great emptiness grew in the lives of our family, friends, and associates.

As the months went on, our family requested the Navy's results of the investigation into these murders. The Navy supplied that information and this is what we discovered. Kerry had been killed a day before he was to report for submarine duty. The Navy also found that Smith was psychologically unfit for submarine duty. He had a serious personality disorder, was extremely aggressive, and could not control his behavior under stress.

In addition, he could not deal with the months of isolation from friends and family and the lack of apparent control of his personal situation that submarine duty involves. The Navy was made aware of this because 2 months earlier it had required Smith, like all candidates for submarine duty, to take a psychological screening test. The results of the screening under normal procedure would have dictated whether further psychological testing would be necessary.

Smith's results were so unusual and departed so far from the norm that in its later investigation the Navy concluded that in Smith's case no further psychological testing would have been necessary to immediately disqualify him from submarine service.

These results showed Smith to be more than four standard deviations above normal, above the 99.99 percentile in aggressive and destructive behavior, and more than two standard deviations above norm in six other categories, including low situational control, impulsive behavior, and negative motivation. These are obviously not impressive traits for a future nuclear engineer scheduled to report to duty on a nuclear submarine. George responded to test questions with answers such as "I know how to make people uneasy when I want to. I can get away with anything I want."

With the screening test abnormal results so pronounced, why didn't Smith's obvious mental unsuitability for submarines disqualify him for that duty? Why was screening performed if normal procedures wouldn't be followed for United States Naval Academy graduates?

If Smith were disqualified, he would not have been under severe pressure that caused him to kill Kerry, himself, and Alton Grizzard. If these deaths had not occurred that December 1, could numerous military lives aboard a submarine have been sacrificed in the future when Smith suffered acute stress?

The answer was and remains shocking and amazing to me. It is in violation of the Navy's procedures that the psychological screening tests were not read or scored by the Navy's civilian psychologist whose job it was to do that. Thus, the evil in these results was not discovered until a subsequent investigation, until after Kerry's life, Smith's life, and Grizzard's life and their future naval careers had been lost.

I think that someone needs to assume responsibility for this. The Navy had appropriate measures which had identified Smith's very erratic and troubling mental problems, even though he may have appeared to be normal to those who knew him. But Dr. John Wallace, the Navy's civilian psychologist, just didn't read them. Although Dr. Wallace at first claimed he had never received these results until after Kerry's death, he indicated during the investigation that while testing of enlistees was worthwhile, that for officers who attended the Naval Academy it was unnecessary.

The Navy finally read Smith's test results after Smith had killed three naval officers. Lieutenant Commander E.C. Calix, a Navy psychologist, performed the review and concluded that the test results showed that Smith would have been screened psychologically before being allowed to serve on duty, but also that the test results and other evidence of Smith's behavior showed clearly without further testing that Smith was not suited for submarine duty, including false answers to certain background questions on which he falsely stated, for example, that he had been married for 6 months.

The test evaluation, according to Navy regulations, should have triggered further counseling and psychological evaluations, which most certainly would have necessitated additional treatment. Smith needed their help. If the Navy's procedures had been followed, my daughter's death most likely would not have occurred. The correct step defined by the Navy were not followed.

The Navy admitted the negligence and oversight in their investigation, knowing that the Supreme Court's *Feres* doctrine would protect them from legal responsibility. I can't imagine why any entity, whether a person, a business, or a military service, should not be held accountable for its careless actions. Kerry had devoted her life to the military, and because of this fact her death was accepted without any possible repercussions. The rights of a civilian were denied her.

Dan Joseph and his firm, Akin, Gump, Strauss, Hauer and Feld, did everything in their power to right this situation. For several years, we went from the district court, to the Third Circuit Court of Appeals, to the Supreme Court, and every appeal was denied. How could this injustice be perpetuated?

We were told that the Supreme Court interprets the laws, but Congress is the country's lawmaker. We were told that the *Feres* doctrine is not based on any part of what Congress wrote in the Federal Tort Claims Act, and that if the statute would have applied as written, the Navy would have been responsible for its failure to read the test results.

I think that the Congress, which we elect, understands these issues better than the Supreme Court, and I ask that the Congress do away with the Court's doctrine. I am here because I need your help. We have lost our case and there is no way we can change

that. I am trying to prevent what happened to Kerry from happening to others.

All of you, unless you had lived through a similar situation, could not possibly imagine the pain and frustration Kerry's family has endured. My goal today is to do what I can to prevent this from happening to others, to ask you to require that the United States assume responsibility for their actions when not in time of war. This will reduce the amount of negligence which the *Feres* doctrine licenses. The *Feres* doctrine should be repealed. We have lost Kerry, but her death will not be in vain.

Senator SPECTER. Take your time, Ms. O'Neill.

Ms. O'NEILL. I am finished. Thank you.

Senator SPECTER. Thank you very much for coming in today and for sharing with us your views.

Senator Leahy?

STATEMENT OF HON. PATRICK J. LEAHY, A U.S. SENATOR FROM THE STATE OF VERMONT

Chairman LEAHY. I will put my statement in the record, Mr. Chairman. I also have some questions that I will submit.

Given the *Johnson* case where Justice Scalia questioned why morale is not equally harmed by barring recovery on behalf of servicemen injured by Government negligence, there is a question on that. I rhetorically ask the question, do you think the friends and classmates of Kerryn O'Neill think her family was treated fairly? I don't. I think it is high time to be looking at the *Feres* doctrine. I think it is a doctrine whose time has come and gone.

I can't add to anything you have said, Ms. O'Neill. Obviously, everybody in this room, whether they are for or against the *Feres* doctrine, if they could make a wish, it would be to bring your daughter back. We can't do that, but I also agree with you that we ought to listen to you so that other families are not put in the bind you and your family were put in.

I think you are very courageous to come here. I think Senator Specter deserves a great deal of credit for having this hearing. I will put my statement in the record.

[The prepared statement of Senator Leahy appears as a submission for the record.]

Senator SPECTER. Thank you very much, Senator Leahy.

As I think all of you know, Senator Leahy is the chairman of the full committee and it was through his good offices that this hearing was scheduled. Senator Leahy makes the decision on which matters are of sufficient importance to call for the attention of the Judiciary Committee, so we thank him.

Ms. O'Neill, you have obviously gone through a long litigation process and you had had the trauma of your daughter being murdered, and then to find out what had happened with respect to the Navy psychological test where people should have been on notice and it was an incident which should have been prevented.

Then you went to counsel, Mr. Joseph, and your testimony shows your familiarity with the legalisms. It is a little hard for lawyers to understand how the court interpreted this provision, and we are going to come to that in the discussion among the lawyers here in just a moment or two.

I would like to start with your reaction to what happened in the interpretation by the Federal courts in Pennsylvania where you are resident, where you litigated, from the language which has already been read, but let me repeat it. "The Federal Tort Claims Act which provides for claims does not apply to any claim arising out of the combatant activities of the military or naval forces or the Coast Guard during time of war."

Now, obviously, you didn't feel that your daughter's murder involved a combatant activity during time of war, did you?

Ms. O'NEILL. No, I did not.

Senator SPECTER. And how did you respond to your expectation that your claims could be pursued in a court of law when that provision, which on its face does not apply to the circumstances involving your daughter's murder—how did you feel about that?

Ms. O'NEILL. I felt very upset when I realized there were things like the *Feres* doctrine coming into play. I felt very cheated. I feel more cheated for Kerry and the other people who may be involved because they are not held responsible for negligence.

I did know when I approached Dan Joseph that it was going to be a very difficult lawsuit to ever win, unfortunately. I realized that, but we all wanted to go forward and their firm was gracious enough to feel the same dedication to it that I did.

Senator SPECTER. Well, Ms. O'Neill, in the law there is an effort made to honor expectations, and when the law allows a recovery but has an exception and the exception doesn't apply at all to the case involving the murder of your daughter, I can see how you would respond. You would be resentful and surprised and really questioning what had happened.

Ms. O'NEILL. Obviously, obviously. I can't imagine this being allowed to continue. I have such strongly feelings also for other young men and women who are going to be in the same situation. I hear all these people talking about the military and how it protects them and the laws of order and what they need to have.

This in no way, in my mind, even touches near what they are saying, in no way. There is no leadership, there are no general issues of war, there is nothing. I have a daughter. A man walked in and killed her. I can't imagine how it could apply. I can't imagine that this would be allowed to continue to go forward with this *Feres* doctrine.

Senator SPECTER. Well, Mr. Joseph, thank you for pursuing this case on behalf of Ms. O'Neill. I have no doubt that when you examined the case law and agreed to undertake the case not on a time basis but perhaps on a contingent fee basis that you thought your chances of recovery were very slight. Why did you take the case?

Mr. JOSEPH. Well, frankly, Senator, I knew something about the——

Senator SPECTER. Let me ask you the ancillary question. Did you think you had any chance to win this case?

Mr. JOSEPH. Well, we had seen Justice Scalia's dissent in the *Johnson* case which was joined by Justices Brennan, Marshall and Stevens.

Senator SPECTER. But this was not a case for original jurisdiction in the Supreme Court.

Mr. JOSEPH. No, but we thought that we had a chance of getting the Supreme Court to take the case. I knew it was small. I mean, it was not taken because we thought we had a large chance, and we thought it was an unjust decision and worth trying to fight. You can never say that you expect the Supreme Court to take something.

Senator SPECTER. Did you petition for cert?

Mr. JOSEPH. Yes.

Senator SPECTER. Were there any dissents? You only need four to get cert granted.

Mr. JOSEPH. That is right. No dissents were noted. As I think you know, it is rare that a dissent is noted on a denial of certiorari.

Frankly, when Judge Becker said in his opinion in the Third Circuit that he thought that the *Feres* decision was wrong and that the Supreme Court should grant cert and reexamine it, I will tell you that at that point I had a flutter in my heart because I knew that Judge Becker is very highly respected at the Supreme Court. And we had our hopes that that might be our ticket in, but it wasn't.

Senator SPECTER. Judge Becker has gotten the Court to take quite a few cases.

Mr. JOSEPH. Yes.

Senator SPECTER. General Sklute, how about this language, the language of exclusion: "The Government is not liable under the Federal Tort Claims Act for injuries to servicemen that arise out of or in the course of activity incident to military service"? That is what the Court said in *Feres*.

Give me your best lawyer's interpretation as to how you could get that rule out of the Federal Tort Claims Act. You have a right to remain silent. That is a pretty tough question, but I am interested in your answer.

Be on guard, General Altenburg, you are next.

Mr. SKLUTE. Can I answer that question in this way, sir? I am going to refer back to what Ms. O'Neill just said, and believe me, all of us express our condolences to you. This is a tragic, tragic case, a case that cries out for some—it cries out for——

Senator SPECTER. Legislation?

Mr. SKLUTE. Not legislation, sir. It cries out for action to be taken against those who were involved in the incident and may have committed some types of negligence that may be—I don't know what the facts of this case would show, other than the fact that——

Senator SPECTER. Whom would Ms. O'Neill sue, Mr. Smith, who killed himself? Did he have an estate?

Mr. SKLUTE. If there is evidence of a violation of the UCMJ, criminal action should be taken against individuals.

Senator SPECTER. Who?

Mr. SKLUTE. Accountability within the Navy.

Senator SPECTER. Criminal charges? You are going to exonerate the service from civil liability, but allow criminal charges to be brought?

Mr. SKLUTE. If the purpose of the civil action is——

Senator SPECTER. They would have to go to Mr. Sprague for that.

Mr. SKLUTE. Excuse me, sir. I am sorry.

Senator SPECTER. Go ahead.

Mr. SKLUTE. If the purpose of the civil action is compensation and accountability, there is already a scheme in place for compensation. If compensation is inadequate, then action could be taken to adjust that, No. 1.

No. 2, if it is accountability, I can assure you that the services have so many different tools at their disposal to assure accountability——

Senator SPECTER. General Sklute, come to my question. How can you read the Federal Tort Claims Act and derive the principle of *Feres* that the Government is not liable under the Federal Tort Claims Act for injury to servicemen that arise out of or in the course of activity incident to military service?

Mr. SKLUTE. I would have to go back to the *Feres* decision itself, sir. When I read *Feres* 10 years when I was on active duty—8 years ago——

Senator SPECTER. Would you supplement your testimony with an answer to that question?

Mr. SKLUTE. I certainly will, yes, sir.

Senator SPECTER. I have been a lawyer for a little longer than you have and I couldn't answer that question, but perhaps General Altenburg can answer the question.

How under the Act, General, can you find a justification for that holding?

Mr. ALTENBURG. You can't find it in the words of the Act, sir. It is clearly judge-made law.

Senator SPECTER. That may just be the testimony to push us over the top on our legislative effort.

Mr. ALTENBURG. Well, Senator, I think it was a recognition by the Court at that time and in the 50 years since of the uniqueness of the military mission and why the military quite frankly needs that protection.

Senator SPECTER. Well, in this room the most frequently repeated statements relate to judges should interpret the law, not make law. Senator Thurmond has made that standard operational procedure and everybody who comes in agrees with that.

When the comment is made that Congress has had the opportunity to correct it for 50 years, that is true. Congress hasn't passed a budget act this term. Congress hasn't passed any of 13 appropriations bills. We have in conference the energy bill and the insurance bill on terrorism and the patient's bill of rights.

To say that because Congress hasn't done something that Congress agrees with it is really as much a non sequitur as the holding in *Feres* is from the case. But, of course, that is on this side of the bar, not on your side.

Mr. Fidell, you are an expert in matters involving the military. I understand that you have lectured on the subject and have extensive experience and qualify as an expert. Based on your expert knowledge, what effect do you think a repeal of *Feres* would have on good order and discipline in the military?

Mr. FIDELL. I think it would have, in fact, a positive effect, and I would like to explain why. Senator, we have for a generation been living in an all-volunteer environment. There is no conscription, and my hunch is I am not alone on this panel in the view that

maybe reinstatement of the draft would be a salutary thing for a variety of social and national reasons, but there is no immediate prospect of that change being made.

Therefore, people of the age bracket that we look to for enlistments, for accession of new personnel, have to have the feeling that they are going to be basically treated fairly when they are in the military. That means the military justice system has to operate in a fair manner.

It also means that the basic terms and conditions under which people are asked to put their lives on the line have to be essentially fair. If that is there, then people will continue to do the patriotic thing and step forward and help defend the country and our entire way of life. If it is not there, then we have placed an impediment in the path of national defense.

While no one can say that this, that, or the other thing is going to make or break the military's ability to defend the country, every factor that bears on the conviction that our military personnel have that they are being treated fairly has to be viewed as a precious and significant matter.

When you have military personnel and their families—who play a potent role in the entire system—when you have those constituencies, if you will, having a shade of doubt, having an erosion of their confidence in the essential fairness of the arrangements under which they or their loved ones serve the country, then I think you have paid a penalty, not a measurable one, but a penalty nonetheless. That is, I think, what is involved here.

Senator SPECTER. Mr. Sprague, you heard General Sklute's suggestion for criminal prosecution to redress the wrong. You have had a lot of experience in the criminal law. Can you see any way that a criminal sanction would lie or be bringable under any of the cases we have talked about, the medical malpractice or the automobile case or any of the examples that we have seen, as an alternative to repealing the *Feres* doctrine?

Mr. SPRAGUE. None whatsoever, Senator. I think that response was typical of the in-bred feeling by the military that this judge-made law which they conceded, the *Feres* doctrine, they want to keep. They want to keep it for a great number of reasons, which I think basically are that they don't want to have the civilian supervision. I don't think they want to have the investigation referred to by Ms. O'Neill.

Liability and paying of damages isn't just paying people money. The people that have to pay then learn from that process and they learn to improve their own system. I have been in the military, I have been in the submarine service in World War II. Obviously, the military wants to keep everything within itself and exclude the civilian supervision to the extent it can.

I would like to point out, Senator Specter, to show this judge-made law that we are talking about, *Feres*, and its horribleness, had the person who was with Ms. O'Neill's daughter not also been a naval personnel, same facts—had that person been a civilian, he could have sued. This judge-made law discriminates, in fact, against people in the service.

If the courts recognize that Congress does something that is unconstitutional, the courts have no reluctance in ruling on that con-

stitutional issue. This time, it is the reverse. The Congress passed a very specific exception which you have read—combatant, time of war. It is time for the Congress to assert itself and keep that exception as the Congress intended it to be, not this judge-made law. It operates in a discriminatory fashion.

One of the officers referred to it as a compensation system. Did they not hear Ms. O'Neill and did they not hear her counsel say there was no compensation? I could go into case after case where the benefits that one may get has nothing to do with the compensation that one should get for the negligence by Government.

Thank you.

Senator SPECTER. Can you see any basis at all—the same question I asked the Generals—for this sort of a rule to come out of the Federal Tort Claims Act?

Mr. SPRAGUE. None whatsoever.

Senator SPECTER. What would you think, Mr. Sprague, of trying to restructure the *Feres* doctrine so that we made an exclusion for items like order and discipline or training programs or matters which were broader, say, than being a combatant and not limited to time of war, because you have a lot of training and you have a lot of military matters in peacetime—I am going to ask the same questions of the other witnesses—but to try to structure it in a way which accommodates the core rationale that the military has used so that you don't have this blanket rule which bars all sorts of cases totally unrelated to the military?

Mr. SPRAGUE. Well, as I said, you have in there present the exemption for discretionary functions. I happen to think that covers the kinds of situations that they were dredging up here.

Senator SPECTER. I don't believe it will help the judicial interpretation, but who can tell?

Mr. SPRAGUE. Who can tell? I think the proposed bill that you submitted, Senator, would make it clear that service people are entitled to the protection of the Federal——

Senator SPECTER. I have seldom seen you prompted in the courtroom, Mr. Sprague. You are at a hearing. Let the record show that Tom Sprague handed you a book.

Mr. SPRAGUE. Servicemen should be entitled to the coverage of the Federal Tort Claims Act, except in the situations that Congress intended in the first place. The amendment that you proposed really says exactly that. You are now stating that servicemen shall be entitled to the coverage of the Federal Tort Claims Act, except for the limitation that you initially spelled out.

If you are willing to hear a suggestion, however, you use the words "military personnel" in your proposed bill. I think, to be consistent with other parts of the Act, it should be "uniform services" and would suggest that correction.

I would also suggest that you talk about—you have "military or naval forces of the United States." I would make it "uniform services of the United States or employees of the Federal Government." Last, I would make a proposal that your amendment state that the amendment shall apply to all claims that have not been finally adjudicated as of the effective date of the Act, and final adjudication to mean a claim in which the trial court has entered a final order

for which there is no outstanding motion for reconsideration, appeal, or petition for writ of certiorari.

Those would be what I would suggest as some corrections to your bill, but I think your bill would correct this problem.

Senator SPECTER. Well, thank you for the suggestions. We will take a close look at them.

General Altenburg, what would you think of leaving you some latitude for the considerations you raised, order and discipline, but allow suits, say, in matters like Ms. O'Neill's?

Mr. ALTENBURG. Senator Specter, we haven't talked much about the medical corps and the medical business of the military, and there is probably not time here to do that. But one of the reasons that I would be opposed to any modification in the *Feres* doctrine is because the medical business of the military is directly linked to command and to good order and discipline. It is not a medical care system, simply.

Senator SPECTER. Well, suppose you left medical out, too?

Mr. ALTENBURG. I am not sure what would be left, Senator.

Senator SPECTER. Well, you would have auto accident cases. You would have the murder of Ms. O'Neill's daughter.

We have gone longer than anticipated. What I would like you to do, General Altenburg, and also General Sklute and Mr. Fidell and Mr. Joseph—Mr. Sprague, you have already answered the question—give some thought to the way you might structure a bill which would accommodate the core considerations that have been raised here with respect to unit cohesiveness, the issues of order and discipline, et cetera.

If you would provide that to the committee, I think that Senator Leahy's agreement with the bill is significant. He controls the docket, he puts it on the docket, and you have got two votes; you only need eight more to have it reported out. And although we are close to adjournment on this session and nothing will happen, this hearing will be on the books and will carry forward for the next Congress.

Mr. Sprague?

Mr. SPRAGUE. Senator Specter, let me just read to you the language of the discretionary function that is in there now because I think it covers what you are asking. The exception is any claim—and it is 2680(a)—any claim based upon an act or omission of an employee of the Government exercising due care in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance, or the failure to exercise or perform, a discretionary function or duty on the part of a Federal agency or an employee of the Government, whether or not the discretion involved be abused.

I suggest to you that covers everything you are talking about.

Senator SPECTER. Well, perhaps it does. When you give me your suggestions, gentlemen, give me a comment on that point as well.

We will leave the record open for 14 days, which is the customary time.

Ms. O'Neill, we are not giving you any more assignments. We are just going to thank you for coming.

Thank you all. That concludes the hearing.

[Whereupon, at 3:42 p.m., the committee was adjourned.]

[Questions and answers and submissions for the record follow.]

[Additional material is being retained in the Committee files.]

QUESTIONS AND ANSWERS

Written Questions from Senator Patrick Leahy for General Altenburg

Q1. You testified in general terms about the need for the Feres Doctrine. I would like to ask you about the specific case of Kerryn O'Neill.
As you know, she and a fellow officer were murdered by a third officer, who then killed himself. As I understand it, the actor whose negligence was at issue in the litigation was a civilian employee. (A) Could you explain why – in that specific case – it would harm military morale and cohesion to allow her estate to bring a lawsuit? (B) Why must we have a blanket rule preventing all lawsuits by members of the Armed Forces, rather than allowing case-by-case determinations?

A1A. I do not have the benefit of the investigative file nor the court record in the O'Neill case, but I can comment as follows. Judge Becker's dissenting opinion states that the O'Neill lawsuit alleges the Navy was negligent in following up on the results of fitness for duty tests and failed to appropriately treat, transfer, or otherwise prevent Ensign Smith from murdering O'Neill at her on post quarters. Mrs. O'Neill's testimony highlighted that Ensign Smith went into the government quarters armed with two guns past the guard. Litigation in this case would have involved not only the one civilian doctor. The entrance of an armed visitor past the guard to the quarters is clearly an issue related to the proximate cause of Ensign O'Neill's death. If this case had gone into discovery, the entire chain of command could have been called in and questioned at depositions and second guessed about what they did and did not do in establishing procedures; who was selected for guard duty, what were their qualifications, training, and level of supervision, what they considered and how much weight they gave it; who they consulted and chose not to consult, and more. This could easily generate a situation in which superiors are blaming subordinates and vice versa and the medical community and the operational chain of command would be accusing each other of responsibility. This will undermine soldiers' confidence in the command structure, unweave unit cohesion and distract from the unit's focus on the mission. Moreover, lawsuits take years from start to finish. Once a suit commences, it would be the unusual case where a soldier will not have been transferred after two or three years on station. Increased litigation would impose an extraordinary burden on the military of periodically pulling a soldier out of his or her new unit and sending them (potentially) all the way around the other side of the world to handle discovery or trial issues. Significantly, court calendars and unit training calendars or operational missions never seem to mesh nicely. Pulling a soldier out of his or her new unit for such circumstances will, unquestionably, not just impact that individual soldier's proficiency but also the combat effectiveness of his or her new unit.

A1B. Mr. Chairman, I respectfully submit that the system we have does in fact allow for case-by-case determinations. The FTCA and the Feres doctrine empower federal District Courts to focus on individual cases and decide whether relief is available through the "incident to service" test.

Q1. (A) Would you agree that our tort system is designed not only to compensate victims but also to deter and prevent negligent behavior? (B) Do you believe that

negligent behavior by the Department of Defense would decrease were we to abolish the Feres Doctrine? Why or why not?

A2A. I believe that our torts jurisprudence is based at the state level in order to allow the flexibility necessary for the varied circumstances we find in the various states. While the remedies for certain causes of action are designed to deter certain behavior, these remedies are generally found in concepts such as "punitive damages" rather than compensatory damages, which was the expressed goal of Congress in the Federal Torts Claims Act. In fact, the recovery of punitive damages against the United States is prohibited (28 USC 2674). I believe that the FTCA is a compensation system, pure and simple. It has little, if any, utility as an accountability tool or preventive measure; I'll explain why I say that. This is true especially when it is compared to the extraordinary accountability mechanisms already existing in the military departments. More than any institution in the United States, the military concerns itself with protecting its people and goes to greater lengths than any other institutions to ensure accountability. While state tort law is, in theory, designed to encourage accountability through liability, it is because of the threat of money damages the defendant will have to pay. To some degree, the existence of insurance ameliorates this accountability principle; however, most individuals and corporations don't carry unlimited insurance and there is always the possibility of judgments exceeding their insurance coverage. Plus, once an insurance claim is paid, the cost of future insurance for the tortfeasor goes up and, theoretically, the incentive to conform behavior to that of the reasonable man is strengthened to avoid increased costs of doing business. None of this applies to the FTCA. Judgments are paid from government funds and not from the personal assets of the actual tortfeasor. Whether there is any actual "accountability" in the case of a government tort claim paid under the FTCA, incident to service or otherwise, it is through the institutional mechanisms I mentioned earlier, not through the tort compensation system. In fact, the tortfeasor has been granted absolute immunity by Congress. 28 US Code 2679 (b) (1). Congress has recognized that the tort system of accountability through liability is particularly inappropriate in the context of government employee tortfeasors. The FTCA, in my opinion, is designed only to compensate victims for pecuniary loss, not serve as a behavior modification system.

A2B. I do not believe that abolition of the Feres Doctrine would increase or decrease the number of negligent incidents. The military is already concerned with reducing accidents. No other organization in the country is as concerned with safety, self-evaluation, and training, both personal and unit. As the Chairman knows, combat is inherently chaotic; one way to reduce —its inherent chaos and confusion is through effective training and drilling to minimize uncertainties and accidents. Mistakes occur in spite of these best efforts and the military has numerous protocols and procedures when they do. Many incidents of negligence are referred to as "career enders" because of the inevitable adverse evaluation reports, relief for cause transfers, administrative eliminations from service, and potential referrals to civilian credentialing authority (such as reporting misconduct by an attorney to his or her state bar). In addition, Congress has provided that negligent actions by soldiers can lead to criminal prosecution under the Uniform Military Code of Justice. For example, under Article 92 of the UCMJ a soldier

can face court-martial for dereliction of duty even through simple negligence. Another example of responsibility imposed on soldiers that has no civilian counterpart is Article 108, UCMJ, which provides that a soldier can be criminally punished for damaging, destroying or losing military property through neglect. I do not believe that adding the potential for fiscal liability on the United States Government will provide greater incentive for responsible behavior than the individual criminal sanctions and administrative procedures already in place.

Q3. You argued that it would harm morale to allow military personnel to bring claims under the FTCA under any circumstances. In the Johnson case, Justice Scalia questioned why morale is not equally harmed by barring recovery from or on the behalf of servicemen injured by government negligence. (A) Do you believe that the Feres Doctrine might produce any loss of morale among the armed forces? (B) Do you believe that the friends and classmates of Kerryn O'Neill think her family was treated fairly by the government?

A3A. Soldiers understand that they are different than the civilian population and give up certain rights for the privilege of serving the nation. For instance, under UCMJ Article 88 it is a criminal offense for an officer to write a letter to the editor of a local newspaper criticizing the President or a Member of Congress. While the loss of this right may upset some soldiers, it is necessary for the good order and discipline of the whole. Similarly, while I believe there are individuals who are disappointed that they cannot sue and receive money for alleged negligent actions, I believe that a far larger adverse impact on morale would result if we treated similarly situated soldiers differently. Soldiers can make an Olympic sport out of grousing how much better life is on the outside – but many of these same soldiers will be first in line when it's time to reenlist. In my years of service, I have had the opportunity to watch units deteriorate when perceived inequities take place, never with the soldier vis-à-vis the civilian, but frequently between soldiers. This is a real danger to morale if claims are determined by non-uniform state law. The O'Neill case also illustrates the uniqueness of military society that the Feres doctrine protects. The Navy imposed on itself the very standard (psychological screening for submarine duty) that generated the allegation of negligence.

A3B. The one thing that everyone at the Hearing knew in their heart of hearts, with not a scintilla of disagreement from any quarter, was that Ensign O'Neill's death was a tragedy. But what was just as clear from Mrs. O'Neill's testimony is that the Navy's investigation was thorough and when the family requested the Navy's investigation, the Navy was responsive and forthcoming with the circumstances of Ensign O'Neill's death. I'm also confident that friends and classmates of Ensign Smith suffered because of the tragedy. The friends one makes at a service academy are life-long and communication continues no matter where you are assigned. A drawn out lawsuit might have caused this graduating class to break into camps arguing who was most at fault in what was clearly a senseless tragedy. This schism would have lasted the length of the careers of these classmates.

U.S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

November 5, 2002

The Honorable Patrick J. Leahy
Chairman
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

Please find enclosed a response to Senator Hatch's written question from the Senate Judiciary Committee's hearing on the Feres Doctrine held October 8, 2002.

Thank you for the opportunity to respond. If we can be of further assistance, please do not hesitate to contact this office.

Sincerely,

Patrick M. O'Brien, PDAAG

Daniel J. Bryant
Assistant Attorney General

Enclosure

cc: The Honorable Orrin G. Hatch
Ranking Minority Member

QUESTION:

Given the testimony presented at the hearing, is there anything further you would like to add to your testimony, or any issues on which you would like to elaborate further?

ANSWER:

Thank you for the opportunity to provide a response to some of the testimony heard from the second panel. The Administration strongly disagrees with the erroneous suggestion that the *Feres* doctrine is a judge-made exception to the Federal Tort Claims Act (FTCA) or "a court imposed restriction on a right that Congress gave to sue"; it is not. To the contrary, a review of the Court's unanimous opinion in *Feres v. United States*, 340 U.S. 135 (1950), demonstrates that *Feres* was a careful decision that correctly ascertained Congress' intent. Importantly, to the extent that congressional intent in the FTCA is ambiguous with respect to waiver of sovereign immunity, the Act must be construed strictly and in favor of non-waiver. *See, e.g., Department of the Army v. Blue Fox, Inc.*, 525 U.S. 255, 261 (1999) ("We have frequently held . . . that a waiver of sovereign immunity is to be strictly construed, in terms of its scope, in favor of the sovereign.").

The *Feres* Court began by recognizing that the issue before it was "whether the Tort Claims Act extends its remedy to one sustaining 'incident to the service' what under other circumstances would be an actionable wrong," and that this issue presented a "task of statutory construction." 340 U.S. at 138. Because there were no committee reports or floor debate to illuminate Congress' intent on this question, the Court had to make its best judgment as to congressional intent by "constru[ing] [the FTCA] to fit, so far as will comport with its words, into the entire statutory system of remedies against the Government to make a workable, consistent and equitable whole." *Id.* at 139.

First, the Court emphasized that the FTCA waived immunity only for liability analogous to existing bases of liability for private actors. *See id.* at 141 ("The United States shall be liable . . . in the same manner and to the same extent as a private individual under like circumstances") (quoting 28 U.S.C. § 2674). As the Court explained, there existed "no liability of a 'private individual' even remotely analogous to that which [plaintiffs] are asserting against the United States." *Id.*

Second, the Court made the related point that the FTCA did not create any new causes of action: "Its effect is to waive immunity from recognized causes of action and was not to visit the Government with novel and unprecedented liabilities." *Id.* at 142; *see also id.* at 141 ("this is not the creation of new causes of action but acceptance of liability under circumstances that would bring private liability into existence"). And as the Court explained, there existed no recognized cause of action for the liability that the plaintiffs were asserting: "We know of no American law which ever has permitted a soldier to recover for negligence, against either his superior officers or the Government he is serving." *Id.* Likewise, the Court observed that "claimants cite us no state, and we know of none, which has permitted members of its militia to maintain tort actions

for injuries suffered in the service." *Id.* at 142. This lack of an analogous existing basis of liability was central to the Court's conclusion that Congress had not intended to authorize the plaintiffs' claims: "We find no parallel liability before, and we think no new one has been created by, this Act." *Id.*

Next, the Court focused upon another provision of the FTCA that further suggested that Congress had not intended to authorize claims for injuries incident to service. By requiring liability to be judged pursuant to "the law of the place where the act or omission occurred," 28 U.S.C. § 1346(b), the FTCA "assimilates into federal law the rules of substantive law of the several states, among which divergencies are notorious." 340 U.S. at 142. However, "[w]ithout exception, the relationship of military personnel to the Government has been governed exclusively by federal law." *Id.* at 146. As a result, it would be at the very least highly anomalous for the Government's liability to service members to depend on variations in state law. *See id.* at 143 ("That the geography of an injury should select the law to be applied to [a service member's] tort claims makes no sense.").

The Court properly reasoned that it would not be rational for Congress to have created a non-uniform remedy for members of the uniformed military system who, for example, were exposed to the same danger and suffered the same harm at the same time, merely because of the happenstance that the injuries occurred in different states with different tort laws. As such, the Court correctly declined to impute to Congress an intent to create such an anomaly "in the absence of express congressional command." *Id.* at 146.

In ascertaining Congress's intent, the Court also relied on the existence of other "enactments by Congress which provide systems of simple, certain, and uniform compensation for injuries or death of those in armed services." *Id.* at 144. These enactments predated the FTCA, but the FTCA did not mention them. "If Congress had contemplated that [the FTCA] would be held to apply in cases of this kind, it is difficult to see why it should have omitted any provision to adjust these two types of remedy to each other. The absence of any such adjustment is persuasive that there was no awareness [by Congress] that the Act might be interpreted to permit recovery for injuries incident to military service." *Id.*

Finally, the Court pointed out that the "systems of simple, certain, and uniform compensation for injuries or death of those in armed services," *id.* also were fair to service members. These programs were more generous than most states' workers compensation programs, *id.* at 145, and provided certain compensation without the need for litigation. The Court reasoned that, had Congress contemplated that the Federal Tort Claims Act would be applied to suits by service members, it would have enacted a specific provision to adjust compensation provided under the uniform military system with any awards issued in tort. *Id.* at 144.

To summarize, the *Feres* Doctrine is not a judicially created exception to the Tort Claims Act; rather, it is the Supreme Court's statutory interpretation of what Congress reasonably intended.

Additional comments might be made in response to suggestions heard during the second panel. First, it was argued that because Kerryn O'Neill's parents did not receive compensation, the *Feres* doctrine is unfair and there is a "tremendous difference between worker's compensation laws and the Veterans Benefit Act." It is typical, however, for workers' compensation statutes that provide the exclusive remedy against a private employer to provide no benefits for the parents, grandparents, or siblings of injured workers, even if those family members would have a right to bring suit in tort if the workers' compensation remedy were not exclusive.

Second, in response to the point that the current military compensation system provides a uniform remedy for all service members with similar injuries, it was suggested that if suit were allowed for a category of claims, that uniformity would be preserved. Thus, the argument goes, if suit is allowed for injuries arising from auto accidents, every service member who is injured by an auto accident would stand in the same position. This argument is flawed, however, for two reasons. First, this approach would treat people with the same injury (for example, an amputated leg) differently based upon whether the injury was a training injury involving a tank, a combat injury involving hostile fire, or an auto accident injury. There is no rational basis for providing a more favorable remedy for an amputation resulting from an auto accident versus an amputation resulting from hostile enemy fire in combat. Second, such an approach would produce different results even within the class of auto accident injuries. Service members injured in auto accidents inside the United States would have a tort remedy, but service members injured by auto accidents in other countries would be barred from bringing suit by the foreign claims exception to the FTCA, 28 U.S.C. § 2680(k). These disparities would be unjustified, and underscore the wisdom and fairness of the existing uniform compensation system.

Third, it was suggested that the *Feres* doctrine was a misinterpretation of the combatant activity exception to the Act, 28 U.S.C. § 2680(j). The combatant activity exception, however, addresses claims brought by *any* party. It is not directed at or limited to members of the military, as is the *Feres* doctrine. Moreover, the *Feres* doctrine would remain a correct interpretation of the FTCA even if the combatant activity exception rendered it ambiguous whether the FTCA waived the government's immunity for some torts incident to service, because any such ambiguity must be resolved in favor of immunity. *See, e.g., Lane v. Pena*, 518 U.S. 187, 192 (1996) ("when confronted with a purported waiver of the Federal Government's sovereign immunity, the Court will 'constru[e] ambiguities in favor of immunity'") (quoting *United States v. Williams*, 514 U.S. 527, 531 (1995)).

Finally, it should be emphasized that amending the FTCA to alter the *Feres* doctrine would not in any way increase the accountability of individual military officers or their military departments for negligent acts or bad decisions. Judgments awarded under the FTCA are never paid by the federal employee who committed the tort; most, including those awarded for Department of Defense or Coast Guard torts, are not paid by the negligent employee's agency. Rather, such payment comes from the Judgment Fund, a statutory mechanism which provides for the payment of judgments entered against the United States, the payment of which is not otherwise provided for. 31 U.S.C. §1304.

RESPONSES
OF
MAJOR GENERAL NOLAN SKLUTE
UNITED STATES AIR FORCE (RETIRED)
TO WRITTEN QUESTIONS POSED BY
THE SENATE COMMITTEE ON THE JUDICIARY
CONCERNING THE OCTOBER 8, 2002
HEARING ON THE FERES DOCTRINE

I appreciate the opportunity to respond herein to the questions posed by the Committee, and I remain available to provide any further assistance in this most important matter.

WRITTEN QUESTIONS FROM SENATOR PATRICK LEAHY

Question 1:

You testified in general terms about the need for the Feres Doctrine. I would like to ask you about the specific case of Kerryn O'Neill. As you know, she and a fellow officer were murdered by a third officer, who then killed himself. As I understand it, the actor whose negligence was at issue in the litigation was a civilian employee. (A) Could you explain why - in that specific case - it would harm military morale and cohesion to allow her estate to bring a lawsuit? (B) Why must we have a blanket rule preventing all lawsuits by members of the Armed Forces, rather than allowing case-by-case determinations?

Answer:

(A) The severity of the impact on unit cohesion, morale, good order and discipline, which would result from eliminating the Feres doctrine, is fact specific and will vary from case to case. There are undoubtedly instances in which the impact might appear less severe—and the O'Neill case may fall into this category. In fact, one might conclude that allowing the Estate of Kerryn O'Neill to bring a lawsuit, would pose little harm to these critical elements. I am sure the same conclusion could follow, if an exception to Feres was carved out for fact patterns in some other situations which present extreme, tragic circumstances. But I must emphasize that one cannot look at these cases in a vacuum.

(B) The foregoing conclusions do not, however, alter my position that the Feres Doctrine, as currently structured, should not be modified. My position in this regard was solidified during my efforts to comply with Senator Spector's request during the hearing to redraft the proposed legislation in order to accommodate the concerns expressed in regard to unit cohesion, morale, good order and discipline. My efforts proved totally unsuccessful. I found it virtually impossible to craft language that would in effect reverse Feres and at the same time protect those principles essential to the effective operations of

our Armed Forces. While the severity of the impact of eliminating the Feres doctrine might be less in some cases, such as the O'Neill case, I could not develop a statutory framework to accommodate these rare instances. Each attempt resulted in "the baby being thrown out with the bath water."

One cannot limit the consequence of abolishing Feres to the O'Neill case. While that case was truly a tragedy, allowing the estate of a service member to sue under the O'Neill facts, while prohibiting other service members and their families from suing when injuries occur during military operations, would clearly present inequities and adversely affect morale. It would result in actual and perceived unfair treatment among service members. Similarly, assuming the visiting officer had been injured rather than killed in the situation involved in the O'Neill case, it would have been highly inequitable to have permitted Mrs. O'Neill to sue on behalf of her daughter's estate, but precluded the surviving fellow officer from filing suit for his personal injuries. Furthermore, if the decision that allegedly led to the triple death could be the subject of litigation, then as a necessary consequence, all actions and decisions made by the chain of command that result in injuries could also be the subject of lawsuits. It is clear that attempting to pick and choose among plaintiffs through legislation is not a viable option.

In the statement I submitted prior to the hearing and in my remarks at the hearing, I discussed the significant adverse effects that would flow from eliminating the Feres Doctrine. It might be appropriate, at this point, to summarize these effects. First, we would create a situation in which the courts would be reviewing and second guessing military decisions that are routinely made in furtherance of the mission. The potential for disastrous consequences is readily apparent. Second, opening the gates to myriad suits by military members will impose on the armed forces the disruptive influence of civil litigation. It is the lawsuits themselves, not the recovery, that would be disruptive of discipline and the orderly conduct of military affairs.

Third, uniformity, consistency and fairness in treatment among all military personnel would be replaced with discriminatory treatment. There would be disparate results depending on whether the incident occurred stateside, where lawsuits could be filed, or whether it occurred overseas, where suits are barred. Imagine the effect on morale if two military members are similarly injured by a government vehicle on base, one stateside where he or she can file suit alleging negligence by the military driver, and the other overseas where he or she would be precluded by the foreign country exception from filing suit under the FTCA. What could be more abhorrent then barring one soldier who is injured in the battlefield from suing, but permitting another to sue for malpractice, for example? Similarly, because of the application of state law under the FTCA, recoveries for similarly injured military members would not be uniform or consistent, and perhaps be viewed as unfair due to disparate state laws on recovery. Fourth, inequitable treatment would result between military personnel, who would not be precluded from filing lawsuits, and civil service personnel, whose sole remedy would be the Federal Employees Compensation Act.

For all of these reasons, permitting tort lawsuits would have a negative effect upon the military mission, and would serve to undermine unit cohesion, morale, good order and discipline. As I stated at the hearing, if the rationale underlying the proposed amendment to the FTCA is the inadequacy of compensation under the current statutory scheme, then that may be a matter which should be analyzed, not in relation to tort litigation, but rather on behalf of all military members. If, on the other hand the rationale focuses on accountability, there already exist adequate mechanisms internal to the Armed Services in this regard[1]--all of which are governed by directives that do not present the disruptive effects inherent in civil litigation.

Question 2:

(A) Would you agree that our tort system is designed not only to compensate victims but also to deter and prevent negligent behavior? (B) Do you believe that negligent behavior by the Department of Defense would decrease were we to abolish the Feres Doctrine? Why or why not?

Answer:

(A) I would agree that our tort system under the FTCA is designed to compensate victims. I disagree that tort lawsuits have a deterrent effect on or prevent negligent behavior of federal employees. There are no statistics that would support either proposition.

(B) As reflected above, I do not agree that abolishing the Feres doctrine would deter or diminish negligent behavior. The military has in place a system that holds its employees personally accountable for their negligent/criminal behavior, which system is far more effective than private lawsuits against the United States for money damages. Indeed, I totally disagree that civil lawsuits are essential to achieving such accountability.

I firmly believe that accountability should focus on individuals, i.e. those persons whose inappropriate conduct caused, or contributed to, the injuries or deaths. The Services employ a wide variety of investigative measures directed towards accountability,[2] yet none of them carries the highly invasive, divisive, disruptive effect implicit in civil lawsuits. These investigative measures do not undermine unit cohesiveness. Rather, they are integral to the makeup of all military organizations. They focus ultimately on two objectives: (1) identifying deficiencies and initiating corrective actions; and (2) disciplining (judicially or administratively) those responsible.

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[1] The potential for adverse administrative actions, as well as criminal actions under the Uniform Code of Military Justice, exist within all of the Military Services.

[2] There are a plethora of investigative mechanisms widely used throughout all military organizations-e.g. Inspector General inquiries and investigations, safety investigations, commander-directed investigations, and inquiries conducted in response to complaints of wrongs under Article 138 of the Uniform Code of Military Justice, to mention only a few.

There have been countless situations in which the Services have held its members accountable for resulting injuries and deaths. Many involve scenarios in which Feres would be applicable. Actions designed to ensure accountability may include a wide range of adverse administrative actions, as well as criminal actions under the Uniform Code of Criminal Justice.[3]

Question 3:

You argued that it would harm morale to allow military personnel to bring claims under the FTCA under any circumstances. In the *Johnson* case, Justice Scalia questioned why morale is not equally harmed by barring recovery from or on the behalf of servicemen injured by government negligence. (A) Do you believe that the Feres doctrine might produce any loss of morale among the armed forces? (B) Do you believe that the friends and classmates of Kerryn O'Neill think her family was treated fairly by the government?

Answer:

The exclusive remedy feature of all Federal and State laws prohibiting tort litigation by an employee against an employer for injuries or death covered by no-fault workers' compensation is not premised on the notion that every potential plaintiff will receive the largest award under that system. Rather, it is premised on the notion that overall it is the best system for the most people, and it has general acceptance on that basis. In the same way, my view of the impact of *Feres* on military morale is not based on any notion that every potential plaintiff is content with that doctrine; rather it is based on the proposition that overall reliance on a uniform, no-fault compensation system has general acceptance as a fairer system than one that would result in potentially enormous compensation differences.. It is in this context that I believe partial or total repeal of the *Feres* doctrine would be harmful to military morale.

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[3] During the hearing, a discussion took place in which the conclusion was erroneously reached that no criminal actions are available to hold individuals accountable in cases to which the Feres doctrine has been applied. While this conclusion might be correct in a total civilian setting, it overlooks the unique nature of the military. As Congress stated in one of its findings in 10 U.S.C. 864--

> [T]the military society is characterized by its own laws, rules, customs, and traditions, including numerous restrictions on personal behavior, that would not be acceptable in civilian society.

For example, under Article 92 of the Uniform Code of Military Justice, there exists the crime of dereliction in the performance of duties, under which military members could be tried by court-martial if they are, willfully or through neglect, derelict in the performance of their duties. Under Article 92, "Any person subject to this chapter who--is derelict in the performance of his duties; shall be punished as a court-martial may direct." The elements of proof for dereliction in the performance of duties are; "(a) That the accused had certain duties; (b) That the accused knew or reasonably should have known of the duties; and (c) That the accused was (willfully) (through neglect or culpable inefficiency) derelict in the performance of those duties."

Every death or serious disability of a military member, whatever the cause--be it enemy action, friendly fire, an accident, or a crime--is a great tragedy for the affected family. There is no doubt that Mrs. O'Neill and family members and friends of the victims of this horrendous crime are devastated by their loss. As I have expressed in my earlier statement, my testimony at the hearing and herein, allowing monetary compensation through tort litigation is not the answer.

WRITTEN QUESTION FROM SENATOR ORRIN G. HATCH

Question:

Given the testimony provided at the hearing, is there anything further you would like to add to your testimony, or any issues on which you would like to elaborate?

Answer:

There are two matters I would like to address.

First, I want to discuss the question posed by Senator Specter at the hearing as to how the principle of Feres was derived from the FTCA by the Supreme Court. The focus of those who oppose the Feres doctrine is directed towards the exception in the FTCA for claims "arising out of the combatant activities of the military or naval forces, or the Coast Guard, during time of war." So they ask, how could this exception be interpreted to mean service members cannot sue for incident to service injuries? As the Supreme Court indicates, the lack of jurisdiction for incident to service cases does *not* turn on this exception. If one examines the FTCA, it is clear the combatant activity exception applies to claims by any person, not just by service members. Indeed, the exceptions enumerated in 28 U.S.C. § 2680 of the FTCA are related to the *cause* of the damage--not to the *status* of the plaintiff.

The Supreme Court, when deciding the Feres case, focused on the nature of the legislation, and the status of other similarly situated personnel. Allowing military members to sue their employer for torts relating to their service would have placed them in a status different from that of civil service workers. It would also have placed military personnel in a status different than their brethren in the National Guards of the various states. At the time of the Feres decision in 1950, most, if not all, of the states had schemes of workers' compensation for those injured on-the-job, having abolished common law tort actions. That same situation holds true today--all of the states have abandoned the common law remedy of workers and replaced it with a scheme of workers' compensation, whereby injured workers are assured an administrative remedy not requiring a finding of fault. The trade-off for that broad coverage for injuries is that the employees are precluded from suing their employers in tort.

Rather than carving out an exception from the FTCA that prohibits suits by members of the armed forces, the Supreme Court recognized that jurisdiction never existed in the first place. The Court looked at the entire system of remedies available, and indicated the purpose of the FTCA was to provide a remedy to those without one. Military personnel already had a scheme of compensation available to them for injuries incurred incident to service, just as civil service employees do. In interpreting the FTCA, the Court noted that "...if we misinterpret the Act, at least Congress possesses a ready remedy." Congress has amended the FTCA several times since Feres was decided, but has not passed legislation disagreeing with the Supreme Court's decision.

Second, I offer the following comments regarding unit cohesion. In his opening remarks at the hearing on October 8, 2002, Mr. Fidell, in commenting upon a portion of my remarks concerning unit cohesion, stated that the legislation I referred to was passed several years ago and related to the "don't ask—don't tell policy." Mr. Fidell doubted that "Congress had in mind the Feres Doctrine when it enacted its comments concerning unit cohesion."

Mr. Fidell is absolutely correct—Congress did not have the Feres doctrine in mind when it enacted the legislation in which it addressed "unit cohesion." However, that is absolutely irrelevant. The legislation enunciates truisms--absolutes--about unit cohesion. They apply across the board, regardless of the subject matter of the legislation in which such language appears. This becomes evident when one reviews pertinent sections of the findings of Congress concerning our Armed Forces, as illustrated by the following:

> " . . . .(4) The primary purpose of the armed forces is to prepare for and to prevail in combat should the need arise.
>
> (5) The conduct of military operations requires members of the armed forces to make extraordinary sacrifices, including the ultimate sacrifice, in order to provide for the common defense.
>
> (6) Success in combat requires military units that are characterized by high morale, good order and discipline, and unit cohesion.
>
> (7) One of the most critical elements in combat capability is unit cohesion, that is, the bonds of trust among individual service members that make the combat effectiveness of a military unit greater than the sum of the combat effectiveness of the individual unit members.
>
> (8) Military life is fundamentally different from civilian life in that -

> (A) the extraordinary responsibilities of the armed forces, the unique conditions of military service, and the critical role of unit cohesion, require that the military community, while subject to civilian control, exist as a specialized society; and
>
> (B) the military society is characterized by its own laws, rules, customs, and traditions, including numerous restrictions on personal behavior, that would not be acceptable in civilian society.
>
> 9) The standards of conduct for members of the armed forces regulate a member's life for 24 hours each day beginning at the moment the member enters military status and not ending until that person is discharged or otherwise separated from the armed forces.

[Emphasis Added] 10 U.S.C. § 864.

Considering the foregoing language in the context of the proposed legislation designed to eliminate the Feres doctrine, one is struck by the inconsistency between the two. On the one hand, the criticality of unit cohesion to the success of our Armed Forces is clearly recognized. On the other hand, legislation is being proposed which carries the implicit effect of undermining this critical element. The two cannot stand side by side.

Once again, thank you for allowing me to offer comments on this matter.

SEN Hatch
RADM Weaver
Senate Judiciary, 8 Oct 02
Q. 1
Approved by: RADM Weaver

Question. Given the testimony presented at the hearing, is there anything further you would like to add to your testimony, or any issues on which you would like to elaborate further?

Answer. There was a great deal of discussion at the hearing regarding the O'Neill case. In brief, the O'Neill case arose from the tragic murder of Ensign Kerryn O'Neill by her former fiancé, Ensign George Smith, both Naval Academy graduates, in 1993. Ensign Smith also killed another officer and himself. The O'Neill estate filed a wrongful death action against the United States for $14 million. The complaint alleged that the results of a psychological test taken by Smith to determine his compatibility with submarine duty showed deviations from a normal score that should have triggered a further psychological review and other actions by the Navy that would have prevented the murder of Ensign O'Neill. The conclusions of the Navy investigation were that Smith's actions were not forewarned by his psychological test or anything in his Naval record, that the failure to follow-up on the test results represented "weaknesses" in the testing and review process, but that these weaknesses "did not contribute to the murder/suicide." Although all of us sympathize with the O'Neill family and recognize their great loss, for the reasons discussed below, I do not believe that the *Feres* doctrine should be repealed.

Abolishing all or part of the *Feres* doctrine would undermine good order and discipline, adversely affect military and operational readiness, and create indefensible inequities among military members depending on where and how they were injured. The underlying issue of good order and discipline is tied to the application of consistent and equitable processes. Thus, while it might be tempting to consider carving out exceptions to the *Feres* doctrine, such an approach would fail to recognize a basic premise of military structure. The military is a "24 hours a day, 365 days a year" institution.

Good order and discipline is the backbone of military service and is a constant that runs up and down the chain of

command, whether in combat, in training, or in administrative duties. An inherent aspect of good order and discipline is the ability of superiors or subordinates to premise all aspects of military decision-making on the knowledge that their decisions and actions will not be the subject of litigation. For example, we cannot afford to allow various state tort laws to shape how military commanders lead and train their troops, based on the threat of lawsuit. This would create unacceptable variations in our training. Uniform training is a central component to operational and combat readiness.

This does not mean that military members are free to act in an arbitrary, capricious or negligent manner; only that their professional actions will not be the subject of litigation. The system of checks and balances established by the existence of the military chain of command, Inspector General oversight, the military justice system, as well as a myriad of other administrative and regulatory requirements provide numerous avenues for oversight and accountability. These internal processes provide the structured means to efficiently address shortcomings, while balancing fairness with minimal disruption to operational readiness.

On the other hand, civil litigation is a personal and inherently contentious and adversarial process. Lawsuits by military members would adversely affect the military's ability to focus assets on its primary mission of military readiness. Congress recognized the burdensome affect of litigation with the passage of the Soldiers and Sailors Civil Relief Act, which put limitations upon the ability to bring personal lawsuits against active duty military members. It is equally, if not more, burdensome for the military to be the defendant.

An overseas, combat-training tragedy that results in an active duty loss of life, whether or not negligence is alleged, is no more, nor no less devastating than the loss of the life of Ensign O'Neill or any other member of the armed services. However, it highlights the inequities that could occur should the Feres doctrine be disturbed. Additionally, regardless of the application of the Feres Doctrine, if a case identical to Ensign O'Neill's murder had occurred overseas, the overseas claim would have been barred under FTCA. How unfair it would be for the O'Neills to pursue litigation seeking additional compensation for the death of their daughter, while other grieving families are left with the same entitlements as every other military family who has lost a loved one in service to their country.

Clearly, the existing compensation system, which safeguards all military members and their families, provides a more equitable response. Allowing lawsuits to proceed for some, but not others, as would inevitably occur with any alteration to the *Feres* doctrine, would simply create a more inequitable arrangement. How does a commanding officer explain the inequities that would arise to the people he must lead? How does he justify it? How does he deal with the natural resentment that such unfair treatment will engender within his organization? These are all very real problems for a commander who must sustain a cohesive unit of motivated military members willing to endure the dangers and sacrifices of military service. Clearly, such disparities cannot encourage the esprit de corps and uniformity necessary for an effective fight force.

In sum, the three purposes of tort litigation, punishment, accountability and compensation, are already adequately addressed through the existing scheme. First, Congress, by refusing to allow punitive damages under the FTCA has eliminated punishment as a purpose of litigation against the United States. Second, accountability for deaths and injuries is addressed under the existing military system of investigations and inspections. Finally, while it may be that a remedy under the FTCA is necessary to ensure adequate compensation of civilians killed or injured by the military, active duty members already are compensated under the Congressionally established scheme that guarantees no-fault uniformity and fairness. It is imperative that military members have the security of knowing that whatever happens, however it happens, the military will take care of them or their families. This is a critical component of personal readiness, which ultimately leads to operational and combat readiness.

SUBMISSIONS FOR THE RECORD

STATEMENT

OF

JOHN D. ALTENBURG
MAJOR GENERAL (RETIRED)
FORMERLY, THE ASSISTANT JUDGE ADVOCATE GENERAL, U.S. ARMY

BEFORE THE

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

CONCERNING

THE *FERES* DOCTRINE

PRESENTED ON

OCTOBER 8, 2002

STATEMENT
OF
JOHN D. ALTENBURG
MAJOR GENERAL (RETIRED)
FORMERLY, THE ASSISTANT JUDGE ADVOCATE GENERAL, U.S. ARMY

I am pleased to appear before the Committee today to present my views on the Feres Doctrine and its importance to the good order and discipline of the United States military. Others have discussed several reasons to support the Feres doctrine. It is my purpose to discuss only one of the commonly cited bases for this doctrine that prevents service members from suing the federal government, other service members, or other government employees for tortious injuries suffered incident to military service. I will discuss the good order and discipline of the Armed Forces and its relationship to the Feres doctrine

There are many elements of our national power – including the rule of law, industrial and mobilization capacity, the national will of our citizens, and the readiness and capability of our armed forces. But it is our armed forces that are fundamentally based upon our greatest national resource: the individual fighting man and woman. Our individual soldiers, sailors, airmen, and marines are cohesive and integral parts of the whole who are trained that operational success in the defense of this nation is predicated upon their individual initiative and capability tempered by their realization that success is accomplished most efficiently and effectively by teams, not individuals. Military good order and discipline is the glue that binds this team together. Congress recognized this need and has used the Uniform Code of Military Justice and its forerunners (Articles of War and Articles for the Government of the Navy) to criminalize acts which could be prejudicial to the good order and discipline. Failure to follow orders, disrespect to superiors, and conduct unbecoming an officer are some of the obvious examples of the Congressional

recognition of the unique requirements of an effective military and the need for good order and discipline.

In 1946, after decades of debate, Congress enacted the Federal Tort Claims Act (FTCA), 28 U.S.C. sections 1346(b), 2671-2680, which with certain exceptions, waived sovereign immunity for common law torts committed by federal employees acting within the scope of their employment. In Feres v. United States, 340 U.S. 135 (1950), the Court did not judicially create a new exception to the FTCA. Rather, it looked at the legislation and concluded that Congress had not intended to waive sovereign immunity for injuries that arise incident to military service.

In the over 50 years Feres has been in place, the courts have continuously and properly continued to recognize its viability and importance. It is even stronger today as a result of the reaffirmation of its rationale by the Supreme Court in United States v. Johnson, 481 U.S. 681 (1987), and the Court's decisions in United States v. Stanley, 483 U.S. 669 (1987); United States v. Shearer, 473 U.S. 52 (1985); Chappell v. Wallace, 462 U.S. 296 (1983); and Stencel Aero Engineering Corp. v. United States, 431 U.S. 666, reh'g denied, 434 U.S. 882 (1977).

I would like to highlight one fairly recent Supreme Court case. In United States v. Shearer, 473 U.S. 52 (1985), the Supreme Court held that Feres barred suit against the government for the off-base, off-duty murder of one service member by another even if the government knew that the murderer had been convicted of a prior manslaughter overseas. The Court concluded that the plaintiff's allegation of negligent personnel practices relating to the murderer and the military's failure to warn others clearly implicates the concerns expressed in Feres in that such a suit would require the civilian courts to second-guess military decision making. The Court in Shearer did not look to the injured service member's military status or the

location of the incident in determining the applicability of the Feres doctrine, rather it rightly focused on whether the courts would have to evaluate military decisions and discipline. The focus of Shearer and its progeny is on the military's dealing with the alleged tortfeasor and challenges to the management of the military and questioning basic choices about discipline, supervision and control of one service member by another. Legislative repeal of the Feres doctrine would embroil the civilian courts in military decision making. More significantly, it could embroil civilian courts at an extremely low level of military decision making. Part of the Supreme Court's rationale in Feres, was concern for the effect upon military order, discipline, and effectiveness if service members were permitted to sue the government or each other for torts which are incident to service. It is the suit, not the recovery, that Feres prohibits. In 1939, Judge Learned Hand noted that public service is not an easy task and that allowing immunity for public officials is necessary to ensure the best good for the public as a whole: "The justification for doing so is that it is impossible to know whether the claim is well founded until the case has been tried, and that to subject all officials, the innocent as well as the guilty, to the burden of a trial and to the inevitable danger of its outcome, would dampen the ardor of all but the most resolute, or the most irresponsible, in the unflinching discharge of their duties." Gregoire v. Biddle 177 F.2d 579 at 581 (1939). I echo Judge Hand's concern; it is even more pertinent in our increasingly litigious society. Proscribing a soldier from bringing his or her superior or fellow soldiers, into court is necessary to ensure not only that orders are followed, but perhaps more significantly, that orders must be freely given. In my opinion, while Judge Hand's concern seemed to be related to the time, effort, and likely distraction of potential litigation, even greater

should be our concern for the disproportionate leader aversion to risk that would ensue if the government were to waive its immunity in this category of cases.

I would like to draw your attention beyond the legalese of Feres to the facts of that case. In the 1940s, a soldier tragically died in a barracks fire in Pine Camp, now Fort Drum, New York, home of the 10th Mountain Division. His estate alleged negligence in quartering a soldier with a defective heating plant and an inadequate fire watch. Members of the Subcommittee, many of these same style barracks remain in use today around the country, not because commanders want to house troops in such areas but because fiscal realities require balancing our national assets. I lived in them in 1968 as an enlisted soldier in training. I worked in them in 1977 as a junior officer. I prepared for operational deployments in them in the 1990s as a senior leader. The fact is our soldiers are routinely billeted in less than optimum conditions by the very nature of our training and mission requirements. Even today, tents catch fire from heaters--but should leaders be embroiled in litigation because of such conditions?

Other examples further illustrate this issue. For instance, two soldiers in a military government vehicle, a Humvee, are in an accident. But for the Feres doctrine, the unit could be embroiled in discovery disputes concerning training and licensing procedures, maintenance records, depositions of unit mechanics – all when they should be focused on preparing to deploy to Bosnia…or Afghanistan…or...

A passing comrade-in-arms renders life-saving first aid to one of the injured soldiers in the same example, but she does so leaving the injured soldier with a permanent disability. Should the Good Samaritan soldier receive a medal for saving her buddy's life or a subpoena to appear in court to defend her actions?

The other soldier in the damaged Humvee seems fine and is not sent to the military doctor until later, after his platoon sergeant realizes that the soldier's medical symptoms appear to be more severe than they first seemed. Must our sergeants become medical experts or risk being brought into court?

Military life is unique. Courts have said so. All service members sacrifice. They cannot always choose where to live; they cannot even choose their roommates. They give up certain 1st and 4th amendment and other rights that their civilian counterparts take for granted. It must be so. Training is rigorous and inherently dangerous. It's done in every kind of weather, every kind of geography, with heavy equipment, massive vehicles, live ammunition, and explosives. The military accepts young, inexperienced individuals, trains them in warfighting skills--difficult, demanding skills--and builds cohesive teams capable of accomplishing whatever missions the country deems critical to our national interests so that the rest of us remain secure. The training mission must approximate combat as closely as possible to ensure a ready, trained military that will achieve decisive victory wherever the country sends them. Examples of military training – simply guiding a 70 ton tank to its pad in the motor pool at Fort Knox, or working on the flight deck of an aircraft carrier during night flight operations off the Virginia coast, or refueling and re-arming a jet aircraft at Langely Air Force Base, or merely driving a 5 ton truck at Midnight in blackout conditions through the forest at a training base in North Carolina – highlight that military training is inherently dangerous. Military drivers don't simply hop into their semi-trailer and drive the interstate highway—as do their civilian counterparts. They must organize in convoys and coordinate driving at a certain speed and at a certain interval from each other—while driving the same interstate highway. Discipline and teamwork are always foremost considerations.

These are but a few examples that illustrate what we mean by a unique society, a unique culture. It is the nature of the mission—to deter aggression through combat readiness, to win the nation's wars when deterrence fails. This is the military culture and it must not change because it is why the military is ready to do the nation's work. In such an environment people—soldiers--make mistakes. To allow such mistakes to result in lawsuits pitting soldier against soldier would be counterproductive; it would undermine combat readiness; it would undermine our ability to deter aggression through readiness. Worse would be the opportunity for plaintiffs to use the elimination of the Feres bar frivolously to second guess leader decisions. Accountability is a key watchword in military society. Our leaders – commissioned officers, noncommissioned officers, and senior civilians – understand the awesome responsibility they have in caring for service members – our national treasure. All military leaders know that they owe the mothers and fathers of our service members the highest possible standard of care. Courts have deferred to the military's ability to conduct its unique business. Congress has provided legislation recognizing the unique nature of the military purpose to provide "for the defense of the United States."

Even more illustrative of the direct relationship between the Feres doctrine and military combat readiness is the observation of only one day of an infantry platoon's training to see the complexity and sheer volume of decisions made by section leaders, squad leaders, and platoon sergeants—all enlisted soldiers, not commissioned officers—involving weapons, ammunition, vehicles, movement of soldiers, day and night, in adverse weather and difficult terrain that would be subject to civilian courts if the Feres doctrine were legislatively repealed.

Another critical aspect of good order and discipline is that soldiers are treated fairly and equally. Under the remedies available in current law, a soldier who is injured in Virginia is

treated the same as a soldier who is injured in Maryland, or Iowa, or Bosnia, or Saudi Arabia. Legislative repeal of the Feres doctrine would change that. Soldiers who are injured in similar circumstances in the U.S. and overseas would be treated differently because the Federal Tort Claims Act does not apply outside the U.S. Just as noteworthy, soldiers injured in the U.S. would be treated differently based on where they are injured through the application of the various state tort laws and jurisprudence.

These types of suits would permit civilian courts to second guess military decisions -- an area in which such courts lack expertise. I echo the Department of Justice testimony that permitting one soldier to sue another for the negligent performance of duty is anathema to the teamwork, mutual trust, and discipline upon which our military system operates. Litigation is by its very nature disruptive and time consuming. The litigation process itself ensures this result: military plaintiffs and witnesses will be summoned to attend depositions and trials, and they will be called from their regularly assigned duties to confer with counsel and investigators. They may be recalled from distant posts. Such disruptions are opposite to the interest of our national defense, which demands that soldiers, sailors, airmen, and marines be ready to perform their duties at all times. Even more to the issue of readiness, military leaders at all levels make decisions daily, even hourly, that involve risk assessment. They must balance the demand for rigorous, realistic training against the safety and security of their troops. They are held rigorously accountable in this endeavor not only by their chain of command, but also other military institutions like the criminal investigative services, Inspectors General, Safety Officers, and Judge Advocates. To make them subject also to accountability in a civilian court system, which has no specialized knowledge of their unique challenges and requirements would undermine their ability

to train the force effectively. It is yet another example of service to nation. Individuals give up certain rights so that the team is stronger and more capable.

In conclusion, I would like to refer to the words of General of the Army Douglas MacArthur when he was addressing soon to be commissioned U.S. Military Academy cadets: "And through all this welter of change and development, your mission remains fixed, determined, inviolable – it is to win our wars....All other public purposes, all other public projects, all other public needs, great or small, will find others for their accomplishment; but you are the ones who are trained to fight; yours is the profession of arms – the will to win, the sure knowledge that in war there is no substitute for victory; that if you lose, the nation will be destroyed; that the very obsession of your public service must be Duty – Honor – Country." [Address by General of the Army Douglas MacArthur upon his acceptance of the Sylvanus Thayer Award, 12 May 1962.]

Mr. Chairman and Members of the Committee, we must allow our service members to remain jointly focused on preparing for their mission and not separately preparing for civil trial as plaintiff and defendant. Thank you for affording me the time to address this Committee.

Testimony of

EUGENE R. FIDELL

Feldesman, Tucker, Leifer, Fidell & Bank, LLP
Washington, D.C.

Before the

Committee on the Judiciary
United States Senate

on

The *Feres* Doctrine:
An Examination of this Military Exception
to the Federal Tort Claims Act

October 8, 2002

Mr. Chairman and Members of the Committee:

My name is Eugene R. Fidell. I am a partner in the Washington law firm of Feldesman, Tucker, Leifer, Fidell & Bank LLP, and have long been involved in issues relating to military service. I served on active duty in the United States Coast Guard from 1969 to 1972. I have represented members and former members of the Armed Forces for over 30 years.

The Committee deserves great credit for concerning itself with the *Feres* Doctrine, which has been a blot on the record of the federal courts for decades, and has repeatedly been an engine of unfairness and mischief. There is no real lobby on this subject, so any legislative attention to the subject is noteworthy and laudable.

I would like to address the notion that adjustment or relaxation of the rule would compromise proper military interests by subjecting commanders and others in leadership positions to a welter of intrusive and distracting investigations. I have no doubt that this argument has been put forward in good faith, but there is little merit in it. It rests on a totally outdated notion of how commanders spend their time. Today's military—every branch—is a highly sophisticated post-industrial effort in which inquiries and investigations play a regular and entirely necessary role in ensuring accountability, efficiency, fairness, and—above all—the achievement of operational objectives.

Let me give you some examples. In every branch, commanders' inquiries are conducted on an infinite variety of subjects. In the Army, for example, these are

conducted under Army Regulation 15-6, *Boards, Commissions and Committees: Procedure for Investigating Officers and Boards of Officers* (30 September 1996). Mishaps large and small can be and are investigated under this kind of regulation, and those in leadership positions may well find themselves called upon to become involved either as appointing officers, investigators, witnesses, or, at times, parties to the investigation. When I was on active duty I was involved in several such investigations. Since leaving the service, I have advised members of the service on their rights in investigations.

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

Congress long ago enacted legislation permitting GIs to file "Complaints of Wrongs." This is currently found in Article 138 of the Uniform Code of Military Justice, 10 U.S.C. § 938. Under it, a member has a right to ask that a complaint that is not redressed by the commanding officer be looked into by a general court-martial convening authority—usually a Flag or General Officer—whose report must be forwarded to the service secretary. According to the most recent published figures, there were 142 Article 138 complaints in FY2001. *See* 2001 Ann. Rep. Code Comm. & Judge Advocates Gen., 56 M.J. CIV (16 Army), CXVIII (96 Navy and Marine Corps), CXXXIV (28 Air Force), CXLIV (2 Coast Guard). My hunch is that many more such complaints are filed, but they are resolved before they reach the general court-martial convening authority level.

While I have personally never seen much good come of an Article 138 investigation, Congress obviously thinks it is a worthwhile procedure, and worth the time and effort in terms of the potential distraction of officials from what they would otherwise be doing with their time and energy. The military has apparently been able to survive despite Article 138 for decades, and I have never heard any official complain that the time needed to deal with such complaints was unwarranted.

Nor, more to the point, has there been any sense that it either undermines the command structure or encourages insubordination to permit junior military personnel to put their superiors "on report" by means of an Article 138 complaint. Indeed, one could argue that permitting GIs to do so serves a useful purpose by affords them a socially-acceptable way to express their frustrations and move on.

These are far from the only settings in which commanders are required to make time for cooperation with official inquiries of one sort or another, oftentimes at the initiative of subordinates. Certainly commanders find themselves having to respond to inquiries from service or Department of Defense Inspectors General. They usually have to drop everything—or at least act very promptly—to respond to congressional inquiries prompted by letters from constituents who are either in uniform or have family members in uniform. And commanders may be called upon

to provide information for such recognized purposes as responding to applications filed by present or former subordinates with the boards for correction of military and naval records, *see* 10 U.S.C. § 1552, or assisting agency and Department of Justice counsel in various kinds of litigation, such as cases under the Tucker Act, 28 U.S.C. § 1491, for pay or retirement matters or cases in the district courts seeking review of decisions of the correction boards under the Administrative Procedure Act, 5 U.S.C. § 706.

In short, there is nothing at all novel in the proposition that there are times when public policy requires military and naval officers to make time to cooperate with legal proceedings and inquiries, including those filed by military subordinates. While some who believe their time might be better spent on other matters may resent having to make room for them, officers in this day and age must be able to "multi-task," and I personally have no reason to believe that the demands associated with an adjustment of the *Feres* Doctrine would be intolerable or could not be accommodated by the Armed Forces in terms of the need to reconcile competing demands on limited time. Plainly, operational demands will always have priority, and the danger of excessive intrusion can be addressed by framing any *Feres* adjustment wisely.

I should also mention that these comments proceed on the assumption that commanders will continue to enjoy the broad personal immunity the law has long afforded them from civil actions brought by subordinates. *Chappell v. Wallace*, 462 U.S. 296 (1983). In other words, there is no reason to fear that adjustment of the *Feres* Doctrine will have any effect on the *personal* liability of any individual.

Thank you again, Mr. Chairman, for the opportunity to present these remarks. As always, it is a privilege to appear as a private citizen before a committee of this body. I would be happy to entertain any questions you might have, and if the Committee decides to proceed with legislation, I would welcome an opportunity to work with staff on the specifics.

EUGENE R. FIDELL

Mr. Fidell is a partner in the Washington law firm of Feldesman, Tucker, Leifer, Fidell & Bank LLP and president of the National Institute of Military Justice. He has served on the American Bar Association's Task Force on Treatment of Enemy Combatants, the Code Committee on Military Justice, the Advisory Board on the Investigative Capability of the Department of Defense, and the Rules Advisory Committee of the United States Court of Appeals for the Armed Forces. He is a graduate of Queens College, Harvard Law School, and the Naval Justice School.

Mr. Fidell served as a Coast Guard judge advocate from 1969 to 1972. He represents personnel in each of the armed forces as well as the U.S. Public Health Service in disciplinary and other personnel actions and related litigation.

Mr. Fidell has taught military justice as an adjunct at Yale Law School and has written widely on military law. He edited the *National Institute of Military Justice Annotated Guide to Procedures for Trials by Military Commissions* (LEXIS/NEXIS Matthew Bender 2002) and co-edited *Evolving Military Justice: An Anthology* (Naval Institute Press 2002) with Dwight H. Sullivan. His current work in progress (with Professors Michael F. Noone and Elizabeth L. Hillman) is a textbook, *Cases and Materials on Comparative Military Justice* (Anderson Publishing Co.).

Mr. Fidell lives in Bethesda, Maryland, with his wife and daughter.

Department of Justice

STATEMENT

OF

PAUL CLINTON HARRIS, SR.
DEPUTY ASSOCIATE ATTORNEY GENERAL
UNITED STATES DEPARTMENT OF JUSTICE

BEFORE THE

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

CONCERNING

THE *FERES* DOCTRINE

PRESENTED ON

OCTOBER 8, 2002

STATEMENT
OF
PAUL CLINTON HARRIS, SR.
DEPUTY ASSOCIATE ATTORNEY GENERAL
UNITED STATES DEPARTMENT OF JUSTICE

I am pleased to appear before the Subcommittee today to present the views of the Department of Justice on the Feres Doctrine and its importance to the United States. To begin, a brief explanation of the doctrine and its underpinnings is in order.

The doctrine derives its name from the case of Feres v. United States, 340 U.S. 135, which was decided by the Supreme Court in 1950. In Feres and its progeny, the Court has held that members of the uniformed services cannot sue the federal government, other service members, or civilian government employees in tort for injuries which arise out of, or are incurred in the course of, activity incident to military service. The Court relied upon three principal reasons in coming to its decision:

(1) The existence and availability of a separate, uniform, comprehensive, no-fault compensation scheme for injured military personnel;

(2) The effect upon military order, discipline, and effectiveness if service members were permitted to sue the government or each other; and,

(3) The distinctly federal relationship between the government and members of its armed services, and the corresponding unfairness of permitting service-connected claims to be determined by nonuniform local law.

It is important to understand where the Feres doctrine fits into the body of law that

governs tort suits involving the United States. To start with, the United States, as sovereign, is immune from suit unless it has consented to be sued, United States v. Sherwood, 312 U.S. 584 (1941). Further, the United States may define the terms and conditions upon which it may be sued. Soriano v. United States, 352 U.S. 270 (1957). The Federal Tort Claims Act (28 U.S.C. §§ 1346(b), 2671, et seq.), constitutes a waiver of sovereign immunity, with certain specific limitations.

With Feres and its two companion cases, Jefferson v. United States, 178 F.2d 518 (4th Cir. 1949), and Griggs v. United States, 178 F.2d 1 (10th Cir. 1949), the Supreme Court was called upon to determine whether the Federal Tort Claims Act was intended to waive that aspect of sovereign immunity which concerned the relationship between soldiers and their government. The common fact underlying each case was that the injured person was a service member on active duty, who sustained injury due to the action or inaction of others in the Armed Forces. Two of the cases concerned allegations of medical malpractice; the third involved a barracks fire. Reflecting upon the body of law from which the Federal Tort Claims Act carved a limited exception, the Supreme Court stated:

> We know of no American law which ever has permitted a soldier to recover for negligence, against either his superior officers or the Government he is serving.

340 U.S. at 141. It concluded that, "the Government is not liable under the Federal Tort Claims Act for injuries to servicemen where the injuries arise out of or are in the course of activity incident to service." Id. at 146.

The holding of Feres has been broadly and persuasively applied by the courts and has now stood for 52 years without either legislative or judicial alteration. It is even stronger today

as a result of the reaffirmation of its rationale by the Supreme Court in United States v. Johnson, 481 U.S. 681 (1987), and the Court's decisions in United States v. Stanley, 483 U.S. 669 (1987); United States v. Shearer, 473 U.S. 52 (1985); Chappell v. Wallace, 462 U.S. 296 (1983); and Stencel Aero Engineering Corp. v. United States, 431 U.S. 666, reh'g denied, 434 U.S. 882 (1977). These cases recognize that the policy underpinnings of the Feres doctrine are as valid today as they were in 1950.

The first of the three reasons or policy factors underlying the Feres doctrine is the availability of a viable alternative to damage suits in the form of a comprehensive statutory compensatory scheme. In Feres, the Supreme Court stressed that the Federal Tort Claims Act "should be construed to fit . . . into the entire statutory system of remedies against the government [and thereby create] a workable, consistent and equitable whole," 340 U.S. at 139, and that it was thus highly relevant that Congress had already provided, "systems of simple, certain, and uniform compensation for the injuries or death of those in the Armed Services." 340 U.S. at 144.

The present statutory compensation scheme has three discrete components. First, members of the uniformed services serving on active duty receive free medical care when injured or ill. See, e.g., 10 U.S.C. §§ 1071 et seq., and 6201. They also receive unlimited sick leave with full pay and allowances until well or released from active duty. Survivors of service members are entitled to death gratuity benefits (10 U.S.C. §§ 1475-1482), as well as subsidized life insurance. 10 U.S.C. §§ 1447, et seq.; 38 U.S.C. §§ 1965, et seq..

Second, Congress has established a comprehensive disability retirement system for service members permanently injured in the line of duty. See 10 U.S.C. §§ 1201 et seq., and

1401 et seq. Moreover, should a service member leave the service without seeking disability retirement, he may later request it. For example, § 1552 of Title 10, United States Code, provides that the Secretary of the Army, acting through the Army Board for the Correction of Military Records (ABCMR), may correct any military record when he considers it necessary to correct an error or remove an injustice. This authority has often been used to provide former service members who demonstrate that they suffer from a permanent disability as a result of a service-related injury, with a retroactive, permanent disability retirement annuity and even back pay.

Third, the Veterans Benefits Act provides yet another system of medical care, disability and death benefits for the service-disabled veteran and his family.[1] (A veteran eligible for both veterans disability benefits and military disability retirement benefits must choose which he will receive.)

The Stencel case emphasized the quid pro quo of this workers compensation-like remedy:

> A compensation scheme such as the Veterans' Benefits Act serves a dual purpose: it not only provides a swift, efficient remedy for the injured serviceman, but it also clothes the Government in the "protective mantle of the Act's limitation-of-liability provisions."

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[1] 38 U.S.C. §§ 1101 et seq.: Compensation for Service-Connected Disability or Death;

38 U.S.C. §§ 1301 et seq.: Dependency and Indemnity Compensation for Service-Connected Deaths;.

38 U.S.C. §§ 1501 et seq.: Pension for Non-Service Connected Disability or Death or for Service;.

38 U.S.C. §§ 1701 et seq.: Hospital, Nursing Home, or Domiciliary Care and Medical Treatment;.

38 U.S.C. §§ 1901 et seq.: National Service Life Insurance.

> [Citation omitted.] Given the broad exposure of the Government, and the great variability in the potentially applicable tort law, see Feres, 340 U.S. at 142-143, the military compensation scheme provides an upper limit of liability for the Government as to service-connected injuries.

431 U.S. at 673. The military service does not leave those permanently injured in the line of duty uncompensated. Congress has attended to such things in a reasonably adequate way.[2]

The second consideration that has led to the broad application of the Feres doctrine by the courts through the years can be understood as an aspect of the traditional reluctance of American courts to intervene in military affairs, and the reluctance of the Congress to force such intervention. In United States v. Brown, 348 U.S. 110, 112 (1954), the Court said:

> The peculiar and special relationship of the soldier to his superiors, the effects of maintenance of such suits on discipline and the extreme results that might obtain if suits under the Tort Claims Act were allowed for negligent orders given or negligent acts committed in the course of military duty, led the Court [in Feres] to read the Act as excluding claims of that character. [Citation omitted.]

Simply put, Feres' prohibition of intramilitary tort litigation derives from society's most elemental instinct: self-preservation through a strong military.

This consideration comes into play even where the issue is not military discipline in the strict sense. The Feres doctrine serves to avoid the general judicial intrusion into the area of military performance. . In Henninger v. United States, 473 F.2d 814 (9th Cir.), cert. denied, 414

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[2] In addition to compensation for personal injury, it is note worthy that the American service member has a plethora of other remedies available to seek equitable and criminal relief for grievances, e.g.: 10 U.S.C. § 938 (Complaints of Wrongs); 10 U.S.C. §§ 801, et seq. (Uniform Code of Military Justice).

U.S. 819 (1973), a medical malpractice case, the plaintiff had elective surgery prior to being released from the service. He argued that since the operation was performed after he had been processed for discharge, permitting him to sue for injuries incurred during its course could not have the undesirable consequences feared by the Supreme Court. The appeals court rejected this argument, stating:

> To determine the effect that a particular type of suit would have upon military discipline would be an exceedingly complex task, as Henninger concedes. The proximity of the injury to discharge would be only one factor. Whether it resulted from an allegedly negligent order would be another. Whether it was caused by totally unrelated military personnel would be yet a third. In short, nearly every case would have to be litigated and it is the suit, not the recovery, that wold be disruptive of discipline and the orderly conduct of military affairs . . . . This is a classic situation where the drawing of a clear line is more important than being able to justify, in every conceivable case, the exact point at which it is drawn. This is especially so because servicemen injured incident to their service are entitled to Veterans' benefits.

Id. at 815-816 (citations and footnotes omitted) [emphasis added].

The third policy consideration, the federal nature of the relationship and the absence of analogous private liability, led the Supreme Court in Feres to conclude that a service member's suit failed to state a claim under the Federal Tort Claims Act language which provides, "The United States shall be liable . . . in the same manner and to the same extent as a private individual under like circumstances . . . ." 28 U.S.C. § 2674. On this point, the Supreme Court, in Feres stated:

> Without exception, the relationship of military personnel to the Government has been governed exclusively by federal law. We do not think that Congress, in drafting this Act, created a new cause of action dependent on local law for service-connected injuries or death due to negligence. We cannot impute to Congress such a

> radical departure from established law in the absence of express congressional command.

340 U.S. at 146.

An analogy to various state workers' compensation statutes which preclude suit by covered workers injured in the course of employment also comes to mind. The Supreme Court in Feres recognized the relationship existing between the United States and its military personnel as one "distinctively federal in character," and that application of local law to that relationship by virtue of the Federal Tort Claims Act would be inappropriate. 340 U.S. at 143. 28 U.S.C. § 1346(b).

While it sometimes is argued that the Feres doctrine is unfair to service members who are the victims of medical malpractice, as we have seen, the Feres doctrine is an adjunct to a military disability compensation package available to service members which, on the whole, is far more generous, even-handed, and fair than compensation available to private citizens under analogous state workers' compensation schemes. This is because service members, unlike their civilian counterparts who suffer serious adverse consequences from medical care, generally are eligible for compensation whether or not those consequences are, or can be proven to be, the result of substandard medical care. While, in certain cases, the compensation may be somewhat less than what might be available to a successful plaintiff who endures a medical malpractice lawsuit (just as workers' compensation systems generally provide lower benefits for work-related injuries than what may be available through tort litigation), the fact is that all of these service members are eligible for such compensation rather than only a small handful who can show a causal link between their condition and substandard medical care. The arbitrariness and uncertainty

associated with tort litigation is eliminated. Accordingly, from the perspective of all service members who suffer adverse consequences from medical care, the existing system of compensation is in many ways superior to what they would receive if they were private citizens.

The Department believes that the policy considerations outlined above are as valid today as when first articulated.

Military morale and discipline are also affected by the special relationship of a soldier to his superiors and his comrades-in-arms. American courts have acknowledged the unique nature of this relationship in their reluctance to intervene in military affairs. Permitting one soldier to sue another for the negligent performance of his duty is anathema to the teamwork, mutual trust, and discipline upon which our military system operates. Superimposing the adversarial process of civil litigation onto the Armed Forces will have a disruptive influence on military operations. The litigative process itself assures this result: military plaintiffs and witnesses will be summoned to attend depositions and trials, and they will have to take time from their regularly assigned duties to confer with counsel and investigators. They may have to be recalled from distant posts. Such disruptions are opposite to the interest of our national defense, which demands that soldiers, sailors, airmen, and marines be ready to perform their duties at all times.

The impact of tort litigation on the "specialized community" of our fighting forces will have another invidious effect. It will undermine trust not only among individual service members, but also between soldiers and their organization. To allow soldiers to sue their government for tort damages implies that the military has failed its own and that only by taking the "boss" to court can justice be attained. Fostering that attitude within a community which demands uncompromising trust and teamwork has dire implications for our national defense.

It is the view of the Department of Justice that the Feres doctrine continues to be a sound and necessary limit on the FTCA's waiver of sovereign immunity, essential to the accomplishment of the military's mission and the safety of the Nation.

Statement of Senator Orrin G. Hatch
Ranking Republican Member
Hearing on "The Feres Doctrine; an Examination of this Military Exception to the Federal Tort Claims Act"
Before the United States Senate Committee on the Judiciary
October 8, 2002

Thank you, Mr. Chairman. I appreciate your scheduling this hearing on the difficult and important issue of the Feres Doctrine. As we all know, the Feres Doctrine arose out of the Supreme Court's consideration of whether the Federal Tort Claims Act extended to provide a remedy to members of the Armed Forces who suffered injuries occurring in the course of activities incident to military service. In a unanimous opinion, the Supreme Court stated: "We do not think that Congress, in drafting [the Federal Tort Claims] Act, created a new cause of action dependent on local law for service-connected injuries or death due to negligence." I believe that most of us here today would agree that there is some validity to the rationales and goals that underlie the Feres Doctrine. I understand that certain criticisms of this doctrine - particularly pertaining to the application of this doctrine -- may raise some issues affecting the dedicated men and women serving in the military. These issues certainly deserve our careful consideration. In keeping with the title of this hearing, I truly hope that today we will have a productive and informative examination of the Feres Doctrine.

First, I would like to say that I firmly believe that we have an absolute moral duty to ensure that those who serve in the United States Armed Forces are treated fairly and with respect. We owe an enormous debt of gratitude and honor to the brave men and women in uniform who defend our great nation. It is a tragedy when any one of America's sons or daughters is injured or dies in the service of the United States. We must also remember that these sons and daughters leave behind mothers, fathers, spouses, and children.

The Feres Doctrine itself is based on fundamentally valid rationales and public policy goals. As the Supreme Court stated in the 1987 case of *United States v. Johnson*, one of the key considerations in limiting the ability of members of the military to sue the Federal Government is that "military discipline may be impermissibly affected by [such litigation] since the judgments and decisions underlying the military mission are necessarily implicated, and the duty and loyalty that service members owe to their services and country may be undermined." I am convinced that the type of prolonged and acrimonious litigation that plagues our society in general and clogs our courts would be severely detrimental to the interests of our nation, of our Armed Forces, and, ultimately, our nation's military personnel.

A second basic consideration articulated by the Supreme Court focuses on the "distinctively federal character of the relationship between the Government and Armed Forces personnel," which "necessitates a federal remedy that provides simple, certain, and uniform

compensation" for military personnel. I am confident that the Administration's witnesses will discuss the federal remedies that are available to our military personnel in some detail, but I would like to comment on one aspect of these remedies. The statutory compensation systems provided to military personnel are, to a large extent, quite similar to the workers' compensation systems that cover most of our civilian workforce. The majority of our nation's workers are prevented by workers' compensation laws from suing their employers for injuries arising out of or incurred in the course of their employment. Of course there are differences between the remedies available to military versus non-military personnel under these schemes, but the basic limitation against employee lawsuits is substantially analogous.

I understand that significant concerns have been raised regarding the way which different courts have applied the Feres Doctrine, particularly with regard to the inconsistent and potentially over-broad interpretation of the phrase "incident to service." I look forward to our witnesses providing a healthy discussion of the relevant legal decisions on that issue. I am also aware that some have criticized the levels of compensation provided to military personnel. Clearly, if the level of compensation currently afforded the members of our Armed Services is inadequate or inequitable, then that is something we need to take a hard look at. However, this type of concern should be addressed by changing the existing military compensation schemes, not by opening up military compensation to the trial bar.

In closing, I should note that these types of problems do not require a wholesale reversal of the Feres Doctrine. These are issues that can be addressed by clarifying the application of the doctrine and by improving the statutory compensation and remedies available to members of the Armed Services. Despite the problems associated with the Feres Doctrine, I would argue that the most prudent course of action is to focus on addressing these problems from within the current system.

I look forward to learning about these and other significant issues from our witnesses and thank them for being here today. I would also like to extend a special thank you to Bonnie O'Neill for traveling here today and also convey to her my heartfelt sympathy for the tragic death of her daughter Kerry.

Thank you.

OPENING STATEMENT OF DANIEL JOSEPH
(OF AKIN GUMP STRAUSS HAUER & FELD LLP),
COUNSEL TO BONNIE O'NEILL
FOR UNITED STATES SENATE JUDICIARY COMMITTEE
HEARING, OCTOBER 8, 2002, 2:00 P.M.

I am Daniel Joseph of the law firm Akin Gump Strauss Hauer & Feld. I am counsel for Bonnie O'Neill. I am submitting this statement and a legal memorandum expanding on it with citations to authorities. On behalf of Bonnie, my firm, and myself, we greatly appreciate very much the opportunity to appear before the Committee. I do want to say that we have represented and do represent Bonnie O'Neill without the payment of any fee, that this is the only Federal Tort Claims Act case in which I have ever represented a plaintiff, and that I do not expect to be handling other such cases. My firm and I undertook this representation because we thought that the *Feres* doctrine was wrong and should be corrected, not because we expected to earn any fees out of it.

We represented Bonnie, as the executrix of the Estate of Kerryn O'Neill and as Kerryn's survivor, in litigation under the Federal Tort Claims Act in federal district court, the Court of Appeals for the Third Circuit, and the Supreme Court, in which we sought to recover under that Act, which we lost because of the Supreme Court's 1950 decision in *Feres v. United States*. Chief Judge Becker and Judges Sloviter and McKee of the Third Circuit said in dissenting from denial of rehearing in that case that the *Feres* decision was wrong and should be reviewed by the Supreme Court. Several years earlier, in dissenting from a decision in *Johnson v. United States*, Justice Scalia for himself and Justices Brennan, Marshall, and Stevens – I think that the Committee will agree that that is not a usual lineup of Justices – had concluded that *Feres* is not based upon the Federal Tort Claims Act and should be overruled. We strongly support legislative action that would remove the influence of the *Feres* decision and return the courts'

treatment of suits brought by members of the military under the Federal Tort Claims Act to the statutory provisions of that Act without the additional and nonstatutory limitations now imposed by *Feres*.

Under *Feres*, when a member of the military or the estate or survivor of a member of the military, brings suit against the United States under the Tort Claims Act, he or she faces a limitation on the ability to sue that does not appear in the Act's language. This is that the suit will fail if injury complained of arises incident to the plaintiff's military service. No similar restriction applies to any other class of person. Although the Supreme Court originally claimed in the 1951 *Feres* decision itself that this holding was based on language of the Act, it later altered that doctrine, and now the Court does not claim, nor does anyone else find, that there is any language in the Act that supports this doctrine. When Justice Scalia made this observation in his dissent in *Johnson*, neither the majority opinion nor any other Justice sought to supply any reason why the doctrine rests on the text of the statute. It is therefore not a statutory test but a court-imposed restriction on a right to sue that Congress gave – the Court has taken back part of the right to sue that Congress intended members of the military to have.

It is our position that the *Feres* doctrine is not within the power of the Supreme Court under the Constitution, that it is not justified, that it is unnecessary for the purposes that the Supreme Court claims for it, that it is irrational and bars many suits, like Kerryn O'Neill's, that have nothing to do with its purported purposes.

1. For three major reasons the Supreme Court has no power under the Constitution to impose the *Feres* doctrine. First, the doctrine has no foundation in the text of the FTCA and constitutes a judicially imposed limitation on a right to sue granted by Congress. The Sixth Circuit observed in *Major v. United States*, 835 F.2d 641, 645 n2 (6th Circuit), that as a result of

Feres it had been persuaded that the phrase "any claim" in the FTCA now means "any claim but that of servicemen". But the Supreme Court has no power so to condition or partially repeal legislation passed by Congress. The Supreme Court lacks the power to change legislation of Congress that it does not like.

Second, the subject matter of *Feres* is lawsuits by members of the military, and the Supreme Court says that the doctrine exists to prevent threats to military decisionmaking and discipline. But the Constitution (Article I, section 8, clause 14) explicitly gives Congress, not the Court, the power to decide the "rights, duties and responsibilities" of the military services. The Court has no business second-guessing Congress on judgments made in this area. The fact that the Court did so in *Feres* at the behest of the Executive Brance makes it all the more important for Congress to act to restore the appropriate Constitutional balance.

Third, the Federal Tort Claims Act constitutes a partial waiver of the sovereign immunity of the United States, and the *Feres* doctrine narrows the waiver that Congress gave. But the Supreme Court has elsewhere held that only Congress can decide how broad a waiver of sovereign immunity should be and that the courts lack power to broaden or to narrow a grant of sovereign immunity provided by Congress. *United States v. Kubrick*, 444 U.S. 111, 118 (1979); *Indian Towing Co. v. United States*, 350 U.S. 61, 69 (1955).

2. The *Feres* doctrine was unnecessary. The Federal Tort Claims Act was carefully crafted by Congress to take appropriate account of particular problems that might be raised by extending that Act to military activities. But in *Feres* the Supreme Court replaced these carefully drawn provisions with its own, much broader, restriction. Because of the *Feres* doctrine, which was imposed by the Court when the enactment of the Federal Tort Claims Act was still quite recent, the particular limitations that Congress imposed have never been allowed to work in the

military context. But they would be effective to cure all of the problems that the Supreme Court says are the impetus for the *Feres* doctrine today. Those Congressionally crafted limitations are:

- Under § 2680 (j) there can be no liability for combatant activities of the military in time of war. This is complete surplusage under the *Feres* doctrine.
- Under § 2680(k) there can be no liability for a cause of action arising in a foreign country. This restriction was clearly aimed largely at freeing all military activities overseas from the threat of tort litigation.
- Under § 2680 (a) there can be no liability based on the performance or non-performance of any discretionary function, whether or not the discretion is abused. Thus decisions based upon military judgments are safe from interference or review by the courts under the FTCA, even without *Feres*.

In all of its decisions based on *Feres*, the Supreme Court has never discussed what kinds of military activities that would be subject to judicial scrutiny under the FTCA were it not for the *Feres* doctrine. We submit that neither the Court nor the Defense Department can cite such an example. In fact, in the recent *Shearer* opinion, the Court held that *Feres* must apply because otherwise "commanding officers would have to stand prepared to convince a civilian court of the wisdom of a wide range of military and disciplinary decisions" – but it was to protect just those sorts of decisions that Congress enacted the discretionary function exception. The Court has never explained why that exception would not be sufficient.

3. At the same time, *Feres* clearly goes much further than it has to to protect military decisionmaking. Cases involving such matters as medical malpractice, ordinary traffic accidents, and other kinds of negligence that are identical in effect to things that happen in a civilian context are routinely barred by *Feres* but would be allowed under the Tort Claims Act. No one

has explained why such cases raise any concern at all. A good example is the Third Circuit's recent decision in *Richards v. United States*, 176 F. 3d 652 (3d Cir. 1999). There a serviceman who worked at Fort Knox was driving home early in his own automobile to assist his pregnant wife. He was driving on a state public highway, owned and patrolled by the State of Kentucky, that happened to pass over a part of the land technically a part of Fort Knox but allowed by the federal government to be used by the state for a road. The general public drives on this highway. He was broadsided by a five-ton military fuel truck and killed instantly. The government argued and the Third Circuit felt forced to agree that the *Feres* doctrine barred the suit, although the court held that none of the policies said to be behind *Feres* was implicated by the case. There is no explanation or rationale that supports application of the doctrine in such cases, but the Supreme Court insists on it.

Cases like Kerryn O'Neill's are rarer – but there is no reason to cover them with a *Feres*-like exclusion. Kerryn was killed because a civilian Navy psychologist failed to perform a non-discretionary duty to read and score the test results of George Smith. This was a standardized test – there was no discretion in assessing or grading the results. With results like those on the standardized test, Navy procedures required that Smith be further examined by a psychologist. Not only was there no claim that Navy procedures or decisionmaking was deficient in our case, but our claim was just the opposite: that the Navy had created a superb test that accurately culled those who might not be fit for submarine duty; and that the Navy had good procedures for dealing with the results. It was only the unaccountable failure to follow those precise procedures that caused the deaths of Kerryn O'Neill and two other naval officers. A lawsuit by the O'Neills would have tended to reinforce rather than question the Navy's procedures. But the *Feres* doctrine tends to suggest that failure to follow military procedures will not have negative

consequences. The unfortunate result of the O'Neill litigation is to encourage disregard of proper military procedures.

4. The *Feres* doctrine has an additional, incurable flaw that flows from the requirement that the lower courts discern what the phrase "incident to service" means. As we have described in detail in our accompanying memorandum, those courts have a very difficult time doing that because the Supreme Court has refused to give them any guidance, saying only that it must be a case-by-case analysis informed by the purposes of the Federal Tort Claims Act. *United States v. Shearer*, 473 U.S. 52, 57 (1985). Some of the courts of appeals concentrate on such factors as whether a complaining member of the armed forces was on active duty or on leave. Others say that those factors are not determinative. One circuit decision holds that the test is the nature of the duties that the injured person was performing at the time of injury. Another analogizes the doctrine to cases under workers' compensation laws – although in many cases, including Kerryn O'Neills, there is no compensation of any kind paid for the injury. Others take refuge in an undefined totality-of-the-circumstances test.

The important point here is that this is not simply a confusion that the Court could clean up. It is actually a fundamental problem with the *Feres* doctrine. This problem flows from the fact that as the Court effectively admitted (in the *Johnson* decision) there is no provision in the Act that the *Feres* doctrine effectuates. There is nothing to look at upon which a court can base a decision of how to apply the incident-to-service test – there is no way to satisfy the Court's command that in applying the test a lower court should look to the purposes of the Federal Tort Claims Act. Thus the confusion in the lower courts is the natural result of the fact that the incident-to-service test is a judicial creation that does not flow from the Tort Claims Act. The Court cannot openly admit that it made the doctrine up out of whole cloth, so the confusion in

applying the doctrine is a built-in problem that cannot go away unless *Feres* is somehow replaced. This alone is a good reason for the Congress to act to abolish the doctrine.

5. It is possible for civilians, as well as members of the military, to be injured by military actions. But there is no *Feres* doctrine applying to actions by civilians who were injured by negligent activity by a member of the military. In two ways, this shows the irrationality of the *Feres* doctrine.

First, imagine a hypothetical case in which George Smith had been engaged to a civilian woman, not Kerryn O'Neill, and that this woman lived in an apartment near Smith's duty station in California. That hypothetical woman could have broken an engagement with Smith and been killed by him at the same time and with the same cause. But the family of such a civilian would not have been barred by the *Feres* doctrine from suing under the Federal Tort Claims Act. Whatever risk to military decisionmaking or discipline a suit by Bonnie O'Neill over Kerryn's death would have provided would also be provided by a suit by the survivor of the hypothetical civilian. Yet the *Feres* doctrine applies only to military plaintiffs. This is irrational.

Second, such suits by civilians exist and have caused no injury at all to the military. The most striking example was that involved in *Sheridan v. United States*, 487 U.S. 392 (1988). In that case gunfire from an unruly and drunken soldier injured civilians who were passing in a car near the Bethesda Naval Hospital, where the soldier worked. The suit, which was by civilians, proceeded and was upheld by the Supreme Court on issues not involved here. But the important point here is that had the person passing in a car who was injured been a member of the military, the suit would have been barred under *Feres*. Yet nothing that rocked military decisionmaking or discipline flowed from the *Sheridan* case, and no such results would flow from abandoning *Feres* and allowing such a case to proceed if the person injured were military and not civilian.

If the *Feres* doctrine were eradicated by action of the Congress, there would of course be additional suits. But that is what the Congress intended when it enacted the Federal Tort Claims Act. Those suits would subject the United States to liability of acts of members of the military that were negligent under the law of the state where they occurred. Because of the limits crafted by Congress into the Act, there would not be lawsuits that intruded unnecessarily or unreasonably into military judgments, just as there are no Federal Tort Claims Act lawsuits today that intrude unreasonably into the judgments of other activities of the federal government that are sensitive and difficult, such as those of the Federal Bureau of Investigation, the Secret Service, cabinet departments, regulatory agencies like the EPA or the Federal Energy Regulatory Commission – despite the fact that no *Feres* doctrine protects them. The fact is that in addition to being beyond the Court's Constitutional power, impossible to interpret, and irrational in scope, the *Feres* doctrine is unneeded because Congress did a very good job in drafting the Tort Claims Act to exclude claims that would question the policy and decisionmaking functions of the federal government and, in special situations, the military. Al the doctrine does is bar otherwise meritorious lawsuits to compensate people injured by negligent acts, like Kerryn O'Neill's family, whom Congress intended to compensate. Congress should act to eliminate the *Feres* doctrine.

U.S. SENATOR PATRICK LEAHY

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Statement of Senator Patrick Leahy
Chairman, Senate Judiciary Committee
Hearing on the "Feres Doctrine"
October 8, 2002

This Committee today will examine whether Congress should amend, eliminate, or retain the Feres Doctrine, which prevents military personnel from bringing suit under the Federal Tort Claims Act. We are holding this hearing at the request of Senator Specter, who has taken a great interest in this issue and has been a strong advocate for members of the Armed Forces. I thank him for his willingness to chair this hearing.

Congress passed the Federal Tort Claims Act ("FTCA") in 1946, to waive the United States' immunity from certain suits. The Supreme Court ruled in 1950 in the case of *Feres v. United States* that active-duty military personnel or their estates could not recover damages under the FTCA where their injuries "arise out of or are in the course of activity incident to service." The Court reasoned that if Congress had intended to apply the FTCA to the military, it would have said so. This decision has prevented a wide range of lawsuits, including civil rights suits and medical malpractice suits arising from care provided at military hospitals.

Although the Court's ruling was unanimous, the Feres Doctrine has been seriously questioned since. It was reaffirmed by the Supreme Court in 1987 over the dissent of four Justices, including Justices Scalia and Stevens, in *U.S. v. Johnson*. The dissenters relied on the fact that the FTCA contains no exemption for military personnel. Justice Scalia wrote: "*Feres* was wrongly decided and heartily deserves the 'widespread, almost universal criticism' it has received." More recently, the D.C. Circuit limited the Feres Doctrine in February by ruling that the doctrine did not apply to claims brought under the Privacy Act.

In the 50 years since the *Feres* decision, the government has argued that the Feres Doctrine is necessary to preserve the chain of command and military discipline. That argument may make sense under certain circumstances, but it is hard to see how allowing medical malpractice suits, for example, would harm military morale. Moreover, the FTCA itself already exempted suits based on combatant activities or causes of action arising in a foreign country.

In general, our civil justice system forces individuals and organizations to behave with care by punishing negligence. By adopting the FTCA, Congress sought to impose the same discipline on government agencies, while also providing compensation for individuals who had suffered harm. I believe the burden should be on the Executive Branch to show why the Feres Doctrine should not be amended or abolished.

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In conclusion, I would like to thank our witnesses for coming here today. In particular, I would like to recognize Bonnie O'Neill, whose daughter Kerry was murdered by a fellow Naval officer. Kerry O'Neill was a woman of remarkable talents and an obvious dedication to her nation. I know that it must be difficult for you to testify today, but I assure you that your perspective – and the views of all our witnesses – will be given great weight by this Committee.

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STATEMENT

OF

MAJOR GENERAL NOLAN SKLUTE
UNITED STATES AIR FORCE (RETIRED)
FORMER AIR FORCE JUDGE ADVOCATE GENERAL

BEFORE

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

CONCERNING

THE *FERES* DOCTRINE

PRESENTED ON

OCTOBER 8, 2002

I am privileged to appear here today to address the *Feres* doctrine and its importance to the military mission. I do so as a retired member of the Air Force, having served on active duty as a Judge Advocate for 30 years. Prior to my retirement in 1996, I served as The Judge Advocate General of the Air Force, having been assigned to that position in August 1993.

The Committee has before it an issue that carries significant implications for the Armed Forces of our Nation—whether the Federal Tort Claims Act should be amended to reverse the 1950 Supreme Court case of Feres v. United, 340 U.S. 135 (1950), and a host of decisions that affirmed and expanded the doctrine enunciated in Feres.[1] This issue, boiled down to it basics, is whether persons should be allowed to sue the United States for injuries sustained by military members serving on active duty, when such injuries result from the negligence of another military member or Federal Government employee.[2]

While there are several factors that underlie the rationale of what has become known as the "Feres Doctrine",[3] I will limit my statement to the doctrine's importance for continued military discipline and morale in the Armed Forces, in its broadest sense. Our soldiers, sailors, marines and airmen perform a service that has no counterpart in civilian

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[1] As this committee has before it a plethora of materials discussing such cases, case citations have been omitted.

[2] Also embraced in this issue are deaths of military members resulting from such injuries.

[3] The Court in United States v. Johnson, 481 U.S. 681, 684 (1987), in citing Stencel Aero Engineering Corp. v. United States, 431 U.S. 666 (1977), identified three factors: (1) The character of the relationship between the Government and members of the armed forces is distinctively Federal; therefore, "it would make little sense to have the Government's liability to members of the Armed Services dependent on the fortuity of where the soldier happened to be stated at the time of the injury." This result would come about because of the provision in the Federal Tort Claim Act under which service-incident claims would be determined by local law. (2) There exists a statutory [no fault] compensation scheme under the Veterans' Benefits Act, which serves as a substitute for tort liability and provides compensation to injured military members, "without regard to any negligence attributable to the Government." (3) The unique relationship between a members of the Armed Forces and their superiors, "the effects of the maintenance of such suits on discipline, and the extreme results that might obtain if suits under the Tort Claims Act were allowed for negligent orders given or negligent acts committed in the course of military duty. . . ." Stencel Aero

life. Theirs is not an eight to five job; rather, it is a way of life. They are called upon to make great sacrifices in performing their assigned duties and missions—often the ultimate sacrifice. The special trust placed in members of our Armed Forces, is so clearly demonstrated by missions they are called upon to perform and the lethality of the weapons systems committed to their use. The relationship among members of the Armed Forces, and between such members and their superiors, is indeed special and unique. There are certain absolutes in this regard, such as-- strict obedience to orders; total loyalty to one's organization, one's service and our Nation; total loyalty up and down the chain of command; complete trust among and between members of one's organization; and discipline. Indeed, unit cohesiveness, essential to success on the battlefield, requires such attributes.

The courts, in dealing with issues surrounding the *Feres* doctrine, have recognized it is the lawsuits themselves, brought by military members for service-related injuries, and not the potential recovery, which would undermine the attributes described above. Commanders make decisions and issue orders each and every day that affect the personal lives of their subordinates. They relate to matters such as daily duties, assignments, travel, disciplinary matters, medical requirements, and a wide array of matters essential to the mission and the welfare of the unit and its members. Many also directly impact the lives of the families of such members.

It is not difficult to imagine the adverse impact on unit cohesiveness that would result from subjecting these decisions to judicial scrutiny. Commanders and other military members would, in many instances, be deposed and summoned into court to

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Engineering Corp. v. United States, 431 U.S. at 671-672 (citations omitted).

justify their decisions. It may also engender the belief among the force that no order or decision is final until the courts have issued a ruling. Trust, one of the essential ingredients for unit cohesiveness, would be undermined--trust not only among individual service members, but also between the members and their organization. To allow service members to sue their government for damages related to military service implies that the military has failed its own and that only by taking the "boss" to court can justice be attained. Fostering such an attitude within a community that demands uncompromising trust and teamwork has dire implications.

While the list of examples that could be used to illustrate this point is virtually endless, the following should suffice:

1. An airman who is denied a security clearance (based upon a mental health diagnosis) challenges his commander's decision in court, in an effort to obtain an adverse ruling that undermines the commander's decision.
2. A pilot removed from flying status, because of a medical diagnosis, seeks judicial relief challenging that diagnosis.
3. An airman injured in a training accident seeks damages for such injuries claiming they resulted from his commander's negligence in planning and executing the training scenario.
4. An F-16 maintenance crew chief who bails out of an F-16 aircraft that flames out during an incentive flight, files a claim for his resulting injuries, alleging that the flame out was caused by the negligence of a maintenance squadron commander and the F-16 pilot.

These examples barely scratch the surface of the countless daily command decisions and actions, which would become litigation targets should the Federal Tort Claims Act (FTCA) be amended to permit service members to sue for alleged incident-to-service injuries. They serve to point out that second-guessing military decisions through protracted and unpredictable litigation would have profound consequences that go far beyond furnishing a remedy of monetary damages. Superimposing the adversarial process of civil litigation onto the Armed Forces will impose a significantly disruptive influence upon military operations. The courts have long recognized this and have thus acknowledged their reluctance to intervene in military affairs.

Uniformity, consistency and fairness—in fact and in appearance—are absolutely vital to the preservation of discipline, order, and unit cohesiveness. Yet, the proposed amendment would have a discriminatory effect among service members. For example, the proposed legislation would allow a service member who is injured by a government vehicle at a U.S. installation to seek judicial relief for his injuries. In contrast, a similarly injured service member assigned to a military installation in a foreign country could not do so under the foreign country exception to the FTCA.[4] How does a commander explain the disparate treatment based on the geographic location of the accident to those he must lead? How does a commander explain to surviving next of kin that they are entitled to certain statutory benefits (to include SGLI and DIC proceeds) because their son, husband or father died fighting the war against terrorism in Afghanistan, while the next of kin of another member of his unit can sue for monetary damages for that member's death in the United States as a result of medical malpractice in a military hospital or some other type

[4] Foreign country exception to the FTCA is at 28 U.S.C. 2680(k).

of negligent activity. Only when similarly situated members are treated in the same manner can we ensure that they have and maintain the faith in their leadership that is integral to achieving and maintaining an effective military force.

The proposed legislation would also be inequitable to civil service personnel, whose only remedy is the Federal Employees' Compensation Act (FECA), a similar no-fault based compensation system that works much like the military's SGLI compensation or our VA entitlements. This is especially important today as our military and federal agencies work side-by-side under the new Northern Command, defending our homeland and responding to disasters. To illustrate, if a military member and civilian employee are traveling together in the same car, and the car is hit by a government vehicle, the military member could sue if Feres is abolished, but the civilian employee could not. How may we foster teamwork under such circumstances? In short, how can we effectively accomplish the mission Congress has entrusted to us?

I share fully the deep concern for those injured, and the families of those whose lives are lost, while serving their country. Regardless of whether the injuries or deaths result from events such as training mishaps, automobile accidents, alleged medical malpractice, friendly fire, or hostile fire, the injury or loss to the individual member or next of kin is no less real. What then is the basis for providing disparate compensatory actions predicated primarily on the situs of the injury or death? If the rationale underlying the proposed amendment to the FTCA is the inadequacy of compensation and other benefits under the current statutory scheme, then that may be a matter which should be analyzed, not in relation to tort litigation, but instead on behalf of all military members. Authorizing monetary compensation through tort litigation, however, is the wrong

answer. We should not throw the victims to the bar—we should not say that widows and children are left to hire personal injury lawyers to obtain adequate compensation for the deaths of their loved ones serving in the Armed Forces. A grateful Nation should take care of them fairly, without subjecting them to litigation and all the associated turmoil.

The *Feres* doctrine has stood over 50 years without legislative change. There must be tremendous hesitation to alter a workable system and risk irreparable harm to the state of our military.

STATEMENT OF SENATOR ARLEN SPECTER

I am chairing this hearing today in order to hear from a variety of experienced witnesses on whether the "Feres" doctrine should be overturned by congressional enactment and, if so, what form that legislation should take. I have proposed such a bill, and introduced a similar bill in the 106th Congress.

In the 1950 case of Feres v. U.S., the Supreme Court held that the United States Government is not liable under the Federal Tort Claims Act for injuries to military personnel where the injuries are sustained "incident to service." Under the Feres doctrine, therefore, a soldier would not be able to seek compensation from the government for injuries sustained due to government negligence unless the soldier happened to be on leave or furlough at the time he or she sustained the injuries.

Over the years, we have seen the Feres doctrine produce anomalous results which reflect neither the will of the Congress nor basic common sense. For instance, under Feres, a soldier who is the victim of medical malpractice at an army hospital cannot sue the government for compensation. Likewise, his family cannot sue for compensation if the soldier dies from the malpractice. But a civilian who suffers from the same malpractice would be entitled to file suit against the government. Likewise, if a soldier driving home from work on an army base is hit by a negligently driven army truck, he is barred from suing the government for compensation. If the soldier dies in the accident, his family will be barred from suing for compensation. Meanwhile, a civilian hit by the same truck would have a cause of action against the United States. Unfortunately, the individuals hurt by the Feres doctrine are the men and women of our armed forces -- people whom we should protect and reward, not punish.

The recent decision of the Third Circuit Court of Appeals in O'Neil v. United States illustrates the troubling results produced by the Feres doctrine. In O'Neil, the family of slain

Naval officer Kerryn O'Neil was barred from pursing a wrongful death claim against the government under the Feres doctrine. O'Neil was murdered by her former fiancé, George Smith, a Navy ensign. The two met at the U.S. Naval Academy and were stationed at the same Naval base in California. After Ms. O'Neil broke off their engagement, Mr. Smith began to stalk her. One night while Ms. O'Neil was sitting in her on-base apartment watching a movie with a friend, Smith came to her building and killed her, her friend, and then himself.

After the murders, Kerryn O'Neil's family learned that Mr. Smith had scored in the 99.99th percentile for aggressive/destructive behavior in Navy psychological tests. Under Naval procedures, these results should have been forwarded to the Department of Psychiatry at the Naval Hospital for a full psychological evaluation. Had their claim not been barred, the O'Neils would have argued that the Navy was negligent in failing to follow up on these extreme test results. I do not know whether the O'Neil's deserved to be compensated under the Act -- this depends on the specific facts and the case law in this area. But it does seem clear to me that the O'Neils should not have been barred from pursuing their claim because their daughter's fatal injuries were sustained "incident to service."

Of course, there are situations in which soldiers should not be allowed to sue the government in tort. For example, in a combat situation, countless judgement calls are made which result in death or injuries to soldiers. We cannot have lawyers and juries second guessing the decisions made by field commanders and combatants in the heat of battle. But such considerations do not necessitate that military personnel should lose the right to sue the government in any context.

The bill I ~~introduce today will~~ propose would reverse the court-created Feres doctrine and return the law

to the way it was originally intended by Congress. My proposed bill is very short and simple. It amends the Federal Tort Claims Act to specifically provide that the Act applies to military personnel on active duty the same as it applies to anyone else. My bill further specifies that military personnel will be limited by the exceptions to government liability already included in the Act, including the bar on liability for injuries sustained by military personnel in combat and the bar on liability for claims which arise in a foreign country. In short, my bill will ensure that members of our armed forces will be entitled to damages they deserve when injured through the negligence or wrongful actions of the Federal government or its agents, except for certain limited cases contemplated by Congress when it originally passed the Act.

Congress passed the Federal Tort Claims Act in 1946 to give the general consent of the government to be sued in tort, subject to several specific restrictions. Under the common law doctrine of sovereign immunity, the United States cannot be sued without such specific consent. The Act provides that the government will be held liable "in the same manner and to the same extent as a private individual under the circumstances." Thus, the Act makes the United States liable for the torts of its employees and agents to the extent that private employers are liable under state law for the torts of their employees and agents.

The Act contains many exceptions to government liability, but it does not contain an explicit exception for injuries sustained by military personnel incident to service. In fact, one of the Act's exceptions prevents "any claim arising out of the combatant activities of the military or naval forces, or the Coast Guard during time of war." By including this exception, Congress clearly contemplated the special case of military personnel and decided that certain limits must be placed on government liability in this context. But by drawing this exception narrowly and

limiting it to combat situations, Congress rejected any broad exception for injuries sustained "incident to service." The Supreme Court did far more than interpret our statute when it significantly broadened the limited combat exception provided by Congress.

The Feres doctrine has been the subject of harsh criticism by some of the leading jurists in the nation. In the 1987 case of United States v. Johnson, a 5 to 4 majority of the Supreme Court held that the Feres doctrine bars suits on behalf of military personnel injured incident to service even in cases of torts committed by employees of civilian agencies. Justice Scalia wrote a scathing dissent in Johnson, in which he was joined by Justices Brennan, Marshall, and Stevens. Scalia wrote that Feres was "wrongly decided and heartily deserves the widespread, almost universal criticism it has received."

Judge Edward Becker, the Chief Judge of the Third Circuit Court of Appeals, has also spoken out strongly against the Feres doctrine. He has noted that "the scholarly criticism of the doctrine is legion" and has urged the Supreme Court to grant *cert.* to reconsider Feres. Judge Becker has written to me that given the failure ~~to~~ of the Court to overturn Feres thus far, I should introduce legislation doing so.

Even in the Feres opinion itself, the Supreme Court expressed an uncharacteristic doubt about its decision. The justices recognized that they may be misinterpreting the Federal Tort Claims Act. They called upon Congress to correct their mistake if this were the case. The Court wrote:

> There are few guiding materials for our task of statutory construction. No committee reports or floor debates disclose what effect the statute was designed to have on the problem before us, or that it even was in mind. Under these circumstances, no conclusion can be above challenge,

> but if we misinterpret the Act, at least Congress possesses a ready remedy.

Congress does possess a ready remedy, and I call upon my colleagues to exercise it. The bill I ~~introduce today~~ propose will eliminate the judicially created Feres doctrine and revive the original framework of the Federal Tort Claims Act. There is no reason to deny compensation to the men and women of our armed services who are injured or killed in domestic accidents or violence outside the heat of combat. I hope that when we resume our business next year my colleagues will join me in supporting and passing this legislation.

Statement of Richard A. Sprague, Esquire Regarding The "Feres" Doctrine

I would like to thank the Committee for inviting me to speak with you today about an outrageous, unfair, and discriminatory judicially-created exception to the Federal Tort Claims Act known as the "Feres" doctrine pursuant to a United States Supreme Court decision in 1950. Before I discuss with you what the "Feres" doctrine is and why it should be corrected legislatively, let me give you some illustrations of how the doctrine is so unfair.

A serviceman goes into an Army hospital for abdominal surgery. Eight months later he has another surgery where a towel 30 inches long by 18 inches wide marked "Medical Department U.S. Army" from the earlier abdominal surgery is discovered within his stomach. No one would question that there was negligence and that were he a civilian or had it happened in a civilian hospital, appropriate litigation could be brought. Yet this precise fact pattern was one of the trilogy of cases decided under the name *Feres v. United States*, 340 U.S. 135, 71 S. Ct. 153 (1950), in which the Supreme Court found that the patient-serviceman could not bring suit.

A Coast Guard rescue pilot is called out on a stormy night to rescue a boater in distress. The weather is so bad that the pilot requests radar guidance from the FAA, a civilian agency of the federal government. Following the FAA's directions, the pilot flies into the side of a mountain and is killed. If he were a civilian pilot there is no question that his wife and family would be able to maintain a suit, yet, because he was an active duty Coast Guard pilot his family's claim was tossed out of court because of

the *Feres* doctrine. *United States v. Johnson,* 481 U.S. 681, 107 S. Ct. 2063 (1987).

A soldier is ordered to stand unprotected in a field while a nuclear device is detonated a short distance away. Not surprisingly, he subsequently develops inoperable cancer and dies some years later. His estate is barred from the courthouse by *Feres. Jaffee v. United States,* 663 F. 2d 1226 (3rd Cir. 1981). Not only is his estate barred from seeking redress for the terrible thing done to their husband and father, but the children cannot bring their own actions for their severe birth defects resulting from the chromosomal damage caused by the radiation poisoning of their father. *Hinkie v. United States,* 715 F. 2d 96 (3rd Cir. 1983).

Hypothetically, suppose that my good friend Senator Specter and I were driving in a car accompanied by an active duty serviceman and an Army truck runs a red light crashing into our vehicle and all are injured. The active duty serviceman in our vehicle is rendered a quadriplegic. Senator Specter and I, even though not as seriously injured, can bring a claim for negligence under the FTCA while the serviceman cannot. Such an outcome is patently unfair and discriminatory.

Before 1946, even a civilian could not recover damages from the government in any of the situations that I have just described because of the doctrine of sovereign immunity. However, in 1946, Congress passed the Federal Tort Claims Act ("FTCA"), which waived much of the sovereign immunity of the United States in "recognition of the Government's obligation to pay claims on account of ... personal injury or death caused by negligent or wrongful acts of employees of the Government."

United States v. Yellow Cab Co., 340 U.S. 543, 71 S.Ct. 399, 404 (1951). Specifically, the Act allowed suits against the government for "injury or ... death caused by the negligent or wrongful act or omission of any employee of the Government ... 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." 28 U.S.C. § 1346 (b); 2671-2680. The Act contains a number of exemptions and specifically precludes claims by servicemen for claims "arising out of the combatant activities of the military or naval forces, or the Coast Guard during time of war." 28 U.S.C. §2680 (j).

In *Feres v. United States,* 340 U.S . 135, 71 S. Ct. 153 (1950), the Supreme Court wrote a new exclusion into the statute, holding that "the Government is not liable under the Federal Tort Claims Act for injuries to servicemen that arise out of or are in the course of activity incident to military service." 71 S.Ct. at 159. Thus, so long as the injury was in the "course of"or "incident to" military service, an injured serviceman was out of court. This principle is now known as the "Feres doctrine."

The *Feres* Court offered three reasons for its decision: (1) there was no parallel private liability as required by the FTCA (71 S.Ct. at 157); (2) Congress could not have intended that local tort law govern the "distinctively federal" relationship between the Government and enlisted personnel because it would be "unfair" to make the serviceman's right to recovery turn on the law of the place where he might be involuntarily stationed (71 S.Ct. at 157-158); and (3) Congress could not have intended to make the FTCA remedy available to servicepersons eligible for veterans' benefits to compensate for injuries suffered incident to service (71 S.Ct. at 158). Four years later, the Court added a fourth rationale, *i.e.*, Congress could not have intended to permit suits for service-related injuries because they would unduly interfere with military discipline. *United States v. Brown*, 348 U.S. 110, 75 S. Ct.

141,143 (1954).

The Court subsequently realized the invalidity of its first "parallel private liability" rationale. *Rayonier, Inc. v. United States*, 352 U.S. 315, 77 S. Ct. 374 (1957). The Court has also acknowledged the weakness of the rationales pertaining to local tort law and the availability of veterans' benefits by describing them as "no longer controlling." *Shearer v. United States*, 473 U.S. 52, 105 S. Ct. 3039, 3043, n. 4 (1985).

However, *Feres* was most recently reaffirmed by the Supreme Court in *United States v. Johnson,* 481 U.S. 681, 107 S. Ct. 2063 (1987) by a 5-4 majority. *Johnson,* as mentioned above, was the case where a negligent FAA radar operator directed a Coast Guard rescue pilot into the side of a mountain. Justice Scalia, joined by Justices Brennan, Marshall, and Stevens, dissented. Justice Scalia's dissent makes cogent arguments attacking the rationale of *Feres,* and quite correctly, I believe, states: "*Feres* was wrongly decided and heartily deserves the 'widespread, almost universal criticism' it has received." 107 S.Ct. at 2074. As for the "local tort law" rationale, Justice Scalia said: "The unfairness to servicemen of geographically varied recovery is, to speak bluntly, an absurd justification, given that we have pointed out in another context,[1] nonuniform recovery cannot possibly be worse than (what *Feres* provides) *uniform nonrecovery*." 107 S.Ct. at 2071 -2072 (emphasis added).

Justice Scalia, in addressing the rationale pertaining to the availability of veterans' benefits, quite cogently noted that the Court had allowed injured servicemen to obtain compensation under the

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[1]The "other context" to which Justice Scalia referred was *United States v. Muniz,* 374 U.S. 150, 83 S.Ct. 1850 (1963) where the Court allowed *federal prisoners* to recover for injuries caused by the negligence of prison authorities. Query: is it appropriate to deny recovery under the FTCA to our men and women in the armed services while allowing federal prisoners to do so?

Veterans Benefit Act even in those rare cases where the Court found the injury was not incident to service and allowed a suit under the FTCA. *Id.* at 2071-2072. While no amount of money can ever fully compensate a tort victim or his survivors for severe injury or death, it is fundamentally unjust to limit the serviceman or his survivors to a fraction of what they could otherwise recover.

Finally, the "negative effect on discipline" rationale was likely the reason that Congress in enacting the FTCA put in a specific exclusion for claims "arising out of the combatant activities of the military or naval forces, or the Coast Guard, during time of war." Moreover, as Justice Scalia noted, it "has long been disputed" whether allowing servicemen to recover under the FTCA would, in fact, have the negative effect on discipline presumed by the *Feres* Court. *Id.* at 2073-2074 (citing Bennett, The *Feres* Doctrine, Discipline, and the Weapons of War, 29 St. Louis U.L.J. 383, 407-411 (1985). As Justice Scalia aptly observed, *barring recovery* by servicemen might *adversely* affect military discipline: "[a]fter all, the morale of Lieutenant Commander Johnson's comrades-in-arms will not likely be boosted by news that his widow and children will receive only a fraction of the amount they might have recovered had he been piloting a commercial helicopter at the time of his death." *Id.* at 2074.

Feres and its progeny have expanded the judicially created exception to the FTCA to preclude suits by service personnel for injuries that occur off duty, *e.g., Major v. United States,* 835 F.2d 641 (6th Cir. 1987)(off-duty serviceman killed on base by vehicle driven by another off- duty serviceman who became drunk at an on-base party held in his company barracks and attended by some of his superiors); injuries that occur off base involving other military personnel, *e.g., United States v. Shearer*, 473 U.S. 52, 105 S.Ct. 3039 (1985)(serviceman who was off-duty and off base killed by another serviceman whom his superiors knew to be dangerous); and injuries caused by other non-

military government employees, *e.g., Loughney v. United States,* 839 F. 2d 186 (3rd Cir. 1988)(malpractice committed upon serviceman by civilian doctor employed by the Army that left serviceman comatose). The *Feres* doctrine has even been extended to active duty Public Health Service officers. *E.g., Backman v. United States,* 1998 U.S. App. Lexis 16911 (10th Cir. 1998)(active duty Public Health Service lieutenant presented to emergency room of PHS facility several times with chest pains and history of heart defect – no diagnostic tests ordered and patient died of a ruptured aortic aneurysm). Of Lt. Backman's plight, Judge Henry, concurring, noted that "Feres ties our hands ... although Lieutenant Backman chose to dedicate herself to the service of this country and may well have lost her life because of that choice, a small death benefit is all that her heirs may recover for their loss." *Id.* at * 8.

Feres has been interpreted to bar "*all* injuries suffered by military personnel that are even remotely related to the individual's *status* as a member of the military ... ." *United States v. Major,* 835 F. 2d 641, 644 (6th Cir. 1987) (original emphasis). Chief Judge Becker's dissent in *O'Neill v. United States,* 140 F. 3d 564 (3d Cir. 1998)(joined in by Circuit Judges Sloviter and McKee) is very persuasive and I would like to speak with you about it for a moment. Chief Judge Becker is an esteemed member of the federal judiciary and was recently awarded the highly prestigious *Devitt* award. Kerryn O'Neill was a Naval officer who along with a friend was murdered by her ex-fiancé, a fellow officer, in her apartment while watching television. The Navy knew that her assailant was violently aggressive due to its recent psychological testing of him, which was not followed up in violation of standard Naval procedures. *Id.* at 565. Her claim was deemed barred by the *Feres* doctrine even though "it is difficult for me to imagine anything less incident to service than to be attacked by an ex-

lover while sitting at home watching a movie with a friend." *Id.* Indeed, had her friend who also was killed been a civilian, even though Ms. O'Neill's estate could not sue because of *Feres, Feres* would not bar the friend's estate's suit despite "the same concerns regarding second-guessing military judgment." *Id.*

Chief Judge Becker noted that "[i]n the decades following the decision in *Feres*, the case was subjected to considerable criticism from both the courts and the academy" and that "scholarly criticism of the doctrine is legion." *Id.*

> In the last decade, however, these voices of courts and commentators have died down. Everyone seems to have given up. But the harshness of the doctrine remains. Just look at the injustice suffered by the family of Kerryn O'Neill. Bolstered by the oft-quoted words of Justice Frankfurter: 'Wisdom too often never comes, and so one ought not to reject it merely because it comes late (citation omitted), I urge the Supreme Court to grant certiorari and reconsider *Feres.*

Id. See also, Peluso v. United States, 474 F.2d 605, 606 (3rd Cir. 1973)(reluctantly affirming dismissal under *Feres* doctrine of case of serviceman who died of a ruptured appendix due to negligent treatment by army doctors, stating "[c]ertainly the facts pleaded here, if true, cry out for a remedy" and that "[p]ossibly the only route to relief is by an application to Congress.").

The pleas of Justices Scalia, Brennan, Marshall, and Stevens, Chief Judge Becker, and many others have not been heeded by the Supreme Court, which on occasion has noted Congressional inaction as a justification for the correctness of its position. *E.g., United States v. Johnson*, 481 U.S. 681, 107 S. Ct. 2063, 2068, n.9 (1987). The rationales for *Feres* are deeply flawed and result in fundamentally unfair treatment of men and women who put it all on the line to serve us.

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

I have been a member of the Pennsylvania Bar since1954 and served as an Assistant District Attorney and First Assistant District Attorney in the Philadelphia District Attorney's Office from 1958 to 1974. I also had the privilege of serving as Chief Counsel and Director of the House of Representatives' Select Committee on Assassinations Investigating the Murders of President John F. Kennedy and Dr. Martin Luther King, Jr. I also served in the submarine service during World War Two. I have a client, Richard Bassett, a former active duty Coast Guardsman who is now disabled because of medical malpractice committed by civilian doctors at a Veterans Administration Hospital in Philadelphia. Although his injuries are not as severe as many of those I spoke to you about, he too is barred from asserting a claim for his injuries because of the *Feres* doctrine. On looking into this doctrine and the various rationales put forth to justify it, I became convinced that a grave disservice is being done to our uniformed personnel. Although I believe that no one would argue with the rationale for exempting from the FTCA claims arising from combat operations during time of war, there is simply no rational justification for denying recovery to the victims and families of those uniformed personnel who are injured or killed simply because of their active duty status. I urge this Committee to heed the pleas of Justices Scalia, Brennan, Marshall, and Stevens, Chief Judge Becker and all those commentators

who have criticized *Feres,* and do what is right by the servicemen and women of our country injured or killed as the results of acts or omissions of our Government.

Subj: PLEASE EXPEDITE: Re: Request to Attend Feres Doctrine hearing
Date: Thu, 3 Oct 2002 12:36:53 PM Eastern Daylight Time
From: VERPAPhila
To: senator_leahy@leahy.senate.gov
Cc: mohbstrmc@i-55.com, barbcrag@hotmail.com, DR PSUEKK, Vietna467, VERPAWA, STAR2012, D CAT 229, VERPAPhila

Veterans Equal Rights Protection Advocacy & Publishing, Inc.
~VERPA~
"Veterans for Equal Justice Under Law"
Inc. December 1999
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Web site: www.verpa.net * E-Mail: VERPAPhila@aol.com
Incorp. State: Duluth, MN
Home Office: Upper Darby, PA
Founder/Executive Director: Jeffrey A. Trueman
President/Chairman VERPA: Dale Van Luven
Press Officer: Raymond Mike Clausen, Jr._MOH

Legislative Coordinator: Barbara Cragnotti
Vice-Chairman: Moho Hukarevic, Sr.

October 3, 2002

The Honorable Mr. Leahy
United States Senator

Dear Senator Leahy:

Good afternoon.

My name is Jeffrey A. Trueman and I am the founder of "VERPA" - Veterans Equal Rights Protection Advocacy, Inc. Please see www.verpa.net for more information about who we are, why we formed, and what we seek as veterans and families from across the nation arising from our bona fide claims of injury and injustice denied redress under the Feres Doctrine.

Briefly, we formed on December 12, 1999, to begin a grassroots movement of veterans and our loved ones to seek reforms or repeal of the "Feres Doctrine." We can produce bona fide evidence and citizens whose rights to equal protection under our Constitution has been denied due to the Feres Doctrine.

In the process of learning about the Feres Doctrine, I have achieved the following goals: (1), authored the book, "Beyond the Scope of Justice: The Chilling Effects of the Feres Doctrine in the United States Armed Forces" after a failed challenge at the United States Supreme Court, (2) Appeared at the Cox Commission's hearings on the 50th Anniversary of the Uniform Code of Military Justice (UCMJ), noting; the commission forwarded to Congress and the Department of Defense VERPA's argument that the "Feres Doctrine" is of major concern to many veterans and loved ones, (3), My military record was used and investigated by ABC's 20/20 in their piece, "An Abuse of Power", (4), Keynote speaker at the July 16, 2002, "Atomic Veterans Annual Conference". In addition, I have spoken at several veterans functions and stand by our claim that the "Feres Doctrine" allows for command, legal and medical abuses to go unchecked and denies enforcement of the Inspectors General and Military Whistleblower Protection Act. Both federal laws designed to prevent the many injustices we formed to address.

Here is the excerpt from the Cox Commission's report:

The following excerpt from the Commission's report to the Department of Defense and United States Congress is as follows:

"C. Feres Doctrine. The Commission was not chartered with the idea that our study would include matters such as the Feres Doctrine. However, given that it was articulated the same year that the UCMJ was adopted, and that many former servicemembers have been frustrated by its constraints on their ability to pursue apparently legitimate claims against the armed forces, many of which bear little if any relation to the performance of military duties or obedience to orders on their merits, the Commission believes that a study of this doctrine is

warranted. An examination of the claims that have been barred by the doctrine, and a comparison of servicemembers' rights to those of other citizens, could reform military legal doctrine in light of present day realities and modern tort practice. Revisiting the Feres Doctrine would also signal to servicemembers that the United States government is committed to promoting fairness and justice in resolving military personnel matters."

I just received an email notification that your Judiciary committee will be in full session with regard to the Feres Doctrine. Our organization does not advocate nor do we attempt to disrupt good order and discipline in the armed forces. Hence, we are not challenging the "incident to service" bar on injury or injustice arising incident to combat or national emergency. We also, do not advocate lawsuits arising from negligence which we feel is "dereliction of duty" and can and should be addressed under the provisions of the UCMJ.

What we do advocate and argue is that the Feres Doctrine allows intentional and deliberate violations of American citizens human rights in violation of the Nuremberg Code and constitutional issues with regard to protection of our liberty and property interests arising from the wrongful acts or omissions of federal employees barred under the Feres Doctrine.

Having stated the above, it is hereby respectfully requested, that I be afforded the opportunity if at all possible to sit in and listen to the discussions with regard to your committee's addressing this unfair judicial body of law.

If authorization can be granted for me to attend, I am sure, all our supporters will be truly appreciative of this show of good faith will go a long way for our goal of instituting true reforms in the DOD and VA for the good of future Americans who will serve ~~or be~~ called upon to serve our nation in the U.S. military.

Very truly yours and thank you!

/s/

Jeffrey A. Trueman
(610) 369-8180

cc: VERPA Board of Directors

Veterans Equal Rights Protection Advocacy & Publishing, Inc.

~VERPA~

"Veterans for Equal Justice Under Law"
Inc. December 1999
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Barb Cragnotti * Board Member * Oregon Field Representative*Legislative Coordinator

Incorp. State: Duluth, MN
Home Office: Upper Darby, PA

Founder/Executive Director: Jeffrey A. Trueman
Chairman: Meho Hakarevic, Sr.
Press Officer: Raymond Mike Clausen, Jr._MOH

Field Reps by State: PA, NY, OH, MA, MI, GA, TN, WI, TX, LA, OR, AR, CA, AZ, HI, NC, VA, WA

October 20, 2002

The Honorable Patrick Leahy
Chairman, Senate Judiciary Committee
Washington, DC 20510

The Honorable Arlen Specter
Presiding Chair, Senate Judiciary Committee
"Feres Doctrine" hearings
Washington, DC 20510

RE: Veterans Equal Rights Protection Advocacy, (VERPA)
Statement for the Record, re: "Feres Doctrine"

Dear Senator Leahy, Senator Specter and Committee Members:

On October 8, 2002, the Senate Judiciary Committee hearings on the "Feres Doctrine" was held. Although, VERPA was not afforded a formal invitation to present our statement, on October 11, 2002, Mr. Swanton, congressional aide to Senator Specter provided us with authorization to submit for the record, VERPA's position statement with regard to the "Feres Doctrine."

We wish to thank you for holding these hearings and for allowing us the opportunity to be heard in this matter.

Very truly yours,

Barbara Cragnotti

Barbara Cragnotti
VERPA Legislative Coordinator

Enclosures
cc: VERPA Board Members, et al.
cc: President George W. Bush

Veterans Equal Rights Protection Advocacy & Publishing, Inc.

~VERPA~

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Field Reps by State: PA, NY, OH, MA, MI, GA, TN, WI, TX, LA, OR, AR, CA, AZ, HI, NC, VA, WA

VERPA

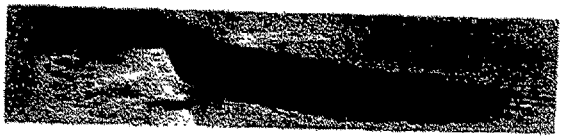
"STATEMENT FOR THE PUBLIC RECORD"

RE: "The Feres Doctrine; An Examination of this Military Exception to the Federal Tort Claims Act."

IN THE
SENATE JUDICIARY COMMITTEE
October 8, 2002

Submitted on behalf of VERPA Board of Directors, Officers, and Supporters

Barbara Cragnotti
VERPA Legislative Coordinator
October 20, 2002



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Field Reps by State: PA, NY, OH, MA, MI, GA, TN, WI, TX, LA, OR, AR, CA, AZ, HI, NC, VA, WA

VETERANS EQUAL RIGHTS PROTECTION ADVOCACY
"VERPA"

STATEMENT FOR THE PUBLIC RECORD

OCTOBER 8, 2002, SENATE JUDICIARY COMMITTEE HEARINGS

RE: "THE FERES DOCTRINE"

INTRODUCTION

COMES NOW, We the People of the United States of America who make up VERPA, specifically, veterans, our family and friends from across the Nation, with our *"Statement for the Public Record."*

This statement is provided in the wake of the October 8, 2002, Senate Judiciary hearings on the *"Feres Doctrine."* VERPA formed as a national grassroots non-profit organization to specifically address and advocate the plight of countless American citizens who have been denied equal justice within our federal judiciary due to the Feres Doctrine exemption to the *Federal Tort Claims Act (FTCA) of 1946.*

It was only on October 3, 2002, when VERPA first received notification that the Senate Judiciary Committee was holding hearings on this most controversial subject matter known as the Feres Doctrine, (hereinafter "FD"). In response, our founder, Jeffrey A. Trueman, on behalf of VERPA'S Board of Directors via electronic mail requested VERPA be afforded the opportunity to testify at the "FD" hearings. *1 As the Senate Judiciary Committee found out by an estimated 500 phone calls, faxes and emails from across the nation, VERPA is a viable and determined organization to put an end to the 52 year injustice we know all to well as the "FD." On October 8, 2002, Trueman attended the "FD" hearings and was fully prepared to testify and answer any and all questions from the committee. As many in the Congress know, Trueman authored the only book in America asserting the "FD" allows intentional and deliberate abuses within the military's command, legal and medical processes. *2 Moreover, Trueman asserted the FD has allowed for intentional and deliberate violations of American citizens human and constitutional rights and we the Board of Directors and supporters of VERPA agree and now expect expedited attention to the "FD" matter by the United States Congress *3

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1. Please see, Exhibit "A", VERPA founder's letter request to attend "FD" hearings for a summary explanation of VERPA'S position with regard to the "FD." Additionally, please see Exhibit "B", VERPA'S proposed legislation to be known as the *"Feres Doctrine Compensation Act [FDCA]"*, presently being distributed to all Members of Congress in both the House and Senate. *3

2. VERPA also believes, the failure of service-connected physical or mental injury to be addressed prior to discharge under the "FD," results in continued injustice with regard to the Veterans Health Administration (VHA/VA) properly rating disabled veterans.

3. VERPA formed as the "umbrella" organization to educate all other veterans' organization who advocate specific injury or injustice such as atomic testing, murders, rapes, Agent Orange, anthrax, Gulf War Syndrome/Illnesses. VERPA does not seek active membership, we only provide other organizations with the knowledge of this unconstitutional law and if those respective organizations believe, the "FD" is bad law, we then independently advocate on their behalf.

Although, VERPA'S eleventh hour attempt to testify at these hearings was denied, on October 9, 2002, VERPA followed up and requested our official statement be allowed for the congressional record. This request was approved *4. Overall, VERPA with this *"Statement for the Public Record"* hereby submits for the record, our strong disagreement with the Department of Justice (DOJ) and Pentagon's position and views, specifically:

"The Feres doctrine continues to be a sound and necessary limit on the FTCA'S waiver of sovereign immunity, essential to the accomplishment of the military's mission and the safety of the Nation."

VERPA strongly disagrees with the position of the DOJ and Pentagon/DOD and VERPA's statement is a specifically provided as a rebuttal for the public record to counter the failed arguments of the DOJ and DOD.

---

4. Please see Exhibit "C", letter authorization from Senator Specter's aide, Mr. Thomas Swanton, granting permission for VERPA to submit this *statement for the record*.

VERPA hereby asserts the "FD" has for the past 52 years resulted in "intentional and deliberate" abuses of American citizens' human and constitutional rights. Moreover, the "FD" and its grant of "sovereign immunity" are directly contributed to unthinkable abuses within our military's command, legal and medical systems. Frankly stated, countless American veterans and families for the past 52 years have been denied "equal justice under law" in the wake of this unconstitutional judicial body of law. Hence, no accountability no justice!

VERPA believes the time has come for the "FD" to be abolished in its entirety, with the exception of injury or injustices arising out of, or in the course of combat or national emergency. VERPA'S intent with addressing the dangers of the "FD" with regard to "individual" civil and human rights and a blanket "damage control" tool to cover up corruption in the military's command, legal and medical processes, we still understand the need to preserve "good order and discipline" in our armed forces. Without question, a military commander's ability to carry out "good faith" orders for the defense of our nation is critical. However, it is no secret now, that the "FD" has gone *"beyond the scope of justice"* and its initial intent as constructed by the United States Supreme Court in 1950 with regard to "medical malpractice" and "negligence" claims has been used by those in our DOD and DOJ to deny redress of substantial other injury or injustice arising from non-legitimate military matters.

VERPA does not advocate in any way, the bringing of a cause of action arising from "negligence." We believe, negligence per se, is "dereliction of duty" and the appropriate venue to address such matters rests solely under the provisions of the *Uniform Code of Military Justice (UCMJ)*. Because of this position, we find the DOJ and DOD's arguments without merit that it will disrupt good order and discipline to abolish the "FD."

Again, the issue VERPA brings to the Judiciary Committee is the ability of the "FD" exception to the FTCA to allow and cover up "intentional and deliberate" abuses of American citizens serving in the military, and notably, abuses which are in direct violation of the Nuremberg Code. This fact is also known to some in Congress. To set the tone for our argument that the "FD" must be abolished with the exception of injury or injustice arising out of or in the course of combat or national emergency matters, the following excerpt is taken from the United States Senate Staff Report, dated, December 8, 1994, and prepared for the "Committee on Veterans' Affairs" re:

"Is Military Research Hazardous to Veterans' Health?" Lessons spanning half a century", which supports VERPA'S charge that "human rights" abuses are being condoned under the "FD."

It states in part:

"During the last few years, the public has become aware of several examples where U.S. Government researchers "intentionally" exposed Americans to potentially dangerous substances without their knowledge or consent."

The report goes on to say:

"For at least 50 years, DOD has intentionally exposed military personal to potentially dangerous substances, often in secret."

In a "free society" and "republic" as America is, these human rights abuses must and cannot be tolerated.

Even more disturbing to VERPA is that the report, specifically with regard to the "FD" states in the *"Recommendations"* section;

"The Feres Doctrine should not be applied for military personnel who are harmed by inappropriate human experimentation when informed consent has not been given."

From the above Senate report, it is no secret that the "FD" is being used to allow and condone human rights abuses. This fact cannot and must not be condoned any longer by the United States Congress! This report, for the record is nearing one decade and the failure of the Congress to act further on this issue, raises serious question. However, we are confident the "FD" subject matter will not be delayed any longer in Congress in redressing this 52 year wrong.

In addition to human rights abuses, the "FD" is also contributed to the cover up of corruption within the military's command, legal and medical processes. The "FD" and its initial intent and exemption to the FTCA have been widely abused. The "FD" is bad law and obstructs the enforcement of laws such as the *Uniform Code of Military Justice, (UCMJ), Inspectors General Act* and *Military Whistleblower Protection Act*. All existing federal law to address and correct matters of fraud, waste and abuse.

For lack of better words, the "FD" renders these federal laws unenforceable and not worth the paper they are printed on.

We wish as veterans, family and friends across the nation to amicably work with our Members of Congress to right the "FD" wrong. VERPA must note for the record, our position that the *"Rockefeller Report"* in our opinion provides us with the right to petition the world court, to seek remedy predicated upon declaratory judgment that the "FD" has resulted in and continues to result in, "human rights" abuses of Americans serving our nation. We wish not to proceed to the world court, however, we are being left with no other option if our representatives in the United States Congress, fail to act and prevent the long train of abuses contributed to the "FD" grant of sovereign immunity in tort. Moreover, VERPA believes, the "FD" ability to cover up corruption in the military's command, legal and medical processes resulting in injury to American citizens constitutional property and liberty interests, provides us jurisdiction to file a petition under the provisions of *Public Law, Title 42, U.S.C. Section 1985/1986, "Brothers Keeper Statute."* VERPA believes, the "FD" is a dangerous threat to the national security of our nation.

VERPA will now provide our argument to rebut the position of our public servants in the DOJ and DOD, that the "FD" frankly speaking, is a necessary evil to preserve and maintain good order and discipline in the United States Armed Forces. To the contrary, VERPA believes, abolishment of the "FD" will strengthen good order and discipline and will ensure honor, integrity and accountability within the Department of Defense (DOD) and continued checks and balances and equity in Veterans Administration (VA).*5

5. The nexus between the FD and its ability to dismiss legitimate claims of service-connected physical or mental injury or constitutional injustice arising in the DOD and extending into the VA will be explained in more detail in our argument section.

ARGUMENT

VERPA'S position with regard to the "FD" remaining the law of the land and an exception to the *Federal Tort Claims Act (FTCA)* is without question, in extreme contradiction to the recent testimony of the DOJ and DOD who continue to believe, the "FD" is a "sound and necessary" judicial body of law.

VERPA, having formed to specifically understand and redress the known abuses arising under the "FD", the question VERPA must ask the Congress is "whose good order and discipline" are we referring to?

If maintaining good order and discipline in the United States Armed Forces is achieved by the DOJ defending at taxpayers' expense, for example, murders, rapes, uniformed consent experimentation's, falsification of official documents, destruction of official documents, grossly negligent failure to medically treat service members service-connected illnesses after exposing citizens to dangers toxins, etc., ordering service members into military mental hospitals to cover up fraud, waste and abuse, all matters clearly condoned under the "FD", then, VERPA believes, the "FD" and the unthinkable condoning of human and constitutional rights abuses must be incorporated in military entrance process. *6

If American citizens are informed they have no rights under the United States Constitution when they swear the oath to protect this very document of freedom, then, the argument to abolish the "FD" will then be moot. However, how many Americans will voluntarily join our military knowing, what countless American families found out to late with respect to the "FD" injustice.

VERPA, for the past two (2) years has actively engaged in a national petition drive to obtain any bona fide claims of injury or injustice, denied redress under the "FD." VERPA has actively educated the general public about the dangers of the "FD" and its grant of sovereign immunity and the corruption it allows in our armed forces. In short, many citizens have simply responded: *This is incredible*. Moreover, they further have stated: *Keep up the good and noble work you are doing for the good of our veterans and nation.*

Without question, the general public is very much in the dark about the injuries and injustices the FD has lead to for the past 52 years. However, the cat is out of the bag and no longer, can our United States Congressional representatives fail to act as stated by Justice Scalia to right the "FD" wrong. What we have come to realize, the "FD" is simply a damage control tool so dearly important to the Pentagon in the sense, no redress of wrongs under the "FD" leads only to no accountability and corruption in our armed forces.*7

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6. VERPA stands ready if called upon to do so by Congress to bring forth organizations and individuals to support our claims the "FD" allows human and constitutional rights abuses in our armed forces.

7. VERPA in no way hereby asserts "everyone" in the DOD and VA corrupted. What we do know, those who attempt to "do the right thing" are often times overruled by the "spin lawyers" in Washington due to "sovereign immunity re; Feres."

It is clearly established in case law and dissenting opinions of federal judges that the "FD" is unfair. As this committee pointed out in its "FD" hearing notice using the dissenting opinion of Justice Scalia in U.S. v. Johnson, (1987) that; *"Feres was wrongly decided and heartily deserves the widespread, almost universal criticism it has received."*

Moreover, Justice Scalia further stated:

"Congress's inaction regarding this doctrine and its doing little, if anything in the way of modifying it to prevent Constitutional claims is clearly unjust and irrational. Again, allowing such power to military leaders can and does result in abuse therefore, where are the checks and balances on the military." *8

VERPA agrees with Justice Scalia et al., who know this judicial body of law is unjust and irrational." For the DOJ to assume the 52 year old position that the "FD" is a necessary evil, VERPA finds this position absolutely without merit. VERPA believes, instead of the DOJ defending violators of Americans' human and constitutional rights in the armed forces, they [DOJ] should be prosecuting those federal employees who wrongful acts and omissions result in injury on injustice to the very citizens serving to preserve the constitution. It is VERPA'S firm belief that more tax dollars are spent defending corruption then would be paid out to right a wrong. Again, where is the justice in this?

It is simply inconceivable but true, that instead of the DOJ prosecuting federal employees who violate the human and constitutional rights of Americans serving in our military, under existing federal laws, they are "defending" said violators at taxpayers' expense! Again, where is the justice in all of this?

Although, it would be virtually impossible to submit for the official record every bona fide claim of injury or injustice VERPA has been presented with since we formed, the following cases speak for the majority in our opinion. *9

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8. Title 42, USC is very clear on the mater of "failure to prevent."

9. In addition to the cases that will be sighted herein, inputs from other organizations and individuals asserting their rights to equal justice under law has been denied due to the "FD", should be granted and placed in the official record upon receipt. Moreover, each and every case we assert supports our position the "FD" is a bad body of law, hereby is willing to testify under oath if afforded this opportunity to do so by the United States Congress.

The following enumerated arguments are now provided as a rebuttal to the DOJ and DOD position, the "FD" is a necessary exemption to the FTCA:

I. WHEN WE ASSUMED THE SOLIDER

In 1775, at the New York Legislature, General George Washington is quoted as stating:

"When we assumed the Soldier, We did not lay aside the citizen."

VERPA will begin our argument by asserting, when we the Americans swore out an oath to defend and protect the United States Constitution, we DID NOT waive our basic constitutional protections nor did we waive our conscious as human begins. It goes without saying, what we know now about the "FD" and its ability to allow "intentional and deliberate" abuses to go un-remedied arising from the wrongful acts or omissions of federal employees and our service-connected physical and mental injuries to be denied redress prior to being forced into the Veterans Health Care system, (VA), many of us would never have served our nation. The argument here is why would any American citizen voluntarily serve our nation if they understand, they will become second-class citizens? The sad but true fact here is that even criminals possess more rights to due process of law than American veterans. And, we must stress, not only does the veteran suffer denial of equal protection of the constitution under the "FD", so does our families. The "FD" has and continues to deny Americans citizens in the military *"equal protection"* and *"due process"* under the United States Constitution to protect the very liberty and property interests all other Americans enjoy, even, the criminal element in our society. The "FD" is a deceptive law, however, it goes much deeper than just individual abuses of Americans. It allows for fraud, waste and abuse within our military's command, legal and medical processes. Hence, what good does the "FD" serve for the good of the public?

In closing this argument, we submit for the record the message of Abraham Lincoln's message to Congress in 1861:

It is as much the duty of government to render prompt justice against itself, in favor of citizens, as it is to administer the same between private individuals.

The "FD" denies this prompt justice and the time is now to right this wrong!

II. SOVEREIGN IMMUNITY IN TORT IS UNCONSTITUTIONAL

VERPA, hereby asserts the "FD" grant of "sovereign immunity" is not only unconstitutional, it allows for intentional, deliberate and gross-negligent acts or omissions to go unchecked. Although, federal statutes such as the Uniform Code of Military Justice (UCMJ), "Inspectors General Act" and "Military Whistleblower Protection Act" should be utilized to address issues of fraud, waste, abuse in our military, these matters are being dismissed in our opinion due to the "FD." As a result, Americans in the armed forces whose liberty and property interests are negatively affected arising from the wrongful acts or omissions of federal employees, are essentially, 'second class citizens.' It is simply unjust and un-American for those who put their lives on the line to protect and defend the constitution and our nation, have been denied the very basic protections of the constitution in the wake of the "FD" decision. It has been often stated; "criminals" are afforded greater protection of the constitution than those in our armed forces under the "FD." Shall we not forget, America was born with the understanding and absolute objections to the notion, *The King Can Do No wrong*. The "FD" and its grant of sovereign immunity go against every principle of the founding fathers that the federal government, is of the People and for the People. VERPA believes, the People of the United States of America if polled, educated on the abuses under the "FD" and its ability to allow corruption to go unchecked in their armed forces, would never stand for this man made law to remain the law of the land!

III. REBUTTAL TO THE DOJ & PENTAGON'S "FD" ARGUMENTS

VERPA would like to specifically argue in this section, why we believe the DOJ and DOD argument that the "FD" continues to be a sound and necessary limit on the FTCA'S waiver of sovereign immunity fails:

Â· Good Order and Discipline.

VERPA understands, without question, a military commander's ability to carry out "good faith" orders for the defense of our nation is critical. However, it is no secret now that the "FD" has gone "beyond the scope of justice" and its initial intent as constructed by in 1950 with regard to "medical malpractice" and "negligence" claims outside the scope of combat. VERPA does not advocate in any way, the bringing of a cause of action arising from "negligence." VERPA believe, negligence per se, is *"dereliction of duty"* and the appropriate venue to address such matters rests solely under the provisions of the Uniform Code of Military Justice (UCMJ). VERPA believes, the DOJ and DOD'S arguments for the "FD" to remain the law of the land carries no merit with regard to maintaining good order and discipline. What we do know, the "FD" provides a damage control tool for the Pentagon/DOD to dismiss legitimate claims of human and constitutional rights abuses of American citizens serving our nation. Even more shocking, the DOJ defends these abuses with taxpayer's monies. The simple fact of the matter is that the DOJ and DOD rather protect the integrity of the command, legal and medical systems and continue to defend the abuses arising in those systems rather than prosecuting them under existing federal laws. This fact is unacceptable! Again, no accountability no justice."

VERPA can only conclude this argument by referring all Members of Congress to Exhibit "B" of this statement, VERPA'S *proposed Feres Doctrine Compensation Act (FDCA)*, noting the *Cox Commission report* and VERPA'S case study, *re: SSG Robert Jones, United States Army.*

In addition to the *"FDCA"* initiative, where hereby provided for the record the following statements from American veterans or surviving loved ones, critical to prove no longer, can our Congress fail to act to right the FD wrong:

a. Statement from SSG Robert Jones, shows the continuous medical problems this family suffers, as a result of the Gulf War. Army medical continues to refuse treatment. This fact is not simply negligence, it is "criminal negligence."

VERPA must stress, although SSG Jones and his family's continued unthinkable injustice wherein the U.S. Army has been grossly/criminal negligent in treating this American family, there are countless other cases that will "outrage" the public when the facts, circumstances and supporting evidence reach the Congress.

The SSG Jones matter has been tirelessly pursued by VERPA because we feel, it supports VERPA'S claims the "FD" allows for abuses in the command, legal and medical processes. The SSG Jones matter, will prove this and further, will prove the Inspectors General and Military Whistleblower Protection Act are "worthless" laws due to the "FD/Sovereign Immunity."

VERPA must emphasize, our founder, "True" has assisted the Jones' after their status as "pro se" and has spent almost two years with on this case within the Medical and Physical Examination (MEB/PEB) processes within the U.S. Army. In summary, True would like to make this statement for the record:

"If this highly decorated combat veteran and or his wife dies due to our government's failure to treat this family, I consider it a "crime against humanity" and will personally take this matter to the world criminal court. For eight years since my improper discharge, and decision to make it my life's work to advocate "equal justice" for veterans and their loved ones, the Jones', (along with countless others), Robert asked me if he died, would I fight on for his wife and children. The answer was absolutely, even if that would lead to my own demise. As my big brother, Congressional Medal of Honor recipient, and VERPA'S press officer, Raymond "Mike" Clausen so deeply believes, "Death before Dishonor" is the position I have taken as an American and United States Veteran!"

The Attorney General of the United States MUST intervene in this matter without further delay! The Jones' can be saved with the recommended treatment plan the U.S. Army knows will save this family! The abuses in this case must end now! (Exhibit D)

b. Statement from Mark Zeller (Exhibit E)

VERPA, has withheld this matter from public view for many reasons. Specifically, SSG Zeller and his family's continued injustice goes to the heart of our argument that the military's mental health system is being used to silence and discredit honorable service members who criticize fraud, waste and abuses.

SSG Zeller, another highly decorated special operations soldier as like SSG Jones, armament systems, took an honorable stand to disprove those in control of our government assertion that the Gulf War Syndrome/Illnesses 'does not exit.' In response, the reprisals were swift and this once honorable combat veteran was attempted to be destroyed by allegations of mental illness, by the very top brass in the DOD, namely, Under Secretary for Gulf War Illnesses office.

As with the Jones', this soldier too is continuing, and for that matter, ALL sick Gulf War veterans continue to be denied treatment suggested by "civilian expert doctors" to help these veterans.

For the public record, SSG Zeller has reported before Senator Shay's VA committee and Senator Rockefeller Senate investigation unit.

This honorably discharged veteran and his family as the Jones', and for that matter, ALL Gulf War families plight MUST be HONORED by those in control of OUR Government without further delay!

c **Statement from MM3 Joseph Cragnotti**, shows the abuses this Sailor suffered while in the U.S. Navy, ongoing now, while on Temporary Disability Retirement List (TDRL) and continues today by the Veterans Administration. Included is a recent letter from the U.S. Navy. (Exhibit F).

This Petty Officer Cragnotti case goes to the heart of "military medical and dental gross-negligence/malpractice" and its condoning under the "FD." Here, this nation lost a bright, intelligent and future leader, only because, the U.S. Navy allowed "corpsman" to make medical diagnosis and allowing this young sailor's pneumonia to progress to a point where, in the wake of being ordered to dental for removal of wisdom teeth, while suffering an infection that went to his brain with unthinkable resulting damage due to brain surgery and other medical procedures which could have been avoided all together, if only this sailor was immediately seen by a medical doctor.

As with the Jones', the Zeller's, and all other victims of the "FD." the Cragnotti family deserves JUSTICE without further delay!

Presently, the Trueman improper discharge matter was denied final redress under the provisions of P.L. Title 10, U.S.C. Sections 1552/1034. This case is critical to proving, reforms in the Military's Administrative Discharge, BCMR and IG systems are expeditiously needed for the good of the honorable men and women who refuse to become party to corruption and for the good of our nation. Specifically, to ensure potential leaders are not railroaded out of the military by less competent and prove performers only because the "rule of man" out ranks the "rule of law" under the "FD."

In conclusion of this argument, VERPA would also request the book, written by our founder and hand-delivered to Senator Specter, *"Beyond the Scope of Justice: The Chilling Effects of the Feres Doctrine in the United States Armed Forces"* be introduced into the public record. Specifically, noting, the *Petition for Writ of Certiorari filed at the United States Supreme Court, Application No. A-675 dated April 20, 1999.*

Trueman's Petition for Writ of Certiorari taken verbatim in the book, charges corruption in the military's command, legal, and medical processes. Moreover, Trueman asserts the "FD" has allowed for a half century of human and constitutional rights abuses in our armed forces under the "FD" and to date, the United States Navy has produced NO evidence to support the retaliatory discharge this once honorable sailor faced for only, refusing to turn his back on corruption and betraying his constitutional oath.

It should further be noted, VERPA'S founder has yet to be sued for libel or called into Congress to defend the serious public trust charges of corruption as cited in the book.

B. Comprehensive Compensation System, Re: the Veterans Health Care System (VHA).

The DOJ and DOD further their arguments by asserting the VHA is far- more generous, even-handed, and fair than compensation available to private citizens under the analogous state workers compensation schemes is simply absurd! The Congress has the ability to poll every veteran and loved one in the system and VERPA believes, a majority if not almost all veterans in the system have experienced some type of abuse or neglect.

If the VHA is such a wonderful medical care system, then, why are no Members of Congress or DOJ public servants mandated to be treated in this system? Would it not be cost effective?

VERPA, and our veterans and loved ones who are in this alleged, fair and generous system, finds this argument simply incredible!

Although, VERPA'S position is that the "FD" although an exemption to the FTCA and bar of redress of injury or injustice arising incident to military service, asserts, the "FD" provides yet another avenue of insult to injury. If the military is not compelled to address service-connected injuries prior to discharging the service member in established Medical and Physical Examination Boards (MEB/PEB), then why would the VHA act to compel complete and accurate records from the military? Case in point, SSG Robert Jones. If the U.S. Army achieves his expedited medical discharge, this soldier will probably be granted only 50% out of the military and then the same or less in the VHA. This is simply insult to injury as 50% VA disability will not truly matter because this soldier will be dead due to the "failure to treat" his service-connected illnesses arising from the Gulf War.

The VHA with the "FD" does not and will not compel the military to provide the accurate record of a veterans' service-connected mental or physical injuries if the military does not want a public embarrassment matter exposed.

To sum up this argument, VERPA hereby provides one case of extreme importance demanding, reforms in the VHA. The following statement,(Exhibit G) is a statement from Silver Star and Purple Heart recipient Jim "Doc" Perry who calls for the VHA system to also be examined should the Congress establish a commission to redress the "FD" matter.

VERPA, overall, will advocate reform of the VHA in due time.

Essentially, choice of either utilizing the VHA or private doctors in the veteran's home area is what we will seek in our FDCA proposed legislation. VERPA, believes, the VHA is infested with fraud, waste and abuse and the Doc Perry's case speaks for countless veterans who are not only denied treatment, but, abused for seeking promised medical attention in the alleged "generous and fair" system the DOJ alleged is the VHA.

C. Relationship of Military Personnel to the Government.

VERPA'S position is that *"When we assumed the soldier, we did not lay aside the citizen."*

Unfortunately, for all the Americans who make up VERPA, it is our belief that many in the United States Congress forgot whom they represent and why they are in Washington. Our position with the claim of the DOJ and long standing case law under the "FD", is that informed acknowledgment should be given to all young citizens and their families about the "FD" if this law should remain the law of the land.

Being on the front lines of this fight to right the "FD" wrong, we know that the American public, if informed their loved ones can be abused and redress denied as has been the "pattern" for 52 years under the FD, many in Congress would not be re-elected.

In light of the continued abuses we veterans and loved ones face due to the "FD" and sovereign immunity, we must note for the record, and public knowledge, the proposed December 20, 2002, Military Draft Legislation introduced into Congress.

We will reserve further comments on this matter at a later date. However, we are compelled to introduce the following at this time for all Members of Congress to ponder;

"The driving force behind an American Soldier"

It's the soldier, not the reporter, who has given us freedom of the press.
It's the soldier, not the poet, who has given us the freedom of speech.
It's the soldier, not the campus organizer, who has given us the freedom to demonstrate.
It's the soldier, not the lawyer, who has given us the right to a fair trial.
It's the soldier who salutes the flag, serves under the flag, and who's coffin is draped by the flag, who gives the protester the right to burn the flag.

By: Father Dennis Edward O'Brien, USMC

IV. OVERVIEW OF PROPOSED REFORMS

The following are proposed reforms to ensure ALL Americans serving in our armed forces, are afforded "equal justice and protection" of the U.S. Constitution.

We again, reserve the right to further our comments and will provided specific detailed ways to incorporate these recommendation to ensure, honor, integrity and accountability in both the DOD and VA for the good of future generations serving our nation:

a. Consolidation of Military Administrative Discharge and Board for the Correction of Military Records (BCMR);
b. Consolidation of IG'S/Supervision by with DOJ oversight;
c, Establishment of a private cause of action under provisions of Military Whistleblower Protection Act (to be renamed, "Military Fidelity Protection Act) with consolidated jurisdiction at the United States Court of Federal Claims (USCFC).

Upon establishment of a national funded Feres Doctrine Commission, as we will continue to advocate and gain the support of the general public, the above suggested reforms issues will be fully detailed and submitted to Congress. Or in the interim, VERPA will lay out in full detail, these suggested reform matters in our "FDCA" proposed legislation.

CONCLUSION

In conclusion, VERPA, our families and supporters understand the 52 year "FD" injustice will not be an overnight fix. However, what we do expect from the United States Congress is an answer to the question in the interim: "Do American Citizens serving our nation in the armed forces, possess Constitutional rights?" We believe, 535 yes or no answers should be provided VERPA expeditiously to our legislative coordinator, Ms. Barbara Cragnotti.

VERPA hereby asserts the DOJ and DOD'S position that any reform of the "FD" will result in disruption to good order and discipline. We disagree wholcheartedly. It would seem to us, that good order and discipline in the armed forces would be strengthen if the federal laws on the books such as the UCMJ and other statutes to address fraud, waste, abuses were enforced. Namely, the Inspectors General Act and Military Whistleblower Protection Act. It is of our opinion, the "FD" obstructs such enforcement of these federal laws and thus, the "FD" should be abolished.

If the United States Congress who under the constitution is the overseers of the armed forces, fail to protect the rights of military personnel arising from intentional, deliberate wrongful acts or omissions, who will defend our nation in time of war or national crisis when the "FD" subject matter reaches the entire American public?

The laws governing the conduct of military and civilian personnel in high positions of power in our armed forces must be equally administered and fairness and justice must always prevail, over the wants or wishes of individuals who betray their constitutional oaths.

For many American veterans and loved ones, to include our children, the "FD" has so deeply and negatively impacted their lives. The "FD" has set forth a separate and unequal system of justice in America for the very veterans and families who sacrifice the most for our freedom.
The "FD" with the exception of injury or injustice arising out of or in the course of combat or national emergency MUST be ABOLISHED.

VERPA hereby respectfully requests the United States Congress to establish a national civilian funded commission to begin the long overdue process to ensure American citizens serving our nation in the United States Armed Forces are afforded "equal protection" of the United States Constitution arising from the "intentional, deliberate, or gross-negligent" acts of federal employees under the provisions of the FTCA. Let us not forget the words of General Washington, for which, many of the victims of the "FD" now have children who are of age or nearing the age, wherein, they might be called upon to serve our nation, specifically, in light of the recent military draft legislation introduced on December 20, 2001:

"The willingness with which our young people are likely to serve in any way, no matter how justified, shall be directly proportional to how they perceive veterans of earlier wars were treated and appreciated by our nation."

For countless families in this nation, the "chilling effects" of the Feres Doctrine is all too real. The time is now to correct this unjust body of law within the United States Congress. To make a

showing that our Congress is truly ready to address the "FD" matter, we would hope the cases cited in this statement receive immediate attention for the good of all American Citizens past, present and future who will serve our great Nation.

These cases are supported by all our supporters in the nation and can be the "case studies" to being the call for a national Feres Doctrine Commission to bring an end to this 52 year unconstitutional and un-American law!

The Feres Doctrine is sovereign immunity and sovereign immunity is a dangerous creature in a free society. We believe, our Chairman, Meho Hukarevic, Sr., and decorated combat Vietnam soldier who sums up sovereign immunity and its wrongful place in our Nation:

"Sovereign immunity should be abolished, every body should be held accountable, and zero tolerance should be installed within the political infrastructure."

Example: Private Slovak was executed for being a conscience objector, while Jane Fonda was given sovereign immunity due to her monetary contributions. She should be put back as an example for what she did with the enemy, and be prosecuted for being a collaborator and traitor to the people of the America. If this is an example of sovereign immunity, our children have a real problem in serving and protecting our country, with restrictions imposed on them (that they don't know about). We the veterans and families who have paid a dear price due to sovereign immunity, will do whatever possible to stop any pending draft legislation until the "FD" is abolished so that when our children, their children return home from war injured, either physically or mentally, they will not have to fight the second war in a system, the DOJ might consider "generous" but for the 17 million present American veterans in the system, it is abusive, insulting and purely sub-substandard. Noting, again, there are wonderful people in the VHA who care, it is the ones in control in Washington DC who need to be held accountable.

As eloquently stated: "This planet earth is far to small for anything less than love and way to little for anything of hate."

Meho Hukarevic, Sr., '67 - '69, 100% Disabled
173rd Airborne Brigade, reactivated 2000, Vincencia, Italy; Kosovo; Afghanistan; S.E.T.A.F.; Southern European Task Armed Forces

In closing, VERPA, Our Board of Directors and Supporters hereby assert, we stand ready to testify under oath to our claims of human and constitutional rights abuses as set forth in this statement for the record. What we are, are Americans and never should the wrongful acts or omissions of federal employees destroy another without being afforded the "right to be heard." The "FD" denies us this right and it must be abolished.

We will anticipate an official response from the Senate Judiciary Committee regarding this matter.

Respectfully submitted,
VERPA Board of Directors

NOT FOR PUBLICATION UNTIL
RELEASED BY THE SENATE
JUDICIARY COMMITTEE

STATEMENT OF

REAR ADMIRAL CHRISTOPHER E. WEAVER , U.S. NAVY

COMMANDANT, NAVAL DISTRICT WASHINGTON

BEFORE THE

SENATE JUDICIARY COMMITTEE

8 OCTOBER 2002

NOT FOR PUBLICATION UNTIL
RELEASED BY THE SENATE
JUDICIARY COMMITTEE

My name is Rear Admiral Chris Weaver. I am the Commandant, Naval District Washington, and the Regional Commander for the Navy's National Capital Region. I have been a Naval Officer for 31 years and have participated in combat operations in Vietnam, as well as preparations up to the commencement of operations during the Gulf War. I have served in six ships and have commanded two. I have also commanded the Navy's largest naval station in Norfolk, Virginia.

I appreciate the opportunity to provide testimony to the Committee on the views of the Department of Defense on the *Feres* Doctrine. The Department of Defense believes the *Feres* Doctrine is sound public policy and national defense policy that should not be disturbed.

To begin with, I am not a lawyer. I am a surface warfare officer. My primary focus is on maintaining good order and discipline and providing support to our military members in the Washington, D.C. area and to those who are forward deployed and prosecuting the war on terrorism. This is an essential aspect of military readiness. I also want to express my condolences to the family of Kerryn O'Neill; her murder several years ago was a terrible tragedy. Our hearts continue to go out to the O'Neill family. Although I do not question their sincere desire to seek redress, I am here to testify that allowing service members to bring suits in federal court against their chain of command will interfere with mission accomplishment and adversely affect our operational readiness. With the challenges confronting our military and nation today, I respectfully submit that you preserve the *Feres* doctrine for the following three reasons.

First, the *Feres* doctrine is important to maintaining good order and discipline in the military. Litigation is inherently divisive and disruptive. Absent this doctrine, opposing participants would often both be military members and include a member's commanding officer and military superiors. Military readiness and effectiveness is based on cohesiveness, trust,

obedience, discipline, and putting the interest of the Service ahead of the interest of the individual. Discipline, morale, and unit cohesion are the hallmarks of an effective fighting force. Everything a commander does is designed to embed these values throughout the organization. Litigation is based on allegations, compulsory process, and aggressively asserting the interest of the individual against the Service. Because of the disruptive effect of litigation, the concept of sailors suing their fellow shipmates and their government is alien to our traditional philosophy of military discipline and U.S. jurisprudence. Good order and discipline are not mere words constituting a slogan or catch phrase in the military environment, they describe the lifeblood by which our military forces are able to successfully perform the mission and, in doing so, defend the nation at home and abroad.

The military has long been recognized as a "specialized community" requiring demands and responsibilities far different from its civilian counterpart. The impact of litigation on this "specialized community" would undermine trust not only among individual service members, but also between sailors and their organization and their superiors and officers throughout the chain of command. Military members at all levels of the organization, from the youngest enlistee to the career officer and commander, are expected to adhere to a uniform code of expectations and standards and, when faced with what they believe to be substantiated failures or deficiencies, use the chain of command and the uniform system of accountability that is attached to it. Accountability within the military community appropriately relies upon involvement of military leaders and commanders, and includes a host of administrative, nonjudicial, and judicial courses of action to uniformly address those deficiencies and take corrective action. The inherent nature of litigation -- which is intensely adversarial by design -- is inherently and

necessarily inimical to military discipline. Other mechanisms are available to ensure that the rights of service members are adequately protected, without resort to litigation.

Whether the complaint is brought to the attention of an Inspector General, law enforcement official, leading petty officer, or Commanding Officer, there exist available and effective avenues for proper redress based on complaints of wrongful acts, omissions, negligence, and derelictions of duty. Individual litigation in the military environment would be extraordinarily disruptive to the organization and would be ill suited to achieve the corrective measures that may be needed. Pitting one sailor against another in personalized litigation would serve to encourage military members to ignore or abandon the chain of command, and other existing judicial and nonjudicial remedies, rather than rely on their strength and uniformity to ensure good order and discipline for all.

Litigation between and among military members in a military organization, to include superior/subordinate or command relationships, could sow dissension and animus within the military organization and would undermine the need for unhesitating and decisive action by military officers and equally disciplined responses by enlisted personnel. Disruption of military operations would almost be inevitable, as service members might elect to weigh obedience to orders and compliance with directives with contemplated litigation to achieve an objective more to their liking or interests. If permitted, some may see litigation and their need to be present as an avenue to attempt to avoid a particular assignment. Again, good order and discipline and military effectiveness would be seriously undermined.

Second, the *Feres* Doctrine does not deprive servicemembers of a remedy since an extensive, no-fault compensation system is applicable to any disability or death incurred during military service. All State and Federal workers' compensation laws provide a no-fault

compensation system as the exclusive remedy for work-related injuries. Employees may not sue the employer to seek larger recoveries, but employees will be compensated even if there was no negligence or the injured employee himself or herself was negligent. This is the rule for Federal civilian employees under the Federal Employees Compensation Act as well as for state and local government and private sector employees throughout the United States under state workers' compensation laws. The military compensation system has the same premise, except that military members are considered to be "on the job" 24-hours a day. Their no-fault compensation applies to virtually all injuries at work or at home, in the U.S. or overseas, whether nobody was at fault or everybody was at fault. The only exclusion is for injuries incurred as a result of intentional misconduct or willful neglect or during a period of unauthorized absence. As part of this comprehensive no-fault compensation system, military members, like public and private sector employees throughout the country, may not sue their employer (in this case, the United States) for any injuries.

The no-fault compensation system applicable to designated survivors of members killed during military service includes the provisions outlined in a fact sheet attached to this statement. In summary, it includes a death gratuity, housing and relocation assistance, burial costs, Servicemen's Group Life Insurance, Dependency and Indemnity Compensation, Uniformed Services Survivor Benefit Plan, comprehensive health care benefits, payment for unused leave, VA education benefits, Social Security, commissary and exchange privileges, and certain tax benefits. In the case of members suffering disabling injuries during military service, some of these benefits are also applicable, in addition to full, no-cost medical care and disability retirement from the military service or disability compensation from the Department of Veterans Affairs. VA also offers service-disabled veterans a comprehensive array of health care benefits

and services, as well as various readjustment programs including vocational rehabilitation and assistance in purchasing specially adapted housing and motor vehicles.

To be sure, these benefits are not extravagant and they do not match the blockbuster tort recoveries we sometimes read about. But it is a comprehensive no-fault compensation system similar to Federal and State workers' compensation and applicable to all military members and families.. And it's fair.

The third reason for preserving the *Feres* Doctrine is that it is essential to maintaining equity among military members injured or killed during military service. If the *Feres* Doctrine were repealed in whole or in part, some injured members or the families of some members killed would be allowed to sue the United States based on an allegation that some other military member or government employee was negligent. This could occur in relation to an automobile accident, plane crash, training mishap, household accident, and many other cases. In contrast, some or all military members injured or the families of members killed in combat or military deployments or as prisoners of war would have only the no-fault compensation system. To give another example, a civilian employee injured in the same accident that injured a military member would be limited to the no-fault compensation of the Federal Employees Compensation Act, while the military member could sue the United States. Still other disparities would arise based on many variations in State tort law, the fact that the Federal Tort Claims Act does not apply to alleged torts outside the United States, and the vagaries of liability jurisprudence. Military training will also be adversely affected if a commander must focus on varying and multiple tort issues and state laws when conducting exercises and training evolutions in various states instead of focusing on operational readiness.

The *Feres* decision itself was based, in part, upon the existence of Congressionally created systems of simple, certain, and uniform compensation for injuries or death of those in armed services. Under present law, compensation is awarded uniformly to all service members who are similarly situated, without regard to whether their injuries were incurred in training, in combat, or while receiving benefits. To allow one service member to receive greater compensation for his or her injuries than that provided to other service members who suffered similar injuries in combat or training would undermine the uniform nature of the compensation system and would foster dissension between similarly injured service members. The death or disabling injury of every military member is a terrible tragedy for the member and the affected family. They may result from anything from enemy action in combat to common household accidents. In establishing public policy for compensating members and families, there is no rational basis for laying as the foundation stone a pleading of negligence in some particular category of cases for which Federal court jurisdiction would be established. Such inequities could not be rationally explained to military personnel or their families and it is hard to imagine that they could be sustained as a matter of public policy or national defense policy.

In conclusion, the *Feres* Doctrine is an important element of public policy and national defense policy. It is a necessary component of maintaining good order and discipline in the military and of enhancing the effectiveness and operational capability of our armed forces. It is also part of a comprehensive no-fault compensation system, which, similar to workers' compensation laws, provides the exclusive remedy for deaths and injuries during military service. Preservation of this exclusive remedy is the only way to maintain equity for all of the military members and families most burdened by the sacrifices endured for our Nation's defense.

Compensation of Survivors of U.S. Military Personnel (Applies to Retired Members only when noted)

Death Gratuity - A $6,000 death gratuity (10 U.S.C. §§1475-1478) is intended to provide immediate cash to meet the needs of survivors.

Government Housing or Allowances and Relocation Assistance - Survivors are provided rent-free Government housing for 180 days or the tax-free allowances for housing appropriate to the member's grade for any portion of the 180 day period while not in quarters (37 U.S.C. § 403(l)). Survivors are also entitled to transportation, per diem, and shipment of household goods and baggage (37 U.S.C. § 406(f)).

Burial Costs - The Government will reimburse up to $6,900 of expenses for the member's burial, depending on the type of arrangements and will provide travel for next-of-kin under invitational travel orders (10 U.S.C. § 1482 and ASD(FM&P) memorandum dated December 13, 2000, and 38 U.S.C. §§ 2301-2308).

Unused Leave - Payment is made to survivor for all the member's unused accrued leave (37 U.S.C. § 501).

Servicemen's Group Life Insurance (SGLI) - Service members are automatically insured for $250,000 through the SGLI program, but may reduce or decline coverage as desired (38 U.S.C. §§ 1965-1979). Although participating members must pay premiums, SGLI is a government-sponsored insurance program that enables U. S. Service members to increase substantially the amount available to their beneficiaries in the event of their death. Without SGLI, many members could not obtain life insurance because of their age or military assignments. Some private plans may not insure persons in high-risk groups or may not pay for combat-related death. SGLI has one affordable premium rate for all Service members, giving them an opportunity to provide for their survivors in the event of their death. Costs traceable to the extra hazard of duty in the uniformed services are paid by the Military Departments whenever death rates exceed normal peacetime death rates as determined by the Secretary of Veterans' Affairs. Retirees may retain their SGLI level of coverage or less under the Veterans Group Life Insurance (VGLI) program.

Dependency and Indemnity Compensation (DIC) - The Department of Veterans' Affairs (DVA) pays a tax-free monthly amount to an unmarried surviving spouse of a Service member who dies on active duty or from a service-connected disability (38 U.S.C. §§ 1310-1318). The basic spouse DIC is a flat-rate annuity of $935 per month (Public Law 103-418). An additional $234 is paid for each dependent child until age 18. The law provides special additional amounts to meet specific needs. A surviving 30-year-old spouse with a life expectancy of 80 years may receive DIC benefits of more than $500, 000 based on current rates. The total could be substantially more when young children are also eligible for benefits. This applies to retired members if the death qualifies as service-connected.

Uniformed Services Survivor Benefit Plan (SBP) - Eligible spouses and children of Service members may also be entitled to monthly payments under the SBP (10 U.S.C. §§ 1447-1460b). Effective September 10, 2001, a surviving spouse (children are entitled if there is no surviving spouse or the spouse later dies) of a member who dies on active duty is entitled to SBP. The annuity is 55% of retired pay while under age 62 and 35% while age 62 and older. The retired pay is determined as the benefit that would have been payable to the member had that member been retired on total disability on the date of death. For the surviving spouse of a retired member, the annuity amount while under age 62 is equal to 55 percent of the retired pay (or lesser-elected base). When the spouse is age 62, the benefit is reduced to 35 percent.

The law offsets a spouse's DIC entitlement from SBP. Thus, a surviving spouse may receive the full DIC plus that part of the SBP entitlement that exceeds the DIC payment. A spouse loses entitlement to SBP if remarried under age 55, but may be reinstated if that marriage ends through death or divorce.

VA Education Benefits - The surviving spouse and dependent may also qualify for up to 45 months of full-time education benefits (38 U.S.C. §§3500-3566) from the VA. Qualifying criteria should be consulted to ascertain entitlement.

Social Security - Death benefits are provided for a spouse caring for the member's dependent children under age 16, a surviving spouse during old age, and for eligible minor children of an insured Service member (26 U.S.C. §§ 3101, 3111, 3121). Benefits depend on the family status of the deceased member, and are the same as for the family of any deceased civilian worker insured under the same circumstances. Monthly entitlement is a percentage of the deceased member's "Primary Insurance Amount (PIA)". The full PIA is paid to a surviving spouse who begins payments at age 65. Reduced amounts are payable as early as age 60. The mother's/father's and children's benefit is 75 percent of the PIA, subject to a family maximum. Retired members qualify to the extent they had covered wages during their uniformed service.

Health Care – An unremarried surviving spouse and minor dependents of the member are eligible for space-available medical care at military medical facilities or are covered by TRICARE/CHAMPUS (MEDICARE after age 65). Dental insurance coverage and full TRICARE/CHAMPUS are extended for three years after the member's death. As of October 1, 2001, TRICARE will become a second-payer to MEDICARE for retirees over age 64. Beneficiaries will pay no enrollment fees, co-pays, or deductibles. A Senior Pharmacy Program has also been established by expanding the DoD mail order and network pharmacy program to cover retirees and their family members over the age of 64. (10 U.S.C. chapter 55) Families of retired members retain their medical coverage so long as a spouse has not remarried.

Commissary and Exchange Privileges - The unmarried surviving spouse and qualified unmarried dependents are eligible to shop at military commissaries and exchanges, normally providing a savings over similar goods sold in private commercial establishments (DoD Directive 1330.17, "Armed Services Commissary Regulations" and DoD Directive 1330.9, "Armed Services Exchange Regulations"). Families of retired members retain their privileges so long as a spouse is not remarried.

Tax Benefits - The next-of-kin of a Service member whose death occurs overseas in a terrorist or military action is exempt from paying the decedent's income tax for at least the year in which the death occurred (26 U.S.C. § 692). Payments made by the VA are tax exempt (38 U.S.C. § 5301).

Judiciary Committee,
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(The information follows:)

The clear example would be the same exact murder-suicide scenario overseas. Since the Federal Tort Claims Act (FTCA) does not apply to alleged torts outside the United States, injuries or deaths occurring overseas, on ships, or in combat situations would not be cognizable under the FTCA. To allow lawsuits like the O'Neill's to proceed would create indefensible inequities among service members depending on where and how they were injured. Another example would be injuries resulting from training accidents that are alleged to be negligently designed or supervised. If those injuries occurred on ship or overseas, they remain barred under the FTCA. If occurring in the states, those suits would vary greatly based on individual state tort law. These inequities are coupled with the fact that identical injuries, which are suffered in non-negligent training activities, would not result in recovery under FTCA. It is long-standing military tradition to honor service members who are forward deployed or engaged in combat. To provide greater benefits for service members who have not been in harm's way, overseas, or in combat could prove divisive and undermine the very structure of our military community.

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