CARMELO RODRIGUEZ MILITARY MEDICAL ACCOUNTABILITY ACT OF 2009

HEARING

BEFORE THE

SUBCOMMITTEE ON
COMMERCIAL AND ADMINISTRATIVE LAW

OF THE

COMMITTEE ON THE JUDICIARY
HOUSE OF REPRESENTATIVES

ONE HUNDRED ELEVENTH CONGRESS

FIRST SESSION

ON

H.R. 1478

MARCH 24, 2009

Serial No. 111–7

Printed for the use of the Committee on the Judiciary

Available via the World Wide Web: http://judiciary.house.gov

U.S. GOVERNMENT PRINTING OFFICE
48–232 PDF WASHINGTON : 2009

For sale by the Superintendent of Documents, U.S. Government Printing Office
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APPENDIX

MATERIAL SUBMITTED FOR THE HEARING RECORD

CARMELO RODRIGUEZ MILITARY MEDICAL ACCOUNTABILITY ACT OF 2009

TUESDAY, MARCH 24, 2009

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON COMMERCIAL
AND ADMINISTRATIVE LAW,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The Subcommittee met, pursuant to notice, at 2:24 p.m., in room 2141, Rayburn House Office Building, the Honorable Steve Cohen (Chairman of the Subcommittee) presiding.

Present: Representatives Cohen, Conyers, Maffei, Scott, Franks, Jordan, and King.

Staff present: Matthew Wiener, Majority Counsel; Adam Russell, Majority Professional Staff Member; and Zachary Somers, Minority Counsel.

Mr. COHEN. This hearing of the Committee on the Judiciary, Subcommittee on Commercial and Administrative Law will now come to order. Without objection, the Chair will be authorized to declare a recess of the hearing. I will now recognize myself for a short statement.

The Federal Tort Claims Act makes the Federal Government liable for injuries or death caused by the negligence of its employees; however, Congress excluded a couple exceptions in the act. One excludes any claim arising out of the combatant activities of the military or naval forces or the Coast Guard during time of war. In a 1950 case called *Feres v. United States*, the U.S. Supreme Court created another exception: that service members can never sue under the act whenever their injuries are incidents of service. That hole that has come to be known as the *Feres* Doctrine.

The Court has reasoned that Congress must have intended to exclude suits by service members even though it provided no such exclusion in the actual language of the act. The Court has offered several reasons for its conclusion, the main one being that Congress must have believed that tort lawsuits by service members would interfere with military discipline and put civilian courts in the business of second guessing military decision-making.

The *Feres* Doctrine has been subject to strong criticism within the Court itself. Justices who have been as diverse in their approaches to statutory interpretations as Justices Stevens and Scalia have condemned it. Nevertheless, the Court has stood by it for almost 60 years and will likely continue to do so.

Several bills have been introduced over the years that would have harshly overturned *Feres* and allowed service members to bring medical malpractice claims. One such bill passed the House during the late 1980's.

Enter Maurice, Representative Maurice Hinchey, who will testify before us today. He has returned to the issue this Congress by introducing H.R. 1478, the "Carmelo Rodriguez Military Medical Accountability Act of 2009." H.R. 1478 would allow service members injured or killed as a result of military medical malpractice to bring suit under the Federal Tort Claims Act with one important exception: they would not be allowed to bring suits "arising out of the combatant activity of the armed forces during times of armed conflict."

Today's hearing will examine H.R. 1478 and whether there is adequate justification for continuing to deny our active duty service members legal redress under the Federal Tort Claims Act when they are killed or injured as a result of medical malpractice. Accordingly, I look forward to receiving today's testimony.

[The bill, H.R. 1478, follows:]

I

111TH CONGRESS
1ST SESSION

H. R. 1478

To amend chapter 171 of title 28, United States Code, to allow members of the Armed Forces to sue the United States for damages for certain injuries caused by improper medical care, and for other purposes.

IN THE HOUSE OF REPRESENTATIVES

MARCH 12, 2009

Mr. HINCHEY introduced the following bill; which was referred to the Committee on the Judiciary

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A BILL

To amend chapter 171 of title 28, United States Code, to allow members of the Armed Forces to sue the United States for damages for certain injuries caused by improper medical care, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "Carmelo Rodriguez Military Medical Accountability Act of 2009".

SEC. 2. ALLOWANCE OF CLAIMS BY MEMBERS OF THE ARMED FORCES AGAINST THE UNITED STATES FOR CERTAIN INJURIES CAUSED BY IMPROPER MEDICAL CARE.

(a) IN GENERAL.—Chapter 171 of title 28, United States Code, is amended by adding at the end the following:

"§ 2681. Certain claims by members of the Armed Forces of the United States

"(a) A claim may be brought against the United States under this chapter for damages relating to the personal injury or death of a member of the Armed Forces of the United States arising out of a negligent or wrongful act or omission in the performance of medical, dental, or related health care functions (including clinical studies and investigations) that is provided by a person acting within the scope of the office or employment of that person by or at the direction of the Government of the United States inside the United States.

"(b)(1) The payment of any claim of a member of the Armed Forces under this section shall be reduced by the present value of other benefits received by the member or the estate, survivors, and beneficiaries of the member under title 10, title 37, or title 38 that are attributable to the physical injury or death from which the claim arose.

"(2) A claim under this section shall not be reduced by the amount of any benefit received under Servicemembers Group Life Insurance under subchapter III of chapter 19 of title 38, including any benefit under—

"(A) section 1980A of title 38 (commonly know as Traumatic Servicemembers' Group Life Insurance); and

"(B) section 1967 of title 38 (commonly known as Family Servicemembers' Group Life Insurance).

"(c) This section shall not apply to any claim arising out of the combatant activities of the Armed Forces during time of armed conflict.

"(d) For purposes of claims brought under this section—

"(1) section 2680(k) does not apply; and

"(2) in the case of an act or omission occurring outside the United States, the 'law of the place where the act or omission occurred' shall be deemed to be the law of the place of domicile of the plaintiff.

"(e) As used in this section, the term 'a negligent or wrongful act or omission in the performance of medical, dental, or related health care functions (including clinical studies and investigations)' has the same meaning given that term for purposes of section 1089(e) of title 10.".

(b) TECHNICAL AND CONFORMING AMENDMENT.—The table of sections for chapter 171 of title 28, United States Code, is amended by adding at the end the following:

"Sec. 2681. Certain claims by members of the Armed Forces of the United States.".

(c) EFFECTIVE DATE.—The amendments made by this section shall apply with respect to a claim arising on or after January 1, 1997, and any period of limitation that applies to such a claim arising before the date of enactment of this Act shall begin to run on the date of that enactment.

○

Mr. COHEN. I now recognize my colleague, Mr. Franks, the distinguished Ranking Member of the Subcommittee, for his opening remarks.

Mr. FRANKS. Well, thank you, Mr. Chairman. And let me begin, sir, by emphasizing that I sincerely embrace the concern expressed by this legislation for service members who have suffered because of medical malpractice. As you may know, sir, I am a member of the Armed Services Committee, and I believe that one of my greatest responsibilities as a Member of Congress is the needs and the interests of those men and women who put their lives on the line for the sake of this country, and that is a very deep commitment on my part.

In order to maintain a well-disciplined, motivated military, it is essential that service members understand that they are being treated fairly in all aspects, including fair compensation for service-related injuries. The question this legislation raises, however, is whether removing the *Feres* bar to medical malpractice would further military discipline, morale, and fair compensation. And Mr. Chairman, it is my sincere opinion that it would not.

Rather, this bill would superimpose on the military's uniform no-fault compensation system a privileged class of claimants within the armed forces itself. H.R. 1478 would create the anomaly of offering a tort remedy with the possibility of substantial compensation to a member who loses a limb through a medical mistake while denying the same compensation to one who loses the limb in combat. This could demean injuries suffered in combat by providing the soldier injured on the battlefield with administrative compensation while the soldier injured in a military hospital could seek a multi-million dollar damage award in Federal court.

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

One of the chief benefits of the existing statutory compensation structure, along with the doctrine, is that comparable injuries are treated uniformly. This uniformity promotes military discipline, morale, unity, and commitment. While it is sometimes argued that the *Feres* Doctrine is unfair to service members who are the victims of medical malpractice, the *Feres* Doctrine is an adjunct to the military disability compensation package that is available to service members.

If we believe that the current system is inadequate or is producing unfair results, we should work to correct that system. We should not take the expedient of turning select military claims over to trial lawyers and the tort system. In short, if the current no-fault military compensation program needs to be improved, if additional funding or other reform is needed, then we should improve that program. There is not excuse for providing our troops less compensation than they deserve.

And I want you to know, just outside the bounds of my written comment here, I would be one that would be very open to increasing that compensation to those soldiers who put themselves in such harm's way.

However, if the current system is not working properly, repealing the *Feres* Doctrine is not the solution. This country can provide our service members with the meaningful benefits that they need without making the brave men and women that serve resort to litigation. Thus, our focus should not be on allowing medical malpractice litigation, but on improving the overall military compensation system for all of this country's service members.

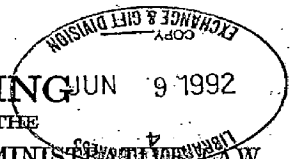
So before closing, I just want to note that I am disappointed that we did not hold this hearing at a time when the Departments of Justice and Defense were available to give their views on this legislation, and I would ask unanimous consent to enter into the record testimony from those departments from the 1991 and 2000 hearings on legislation to modify the *Feres* Doctrine.

And with that Madam—I mean, Mr. Chairman—with that, Mr. Chairman, I would yield back and thank you, sir.

Mr. COHEN. I thank the gentleman for his statement. We will accept the testimony, as dated as it may be, as part of the record, although I believe we did invite them to testify and——

[The information referred to follows:]

CLAIMS FOR NEGLIGENT MEDICAL CARE PROVIDED MEMBERS OF THE ARMED FORCES



HEARING

BEFORE THE

SUBCOMMITTEE ON ADMINISTRATIVE LAW AND GOVERNMENTAL RELATIONS

OF THE

COMMITTEE ON THE JUDICIARY HOUSE OF REPRESENTATIVES

ONE HUNDRED SECOND CONGRESS

FIRST SESSION

ON

H.R. 3407

CLAIMS FOR NEGLIGENT MEDICAL CARE PROVIDED MEMBERS OF THE ARMED FORCES

OCTOBER 2, 1991

Serial No. 41

Printed for the use of the Committee on the Judiciary

U.S. GOVERNMENT PRINTING OFFICE
51-768 WASHINGTON : 1992

For sale by the U.S. Government Printing Office
Superintendent of Documents, Congressional Sales Office, Washington, DC 20402
ISBN 0-16-038554-7

PREPARED STATEMENT OF STUART M. GERSON, ASSISTANT ATTORNEY GENERAL, CIVIL DIVISION, U.S. DEPARTMENT OF JUSTICE

I am pleased to appear before the Subcommittee today to present the views of the Department of Justice on H.R. 3407, a bill that would allow active duty members of the Armed Forces to sue the United States for damages for certain injuries caused by improper medical care.

H.R. 3407 would permit claims against the United States under the Federal Tort Claims Act for the personal injury or death of a member of the Armed Forces serving on active duty when the claim arises out of medical or dental care furnished in medical facilities operated by the United States. If enacted, this proposal would essentially overrule a sound, long-standing, and viable rule of law known as the Feres doctrine for certain military medical malpractice claims. The Department of Justice is strongly opposed to this legislation and we would be compelled to recommend Executive disapproval if it were presented to the President.

Before I address the Feres doctrine and H.R. 3407, I want to comment about the impressive action the Department of Defense has initiated to improve the quality of care to our soldiers. Beginning in the late 1980's, all military hospitals have screened the medical records of all patients to determine if the treatment should be more closely reviewed to identify instances of poor medical care. The screening is performed on a criteria-based monitoring of patient care. For example, a patient who is readmitted to the hospital within 48 hours of discharge would cause the medical record to be flagged and a senior physician would closely review the record to determine if the first

discharge was premature. This occurrence screening system is used for all patients including all service members. Each military hospital also has a quality assurance committee charged with conducting a complete audit of at least 5% of medical records of patients discharged each month. The records are reviewed pursuant to checklists designed to determine if the medical decisions made in the care of patients were correct.

In 1987, DOD hired a civilian contractor, Forensic Medical Advisory Service, to review the quality of medical care in military hospitals during a two year period. During the study, the contractor found that the percentage of cases where the medical care was substandard was less than 2% and there was no statistical difference between the care provided to service members and all other patients.

At present, DOD is conducting a study of the medical records of service members recommended for discharge by their commanders due to medical disabilities. The study is intended to determine if service members suffered disabling injuries as a result of negligent medical care.

The Department of Defense is also a participant in the Joint Commission on Hospital Accreditation's Agenda for Change. A major component of the Joint Commission's Agenda for Change involves creating a data-based performance monitoring mechanism for accredited healthcare organizations. Through this process hospitals will routinely collect a limited set of important clinical and organizational process and outcome data, send them

to the Joint Commission, and receive back aggregate, comparative data. Several DOD medical facilities were asked by the Joint Commission to participate in developing the parameters for the monitoring system.

The Feres Doctrine

Since H.R. 3405 would so directly impact upon the Feres doctrine, 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. United States v. Sherwood, supra; Carr v. Veterans Administration, 522 F.2d 1355 (5th Cir. 1975); Childers v. United States, 442 F.2d 1299 (5th Cir.), cert. denied, 404 U.S. 857 (1971); Simon v. United States, 244 F.2d 703 (5th Cir. 1957).

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. I specifically note that two of the cases concerned allegations of

medical malpractice. 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 41 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. §§ 3721, 6201, and 8721. 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, P. L. 102-25), as well as partially subsidized life insurance. 10 U.S.C. §§ 1447, et seq.; 38 U.S.C. §§ 765, 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 and 1401. 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. See 32 C.F.R. § 581.3(b)(2) (1987); Sec. 4, A.R. 15-185.

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." [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.

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[1] 38 U.S.C. §§ 301-362: Compensation for Service-Connected Disability or Death.

38 U.S.C. §§ 501-562: Pension for Non-Service Connected Disability or Death or for Service.

38 U.S.C. §§ 401-423: Dependency and Indemnity Compensation for Service-Connected Deaths.

38 U.S.C. §§ 601-654: Hospital, Nursing Home, or Domiciliary Care and Medical Treatment.

38 U.S.C. §§ 701-788: National Service Life Insurance.

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. Bailey v. Van Buskirk, 345 F.2d 298 (9th Cir. 1965), cert. denied, 383 U.S. 948 (1966).[2]

The second consideration that has led to the broad application of the Feres doctrine by the courts through the year 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.]

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[2] In addition to compensation for personal injury, it is worthy to note that the American service member has a plethora of other remedies available to seek equitable and criminal relief for grievances. For example, see:

10 U.S.C. § 938: Complaints of Wrongs;

10 U.S.C. §§ 801, et seq.: Uniform Code of Military Justice;

United States Navy Regulations, ¶ 1107, Interview with Commanding Officer (Request Mast);

United States Navy Regulations, ¶ 1106, Redress of Wrong Committed by a Superior.

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. United States v. Lee, supra. The Feres doctrine serves to avoid the general judicial intrusion into the area of military performance. See Mattos v. United States, 412 F.2d 793 (9th Cir. 1969); Callaway v. Garber, 289 F.2d 171 (9th Cir.), cert. denied, 368 U.S. 874 (1961). In Henninger v. United States, 473 F.2d 814 (9th Cir.), cert. denied, 414 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].

H.R. 3407 would substantially blur the "clear line" that currently exists under the law. The disparity in treatment tha this proposal would create between service members injured by malpractice in stateside medical facilities, and those injured the negligence of their fellow service members anywhere else in the world, would lead to a plethora of special bills seeking additional exceptions to the doctrine.

In the last year, our military forces had tremendous succe in the liberation of Kuwait. Unfortunately, that military success had a tragic, although fortunately very limited, human cost. In addition to the 98 service members who were killed in action, 354 were wounded in action. A substantially larger number of service members suffered other medical problems. The medical care provided to these people was outstanding. In all, 10,314 service members were evacuated for medical reasons from Desert Storm/Desert Shield to military medical facilities in Germany. Of these, 5,674 were evacuated from Germany to the United States. The mortality rate for all evacuees was less tha .05%. These statistics alone demonstrate the high quality of military medicine despite unique and adverse conditions. Under the proposed bill, those service-members who were evacuated to the United States could bring malpractice suits; those who were

treated only in Germany could not. This disparity in treatment cannot be justified.

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. United States v. Lee, 400 F.2d 558 (9th Cir. 1968), cert. denied, 393 U.S. 1053 (1969). 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). See Atkinson v. United States, 825 F.2d 202 (9th Cir.

1987) (availability of alternative compensation scheme and the distinctly federal nature of the relationship between U.S. and members of its Armed Forces supports application of doctrine to this case). The fact that the geographic location of the injury should determine the law to be applied "makes no sense and is unfair to the soldier who has no choice as to his location, particularly because of wide variances in local law." United States v. United Services Automobile Association, 238 F.2d 364, 366 (8th Cir. 1956).

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 t 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. Indeed, with suits against the government and individual federal officers increasing in numbers every year, the rationale for the Feres doctrine is even more compelling today.

Negative Impact of the Proposed Legislation

Accordingly, when H.R. 3407 is examined in light of the three policy considerations upon which the Feres doctrine is based, the shortcomings, as well as the problems which it will create, come disturbingly into focus.

Disruption of Military Units

One of the chief morale benefits of the existing statutory compensation scheme is that comparable injuries are treated uniformly. The principle is as basic as it is essential: in a military organization, uniformity, consistency, and fairness within the group are vital to the preservation of discipline,

order, and cohesiveness. H.R. 3407 threatens this principle and seeks to replace it with special compensation based upon the circumstances and situs of injury.

As I understand the bill, it would apply only to those malpractice aims that occur in federal medical treatment facilities located in the United States: suits for injuries that occur outside those facilities would not be allowed. Inevitably, disparities will arise. One sailor would be able to sue for injuries received at a naval hospital; another, similarly injured a few miles away aboard an aircraft carrier, would not. A soldier injured by medical malpractice at the Walter Reed Army Medical Center could sue, whereas another similarly injured in Europe, or on board a medical evacuation flight landing at Andrews Air Force Base, could not. Because the FTCA predicates liability on state law, a Marine in California might recover; but another, treated in the same fashion by the same doctor in North Carolina, might not. Both Marines, however, would have one thing in common: their geographic duty stations are the result of military orders -- not their personal choice. Selective special compensation dependent upon the fortuity of location falls far short of the even-handed fairness required to preserve military morale.

Of even greater concern is the fact that only claims based on malpractice will have access to this new remedy. Thus, under H.R. 3407, a soldier who loses a leg on field maneuvers or on base in a driving accident will be treated differently than one

who loses a leg in a military hospital at the hands of a surgeon, although all three suffered the same injury as a result of someone else's negligence. More importantly, the bill could be read to significantly demean all injuries sustained in combat by providing the soldier injured on the battlefield with administrative compensation, while the soldier injured in a military hospital could seek a million-dollar damage award in federal court.

The Administration is opposed to creating a special class of service members who may file tort suits against the United States. Service members injured as a result of medical malpractice should not have greater rights than service members injured during field training exercises, motor vehicle accidents, or any other activity.

Disruptive Impact of Litigation

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, even in the limited area of medical malpractice, 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.

Decisions involving medical care involve not only health care practitioners, but also commanders and other members of the chain-of-command who must make decisions on whether service members are fit for duty or require medical care. If service members are allowed to file suit for alleged negligent medical care, military physicians and commanders could conceivably engage in fingerpointing to explain a service member's poor medical outcome.

The impact of 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 damages, even if limited to medical malpractice, 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.

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Negative Influence on General Military Activities

The implications of retrenching on the Feres doctrine go far beyond providing tort remedies for injuries. Military health care practitioners often make determinations upon which commanders rely. The resulting decisions of the commanders frequently are contrary to the personal desires of the member and may have an adverse economic impact on him, e.g., the physical disqualification of a pilot from flying status. To allow disgruntled service members to challenge their superiors by attacking the medical bases of those decisions would surely "involve the judiciary in sensitive military affairs at the expense of military discipline and effectiveness." United States v. Shearer, 473 U.S. 52, 59 (1985).

The Services already have procedures in place by which erroneous medical judgments can be challenged, examined, and corrected. Allowing malpractice suits by military personnel would exact an intolerable price for the use of medical information in making personnel decisions. Such litigation would create an environment in which a commander could not act without looking over his shoulder for the process server.

The Office of Management and Budget advises that H.R. 3407 would increase direct spending. Therefore, it is subject to the pay-as-you-go requirement of the Omnibus Budget Reconciliation Act of 1990.

Conclusion

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.

PREPARED STATEMENT OF TERRENCE O'DONNELL, GENERAL COUNSEL, U.S. DEPARTMENT OF DEFENSE

Mr. Chairman and Members of the Subcommittee:

I appreciate the opportunity to present the views of the Department of Defense on H. R. 3407, a bill to modify the Feres doctrine by allowing active-duty members of the Armed Forces to sue the United States through the Federal Tort Claims Act for injuries arising from medical malpractice in military facilities. We strongly oppose H.R. 3407 and would recommend Executive disapproval of this legislation because it would disrupt military operations without any significant benefit to servicemembers.

Before addressing our specific concerns with the proposed legislation, I want to emphasize that all of us at the Department of Defense share Congress' concern for those who have suffered because of inappropriate medical treatment. Because of that concern, the Secretary of Defense, the Assistant Secretary of Defense for Health Affairs, the General Counsels of the Military Departments, the Surgeons General, the Judge Advocates General, the Inspectors General, and the audit agencies continue collectively to monitor diligently and to improve when necessary the quality of military health care. I know of no one in the Department of Defense who is insensitive to the needs of military men and women. And no one is more sensitive to these needs than

the Secretary of Defense. Our highest priority is to ensure that their morale and motivation to serve remain high.

Unquestionably, one of the essential ingredients for maintaining a well-disciplined, motivated armed force is the understanding by servicemembers that they are being treated fairly in all respects, including receiving fair compensation for service-connected injuries. The key issue before us, however, is whether removing the Feres bar to medical malpractice cases would further the legitimate ends of discipline, morale, and fair compensation. We maintain it would not.

Since its opinion in Feres v. United States, 340 U.S. 135 (1950), the Supreme Court has interpreted the Federal Tort Claims Act ("FTCA") as barring suits by servicemembers for alleged injuries incurred incident to service. While we understand the arguments of those who oppose application of the Feres doctrine to medical malpractice claims, for the reasons we have stated in the past, we do not believe the doctrine to be unfair or unreasonable in the context of medical malpractice. The relationship between members of the Armed Forces and their superiors is genuinely unique, with no analogous civilian counterpart. Delivery of medical care to members of the Armed

Forces is inextricably intertwined with numerous aspects of military policy and decision making.

The Supreme Court holding in Feres was based on three considerations. First, permitting tort actions would adversely affect military discipline, morale, and effectiveness. Second, there is an elaborate system of compensation for military personnel injured incident to service that is available regardless of fault. Third, the Court noted the distinctly federal relationship between servicemembers and their Government Because of this relationship, which permits the Government and not the member to select his or her duty station, it would be unfair to make recoveries dependent on disparate state laws, as is required under the FTCA. Indeed, as I will describe later in this statement, the FTCA does not even permit a suit, much less judgment, against the United States for torts occurring in foreign countries, where many servicemembers are assigned. I would like to address these concerns highlighted by the Supreme Court in the context of the proposed legislation, and discuss wh the bill is ill-advised from the standpoint of national defense.

THE PROPOSED LEGISLATION ERODES UNIFORMITY

The proposed amendment to the FTCA would create a privileged class of claimants within the Armed Forces. Specifically, H.R. 3407 creates the anomaly of offering a tort remedy, with the possibility of extra, and in some cases substantial compensation, to the military member who loses a leg through a medical mistake, but of denying the same remedy and compensation to one who loses his leg by an unlucky step on a mined battlefield.

Another example illustrates this point. A surgeon in a military hospital makes a negligent error. As a result, servicemember A suffers paralysis. Under the proposed legislation, he could sue the United States. Servicemember B is walking on the sidewalk outside the hospital and is hit by a government vehicle driven negligently by a motor pool driver. Servicemember B is paralyzed as a result of his injuries. He may not sue, although he has virtually the same disability.

How does a commanding officer explain this distinction to the people he must lead? How does he justify it? Servicemembers understand they give up certain rights when they enter the service and they learn that they receive certain benefits. One

of those benefits is a system that provides them sure and swift compensation if they are injured incident to their service, regardless of fault. Without question, that compensation should be adequate and fair. It should compensate Servicemember B in the same manner as Servicemember A. If that compensation is deemed inadequate, that inadequacy should be corrected. Courts have often cited the simple, certain, and uniform compensation for injuries or death of those in the Armed Services. This uniformity would be destroyed by statutory exceptions carving out privileged areas of litigation, and with it will go the understanding that all are being treated fairly.

Perhaps an even greater disparity among servicemembers established by H.R. 3407 is the fact that the judicial remedy proposed would apply only to servicemembers assigned in the United States and would be applicable only to malpractice committed in a "fixed medical care facility." Thus, we face the possibility of one sailor being able to sue for injuries that occur in a naval hospital, while a sailor similarly injured several hundred miles away aboard an aircraft carrier at sea will be denied comparable relief. Or a soldier injured by medical malpractice at Walter Reed Army Medical Center could sue, whereas another soldier treated in our best hospital in Europe or on board a medical evacuation flight overseas could not. It is

obvious that disparate treatment of injuries based on the geographic location of an accident is as ill-advised as is disparate treatment based on how the injury occurred.

Furthermore, because the FTCA bases liability on state law, a marine in California might recover, but another marine, subject to a different body of state law in North Carolina, might not. Both marines, however, would have one thing in common: their duty stations are the result of military orders, not their personal choice. Selective special compensation dependent upon fortuity of location falls short of the even-handed fairness we must exercise to preserve military morale.

We fully support a compensation system for all service-connected injuries that is equitable and reflects current economic conditions. Accordingly, we urge Congress to maintain the existing, exclusive compensation system for all service-connected injuries, including those from military medical malpractice. This will have a far more positive impact on morale than creating a special class of litigants whose right to recover depends upon where and how they were injured and not on the injury they suffered.

The no-fault compensation that provides the exclusive remedy for active-duty military personnel is similar to other Federal no-fault compensation programs. Thus, civilian employees covered by the Federal Employees' Compensation Act or by the Nonappropriated Fund Instrumentalities Act, both providing compensation for injuries regardless of fault, expressly prohibit beneficiaries from suing the United States under the Federal Tort Claims Act. This prohibition extends to medical malpractice suffered by these civilians in medical facilities operated by the Federal Government. Similarly, other Federal laws that provide remedies for injuries sustained in the course of one's employment, such as the Longshore and Harbor Workers' Compensation Act, the Jones Act, the Admiralty Act and the Public Vessels Act, make the remedies provided in those statutes exclusive, and in place of all other liability. If Congress should change the exclusive remedy limitation applicable to military personnel through the Feres doctrine, logic would dictate that it prepare to change all of these other statutes.

To the extent that Congress concludes that the current no-fault scheme is not adequate--whether the condition requiring compensation is the result of medical malpractice or participation in an inherently dangerous training exercise--it should be improved. To this end, let me reiterate that we, in

DoD, are prepared to work with this Subcommittee and other agencies to improve the no-fault compensation system so that the benefits are fair to all, while preserving that system's essential qualities of directness, efficiency, and even-handedness.

PERMITTING MORE LAW SUITS WILL NOT IMPROVE MILITARY MEDICINE

The proposition that military medical care would improve with the threat of more lawsuits cannot withstand close analysis. First, medical malpractice suits under the FTCA are permitted for a majority of the patient population served by military medical facilities, i.e., military retirees and dependents of active-duty and retired personnel. It defies belief to assert that increasing the potential tort claim and litigation case load by the remainder, i.e., active duty personnel, would achieve any beneficial effect upon the quality of health care. Any argument that military physicians provide better care to those who may sue for malpractice is a gratuitous insult to this dedicated group of officers who are bound by the same ethical requirements in treating all of their patients.

Next, we are all aware of the ongoing malpractice liability crisis in the civilian medical community. In several areas, notably southern Florida, the crisis has resulted in the denial of health care in some hospitals. Instead of opening new avenues for malpractice recovery, state legislatures are now passing tort reform measures designed to restrict the amount of recovery, to limit attorney's fees, and to allow consideration of collateral compensation in computing judgments. The point is that, notwithstanding all the malpractice suits in the civilian sector, malpractice claims are still on the rise. In other words, if the number of malpractice actions reflects the incidence of malpractice, then the threat of suit does nothing to improve medical care.

The Department of Defense is not only dedicated to providing our personnel with the best health care possible, but has taken aggressive action to assure it. As we have stated before, the watchwords of today are "quality assurance" and "provider accountability." Lawsuits are not needed, nor would they be effective to encourage us to do better. Indeed, the performance of military physicians is reviewed with greater frequency and more vigor, and against tighter standards, than in any health care system about which we are aware.

In short, we in the Department of Defense have not been insensitive to the critics of medical care in the Armed Services, nor do we have a callous disregard for those who have been injured. Instead, we submit, a litigious approach to eliminating medical malpractice misses the mark and will cause serious problems for miliary morale and discipline, thereby jeopardizing the ability of the Department of Defense to perform its mission.

THE FERES DOCTRINE IS CRUCIAL TO THE MAINTENANCE OF GOOD ORDER AND DISCIPLINE

Because of the inherently disruptive nature of litigation, the concept of soldiers suing their government is alien to our traditional philosophy of military discipline and Anglo-Saxon jurisprudence. Thus, courts have recognized the unique nature of the military and its indispensable role in preserving the nation, and have been reluctant to intrude into the military environment. Indeed, the Supreme Court has repeatedly affirmed that "[i]n every respect the military is 'a specialized society.'" Parker v. Levy, 417 U.S. 733 (1974). Accord, e.g., Orloff v. Willoughby, 345 U.S. 83 (1955). Good order and discipline are not merely "buzz words." Rather, they are dynamic values, vital to the effectiveness of our armed forces to deter war and, when deterrence fails, to win wars.

The Feres doctrine has been applied in deciding recent case that have constitutional dimensions: Chappell v. Wallace, 462 U.S. 292 (1983); United States v. Shearer, 473 U.S. 52 (1985); United States v. Johnson, 107 S. Ct. 2063 (1987). In each case, the Supreme Court barred suit. The essence of these decisions is that even when constitutional deprivations are alleged, the remedy must reflect the unique nature of military service. This does not mean military authorities may violate individual rights with impunity. For aggrieved servicemembers, numerous forms of redress are available within the military structure, in addition to the right to communicate directly with the Congress or the President. Moreover, if the conduct complained of violates law or regulation, an array of administrative actions and criminal proceedings, such as courts-martial, are available to deal with transgressors. For military personnel who suffer physical injury or disability, Congress has created a comprehensive compensation scheme to provide benefits--both financial and medical--without regard to fault.

The Supreme Court has repeatedly recognized that courts must be solicitous of the zone of interests peculiar to the military. We urge Congress to continue this same approach.

Accordingly, we disagree vehemently with the proposed bill's judicial remedy. Lawsuits have the great potential of disrupting discipline and military operations. As the United States Court of Appeals for the Ninth Circuit stated, "To determine the effect that a particular type of suit would have upon military discipline would be an exceedingly complex task ... [N]early every case would have to be litigated and it is the suit, not the recovery that would be disruptive of discipline and the orderly conduct of military affairs." Henninger v. United States, 473 F.2d 814, 815-816, (9th Cir. 1973) (emphasis added).

At first blush, widespread challenges to military decisionmaking would appear remote from entitling servicemembers to sue for medical malpractice injuries. However, military health care practitioners often make determinations upon which commanders rely. The resulting decisions of the commanders frequently are contrary to the personal desires of the member and may have an adverse economic impact on the member. Under the proposed legislation, any such decision might become subject to attack in a tort action alleging that a negligent medical finding resulted in physical discomfort and emotional distress. Indeed, in some jurisdictions, an allegation of emotional distress alone would suffice.

Several hypothetical cases illustrate the potential for misplaced attacks upon military decisions through the FTCA suit that would be authorized by H.R. 3407. Consider the following:

a. A pilot is ordered removed from flight status because of a medical condition diagnosed by a flight surgeon. The pilo (whose career and, therefore, livelihood are in jeopardy), instead of following his orders, attempts to circumvent those orders through a malpractice suit alleging that the diagnosis w improper.

b. A commander denies a security clearance to a soldier based upon a mental health examination. The soldier brings sui alleging misdiagnosis and mental anguish as a result of the diagnosis.

These types of decisions are made routinely in almost ever command in the military. They are not always purely medical decisions. Frequently, non-medical decisions made by commandin officers are based on factors which may have as their basis a physical or mental health report. Subjecting these decisions t judicial scrutiny concerning their medical basis would have a negative impact on the discipline of the military personnel who would see medical personnel and commanders hailed into court to

justify their decisions. This situation would foster the belief that no order is lawful and final until the courts have ruled that it is.

One further example will show how good order and discipline could be affected. Assume that H.R. 3407 is enacted. A servicemember in an overseas command is scheduled for surgery. He demands that it be performed in the United States (so he may sue if, in his judgment, the surgery is not successful). Does the commanding officer send this individual back? Does he medically discharge him? Does he allow the servicemember to make the decision or barter for the choice? Does he court-martial him for disobeying the order to go to the hospital? What is at issue here is the authority of the commanding officer; the knowledge that such authority was challenged takes no time at all to spread throughout the unit, and that is what serves to undermine the good order and discipline, as well as the cohesiveness, of the unit.

These examples serve to point out that the implications of foregoing sovereign immunity to permit malpractice suits by active-duty members go far beyond furnishing a money-damage remedy for physical injuries. Practically all military medical decisions in the United States and the administrative actions

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that flow from them would become fair game in FTCA suits under the proposed bill. Military personnel decisions would be seriously impaired, remaining in limbo for lengthy periods until judicially resolved.

As the Supreme Court has noted, "[T]o accomplish its mission the military must foster instinctive obedience, unity, commitment, and esprit de corps." Goldman v. Weinberger, 475 U.S. 503 (1986). Accordingly, it held in United States v. Johnson, 481 U.S. 681 (1987):

Even if military negligence is not specifically alleged in a tort action, a suit based upon service-related activity necessarily implicates the military judgments and decisions that are inextricably intertwined with the conduct of the military mission. Moreover, military discipline involves not only obedience to orders, but more generally duty and loyalty to one's service and to one's country. Suits brought by service members against the Government for service-related injuries could undermine the commitment essential to effective service and thus have the potential to disrupt military discipline in the broadest sense of the word.

CONCLUSION

To summarize:

- The notion of military personnel suing the United States in tort runs counter to the accumulated wisdom and experience of all three branches of government.

- Enacting H.R. 3407, thereby creating the right to sue for malpractice, will open a Pandora's box of administrative, morale, and disciplinary problems in the Armed Services.

- Such a law would in fact erode the uniform treatment of servicemembers vital to the maintenance of good order and discipline as it would create a special class of litigants favored over all others. Furthermore, servicemembers overseas could not sue; their compatriots in the United States could. For those servicemembers who could sue, damage awards for the same injury could vary dramatically from one jurisdiction to another, thereby underscoring disparate treatment of military members.

- Medical care in the military services is not in a state of chaos and disrepair. The Congress should not topple the well-established proscription against tort suits by active-duty military personnel in an ill-conceived effort to enhance quality assurance in military medical facilities.

- A compensation scheme already exists that can fairly compensate all injured persons regardless of the cause of the negligence. If that compensation is inadequate, let's correct it.

The proposed legislation is an expression of concern for the plight of those who have suffered real injuries. But its premises are faulty. First, H.R. 3407 will not, in our view, reduce malpractice or improve morale. Only the Department of Defense can do that as we aggressively pursue improved health care. Second, the financial objective of these bills would be best advanced by a thorough review of our no-fault benefits system, which should provide adequate, realistic compensation for service-connected injuries on a uniform basis without regard to the fortuitous circumstances of individual claimants.

S. HRG. 107–977

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

SECOND SESSION

OCTOBER 8, 2002

Serial No. J–107–109

Printed for the use of the Committee on the Judiciary

U.S. GOVERNMENT PRINTING OFFICE

88–833 PDF WASHINGTON : 2003

For sale by the Superintendent of Documents, U.S. Government Printing Office
Internet: bookstore.gpo.gov Phone: toll free (866) 512–1800; DC area (202) 512–1800
Fax: (202) 512–2250 Mail: Stop SSOP, Washington, DC 20402–0001

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.

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,
8 Oct 02
Feres Doctrine
P 16 L 24

(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.

○

Mr. FRANKS [continuing]. You did invite them to testify? They weren't available? Okay. They weren't available.

Mr. COHEN. I now recognize Mr. Conyers, a distinguished Member of the Subcommittee, and the Chairman of the Committee on the Judiciary.

Mr. CONYERS. Thank you, Chairman Cohen. I think this is important.

I don't know what some lawyers have against other lawyers. I mean, this has—it has always been incredible to me, some of the people that criticize lawyers. You know, when you want a lawyer, you want a good, tough, aggressive lawyer, but when somebody else wants one you say, "Oh, gosh. Here we go with the litigation again."

Now, there are some things that aren't understood here about this matter. Nobody in the service can be sued—nobody—whether you lost a limb or anything else. So that has absolutely nothing to do with the measure that Mr. Hinchey—Maurice Hinchey—brings before us today.

And the Defense Department didn't want to come before us. That is why they aren't here.

Now, I am going to do something I rarely do: quote Justice Scalia. I mean, this is a—I can't ever remember doing this before. But everybody gets something right sometimes. Broken clocks are right at least once a day—twice a day. Thanks.

Here is Justice Scalia: "As it did almost 4 decades ago in *Feres*, the Court today provides several reasons why Congress might have been wise to exempt from the Federal Tort Claims Act certain claims brought by servicemen. The problem now, as then, is that Congress not only failed to provide such exemption, but quite plainly excluded it. We have not been asked by respondent here to overrule *Feres*, but I can perceive no reason to accept petitioners' invitation to extend it as the Court does today."

I ask unanimous consent to put the full opinion into the record, and I yield back the balance of my time.

Mr. COHEN. Without objection, the second clock—broken clock—will be put into the record.

[The information referred to follows:]

U.S. Supreme Court

UNITED STATES v. JOHNSON, 481 U.S. 681 (1987)

481 U.S. 681

UNITED STATES v. JOHNSON, PERSONAL REPRESENTATIVE OF THE ESTATE OF JOHNSON
CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 85-2039.

Argued February 24, 1987
Decided May 18, 1987

Under Feres v. United States, 340 U.S. 135, the Government has no Federal Tort Claims Act (FTCA) liability for injuries to members of the military service arising out of or in the course of activity incident to service. Respondent's husband, a helicopter pilot for the Coast Guard, was killed when his helicopter crashed during a rescue mission. Shortly before the crash, air traffic controllers from the Federal Aviation Administration, a civilian agency of the Federal Government, had assumed positive radar control over the helicopter. After receiving veterans' benefits for her husband's death, respondent filed an FTCA action seeking damages from the Government on the ground that the controllers' negligence had caused the crash. The Federal District Court dismissed the complaint, relying exclusively on Feres. However, the Court of Appeals reversed, distinguishing Feres from cases such as the present in which negligence is alleged on the part of a Government employee who is not a member of the military. Finding the effect of a suit on military discipline to be the Feres doctrine's primary justification, the court ruled that Feres did not bar respondent's suit since there was no indication that the conduct or decisions of military personnel would be subjected to scrutiny if the case proceeded to trial.

Held:

The Feres doctrine bars an FTCA action on behalf of a service member killed during an activity incident to service, even if the alleged negligence is by civilian employees of the Federal Government. Pp. 686-692.

(a) This Court and the lower federal courts have consistently applied the Feres doctrine since its inception, and have never suggested that the military status of the alleged tortfeasor is crucial. Nor has Congress seen fit to change the Feres standard in the more than 35 years since it was articulated. Pp. 686-688.
(b) The three broad rationales underlying Feres refute the critical significance ascribed to the status of the alleged tortfeasor by the Court of Appeals. First, the distinctively federal character of the relationship between the Government and Armed Forces personnel necessitates a federal remedy that provides simple, certain, and uniform compensation, unaffected by the fortuity of the situs of the alleged negligence. Second, the statutory

veterans' disability and death benefits [481 U.S. 681, 682] system provides the sole remedy for service-connected injuries. Third, even if military negligence is not specifically alleged in a service member's FTCA suit, military discipline may be impermissibly affected by the suit 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 the country may be undermined. Pp. 688-691.

(c) Respondent's husband's death resulted from the rescue mission, a primary duty of the Coast Guard, and the mission was an activity incident to his service. Respondent received statutory veterans' benefits on behalf of her husband's death. Because respondent's husband was acting pursuant to standard Coast Guard Operating Procedures, the potential that this suit could implicate military discipline is substantial. Thus, this case falls within the heart of the Feres doctrine. Pp. 691-692.

779 F.2d 1492, reversed and remanded.

POWELL, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and WHITE BLACKMUN, and O'CONNOR, JJ., joined. SCALIA, J., filed a dissenting opinion, in which BRENNAN, MARSHALL, and STEVENS, JJ., joined, post, p. 692.

Deputy Solicitor General Ayer argued the cause for the United States. With him on the briefs were Solicitor General Fried, Assistant Attorney General Willard, Christopher J. Wright, and Nicholas S. Zeppos.

Joel D. Eaton argued the cause and filed a brief for respondent. *

[Footnote *] Donald L. Salem filed a brief for William H. Gilardy, Jr., et al., as amici curiae urging affirmance.

JUSTICE POWELL delivered the opinion of the Court

This case presents the question whether the doctrine established in Feres v. United States, 340 U.S. 135 (1950), bars an action under the Federal Tort Claims Act on behalf of a service member killed during the course of an activity incident to service, where the complaint alleges negligence on the part of civilian employees of the Federal Government.

I

Lieutenant Commander Horton Winfield Johnson was a helicopter pilot for the United States Coast Guard, stationed [481 U.S. 681, 683] in Hawaii. In the early morning of January 7, 1982, Johnson's Coast Guard station received a distress call from a boat lost in the area. Johnson and a crew of several other Coast Guard members were dispatched to search for the vessel. Inclement weather decreased the visibility, and so Johnson requested radar assistance from the Federal Aviation Administration (FAA), a civilian agency of the Federal Government. The FAA controllers assumed positive radar control over the helicopter. Shortly thereafter, the helicopter crashed into the side of a mountain on the island of Molokai. All the crew members, including Johnson, were killed in the crash.

Respondent, Johnson's wife, applied for and received compensation for her husband's death pursuant to the Veterans' Benefits Act, 72 Stat. 1118, as amended, 38 U.S.C. 301 et seq. (1982 ed. and Supp. III). 1 In addition, she filed suit in the United States District Court for the Southern District of Florida under the Federal Tort Claims Act (FTCA), 28 U.S.C. 1346, 2671-2680. Her complaint sought damages from the United States on the ground that the FAA flight controllers negligently caused her husband's death. The Government filed a motion to dismiss, asserting that because Johnson was killed during the course of his military duties, respondent could not recover damages from the United States. The District Court agreed and dismissed the complaint, relying exclusively on this Court's decision in Feres.

The Court of Appeals for the Eleventh Circuit reversed. 749 F.2d 1530 (1985). It noted the language of Feres that precludes suits by service members against the Government [481 U.S. 681, 684] for injuries that "arise out of or are in the course of activity incident to service." 340 U.S., at 146. The court found, however, that the evolution of the doctrine since the Feres decision warranted a qualification of the original holding according to the status of the alleged tortfeasor. The court identified what it termed "the typical Feres factual paradigm" that exists when a service member alleges negligence on the part of another member of the military. 749 F.2d, at 1537. "[W]hen the Feres factual paradigm is present, the issue is whether the injury arose out of or during the course of an activity incident to service." Ibid. But when negligence is alleged on the part of a Federal Government employee who is not a member of the military, the court found that the propriety of a suit should be determined by examining the rationales that underlie the Feres doctrine. Although it noted that this Court has articulated numerous rationales for the doctrine, 2 it found the effect of a suit on military discipline to be the doctrine's primary justification.

Applying its new analysis to the facts of this case, the court found "absolutely no hint . . . that the conduct of any alleged tortfeasor even remotely connected to the military will be scrutinized if this case proceeds to trial." 749 F.2d, at 1539. [481 U.S. 681, 685] Accordingly, it found that Feres did not bar respondent's suit. The court acknowledged that the Court of Appeals for the Ninth Circuit, "in a case strikingly similar to this one, has reached the opposite conclusion." 749 F.2d, at 1539 (citing Uptegrove v. United States, 600 F.2d 1248 (1979), cert. denied, 444 U.S. 1044 (1980)). 3 It concluded, however, that "Uptegrove was wrongly decided," 749 F.2d, at 1539, and declined to reach the same result.

The Court of Appeals granted the Government's suggestion for rehearing en banc. The en banc court found that this Court's recent decision in United States v. Shearer, 473 U.S. 52 (1985), "reinforc[ed] the analysis set forth in the panel opinion," 779 F.2d 1492, 1493 (1986) (per curiam), particularly the "[s]pecial emphasis . . . upon military discipline and whether or not the claim being considered would require civilian courts to second-guess military decisions," id., at 1493-1494. It concluded that the panel properly had evaluated the claim under Feres and therefore reinstated the panel opinion. Judge Johnson, joined by three other judges, strongly dissented. The dissent rejected the "Feres factual paradigm" as identified by the court, finding that because "Johnson's injury was undoubtedly sustained incident to service, . . . under current law our decision ought to be a relatively straightforward affirmance." Id., at 1494.

We granted certiorari, 479 U.S. 811 (1986), to review the Court of Appeals' reformulation of the Feres doctrine and to resolve the conflict among the Circuits on the issue. 4 We now reverse. [481 U.S. 681, 686]

In Feres, this Court held that service members cannot bring tort suits against the Government for injuries that "arise out of or are in the course of activity incident to service." 340 U.S., at 146. This Court has never deviated from this characterization of the Feres bar. 5 Nor has Congress changed this standard in the close to 40 years since it was articulated, even though, as the Court noted in Feres, Congress "possesses a ready remedy" to alter a misinterpretation of its intent. Id., at 138. 6 Although all of the cases decided by this Court under Feres have involved allegations of negligence on the part of members of the military, this Court has never suggested that the military status of the alleged tortfeasor is crucial to the application of the doctrine. 7 [481 U.S. 681, 687] Nor have the lower courts understood this fact to be relevant under Feres. 8 Instead, the Feres doctrine has been applied consistently to bar all suits on behalf of service members [481 U.S. 681, 688] against the Government based upon service-related injuries. We decline to modify the doctrine at this late date. 9

A

This Court has emphasized three broad rationales underlying the Feres decision. See Stencel Aero Engineering Corp. [481 U.S. 681, 689] v. United States, 431 U.S. 666, 671-673 (1977), and n. 2, supra. An examination of these reasons for the doctrine demonstrates that the status of the alleged tortfeasor does not have the critical significance ascribed to it by the Court of Appeals in this case. First, "[t]he relationship between the Government and members of its armed forces is `distinctively federal in character.'" Feres, 340 U.S., at 143 (quoting United States v. Standard Oil Co., 332 U.S. 301, 305 (1947)). This federal relationship is implicated to the greatest degree when a service member is performing activities incident to his federal service. Performance of the military function in diverse parts of the country and the world entails a "[s]ignificant risk of accidents and injuries." Stencel Aero Engineering Corp. v. United States, supra, at 672. Where a service member is injured incident to service - that is, because of his military relationship with the Government - it "makes no sense to permit the fortuity of the situs of the alleged negligence to affect the liability of the Government to [the] serviceman." 431 U.S., at 672. Instead, application of the underlying federal remedy that provides "simple, certain, and uniform compensation for injuries or death of those in armed services," Feres, supra, at 144 (footnote omitted), is appropriate.

Second, the existence of these generous statutory disability and death benefits is an independent reason why the Feres doctrine bars suit for service-related injuries. 10 In Feres, the Court observed that the primary purpose of the [481 U.S. 681, 690] FTCA "was to extend a remedy to those who had been without; if it incidentally benefited those already well provided for, it appears to have been unintentional." 340 U.S., at 140. Those injured during the course of activity incident to service not only receive benefits that "compare extremely favorably with those provided by most workmen's compensation statutes," id., at 145, but the recovery of benefits is "swift [and] efficient," Stencel Aero Engineering Corp. v. United States, supra, at 673, "normally requir[ing] no litigation," Feres, supra, at 145. The Court in Feres found it difficult to believe that Congress would have provided such a comprehensive system of benefits while at the

same time contemplating recovery for service-related injuries under the FTCA. Particularly persuasive was the fact that Congress "omitted any provision to adjust these two types of remedy to each other." 340 U.S., at 144. Congress still has not amended the Veterans' Benefits Act or the FTCA to make any such provision for injuries incurred during the course of activity incident to service. We thus find no reason to modify what the Court has previously found to be the law: the statutory veterans' benefits "provid[e] an upper limit of liability for the Government as to service-connected injuries." Stencel Aero Engineering Corp. v. United States, supra, at 673. See Hatzlachh Supply Co. v. United States, 444 U.S. 460, 464 (1980) (per curiam) ("[T]he Veterans' Benefits Act provided compensation to injured servicemen, which we understood Congress intended to be the sole remedy for service-connected injuries").

Third, Feres and its progeny indicate that suits brought by service members against the Government for injuries incurred incident to service are barred by the Feres doctrine because they are the "type[s] of claims that, if generally permitted, would involve the judiciary in sensitive military affairs at the expense of military discipline and effectiveness." United States v. Shearer, 473 U.S., at 59 (emphasis in original). In every respect the military is, as this Court has recognized, [481 U.S. 681, 691] "a specialized society." Parker v. Levy, 417 U.S. 733, 743 (1974). "[T]o accomplish its mission the military must foster instinctive obedience, unity, commitment, and esprit de corps." Goldman v. Weinberger, 475 U.S. 503, 507 (1986). Even if military negligence is not specifically alleged in a tort action, a suit based upon service-related activity necessarily implicates the military judgments and decisions that are inextricably intertwined with the conduct of the military mission. 11 Moreover, military discipline involves not only obedience to orders, but more generally duty and loyalty to one's service and to one's country. Suits brought by service members against the Government for service-related injuries could undermine the commitment essential to effective service and thus have the potential to disrupt military discipline in the broadest sense of the word.

B

In this case, Lieutenant Commander Johnson was killed while performing a rescue mission on the high seas, a primary duty of the Coast Guard. See 14 U.S.C. 2, 88(a)(1). 12 There is no dispute that Johnson's injury arose directly out of the rescue mission, or that the mission was an activity incident to his military service. Johnson went on the rescue mission specifically because of his military status. His wife received and is continuing to receive statutory benefits on account of his death. Because Johnson was acting pursuant to standard operating procedures of the Coast [481 U.S. 681, 692] Guard, the potential that this suit could implicate military discipline is substantial. The circumstances of this case thus fall within the heart of the Feres doctrine as it consistently has been articulated.

III

We reaffirm the holding of Feres 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." 340 U.S., at 146. Accordingly, we reverse the judgment of the Court of Appeals for the Eleventh Circuit and remand for proceedings consistent with this opinion.

It is so ordered.

Footnotes

[Footnote 1] Respondent has received $35,690.66 in life insurance and a $3,000 death gratuity, and receives approximately $868 per month in dependency and compensatory benefits. Brief for United States 3, n. 1. The dependency and compensatory benefits normally are payable for the life of the surviving spouse and include an extra monthly sum for any surviving child of the veteran below age 18. See 38 U.S.C. 410, 411 (1982 ed. and Supp. III); 38 CFR 3.461 (1986).

[Footnote 2] We have identified three factors that underlie the Feres doctrine:

> "First, the relationship between the Government and members of its Armed Forces is `"distinctively federal in character"'; 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 stationed at the time of the injury. Second, the Veterans' Benefits Act establishes, as a substitute for tort liability, a statutory `no fault' compensation scheme which provides generous pensions to injured servicemen, without regard to any negligence attributable to the Government. A third factor . . . [is] `[t]he peculiar and special relationship of the soldier to his superiors, the effects of the maintenance of such suits on discipline, and the extreme results that might obtain if suits under the Tort Claims Act were allowed for negligent orders given or negligent acts committed in the course of military duty . . . .'" Stencel Aero Engineering Corp. v. United States, 431 U.S. 666, 671 -672 (1977) (citations omitted).

[Footnote 3] In Uptegrove, the wife of a Navy lieutenant killed while flying home on an Air Force C-141 transport brought suit against the Government under the FTCA, alleging negligence on the part of three FAA air traffic controllers. The court in Uptegrove dismissed the suit on the basis of Feres.

[Footnote 4] In addition to the decision of the Court of Appeals for the Ninth Circuit in Uptegrove v. United States, 600 F.2d 1248 (1979), cert. denied, 444 U.S. 1044 (1980), specifically acknowledged by the Court of Appeals in this case, the decision conflicts in principle with the decisions of the Courts of Appeals cited in n. 8, infra.

[Footnote 5] See United States v. Brown, 348 U.S. 110, 112 (1954); United States v. Muniz, 374 U.S. 150, 159 (1963); Stencel Aero Engineering Corp. v. United States, supra, at 671; Chappell v. Wallace, 462 U.S. 296, 299 (1983); United States v. Shearer, 473 U.S. 52, 57 (1985).

[Footnote 6] Congress has recently considered, but not enacted, legislation that would allow service members to bring medical malpractice suits against the Government. See H. R. 1161, 99th Cong., 1st Sess. (1985); H. R. 1942, 98th Cong., 1st Sess. (1983).

[Footnote 7] In two places in the Feres opinion, the Court suggested that the military status of the tortfeasor might be relevant to its decision. First, the Court identified "[t]he common fact underlying the three cases" as being "that each claimant, while on active duty and not on

furlough, sustained injury due to negligence of others in the armed forces." 340 U.S., at 138 (emphasis added). Second, in discussing one of several grounds for the holding, the Court stated: "It would hardly be a rational plan of providing for those disabled in service by others in service to leave them dependent upon geographic considerations over which they have no control." Id., at 143 (emphasis added). Nevertheless, the language of the opinion, viewed as a whole, is broad: "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., at 141 (emphasis added; footnote omitted); "'To whatever extent state law may apply to govern the relations between soldiers or others in the armed forces and persons outside them or nonfederal governmental agencies, the scope, nature, legal incidents and consequences of the relation between persons in service and the Government [481 U.S. 681, 687] are fundamentally derived from federal sources and governed by federal authority.'" Id., at 143-144 (quoting United States v. Standard Oil Co., 332 U.S. 301, 305-306 (1947)) (emphasis added; citations omitted). See id., at 142 (finding relevant "the status of both the wronged and the wrongdoer") (emphasis added).

Although one decision since Feres noted the military status of the tortfeasors, see United States v. Brown, supra, at 112, it did not rely on that fact. See 348 U.S., at 113 ("We adhere . . . to the line drawn in the Feres case between injuries that did and injuries that did not arise out of or in the course of military duty"). Moreover, it is the broad language that consistently has been repeated in recent decisions describing the Feres doctrine. See Chappell v. Wallace, supra, at 299 ("Congress did not intend to subject the Government to . . . claims [for injuries suffered in service] by a member of the Armed Forces") (emphasis added); Stencel Aero Engineering Corp. v. United States, 431 U.S., at 669 ("In Feres . . . the Court held that an on-duty serviceman who is injured due to the negligence of Government officials may not recover against the United States under the Federal Tort Claims Act") (emphasis added); Dalehite v. United States, 346 U.S. 15, 31, n. 25 (1953) (characterizing the Feres cases as involving "injuries . . . allegedly caused by negligence of employees of the United States") (emphasis added).

[Footnote 8] The list of cases compiled by the dissent below, 779 F.2d 1492, 1495-1496 (1986), in which the lower courts have interpreted Feres to bar suit against the Government even though the negligence alleged was on the part of a civilian employee is worth repeating: Potts v. United States, 723 F.2d 20 (CA6 1983) (Navy corpsman injured when struck by a broken cable from a hoist operated by civilians), cert. denied, 466 U.S. 959 (1984); Warner v. United States, 720 F.2d 837 (CA5 1983) (off-duty Army enlisted man injured on base when motorcycle collided with shuttle bus driven by civilian Government employee); Jaffee v. United States, 663 F.2d 1226 (CA3 1981) (serviceman injured by radiation exposure allegedly due in part to international tort of civilian Department of Defense employees), cert. denied, 456 U.S. 972 (1982); Lewis v. United States, 663 F.2d 889 (CA9 1981) (Marine Corps pilot killed in crash allegedly due to negligence of Government maintenance employees), cert. denied, 457 U.S. 1133 (1982); Carter v. Cheyenne, 649 F.2d 827 (CA10 1981) (Air Force captain killed in crash at city airport for which city brought third-party claim against FAA air traffic controllers); Woodside v. United States, 606 F.2d 134 (CA6 1979) [481 U.S. 681, 688] (Air Force officer killed in plane crash allegedly due to negligence of civilian flight instructor employed by military flight club), cert. denied, 445 U.S. 904 (1980); Uptegrove v. United States, 600 F.2d 1248 (CA9 1979) (see n. 3, supra), cert. denied, 444 U.S. 1044 (1980); Watkins v. United States, 462 F. Supp. 980 (SD Ga. 1977) (serviceman killed on base when motorcycle collided with shuttle bus driven by civilian

Government employee), aff'd, 587 F.2d 279 (CA5 1979); Hass v. United States, 518 F.2d 1138 (CA4 1975) (suit by serviceman against civilian manager of military-owned horse stable); United States v. Lee, 400 F.2d 558 (CA9 1968) (serviceman killed in crash of military aircraft allegedly due to FAA air traffic controller negligence), cert. denied, 393 U.S. 1053 (1969); Sheppard v. United States, 369 F.2d 272 (CA3 1966) (same), cert. denied, 386 U.S. 982 (1967); Layne v. United States, 295 F.2d 433 (CA7 1961) (National Guardsman killed on training flight allegedly due to negligence of civilian air traffic controllers), cert. denied, 368 U.S. 990 (1962); United Air Lines, Inc. v. Wiener, 335 F.2d 379 (CA9) (serviceman injured in part due to alleged CAA employee negligence), cert. dismissed sub nom. United Air Lines, Inc. v. United States, 379 U.S. 951 (1964).

[Footnote 9] JUSTICE SCALIA indicates that he would consider overruling Feres had this been requested by counsel, but in the absence of such a request he would "confine the unfairness and irrationality [of] that decision" to cases where the allegations of negligence are limited to other members of the military. Post, at 703. In arguing "unfairness" in this case, JUSTICE SCALIA assumes that had respondent been "piloting a commercial helicopter" his family might recover substantially more in damages than it now may recover under the benefit programs available for a serviceman and his family. Ibid. It hardly need be said that predicting the outcome of any damages suit - both with respect to liability and the amount of damages - is hazardous, whereas veterans' benefits are guaranteed by law. Post, at 697. If "fairness" - in terms of pecuniary benefits - were the issue, one could respond to the dissent's assumption by noting that had the negligent instructions that led to Johnson's death been given by another serviceman, the consequences - under the dissent's view - would be equally "unfair." "Fairness" provides no more justification for the line drawn by the dissent than it does for the line upon which application of the [481 U.S. 681, 689] Feres doctrine has always depended: whether the injury was "incident to service?" In sum, the dissent's argument for changing the interpretation of a congressional statute, when Congress has failed to do so for almost 40 years, is unconvincing.

[Footnote 10] Service members receive numerous other benefits unique to their service status. For example, members of the military and their dependents are eligible for educational benefits, extensive health benefits, home-buying loan benefits, and retirement benefits after a minimum of 20 years of service. See generally Uniformed Services Almanac (L. Sharff & S. Gordon eds. 1985).

[Footnote 11] Civilian employees of the Government also may play an integral role in military activities. In this circumstance, an inquiry into the civilian activities would have the same effect on military discipline as a direct inquiry into military judgments. For example, the FAA and the United States Armed Services have an established working relationship that provides for FAA participation in numerous military activities. See FAA, United States Dept. of Transportation, Handbook 7610.4F: Special Military Operations (Jan. 21, 1981).

[Footnote 12] The Coast Guard, of course, is a military service, and an important branch of the Armed Services. 14 U.S.C. 1.

JUSTICE SCALIA, with whom JUSTICE BRENNAN, JUSTICE MARSHALL, and JUSTICE STEVENS join, dissenting.

As it did almost four decades ago in Feres v. United States, 340 U.S. 135 (1950), the Court today provides several reasons why Congress might have been wise to exempt from the Federal Tort Claims Act (FTCA), 28 U.S.C. 1346(b), 2671-2680, certain claims brought by servicemen. The problem now, as then, is that Congress not only failed to provide such an exemption, but quite plainly excluded it. We have not been asked by respondent here to overrule Feres; but I can perceive no reason to accept petitioner's invitation to extend it as the Court does today.

I

Much of the sovereign immunity of the United States was swept away in 1946 with passage of the FTCA, which renders the Government liable

> "for money damages . . . for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United [481 U.S. 681, 693] 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).

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

In our first encounter with an FTCA suit brought by a serviceman, we gave effect to the plain meaning of the statute. In Brooks v. United States, 337 U.S. 49 (1949), military personnel had been injured in a collision with an Army truck while off duty. We rejected the Government's argument that those injured while enlisted in the military can never recover under the FTCA. We noted that the Act gives the District Courts "jurisdiction over any claim founded on negligence brought against the United States" and found the Act's exceptions "too lengthy, specific, and close to the present problem" to permit an inference that, notwithstanding the literal language of the statute, Congress intended to bar all suits brought by servicemen. Id., at 51. Particularly in light of the exceptions for claims arising out of combatant activities, 28 U.S.C. 2680(j), and in foreign countries, 2680(k), we said, "[i]t would be absurd to believe that Congress did not have the servicemen in mind" in passing the FTCA. 337 U.S., at 51. We therefore concluded that the plaintiffs in Brooks could sue under the Act. In dicta, however, we cautioned that an attempt by a serviceman to recover for injuries suffered "incident to . . . service" would [481 U.S. 681, 694] present "a wholly different case," id., at 52, and that giving effect to the "literal language" of the FTCA in such a case might lead to results so "outlandish" that recovery could not be permitted, id., at 53.

That "wholly different case" reached us one year later in Feres. We held that servicemen could not recover under the FTCA for injuries that "arise out of or are in the course of activity incident

to service," 340 U.S., at 146 , and gave three reasons for our holding. First, the parallel private liability required by the FTCA was absent. Id., at 141-142. Second, Congress could not have intended that local tort law govern the "distinctively federal" relationship between the Government and enlisted personnel. Id., at 142-144. Third, Congress could not have intended to make FTCA suits available to servicemen who have already received veterans' benefits to compensate for injuries suffered incident to service. Id., at 144-145. Several years after Feres we thought of a fourth rationale: 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, 112 (1954).

In my view, none of these rationales justifies the result. Only the first of them, the "parallel private liability" argument, purports to be textually based, as follows: The United States is liable under the FTCA "in the same manner and to the same extent as a private individual under like circumstances," 28 U.S.C. 2674; since no "private individual" can raise an army, and since no State has consented to suits by members of its militia, 2674 shields the Government from liability in the Feres situation. 340 U.S., at 141 -142. Under this reasoning, of course, many of the Act's exceptions are superfluous, since private individuals typically do not, for example, transmit postal matter, 28 U.S.C. 2680(b), collect taxes or customs duties, 2680(c), impose quarantines, 2680(f), or regulate the monetary system, 2680(i). In any event, we subsequently recognized our error and rejected [481 U.S. 681, 695] Feres' "parallel private liability" rationale. See Rayonier, Inc. v. United States, 352 U.S. 315, 319 (1957); Indian Towing Co. v. United States, 350 U.S. 61, 66 -69 (1955).

Perhaps without that scant (and subsequently rejected) textual support, which could be pointed to as the embodiment of the legislative intent that its other two rationales speculated upon, the Feres Court would not as an original matter have reached the conclusion that it did. Be that as it may, the speculation outlived the textual support, and the Feres rule is now sustained only by three disembodied estimations of what Congress must (despite what it enacted) have intended. They are bad estimations at that. The first of them, Feres' second rationale, has barely escaped the fate of the "parallel private liability" argument, for though we have not yet acknowledged that it is erroneous we have described it as "no longer controlling." United States v. Shearer, 473 U.S. 52, 58 , n. 4 (1985). The rationale runs as follows: Liability under the FTCA depends upon "the law of the place where the [negligent] act or omission occurred," 28 U.S.C. 1346(b); but Congress could not have intended local, and therefore geographically diverse, tort law to control important aspects of the "distinctively federal" relationship between the United States and enlisted personnel. 340 U.S., at 142 -144. Feres itself was concerned primarily with the unfairness to the soldier of making his recovery turn upon where he was injured, a matter outside of his control. Id., at 142-143. Subsequent cases, however, have stressed the military's need for uniformity in its governing standards. See, e. g., Stencel Aero Engineering Corp. v. United States, 431 U.S. 666, 672 (1977). Regardless of how it is understood, this second rationale is not even a good excuse in policy, much less in principle, for ignoring the plain terms of the FTCA.

The unfairness to servicemen of geographically varied recovery is, to speak bluntly, an absurd justification, given that, as we have pointed out in another context, nonuniform [481 U.S. 681, 696] recovery cannot possibly be worse than (what Feres provides) uniform nonrecovery. See United States v. Muniz, 374 U.S. 150, 162 (1963). We have abandoned this peculiar rule of solicitude in

allowing federal prisoners (who have no more control over their geographical location than servicemen) to recover under the FTCA for injuries caused by the negligence of prison authorities. See ibid. There seems to me nothing "unfair" about a rule which says that, just as a serviceman injured by a negligent civilian must resort to state tort law, so must a serviceman injured by a negligent Government employee.

To the extent that the rationale rests upon the military's need for uniformity, it is equally unpersuasive. To begin with, that supposition of congressional intent is positively contradicted by the text. Several of the FTCA's exemptions show that Congress considered the uniformity problem, see, e. g., 28 U.S.C. 2680(b), 2680(i), 2680(k), yet it chose to retain sovereign immunity for only some claims affecting the military. 2680(j). Moreover, we have effectively disavowed this "uniformity" justification - and rendered its benefits to military planning illusory - by permitting servicemen to recover under the FTCA for injuries suffered not incident to service, and permitting civilians to recover for injuries caused by military negligence. See, e. g., Indian Towing Co. v. United States, supra. Finally, it is difficult to explain why uniformity (assuming our rule were achieving it) is indispensable for the military, but not for the many other federal departments and agencies that can be sued under the FTCA for the negligent performance of their "unique, nationwide function[s]," Stencel Aero Engineering Corp. v. United States, supra, at 675 (MARSHALL, J., dissenting), including, as we have noted, the federal prison system which may be sued under varying state laws by its inmates. See United States v. Muniz, supra. In sum, the second Feres rationale, regardless of how it is understood, is not a plausible estimation [481 U.S. 681, 697] of congressional intent, much less a justification for importing that estimation, unwritten, unwritten, into the statute.

Feres's third basis has similarly been denominated "no longer controlling." United States v. Shearer, supra, at 58, n. 4. Servicemen injured or killed in the line of duty are compensated under the Veterans' Benefits Act (VBA), 72 Stat. 1118, as amended, 38 U.S.C. 301 et seq. (1982 ed. and Supp. III), and the Feres Court thought it unlikely that Congress meant to permit additional recovery under the FTCA, 340 U.S., at 144 -145. Feres described the absence of any provision to adjust dual recoveries under the FTCA and VBA as "persuasive [evidence] that there was no awareness that the Act might be interpreted to permit recovery for injuries incident to military service." Id., at 144. Since Feres we have in dicta characterized recovery under the VBA as "the sole remedy for service-connected injuries," Hatzlachh Supply Co. v. United States, 444 U.S. 460, 464 (1980) (per curiam), and have said that the VBA "provides an upper limit of liability for the Government" for those injuries, Stencel Aero Engineering Corp. v. United States, supra, at 673.

The credibility of this rationale is undermined severely by the fact that both before and after Feres we permitted injured servicemen to bring FTCA suits, even though they had been compensated under the VBA. In Brooks v. United States, 337 U.S. 49 (1949), we held that two servicemen injured off duty by a civilian Army employee could sue the Government. The fact that they had already received VBA benefits troubled us little. We pointed out that "nothing in the Tort Claims Act or the veterans' laws . . . provides for exclusiveness of remedy" and we refused to "call either remedy . . . exclusive . . . when Congress has not done so." Id., at 53. We noted further that Congress had included three exclusivity provisions in the FTCA, 28 U.S.C. 2672, 2676, 2679, but had said nothing about servicemen plaintiffs, 337 U.S., at 53 . We

indicated, however, that VBA compensation [481 U.S. 681, 698] could be taken into account in adjusting recovery under the FTCA. Id., at 53-54; see also United States v. Brown, 348 U.S., at 111, and n. That Brooks remained valid after Feres was made clear in United States v. Brown, supra, in which we stressed again that because "Congress had given no indication that it made the right to compensation [under the VBA] the veteran's exclusive remedy, . . . the receipt of disability payments . . . did not preclude recovery under the Tort Claims Act." Id., at 113.

Brooks and Brown (neither of which has ever been expressly disapproved) plainly hold that the VBA is not an "exclusive" remedy which places an "upper limit" on the Government's liability. Because of Feres and today's decision, however, the VBA will in fact be exclusive for service-connected injuries, but not for others. Such a result can no more be reconciled with the text of the VBA than with that of the FTCA, since the VBA compensates servicemen without regard to whether their injuries occur "incident to service" as Feres defines that term. See 38 U.S.C. 105. Moreover, the VBA is not, as Feres assumed, identical to federal and state workers' compensation statutes in which exclusivity provisions almost invariably appear. See, e. g., 5 U.S.C. 8116(c). Recovery is possible under workers' compensation statutes more often than under the VBA, and VBA benefits can be terminated more easily than can workers' compensation. See Note, From Feres to Stencel: Should Military Personnel Have Access to FTCA Recovery?, 77 Mich. L. Rev. 1099, 1106-1108 (1979). In sum, "the presence of an alternative compensation system [neither] explains [n]or justifies the Feres doctrine; it only makes the effect of the doctrine more palatable." Hunt v. United States, 204 U.S. App. D.C. 308, 326, 636 F.2d 580, 598 (1980).

The foregoing three rationales - the only ones actually relied upon in Feres - are so frail that it is hardly surprising that we have repeatedly cited the later-conceived-of "military discipline" rationale as the "best" explanation for that decision. [481 U.S. 681, 699] See United States v. Shearer, 473 U.S., at 57; Chappell v. Wallace, 462 U.S. 296, 299 (1983); United States v. Muniz, 374 U.S., at 162. Applying the FTCA as written would lead, we have reasoned, to absurd results, because if suits could be brought on the basis of alleged negligence towards a serviceman by other servicemen, military discipline would be undermined and civilian courts would be required to second-guess military decisionmaking. See Stencel Aero Engineering Corp. v. United States, 431 U.S., at 671-672, 673. (Today the Court goes further and suggests that permitting enlisted men and women to sue their Government on the basis of negligence towards them by any Government employee seriously undermines "duty and loyalty to one's service and to one's country." Ante, at 691.) I cannot deny the possibility that some suits brought by servicemen will adversely affect military discipline, and if we were interpreting an ambiguous statute perhaps we could take that into account. But I do not think the effect upon military discipline is so certain, or so certainly substantial, that we are justified in holding (if we can ever be justified in holding) that Congress did not mean what it plainly said in the statute before us.

It is strange that Congress' "obvious" intention to preclude Feres suits because of their effect on military discipline was discerned neither by the Feres Court nor by the Congress that enacted the FTCA (which felt it necessary expressly to exclude recovery for combat injuries). Perhaps Congress recognized that the likely effect of Feres suits upon military discipline is not as clear as we have assumed, but in fact has long been disputed. See Bennett, The Feres Doctrine, Discipline, and the Weapons of War, 29 St. Louis U. L. J. 383, 407-411 (1985). Or perhaps

Congress assumed that the FTCA's explicit exclusions would bar those suits most threatening to military discipline, such as claims based upon combat command decisions, 28 U.S.C. 2680(j); claims based upon performance of "discretionary" functions, 2680(a); claims [481 U.S. 681, 700] arising in foreign countries, 2680(k); intentional torts, 2680(h); and claims based upon the execution of a statute or regulation, 2680(a). Or perhaps Congress assumed that, since liability under the FTCA is imposed upon the Government, and not upon individual employees, military decisionmaking was unlikely to be affected greatly. Or perhaps - most fascinating of all to contemplate - Congress thought that barring recovery by servicemen might adversely affect military discipline. After all, the morale of Lieutenant Commander Johnson's comrades-in-arms will not likely be boosted by news that his widow and children will receive only a fraction of the amount they might have recovered had he been piloting a commercial helicopter at the time of his death.

To the extent that reading the FTCA as it is written will require civilian courts to examine military decisionmaking and thus influence military discipline, it is outlandish to consider that result "outlandish," Brooks v. United States, 337 U.S., at 53, since in fact it occurs frequently, even under the Feres dispensation. If Johnson's helicopter had crashed into a civilian's home, the homeowner could have brought an FTCA suit that would have invaded the sanctity of military decisionmaking no less than respondent's. If a soldier is injured not "incident to service," he can sue his Government regardless of whether the alleged negligence was military negligence. And if a soldier suffers service-connected injury because of the negligence of a civilian (such as the manufacturer of an airplane), he can sue that civilian, even if the civilian claims contributory negligence and subpoenas the serviceman's colleagues to testify against him.

In sum, neither the three original Feres reasons nor the post hoc rationalization of "military discipline" justifies our failure to apply the FTCA as written. Feres was wrongly decided and heartily deserves the "widespread, almost universal criticism" it has received. In re "Agent Orange" [481 U.S. 681, 701] Product Liability Litigation, 580 F. Supp. 1242, 1246 (EDNY), appeal dism'd, 745 F.2d 161 (CA2 1984). *

II

The Feres Court claimed its decision was necessary to make "the entire statutory system of remedies against the Government . . . a workable, consistent and equitable whole." 340 U.S., at 139. I am unable to find such beauty in what we have wrought. Consider the following hypothetical (similar to one presented by Judge Weinstein in In re "Agent Orange" Product Liability Litigation, supra, at 1252): A serviceman is told by his superior officer to deliver some papers to the local United States Courthouse. As he nears his destination, a wheel on his Government vehicle breaks, causing the vehicle to injure him, his daughter (whose class happens to be touring the courthouse that day), and a United States marshal on duty. Under our case law and federal statutes, the serviceman may not sue the Government (Feres); the guard may not sue the Government (because of the exclusivity provision of the Federal Employees' Compensation Act (FECA), [481 U.S. 681, 702] 5 U.S.C. 8116); the daughter may not sue the Government for the loss of her father's companionship (Feres), but may sue the Government for her own injuries (FTCA). The serviceman and the guard may sue the manufacturer of the vehicle, as may the daughter, both for her own injuries and for the loss of her father's companionship. The

manufacturer may assert contributory negligence as a defense in any of the suits. Moreover, the manufacturer may implead the Government in the daughter's suit (United States v. Yellow Cab Co., 340 U.S. 543 (1951)) and in the guard's suit (Lockheed Aircraft Corp. v. United States, 460 U.S. 190 (1983)), even though the guard was compensated under a statute that contains an exclusivity provision (FECA). But the manufacturer may not implead the Government in the serviceman's suit (Stencel Aero Engineering Corp. v. United States, 431 U.S. 666 (1977)), even though the serviceman was compensated under a statute that does not contain an exclusivity provision (VBA).

The point is not that all of these inconsistencies are attributable to Feres (though some of them assuredly are), but merely that bringing harmony to the law has hardly been the consequence of our ignoring what Congress wrote and imagining what it should have written. When confusion results from our applying the unambiguous text of a statute, it is at least a confusion validated by the free play of the democratic process, rather than what we have here: unauthorized rationalization gone wrong. We realized seven years too late that "[t]here is no justification for this Court to read exemptions into the Act beyond those provided by Congress. If the Act is to be altered that is a function for the same body that adopted it." Rayonier, Inc. v. United States, 352 U.S., at 320 (footnote omitted).

I cannot take comfort, as the Court does, ante, at 686, and n. 6, from Congress' failure to amend the FTCA to overturn Feres. The unlegislated desires of later Congresses with regard to one thread in the fabric of the FTCA could hardly [481 U.S. 681, 703] have any bearing upon the proper interpretation of the entire fabric of compromises that their predecessors enacted into law in 1946. And even if they could, intuiting those desires from congressional failure to act is an uncertain enterprise which takes as its starting point disregard of the checks and balances in the constitutional scheme of legislation designed to assure that not all desires of a majority of the Legislature find their way into law.

We have not been asked by respondent to overrule Feres, and so need not resolve whether considerations of stare decisis should induce us, despite the plain error of the case, to leave bad enough alone. As the majority acknowledges, however, "all of the cases decided by this Court under Feres have involved allegations of negligence on the part of members of the military." Ante, at 686. I would not extend Feres any further. I confess that the line between FTCA suits alleging military negligence and those alleging civilian negligence has nothing to recommend it except that it would limit our clearly wrong decision in Feres and confine the unfairness and irrationality that decision has bred. But that, I think, is justification enough.

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

[Footnote *] See, e. g., Sanchez v. United States, 813 F.2d 593, 595 (CA2 1987); Bozeman v. United States, 780 F.2d 198, 200 (CA2 1985); Hinkie v. United States, 715 F.2d 96, 97 (CA3 1983), cert. denied, 465 U.S. 1023 (1984); Mondelli v. United States, 711 F.2d 567, 569 (CA3 1983), cert. denied, 465 U.S. 1021 (1984); Scales v. United States, 685 F.2d 970, 974 (CA5 1982), cert. denied, 460 U.S. 1082 (1983); LaBash v. United States Dept. of Army, 668 F.2d 1153, 1156 (CA10), cert. denied, 456 U.S. 1008 (1982); Monaco v. United States, 661 F.2d 129, 132 (CA9 1981), cert. denied, 456 U.S. 989 (1982); Hunt v. United States, 204 U.S. App. D.C. 308, 317, 636 F.2d 580, 589 (1980); Veillette v. United States, 615 F.2d 505, 506 (CA9 1980); Parker v. United States, 611 F.2d 1007, 1011 (CA5 1980); Peluso v. United States, 474 F.2d 605, 606 (CA3), cert. denied, 414 U.S. 879 (1973); Bennett, The Feres Doctrine, Discipline, and the Weapons of War, 29 St. Louis U. L. J. 383 (1985); Hitch, The Federal Tort Claims Act and Military Personnel, 8 Rutgers L. Rev. 316 (1954); Rhodes, The Feres Doctrine After Twenty-Five Years, 18 A. F. L. Rev. 24 (Spring 1976); Note, 51 J. Air L. & Com. 1087 (1986); Note, 6 Cardozo L. Rev. 391 (1984); Note, 77 Mich. L. Rev. 1099 (1979); Note, 43 St. John's L. Rev. 455 (1969). [481 U.S. 681, 704]

Mr. COHEN. I thank the gentleman for his statement. Without objection, other Members' statements will be included in the record.

I am now pleased to introduce the witnesses for our first panel. The witness, singular, is Representative Maurice Hinchey. Congressman Hinchey represents New York's 22nd congressional district, which spans eight counties from the Hudson Valley to the Finger Lakes Region. A ninth-term Member of Congress, Mr. Hinchey is a Member of the House Appropriations Committee, the House of Natural Resources Committee, and the Bicameral Joint Economic Committee.

Prior to his election to Congress, Mr. Hinchey served 18 years at the New York State Assembly. He was the first Democrat elected to the state legislature from Ulster County since 1912, and only the second since the Civil War. Mr. Hinchey is the sponsor of H.R. 1478.

Thank you for participating at today's hearing, and although I am sure you know the procedure I will go over it with you for the benefit of the other witnesses. Without objection, your written statement and the others will be placed into the record, and we would ask that you limit your oral remarks to 5 minutes.

We have a lighting system, and at 4 minutes the yellow light comes on which says you have a minute left. You will have a green light on that starts, yellow says 1 minute left, then at the end of that minute a red light comes on, in which case your testimony should have concluded.

After each witness has presented his or her testimony, Subcommittees Members will be permitted to ask questions subject to the same 5-minute limit.

Mr. Hinchey will start his testimony, but his testimony will begin, at his request and with the agreement of the minority, with a testimony that Mr. Hinchey has through a short video. And before the video I recognize Mr. Hinchey to precede the video, which we have.

Mr. Hinchey, you are recognized.

TESTIMONY OF THE HONORABLE MAURICE D. HINCHEY, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF NEW YORK

Mr. HINCHEY. Chairman Cohen, I thank you very much, sir.

Also, Ranking Member Franks, I thank you very much.

And Chairman Conyers, Chairman of the Judiciary Committee, I very much appreciate you being here.

All of the other very distinguished Members of this Subcommittee, I thank you for the attention that you are giving to discuss the Carmelo Rodriguez Military Medical Accountability Act of 2009. The focus of this hearing is about equal protection under the law. The question before you is whether or not we, as Members of the Congress, believe that members of our Nation's military are deserving of the same rights as you and I and the rest of our country.

In our country, if you or a member of your family goes to a doctor or medical professional for treatment and that professional is negligent in their job, you have the legal right to hold that health care provider accountable, through the judicial system. For example, if you had a planned surgery to amputate your left leg and the doctor

involved was negligent, and that surgery removed your right leg, you would have a method of recourse. That recourse is available for all of our citizens, including those in Federal prison; but that is not the case for members of the military.

I thank you very much for the opportunity to display this video, and if we could see it now, I think it would be very interesting.

Mr. COHEN. Thank you——

Mr. HINCHEY. This is a story about one Marine who served his country with honor. One Marine, one family. What happened to them has happened before.

[Begin video clip.]

VOICE. You are looking at Carmelo Rodriguez dancing with his niece—by all accounts, this 29-year-old loved life, his family, and the Marine Corps. In August, a part-time actor—here he is with actress Katie Holmes in the scene from the TV series, "Dawson's Creek." And this is Sergeant Rodriguez with his Marine buddies in Iraq in 2005, a fit, gung-ho platoon leader.

VOICE. It is not fair.

VOICE. This was Sergeant Rodriguez when I met him: that once buff physique whittled down to less than 80 pounds in 18 months by stage four melanoma, surrounded by family, his 7-year-old son holding his hand. It was the sergeant's idea we meet.

When Sergeant Rodriguez was in Iraq, military doctors, he says, misdiagnosed his skin cancer. They called it a wart.

Eight minutes after I met Sergeant Carmelo Rodriguez, as we were preparing for an interview, he died. At his family's insistence we stayed. With his body in the next room, we sat down with his relatives.

Why—for such a painful moment for your family?

VOICE. His wish is to have this known, because he don't want no other soldier to fight for his country and go through what he had to go through, and be neglected.

VOICE. He said, "Don't let this just be it. Don't let this be it. Fight." So that is what we are doing.

VOICE. Their fight is over what is known as the *Feres* Doctrine, a 1950 Supreme Court ruling that bars active duty military personnel and their families from suing the Federal Government for injuries incidental to their service. In other words, unlike every other U.S. citizen, people in the military can not sue the Federal Government for medical malpractice.

You use the word "neglected." Explain.

VOICE. When he enlisted in 1997, his initial medical checkup, or, I mean, physical, the doctor documented that he had melanoma but never told him, or never had anybody follow up on it. And that was back in 1997. If we would have known that in 1997, he would still be with us.

VOICE. Here is that medical report. The doctor notes skin as "abnormal." In further details, he describes it as melanoma on the right buttocks. There is not recommendation for further treatment.

Eight years pass. Sergeant Rodriguez is in Iraq.

VOICE. It is a birthmark. It is about that big and about that—it has a raise—like that and pussing. Who does that? How does that happen? I just don't understand it. It is not right. It is not right.

Twenty-nine years old, you know, and all his life was good. Never into drugs; never into partying; never—served his country faithful; served the Lord faithfully. And he held out positive, because he is a soldier. He is a warrior. He is a Marine. He fought for his country and also for his family.

VOICE. According to a veterans group that tracks soldiers who are misdiagnosed, there are hundreds of cases across the country. Twenty-five-year-old Air Force Staff Sergeant Dean Patrick Witt was one of them. Witt's family says his appendicitis was repeatedly misdiagnosed. After emergency surgery, Witt ended up brain-dead. He later died.

Military law expert Eugene Fidell.

You talk to military families who believe they have a malpractice case against the military, and you tell them what?

Mr. FIDELL. It is very, very difficult when I get these calls. And I get these calls repeatedly over the course of the year; I probably get one every 2 months. These people have to be made to understand that the law simply doesn't permit them to bring a lawsuit. They can bring a lawsuit, but their lawsuit will be a complete waste of time.

VOICE. We showed Attorney Fidell a copy of Sergeant Rodriguez's medical records, military emails. Sergeant Rodriguez's commanding officer, Lieutenant Colonel B.W. Barnhill, quotes a military nurse who called Rodriguez's case, "a major screw-up. He should have been immediately seen and the wart removed, and we may not have gotten to where we are now."

VOICE. Well, he is in Iraq and the doctor says, "Have someone look at it when you get it back to the states in 5 months." If a member of my family had a comparable condition myself and somebody said, "I am sorry. No one can see you for 5 months," I would fire the doctor. He didn't have that option. No, he didn't. I hope Members of Congress are watching this show, because the law has got to change——

[End video clip.]

Mr. COHEN. You are recognized, Mr. Hinchey.

Mr. HINCHEY. Thank you very much, Chairman Cohen. I very much appreciate it.

As we have just seen and heard, in 1950, nearly 60 years ago, the U.S. Supreme Court ruled, in *Feres v. United States*, that military members and their families have no right or ability to sue the military for negligent medical care given to them during their service. The ruling, which has subsequently been referred to as the *Feres* Doctrine, has left families with no recourse for addressing the loss of a loved one due to obvious medical malpractice by military doctors or other medical personnel.

Sadly, the Rodriguez family is all too familiar with this situation. Sergeant Carmelo Rodriguez was a young, strong Marine. He was dedicated to his country and his family. He served admirably as a platoon leader in Iraq. After being repeatedly misdiagnosed by military doctors, Sergeant Rodriguez's cancer spread throughout his body and weakened him to the point that he went from being an athlete, strong at 190 pounds, to a man weighing less than 80 pounds.

He left behind a loving family, including a 7-year-old son. The death of Sergeant Rodriguez is an extraordinary tragedy that has left his family with nowhere to turn. As a result of a misguided law and subsequent U.S. Supreme Court ruling, the Rodriguez family and many other military families in similar situations have no way of holding the military responsible for the negligence of military medical personnel. And I might say that this kind of negligence is less likely to occur if that responsibility were put into place.

Joining the military should not mean that one has to give up his or her right to hold medical providers accountable. The Carmelo Rodriguez Military Medical Accountability Act of 2009 will finally bring accountability into the military medical system and afford our service members and their families the same rights that the rest of us have when it comes to medical malpractice.

This bill would legislatively reverse the *Feres* Doctrine; it would only apply to military personnel who were injured by medical negligence by military medical personnel. Importantly, this legislation prohibits any claim arising out of the combatant activities of the armed forces during times of armed conflict, which means military medical personnel working in combat would continue to be exempt.

In addition, this legislation would require the payment of any claims to be reduced by the value of other Federal benefits received as a result of the injury. In addition to providing the Rodriguez family and other military families with a way to hold the military accountable for the wrongful death and injuries of loved ones, this bill helps ensure that the military, like any other health care institution, takes steps to improve care so that no one else ever has to go through what the Rodriguez family has endured.

Sergeant Rodriguez's situation speaks directly to the fact that our military, including the military's health care system, has been spread far too thin by our ongoing military operations. Our military is facing shortfalls of doctors, nurses, and other health care staff across the board. It is incumbent upon the military to ensure that it has doctors who know how to diagnose non-combat injuries and disease, such as skin cancer, rather than just having doctors who are trained to treat combat wounds.

In the opinion of the Subcommittee, how could it be possible that of all Americans, members of all the military and their families are left no recourse in the face of such medical negligence? Unfortunately, the Rodriguez family is not in any way alone. In California, the wife and two small children of Staff Sergeant Dean Witt want to know why the military can't be held accountable when he died after routine appendicitis surgery.

Christine Lemp, whose husband, James, died after receiving questionable medical care for a stomach virus in Missouri deserves to know why there is no recourse to holding the military accountable for his death. Eight National Guardsmen and their families in the New York City area deserve answers in the face of the medical negligence that occurred after their exposure to depleted uranium.

This country and this Congress have affirmed their support for the men, women, and families of the United States military, and now this lasting injustice must be fixed. This bill isn't about members of the military being compensated fairly for medical negligence; it is about holding our military accountable for its actions

and for its responsibility to its members, thereby making them more accountable.

As a veteran and Member of Congress, I believe we must match the dedication and sacrifice of our soldiers with the adequate health care they deserve and a fair avenue of recourse in the case that they do not receive that health care which they do deserve. I am hopeful that this Subcommittee will agree and work with us to advance this important legislation, and I deeply express my gratitude and appreciation to you for the attention that you are paying to this issue.

I thank you very much, Mr. Chairman.

[The prepared statement of Mr. Hinchey follows:]

PREPARED STATEMENT OF THE HONORABLE MAURICE D. HINCHEY, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF NEW YORK

STATEMENT OF
CONGRESSMAN MAURICE HINCHEY

BEFORE THE
COMMITTEE ON THE JUDICIARY
SUBCOMMITTEE ON COMMERCIAL AND ADMINISTRATIVE LAW

H.R. 1478, THE "CARMELO RODRIGUEZ MILITARY MEDICAL ACCOUNTABILITY ACT OF 2009"

MARCH 24, 2009

Chairman Cohen, Ranking Member Franks and distinguished members of the Subcommittee, thank you for the opportunity to appear before you today to discuss the Carmelo Rodriguez Military Medical Accountability Act of 2009.

The focus of this hearing is about equal protection under the law. The question before you is whether or not we, as members of this Congress, believe that members of our nation's military are deserving of the same rights as you or I.

In our country, if you or a member of your family goes to a doctor or medical professional for treatment and that professional is negligent in their job, you have the legal right to hold that healthcare provider accountable through the judicial system. For example, if you had a planned surgery to amputate your left leg and the doctors involved were negligent in that surgery and removed your right leg, you would have a method of recourse. That recourse is available for all of our citizens, including those in federal prison. But that is not the case for members of the military.

In 1950, nearly 60 years ago, the U.S. Supreme Court ruled in Feres vs. United States that military members and their families have no right or ability to sue the military for negligent medical care given to them during their service. The ruling, which has subsequently been referred to as the Feres Doctrine, has left families with no recourse for addressing the loss of a loved one due to obvious medical malpractice by military doctors and other medical personnel.

Sadly, my constituent and his family are all too familiar with this situation.

Sgt. Carmelo Rodriguez was a young, strong Marine. He was dedicated to his country and family and served admirably as a platoon leader in Iraq. After being repeatedly misdiagnosed by military doctors, Sgt. Rodriguez's cancer spread throughout his body and weakened him to the point that he went from being an

athletic 190 pound man to weighing less than 80 pounds. He left behind a loving family, including a seven year old son.

The death of Sgt. Rodriguez is an extraordinary tragedy that has left his family with nowhere to turn. As the result of a misguided law and subsequent U.S. Supreme Court ruling, the Rodriguez family and many other military families in similar situations have no way of holding the military responsible for the negligence of military medical personnel.

Joining the military should not mean that one has to give up his or her right to hold medical providers accountable. The Carmelo Rodriguez Military Medical Accountability Act of 2009 will finally bring accountability into the military medical system and afford our service members and their families the same rights that the rest of us have when it comes to medical malpractice.

This bill would legislatively reverse the Feres Doctrine. It would only apply to military personnel who were injured by medical negligence by military medical personnel. Importantly, this legislation prohibits any claim arising out of the combatant activities of the Armed Forces during time of armed conflict, which means military medical personnel working in combat would be exempt. In addition, this legislation would require the payment of any claims to be reduced by the value of other federal benefits received as a result of the injury.

In addition to providing the Rodriguez family and other military families with a way to hold the military accountable for the wrongful death and injuries of loved ones, this bill helps ensure that the military, like any other healthcare institution, takes steps to improve care so that no one else ever has to go through what the Rodriguez's have endured.

Sgt. Rodriguez's situation speak directly to the fact that our military, including the military's health care system, has been spread far too thin by our ongoing military operations. Our military is facing shortfalls of doctors, nurses, and other health care staff across the board. It is incumbent upon the military to ensure that it has doctors who know how to diagnose non-combat injuries and diseases such as skin cancer rather than just having doctors who are trained to treat combat wounds.

In the opinion of the subcommittee, how could it be possible that of all Americans, members of the military and their families are left no recourse in the face of such medical negligence?

Unfortunately, the Rodriguez family is not alone.

In California, the wife and two small children of Staff Sergeant Dean Witt, want to know why the military can't be held accountable when he died after routine appendicitis surgery.

Christine Lemp, whose husband, James, died after receiving questionable medical care for a stomach virus in Missouri, deserves to know why there's no recourse to holding the military accountable.

Eight National Guardsman and their families from the New York City area deserve answers in the face of the medical negligence that occurred after their exposure to depleted uranium in Iraq.

This country and this Congress have affirmed their support for the men, women and families of the United States military. And now this lasting injustice must be fixed.

This bill isn't about members of the military being compensated fairly for medical negligence, it's about holding our military accountable for its actions and for its responsibility to its members.

As a veteran and member of Congress, I believe we must match the dedication and sacrifice of our soldiers with the adequate healthcare they deserve and a fair avenue of recourse in the case that they do not receive it.

I am hopeful that this Subcommittee will agree and work with me to advance this important legislation.

Thank you for this opportunity to present this testimony.

Mr. COHEN. Thank you, Mr. Hinchey. I appreciate your testimony and the video, which is compelling.

Let me ask you a question. You distinguish medical malpractice claims that might be based on injuries in combat. Why do you think that is an equitable portion of the law? Why should they be distinguished?

Mr. HINCHEY. Well, the situation in combat is very difficult and very dangerous, and the medical attention that has to be given there has to be immediate, and it has to be in ways that are designed to save the life of that person. And it is a very dramatic and very, very strong action that has to be taken on behalf of those who are injured or wounded, whatever the circumstances might be. So I don't think it is the same situation.

What we are talking about here is in the context of military personnel who become injured in the same way that anyone can become injured: some form of disease, some form of other circumstances that are going to impede upon their health and may impede upon that health so adversely that it is going to result in their death. So it is a very strong, different set of circumstances, neither of which are held accountable now.

What we are saying in this legislation is that there is one aspect of these situations where accountability must be ensured to make certain that people who have the kind of skin cancer that Mr. Rodriguez had, or the kind of appendicitis that other military personnel have had received proper and appropriate attention. It needs it quickly and it needs it responsibly, and it needs to be taken care of because it is a relatively easy thing to do. But if an injury is not—if it is not attended to quickly and responsibly—it can, as we have seen in these two instances and numerous other examples, how it can cause the death of the military personnel who are ignored as a result of these set of circumstances and this *Feres* Doctrine.

Mr. COHEN. So you believe that a medic operating in a combat environment, with weapons, rockets possibly coming in, weapons fire, et cetera, might have a different basis of making a decision than the luxury of his office—his or her office?

Mr. HINCHEY. Well, obviously the people who are in military circumstance and who are injured, who are wounded, who suffer in some way or another physically, need to get the proper attention and they need to get it quickly. But the circumstances there you are dealing with are very, very difficult, and very, very dangerous for the people who are wounded and for the people who are providing the medical care and attention.

So I think it is just a different set of circumstances that has to be dealt with in a different way; not as simply as this set of circumstances here, which involve the kind of simple medical problems and the resulting medical malpractice, which causes their increasingly serious injury, and in the cases that we have seen, eventually their death.

Mr. COHEN. What is your response to the argument about military discipline?

Mr. HINCHEY. Military discipline?

Mr. COHEN. Yes, sir.

Mr. HINCHEY. Military discipline, of course, is very important. Military discipline—if military discipline would occur in the proper way, then the discipline that you would expect from professional medical personnel would have been applied to the Rodriguez condition, and the medical malpractice that we see that resulted in his death would never have occurred. So that kind of responsibility is very, very important, and that is what we are trying to do, basically, in the context of this proposed legislation: make certain that people who are engaged in their objects of responsibility in the context of their military obligations, whatever they may be, including military health care responsibilities, deal with them in ways that are responsible, in the best possible way, to help and assist the military personnel, to ensure that they are getting the right kind of attention.

Mr. COHEN. Thank you, sir. I have no further questions.

Mr. Franks, do you have questions, or any Member of the panel have questions?

If there are no questions of——

Mr. King, I am sorry. Mr. King, from Iowa, is recognized.

Mr. KING. Thank you, Mr. Chairman.

I want to thank the Congressman Hinchey for his testimony, and it is obvious you have done a lot of work on this, and the very clear and concise way that you have delivered it tells me that. I just have a couple of questions that I am curious about, and that is, will service members under your bill, would they be able to recover non-economic damages?

Mr. HINCHEY. We are not talking about economic damages; we are talking about the responsibility of providing health care in the appropriate way, just the same way that civilians who receive incompetent heath care have the right, and in many cases simply the obligation, to ensure that these responsibilities are taken care of in the appropriate way.

Mr. KING. Let me phrase it another way. We commonly refer to those as punitive damages, and so non-economic is more a term we use inside this Committee, but what about punitive damages, and I am thinking of the lady with the $7 million cup of coffee spilled in her lap, but that is, of course, the extreme of the extreme.

Mr. HINCHEY. Would you say that again? I couldn't hear that.

Mr. KING. I am talking about punitive damages, and I would use that as a definition outside of the legal term we use here called non-economic, but the punishment that might be delivered out—one thing is to make a patient whole and recover their actual real loss and their loss of income, but it is another to send a message by granting a significant award to a claimant, and that is the non-economic component, or the punitive. Under your bill, would it allow for that kind of award too, that goes beyond the loss itself?

Mr. HINCHEY. Well, that would be up to the judicial process. It would be up to the court to make those kinds of decisions. What we are trying to do here is to say that the *Feres* Doctrine, which prevents military personnel from having the ability to go to court to get those kinds of decisions put into place based upon a clear, accurate analysis of the set of circumstances, that that *Feres* Doctrine is doing an awful lot of harm to military personnel. So that

kind of decision is going to be made by the courts through the judicial process.

We want to open the court and open that judicial process for these military personnel.

Mr. KING. I take that that there is not, then, a limiting provision in the bill at this point, that might limit it to actual losses rather than the punitive damages that go beyond that. That is a point of information I appreciate.

And then, as you have studied this and worked on this, have you been able to determine that the increase in the medical malpractice liability suits in the civilian world, have they served to increase the quality of medical care or has there been more accountability that is measurable and quantifiable?

Mr. HINCHEY. I think the responsibility for medical malpractice has done a significant amount of good work to upgrade the quality of health care in a variety of ways, including the likelihood that medical personnel—medical responsible people—who are not capable of delivering the right kind of health care will soon find that they would have to find something else to do. They wouldn't be doctors any longer. They wouldn't be other forms of health care personnel any longer. So I think that that is one of the things that is very important here: We want to have good, competent, highly-qualified personnel dealing with the normal set of circumstances to which military personnel might be involved with.

Mr. KING. Thank you. And then, Mr. Hinchey, I thank you. And to restate my question maybe more precisely would be: Is there quantifiable data out there with studies that have been done that would support the judgment that you have delivered to the Committee here, that would support the argument that we have higher quality health care, adequate access to health care, and more accountability because of the litigation on malpractice?

Mr. HINCHEY. Oh, I think that is very clear, yes. There is an awful lot of history of this situation, and I think that it is very clear in just a routine examination of that history, it is quite obvious that accountability upgrades quality.

Mr. KING. Let me offer an alternative scenario, and I don't have the data on either side, so this is our conversation here. And that is, I am thinking about what goes on in the mind of someone who wants to enter the medical profession, and let us say often it is two or three generations of doctors, and if they are seeing high—and this is the civilian world, not speaking of this case at all—but often, they will look at the cost of the medical malpractice insurance, the litigation that is there—many doctors are sued—and so, are there fewer doctors because of the litigation in the civilian world, and is that part of the studies that you might be able to produce for this Committee? And then, would that translate itself into fewer doctors in the military world as well? And I take your point about doctors that have skills within the area where they need to be; not just battlefield doctors, but doctors that can diagnose melanoma.

Mr. HINCHEY. I don't think there are fewer doctors, no. I think that that has not had an impact on the number of doctors that are available. I think it has an impact, however, on the quality of medical personnel. And I think it has an impact on the focus of atten-

tion of medical personnel, just as it does and should for any particular profession or any particular activity. Whatever we are doing——

Mr. KING. I think we are getting——

Mr. HINCHEY. Whatever we are doing, we should be doing it as well as we can.

Mr. KING. I see that we have bypassed the yellow light and gone to the red one appropriately, and I would thank the gentleman and yield back the balance of my time.

Mr. COHEN. Thank you, sir. Are there other Members who would like to ask the representative a question?

If not, I thank Mr. Hinchey for his testimony, and he may be excused.

Mr. HINCHEY. Chairman Cohen, I thank you.

Mr. COHEN. And I thank you for your service to our country in the military as well as here in Congress.

Will the second panel now be seated?

Our first witness is Stephen Saltzburg, who is testifying on behalf of the American Bar Association. Professor Saltzburg joined the George Washington School of Law in 1990. Before that he taught at the University of Virginia School of Law and was named the first incumbent of the class of 1962 endowed chair. In 1996, Professor Saltzburg founded and directed the master's program of litigation and dispute resolution at George Washington Law School.

In 2004 he was named University Professor, the highest title a university can confer upon a faculty member. Professor Saltzburg has served as a special master in two class action cases in the D.C. District Court and continues to serve as the mediator for the D.C. Court of Appeals.

He has mediated on a variety of disputes involving public agencies and private litigants, served as a special sole arbitrator, panel chair, and panel member of domestic arbitrations, and served as an arbitrator for the International Chamber of Commerce. Professor Saltzburg is the author of numerous books and articles on evidence, procedure, and litigation.

I now recognize Mr. Saltzburg for his testimony.

Turn yourself on.

TESTIMONY OF STEPHEN A. SALTZBURG, PROFESSOR, THE GEORGE WASHINGTON UNIVERSITY LAW SCHOOL, WASHINGTON, DC

Mr. SALTZBURG. Sorry. Mr. Chairman, Ranking Member Franks, Members of the Committee, it is an honor for me to be here today, and it is a special honor to be part of this panel. Gene Fidell and I have served together for many years on the National Institute of Military Justice, which we founded in 1991. To be with the sister of Carmelo Rodriguez is a particular honor, and General Altenburg is someone I have admired for many years.

You have my written statement, and I don't intend to read any portion of it. I would much rather answer questions if you have them. But there are a few points I did want to make, and they are these: that the American Bar Association has long urged Congress to amend *Feres*, starting with medical malpractice. And if Congress doesn't do it, it will never change, because as the Subcommittee I

am sure is aware, the basic Supreme Court approach to statutes is, once it interprets a statute, if it gets it wrong it expects Congress to say so and to amend the statute.

Unlike a constitutional ruling, where Congress can't change it except by proposing a constitutional amendment, the Court will often reverse itself in the nonconstitutional case. This won't happen with *Feres*, and that is why we have had this doctrine for going on—almost 60 years. Now, a question was asked during the first panel, what about the effect on military discipline? And there are reasons why, I think, people could debate—reasonable people—could debate the ABA broader proposal that would say, "Let us do away with *Feres* completely and apply the Federal Tort Claims Act exception, and just use the exceptions and just get rid of this doctrine."

But when it comes to medical malpractice cases, no one seriously makes an argument that military discipline is somehow going to be adversely affected if *Feres* is modified by the Congress so that military members can bring the same kind of malpractice claims as ordinary civilians can. The kinds of military treatment and military interventions that are the subject of the bill simply are far removed from battlefield decisions, command decisions, the kind of decisions that General Altenburg was called upon to make throughout his career.

There are questions about—Justice Scalia raised these—there are questions about whether or not it is a good thing to have state laws, which get incorporated in the Federal Tort Claims Act, providing different standards for military members. But as Justice Scalia said, it is a lot better to have non-uniform relief that is available than to have relief uniformly unavailable.

I think that, as the film that we all saw just a little while ago points out, that there is a crying need for military members simply to be able to be compensated when their health or their life is taken, ruined, as a result of medical malpractice. The American Bar Association House of Delegates supported a broader resolution, but has long supported the reform of *Feres* to deal with medical malpractice.

If the Subcommittee has any questions, I would be more than pleased to answer them.

[The prepared statement of Mr. Saltzburg follows:]

PREPARED STATEMENT OF STEPHEN A. SALTZBURG

STATEMENT OF

STEPHEN A. SALTZBURG, MEMBER

HOUSE OF DELEGATES

Presented on behalf of the

AMERICAN BAR ASSOCIATION

Before the

SUBCOMMITTEE ON COMMERCIAL AND ADMINISTRATIVE LAW

COMMITTEE ON JUDICIARY

of the

U.S. HOUSE OF REPRESENTATIVES

Concerning

H.R. 1478 the "Carmelo Rodriguez Military Medical Accountability Act of 2009"

March 24, 2009

Chairman Cohen, Ranking Member Franks, and Members of the Subcommittee:

Introduction

My name is Stephen Saltzburg and I am a member of the House of Delegates of the American Bar Association (ABA). I am also Co-Chair of the Military Justice Committee of the Criminal Justice Section. I am appearing on behalf of the ABA, at the request of its President, H. Thomas Wells, Jr., in order to support enactment of H.R. 1478, the "Carmelo Rodriguez Military Medical Accountability Act of 2009." I am also here to present the ABA's views concerning the *Feres* doctrine (a judicially created doctrine announced in *Feres v. United States*, 340 U.S. 135 (1950)) and to provide you with the reasons why that doctrine does a great disservice to the men and women who wear the uniform of the United States. As I shall explain, the ABA has urged Congress to take a look at the *Feres* doctrine in its entirety, but the thrust of my remarks will focus on medical malpractice claims which are the subject of the proposed legislation.

The American Bar Association 1987 Resolution and Report

The *Feres* doctrine is not new to the Congress nor to the ABA. At its August 1987 annual meeting, the ABA adopted a resolution supporting a modest amendment to the doctrine. That resolution read as follows:

> RESOLVED, That the American Bar Association supports H.R. 1054 (99th Congress) or similar legislation which would partially overturn the doctrine enunciated in *Feres v. United States* and allow members of the armed services to sue the United States for damages under the Tort Claims Act for non-combat related injuries caused by negligent medical or dental treatment.

As the report (1987 report) considered by the ABA House of Delegates (HOD) when it adopted the 1987 resolution [1] noted, Justice Scalia explained persuasively in his

[1] The reports considered by the ABA House of Delegates do not constitute ABA policy. Only the resolution adopted by the HOD constitutes ABA policy. Nevertheless those background reports often explain the reasons for the policy that was adopted by the HOD.

dissenting opinion in *United States v. Johnson*, 481 U.S. 681, 692-699 (1987), joined by Justices Brennan, Marshall and Stevens, that none of the rationales withstand even modest, let alone careful, scrutiny. The four dissenters argued that *Feres* was a "clearly wrong decision," and noted the "unfairness and irrationality that decision has bred."[2]

***United States v. Johnson* Dissent**

Justice Scalia outlined the three reasons given for the holding in *Feres*, as well as a subsequently developed rationale and concluded that none had merit. Any analysis of the rationales for *Feres* must be analyzed in light of the words of the Federal Tort Claims Act (FTCA), which renders the Government liable

> for money damages . . . for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.[3]

The first rationale is that "parallel private liability" does not exist. The Act states that the United States is liable under the FTCA "in the same manner and to the same extent as a private individual under like circumstances."[4] Since private individuals cannot raise armies, the argument is there can be no liability for the government. Justice Scalia pointed out, however, that civilians can sue under FTCA for tortious acts of the military; it is only military members who are barred. Justice Scalia also pointed out that such reasoning would make many of the Act's exceptions superfluous, since there are many things that private individuals cannot do -- for

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[2]United States v. Johnson, 481 U.S. 681, 703 (1987).

[3]28 U.S.C. § 1346(b); *Johnson*, 481 U.S. at 692.

[4]28 U.S.C. 2674.

example, regulate the monetary system.[5] Not content with simply demonstrating the inadequacy of the rationale, Justice Scalia added a controlling point: i.e., the Court has itself subsequently rejected this rationale.[6]

The second rationale is that Congress "could not have intended that local tort law govern the 'distinctively federal' relationship between the government and enlisted personnel."[7] Justice Scalia called this an "absurd" justification, and reasoned that "nonuniform recovery cannot possibly be worse than (what *Feres* provides) uniform nonrecovery."[8] He added that the Court, while not outright rejecting this rationale, has found it "no longer controlling."[9]

The reality is that state law already intrudes upon the relationship between the Government and its armed forces when civilians (including family members who are dependents of military personnel) sue under the Federal Tort Claims Act for injuries inflicted by military employees and service members. State law (which obviously can vary from state to state) governs civilians' ability to recover under the Act by providing both the substantive tort law to establish the United States' liability for its employees' actions and the measure of damages.

The third rationale – that "Congress could not have intended to make FTCA suits available to servicemen who have already received veterans benefits to compensate for injuries suffered incident to service"[10] has also been found "no longer controlling."[11] Justice Scalia noted that the "credibility of this rationale is undermined severely by the fact that, both before and after *Feres*, we permitted

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[5]28 U.S.C. 2680 (i); *Johnson*, 481 U.S. at 694.

[6]*Johnson*, 481 U.S. at 694-5, *citing* Rayonier, Inc. v. United States, 352 U. S. 315, 319 (1957); Indian Towing Co. v. United States, 350 U. S. 61, 66-69 (1955).

[7]*Johnson*, 481 U.S. at 694.

[8]*Johnson*, 481 U.S. at 695-6.

[9]*Johnson*, 481 U.S. at 695, *citing* United States v. Shearer, 473 U. S. 52, 58, n. 4 (1985).

[10]*Johnson*, 481 U.S. at 694.

[11]*Johnson*, 481 U.S. at 697, *citing* United States v. Shearer, 473 U. S. 52, 58, n. 4 (1985).

injured servicemen to bring FTCA suits, even though they had been compensated under the VBA."[12] Justice Scalia ended his discussion by noting that the "foregoing three rationales -- the only ones actually relied upon in *Feres* -- are so frail that it is hardly surprising that we have repeatedly cited the later-conceived-of 'military discipline' rationale as the 'best' explanation for that decision."[13]

Justice Scalia also rejects the more recent military discipline argument for *Feres*. Although he acknowledges the "possibility that some suits brought by servicemen will adversely affect military discipline,"[14] he looks to the clear language of the statute and suggests:

> It is strange that Congress' "obvious" intention to preclude *Feres* suits because of their effect on military discipline was discerned neither by the *Feres* Court nor by the Congress that enacted the FTCA (which felt it necessary expressly to exclude recovery for combat injuries). Perhaps Congress recognized that the likely effect of *Feres* suits upon military discipline is not as clear as we have assumed, but in fact has long been disputed. * * * Or perhaps Congress assumed that the FTCA's explicit exclusions would bar those suits most threatening to military discipline, such as claims based upon combat command decisions, 28 U.S.C. § 2680(j); claims based upon performance of "discretionary" functions, § 2680(a); claims arising in foreign countries, § 2680(k); intentional torts, § 2680(h); and claims based upon the execution of a statute or regulation, § 2680(a). Or perhaps Congress assumed that, since liability under the FTCA is imposed upon the Government, and not upon individual employees, military decisionmaking was unlikely to be affected greatly. Or perhaps -- most fascinating of all to contemplate --

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[12] *Johnson*, 481 U.S. at 695, *citing* Brooks v. United States, 337 U. S. 49 (1949) and United States v. Brown, 348 U.S. 110 (1954).

[13] *Johnson*, 481 U.S. at 698.

[14] *Johnson*, 481 U.S. at 699.

Congress thought that barring recovery by servicemen might adversely affect military discipline.[15]

Pre-*Johnson* Criticisms

The 1987 report noted that before Justice Scalia criticized the *Feres* doctrine other courts and commentators had assailed it. See *Labash v. United States Dept. of Army*, 668 F.2d 1153, 1156 (10th Cir. 1982) (citing cases); *Monaco v. United States*, 661 F.2d 129, 134 (9th Cir. 1981), cert. denied, U.S. 456, U.S. 989 (1982); *Broudy v. United States*, 661 F.2d 125, 127-128 (9th Cir. 1981) (citing cases); *Hunt v. United States*, 636 F.2d 580, 589 (D.C. Cir. 1980); See generally *Note, From Feres to Stencel: Should Military Personnel Have Access to FTCA Recovery*? 77 Mich. L.Rev.1099, 1100 n.7 (1979).

The Focus on Medical Malpractice Cases

The reach of the 1987 resolution was limited. Its focus was on medical malpractice because the ABA was supportive of then-proposed H.R. 1054 which would have amended or modified the *Feres* doctrine as it applies to medical malpractice cases.

The 1987 report concluded that "[t]he distinction in the rights of members of the armed services treated in a civilian institution by civilian personnel and those treated in a government hospital by government or civilian employees of the government, cannot be justified on any of the three grounds given for the doctrine." The report offered five reasons why this is so.

"First, the government no-fault compensation scheme does not provide a quid pro quo for the right to sue. Members of the armed forces who suffer medical malpractice, when treated in a civilian hospital for injuries incurred in the line of duty, are still eligible for benefits under the government no-fault compensation scheme. 38 USC, §331.

"Second, honorably discharged service personnel may bring an action for malpractice against the government where the malpractice occurs in a government facility in the course of treatment of a previous service-connected injury. H.R. 1054 would merely put active duty military personnel on a footing with non-active duty

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[15] *Johnson*, 481 U.S. at 699-700.

personnel who suffer medical malpractice in a government hospital. U.S. v. Brown, 348 U.S. 110 (1954).

"Third, civilian physicians employed by the government generally carry or can be required to carry, medical malpractice coverage; so that the grant of immunity only favors an insurance carrier at the expense of service personnel.

"Fourth, a bar to damage actions insulates the military from investigation and accountability for negligent and incompetent medical care and undermines confidence in the quality of health care provided non-combat military service personnel.

"Fifth, the grant of immunity to the government will encourage armed forces members, where feasible, to seek treatment in private institutions."

American Bar Association 2008 Resolution and Report

Although the 1987 report is now more than twenty years old, the arguments it made remain sound. At its August 2008 annual meeting the House of Delegates approved a resolution that attacked the *Feres* doctrine more broadly than the 1987 resolution. The 2008 resolution reads as follows:

> RESOLVED, That the American Bar Association urges Congress to examine the "incident to service" exception to the Federal Tort Claims Act (FTCA) created by the Supreme Court in *Feres v. United States*, 340 U.S. 135 (1950), provide that only the exceptions specifically provided in the Act limit active duty military members' access to the courts when they are victims of tortious government conduct, and amend the Act to provide that the exception limiting access for conduct that occurs in combatant activities applies "during time of armed conflict" rather than "during time of war."

The 2008 resolution has two main goals: (1) most importantly to urge Congress to specifically provide that only exceptions found in the FTCA limit the right of service members to sue and to reject the overbroad "incident to service" exception created by the Supreme Court; and (2) to make clear that the exception for conduct that occurs during military action extends to all "armed conflict" and not only "wars." The resolution was balanced in the sense that it urged Congress to examine

the cases in which service members are denied the right to sue without good reason and to clarify in the FTCA that the Supreme Court went too far in *Feres* while simultaneously recognizing the importance of barring suits for decisions made as part of combatant activities.

As was true in 1987, the report (2008 report) considered by the HOD when it adopted the 2008 resolution does not constitute ABA policy as only the 2008 resolution constitutes policy. But, the 2008 report makes a strong case for congressional action. Despite the fact that the 2008 resolution is broader than the 1987 resolution and reaches beyond medical malpractice claims, every argument made in support of the resolution certainly applies to medical malpractice claims.

As one who had a hand in moving the 2008 resolution forward, I feel free to and do borrow heavily in this testimony from the 2008 report including supporting footnotes:

Background of *Feres*

The 2008 report began with a description of how the *Feres* doctrine came into being:

> For more than a half-century, active duty members of the armed forces have been the only class of persons denied the benefits of the waiver of sovereign immunity contained in the Federal Tort Claims Act (FTCA), under which Congress endeavored to make the United States liable in tort for the negligence of its employees. This special military exclusion was not part of the statutory language adopted by Congress (other than for combatant activities in time of war), but was the result of a decision of the Supreme Court,[16] that held that members of the armed forces harmed incident to military service (*i.e.*, on active duty) may not recover damages under this Act. This decision has often been challenged but never overruled. The Court's ruling, known ever since as the "Feres Doctrine," has resulted in a form of "lawful discrimination" that has resulted in active duty service members being treated differently than all other persons. If there ever was justification for

[16] Feres v. United States, 340 U.S. 135, 138 (1950).

denying service personnel the benefits of this statute, there appear now to be overwhelming reasons to reexamine the issue and to once again include those who defend our freedoms on the field of battle among those who may recover for injuries incurred, at least for injuries unrelated to combatant or combatant related activities or otherwise excluded from coverage under the Act, such as claims that raise the discretionary function exception.

The Cox Commission

The 2008 report relied upon the work done in 2001 by the Commission on the Fiftieth Anniversary of the Uniform Code of Military Justice (UCMJ), commonly known as the "Cox Commission," after its Chair, Senior Judge Walter T. Cox, III, former Chief Judge of the Court of Appeals for the Armed Forces. The Commission was established by the National Institute of Military Justice which I have served since 1991 as General Counsel. The Cox Commission had not intended to examine *Feres* but ultimately found that the operation of the "Feres Doctrine" was so detrimental and unfair that it warranted its comment and its recommendation. The Cox Commission's recommendation reads 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.[17]

Kevin J. Barry's Law Review Article

The 2008 report also relied upon two law review articles which post-dated the Cox Commission. The first was a 2002 law review article[18] commenting on the recommendations of the Cox Commission. I quote from the article with the original footnotes set forth but renumbered:

> In 1950, the Supreme Court decided the case of *Feres v. United States*,[19] and this case and its progeny have wrought untold injustice in the half-century since. The case interpreted the Federal Tort Claims Act (FTCA),[20] under which the United States has waived sovereign immunity, and accepted liability for the tortious conduct of U.S. government employees. The Court determined that a member of the military is barred from collecting damages for injuries under the FTCA whenever those injuries are "incident to the [member's] service."[21] The problem is that virtually *everything* a military member does, unless perhaps she is absent without leave or engaging in substantial misconduct, is incident to military service.

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[17] *See* Honorable Walter T. Cox III et al., *Report of the Commission on the 50th Anniversary of the Uniform Code of Military Justice* § IV.C. (May 2001), *available at* http://www.badc.org/html/militarylaw_cox.html.

[18] Kevin J. Barry, *A Face-Lift (and Much More) for an Aging Beauty: The Cox Commission Recommendations to Rejuvenate the Uniform Code of Military Justice*, 2002 L. Rev. M.S.U.-D.C.L. 57, 119-21. The author of this article is a member of the Military Law Committee of the Bar Association of the District of Columbia.

[19] 340 U.S. 135 (1950).

[20] 28 U.S.C. §§ 1346(b), 2671-2680 (1994 & Supp. V 1999).

[21] Feres v. United States, 340 U.S. 135, 138 (1950).

> The FTCA itself contains no such limitation. The Act bars only liability on any claim arising out of the combatant activities of the military during time of war.[22] Nonetheless, the Supreme Court, in *Feres*, held that the family of a servicemember who died in a barracks fire which resulted from the government's clear negligence was barred from any recovery under the Act.[23] The ruling has since been applied to virtually all claims for damages by a military member, including injuries that had virtually no relationship to any military duty. For example, military prisoners who suffer cruel and unusual punishment in a confinement facility cannot recover damages, although civilian prisoners under identical circumstances can do so.[24]
>
> The reasons articulated to deny military members damages under circumstances that have little relationship to any military duty include concern that such claims would affect the military senior-subordinate relationship and thus interfere with discipline, that there are adequate statutory compensation schemes for military personnel who are injured or disabled, and that it is inappropriate for military members to be subjected to a multitude of state tort law schemes, which would give different results, depending on the location of the tort. If such arguments ever had strong merit, they clearly seem not to today.

Major Deidree G. Brou's Law Review Article

The second law review article was written by Major Deirdree G. Brou in 2007 and is the most recent criticism of *Feres*. It builds upon the arguments made by Justice Scalia in the *Johnson* case. I quote from the article with the original footnotes set forth but renumbered:

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[22]*See* 28 U.S.C. § 2680(j).

[23]*See Feres*, 340 U.S. at 146.

[24]*See, e.g.*, United States v. Sanchez, 53 M.J. 393, 398 (C.A.A.F. 2000) (citing Marrie v. Nickels, 70 F. Supp. 2d 1252 (D. Kan. 1999)).

The U.S. Supreme Court, in *Feres v. United States*,[25] established the *Feres* doctrine to protect the Government from tort liability derived from military decisions . . . or the individual acts of [members of the armed forces] involved in [executing military decisions]. The Court has often concluded that this function of the *Feres* doctrine--preserving military decision-making and discipline--is necessary for the effective and efficient functioning of the U.S. military.[26] Military decision-making entails balancing, among other things, the demands of the mission with the safety of the individual service member and the safety of the unit.[27] Arguably, military leaders at all levels cannot afford to cloud their decisions with issues of potential governmental or personal tort liability. The Court averred that military leaders must be free to make policies and decisions without the fear that they will face judicial scrutiny in civil court.[28]

The *Feres* doctrine, however, is too broad in scope and goes

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[25]340 U.S. 135 (1950).

[26]*See* United States v. Johnson, 481 U.S. 681, 691 (1987) ("[A] suit based upon service-related activity necessarily implicates the military judgments and decisions that are inextricably intertwined with the conduct of the military mission."); United States v. Stanley, 483 U.S. 669, 682-83 (1987) ("A test for liability that depends on the extent to which particular suits would call into question military discipline and decisionmaking [sic.] would itself require judicial inquiry into, and hence intrusion upon, military matters."); United States v. Shearer, 473 U.S. 52, 57 (1985) ("[T]he situs of the murder is not nearly as important as whether the suit requires the civilian court to second-guess military decisions, ... and whether the suit might impair essential military discipline ....").

[27]When small unit leaders receive missions, they must develop tentative mission plans based on the following factors: mission, enemy, terrain and weather, time available, troops available, and civilian activity in the mission area. *See* U.S. DEP'T OF ARMY, FIELD MANUAL 4-01.45, TACTICAL CONVOY OPERATIONS ch. 1 (24 Mar. 2005) [hereinafter FM 4-01.45] (describing the convoy troop leading procedures small unit leaders must use to plan and execute a mission).

[28]*See Johnson*, 481 U.S. at 691 ("Suits brought by service members against the Government for service related injuries could undermine the commitment essential to effective service and thus have the potential to disrupt military discipline in the broadest sense of the word."); *Stanley*, 483 U.S. at 682-83 ("A test for liability that depends on the extent to which particular suits would call into question military discipline and decisionmaking [sic.] would itself require judicial inquiry into, and hence intrusion upon, military matters.").

beyond protecting military decision making and discipline. The *Feres* doctrine extends protection to all government personnel who, while acting within the scope of their employment, negligently harm or kill a service member. It goes beyond protecting the leader who decides to put a Soldier on point during a combat patrol or who plans a training exercise that harms a service member. It also protects the military surgeon who negligently leaves a towel in a service member's abdomen after surgery;[29] the civilian government employee who negligently operates a military morale, recreation, and welfare program;[30] the civilian mechanic at the Post Exchange garage who negligently repairs a service member's car;[31] and the government driver who, while negligently operating a government vehicle, kills a service member.[32]

When it promulgated the "incident to service" test in 1949, the U.S. Supreme Court had several tools at hand, in the form of the Federal Tort Claims Act's enumerated exceptions,[33] to prevent courts

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[29]*See* Jefferson v. United States, 178 F.2d 518, 519 (4th Cir. 1949), *aff'd sub nom.*, Feres v. United States, 340 U.S. 135 (1950) (barring a Soldier's suit against the Government for negligently performed surgery).

[30]*See* Costo v. United States, 248 F.3d 863 (9th Cir. 2001) (barring suit for the wrongful death of a Sailor during a negligently-operated Navy Morale, Welfare, and Recreation (MWR) program's rafting trip); Bon v. United States, 802 F.2d 1092 (9th Cir. 1986) (barring a Sailor's suit for injuries sustained while canoeing at a Navy MWR program's marina).

[31]*See* Sanchez v. United States, 878 F.2d 633 (2d Cir. 1989) (barring a Marine's suit for damages arising out of a vehicle accident caused by the Base Exchange garage's negligent repair of his car).

[32]*See* Richards v. United States, 176 F.3d 652 (3d Cir. 1999) (barring suit for the wrongful death of a Soldier in an accident with a negligently-operated government vehicle).

[33]*See* 28 U.S.C. § 2680 (2000).
The provisions of this chapter [28 U.S.C. §§ 2671-2680] and section 1346(b) of this title [28 U.S.C. § 1346(b)] shall not apply to--
(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.
(b) Any claim arising out of the loss, miscarriage, or negligent transmission of letters or postal matter.
(c) Any claim arising in respect of the assessment or collection of any tax or customs duty, or the detention of any goods, merchandise, or other property by any officer of customs or excise or any other law enforcement officer, except that the provisions of this chapter and section 1346(b) of this title apply to any

from intruding upon military decision making and discipline. Rather than creating the "incident to service" exception, the Court should have applied the Act's existing enumerated exceptions to ensure that it protected military discipline and decision making and also preserved service members' rights under the Federal Tort Claims Act. This article analyzes the nature of the Court's decisions in *Brooks v. United States*[34] and *Feres v. United States*[35] and concludes that the promulgation of the *Feres* doctrine was an act of judicial legislation that violated the principles of separation of powers. This article also addresses the need

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claim based on injury or loss of goods, merchandise, or other property, while in the possession of any officer of customs or excise or any other law enforcement officer, if--
(1) the property was seized for the purpose of forfeiture under any provision of Federal law providing for the forfeiture of property other than as a sentence imposed upon conviction of a criminal offense;
(2) the interest of the claimant was not forfeited;
(3) the interest of the claimant was not remitted or mitigated (if the property was subject to forfeiture); and
(4) the claimant was not convicted of a crime for which the interest of the claimant in the property was subject to forfeiture under a Federal criminal forfeiture law[.]
(d) Any claim for which a remedy is provided by sections 741-752, 781-790 of Title 46, relating to claims or suits in admiralty against the United States.
(e) Any claim arising out of an act or omission of any employee of the Government in administering the provisions of sections 1-31 of Title 50, Appendix.
(f) Any claim for damages caused by the imposition or establishment of a quarantine by the United States.
....
(h) Any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights: Provided, That, with regard to acts or omissions of investigative or law enforcement officers of the United States Government, the provisions of this chapter and section 1346(b) of this title shall apply to any claim arising, on or after the date of the enactment of this proviso [enacted March 16, 1974], out of assault, battery, false imprisonment, false arrest, abuse of process, or malicious prosecution. For the purpose of this subsection, "investigative or law enforcement officer" means any officer of the United States who is empowered by law to execute searches, to seize evidence, or to make arrests for violations of Federal law.
(i) Any claim for damages caused by the fiscal operations of the Treasury or by the regulation of the monetary system.
(j) Any claim arising out of the combatant activities of the military or naval forces, or the Coast Guard, during time of war.
(k) Any claim arising in a foreign country.
(l) Any claim arising from the activities of the Tennessee Valley Authority.
(m) Any claim arising from the activities of the Panama Canal Company.
(n) Any claim arising from the activities of a Federal land bank, a Federal intermediate credit bank, or a bank for co-operatives.
Id.

[34]337 U.S. 49 (1949).

[35]340 U.S. 135 (1950).

> to critically look at the *Feres* doctrine and determine whether the Federal Tort Claims Act itself and its thirteen enumerated exceptions shield the Government from liability for most military leaders' decisions.[36]

Major Brou proposed to substitute the exceptions set forth in the FTCA, in place of the "incident to service" rule of *Feres,* and this is the approach that the ABA House of Delegates approved. The doctrine of *stare decisis* makes it unlikely that after all this time courts will overrule the doctrine on its own. That is why legislation is needed.

Although the 2008 ABA resolution and the two law review articles all support a comprehensive review of *Feres*, the need to deal with medical malpractice claims has been apparent for many years, as the next section of this testimony demonstrates.

Past Congressional Efforts at Reform

Major Brou's article is a reminder that Congress has in the past considered remedial legislation, which once came close to passing.

> Throughout the 1980s, Congress attempted several times to pass bills permitting service members to sue under the Federal Tort Claims Act for medical malpractice. *See* 134 CONG. REC. S929, 929 (Feb. 18, 1988) (statement of Sen. Sasser); 134 CONG. REC. H354, 356 (Feb. 17, 1988) (statement of Rep. Frank). One of the bills passed the House with a vote of 317-90; however, it failed to make it out of the Senate. *See* 134 CONG. REC. H354, 356 (Feb. 17, 1988) (statement of Rep. Frank). The bill never made it "out of the [Senate] Judiciary Committee because of the strong opposition of Senator Strom Thurmond, Republican of South Carolina, the committee's chairman." Linda Greenhouse, *Washington Talk; On Allowing Soldiers to Sue*, N.Y. TIMES, Dec. 16, 1986,

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[36]Brou, *supra* note 11, at 3-6.

http://query.nytimes.com/gst/fullpage.html?sechealth&res=9A0DE3DB123EF935A25751C1A960948260.[37]

Congress again considered legislation to ameliorate the egregious effects of the doctrine in medical malpractice cases in 2001. H.R. 2684 was introduced in the 107th Congress to provide that the doctrine would not apply to claims of members of the armed forces for damages as a result of medical or dental care provided in a "fixed medical treatment facility" operated by the Secretary of Defense, or in a "fixed medical facility" operated by the United States. That bill would have permitted active duty military members to bring the same types of claims under the FTCA that retired members of the military and of dependents of both retired and active members of the military can now bring.

On May 20, 2008, Representative Maurice D. Hinchey (D-NY) introduced H.R. 6093, the "Carmelo Rodriguez Military Medical Accountability Act of 2008." This bill would have amended the FTCA to allow claims for damages to be brought against the United States for personal injury or death of a member of the Armed Forces arising out of a negligent or wrongful act or omission in the performance of medical, dental, or related health care functions that: (1) takes place other than in the context of combat; and (2) is provided by persons acting within the scope of their office or employment by or at the direction of the Armed Forces, whether inside or outside the United States. The bill provided for a reduction of claims by the present value of other benefits attributable to such death or injury received by the member and by that member's estate, survivors, and beneficiaries pursuant to other federal law.[38] H. R. 6093 died at the end of the last Congress and was introduced in this Congress by Representative Hinchey as H.R. 1478. H.R 1478 adds a new section that

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[37] Brou, *supra* note 11, at 39, note 272.

[38] Carmelo Rodriguez was a service member whose death in 1997 resulted directly from gross negligence in failing to order treatment when his melanoma was first diagnosed in 1997, and later in either misdiagnosing his condition or again failing to order treatment, and instead telling the member to have it looked at on his return from Iraq to the United States five months hence (in 2005). The case has been widely reported in the press. *See, e.g.*, http://cbs2chicago.com/national/Carmelo.Rodriguez.marine.2.643002.html.

provides that claims shall not be reduced by the amount of any benefit received under the Servicemembers Group Life Insurance and that the legislation shall not apply to any claim arising out of the combatant activities of the Armed Forces during time of armed conflict.

The Current Position of the American Bar Association

The current position of the ABA is that at a minimum legislation such as H.R. 1478 should be enacted in order to repeal the *Feres* doctrine as it applies to military medical malpractice cases.

In adopting its 2008 resolution, the ABA House of Delegates was fully aware of the argument that repeal of *Feres* would endanger the chain of command by allowing service members to, in effect, sue their commanders. The House of Delegates ultimately was persuaded by the resolution's sponsors that the current exceptions in the FTCA provide ample protection to any actions which challenge discretionary command decisions or any tortious acts resulting therefrom, or acts that arise out of combatant activities. Moreover, as noted above, in recognition of the fact that most combatant activities arise in armed conflicts other than declared wars, we recommended, and the House of Delegates approved, a call to modify the "combatant activities . . .during time of war" exception to apply to any combatant activities occurring in any armed conflict.

It is especially difficult to see how repealing *Feres* in medical malpractice cases could have any negative impact on the chain of command. Dealing now with medical malpractice cases would not prevent Congress from taking a more comprehensive view of *Feres* at a later time.

Those of us who sponsored the 2008 ABA resolution were aware that there are no hard data available to enable an accurate prediction as to the cost of such a change in the law. There is a strong argument that any increased costs pale in significance to the costs of maintaining the armed forces and conducting combat operations, and to the gains to be made by remedial legislation. But, Congress certainly could conduct a cost-benefit analysis in the course adopting legislation.

The sponsors of the 2008 ABA resolution ended their report with this call to action: "It is time for the current separate and unequal status and treatment of military

personnel to be acknowledged as unnecessary, unwarranted, and patently unfair and unjust. The sponsors urge that Congress enact statutory changes to resolve such inequities by restoring the original intent of the FTCA, and requiring the application of the exceptions in the FTCA rather than the 'incident to service' rule of *Feres*." This call to action reiterates calls for reform of medical malpractice claims that have been made for decades. The time to act is now.

Thank you for the opportunity to appear before you today to present the views of the ABA. I would be happy to answer any questions you may have.

Mr. COHEN. Thank you, Mr. Saltzburg. We probably will have questions, but we will do that after we complete the panel testimony.

Our second witness is Ivette Rodriguez. Ms. Rodriguez is a stay-at-home mother from Wurtsboro, New York. Her brother, Sergeant Carmelo Rodriguez, was a decorated Marine and platoon leader who died of a misdiagnosed skin cancer, obviously the subject of the video we saw.

Ms. Rodriguez, thank you so much for coming and sharing your story with us today.

TESTIMONY OF IVETTE RODRIGUEZ, WURTSBORO, NY

Ms. RODRIGUEZ. Thank you. Chairman Cohen, Representative Franks, and distinguished Members of the Committee, thank you for the opportunity to appear before you today to discuss my brother's service to this country, the events that led to his death, and the bill Congressman Hinchey introduced, which is named after him, the Carmelo Rodriguez Military Medical Accountability Act of 2009.

I am not someone with a big, fancy job, or political connections. I am just a loving sister and a mother of two, soon to be three, who lost her brother to a horrific case of medical negligence. I speak not just for my whole family, who miss my brother dearly, including his young son, Carmelo Rodriguez, IV, but I speak for the countless other military families who have been forced to confront similar situations.

On November 16, 2007, when Carmelo passed away, I lost not only my brother but my best friend and an American hero. Carmelo was a decorated Marine and a platoon leader who proudly served his country in Iraq. Before, during, and after my brother's service in Iraq, his cancer was repeatedly and extraordinarily misdiagnosed as a wart or a birthmark.

In 1997, when Carmelo enrolled in the Marines, a physical performed by U.S. military staff concluded that Carmelo Rodriquez had melanoma present on his right buttocks. However, no action was taken.

In March of 2000, Carmelo marked "no" on a medical history report question about cancer; he was not aware of his melanoma. During March of 2005, while Carmelo was deployed in Iraq, he saw another military doctor for a growth or sore on his buttock. He was told to keep it clean and visit the doctor again when he got back to the United States, which would be 5 months later.

In November of 2005, Carmelo saw that same doctor back in the United States and was directed to dermatology to have the so-called birthmark removed for cosmetic purposes. The next year and several months later, in April of 2006, while several referrals were lost in the system, Carmelo's so-called birthmark was bleeding and pussing all the time.

Finally, out of frustration and concern for his own health, he took action and made an appointment to see a dermatologist without a referral. A week after his next appointment, he was told he had stage three malignant melanoma.

Carmelo had three surgeries, received radiation and chemotherapy, but it was too late. The cancer had spread to his lymph nodes, his liver, kidney, stomach, and throughout his body.

The doctors told him that if it had been caught earlier, it would have made a big difference. It probably would have saved his life.

My brother was a young, strong man. His body was reduced from 190 pounds to under 80 pounds. At the age of 29, he died of skin cancer that should have been caught much, much earlier by the military he so ably served and was counting on.

Carmelo wanted his story to be heard even if his life couldn't be saved. He wanted to ensure that what happened to him would not happen to another servecemember. On November 16, 2007, with CBS news reporter Byron Pitts at our family's home, my brother passed away.

When he enlisted in the Marine Corps he swore an oath to live his life according to military standard, to follow orders without question. He did this willingly and without reservation. He proudly took this oath assuming that the military would care for his wellbeing. Those who were tasked by the military to provide that care were expected to provide the basic standard care.

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

Sadly, my family's story is shared by many others. My question for the military is: Why, after such a critical failure in health care, did it take the military 16 months to finish this report, which I just got last night, on the investigation of the circumstances that led to my brother's death? I received this report late last night, the night before this Committee's hearing, which was not enough time to fully read it.

Why would this not have been done sooner to perhaps save the lives of others who currently may be misdiagnosed right now? My question for Congress is: How could it be possible that of all Americans, members of the military and their families are left no recourse in the case of such medical negligence?

I am grateful to Congressman Hinchey for his support. He has never wavered in his commitment to my brother, our family, and all service men and women. What service men and women and their families want and deserve is equal protection under the law.

Thank you.

[The prepared statement of Ms. Rodriguez follows:]

PREPARED STATEMENT OF IVETTE RODRIGUEZ

STATEMENT OF
IVETTE RODRIGUEZ
SISTER OF SGT. CARMELO RODRIGUEZ

BEFORE THE
COMMITTEE ON THE JUDICIARY
SUBCOMMITTEE ON COMMERCIAL AND ADMINISTRATIVE LAW

H.R. 1478, THE "CARMELO RODRIGUEZ MILITARY MEDICAL ACCOUNTABILITY ACT OF 2009"

MARCH 24, 2009

Chairman Cohen, Representative Franks and distinguished members of the Subcommittee, thank you for the opportunity to appear before you today to discuss my brother's service to this country, the events that led to his death, and the bill Congressman Hinchey introduced, which is named after him, the Carmelo Rodriguez Military Medical Accountability Act of 2009.

I'm not someone with a big fancy job, or political connections. I'm just a loving sister and mother of two, soon to be three, who lost her brother to a horrific case of medical negligence. I speak not just for my whole family who miss my brother dearly, including his young son Carmelo Rodriguez IV, but I speak for the countless other military families who have been forced to confront similar situations.

On November 16, 2007, when Carmelo passed away, I lost not only my brother but my best friend and an American hero. Carmelo was a decorated Marine and platoon leader who proudly served his country in Iraq. Before, during, and after my brother's service in Iraq his cancer was repeatedly and extraordinarily misdiagnosed as a wart or birthmark.

In 1997, when Carmelo enrolled in the Marines, a physical performed by U.S. Military staff concluded that Carmelo Rodriguez had melanoma present on his right buttocks. However, no action was taken. In March of 2000, Carmelo marked "no" on a medical history report question about cancer -- he was not aware of his melanoma.

During March of 2005, while Carmelo was deployed in Iraq, he saw another military doctor for a growth or sore on his buttock. He was told to keep it clean

and visit the doctor again when he got back to the United States, which would be five months later.

In November of 2005, Carmelo saw that same doctor back in the United States and was directed to dermatology to have the so-called "birthmark" removed for cosmetic purposes. The next year and several months later in April of 2006, while several referrals were "lost in the system," Carmelo's so-called "birthmark" was bleeding and pussing all the time.

Finally, out of frustration and concern for his own heath, he took action and made an appointment to see a dermatologist, without a referral. A week after his next appointment he was told he had stage III malignant melanoma.

Carmelo had three surgeries, received radiation and chemotherapy but it was too late. The cancer had spread to his lymph nodes, his liver, kidney, stomach, and throughout his body. The doctors told him that if it had been caught earlier, it would have made a big difference. It probably would have saved his life.

My brother was a young, strong man. His body was reduced from 190 pounds to under 80 pounds. At the age of 29, he died of a skin cancer that should have been caught much, much earlier by the military he so ably served and was counting on.

Carmelo wanted his story to be heard even if his life couldn't be saved, he wanted to ensure that what happened to him would not happen to another service member. On November 16, 2007, with CBS news reporter Byron Pitts at our family's home, my brother passed away.

When Carmelo enlisted in the Marine Corps he swore an oath to live his life according to military standard, to follow orders without question. He did this willingly and without reservation. Carmelo proudly took this oath assuming that the military would care for his well-being. Those who were tasked by the military to provide that care were expected to provide a basic standard of care.

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

Sadly, my family's story is shared by many others. My question for the military is why, after such a critical failure in health care, has the military not conducted and completed a full investigation into the circumstances that led to my brother's death? Why would this not be done to save the lives of others who currently may be misdiagnosed right now?

My question for Congress is how could it be possible that of all Americans, members of the military and their families are left no recourse in the face of such medical negligence?

I am grateful to Congressman Hinchey for his support. He has never waivered in his commitment to my brother, our family, and all service men and women.

What service men and women and their families want and deserve is equal protection under the law.

Thank you.

Mr. COHEN. Thank you, Ms. Rodriguez. I appreciate your testimony.

Our third witness is Mr. John Altenburg—Major John Altenburg, excuse me. Major General, excuse me for the third time.

Major General Altenburg is a counsel at Greenberg Traurig, otherwise known as Diane Blagman's firm, and focuses his practice on contract litigation and international law. The scope of his practice includes corporate and governmental representation, both domestic and international, including multilateral development bank and Federal agency debarment proceedings.

General Altenburg served 28 years as a lawyer in the Army, where he represented the Army before Congress, numerous state and local governments, and in court in the United States and Germany. He advised, counseled, and negotiated all levels within the Army, the Department of Defense, the Department of Justice, frequently on matters of great interest to Members of Congress and the national media.

Major General Altenburg, you are recognized.

TESTIMONY OF JOHN D. ALTENBURG, JR., ESQ., MAJOR GENERAL (RETIRED), UNITED STATES ARMY, GREENBERG TRAURIG, LLP

General ALTENBURG. Chairman Cohen, Representative Franks, other distinguished representatives, I thank you for inviting me to appear today. I appear solely by your invitation to provide my personal views regarding House of Representatives bill 1478, the Carmelo Rodriguez Military Medical Accountability Act of 2009.

I have submitted a written statement and would like to supplement that with just a few comments. My knowledge of this tragic case is solely through media reports. I regret deeply that our Nation has lost such a talented and committed military man. Besides his outstanding performance as a Marine leader, I think he was the kind of man who was loved by all who met him. From what I can tell, his human qualities actually exceeded his extraordinary military values.

I convey my deepest sympathy and condolences to the Rodriguez family. No Marine, sailor, soldier, or airman should ever go through the medical tragedy suffered by Staff Sergeant Rodriguez and his family, but I believe changing the law to permit more lawsuits is not a way to increase the accountability of military medicine. Further, I believe changing the law to permit more lawsuits is not in the best interest of our service members and the families who support them.

The government, and especially the military, has programs and procedures in place to enforce medical standards and to improve military medical care—programs such as peer reviews, credentialing actions, quality assurance programs, reports to state licensing agencies, command investigations including I.G. inquiries and UCMJ actions. Lawsuits are contentious, and they take years to conclude, but lawsuits are not designed to prevent medical errors.

The military's internal systems and programs act more quickly. Congress, in fact, has oversight of these programs and systems and

ensures that quality assurance and other programs work effectively.

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

During deployment, one Marine is medically evacuated to a hospital in Germany for severe stomach pains. They are properly diagnosed as a burst appendix, but a military doctor breaches the standard of care by failing to administer antibiotics properly. The Marine develops an infection and he dies. His family is outraged, and they are able to bring—under this bill, if it passes—a wrongful death action against the government to recover lost economic compensation and mental and physical pain and suffering.

About the same time, though, tragic news arrives that the other Marine family in the same town has lost their loved one following an engagement in battle. A command investigation concludes that this Marine was killed, accidentally, by a fellow squad member in a fire fight. This Marine's death is a result of negligence that may have been prevented.

Like their neighbors who lost the Marine to medical negligence, this Marine family suffers damages. The family is grief-stricken; they are angered. They want to sue and hold the military accountable, but they cannot sue because their loved one died in combat.

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

Whether the injury or death was caused by medical error, driver error, mechanic error, or otherwise, service members and their families suffer real emotional, physical, and monetary damage. Our brave service members and their families should not be forced to the courtrooms for needed benefits. If our compensation benefits are inadequate, then less increase the benefits to service members and their families, including consideration of pain and suffering.

Also, consider how this bill could adversely affect military decision-making. This bill proposes to permit active duty military personnel to sue for any, "medical care and other purposes." Virtually any military decision or action, based on a medical assessment, could be challenged as causing personal injury: flight status boards, medical evaluation boards, annual physicals, administrative separation proceedings, even medical determinations affecting medical profiles, duty limitations, airborne operations, special operations units, schools, and all manner of everyday military decision-making may be affected.

Resources would be diverted from treatment of troops to preparing expert reports, submitting to interviews and depositions, and attending judicial and claims proceedings. Creating a special right to sue is not what will improve medical care and benefits. A service man won't be forced to sue his country if the benefits are appropriate in the first place. A grateful Nation should take care

of all service members and all their families fairly, without subjecting them to litigation and the associated turmoil.

Congress can act now to improve benefits for all those injured and killed, regardless of the cause. Such congressional action will be a most fitting legacy of Staff Sergeant Carmelo Rodriguez.

Thank you for permitting me to print my views. I stand ready to address your questions.

[The prepared statement of General Altenburg follows:]

PREPARED STATEMENT OF JOHN D. ALTENBURG, JR.

STATEMENT

OF

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

BEFORE THE

SUBCOMMITTEE ON COMMERCIAL AND ADMINISTRATIVE LAW
COMMITTEE ON THE JUDICIARY
UNITED STATES HOUSE OF REPRESENTATIVES

CONCERNING

THE FERES DOCTRINE

AND

THE CARMELO RODRIGUEZ MILITARY MEDICAL ACCOUNTABILITY ACT OF 2009

PRESENTED ON

MARCH 24, 2009

STATEMENT

OF

JOHN D. ALTENBURG, JR.

MAJOR GENERAL (RETIRED)

FORMERLY, THE DEPUTY JUDGE ADVOCATE GENERAL, U.S. ARMY

Mr. Chairman and Distinguished Representatives, I am privileged to appear before you concerning H.R. 1478, The Carmelo Rodriguez Military Medical Accountability Act of 2009. Thank you for inviting me to appear before the Committee on the Judiciary Subcommittee on Commercial and Administrative Law to provide my views on the Federal Tort Claims Act, the Feres Doctrine, and its importance to the United States military with the case of Marine Staff Sergeant Carmelo Rodriguez and military medicine in mind.

Although I am a retired Army Major General and previously served on active duty as The Deputy Judge Advocate General, I do not appear before you on behalf of the Army or any other military Service, Department of Defense, or other agency. I appear solely by your invitation to provide my personal views.

I appeared before a Senate Committee in 2002 to present my views on the same topic, the Feres Doctrine and the Federal Tort Claims Act, but in the context and backdrop of another case; one of different factual circumstances that neither involving a specific bill nor such a sharp concern for military medical care.

I respectfully request that my prior written submission from the 2002 Senate

hearing be incorporated and made a part of the record here, which I have attached to this written submission. I ask you to consider what I said in 2002. I may cover similar ground today, but because the matter before us today is unique, I want to focus my comments on the legal and practical aspects of the proposed Act. I believe the proposed Bill creates more problems than solutions. The intent and purpose of the Rodriguez family and the lawmakers proposing congressional action to improve benefits for service members and their families is worthy and sincere, but I believe their actions are misdirected through this particular Act, H.R. 1478, The Carmelo Rodriguez Military Medical Accountability Act of 2009. I want to discuss how it might better accomplish those worthy goals and, of course, address the particular concerns of the Committee.

The Case of Carmelo Rodriguez

In my preparations to appear before you, I reviewed several news articles about Carmelo Rodriguez, and in particular, a 2008 CBS News special report by Mr. Byron Pitts that included a video report with the Carmelo Rodriquez family on the day, and actually at the very moment, Carmelo died from cancer. I have attached the news articles to these prepared remarks. My knowledge of the case is limited to the media reports I have reviewed; I have not seen any official reports from the Department of Defense's investigations.

Before proceeding any further, I wish to convey my deepest sympathy and condolences to the Rodriguez family and loved ones. Without question, Staff Sergeant Rodriguez was a combat-tested Marine whose patriotism, sense of duty, and honor were in keeping with the finest traditions and customs of the Marine Corps and all

citizens who seek service in any capacity to our Nation. As a former military leader, it pains me greatly and I regret deeply that we lost such an immensely talented and committed young man, especially under the circumstances of the insidious disease of cancer and the poor medical care in his case. I believe the poor medical care was the result of simple negligence, but not gross negligence, recklessness, or conscious disregard for his safety and health by any of his doctors or leaders. Based on the media accounts I have reviewed, the negligent medical care in Staff Sergeant Rodriguez' case is inexcusable and without justification.

The case of Staff Sergeant Carmelo Rodriguez, and what his family endures, is tragic and heartbreaking; I wholly agree with his uncles and sister who I heard during the interviews speak on Carmelo's behalf to describe his fight: "I just want to save the next Marine" from the same errors and fate that could have been avoided. I agree with this fight.

What I heard from the Carmelo Rodriguez Family

I listened intently to the thoughts expressed by the Carmelo Rodriguez family. Their words resonated with me then and now. His uncle, Dean Ferraro, said: "[It was Carmelo's] wish to have this known, because he doesn't want any other soldier to fight for his country and go through what he had to go through -- to be neglected.," Dean explained:

> When [Carmelo] enlisted in 1997, from his initial medical [physical] - the doctor documented [in his medical records] that he had melanoma, but never told him or had anyone follow up on it. And that was back in '97.

If we would have known back in '97, [Carmelo] would still be with us.

His sister, Elizabeth Rodriguez, followed and pointed to wrongful medical care while Carmelo was deployed in defense of this country in a war zone. Eight years passed from his enlistment physical and Carmelo was in Iraq when he was examined for a painful lesion on a birth mark, which his sister Elizabeth understands was "raised and pussing [and perhaps bleeding] -- and just to let it go and say it is a wart? Who [what medic or doctor] does that? How does [a medical system let] that happen? I just don't understand it? It's not right. It's not right!"

Upon returning from Iraq after the deployment, and because of difficulties obtaining a doctor's appointment through no fault of his own, Carmelo did not see a medical doctor until about nine months later. By that time the cancer had spread. It was too late; he was diagnosed with Stage III melanoma and after the long and painful ordeal fighting for his life through myriad treatments he succumbed. Elizabeth tells us that Carmelo wanted his family to continue fighting after he died: "He said, 'don't let this be it. Don't let this be it. Fight!'"

I understand their fight. I agree with the family; this should have been prevented, and I know that Carmelo left behind a young son who needs financial support, and I did see in the CBS News report that Carmelo's son received a portion of his father's military benefits. I also saw that there was a problem with funeral expenses not covered by the government, which greatly compounded the pain and justified anger. This is not right and should not have occurred. Such a problem must be fixed immediately.

Although I have not spoken with the Rodriguez family, or directly with other

families who have suffered because of negligent military medical care, I understand their fight. I understand what they mean and what change they want to bring about, but as a former enlisted soldier and then military lawyer for many years, my experience and judgment inform my understanding of our system. It counsels that waiver of sovereign immunity to permit tort lawsuits focused on the military for "improper medical care and for other purposes," as this Bill proposes, is not the way to effect meaningful and lasting change. Rather than lawsuits, there are other, more direct, faster, better, and more efficient tools in place to correct medical errors and to provide needed compensation. These systems and methods are scant solace to families like the Rodriquez family who lose loved ones in spite of systems that minimize negligence and improve constantly the quality of military medical care.

Congress can better serve our service members and their families by improving benefits, by eliminating disparities and inequities, and by increasing compensation to better approximate damage recoveries of civil lawsuits. When you consider a change in the law, a basic chord of fairness must be struck. After all, a Marine who loses a limb in combat and an Army Soldier who loses a leg due to medical malpractice in a military hospital both experience similar pain and suffering, and both will likely experience reduced economic earning capacity, among other damages. Both injured service members, and their families, need -- they deserve -- similar benefit packages that genuinely take into account the realities of life in the 21st century.

While causes of injury may differ, their basic situations are the same. To authorize a medical malpractice lawsuit for the possibility of more compensation than a

service member injured on the battlefield seems to me fundamentally unfair. Such a result ignores the real and practical challenges that both service members face as a result of similar injuries suffered in service to the Nation. Service members and their families need to be treated the same regardless of the source of injury.

Lawsuits are not the answer to what is admittedly a problem. America's fighting men and women and their families need meaningful and responsible compensation benefits. Our service members and their families need meaningful benefits that can be timely delivered in a non-adversarial administrative forum with appropriate checks and balances, without making our brave service members resort to litigation.

Overview of H.R. 1478 to Amend the Federal Tort Claims Act

H.R. 1478, The Carmelo Rodriquez Military Medical Accountability Act of 2009, would permit active-duty military personnel injured by other service members or government civilian employees to sue the government under the Federal Tort Claims Act for "medical care and other purposes." The title of the Bill suggests the military is irresponsible and unaccountable for the quality of its medical care (which is far from the truth) and thus civil lawsuits are needed to review and to correct the quality of military medical care. This Act authorizing lawsuits for money damages as just compensation for injuries suffered due to military service directly questions whether Congress has adequately equipped the system of military and veteran benefits already authorized.

As you consider the wisdom of H.R. 1478, I believe there are two fundamental principles you must keep in mind. First, it is important to understand that military medical care is unique. Military medical care is a necessity to keep the fighting force

healthy and fit to win the Nation's wars. No other employer -- government or private employer -- is charged with such a unique undertaking. The military's medical system is fundamentally different because the care is performed by colleagues and comrades in arms, under a wide range of conditions difficult to predict and to control. Military medical care is organic and integral to the military; essentially, it is part of the military job. Service members injured by military medical care have essentially suffered a job-related injury.

The second principle important to appreciate is that the government already provides for a uniform system of benefits to compensate service members for on-the-job injuries, including medical malpractice injuries. These uniform benefits cover all service members under all conditions and circumstances while performing military duty. No one is excluded or treated differently. The benefits are the same whether the service member is injured on the battlefield or in a hospital. The benefits remain consistent for the same type of injury, no matter how the injury was incurred. To permit one service member more compensation because of the circumstance of the injury is fundamentally unfair to other service members. If our compensation benefits are not adequate, then we must fix that system for all service members, not just a particular category of service members. The government should not force its brave service members and their families to resort to a lawsuit for appropriate compensation.

In considering a change to the Federal Tort Claims Act (FTCA), I think it is important to appreciate the purpose of Congress in implementing the FTCA in 1946. Congress designed the FTCA to permit private citizens to sue the government for

personal injury, but not government employees to sue their own employer, the United States. Prior to the passage of the FTCA, Congress was flooded with private bills of relief from citizens injured by government employees. WWII war-time activities increased the frequency of injury to private citizens by government employees. The FTCA authorized private tort lawsuits against the government, but not tort lawsuits from government employees like civil servants and members of the armed forces for injuries incurred while performing government service.

This congressional purpose is why civilian employees cannot sue the government under the FTCA for on-the-job injuries. The exclusive remedy for civil servants provided by Congress is a workers' compensation program under the Federal Employees Compensation Act, a litigation-free administrative program of medical, health, and wage-compensation benefits. This same premise is the foundation of all state workers compensation laws. Injured civilian workers receive "no-fault" compensation for injuries incident to employment, and in return, cannot sue their employer for fault-based tort recovery. Like civilian federal employees, all military members injured while in the line of duty are supported by a broad system of workers' compensation-like benefits administered by the military Services and the Veterans Administration. For military members, the coverage of benefits is even broader than other federal civil servants because military members are considered on the job 24 hours a day, seven days a week; thus they are covered by the military's compensation benefits for virtually anything that happens to them. These benefits make lawsuits for money damages unnecessary, in theory. In practice, they may be inadequate; let's

enhance them to make certain they are adequate.

Military members already covered by a system of benefits generally cannot sue the United States, other service members, or civil servants for job-related injuries for what we call "incident to service" activities. The incident to service legal principle used to define military job-related activities has been known to courts and military personnel alike for over fifty years as the Feres Doctrine under the Supreme Court's interpretation of the FTCA. Feres v. United States, 340 U.S. 135 (1950). The Feres Doctrine does not bar all lawsuits. Rather, the Feres Doctrine's "incident to service" test defines which lawsuits should be permitted to go forward as unrelated and unconnected to military service. The factors of the "incident to service" test include: (1) the location of the injury; (2) the nature of the service member's activities at the time of the incident; (3) the duty status of the service member at the time of the incident; and (4) the benefits accruing to the service member. This test has proven to capture accurately most circumstances that should remain barred. A change in the FTCA law is not needed.

The Real Issue

The purpose and utility of medical tort lawsuits is the real contention before us. Advocates argue that active duty service members are mistreated by inadequate benefits and deprived of the right to sue for just compensation. Admittedly, current government-provided benefits may be inadequate to match lost economic earning power, pain and suffering, and other similar damages awarded in typical tort lawsuits. However, permitting additional lawsuits will harm morale among service members and families who do not have the right to sue for similar injuries due to causes other than

medical malpractice, and additional lawsuits will overburden the military while providing uncertain benefit to those who sue. Improving administrative benefits will better serve our service members and their families and our Nation.

I believe our military medical system is fundamentally sound, despite the clear evidence of errors in the case of Staff Sergeant Carmelo Rodriguez. The Feres Doctrine and the limits of the FTCA are legally sound. If Congress agrees with me and others who believe current Department of Defense and Veterans Administration benefits are inadequate, Congress can -- and must -- do much better for our Soldiers, Sailors, Marines, and Airmen in the area of administrative benefits rather than authorizing more FTCA lawsuits; and at the same time, preserve morale and good order and discipline of the military under a system of judicial review that has worked well for more than fifty years since the implementation of the FTCA.

Holding the Military Accountable

Turning to the proposed Act, H.R. 1478, I would like first to address the idea of holding the military responsible for medical care because this appears to be the primary issue for the Rodriguez family and others. Indeed, the name of the proposed bill, "The Carmelo Rodriguez Military Medical Accountability Act of 2009," tells us that improving military medical care is a lead purpose of the amendment to the FTCA. What I would like to highlight is that there are in place military programs and systems to prevent medical wrongs and to make sure the same medical error is not repeated, or at the very least, the possibility of making the same mistake is minimized. These military systems and processes prevent and correct medical errors independently of lawsuit. Increased

litigation will not enhance these systems, which are immediate and focused on constant improvement of the quality of military medical care.

Perhaps misunderstood by most of the public is that lawsuits against the United States government, unlike private lawsuits, are not brought against individual defendants. Only the United States is the named defendant. Also, punitive damages are not authorized against the United States, and medical malpractice actions are not criminal proceedings against individuals. With this understanding, the utility of holding individuals or government institutions accountable through a medical malpractice lawsuit is misdirected.

Although participation in a civil lawsuit can leave a lasting impression and adverse judgments can cause reporting actions to state medical licensing authorities, missing is full consideration and appreciation of the military's internal corrective systems and programs to improve medical care that often move quicker than lawsuits. Courts focused on assessing money damages generally do not direct changes or corrective action to medical systems or programs. The primary purpose of medical malpractice lawsuits is not to hold individuals or institutions accountable, but to justly compensate people for money losses who have no other remedy or source of compensation, unlike our military service members.

The many systems in place to hold military medicine accountable are known to the Committee, and practiced in military hospitals, clinics, and aid stations on a daily basis. The systems and programs include individual medical case studies and presentations, quality assurance peer review processes, credentialing actions, and

adverse reporting to state licensing boards. Military commanders also have oversight authority over medical care. They can and do order investigations. They also can request investigations by inspectors general located both within medical commands and at other, superior levels of command throughout the military services. Military doctors and medical professionals receive individual efficiency performance reports at least annually by their supervisors, which become part of their permanent military employment record. When necessary, military commanders impose adverse administrative action and disciplinary proceedings under the Uniform Code of Military Justice. All of these military systems and processes are designed to fix responsibility for wrongful medical care. I trust that the right procedures were properly pursued in the Case of Carmelo Rodriguez to find exactly what went wrong with a view to implement preventive measures, and as the family and Congressman Hinchey desire, to save other Marines and to avoid future medical neglect.

H.R. 1478, The Carmelo Rodriguez Military Medical Accountability Act

Two basic practical considerations must be explored when discussing the proposal to permit military members to bring medical malpractice lawsuits. First, would claimants actually realize their compensation goals? Second, how would the additional burden of military medical litigation affect the service members, their families, and the military?

The Benefit and Compensation Program Offset Provision of H.R. 1478

For overseas medical cases, H.R. 1478 proposes to adopt the law where the service member is domiciled and to offset or to reduce the money award of an FTCA

lawsuit by the present value of Service and Veterans' Administration benefits attributable to the physical injury or death from which the claim arose. This provision is consistent with the common law and statutory law currently in effect among the states requiring tort awards to be reduced by non-collateral source compensation already provided by the party at fault to the injured party. This provision seeks to ensure service members do not obtain double recoveries for injuries.

However, the monetary difference between government-provided benefits and the potential recovery under a tort lawsuit is not specifically identified in H.R. 1478; and therefore, the value of compensation already authorized is not known and explained in the legislation. Government provided benefits valued at hundreds of thousands of dollars such as continued medical care, medical disability, vocational training and job placement services, survivor benefits, and potential pay and entitlements (among others like life and injury insurance), will substantially reduce the award of a lawsuit. At this point, a careful accounting of the value of government-provided benefits has not been compared to the possible money judgments from lawsuits, so the potential difference, or gain, is difficult to ascertain. The money gap, if any, most likely will be found in non-economic damages like pain and suffering. Until a careful monetary analysis is undertaken, the relative money value of permitting lawsuits cannot be clear either to lawmakers or to the public. Exactly what will be recovered by a lawsuit needs close examination.

In my estimation, the value of lost future wages or earning capacity and non-economic damages like pain and suffering and reduced quality of life are the main areas

where government-provided benefits fall short. The judgment value of these damages can be significant awards in typical lawsuits, but many states have enacted tort reform to cap the money recovered on pain and suffering awards. Some states now permit reduction for collateral source income like life insurance. With all of the other compensation elements of a tort lawsuit reduced, it is not clear whether a lawsuit will produce a significant money dividend for the service member and their families. Clearly, it will vary from state to state.

If H.R. 1478 is implemented, I expect much of the litigation to target excluding or reducing the value of government-provided benefits to make the recovery through a lawsuit worthwhile. Additional costs and fees to lawyers and others to advance the lawsuit will further reduce that final amount. The combination of authorized attorney fees and legal expenses can approach, and possibly exceed, 40% of the total recovery. Thus, with all reductions calculated, the actual money gap may be a relatively small dollar amount in most cases. Lawsuits may, in fact, offer little realistic and practical gain for our service members and their families.

Disparate Results in Compensation

Uniformity, consistency, and fairness — in fact and in appearance — are absolutely vital to the preservation of military discipline, and unit cohesiveness. These factors are directly linked to combat readiness and national security. Medical lawsuits for money damages are designed to provide compensation for needs, but the needs of military members and their families are covered by fair, equitable, no-fault, and non-adversarial Service and Veterans Administration compensation and benefit plans, which

provide equal treatment under all line of duty circumstances. Only when similarly situated service members and their families are treated in the same manner can we ensure that they have and that they maintain the faith and morale in their military leadership that is so important to maintaining an effective military force. As stated earlier, Congress can increase the benefits to service members and their families if the current benefits are inadequate.

The current military disability and compensation system is designed to ensure service members receive similar compensation for similar injuries under all circumstances experienced in the line of duty, and the Feres Doctrine "incident to service" test directly supports this design. Yet, H.R. 1478 proposes a discriminatory favoritism among service members and will harm morale by undermining the equities of the benefit system and the justice system. For example, a Marine who loses his leg because of military medical malpractice could recover additional compensation for pain and suffering while another Marine who loses his leg in a military vehicle accident due to the negligence of the Marine driving the vehicle could not. Even for those permitted to sue, tort reform among the states will produce disparate results even among only those injured by medical negligence. How will service members understand this disparate treatment for similar injuries incurred in the line of duty?

H.R. 1478 also specifically proposes to maintain the FTCA's combat exclusion, so service members who suffer the same type of medical negligence injury in a combat-connected situation would not be permitted to bring a lawsuit. Even further, how will the surviving next of kin understand that they are only entitled to certain benefits for the

death of their Marine while deployed overseas fighting against our enemies, but they are not allowed to sue for additional compensation like the family of a Marine who died in a United States hospital due to a medical error or some other negligent activity?

I share the deep concern for our injured service members and their families while serving our country. Regardless of whether injury or death results from training mishaps, automobile accidents, medical malpractice, friendly fire, or hostile fire, the injury and loss to the individual service member and next of kin is no less painful or real. If the rationale underlying H.R. 1478 to amend the FTCA is the inadequacy of compensation and other benefits under the current statutory scheme, then that should be analyzed and corrected for all. Our focus should not simply be tort litigation for just one type or circumstance of injury suffered in the line of duty, but instead on improving our total system on behalf of all military members and their families.

Undue Burdens on the Military and the Government

The additional medical litigation proposed by H.R. 1478 would increase the military's burden. Instead of focusing on providing medical treatment to eligible service members and family members, military medical personnel would dedicate more time preparing expert reports, submitting to interviews and depositions, and attending other judicial and quasi judicial proceedings related to the claims and litigation process. Congress would need to provide additional funding and staffing to handle an increased number of claims. The claims services and litigation divisions of the Services, the U.S. Attorney Offices, and the Federal Courts would similarly need to increase capacity. At a time when we need to increase our military's capacity and readiness, the capability

should not be spent fighting courtroom battles at home. Instead, our military must remain focused on confronting our Nation's enemies through readiness, deterrence, and failing deterrence, combat success.

Permitting lawsuits for overseas torts, in particular, may entail questioning into sensitive areas of military decision making. Governmental negligence can be alleged at many levels, any of which could become part of a plaintiff's theory of the case. For instance, a service member harmed in Iraq as a result of medical malpractice could allege that the doctor in Iraq was negligent in failing to diagnose the carcinoma, and although the FTCA's combat exception would seem to bar such a suit, the same plaintiff could also allege that the military leadership's decisions in training and equipping the doctor occurred in the United States and the negligence was committed in a location not connected to combat or a war zone. Such a lawsuit crafted to skirt the intent of H.R. 1478 could nonetheless be permitted to proceed.

Litigation is by its nature disruptive and time consuming. The litigation process itself ensures this result. Military plaintiffs and witnesses will be summoned to attend depositions and trials. They will be called from their regularly assigned duties to confer with counsel and investigators. They also may be recalled from distant posts. Such disruptions degrade the quality of our national defense, which demands Soldiers, Sailors, Airmen, and Marines be ready to perform their duties at all times anywhere in the world.

Logistically, defending and litigating a lawsuit arising from an overseas medical tort can prove expensive and extremely difficult. This increases the costs, difficulties,

and delays for the military and any potential service member-plaintiff alike. Because H.R. 1478 allows suits for overseas medical malpractice, witnesses will likely be located throughout the world. A federal court may not have authority under the Federal Rules of Civil Procedure to compel production of a witness from overseas. Even if a federal court has such authority, the associated travel expenses could prove extremely burdensome. Permitting medical claims and lawsuits more than a decade old as H.R. 1478 proposes will prove difficult to conduct because memories fade, witnesses relocate, and evidence disappears. The time, effort, and expense of conducting these lawsuits would be better devoted to resourcing the military's administrative benefits programs.

Impact on Military Combat Readiness

Discipline and prompt obedience to military orders and directives are the principles that bind the members of our armed forces into a cohesive team. The preservation of discipline and obedience is a constant dynamic, which requires authoritative rule. Congress has long understood the peculiar needs of the military to maintain good order and discipline. The Uniform Code of Military Justice criminalizes acts such as the failure to follow orders, disrespect to superiors, and conduct unbecoming an officer. The Supreme Court has repeatedly recognized that the military institution is distinctly different than civilian society, and as such, deserves special protections, unique treatment, and deference. The unique culture and requirements of military life lead the courts to resist interfering in military decision making, most often in personnel decisions, but also regarding medical issues.

I urge Congress to continue to take the same approach in dealing with military matters regarding lawsuits. The implications of amending the FTCA to permit medical malpractice lawsuits by service members are further reaching than they may appear. Numerous military administrative actions and command decisions are directly based on medical determinations and assessments. Consider the following situations and consequences if H.R. 1478 were permitted to amend the FTCA.

- An Army Flight Status Board disqualifies a Pilot from flying status based on a medical evaluation, but the Pilot disagrees with the decision and sues in federal court. Through an FTCA medical malpractice action, the Pilot claims personal injury alleging his career has been irreparably harmed, he will suffer economic loss, and he has experienced emotional distress. The smooth and orderly operation of that Flight Status Board comes to a halt to defend the case in federal court. Other cases before the Flight Status Board must be delayed, causing disruption to other military personnel decisions, inhibiting the Army's ability to operate its aircraft.
- A Soldier being processed for administrative separation for a personality disorder contests the medical aspects of the diagnosis and brings a lawsuit alleging medical malpractice.
- While participating in a training exercise, a Medic provides aid to a Soldier for a stomach ache, but the Soldier suffers a burst appendix and severe personal injury complications. The Soldier and his family sue the Medic and the

Commander for missed diagnosis and the resultant pain and suffering and loss of consortium.

These examples are just a few of the situations under which H.R. 1478 may expose the military to medical lawsuits. They illustrate the adverse implications of permitting malpractice claims by active-duty military members. But the implications go far beyond simply providing money compensation for physical injuries. Military decisions and compliance with important orders would be impaired waiting for judicial resolution. Unavoidably, practically all command and leader actions based on medical decisions would be fair game as a federal lawsuit under H.R. 1478. Any medical decision might be construed as actionable malpractice even if administrative in nature. The legislative change intended by H.R. 1478 would necessarily embroil the civilian courts in military decision making.

Conclusion

The Feres Doctrine has remained for 50 years without legislative modification, which counsels tremendous hesitation to alter a workable system and risk irreparable harm to the state of our legal system and the military. I believe the military accountability purpose of H.R. 1478 is misplaced because the government has programs and procedures (many at the behest of Congressional oversight committees) in place to enforce medical standards and to improve military medical care. It is my understanding that they have become more focused and aggressive in recently years. Those systems are used on a daily basis to improve constantly the care military members receive. Lawsuits, after long, drawn out, contentious, and adversarial legal

battles that may take years to conclude, do eventually arrive -- after the fact -- at sound compromises for money compensation, but lawsuits are not tools designed to prevent medical errors. The military's internal systems and programs move more quickly than lawsuits.

If adequate compensation is the goal of H.R. 1478, authorizing the opportunity to seek additional compensation through tort litigation is the wrong answer. Disparate treatment of similarly injured service members will most assuredly harm morale and therefore combat readiness. We should not force our injured service members and their families into the courtroom. A grateful Nation should take care of all service members and their families fairly, without subjecting them to litigation and all the associated turmoil. To the extent Congress believes current Department of Defense and Veterans Administration compensation is inadequate, that system should be modified immediately to provide the kind of compensation the family of Staff Sergeant Rodriguez and others deserve. His desire would be fulfilled. Enhanced and improved benefits for family members of all service members would be his lasting legacy to his family, his Marine Corps, and the Nation he proudly and with great dedication served.

Mr. COHEN. Thank you, General Altenburg. I appreciate your testimony.

Our fourth witness is Eugene R. Fidell?

Mr. FIDELL. Fidell.

Mr. COHEN [continuing]. Fidell. Professor Fidell began teaching at Yale in 1993 as a visiting lecturer in law and was appointed the Florence Rogatz visiting lecturer in law in 2008, president of the National Institute of Military Justice and the counsel at Feldsman Tucker Leifer Fidell, in Washington, DC

Professor Fidell is a coauthor of "Military Justice: Cases and Materials." A fellow of the American Bar Foundation, a life member of the American Law Institute, and a member of the ABA Task Force on Treatment of Enemy Combatants and the board of directors of the International Society of Military Law and the Law of War. He has also taught at Harvard Law School and the Washington College of Law at American University.

Mr. Fidell, you are recognized. We appreciate your testimony.

TESTIMONY OF EUGENE R. FIDELL, ESQ., YALE LAW SCHOOL, NATIONAL INSTITUTE OF MILITARY JUSTICE, WASHINGTON, DC

Mr. FIDELL. Thank you, Mr. Chairman, Mr. Ranking Member.

I would like to begin with a word about the military medical providers. I think we can all be very proud of the overall quality of medical care that our military personnel receive. Many years ago I was a beneficiary of that medical care for the 3 years, 7 months, and 8 days that I served on active duty.

I still vividly recall the dedicated providers who attended to my needs, which happily were modest. They were wonderful, caring human beings, excellent clinicians.

The current generation of military medical personnel also deserves thanks, particularly given the stresses imposed by the heartbreaking cases they have had to deal with as a result of military operations in Iran—in Iraq and Afghanistan. Nonetheless, no system for delivering health care is perfect, and excellent as it is, the military health care system is not an exception.

I agree emphatically with my friend, General Altenburg, that there are other modalities, mechanisms for ensuring the highest level of medical attention in the military. He has identified them properly. They have to do with peer review, credentialing issues, even disciplinary action under the UCMJ, on rare occasion.

Personally, I don't think that is why we are here. I think, although, you know, its impact on the quality of medical care is something that would be nice, what we are really talking about is compensation to people who have been injured.

To clarify a question that came up in the colloquy between Representative King and Representative Hinchey, this is not about punitive damages, as I understand it. Punitive damages are not provided for under the Federal Tort Claims Act; nobody expects that. So that should not play a role in the Subcommittee's or the full Committee's consideration of these issues.

What we are talking about, I believe, is pain and suffering types of damages, the hardcore civil damages in our society. I think it is quite critical that, as the Committee catches its breath and sorts

all this out, it bears fully in mind that we are in an all-volunteer environment, and have been for several decades now.

I think legislators as well as people with responsibility in the executive branch have to take account of the potential impact of the legal environment on things like recruitment and retention. And we must make sure that people who come into the service, or are candidates for coming into the service, or are already in the service, have the assurance that they will be treated fairly.

My view is, that in the year 2009, expectations in our society are that medical malpractice, the failure to observe the applicable standard of care ordinarily is compensated through at least pain and suffering type compensation. I haven't seen a proposal that would expand the normal benefits system established either for the Department of Veterans' Affairs, or for the active duty force through the military services that would in any way approach the kinds of pain and suffering compensation that all of us in this room would be entitled to if, God forbid, we were the victim of medical malpractice.

I think that is what this is about. I do think it is something where Congress, after so many years, has a responsibility to grasp the nettle and, in my opinion, do the right thing, which is to pass either this measure or something very much like it. Is it perfect? No. Does it resolve all the inequities? No.

We all strive for fairness, and being only human we will never achieve perfect fairness; nobody disagrees with that. But this is a step forward, and I hope that it will be favorably considered.

[The prepared statement of Mr. Fidell follows:]

THE *FERES* DOCTRINE: THE TIME HAS COME FOR ACTION BY THE CONGRESS

Testimony of
Eugene R. Fidell

Florence Rogatz Visiting Lecturer, Yale Law School
President, National Institute of Military Justice

Before the Subcommittee on Commercial
and Administrative Law
Committee on the Judiciary
U.S. House of Representatives

March 24, 2009

Chairman Cohen, Ranking Member Franks, and Members of the Subcommittee:

I very much appreciate being invited to testify about the *Feres* Doctrine. This is the second time I have testified on this subject, the first having been (incredibly) more than six years ago, before the Senate Judiciary Committee.* My views have not changed; if anything, I feel more strongly than ever that Congress must act.

By way of introduction, I am a veteran, having served on active duty in the U.S. Coast Guard from 1969 to 1972. I have been practicing military law for many years, and have taught the subject at Yale and Harvard Law Schools and the Washington College of Law. I have led the National Institute of Military Justice (NIMJ) since 1991, and am currently

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* *The Feres Doctrine: An Examination of Th[e] Military Exception to the Federal Tort Claims Act, Hearing before the Sen. Comm. on the Judiciary*, 107th Cong., 2d Sess., Ser. No. J-107-109, at 14-15, 55-58 (2003).

Florence Rogatz Visiting Lecturer in Law at Yale Law School. I am also of counsel at the Washington law firm of Feldesman Tucker Leifer Fidell LLP, where I have represented members and veterans of every branch of the service. My military clients have included not only patients, but also physicians, dentists, nurses, physician's assistants, physical therapists, and pharmacists. My work for them has included not only garden-variety personnel and disciplinary issues, but also issues relating to quality of care.

In 2001, NIMJ sponsored the Commission on the Fiftieth Anniversary of the Uniform Code of Military Justice. It soon became known as the Cox Commission, after its chair, former Chief Judge Walter T. Cox III of the U.S. Court of Appeals for the Armed Forces. This is what the Cox Commission said about the *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.

Now, the better part of a decade later, the time for study has passed. Congress has to bite the bullet and enact legislation that will prevent the unfairness that can result from the *Feres* Doctrine. I regularly receive phone calls from potential clients seeking to bring lawsuits for medical malpractice. Not infrequently these seem potentially meritorious—and not infrequently the facts are disturbing. Yet I must advise these callers that they are wasting their

time because of decision by the Supreme Court. The Court created the *Feres* Doctrine and it has long been clear that the Justices believe that if that doctrine is mistaken, Congress can easily fix it.

It is, and you should.

There is simply no reason why a military dependent or a retiree should be able to recover under the Federal Tort Claims Act but not a GI, for identical care at the identical military treatment facility. Last year, in the company of my dear friend, retired Captain Kevin J. Barry, I attended meetings of ABA committees in New York, at which a *Feres* resolution was considered. I was very disappointed that the armed services representatives who showed up in force did not support the proposal (although one privately revealed that he disagreed with the others). As Professor Saltzburg can attest, the resolution passed overwhelmingly in the House of Delegates. I hope that the new Administration will

have a different view of this issue and will work with Congress to fashion wise and workable legislation.

One point must be stressed very strongly: we can be proud of the overall quality of military medical care. Long ago, I was a beneficiary of that care for three years, seven months, and eight days, and still vividly recall the dedicated providers who attended to my needs. They were wonderful, caring, human beings and excellent clinicians. The current generation of military medical personnel also deserves thanks, especially given the stresses imposed by the heartbreaking cases they have had to deal with as a result of military operations in Iraq and Afghanistan. Nonetheless, no system for delivering health care is perfect, and, excellent as it is, the military health care system is no exception.

I will be happy to respond to your questions.

Mr. COHEN. Thank you, Mr. Fidell.

We have now concluded our witnesses, and at this time we will have opportunities to ask questions of any member of the panel. Again, we are limited to 5 minutes, and I will begin.

General Altenburg, you mentioned that you thought that there are distinctions in injuries in the military, that a person who might lose his leg, or her leg, in—or die in this military hospital, as you mentioned, in Germany, for some reason—stomach, I think, was your example—that they would get compensation, yet somebody who was killed through some negligence in the field would not. Is that true, I recall that correctly?

General ALTENBURG. Well, what I said is, under the proposed legislation, the person who is injured by medical malpractice in the hospital in Germany could sue for compensation, and the soldier who died because of the negligence of a fellow Marine on the battlefield could not sue. Under the current law, both would be compensated and both families would be compensated, but they wouldn't have the right to sue if they were killed on the battlefield.

Under the proposed legislation, what changes is, the person who dies in the hospital due to medical malpractice, would be able—or alleged medical malpractice—would be able to sue. That is what is different.

Mr. COHEN. Right. Do you see a distinction, though, in the circumstances upon which the physician who was operating in a similar capacity as a civilian doc would if he was operating on you or me or anybody else in a hospital and be subject to tort liability, and a soldier who was operating under combat? Aren't there pretty clear distinctions in the judgment that might be rendered because of the extraneous existing circumstances?

General ALTENBURG. Mr. Chairman, are we talking about the medical doctor in the military in Germany or in a combat zone?

Mr. COHEN. The medical doctor in Germany, as distinguished from either a Corpsman in the combat zone or, in your circumstance, I think it was just a soldier who did something—I think in your testimony he got shot or something.

General ALTENBURG. In my experience, a doctor—a major in the Army operating on a service man in Landstuhl Hospital Medical Center in Germany is under very similar conditions as a doctor in any hospital in the United States.

Mr. COHEN. Okay. So why should they be treated differently for medical malpractice? Why should the—not they, but the victim be treated differently? Because they are in the military?

General ALTENBURG. In the military they can't sue.

Mr. COHEN. Right. I know that. Why do you think that is correct?

General ALTENBURG. Because they are compensated. If I go to a—if I am a civilian and I go to the hospital and a doctor malpractices on me, if I don't sue them nothing happens; I don't get anything. In the military, we have set up what some would argue is a fairly elaborate compensation system, and many, myself included, would argue it should be even better in the 21st century, but the fact is there is a compensation package that includes payments for children until they are 18, or 23 if they go to college, a $100,000 death benefit.

There are numerous pieces to this package that the Congress has developed over the years to justify not allowing them to sue and to preclude the lawsuits. It has been compared to workman's compensation. And something that I have not heard anybody say in the discussion about *Feres* is that in those few places in the civilian sector where an employer provides medical care—not contracted out, but provides medical care, and I personally worked in a factory in Detroit where that was the case in the 1960's; there was a hospital at the River Rouge Plant, and if I was treated there and I was malpracticed on, I couldn't sue. I had to use workman's compensation. It never happened, thankfully, but even in the civilian sector, if your medical care is provided by the employer, you have workman's compensation; you cannot sue the doctor for malpractice. That is what we have done to our—for ourselves in the military.

Mr. COHEN. Mr. Fidell, do you see a distinction there, and is the damages that a soldier would get now different from the damages he could—or she could—recover under this bill?

Mr. FIDELL. Absolutely. I think there is a serious distinction. And by the way, one peculiarity that the Committee might want to be aware of is, the military retirement programs, for example, for people who are injured—benefits administered by the military are a function of your pay grade, so that a general, for example, who is the victim of malpractice and is injured—not killed, but injured—as a result of malpractice is going to achieve a higher form of compensation than the lance corporal. That is not a compensation scheme; it is something else. And that, I think, would rub many people the wrong way if they ever focused on it.

Mr. COHEN. Thank you, sir.

Ranking Member Franks?

Mr. FRANKS. Thank you, Mr. Chairman. And Mr. Chairman, I was, as all of us, very, very moved by the video and by Ms. Rodriguez's testimony.

You know, there is a verse that says, "Greater love hath no man than this, that a man lay down his life for his friend." And that is certainly what your brother did, and there is no more noble thing that a human being can do in this life than to try to put themselves in harm's way for the sake of others and to promote the cause of human dignity and freedom. And I just don't know how to express that enough, but I salute your brother with all of my heart.

One of the challenges about having a military mechanism is that, you know, it is unique in just about every significant measure. Sometimes a general is compelled to deliberately put his soldiers in harm's way for the sake of, perhaps, protecting a larger number of soldiers or protecting the country that they defend. And, you know, it is a unique situation.

We don't have to do that in the corporate world; we don't have to order some of our workers to go out and face fire, and knowing that many of them will definitely be killed. That is an extremely difficult situation, and there is no way, I think, that any of us have the wisdom to be able to extricate every significant issue that arises in a situation like that.

But I found myself identifying tremendously with General Altenburg's remarks because he seemed, being a general, having been in

that situation, seems to understand some of the unique circumstances that apply here. And I do think that the example of a soldier in a battlefield situation that maybe died because of negligence on the part of his commanding officers—and I think that could be a circumstance that would occur—or even medical personnel, there is an issue there that I think is a conundrum that is very compelling in this particular legislation.

And as a member of the Armed Services Committee, I believe that what is really wrong here with this system is that the compensation mechanism is out of whack. And I think that when someone like your brother, Ms. Rodriguez, does what they have done and faces that kind of what was negligence, that we should have written in these compensation schedules something to deal with that situation. And I would be certainly favorable in the Armed Services Committee to supporting to such a legislation.

But I am convinced that to—I am convinced that the tort situation that we face in our civilian life right now has not garnered us better medical care; it has only created more confusion, and I think, actually, perhaps in some cases, reduced the quality of medical care. That is an opinion, and it is not in evidence. But I hope that we can address this situation with our compensation package, and then I hope that somehow that this legislation, if nothing else, leads us to a greater discussion along those lines.

So with that, I think there are two issues here. One is the accountability of those who made the error, and of course the compensation that is mentioned.

So, General, let me ask you, are there mechanisms now that are currently—within the military system—that hold physicians that commit medical malpractice accountable? Are there systems there to address that? And if you would consider any ways to improve that, what would they be?

General ALTENBURG. Yes, sir. I will be happy to answer that question, although I am 7 years out of the military. I will do my best to recount what I recall from that time. Also, before someone counters, you know, any experience that my benefit me at this table or because I attained the rank of major general,—I spent 5 years as an enlisted soldier, so I have that perspective of military medicine and military service, also, and I think, perhaps, that informs me in my opinions in this regard as much as anything.

There are extensive—and I mention them all in my oral statement—review mechanisms and programs to ensure that military medicine is held accountable: reporting to state agencies, and the like. Ironically, because the Congress has oversight and requires us to report on any alleged medical malpractice in every military hospital, we know more about medical malpractice in our hospitals than we, as a country, know about medical malpractice in any other hospital, because most hospitals aren't required to produce that information. But we are, in the military, because of congressional oversight. I am implying that as a good thing, not a bad thing.

In addition, there are specific provisions of Title 10—if I were a professor I would cite them, but I am not, and I don't remember them—but there are specific sections of Title 10 that require some of these programs. And over the years, especially since I have been

retired, I am aware, they have become even more stringent and more aggressive in their pursuit of ensuring that doctors are held accountable. Military doctors who commit malpractice, you know, are reported to the state agencies; they are in the same national database that tracks all medical malpractice.

So in spite of this, and in spite of medical malpractice suits, there is malpractice every day in hospitals around the world. It happens. But I would tell you that the accountability procedures in the military are rigorous, and the Congress has direct access to those programs.

Mr. FRANKS. Mr. Chairman, thank you very much. Might I just say, Mr. Chairman, that I do believe that the military and the American people have the responsibility to bind up the wounds of those who have borne the heat of the battle, and I thank the Rodriguez family for bearing the heat of the battle for human freedom.

Mr. COHEN. Thank you, sir.

Mr. Scott, from Virginia, is recognized, the distinguished Chairman of the Subcommittee on Crime, Terrorism, and Homeland Security.

Mr. SCOTT. Thank you. Thank you very much, Mr. Chairman. While we are holding the physicians accountable, our focus in this hearing is really on the victim. We have heard a suggestion that this may discourage physicians from serving in the military. Is there any expectation that the physician would actually pay the cost of malpractice under the Tort Claims Act, Professor Fidell?

Mr. FIDELL. The government winds up footing the bill.

Mr. SCOTT. Is any physician—a Federal employee—when they are sued under these circumstances by civilians, not people in the military, barred under this Feres Act—*Feres* Doctrine—have physicians actually had to pay?

Mr. FIDELL. No. I believe what happens, Congressman, is the Westfall Act, perhaps Steve Saltzburg could correct me on that, but I believe the Westfall Act basically substitutes the Federal Government for the individual employee or official whose conduct is at issue.

Mr. SCOTT. So we don't have to worry about the bill having an effect on physicians. Let me ask another question. I think, Mr. Fidell, you indicated that punitive damages are not allowed under the Federal Tort Claims Act. Is anybody——

Mr. FIDELL. That is my understanding.

Mr. SCOTT. Does anybody—everybody agree with that? The record reflects that that——

Mr. SALTZBURG. I am not certain, Congressman, that that is true. Generally, state law provides the substantive law and the law on damages, and state laws that restrict damages restrict recoveries, I believe, under the Claims Act, as well, so that it is conceivable to me that in a given suit punitive damages could be available. I am not certain of that, either.

Mr. SCOTT. Okay. Well, we will check that. It is my understanding that the Federal Tort Claims Act specifically excluded punitive damages.

Mr. Altenburg, you indicated fairness to the victims. Could you explain why a soldier who was a victim of malpractice should have

less rights than a person convicted of crime, serving in prison, in terms of rights to compensation? The criminal would have—so long as this doctrine continues, the criminal would have more right to compensation than the soldier. Is that right?

General ALTENBURG. Well, the criminal has the right to sue, and the soldier does not.

Mr. SCOTT. Okay.

General ALTENBURG. The difference, though, is that the soldier has a compensation package, which we could make even better, and we do that so that they won't——

Mr. SCOTT. But the soldier will get the compensation whether he is a victim of malpractice or not.

General ALTENBURG. He is compensated for any negligent act that harms him, whether it is the result of malpractice or some other type of negligence.

Mr. SCOTT. You mean, he is entitled to medical treatment?

General ALTENBURG. Correct.

Mr. SCOTT. Okay. He does not get any compensation under the normal view of compensation in a negligence case for being the victim of malpractice?

General ALTENBURG. I think that is probably true, but it is——

Mr. SCOTT. Whereas a prisoner would be able to receive compensation as a result of being a victim of malpractice.

General ALTENBURG. A prisoner would be able to sue for compensation of some type.

Mr. SCOTT. Okay.

Mr. FIDELL. If I may, your colloquy raises a point that perhaps I could inject. There has been a lot of discussion about suing, heavy lawyering, and so forth. That is a separate conversation. However, I think it is quite important to bear in mind that the Federal Tort Claims Act has a mandatory administrative step that you have to exhaust before you can actually go into court. And most Federal Tort Claims Act claims are resolved administratively.

Just so that we all have the same sheet music in front of us on that, the mere fact that you have a claim under the Federal Tort Claims Act does not mean that you and the government are condemned to appear before a Federal judge; in fact, you are going to be engaged for some period of time in a colloquy with the agency to try to resolve it amicably. And that is, in fact, what happens in, I believe, the vast majority of FTCA claims.

Mr. SCOTT. Now, the law that you would recover under would be the state law, if it is—would it matter which state the prison was in, for example? One prisoner might get recovery under some circumstances and not in another?

Mr. FIDELL. The FTCA is imperfect, and it does—as a reflection of our Federal system—local law.

Mr. SCOTT. Now is there any reason why this—bill ought to be limited to medical malpractice—why a soldier off duty, sitting at a stoplight, gets rear-ended, why they couldn't get compensation like every other automobile accident victim?

Mr. SALTZBURG. Perhaps I could address that, Congressman. The American Bar Association's position is that *Feres* ought to be rejected by Congress, that—Congress never ever adopted *Feres*. This is a judicial creation. In most other instances, when the courts read

a statute and put something in that Congress never included, Congress looks at it and isn't very happy about it. But for 60 years, Congress has sat back and let the courts invent this doctrine and develop it.

The testimony that I provided you indicates that there are a lot of people who have looked at the Federal Tort Claims Act and the exceptions that are there and said if you just applied the exceptions, you wouldn't be interfering with military discipline or military decisions that are being made, but you would provide fundamental fairness to military personnel in a variety of settings, including all of those you have mentioned.

Mr. SCOTT. Thank you, Mr. Chairman.

Mr. COHEN. Thank you, Mr. Scott.

Mr. Jordan, the gentleman from Ohio, is recognized—member of the great class of 2006.

Mr. JORDAN. Thank you, Mr. Chairman.

Ms. Rodriguez, let me, too, thank you and your family for being here. And we certainly feel terrible about the loss you have had to suffer, and we appreciate your brother's service. While it is not the same as losing a family member, before politics I was assistant wrestling coach at Ohio State University, and we had a wonderful young man who wrestled for us, and unfortunately lost his—Major Ray Mendoza lost his life after doing three tours in Iraq. So we, again, appreciate the sacrifice of your brother.

I want to go to this distinction that Congressman Hinchey is talking about where the difference in—kind of the example that the general brought up in his testimony, where the one individual is medical malpractice in the hospital versus the one from friendly fire. And I am always—Congressman Hinchey is confident that you can maintain this distinction, but I am always nervous about the slippery slope in a variety of areas. When politicians start down one road, it is not too long before we are moving to something else, and it is interesting—before this Committee I just came from going through a Stryker MEV, medical evacuation vehicle, they have out on the street here in front of Rayburn.

And General, your thoughts on if we, in fact, pass this legislation, is it too far—is it not too big a step before the person providing treatment from a combat wound in that MEV, as they are moving that soldier from the combat area back to a safer place, if they do something wrong, if they don't do exactly what needs to happen in that vehicle as they are treating that soldier, do you think that we can—we would ever see the day where that individual would, you know, be liable for some type of negligent treatment of the soldier resulting from, you know, treating them from a combat injury? Not friendly fire, per se, but, you know, legitimate—another combat injury.

Your thoughts on that, because it always concerns me how we start down one road which seems to make sense, seems to be limited, seems to me we can maintain that distinction, but the unintended consequences of the slippery slope.

General ALTENBURG. I think that is remotely possible. I don't think it is quite the slippery slope that other issues could be. I think that Congressman Hinchey has been careful to exclude com-

bat, and seems sincere about wanting to make sure that that is not a part of this.

I think a potential that is latent in the proposed legislation is, how do you define combatant activities? What does that mean? I mean, Sergeant Rodriguez was diagnosed or misdiagnosed in a combat theater. Is that enough? It clearly wasn't a combat wound. So you will get into all kinds of things like that——

Mr. JORDAN. That is sort of my point. The injury takes place in combat, but let us say they are back at the base hospital and, you know, the standard of care is such that it was definitely medical malpractice when they were trying to fix the wound and help this and treat this soldier. Do you think we run afoul there? Do you think there is a problem?

General ALTENBURG. Well, obviously I support the *Feres* Doctrine because I think not to have it would truly create serious issues for the military in its day-in-and-day-out operations, and I don't use the term "discipline" and "military order and discipline" as much as I think in terms of the mundane, really, day-in-and-day-out decisions that military leaders at all ranks, from sergeant first class all the way up to brigade commanders make and hospital commanders make in making this process. And I am concerned that ultimately combat readiness gets affected because of the types of decisions that are made.

We take for granted, because we don't know as much about what it is like on a day-in-and-day-out basis, and again, in my oral statement, which will be transcribed, I refer to all these different aspects of day-in-and-day-out military life that could be affected by lawyers who could allege medical malpractice. Whether they would be ultimately successful or not is really kind of beside the fact when you are looking systemically. The fact is, we would invest a lot of resources in trying to determine whether, in fact, it was medical malpractice and so forth.

Mr. JORDAN. Right. Right.

Mr. Saltzburg, I mean, your thoughts on the slippery slope? Again, just from my limited time here in Congress, I see, you know, we had a government say, "Well, we are going to work on making sure Fannie and Freddie don't fail," and then, "Oh, that is where we will stop," and then the next thing you know it is AIG, next thing you know it is $700 billion, and here we are. So, the tendency of government to start with very limited intentions and then quickly move in a broader context is, you know, the history is pretty strong that it does that, so your thoughts?

Mr. SALTZBURG. I actually think that it is always a good idea to worry about slippery slopes, and particularly in this context, because look at the last 60 years. The *Feres* Doctrine started out in what looked like it was going to be a narrow doctrine and it has flipped the other way, as you say, so it now covers virtually everything that military personnel end up being involved with. I think the choice of "combat operations" was an important one because of its avoidance of the use of the term "war," which causes even more confusion.

I would agree with General Altenburg. I think if you ask, "What are the odds that this will result in a problem?" I think remote is

probably the right answer. But if somebody said nonexistent, they would be lying to you.

Mr. JORDAN. Okay.

Mr. COHEN. Thank you, Mr. Jordan.

Mr. JORDAN. Thank you, Mr. Chairman.

Mr. COHEN. You are very welcome.

Mr. King, you are recognized.

Mr. KING. Thank you, Mr. Chairman.

I do thank all the witnesses, and I wish to associate myself with the remarks by Mr. Jordan and Mr. Franks as well, especially with regard to the service of your brother, Ms. Rodriguez. And these stories play themselves out by the thousands and thousands across the history of this country, and we enjoy this freedom partly because of that, and I know how difficult it is to come forward and testify.

But I also have a couple of questions that recur to me, and one is unresolved as I asked staff, and the diagnosis in 1997—the melanoma diagnosis—I understand it is part of a medical record, and I am curious about when did your brother learn about that diagnosis from 1997? I understand it wasn't—at least we don't know that he was told that in 1997, because he marked on the form in 2000 that he didn't have—he marked "no" on the medical history question about cancer. So when did he learn?

Ms. RODRIGUEZ. After he found out he had malignant melanoma stage three, I contacted Congressman Hinchey, and I wanted to get his medical records. He couldn't get his medical records himself, I don't know why, but we got them through Congressman Hinchey, and that is when he found out. We were looking through them and it was there; he never saw it before.

Also, in 2003 he had another physical in Florida; it said the same exact thing, and he never was aware of it.

Mr. KING. Okay. And were there lab reports from the 1997 and the 2003——

Ms. RODRIGUEZ. Yes.

Mr. KING. So they took a test; they got the diagnosis.

Ms. RODRIGUEZ. I am not sure if they took a test, but it was on a document, dated, with a checkmark in "right buttock melanoma."

Mr. KING. I am just going to ask that we search out that information, if there was tests. And I don't want to be difficult with you, I just—I don't disagree with what you said here at all, but as I bring up that subject—as I bring up that subject the—I know you have listened to General Altenburg's testimony too, and I wonder if you have anything you would like to say into the record about your response to General Altenburg's testimony.

Ms. RODRIGUEZ. I do have a lot of—not only on his statement—I hear a lot of suing and families getting monies, and that is not why my family is here. We are here for the military to be accountable.

Every day my brother is not here with us, and to know that someone is not accountable for what happened and is still continuing working and going about with his family, and going about their life, it hurts. And nothing is being done.

There is a lot—we are not the only family; there are other families.

Mr. KING. Could I summarize in that, you have a strong sense of correcting an injustice?

Ms. RODRIGUEZ. Just correcting it. That is what he wanted. He wanted this; he began this.

Mr. KING. Thank you, Ms. Rodriguez. I appreciate it.

I think the clock is ticking quickly, but I think we need to go back to Mr. Fidell, and when you spoke about the wrongful death compensation in civilian tort claims—the wrongful death compensation in civilian tort claims and—or, excuse me, in military claims, that are proportional to rank, and that, of course, is proportional, then, to the income-earning capability of that individual. Isn't that also reflective in civilian courts?

Mr. FIDELL [continuing]. Wrongful death. Not for wrongful death. What I was talking about was military retirement disability.

Mr. KING. Okay. The right of retirement disability, and then you testified that you believe there would be people that would object to that formula, to that type of compensation?

Mr. FIDELL. Yes, I think distinguishing on the basis of pay grade, when compensating people who are put on the permanent disability retired list, for example, would startle many Americans.

Mr. KING. And then, but would you agree that that also is the system in the wrongful death circumstances in civilian tort claims—the income-earning capability of that individual is calculated in a similar manner?

Mr. FIDELL. Yes, but pain and suffering is not.

Mr. KING. I just thought it was important to make that clarification, and I also appreciate you making a clarification on my earlier inquiry of Mr. Hinchey. I would like to just offer the balance of the response to General Altenburg.

General ALTENBURG. I am not familiar with the military retirement disability, that is to say, when the military considers you disabled and they pay something. But I am familiar, thoroughly, with VA disability retirement, and you are paid the same whether you are a four-star general or a PFC; it is based on the percentage of disability, period.

Now, Mr. Fidell may be talking about the less often used retirement disability of the military system, but, I mean, I am a disabled veteran, and I know what I get, and I get the same thing that someone who has the same disability gets regardless of their rank or years of service.

Mr. FIDELL. I am, in fact, talking about the people who are retired under Title 10 who are found not fit for duty. That is a different economic exercise from the programs administered by the Department of Veterans' Affairs, and it is the active duty retirements that I thought the colloquy concerned.

Mr. KING. I thank all the witnesses, and I think we have got clarification on at least three points here, and I appreciate that.

And Mr. Chairman, I would yield back the balance of my time.

Mr. COHEN. Thank you, Mr. King.

I would now like to recognize the distinguished Member from the 25th district of New York, Mr. Maffei.

Mr. MAFFEI. Thank you, Mr. Chairman.

I just want to—I will start with Mr. Fidell—I just wanted to ask—again, I am trying to figure out, would this situation have

been any different if Sergeant Rodriguez were a reservist or National Guardsman as opposed to regular, you know, regular military.

Mr. FIDELL. Well, if the individual was on Title 10 status there would be no difference. In other words, a National Guardsman or Air National Guard, or a classic weekend warrior reservist, if the person was on extended active duty, the legal regime would be precisely the same as was involved in the particular case that has brought us all here today.

Mr. MAFFEI. What would happen if this was a dependent of a military person and stationed someplace? They often do see military physicians——

Mr. FIDELL. Absolutely, and they have every right, under the Federal Tort Claims Act, to file a claim. It would be administratively examined in the first instance, and if they are unable to reach an agreement with the service, then they have the right to go into Federal district court.

Mr. MAFFEI. Okay.

Mrs. Rodriguez, I want to thank you for both your husband's service and your service to our country and for being here today. I just want to ask you, Sergeant Rodriguez, I mean, he was a very good NCO, and what was his—clearly he must have known that the military was saying that this would have some sort of effect on discipline, et cetera. Did he share with you any of his thoughts on that, I mean, being such a loyal soldier?

Ms. RODRIGUEZ. Did you say disciplinary?

Mr. MAFFEI. No, no. The counter-argument, that he knew that a lot of officers were against this, and he was accustomed to obeying the orders of officers, why did he feel differently? Why did he disagree? Why did he feel that this is an example of a thing that he should have been able to seek restitution on?

Ms. RODRIGUEZ. I don't think he—he never sought out restitution.

Mr. MAFFEI. Or just even the ability to sort of make light of it?

Ms. RODRIGUEZ. Make light of it——

Mr. MAFFEI. I mean, what do you think he would think of this hearing? Let me ask you that.

Ms. RODRIGUEZ. What would he think——

Mr. MAFFEI. Of this hearing, yes.

Ms. RODRIGUEZ. Oh, he would think that this is wonderful. I mean, we have come here so quickly, and we are very grateful, and——

Mr. MAFFEI. Good. Thank you very much.

General Altenburg, I am just curious as to, you know, how—I know we have sort of gone around this before, but given that a civilian, even a military dependent, how do we sort of—how do we explain kind of the double standard here? Let me ask you this, let me ask you this, because we have already covered that. Is there anything that you could think of that we could do that would, you know, help give our men and women in the service some sort of a sense that they can at least change the behavior of physicians—military physicians, or something like that—if something happens, so that even if they can't, you know, sue in the traditional sense, that they could make sure it doesn't happen again?

General ALTENBURG. Well, I think if military members knew how many procedures there are and how many programs there are to review military medicine, then they ought to understand that there is a way of holding people accountable. Quite frankly, the privacy interests of doctors is what precludes more knowledge being out there among the forces of knowing exactly what happened to somebody.

If you report someone to the national database or they can't practice medicine anymore, their personal privacy interests preclude people from sharing that information. The military can't publicize that they have taken a doctor out, that he is not practicing medicine anymore.

I don't know if that is the case with the particular doctor that misdiagnosed Staff Sergeant Rodriguez. I simply don't know; I don't have any knowledge of that. But it is possible that his career has been terminated, and he is out there digging ditches somewhere.

Mr. MAFFEI. But you think there is at least sufficient incentive in place that this wouldn't happen, even though lawsuits are not allowed in this case?

General ALTENBURG. Well, sir, I believe there is, or soldiers would be not coming in as much as they are being recruited, and they would be leery of going to military doctors, and I don't find that to be the case.

Mr. MAFFEI. You don't think it is just their sense of patriotism makes them feel that——

General ALTENBURG. Oh, clearly that has something—what I am saying, a sense that the medical system won't take care of them is not enough to—if there is that sense, it is not enough to outweigh their patriotism. That is certainly true.

Mr. MAFFEI. Thank you very much. My time is up.

Thank you, Mr. Chairman.

Mr. COHEN. You are welcome.

We will have a second round, if necessary, and I would like to ask Mr. Fidell, you wanted to follow up, and I ask you to do so.

Mr. FIDELL. This thought has occurred to me: If I were a Member of this Subcommittee, I would be interested in knowing, actually, what was on the other side of the looking glass, in terms of disciplinary action, peer review action, credentialing action. General Altenburg is correct, there are privacy interests at play here, although the service has the discretion to disclose disciplinary action. Credentialing may be a different kind of issue, but in any event, it seems to me the Committee would want to know, as you exercise your legislative function, what did happen here.

Mr. COHEN. I think that is a very good question. If staff could inquire I would like to know the answer. I suspect if we had tort law and the physician was sued, that he would start to examine people's dermatological problems on their posteriors—he would make that a priority.

Mr. FIDELL. I will say this: I have represented military providers, medical providers of every description, and they take this stuff very seriously. I don't think we should be casual about this; this is a real serious thing. You are talking about people's licenses, their livelihoods, they may have invested time studying at taxpayer ex-

pense to become physicians or other specialists, so this is a real serious business——

Mr. COHEN. Thank you. We will follow up; staff will follow up, and I want you to know the Chair is disappointed that it was the minority that asked the Department of Defense to come. I am disappointed they didn't come, and they might not have come for—they didn't want to disclose whatever happened. But they should have been here, and I think it is a disgrace they weren't here when they were asked to testify on such a subject.

Ms. Rodriguez, your brother—did he leave behind any dependent children?

Ms. RODRIGUEZ. Yes, he has a son, Carmelo.

Mr. COHEN. And do you know if he received any benefits from the Federal Government as a result of your brother's death?

Ms. RODRIGUEZ. Yes, he does.

Mr. COHEN. And do you know the value of those benefits?

Ms. RODRIGUEZ. I believe it is $1,500 monthly.

Mr. COHEN. $1500 a month.

Ms. RODRIGUEZ. Yes.

Mr. COHEN. Does Mr. Fidell or anybody else know, maybe General Altenburg, would it have been different if he would have been a general?

General ALTENBURG. I don't know the answer to that.

Mr. COHEN. Mr. Fidell, do you know?

Mr. FIDELL. Not off the top of my head, no, sir.

Mr. COHEN. You suspect it would have been different if he was a general?

Mr. FIDELL. I am not going to go there without—I am kind of——

Mr. COHEN. Mr. Saltzburg, anything you want to follow up on?

Mr. SALTZBURG. I did want to—there is a point, I think, that we haven't made, and it actually relates to what Congressman King asked in a few questions earlier, and I thought the Committee probably ought to think about a couple of these things. One of them is, would changing this doctrine reduce the number of doctors willing to serve in the military? I think the answer to that is no, because the doctors aren't personally liable; in fact, they have an insulation that they don't have in private life.

The second issue is whether you need a right to sue. I want to respond to General Altenburg on this—without deprecating in any way peer review, discipline, even the opportunity to bring a court martial proceeding against a doctor. The fact of the matter is if you believe that the 50 states have a pretty good idea of what they ought to be doing with respect to medical malpractice, there isn't a single one that basically says if you end up with peer review and you claim discipline, that we should completely do away with the right to sue—nobody has to sue, but the right to sue—and the reason is that each patient becomes a kind of a private attorney general.

There is not an incentive out there—and despite what anybody thinks, there is no incentive for doctors to run around trying to catch their brothers and sisters in the profession in malpractice. If anything the incentive goes the other way, which is, "There, but for the grace of God, go I," and therefore, when in doubt, don't make an accusation. It is the patient and the patient's family—and Ms.

Rodriguez is sitting here—they have a true stake, and they identify things that often people who are busy and have other issues, that they are unwilling to confront.

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

And as Gene Fidell has said to you, under the Federal Tort Claims Act, it is a much more efficient process than most of the states have. If you do change *Feres*, you don't need to assume that there are going to be X number of Federal lawsuits; you can assume there will be more claims brought, and probably most settled without a lawsuit ever being brought.

Mr. COHEN. Thank you, Mr. Saltzburg. Let me ask you this: You mentioned private attorney generals, and sometimes we think of lawyers who bring tort actions as being private attorney generals. Do you know of any statistics that Mr. King asked about that would show that tort actions do improve health care?

Mr. SALTZBURG. If you were to look at the literature, you would find that there are studies that support virtually any opinion that anyone would care to offer, and it is largely because there are interest groups that fund a lot of these studies. The——

Mr. COHEN. So your answer is yes, but it is also statisticians—damned statisticians, the liars.

Mr. SALTZBURG. The case has been made—I say made, and argued, I should have said—the case has been argued that medical malpractice lawsuits drive up medical insurance, tend to make people less wanting to be doctors, and don't improve the quality of medical care. And the counter case has been that, in fact, insurance costs hardly are affected by medical malpractices; they are much more affected by investment policies of insurance companies. We have no shortage of people applying to medical school wanting to be doctors, and private litigation at least has done this: It has put a lot of doctors that have committed malpractice on the list that identifies them as people who have committed malpractice, and they might not have been there without the private suits. But no one, I think, can cite you one study that would say, "This is the answer. This is how much benefit you get from litigation."

Mr. COHEN. Thank you, sir. And I am going to allow myself one last question, because we went from green to red, which was unusual—mistake in our system.

Either Mr. Saltzburg or Mr. Fidell, are there statutes that you are aware of that permit service members to sue the government?

Mr. FIDELL. Oh, absolutely, and although the government may not be happy about this, G.I.s do, from time to time, sue the government. For example, a G.I. can sue for a violation of the Privacy Act. It happens; they are hard lawsuits.

A G.I. can sue the government, for example, to overturn a decision of one of the boards for correction of military records. That happens with some regularity, in this judicial district, particularly. So there are certainly situations where G.I.s are in court and the government is on the other side. There is nothing particularly disturbing about that. I think if you didn't have that, people would be up in arms.

Mr. COHEN. Mr. Saltzburg, do you have anything to add?

Mr. SALTZBURG. I agree with that, but let me see if my friend, Gene, agrees with me on one thing. If Sergeant Rodriguez had been on leave from Iraq, and he had been back in New York, and he was driving his car and he was run into by a military doctor, he would have been able to sue the military doctor without any limitation due to *Feres*, wouldn't you agree?

Mr. FIDELL. Just a fortuity that one—yes——

Mr. SALTZBURG. And the doctor, in that case, would be facing, you know, personal liability. I mean, *Feres* goes so far, if he is on his base in Iraq and he gets in a vehicle, and a military doctor is drunk and drives his vehicle into Sergeant Rodriguez, this isn't medical malpractice, but he can't sue. I mean, that is the problem with this *Feres* Doctrine, which is, it does make our military personnel second-class citizens when it comes to using the tort system to try and assure that they will be treated fairly.

Mr. COHEN. And General Altenburg, knowing that there—and I presume you knew as well—that there are statutes that allow the military to sue in these circumstances even from their employment, that doesn't interfere with military discipline. These are distinctions where military can sue, and those distinctions do or do not bother you?

General ALTENBURG. Are you talking about the distinction in the case of torts?

Mr. COHEN. Yes, sir. Or non-torts, for that matter.

General ALTENBURG. Well, just so they can be a party plaintiff and sue their military superiors. I believe that tort litigation, where the facts indicate incident to service, can be and usually are disruptive to the efficiency of the service, because of the unique nature of the mission and the training that goes with it.

Mr. COHEN. Thank you, sir.

Mr. King, do you have any further questions?

Mr. KING. Thank you, Mr. Chairman. I had a few things that arose to my mind as I listened to your questions, and I was listening to Mr. Saltzburg, whom I consider to be a very objective witness, and you have endeavored to inform this panel each time you have spoken. This question occurs to me, though, and that would be off of, I believe, a statement you made that if this proposal, this bill that we are discussing, Mr. Hinchey's bill, if it doesn't discourage doctors from entering and training in the military—if it doesn't discourage them, then the system that would evolve from it or would emanate from it—how can it then provide for accountability?

What is the check on accountability—if it is not a discouragement to doctors, then where does accountability manifest itself under this bill?

Mr. SALTZBURG. I am not a doctor, but I am old enough now that I happen to deal with a lot of them, and they do talk about litiga-

tion, their concerns about insurance and things like that, and the answer, I think, Congressman, is this: That people thinking about being doctors and who are doctors are worried about several things. They are worried about whether they are going to be sued, whether they are going to be personally liable, and whether their right to practice medicine is going to be adversely affected.

Now, in a perfect system, if they commit malpractice they should be on a list that identifies them as having committed malpractice, which does adversely affect them. But all things being equal, the doctor who chooses the military knows that he probably—or she probably—will never be personally liable. So the real fear is of an extraordinary adverse event that exceeds your insurance and exposes whatever assets you have to somebody's recovery, that will never happen in the military.

As for the question, well, how do you get accountability? Everyone, I think, on the panel agrees that accountability is important, that all of the devices, whether it is peer review or discipline or a suit, are all designed to identify that doctor who commits malpractice. The reality is, that doctor shouldn't and can't expect to escape responsibility for malpractice. What they can escape is being personally responsible, and that is what the military does—it protects them.

Mr. KING. Would a doctor that would move from private practice into the military, he would escape malpractice premiums and the threat of malpractice? If I follow your thought through, then the next question that flows to me is, would there be civilian doctors that would seek to go into the military for the protection that would exist?

Mr. SALTZBURG. My experience has been that the civilian doctors who are willing to go into the military do it not to escape—they really don't do it to escape liability; they do it out of sense of public service.

Mr. KING. Would you agree that the incentive would exist?

Mr. SALTZBURG. I do.

Mr. KING. And also, I just want to reiterate your testimony that the data says yes and no on these questions, and I appreciate that.

And I wanted to give General Altenburg an opportunity to respond to that, because I may have left something hanging in the air here that needs to be cleared up.

General ALTENBURG. With regard to accountability?

Mr. KING. Yes. How can there be accountability that is provided if the doctors are shielded from liability that are in the military, then how does accountability emerge from this legislation? That seems to be the thrust of this legislation, is the accountability rather than the compensation.

General ALTENBURG. Yes, sir. And I think that—well, first of all, in the civilian sector, besides the peer review and so forth, all they really have is lawsuits, you know, for accountability, and as Steve said, it is up in the air as to whether that really does reduce medical malpractice or not.

In the military, besides all these systems, and I would tell you that there are more systems and more procedures simply because we are getting more oversight from you gentlemen and women, and because our culture is all about accountability, more so than any

segment of our society. And we have more tools available, in terms of administrative actions outside the medical discipline itself, and discipline and administrative procedures, and literally really kicking people out of the ability to practice medicine and force them out of the service, I think we have more capability than the civilian sector does.

Mr. KING. General, you referenced Landstuhl, and I, like you, have spent a little time there, mine very briefly, but it occurs to me that there was a Major Langvine, I recall, who took care of the logistics of the transfer of patients to the tarmac to be brought back here to Andrews and Walter Reed, and Bethesda, sometimes, in Texas, and I remember that at that time that he had delivered this information to me, that they had transferred 39,000 patients from Landstuhl to the United States, lost only one, and that was an unrelated heart attack, rather than to an injury, and that occurs to me as you testify.

I would ask you if there has ever been a military in the history of the world that delivered such first-class health care to all of its people on balance. Has there ever been anyone that would rival what has been accomplished by the United States of America in this recent conflict?

General ALTENBURG. I share your enthusiasm for our medicine, and I am just reluctant to compare ourselves to everybody in the world. I wouldn't doubt that that is true, and I will say personally, I am very proud of military medicine. It is extraordinary what these people do—the medical care people—in the military, and we have seen some distractions in the last few years that actually have nothing to do with acute medical care, but had to do with caring for people as they were in a different kind of status, and it may very well be the best. I can't imagine a military medicine system that is better than ours.

Mr. KING. I am happy for that to be the last word. I thank all the witnesses, and especially Ms. Rodriguez, for coming forward in a difficult time, and I yield back the balance of my time, Mr. Chairman.

Mr. COHEN. Thank you, Mr. King.

I would like to thank the Members who participated today, and all the witnesses who participated with their testimony, particularly Ms. Rodriguez and on behalf of the family. Without objection, Members will have 5 legislative days to submit additional questions, which will be submitted to the panelists, and we hope that you would then respond to those; they will be made a part of the record. Without objection, the record will remain open for 5 days for submission of any additional materials the Members might want to submit.

Again, I thank everybody for their time and their patience.

This hearing of the Subcommittee on Commercial and Administrative Law is adjourned.

[Whereupon, at 4:16 p.m., the Subcommittee was adjourned.]

APPENDIX

MATERIAL SUBMITTED FOR THE HEARING RECORD

PREPARED STATEMENT OF THE HONORABLE JOHN CONYERS, JR., A REPRESENTATIVE IN CONGRESS FROM THE STATE OF MICHIGAN, CHAIRMAN, COMMITTEE ON THE JUDICIARY, AND MEMBER, SUBCOMMITTEE ON COMMERCIAL AND ADMINISTRATIVE LAW

The Supreme Court's long-standing "*Feres* doctrine" denies members of our armed forces the right to sue the government that Congress gave all Americans when it enacted the Federal Tort Claims Act.

Our issue at today's hearing is whether Congress should allow this doctrine to continue denying service members the right to sue under the Act when they are killed or injured as a result of medical malpractice while serving our country.

Let me offer three initial comments on that issue:

First, *Feres* was wrongly decided. The Federal Tort Claims Act does not exclude service members from its coverage. It excludes only claims "arising out of the combatant activity" of service members "during time of war."

That exemption, as Justice Scalia has explained, shows that Congress "quite plainly excluded" the blanket exemption for service members recognized in *Feres.*

Second, it is too late to expect that the Supreme Court will overrule *Feres.* The restoration of the rights conferred on service members by the Federal Tort Claims Act can only come from Congress.

Third, none of the arguments supporting *Feres* have ever struck me as persuasive.

The main argument is that lawsuits by service members will interfere with "military discipline." I hope our witnesses will address whether medical malpractice suits, in particular, will have that effect.

They should keep in mind that the legislation before us specifically excludes medical malpractice claims when they "arise out of the combatant activities of the Armed Forces during time of armed conflict."

RESPONSE TO POST-HEARING QUESTIONS FROM STEPHEN A. SALTZBURG, PROFESSOR, THE GEORGE WASHINGTON UNIVERSITY LAW SCHOOL, WASHINGTON, DC

Questions for the Record
Subcommittee on Commercial and Administrative Law
Hearing on H.R. 1478, the "Carmelo Rodriguez Military Medical Accountability Act of 2009"
Tuesday, March 24, 2009

Stephen A. Saltzburg, American Bar Association

Questions from the Honorable Steve Cohen, Chairman:

1. **In adopting the resolution about which you testified, did the American Bar Association (ABA) consider the likely effects of lawsuits by service members on military discipline? What conclusion did it reach? Did it consult with any current or former service members or civilian Department of Defense officials in reaching its conclusion? Please explain.**

The American Bar Association did consider the consequences of potential lawsuits by service members on military discipline. Consistent with this, we propose amending 28 U.S.C. § 2680(j) to change the language from "during a time of war" to "during a time of armed conflict." This language better reaches the universe of "combatant activities" in which the integrity of the military chain of command and discipline are of paramount importance. As it stands today, the *Feres* Doctrine exceeds the conduct and circumstances in which military discipline is at issue, including matters unrelated to the performance of one's military duties. If some unanticipated circumstance arises in the future warranting consideration, Congress is able to add to the current list of 14 exceptions to the Federal Tort Claims Act. Such an exception would be added pursuant to an open and deliberative lawmaking process that produces more neatly-tailored exceptions than the *Feres* Doctrine provides.

The ABA's 2008 policy was sponsored by the Bar Association of the District of Columbia upon recommendation of its Military Law Committee. It was written by a well-published former staff judge advocate, trial and defense counsel and a trial and appellate military judge who went on to a private law practice that concentrated on military law cases. For their consideration, the policy position was further circulated to 17 entities of primary jurisdiction, including the Judge Advocates Association. Four of the ABA entities included focus on aspects of military law specifically, and are led by current and former military lawyers. There was no opposition to the resolution.

2. **You note on page 16 of your written statement that the American Bar Association (ABA) "was persuaded by the resolution's sponsors that the current exceptions in the FTCA provide ample protection to any actions which challenge discretionary command decisions." What, exactly, are those exceptions, and what relevance do they have to the issue before the Subcommittee?**

28 USC § 2680 provides an enumerated list of 14 circumstances under which Congress has determined that as a matter of public policy claims should not be permitted under the FTCA. Several of these, e.g. (e), (h), (j) and (k) relate to circumstances that may arise for military personnel while operating in the line of duty, including in the course of combatant activities; certain claims of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights; or when in a foreign country. These may be relevant to the Subcommittee to demonstrate the breadth of the Act and its exceptions, as well as to assist in identifying whether additional circumstances that implicate military discipline or discretionary command decision making are not covered but should be. For example, the ABA urges that (j) be amended to cover combatant activities "during a time of armed conflict" rather than merely "during a time of war." Military discipline is non-negotiable when soldiers and their weapons are deployed, yet there are circumstances in which this may occur short of a formal declaration of war.

3. **Major General John D. Altenburg, Jr. (retired) notes in his written statement (at page 8) that the exclusivity provision of the Federal Employees Compensation Act bars suits under the Federal Tort Claims Act by civilian employees of the federal government arising from "on-the-job injuries." Should the no-fault compensation system under which injured or killed service members are compensated (which is discussed at length in General Altenburg's written statement) provide the exclusive remedy for service members injured or killed as a result of medical malpractice committed by government healthcare providers? Please explain.**

I don't believe it should be. Currently, because of the *Feres* Doctrine, service members can bring an action for medical malpractice against a civilian hospital or physician but not against the United States if treated in a government facility. We believe that the distinction in the rights of members of service members treated in a civilian institution by civilian personnel and those treated in a government hospital by government or civilian employees of the government is not justifiable.

4. **What is your response to the argument made by Major General John D. Altenburg, Jr. (retired) under the heading "The Benefit and Compensation Program Offset Provision of H.R. 1478" on pages 12-14 of his written statement?**

Because service members can bring an action for medical malpractice against a civilian hospital or physician, we have an idea of the money dividend for those service members. It would appear that, under the same set of circumstances, the money dividend for services members treated in a civilian institution by civilian personnel would be the same as for those treated in a government hospital by government or civilian employees of the government.

5. **Would jury trials be available in suits brought under the amendments to the Federal Tort Claims Act appearing in H.R. 1478?**

Jury trials are not available for suits against the government brought under the Federal Tort Claims Act (See 28 U.S.C. § 2402) and nothing in H.R. 1478 would change that.

RESPONSE TO POST-HEARING QUESTIONS FROM JOHN D. ALTENBURG, JR., ESQ., MAJOR GENERAL (RETIRED), UNITED STATES ARMY, GREENBERG TRAURIG, LLP

Questions for the Record
Subcommittee on Commercial and Administrative Law
Hearing on H.R. 1478, the "Carmelo Rodriguez Military Medical Accountability Act of 2009"
Tuesday, March 24, 2009

Major General John D. Altenburg, Jr., U.S. Army-Retired

Questions from the Honorable Steve Cohen, Chairman:

1. **Do you believe that Feres correctly interpreted the Federal Tort Claims Act? Please explain.**

In short, yes. The Feres Supreme Court correctly interpreted the meaning and purpose of the Federal Tort Claims Act (FTCA). The Feres Supreme Court of 1950 knew and understood why the 1946 Congress passed the FTCA. Congress designed FTCA to give individuals, who previously had no remedy for compensation, a right to bring tort claims against the government for injuries inflicted by government employees. The FTCA provides "money damages" -- and this is the only accountability established by the law -- to provide just compensation to those who otherwise have no remedy against the government.

Service members and civilian employees do not need FTCA rights because the government provides them with a system of compensation benefits for on-the-job injuries. As I was asked at the hearing, this is why federal prisoners have the right to sue for government medical malpractice but service members do not. Federal prisoners are not government employees, thus they are not covered by compensation benefits; their only recourse is to sue.

Unfortunately, the FTCA does not directly address who can sue the government, only that the district courts shall have jurisdiction over "all claims" (except for those specifically excluded). The absence of language defining a proper claimant prompts some to contend that Congress intended for anyone to be able to sue the government. However, Congress had already declared the Federal Employees Compensation Act as the exclusive remedy for civilian employees injured on the job, thus the FTCA was clearly not enacted to give civilian employees a means to sue the government.

In 1946, the FTCA was a remarkable and cutting-edge development in the law for its time because it embodied a significant change in legal philosophy about the limits of sovereign immunity. It is very difficult for a piece of legislation to anticipate every circumstance that might arise; the failure of the FTCA to specify who was a proper claimant raised a new issue. In addition to private individuals suing the government, military members and their survivors also started suing under the FTCA.

Even though both civilians and service members could not sue the government prior to the passage of the FTCA in 1946, the concept that military members could sue the government they served was especially novel. The Feres Supreme Court described the possibility of tort lawsuits by service members against the government "a radical departure from established law." Feres v. U.S., 340 U.S. 135, 146 (1950). The Court observed:

> 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. at 141 (reference to supporting historical authorities cited by the Court omitted).

The Court surveyed federal law and found that "no federal law recognizes a recovery such as [military] claimants seek," and in the Military Personnel Claims Act, Congress already had specifically excluded claims of military personnel "incident to their service." Id. at 144. The Supreme Court also observed that no state "has permitted members of its militia to maintain tort actions for injuries suffered in the service, and in at least one state [New York] the contrary has been [specifically] held to be the case." Id. at 144 (citing Goldstein v. New York, 281 N.Y. 396, 24 N.E. 2d 97 (1939) ("the State [of New York] has never waived its immunity from liability to members of the militia nor obligated itself to respond in damages for injuries negligently inflicted in active service by one member of the militia upon another.")). Even today, the State of New York does not authorize members of its National Guard to sue the State for injuries incurred in the service of its militia. Section 8a, New York State Court of Claims Act.

In the Feres opinion, the Supreme Court closely examined the system of compensation and benefits already provided by the government and made two important observations. First, because Congress did not specifically address in the FTCA whether military and Veterans Administration benefits should be excluded from recovery: "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. at 144. Second, the Court found the recoveries under the compensation system for service members "compared extremely favorably with those provided by most [state law] workmen's compensation statutes." Id. at 145. The Feres Court concluded, "The primary purpose of the Act was to extend a remedy to those who had been without [private individuals, and not those employed by the

government]; if it incidentally benefited those [government employees] already well provided for, it appears to have been unintentional." Id.

It is clear from the Feres opinion that the Supreme Court carefully and cautiously interpreted congressional meaning of the FTCA. The Court stated:

> 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.

Id. at 135. After considering the language of the FTCA and all reasonable inferences in light of the government benefit system and, among other considerations, the federal character of the relationship between the government and its military members, the Supreme Court concluded that Congress did not intend the FTCA to create a new cause of action for service-connected injuries or death due to government negligence. The Feres Supreme Court ruled the FTCA did not authorize claims for injuries to servicemen where the injuries arise out of or are in the course of activity "incident to service," which has become known as the Feres Doctrine. Id. at 146. The Feres Court determined that Congress did not intend to create new legal remedies for service-connected injuries or death due to government negligence. Over the years Congress has fundamentally agreed.

After the Supreme Court ruling in Feres, Congress did not act to contradict or change the Feres Doctrine "incident to service" test as an FTCA rule of law in any regard. Although there has been criticism and proposed legislation from time to time,

each Congress has recognized the wisdom of the Feres Doctrine and reaffirmed the essential principle of the Feres ruling that the 1946 Congress did not intend for the FTCA to permit every claim arising from military activity, but only those claims that had no connection to military duty.

The Feres Supreme Court understood and correctly interpreted the congressional purpose and intent of the FTCA as applied to private individuals and to both civilian employees and military service members. It's important to understand and appreciate the historical context of the reasoning of the Feres Supreme Court in 1950. Despite the criticism of the decision over the years, the FTCA "incident to service" test applied to the military has been straightforward but appropriately flexible. The Feres Doctrine lengthy history of consistent application has been generally accepted by Americans, an acceptance similar to how Americans have come to grips with the limitations of workers' compensation as the exclusive remedy for job-related injuries.

The Feres Doctrine "incident to service" test is a sound FTCA rule of law. It retains its vitality, even in military medical malpractice cases. Though the supporting rationales may not apply with equal weight and persuasion in every case, the Feres Doctrine has proven an enduring legal decision undisturbed by Congress over the years. This longevity reflects an essential principle of fundamental agreement among the generations of Americans as to the rightness of the Feres Doctrine. There are better, more efficient ways than money claims against the government to hold public institutions and servants accountable while providing individuals recourse and needed compensation. If Congress believes the benefits to our service members for medical

negligence are inadequate, then I believe it would be more efficient and fair to all to improve those benefits.

Questions from the Honorable Steve Cohen, Chairman:

2. **What benefits are available to service members injured or killed as a result of medical malpractice committed by government (including military) healthcare providers? What eligibility criteria must a service member satisfy to receive the benefits you identify?**

I will endeavor to provide a meaningful response, but the Department of Defense and the Department of Veterans Affairs are probably better suited to answer this question and I ask the Subcommittee Chairman to direct this question to those agencies also. I have fashioned sub-questions and answers to this question.

Question: What eligibility criteria must a service member satisfy to receive the benefits you identify?

Answer: The benefit system is a "no-fault" system similar to workers' compensation programs, and because military members on active duty orders of 30 days or more are considered on-duty around the clock subject to recall even while on leave, generally speaking every service member carried in a favorable duty status (e.g., not absent without leave or some other adverse or disciplinary status), they remain at all times eligible for all available benefits. Service members not on active duty orders of over 30 days must incur injury or disease found to be in the line of duty to be eligible for benefits. Regarding eligibility for specific benefits, please see responses below.

Question: What benefits are available to service members injured or killed as a result of medical malpractice committed by government (including military) healthcare providers?

Answer: With the exception of Service members' Group Life Insurance Traumatic Injury Protection, no benefit eligibility is tied directly to medical negligence or care; rather, benefits are broadly available for injury regardless of the cause. Benefit eligibility depends on whether the service member is injured or killed (regardless of the cause). Eligibility categories are as follows:

Injured and able to continue to serve

Injured service members declared "fit" for military duty receive the following benefits.

1. Military Pay -- Continued Pay and Allowances at Full Rate.

2. Health Care -- Continued Medical Care, Pharmacy, and all Related Care (for the service member and dependent family members).

3. Other Benefits -- Continue to be eligible for all other possible benefits of military service (e.g., Commissary and Exchange, Sports Facilities, Child Care Services, Entertainment, etc.) (service member and dependent family members).

4. Insurance -- Service members' Group Life Insurance Traumatic Injury Protection (TSGLI) is designed to help traumatically injured service members and their families with financial burdens associated with recovering from a severe injury, and payments range from $25,000 to $100,000. TSGLI is payable for a "traumatic event" that results in a "traumatic injury" listed as a "qualifying loss." TSGLI is not payable for a loss resulting from medical or surgical treatment of an illness or disease (or that portion of injury or loss due to medical or surgical treatment). Currently, surgical and medical treatment, care, or examination causing injury to the body is not considered an "external force" or "violence" or other "traumatic event." 38 C.F.R. 9.20 ("(b)(3) A traumatic event

does not include a medical or surgical procedure in and of itself." and "(3) A benefit will not be paid if a scheduled loss is due to a traumatic injury -- (i) Caused by -- . . . (C) Diagnostic procedures, preventive medical procedures such as inoculations, medical or surgical treatment for an illness or disease, or any complications arising from such procedures or treatment."). For example, a puncture of the bowel injury during a routine colonoscopy examination, and any resulting complications from the medical injury, are not covered. Similarly, failure to medically diagnose an illness or disease leading to further injury is not covered.

Injured, but unable to continue to serve

Not Retirement Eligible

Service members with a military disability rating of below 30% and declared "unfit" for further military duty are not eligible for retirement (20 or more years of qualifying service) will discharged from service. Service members discharged from service receive the following benefits.

1. Military Pay -- Department of Defense Disability Severance Pay upon Discharge (calculated based on pay grade and years in service at time of discharge (up to 20), but not tied to the nature or severity of injury).
2. Unused Leave -- Payment to the service member for all unused accrued leave.
3. Department of Defense Health Care -- Discharged Disabled Service Members and their dependent family members remain eligible for Medical Care, Pharmacy, and all Related Care for six months from military-provided medical care (military facilities or private physicians through TRICARE).

4. Department of Veterans Affairs Health Care -- Discharged Disabled Service Members (veterans) are entitled to seek a disability rating and determination of eligibility for veteran benefits from the Department of Veterans Affairs, which may entitle the veteran to continued medical care (declared either a "temporary" status where the condition can be resolved within in a five-year period or declared a "permanent" status).

5. Department of Veterans Affairs Disability Compensation -- Discharged Disabled Service Members may be eligible for monthly disability compensation from the Department of Veterans Affairs. A disability must be considered "service connected." Payments vary by the severity of the disability, family size, and other contributing factors such as need for aid and care from others. This compensation replaces the loss of earning power resulting from the disability and offsets Department of Defense severance pay and is tax exempt.

6. Department of Veterans Affairs Rehabilitation Subsistence Allowance – During rehabilitation training, while the veteran is unable to be gainfully employed, the Department of Veterans Affairs pays a subsistence allowance to assist the veteran with household expenses. The Subsistence Allowance varies by family size and normally is limited to 48 months.

7. Social Security -- Disability benefits are provided for a veteran who is or will be unemployable for at least one year. Benefits depend on the earnings of the individual before becoming 100 percent disabled, and are influenced by family size.

8. Other Benefits -- Discharged Disabled Service Members and their dependent family members are entitled to enjoy all other possible benefits of military service (e.g.,

Commissary and Exchange, Sports Facilities, Child Care Services, Entertainment, etc.) for six months.

9. Insurance -- Service members' Group Life Insurance Traumatic Injury Protection (TSGLI) is designed to help traumatically injured service members and their families with financial burdens associated with recovering from a severe injury, and payments range from $25,000 to $100,000. TSGLI is payable for a "traumatic event" that results in a "traumatic injury" listed as a "qualifying loss." TSGLI is not payable for a loss resulting from medical or surgical treatment of an illness or disease (or that portion of injury or loss due to medical or surgical treatment). Currently, surgical and medical treatment, care, or examination causing injury to the body is not considered an "external force" or "violence" or other "traumatic event." 38 C.F.R. 9.20 ("(b)(3) A traumatic event does not include a medical or surgical procedure in and of itself." and "(3) A benefit will not be paid if a scheduled loss is due to a traumatic injury -- (i) Caused by -- . . . (C) Diagnostic procedures, preventive medical procedures such as inoculations, medical or surgical treatment for an illness or disease, or any complications arising from such procedures or treatment."). For example, a puncture of the bowel injury during a routine colonoscopy examination, and any resulting complications from the medical injury, are not covered. Similarly, failure to medically diagnose an illness or disease leading to further injury is not covered.

Retirement Eligible or Disability Retirement

Service members already retirement eligible (20 or more years of credible service) or service members with a military disability rating of 30% or more, will be "medically retired." Medically (or disability) retired service members receive the following benefits.

1. Military Pay -- Retired pay (based on years in service and pay grade or disability percentage, whichever is higher) for life with the option to seek from the Department of Veterans Affairs a determination whether a portion of military retired pay should be converted to non-taxable disability compensation pay. Combat-related disability entitles the retiree to all military disability retirement pay tax free.

2. Unused Leave -- Payment to the service member for all unused accrued leave.

3. Department of Defense Health Care and Department of Veterans Affairs Health Care -- Retired service members (veterans) and their dependent family members remain eligible for Medical Care, Pharmacy, and all Related Care from military-provided medical care (military facilities or private physicians through TRICARE).

4. Department of Veterans Affairs Disability Compensation -- Retired service members (veterans) may be eligible for monthly disability compensation from the Department of Veterans Affairs. A disability must be considered "service connected." Payments vary by the severity of the disability, family size, and other contributing factors such as need for aid and care from others. This compensation replaces the loss of earning power resulting from the disability and offsets Department of Defense retired pay and is tax exempt.

5. Department of Veterans Affairs Rehabilitation Subsistence Allowance – During rehabilitation training, while the veteran is unable to be gainfully employed, the Department of Veterans Affairs pays a subsistence allowance to assist the veteran with household expenses. The Subsistence Allowance varies by family size and normally is limited to 48 months.

6. Social Security -- Disability benefits are provided for a retired veteran who is 100 percent disabled and is or will be unemployable for at least one year. Benefits depend on the earnings of the individual before becoming 100 percent disabled, and are affected by family size.

7. Other Benefits -- Retired service members and their dependent family members remain entitled to all other possible benefits of military service (e.g., Commissary and Exchange, Sports Facilities, Child Care Services, Entertainment, etc.).

8. Insurance -- Service members' Group Life Insurance Traumatic Injury Protection (TSGLI) is designed to help traumatically injured service members and their families with financial burdens associated with recovering from a severe injury, and payments range from $25,000 to $100,000. TSGLI is payable for a "traumatic event" that results in a "traumatic injury" listed as a "qualifying loss." TSGLI is not payable for a loss resulting from medical or surgical treatment of an illness or disease (or that portion of injury or loss due to medical or surgical treatment). Currently, surgical and medical treatment, care, or examination causing injury to the body is not considered an "external force" or "violence" or other "traumatic event." 38 C.F.R. 9.20 ("(b)(3) A traumatic event does not include a medical or surgical procedure in and of itself." and "(3) A benefit will not be paid if a scheduled loss is due to a traumatic injury -- (i) Caused by -- . . . (C)

Diagnostic procedures, preventive medical procedures such as inoculations, medical or surgical treatment for an illness or disease, or any complications arising from such procedures or treatment."). For example, a puncture of the bowel injury during a routine colonoscopy examination, and any resulting complications from the medical injury, are not covered. Similarly, failure to medically diagnose an illness or disease leading to further injury is not covered.

Death

Survivors of service members who die receive the following benefits:

1. Death Gratuity -- $100,000 tax-exempt death gratuity provides immediate cash to meet the needs of survivors.

2. Government Housing or Allowances and Relocation Assistance -- Survivors receive rent-free government housing for up to one year or the tax-free Basic Allowance for Housing (BAH) appropriate to the member's grade for any portion of the one year period while not in quarters. Survivors are also entitled to transportation, per diem, and shipment of household goods and baggage.

3. Burial Costs -- The government reimburses up to $8,800 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.

4. Unused Leave -- Payment is made to survivor for all of the service member's unused accrued leave.

5. Insurance -- Under Service members' Group Life Insurance (SGLI), service members are automatically insured for $400,000 through the SGLI program, but may reduce or

decline coverage as desired. 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. Maintaining updated information on the Servicemember Group Life Insurance Election and Certificate, SGLV 8286 and Record of Emergency Data (DD 93) forms is extremely important in ensuring prompt financial assistance.

Costs traceable to the extra hazard of duty are paid by the Military Departments whenever death rates exceed normal peacetime death rates as determined by the Secretary of Veterans Affairs. Beginning in 2006, an allowance is paid to reimburse premiums for the SGLI coverage for members serving in Operations Enduring Freedom or Iraqi Freedom (currently, SGLI coverage of $400,000 has a premium of $29.00 including the $1.00 for TSGLI). Retirees may retain their SGLI level of coverage or less under the Veterans Group Life Insurance (VGLI) program.

Without SGLI, some service members could not obtain life insurance because of their age or military assignments. Although some private plans are comparable to SGLI, 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.

6. Dependency and Indemnity Compensation (DIC) -- The Department of Veterans Affairs pays a tax-free monthly amount to an unmarried surviving spouse and dependent children of a service member who dies on active duty or from a service-connected disability. The basic spouse DIC is a flat-rate annuity of $1,091 per month.

A spouse receiving a taxed annuity under the Survivor Benefits Plan is reduced by the non-taxable DIC amount received.

An additional $271 per month is paid for each dependent child until age 18. The law provides special additional amounts to meet specific needs. Another additional payment of $250 per month is paid to the surviving spouse for transitional assistance for the first two years if caring for at least one child less than 18 years of age. Parents may be eligible for DIC depending on the income.

A surviving 30-year-old spouse with a life expectancy of 80 years may receive DIC benefits of $655,000 based on current rates. The total could be much more if young children are also eligible for benefits. This applies to retired members if the death qualifies as service-connected.

7. Uniformed Services Survivor Benefit Plan (SBP) -- Active duty service members are automatically covered by SBP. If retired and the service member elected SBP coverage (a portion of retired pay contributes premiums for the coverage), eligible spouses and children also may be entitled to monthly SBP payments.

For a surviving spouse (children are entitled if there is no surviving spouse or the spouse later dies) of a service member who dies on active duty is entitled to SBP. The annuity is 55% of retired pay while under age 62. A reduced benefit level applies until April 1, 2008, if the spouse is age 62 or older. The reduced amount between April 1, 2007, and April 1, 2008 is 50%.

The SBP benefit is based on the above percentages of retired pay that would have been payable to the member had that member been retired for total disability on the date of death.

The law offsets a spouse's DIC entitlement from SBP, so a surviving spouse receives 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 SBP may be reinstated if that marriage ends through death or divorce.

When a service member dies on active duty, the spouse may request the SBP benefit for the children and receive the DIC payment in addition. However, the SBP benefits then stop on the child's 18th birthday if not in college or on the 23rd birthday while attending college or when married before their 23rd birthday.

8. VA Education Benefits -- A surviving spouse and dependent(s) may also qualify for up to 45 months of full-time education benefits from the VA.

9. Social Security -- Death benefits are provided for a spouse caring for the service member's dependent children under age 16, a surviving spouse during old age, and for eligible minor children of an insured service member. Social Security benefits depend on the family status of the deceased service member, and are the same for the family of any deceased civilian worker insured under the same circumstances. Social Security benefit payments include:

- 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.

10. Health Care -- Families of retired service members ("retired" or "medically retired") may be eligible to retain medical coverage. A spouse retains medical coverage so long as the spouse remains un-married. An un-remarried surviving spouse and minor dependents of the service member are eligible for space-available medical care at military medical facilities or are covered by TRICARE (MEDICARE after age 65; TRICARE is a second-payer to MEDICARE for retirees and survivors over age 64). Dental insurance coverage and full TRICARE are extended for three years after the member's death. Beneficiaries pay no enrollment fees, co-pays, or deductibles.

11. Commissary and Exchange Privileges -- An unmarried surviving spouse and qualified unmarried dependents are eligible to shop at military commissaries and exchanges, providing a savings over similar goods sold in private commercial establishments.

12. Tax Benefits -- Payments made by the Department of Veterans Affairs are tax-exempt. The $100,000 death gratuity and SGLI payments are tax exempt.

Case Example

E-6 SERVICE MEMBER WITH OVER 8 YEARS OF SERVICE WITH TWO DEPENDENTS (WIFE 30 YEARS OLD AND CHILD 1 YEAR OLD) 100% DISABLED AND MEDICALLY RETIRED FROM ACTIVE DUTY AND IMMEDIATELY DIES DUE TO SERVICE CONNECTED CAUSE

SGLI Insurance and Death Gratuity -- Current funds available to designated beneficiaries:

SGLI	$400,000
Death Gratuity	$100,000
Total	$500,000 tax exempt

Government Housing or Allowances and Relocation Assistance (up to one year):

With Dependent Rate for Watertown, New York, $1378.00 per month (x 12 = $16,536)

Burial Costs: Up to $8,800 reimbursed plus travel costs for next-of-kin plus $300 plot-interment allowance.

Dependency and Indemnity Compensation DIC (Tax Free):

$1,091 per month (x 12 = $13,092; 50 year life expectancy = $654,600.00)

$271 per month for child under 18 (x12 = $3,252; 17 years = $55,284.00)

$250 per month transitional assistance for one year (x12 = $3000)

Uniformed Services Survivor Benefit Plan: If elected,

Assume Disability Retirement Pay $2,950.80 per month x .55 = $1622.94

(x 12 = $19,475.28 minus $13,092 DIC tax free entitlement = $6383.28 per year;

50 year life expectancy if unmarried under age 55 = $319,164.00)

VA Education Benefits: Full-time Rate of $803 per month x 45 months = $36,135.00.

Social Security -- Not calculated.

Health Care -- Spouse retains medical coverage while unmarried. Child remains eligible until age 18.

Commissary and Exchange Privileges -- Unmarried surviving spouse and qualified unmarried dependents are eligible to shop at military commissaries an

Questions from the Honorable Trent Franks, Ranking Member:

1. **Setting aside the question of a fundamental fairness concern by permitting certain military Federal Tort Claims Act (FTCA) lawsuits, do you see any practical and technical legal problems with H.R. 1478 as currently drafted?**

House Resolution 1478 proposes a number of significant changes to current Federal Tort Claims Act application. I see significant practical and technical legal problems. Congress should consult with the Department of Justice and the Department of Defense.

A. Benefit Reduction -- The Bill proposes the payment of any claim be reduced by the present value of other benefits received under titles 10, 37, or 38 "that are *attributable to the physical injury or death from which the claim arose*." This language creates potential confusion and may generate disputes requiring judicial determination, and possible conflicting results among the courts because eligibility for Service and Veterans Affairs benefits is not tied to the cause of a physical injury or death (exception: Traumatic Injury Group Life Insurance). Benefits are delivered based on the whole injury and life circumstances of the service member and survivors. For example, a Soldier's injury requiring surgical repair that involves medical negligence will require an assessment of that portion of injury attributable to medical negligence to be tied to a particular benefit or portion of a benefit. Although such an analysis is possible, I think it needlessly complicates the proposed law. I recommend eliminating the clause completely so the provision simply requires reduction by the present value of any benefits received under titles 10, 37, or 38. Specific benefits Congress believes are not tied to a medical injury could be identified and excluded from reduction of the money

claim, as the proposed Bill already does regarding Servicemembers' Group Life Insurance.

B. Government-Provided Insurance -- The Bill proposes that the claim will not be reduced by benefits received under the government-sponsored insurance program, which permits a double recovery against the government. Double recovery is not customarily recognized under tort law. Although collateral sources of compensation like private life insurance are traditionally excluded from the credit calculation to reduce a tortfeasor's liability, the Servicemembers' Group Life Insurance program is not truly a collateral source. Service members pay premiums for coverage, but service members and their families do not contract with a separate private insurance entity, and the source of payout funds originates from the government and not a private insurance entity. Service members have the option to decline government-sponsored insurance plans and obtain other insurance coverage through private sources. All government-sponsored insurance programs should be included as government benefits received to reduce the value of the claim. Only the premiums paid by the service member for government-sponsored insurance should be included as recoverable damages against the government. Private sources of insurance qualifying as collateral sources would continue to be excluded from the credit calculation.

C. Traumatic Servicemembers' Group Life Insurance (TSGLI) -- The Bill proposes that the claim will not be reduced by TSGLI, but TSGLI is not currently payable for injuries caused by medical negligence. TSGLI, designed to help traumatically injured service members and their families with financial burdens associated with recovering from a severe injury, is not payable for a loss resulting from medical or surgical

treatment of an illness or disease (or that portion of injury or loss due to medical or surgical treatment). Surgical and medical treatment, care, or examination causing injury to the body is not considered an "external force" or "violence" or other "traumatic event." 38 C.F.R. 9.20(b)(3). For example, a puncture of the bowel injury during a routine colonoscopy examination, and any resulting complications from the medical injury, are not covered under TSGLI. Similarly, failure to medically diagnose an illness or disease leading to further injury is not covered. Thus, the Bill's exclusion of TSGLI to reduce the recovery of the amount of the claim has no legal effect under the terms of the current TSGLI program.

D. Combat Exclusion -- The Bill's failure to define what is meant by barring "any claim arising out of the combatant activities of the Armed Forces during time of armed conflict" is confusing because medical personnel are not combatants, and the meaning described by Representative Hinchey as "immediate medical attention" to "save life" in the "very difficult and very dangerous" situation in combat appears different from the plain meaning of the proposed language and the meaning intended by the combatant exclusion already enumerated by the Federal Tort Claims Act.

What Representative Hinchey described is a situation where medical judgment or ability is impaired by combat activities, which is different than combatant activities causing injury. Immediate and strong, rapid life saving decisions often must be made at Battalion Aid Stations, and even at field Combat Support Hospitals removed and reasonably safe from battle action. It's important to note that any emergency situation requiring immediate life saving treatment, even in a training situation, either at the scene or in the emergency room, can be very difficult and complicated by the circumstances.

I also believe that routine non-emergency medical care can be hindered by circumstances in a deployed environment. For example, the military must make decisions about training, staffing, and equipping unit aid stations and field medical units, which may not have the specialized expertise or equipment to detect the medical problem. From experience with "headquarters negligence" allegations with the overseas exception of the Federal Tort Claims Act, we know that some may attempt to avoid application of the combat exception by alleging negligent training, equipping, and staffing, which occurred elsewhere and proximately caused medical harm in deployment circumstances. It is not clear whether the Federal Tort Claims Act discretionary function exception would bar such claims. The Bill should clarify these issues.

The combat exclusion intended by the Bill requires more study and refinement. I address the combat exclusion in more depth in a question below, but I recommend that Congress be more specific regarding this provision to avoid confusion and vexatious litigation. To avoid troublesome fact questions for the courts, I suggest foreclosing claims arising from medical care provided in a conflict zone or operational theater, and in any emergency life saving situation. If not limited to a geographic area, then field medicine and health care in trauma centers and mobile hospitals should be excluded, and only claims arising from clinical practices and fixed medical hospitals and outpatient facilities should be permitted. I recommend Congress closely consult with the Department of Defense before implementing a combat exclusion for medical care.

E. Choice of Law Issue -- The Bill's overseas tort provision adopting "the 'law of the place where the act or omission occurred' shall be deemed to be the law of the place of domicile of the plaintiff" creates significant legal problems. Many state tort choice of law

provisions require the law of the country in which the tort occurred to control. Thus, many states require a court to apply the tort law of the foreign country in which a tort occurred. Other states, like New York, apply an interest test or "significant relationship" test, applying the law of the state or country with the greatest concern for the specific issue. This test requires the court to consider (1) the place where the injury occurred, (2) the place where the conduct causing the injury occurred, (3) the domicile, residence, nationality, place of incorporation, or place of business of the parties, and (4) the place where the relationship, if any, between the parties is centered. In balancing these considerations, it is possible the courts would apply either the foreign law where the tort occurred or the law where the Pentagon is located, Virginia. If, as argued by the Bill's proponents, accountability of the military is the purpose of the legislation -- to regulate primary conduct, the medical standards of care versus post event remedial compensation -- then the domestic jurisdiction with the greatest interest in regulating the conduct of the military likely lies either with Virginia where the Pentagon is located and medical policy and supervision originates or with the District of Columbia where the seat of Federal Government resides. Unless the plaintiff is domiciled in these jurisdictions, the domicile choice of law specified by the Bill will not necessarily benefit the service member as I think the provision intends. If this provision remains, then choice of law results could vary widely. To avoid needless litigation of choice of law issues, and to provide a uniform application of law, a workable resolution would be to declare either the law of Virginia or the law of the District of Columbia, except the choice of law rules, to control all substantive issues regarding duty, standard of care, and damages.

2. Discuss your understanding of the combat exclusion proposed in H.R. 1478 and how it would operate, legally and practically, to bar a claim in federal court.

Both the inclusion of overseas torts and the "combatant activities" exclusion of H.R. 1478 applied to military medical care present several legal and practical problems that require further study and close consultation with the Department of Defense and the Department of Justice.

The Bill's exclusion provision states, "This section shall not apply to any claim arising out of the combatant activities of the Armed Forces during time of armed conflict." This language follows the current Federal Tort Claims Act exception at 28 U.S.C. § 2680(j), but a review of case law interpreting this provision compared to the description provided by Representative Hinchey at the hearing leads me to conclude that H.R. 1478 intends a meaning different from existing language and the case law interpreting it There's no need to repeat the exception as it is enumerated already in the FTCA at 2680(j).

Courts have narrowly interpreted the 2680(j) "combatant activities" exception to apply only to those situations in which the United States Armed Forces are actually engaging the enemy with physical force. The exception does not include combat practice, training, maneuvers, preparations, movement to and from the combat area, or other military operations not directly connected with engaging the enemy or actual hostilities. The term "combatant" implies only acts by those engaged in physical violence or others directly assisting, but not non-combatant military personnel like medical personnel who take no direct part in hostilities and are charged with caring for those who have fallen out of combat. See Skeels v. United States, 72 F. Supp. 372

(W.D. La. 1947) (aerial gunnery training in the Gulf of Mexico not combatant activity); Johnson v. United States, 170 F.2d 767 (9th Cir. 1948) (ammunition ships causing oil pollution while anchored in a "peaceful American harbor" not engaged in combatant activities; varied activities having an incidental relation are not "combatant activities"). "Combatant activities" intended by H.R. 1478 appears to imply some other meaning.

H.R. 1478's overseas tort inclusion and "combatant activities" exception would combine to permit medical malpractice causes of action that occur in deployed environments or overseas locations. This could open the door for lawsuits arising out of the actions of medics, emergency room doctors and staff, and medical care performed in less than ideal situations. Permitting overseas medical torts by active duty service members raises an issue that is not often, or ever, addressed in our courts — the issue of the standard of medical care in a conflict area or in a foreign country.

On the other hand, the overseas exception of the FTCA would continue to bar lawsuits by family members and retirees, which creates an inequity. Because of this inequity and fundamental problems in defining and applying the "combatant activities" exclusion to medical care, perhaps it would be best not to attempt to change any of the Federal Tort Claims Act exceptions already enumerated. Regardless, there should be further resolution and definition of what is meant by "arising out of combatant activities" applied to medical care.

During the Subcommittee Hearing, Representative Hinchey described the intent of H.R. 1478's "combatant activities" exception as encompassing "situations in combat [that] are very difficult and dangerous, and the medical attention that has to be given there has to be immediate, and it has to be in ways that are designed to save the life of

the person. And it's a very dramatic and very, very strong action that has to be taken on behalf of . . . the injured or wounded, *whatever the circumstances might be*" [emphasis added]. This explanation implies a broader concern than combat engagement; instead, it seems to encompass any dangerous and difficult situation requiring immediate life saving measures such as treating injuries arising from a convoy accident or a helicopter crash that could occur in locations which are removed from battle. This suggests that the nature of the medical emergency rather than the nature of the external circumstances is the important factor.

Chairman Cohen asked during the Hearing whether the idea of the H.R. 1478 exception is to address medical decisions that would be impaired in combat situations: ". . . a medic operating in a combat environment, with weapons, rockets possibly coming in, weapons fire, et cetera, might have different basis of making a decision than the luxury of his or her office?" Representative Hinchey responded that the intent of the exception is to cover circumstances that are "very, very difficult, and very, very dangerous for the people who are wounded and for the people who are providing the medical care and attention."

However, if "combatant activities" were limited to the understanding currently applied under 2680(j), few medical acts would be covered because immediate life-saving care in battle is performed by non-medical personnel. We call these personnel "Combat Life Savers." These are non-medical personal, frequently infantrymen, with additional training in life saving techniques. Their job is to apply necessary life-saving techniques and procedures while the wounded service member is being transported to medics at aid stations or doctors at medical facilities. Both of the latter are removed

and secure from the action of battle. Because medical personnel are rarely available to provide care in actual combat situations, the intended exception would cover a very narrow set of circumstances and would affect very few cases.

If the Bill intends to address the dangerous circumstances that might affect the quality of medical care, then the exclusion should state this. A more useful definition could be, ". . . shall not apply in dangerous situations affecting medical judgment or the quality of medical care." This definition would address both decisions and performance of medical care in dangerous circumstances, and it would give the courts more flexibility to address different circumstances. This thought, however, embraces both combat situations and any dangerous context affecting medical care.

The idea behind the combat exception in H.R. 1478 seems to be the medical circumstance of the injury requiring rapid and decisive action. This sounds like an emergency situation to save life or limb. The discussion during the Hearing highlighted a broader concern about environmental conditions and stresses that may affect medical judgment. This concept includes the possibility of external harm to the care provider and the nature of the injury requiring rapid and decisive medical action. In my view, circumstances affecting medical judgment and ability arise in all cases requiring immediate and rapid life saving treatment.

Emergency situations certainly arise on the battlefield, but they also arise at aid stations, field hospitals, and hospital emergency rooms far removed and disconnected from battle actions. Nevertheless, emergency circumstances can be difficult, possibly dangerous, and the urgency of the case does not offer the luxury of careful study. A situation requiring quick medical action to save life and limb -- an emergency situation --

appears to be the intent behind the H.R. 1478 exception. If emergency situations are the intent, then a better exception would be to eliminate claims and lawsuits arising from emergency situations involving immediate life saving medical care.

H.R. 1478 also raises questions about the intended scope of the medical care that should be subject to a claim and a lawsuit. Rather than attempting to link medical judgment and care to dangerous conditions or emergency circumstances, a better exception might be to exclude all "emergency medical care." This provision would be consistent with Representative Hinchey's intent to address clinical practices, elective surgical procedures (versus emergency surgeries), and medical diagnoses and treatments that afford opportunity for study and calm medical thought. This type of routine military medical care closely resembles civilian medical practice and is evaluated and accredited by The Joint Commission and other independent civilian governing bodies. Military field medical care is not practiced and accredited by an independent civilian organization, so there is no "analogous private liability" under state law in this regard as required by the FTCA.

I recommend strongly that before including overseas medical care and implementing a "combatant activities" exception in this Bill, members and staff act to gain a complete appreciation of the military's practices and approach to medical care on the battlefield, in conflict areas, and overseas. I recommend Congress be more specific regarding this exception to avoid confusion and troublesome fact questions for the courts. I suggest excluding claims arising from medical care provided in a conflict area or operational theater, and in any emergency life-saving situation. If not limited to a geographic area and emergency situations, then field medicine and health care in

trauma centers and mobile hospitals should be excluded, and only claims arising from clinical practices and fixed medical hospitals and outpatient facilities should be permitted. A better option would be not to attempt to extend or modify the coverage of the standing exceptions enumerated by the Federal Tort Claims Act. I recommend Congress closely consult with the Department of Defense and the Department of Justice before extending coverage overseas and implementing a combat exclusion for medical care.

3. Do you foresee any legal or practical problems with establishing a requirement to use the law of the domicile of the service member for medical malpractice incidents occurring overseas as specified by H.R. 1478?

Proposed H.R. 1478 may raise a number of issues. The "law of the domicile" provision for overseas medical torts introduces a significant change to the Federal Tort Claims Act (FTCA). I recommend that Congress consult with the Department of Justice and the Department of Defense.

I provide the following additional observations in addition to my response to Question 1 (Representative Franks):

1. The proposed wording of the Bill provides that "in the case of an act or omission occurring outside the United States, the 'law of the place where the act or omission occurred' shall be deemed to be the law of the place of domicile of the plaintiff." If the purpose of this provision is to avoid applying foreign tort law to the cause of action, the provision does not avoid this consequence. In states where the entire law of the state in governs, then federal courts will likely apply the state's choice of law rules to adjudicate the claims. Some states' choice of law rules require the court to apply the substantive law where the tort occurred; thus, the court will apply foreign tort law to a case that involves a tort that occurred overseas. If the purpose of this provision is to avoid applying foreign law to the cause of action, then the Bill should probably specify that the substantive tort law of the state, and not foreign law, governs. Otherwise, courts will likely apply the entire body of law of the state, including its choice of law rules — which can lead to the application foreign law to both liability and damages. This may prove especially troublesome when trying to apply Iraqi law, which is new.

2. H.R. 1478 proposes to allow only active duty service members to bring an FTCA claim and lawsuit for overseas medical torts. However, military retirees, civilian dependents, and civilian employees authorized to receive medical care in overseas military medical facilities would be barred. These three groups are either not covered by government compensation benefits or their benefits are substantially different than benefits received by active duty service members. Where they are injured by the government's negligence overseas they have a limited cause of action under the Military Claims Act, but do not have a right to sue the government if dissatisfied with the agency's decision. The proposed change would provide service members or their families the right to sue in federal court for the same type of injury. Juxtaposed thus, it is apparent that the Bill's complexity and various permutations must be examined carefully and staffed with the pertinent federal agencies to ensure that Congress intends all the consequences that the proposed law may generate.

3. Logistically, defending and litigating a suit that arises out of an overseas tort can prove expensive and/or impossible. Federal Rule of Civil Procedure 45 provides that "a subpoena may be served at any place within the district of the court by which it is issued, or at any place without the district that is *within 100 miles* of the place of the deposition, hearing, trial, production, or inspection specified in the subpoena . . . ." Because the Bill allows suits for overseas medical torts, witnesses will likely be located throughout the United States and overseas—far outside the "100 miles" provision.

4. Permitting suit for deployment environment overseas torts may entail probing into sensitive areas of military decision making. For instance, to avoid the application of the combatant activities exception, a military plaintiff could allege negligence in training,

equipping, and supervising. A "negligent supervision" or "headquarters negligence" cause of action would permit more expansive discovery of facts and circumstances than the discrete act of negligent medical care by a doctor. Procedurally, the discovery process would require involvement of numerous military officials who would be from various commands and functions. The courts would be able to engage in review and second-guessing of sensitive decision making traditionally left to the military. The result would be judicial interference.

Because of the nature of the military mission, a service-member plaintiff could posit a theory that the alleged negligence incident involves several locations -- Iraq, Kuwait, Germany, North Carolina, Virginia, etc. The negligence could have occurred in multiple jurisdictions, none of them the service member's domicile. Each jurisdiction would have an interest in applying its standards and law to regulate the military decisions which the courts would have to resolve.

4. Because of compensation offset rules, is it possible that the partial repeal of the Feres doctrine proposed in H.R. 1478 will benefit very few injured service members?

Proposed H.R. 1478 would provide significant benefits to those who win substantial judgments in lawsuits. H.R. 1478 would not provide significant benefits to those whose lawsuit judgment exceeds currently available benefits marginally. It will provide no benefit to those who lose lawsuits. Proposed H.R. 1478 will increase government litigation costs regardless of outcome. Increased litigation will also raise government costs associated with claims administration because of the sheer numbers to process. of claims. H.R. 1478 would enable service members or families injured by medical negligence the opportunity to sue for more compensation. These families will enjoy a substantial benefit and have a distinct advantage over other service members and their families who have similar needs caused by government negligence but who are barred from suing. Allowing one small group of military people the ability to file suit while barring others is neither fair nor equitable.

Comparing the typical tort elements of damage to the government-sponsored benefits, I believe the money gap lies with lost economic earning capacity and pain and suffering, and other non-economic damages sometimes permitted by state law such as loss of consortium, care, and societal guidance. The specific difference and advantage will differ significantly from case to case. In death cases, H.R. 1478 proposes to exclude from the credit calculation government-sponsored life insurance, which can be a substantial amount (up to $400,000.00). Excluding this amount gives a significant opportunity to obtain a substantial double recovery from the government. Life insurance, customarily intended to cover lost future earning capacity, should be

included in the credit calculation if sponsored by the government even if the service member paid premiums. Only premiums for government-sponsored insurance should be recovered.

Unless Congress specifically defines which government-sponsored benefits should be offset, I believe the courts may have difficulty applying the Bill's language excluding benefits "that are attributable to the physical injury or death from which the claim arose." Government benefits are provided based on the whole person, and not directly tied to a discrete injury caused by medical negligence. Some benefits do correlate to the injury, such as future health care for the injury; rehabilitation therapy for the injury; vocational training required by the injury; and in the case of death, dependent indemnity compensation, survivor benefit plan annuity payments, and government-sponsored insurance if not excluded by law. Continued military pay, other pay and allowances, and other benefits like commissary privileges and exchange privileges may not be included in the credit calculation.

I recommend Congress pose this question to the Department of Defense, the Department of Veterans Affairs, and the Department of Justice for a careful accounting of the value of government-provided benefits compared to the possible money judgments from claims and lawsuits.

5. Do you foresee any legal or practical problems with allowing lawsuits from 1997 forward to be brought against the United States, as is provided for in H.R. 1478?

Litigating older cases presents multiple challenges such as locating witnesses and finding evidence that may have been discarded. Witnesses' memories often fade over time. The legal and practical problems associated with allowing old potential lawsuits to be brought against the United States are many and profound.

6. Identify and explain the systems, programs, standards, and mechanisms the military uses and must comply with to establish and maintain individual and organizational medical accreditation or credentialing regarding the medical standards of care?

This question is best answered by the Department of Defense, but my understanding of the military medical accountability program follows. Like the civilian medical profession, the military medical system involves multiple components and processes to establish and maintain organizational and individual medical competence.

Regulations

Two major Department of Defense regulations establish systems, program standards, and mechanisms to comply with medical standards of care.

a. Department of Defense Directive 6025.13, Medical Quality Assurance in the Military Health System (dated May 4, 2004); and,

b. Department of Defense Regulation 6025.13-R, Military Health System Clinical Quality Assurance Program Regulation (dated June 11, 2004).

In addition to implementing service regulations like Army Regulation 40-68, Clinical Quality Management (dated February 26, 2004), the Department of Defense publishes additional guidance such as Assistant Secretary of Defense Memorandum, Improved Medical Quality Assurance Program Procedures for National Practitioner Data Bank Reporting under DoD Directive 6025.13 (dated January 16, 2009).

Organizational Accreditation

External governing bodies must review and accredit all Department of Defense (DoD) facilities in the United States and overseas (DoD 6025.13). Like most civilian health care organizations, the military uses The Joint Commission, an independent not-for-profit organization that sets national standards for health care organizations.

The Joint Commission's process evaluates an organization's compliance with standards and other accreditation and certification requirements. To earn and maintain The Joint Commission's Gold Seal of Approval, an organization must undergo an on-site survey by a Joint Commission survey team at least every three years (laboratories must be surveyed every two years). The Joint Commission provides accreditation reviews of all DoD facilities, including outpatient facilities and clinics, except for Air Force small clinics that are reviewed by the Accreditation Association for Ambulatory Healthcare. Operational medical units (E.g., CASH) providing health care are exempt from the accreditation requirements; I have no personal knowledge why, but I suspect it is because there is no civilian equivalent practice, let alone a similar organization.

I do not know which military medical organizations or facilities have received the Gold Seal of Approval or whether the military medical accreditation results are published or reported to Congress. I recommend the Subcommittee ask the DoD for the accreditation results to gauge the overall fitness of military medical care.

Other Accreditations

I am informed that other aspects of military healthcare are subject to specific independent reviews. For example, military medical laboratories are accredited by either the Council of American Pathologists or by The Joint Commission, and all military

Graduate Medical Education (GME) programs are accredited by the Accreditation Council for Graduate Medical Education, the civilian organization that accredits all GME programs in the United States.

Individual Credentialing

10 U.S.C. § 1094 requires that all military healthcare providers must meet training and state licensing requirements, which must comply with The Joint Commission standards. Individual healthcare provider qualifications are carefully evaluated before allowing involvement in patient care. Staff appointments and clinical privileges are granted only after all selection criteria have been verified. Military healthcare practitioners must possess and maintain a current, valid, and unrestricted license or other authorizing document in accordance with the issuing authority before practicing within scope of practice for like medical specialties.

Risk Management and Quality Assurance Reviews

All Military Treatment Facilities conduct regular, systematic, and comprehensive reviews of the quality of healthcare provided. These reviews implement active risk management systems and programs to reduce the chances of bad medical practices and outcomes. The program involves supervisor reviews, peer reviews by case presentation method, and multi-disciplinary review panels and boards with the power to direct corrective action, which may include a wide range of measures from additional supervision and training to suspension of privileges and possible adverse reporting to state licensing agencies.

Individual Adverse Privileging Actions

Military healthcare providers who provide substandard care, exhibit unprofessional conduct, have other impairments that interfere with their ability to practice safely or other substantial issues, and undergo adverse privileging actions in accordance with Service regulations. When the final outcome is restriction, suspension, or revocation of practice privileges, the action is reported to the National Practitioner Data Bank for public knowledge.

7. **How do the military's individual and organizational medical accreditation and credentialing compare to civilian standards in the United States?**

The military medical system uses the same civilian standards and governing bodies, such as The Joint Commission, to ensure the highest possible quality medical care. However, in some respects the military medical system exceeds civilian standards. Unlike the military system, I understand civilian clinics and group medical practices generally are not accredited by any organization. Department of Defense clinics are surveyed and accredited by The Joint Commission as part of the hospital accreditation, or surveyed and accredited under The Joint Commission's Ambulatory Care facility standards, or surveyed and accredited by the Accreditation Association for Ambulatory Healthcare. I believe the military meets or exceed civilian standards in the United States for individual and organizational medical accreditation and credentialing. I recommend the Subcommittee refer this question to The Joint Commission and the Accreditation Association for Ambulatory Healthcare for authoritative verification.

8. **What are the processes and procedures military medical officials use to handle allegations or claims of medical malpractice? Can the military hold medical personnel criminally responsible for malpractice or other wrongs associated with medical care? Can you provide any examples?**

Allegations and Claims of Military Medical Malpractice

All Services implement proactive risk management programs to ensure integrity and accountability of their medical facilities, programs, and care providers. The military attempts to identify adverse medical events before they become allegations or claims of medical malpractice. Review of adverse medical events involving active duty service members are treated the same as for dependents and retirees. All adverse medical events are reviewed and standard of care determinations are made regarding the performance of each healthcare provider involved. Unsatisfactory performance results are referred to a credentialing committee to determine if any corrective action is warranted. Each case is tracked to monitor performance and to search for ways to improve processes and systems to prevent future adverse events.

Allegations or claims for compensation because of medical malpractice are handled in the same manner as any adverse medical event. If a claim is paid, or if the case involves active duty death or disability related to healthcare, the medical facility completes its risk management review and an additional review process occurs at the Department level. The Department level review includes internal expert review of the case by a panel of physicians and other care providers, and in appropriate cases, an external peer review by non-Department of Defense organizations or medical specialists. The Department review makes a recommendation to The Surgeon General regarding the standard of care and whether adverse reports should be made to the National Practitioner Data Bank.

The Department of Defense is required to report to the National Practitioner Data Bank all medical malpractice compensation payments, both judicially imposed and administratively paid or when the disability and benefit system awards compensation and the record indicates medical negligence. Adverse reports are required for review actions that adversely affect a healthcare provider's privileges for more than 30 days. Reports to the National Practitioner Data Bank become a by-name permanent public record of a healthcare provider's failure to meet the standard of care. By law, all hospitals must query the National Practitioner Data Bank when a provider initially applies for privileges and each time a provider applies for renewal of privileges.

Criminal Responsibility for Medical Malpractice

Although most medical malpractice is not criminal in nature, the military can hold medical personnel criminally responsible for medical negligence under various articles of the Uniform Code of Military Justice, such as Article 92 Dereliction of Duty and Article 134 Conduct Prejudicial to Good Order and Discipline or Service Discrediting Conduct. In my experience, the military customarily disposes of negligent acts by administrative sanctions such as letters of reprimand or non-judicial punishment designed to correct and rehabilitate the offender. Such adverse actions are not publicly published but may be noted in the service member's permanent official personnel records, so duty assignments, advancement, and promotion can be assessed and curtailed as appropriate. Courts-martial generally are reserved for acts of recklessness and culpable or gross negligence. I am personally familiar with at least one court-martial of a military doctor for his negligent treatment of a military dependent.

A search of reported courts-martial cases revealed a number of different offenses involving medical personnel such as assaults, abuse of controlled substances, and falsifying medical records and reports. Three cases in particular involved medical malpractice as dereliction of duty.

In United States v. Ansari, 15 M.J. 812 (1983), a lieutenant commander staff urologist was convicted by a general court-martial of involuntary manslaughter through culpable negligence when he negligently performed a surgical procedure on a service member by transecting the iliac vein returning blood from the leg to heart, which caused uncontrolled bleeding and eventual death of the service member from renal and respiratory complications. Expert testimony characterized the performance of the surgical procedure as incompetent and the degree of negligence as terrible and gross. The totality of the evidence established that the military doctor committed culpable negligence while performing the surgery and he failed to render required post-operative care within accepted standards of medical care.

In United States v. Billing, 26 M.J. 744 (1988), a military cardiothoracic surgeon and head of the Cardiothoracic Surgery Department was charged with 24 specifications of willful dereliction of duty for his alleged failure to provide a supervisory surgeon present during various open heart surgeries. He was also charged with five specifications alleging involuntary manslaughter arising from coronary bypass surgeries where the patients died. The general court-martial convicted the surgeon of 12 specifications of willful dereliction, 4 specifications of negligent dereliction, 2 specifications of culpable inefficiency, as well as 2 specifications of involuntary manslaughter and 1 specification of negligent homicide. The trial court sentenced the

surgeon to four years confinement, total forfeiture of pay and allowances, and to be dismissed from military service. On appeal, the military court of appeals set aside the conviction and sentence because it concluded the evidence did not substantiate guilt beyond a reasonable doubt. The appellate court noted that criminal negligence required reckless and wanton conduct, which rarely is the case in medical care situations.

In United States v. Rust, 38 M.J. 726 (1993), a general court-martial found a military doctor derelict in duty by willfully failing to report to the emergency room when required to do so and by failing to personally examine and provide proper medical care to a patient. The doctor was sentenced to a reprimand, a fine of $5,000, and to be dismissed from service.

9. Without the ability to sue, how can service members and their families find out whether the medical care met the standard of care and hold the military accountable?

Although service members and their family members do not have the right to direct or to control the military medical accountability process, they make inquiries and influence the military to hold healthcare providers responsible for their actions.

They file complaints with the patient advocate at their facility. Patient advocates usually resolve the individual's complaint, but they do not often resolve systemic problems. To make systemic changes, service members and family members make inquiries with military commanders and inspectors general. They also provide information and testimony to the risk management and quality assurance panels.

A point of frustration for many military families is the perception (sometimes the reality) of a poor flow of information and feedback from medical staff and commands, which leads them to believe incorrectly that no meaningful corrective and disciplinary action was taken. Currently, no law or regulation requires the medical risk management and quality assurance review process to provide an explanation to the patient and family members. The confidentiality rationale to encourage frank and open discussion and to keep those medical reviews confidential has little merit in situations where there is no possibility of a civil legal claim. In my opinion, the Department of Defense should keep service members and their families better informed about resolution of medical care problems and the remedial actions taken. For example, I am skeptical regarding the length of time taken to provide a response to the Rodriguez family Freedom of Information Act request.

I recommend a Department of Defense Inspector General review of the overall military medical system manner in which medical negligence complaints and inquiries are handled, with the specific task to determine whether adequate information and resolution is provided to patients and family members. I believe the Department of Defense should devise meaningful improvements to preserve the confidentiality and the integrity of the medical review process and provide genuine recourse to active duty service members and their families who believe they are the victims of military medical malpractice.

Unfortunately, administrative claims and lawsuits are not optimum mechanisms to hold military medicine accountable. First, the power granted to the federal district courts under the Federal Tort Claims Act is specifically limited to money damages for actual compensation and no other type of relief like punitive damages, declaratory judgment, injunction, or other equitable action is authorized. Second, claims and lawsuits usually take years to resolve. It is clear to me the primary purpose of a tort lawsuit is compensation, not accountability and rapid corrective action.

Further, most tort claims and lawsuits are resolved by settlement rather than by judicial findings of fact. Payment of a medical claim is not the same as a standard of care determination. Legal claims are sometimes paid even when all medical providers met the standard of care. There are various reasons for this, including unfortunate or undesirable outcomes without malpractice, and convenience to the government when the cost to defend the claim would exceed the settlement cost. In practice, accountability through judicial determination is a rare circumstance.

The reality is that the accountability processes and programs in place at all levels of the military health system move quicker than administrative claims and lawsuits. These accountability measures are constant and ongoing and not claims-driven. I reiterate, though, my belief that the Department of Defense should address improvements regarding information to military patients and family members.

10. What benefits are service members currently entitled to if they suffer injuries as a result of military medical malpractice?

Please see my response to Question 2 (from Representative Cohen). I recommend this topic also be directed to the Department of Defense and the Department of Veterans Affairs.

11. How does the military and VA benefit system compare to the federal civilian employee workers' compensation plans? To state-law civilian workers' compensation plans? To other national military compensation systems (e.g., our NATO allies)?

Congress may wish to verify my response with the Department of Defense (DoD), Department of Veterans Affairs (VA), and the Department of Labor, but I believe compensation under the DoD and VA benefit system favorably compares to federal and state workers' compensation plans. Although I have not conducted a complete survey of our military allies, I do believe their service member and veteran compensation systems are also comprehensive. I found none that allowed lawsuits to seek damages, although some allowed judicial review of government benefits awards to service members.

Like benefits for service members, the Federal Employees Compensation Act (FECA) is a federal workers' compensation plan. It provides a broad range of benefits for civilian employees, like medical, hospital, surgical, and related medical services; vocational rehabilitation; burial expenses, pay compensation, etc. However, FECA extends coverage to civilian employees only for injuries sustained while actually performing work. 5 U.S.C. § 8102. Injured service members, on the other hand, are covered by benefits at any time and place. For example, a civilian employee injured at home would not be covered by FECA because the injury did not occur on the job. A service member injured at home would continue to receive full pay and allowances in addition to other military benefits.

FECA has a detailed schedule of coverage for total and partial disability and for death. The FECA schedule pays a basic compensation benefit based on weeks of pay relating to a particular injury for civilians with a permanent disability. For example, a

civilian employee receives basic disability compensation according to the following: (1) Arm lost, 312 weeks' compensation; (2) Leg lost, 288 weeks' compensation; (3) Hand lost, 244 weeks' compensation; (4) Foot lost, 205 weeks' compensation; etc. 5 U.S.C. § 8107. Permanent disability compensation for service members is not as rigid or limited by time. Disabled service members receive a percentage of disability, and if permanent, the rating entitles compensation for life.

FECA, like most workers' compensation plans, does not cover medical malpractice because medical care is not provided as part of the job, and cannot contribute to a job-related injury. See, e.g., Crosson v. Jamaica Med Ctr., 14 A.D.3d 587 (N.Y. App. Div. 2005) (hospital employer not liable for treatment of hospital worker's job-related injury); Budd v. Punyanitya, M.D., 69 Va. Cir. 148, (Va. Cir. 2005) (hospital employee injured at work could not recover for hospital-employer's negligent treatment of the injury); but see, Wright v. United States, 717 F.2d 254 (6th Cir. 1983) (federal employee allowed to recover under the FTCA for negligent medical treatment of a tubal pregnancy that ruptured at work because medical injury was not suffered in the course of her employment); and McCall v. United States, 680 F. Supp. 283 (S.D. Oh. 1987) (employee can bring FTCA action for medical malpractice as independent or aggravating injury related to underlying on-the-job injury covered by FECA).

Service members are in a different circumstance than civilian employees because medical care is provided as part of their military service. Service members receive medical care for both work and non-work related injuries and conditions, and unlike civilian employees, medical care is integral to ensuring service members are

healthy and fit to perform military duties. Thus, benefit coverage is broader for service members.

12. Isn't it correct that attorneys' fees likely would reduce any award under the FTCA that the service member received for a medical malpractice claim?

Yes, the Federal Tort Claims Act (FTCA) limits the amount of fees an attorney may charge and are deducted from the amount awarded. 28 U.S.C. § 2678 (limiting attorneys fees to twenty percent of the administrative claim and twenty five percent of the judgment rendered). In practice, because the FTCA does not address costs associated with the litigation, the plaintiff must also pay costs, usually an amount over and above attorney fees.

13. Compare the typical areas of recovery in a state-court medical malpractice lawsuit to the current military and Veterans Affairs (VA) compensation programs and explain any shortfalls or areas of damage and injury not covered by the military or VA provided benefit programs.

I recommend this question be directed to the Department of Justice, the Department of Defense, and the Department of Veterans Affairs to confirm my response. I believe compensation for pain and suffering and loss of future earnings are the two areas where government benefits may not compare favorably to civil tort awards. Because damage awards vary widely from case to case, it is difficult to provide firm dollar amounts.

Lawsuit Damage Elements

Under most state laws, civilians who file Federal Tort Claims Act (FTCA) lawsuits may recover for past and future conscious pain and suffering, emotional distress, physical disfigurement, and loss of consortium. A civilian decedent's survivors may

recover for loss of monetary support, loss of ascertainable contributions, and loss of services. The survivors may also recover for the civilian decedent's pre-death conscious pain and suffering; loss of companionship, comfort, society, protection, and consortium; loss of training, guidance, education and nurturing; and emotional distress. All these factors are dictated by each state's laws.

Non-Economic Damages

Department of Defense (DoD) and Department of Veterans Affairs (VA) benefits do not provide such non-economic damages. Damage awards for non-economic losses vary widely; anywhere from a few thousand dollars to six figure dollar amounts. No DoD or VA benefits specifically compensate for the actual injury inflicted and the pain and suffering associated with the injury.

Economic Damages

In situations involving the wrongful death of a service member, a military decedent's survivors and estate are limited to VA survivors' benefits. One of the first benefits the survivors receive is the Servicemembers' Group Life Insurance (SGLI). SGLI provides up to $400,000 in coverage for the service member. This insurance equates to future earning capacity that would be recovered in a typical civilian lawsuit. If this insurance is excluded as H.R. 1478 proposes, then it would be logical to expect courts to award at least $400,000 for lost economic earning capacity. The total economic-loss award could be much higher considering monthly salary earned over the expected work life of the decedent.

H.R. 1478 likely excludes SGLI as a government benefit under the collateral source theory of the common law where private-contract exists with a third party and

thus it is not considered a payment by the tortfeasor. In collateral source cases, there is no chance of a double recovery against the tortfeasor. In the case of SGLI, however, the collateral source rule should not apply. SGLI is considered a benefit because it is government sponsored and the contractual agreement exists between the government and its service members. Service members do, however, incur out-of-pocket expenses for SGLI coverage. This should not make SGLI a collateral source because the payout originates from the government. Premiums paid should be recoverable though.

In addition to life insurance, the government provides for lost future earnings under the Dependency Indemnity Compensation program and the Survivor Benefit Plan. These programs combine to provide between $1,091 to approximately $2,500 per month. Each child under eighteen years of age is entitled to $271 per month; the surviving spouse is entitled to an additional $250 in dependency and indemnification compensation per month until the youngest child is eighteen. Children may retain the dependency and indemnification compensation until age twenty-three if they are enrolled at an approved educational institution.

Over a lifetime, these benefits will be substantial, but the monthly amounts equal only about half of what the service member could have earned and contributed to his family. Economic damages in typical tort lawsuits consider the total monthly earning capacity over the life of the decedent.

Another difference compared to lawsuits is that surviving military spouses also face the possibility of losing their survivor benefits if they remarry prior to age 55. In 2002, Congress permitted remarried spouses to resume drawing benefits upon the termination of the remarriage by divorce or death. A civilian's spouse faces no such

potential loss of an FTCA award upon remarriage; the award remains the property of the civilian's spouse, regardless of remarriage.

14. If it is determined that service members and family members are not adequately covered by the military and VA systems, how or what system and program changes would you recommend?

I recommend the following changes to the government compensation programs. I recommend that Congress ask the Department of Defense and the Department of Veterans Affairs to evaluate my recommendations.

Compensation for Traumatic Injury (from any cause)

The actual injury and associated pain and suffering are not addressed by the service member benefits. This could be addressed through Traumatic Injury Servicemembers' Group Life Insurance (TSGLI). I recommend three changes.

1. The purpose of TSGLI should be modified to cover both the injury and associated pain and suffering in addition to compensating the insured and family for out-of-pocket expenses associated with care.

2. TSGLI coverage amounts should be expanded from $1 to $300,000. Out-of-pocket expenses and pain and suffering damages exceeding the coverage limit could be referred to a review board authorized to award higher amounts.

3. TSGLI coverage should specifically include injury caused by medical negligence (currently, TSGLI inexplicably denies coverage for medical negligence).

Economic Earning Capacity Loss

I recommend two options in this area.

a. Dependency Indemnity Compensation should not be offset against Survivor Benefit Plan payments. This change would rival damage awards from civilian tort lawsuits.

b. Alternatively, base-pay percentages paid under the Dependency Indemnity Compensation program and the Survivor Benefit Plan should be increased above 55%.

15. If Congress were to modify the system of military and VA benefits, how or what type of system would you propose to assess and implement monetary awards for lost economic earning capacity?

Compensation paid by Dependency Indemnity Compensation (DIC) represents a percentage (below 45%) of base pay. I understand that Representatives Steve Butler and Tim Walz have co-sponsored legislation to raise the percentage by 12% to the 55% mark. This would be the first DIC adjustment by Congress in sixteen years. I understand more than 300,000 surviving spouses and more than 30,000 surviving children currently receive DIC payments. I believe the Butler-Walz Bill is a step in the right direction, and I urge Congress to pass the Bill. If the goal is to approximate the salary lost by death of a service member, then DIC and Survivor Benefit Plan payments should not be offset.

It's also important to note that the supposed inequality of payments to families based on deceased service member base pay is not different than the calculus applied in civil lawsuits to assess age, experience, education, job position, and other considerations when computing the likely earnings potential lost to the victim's family.

16. Is it true that civilian employees injured on the job cannot sue the United States under the FTCA?

Yes, although the Federal Tort Claims Act (FTCA) does not bar any individual from suing the government, claims by civilian employees for injuries incurred in the course of duty are barred by operation of other laws thus providing a similarly exclusive remedy.

Federal Employment Compensation Act (FECA) benefits are the exclusive remedy afforded to civilian employees, so they cannot sue the government under the Federal Tort Claims Act (FTCA) for job-related injuries. 5 U.S.C. § 8173; see, e.g., Dolin v. United States, 371 F.2d 813 (6th Cir. 1967) (FTCA claim involving injury by fellow employee dismissed based on FECA exclusive remedy); Vilanova v. United States, 851 F.2d 1 (1st Cir. 1988) (Navy civilian employee injured by military medical malpractice barred from bringing FTCA claim because FECA compensation sufficient). Also, the Longshore and Harbor Workers' Compensation Act is the exclusive remedy for claims against the United States for personal injury or death of civilian employees of non-appropriated fund instrumentalities. 5 U.S.C. § 8173. Further, statutory remedies provided by the Civil Service Reform Act of 1978 and Title VII of the Civil Rights Act of 1964 preclude lawsuits under the FTCA for allegations covered by those laws.

Where the civilian employee is covered by workers' compensation benefits, an FTCA claim is not allowed. The Supreme Court has also applied the availability of workers' compensation benefits to bar federal prisoners from recovering under the FTCA. United States v. Demko, 385 U.S. 149 (1966) (prison workers' compensation law coverage and payment amounts, as shown by its regulations, compare favorably

with compensation laws all over the country). The Supreme Court in Demko explained and distinguished its ruling in United States v. Muniz, 374 U.S. 150 (1963), where it permitted a FTCA lawsuit by a prisoner for medical malpractice (misdiagnosis of a brain tumor) because the prisoner was not covered by the prison workers' compensation law.

RESPONSE TO POST-HEARING QUESTIONS FROM EUGENE R. FIDELL, ESQ., YALE LAW SCHOOL, NATIONAL INSTITUTE OF MILITARY JUSTICE, WASHINGTON, DC

Questions for the Record
Subcommittee on Commercial and Administrative Law
Hearing on H.R. 1478, the "Carmelo Rodriguez Military Medical Accountability Act of 2009"
Tuesday, March 24, 2009

Eugene R. Fidell, Yale Law School, National Institute of Military Justice

Questions from the Honorable Steve Cohen, Chairman:

1. **Will allowing suits by service members for medical malpractice under the Federal Tort Claims Act adversely affect military discipline? Please explain.**

   There is no reason to believe that allowing active duty personnel to seek FTCA damages for military medical malpractice would adversely affect discipline. Military personnel can already make complaints about a variety of types of official action, in the form of complaint of wrongs under Article 138 of the UCMJ, 10 U.S.C. § 938, "request mast," equal opportunity complaints, or applications for the correction of errors and injustices, among others. These long-established remedies are in no way injurious to discipline. Indeed, affording our military personnel access to the FTCA for malpractice cases will, if anything, not only add a further incentive for the government to demand and monitor adherence to applicable medical standards of care, but also enhance morale by giving serving personnel greater assurance that the country truly cares about them and recognizes the importance of treating them fairly.

2. **Major General John D. Altenburg, Jr. (retired) notes in his written statement (at page 8) that the exclusivity provision of the Federal Employees Compensation Act bars suits under the Federal Tort Claims Act by civilian employees of the federal governmeut arising from "on-the-job injuries." Should the no-fault compensation system under which injured or killed service members are compensated (which is discussed at length in General Altenburg's written statement) provide the exclusive remedy for service members injured or killed as a result of medical malpractice committed by government healthcare providers? Please explaiu.**

   With exceptions not relevant here, Congress has made the FECA the exclusive remedy for disability or death sustained by a government employee in the performance of duty. 5 U.S.C. §§ 8102(a), 8116(c). A number of cases have held that § 8116(c)'s exclusivity provision bars FTCA actions in respect of negligent medical care furnished by the government where the care related to underlying injuries that were sustained in the course of employment, a circumstance I do not believe is presented by Carmelo Rodriguez's case. His underlying "injury"—the cancer—was not caused by his military service. *Cf. Wright v. United States*, 717 F.2d 254 (6th Cir. 1983) (FECA was not VA employee's exclusive remedy because tubal pregnancy was preexisting personal pathology and not

work-related). Whether or not the government should be considered to act in dual capacities when it *both* (a) serves as an employer and (b) furnishes medical attention—and a number of courts have declined to embrace that doctrine, *e.g., Spinelli v. Goss*, 446 F.3d 159, 161 (D.C. Cir. 2006) (PTSD-related psychiatric malpractice following gunshot wounds sustained on overseas mission)—I would argue that where the initial injury that triggers the negligent care was not itself sustained in the performance of duty, the exclusivity provision should not apply.

But this covers, in my judgment, relatively few cases. More broadly, I believe Congress should resist the temptation to analogize to federal civilian employment. Service in the armed forces is not simply another job; it is unique in our society, and has long been recognized as such. To me, a salient consideration is the irrationality of the disparate treatment, for FTCA purposes, of military personnel who are on active duty, on the one hand, and the other broad categories of beneficiaries of military medical care who are permitted to invoke the FTCA, on the other. These include retirees and dependents. I find it extremely difficult to understand why our country would permit FTCA cases brought by, for example, dependents and retirees who are victims of malpractice in the course of, say, an appendectomy, but not by active duty personnel undergoing precisely the same surgical procedure by the same surgical team in the same military treatment facility.

3. Are military doctors accountable to civilian state licensing authorities?

Yes. Military physicians who furnish direct patient care must have unrestricted licenses, 10 U.S.C. § 1094, and may be disciplined by state licensing authorities.

4. What is your response to the argument made by Major General John D. Altenburg, Jr. (retired) under the heading "The Benefit and Compensation Program Offset Provision of H.R. 1478" on pages 12-14 of his written statement?

I have no objection to a collateral source provision that offsets the value of future medical services against the medical care component of an FTCA award. Such an offset should not affect the pain-and-suffering component. The fact that most successful claimants will not, at the end of the day, receive enormous damage awards is, if anything, a reason to enact reform legislation rather than a reason not to do so. FTCA attorneys fees are capped by law at 25% for fully litigated cases and 20% for cases that settle. 28 U.S.C. § 2678. The valuation of future benefits and lost earnings is entirely familiar territory in tort litigation and is emphatically not a reason not to enact the bill. Whether there should be a dollar cap on damages, as some states have enacted, is a broader policy question that applies to all FTCA cases. Its resolution on a generic basis, assuming there is any support in Congress for such a limitation, should not drive action on the present bill. I personally would find it unconscionable to invent an FTCA damage cap only for GIs.

5. What is your response to the argument made by Major General John D. Altenburg, Jr. (retired) his written statement (page 15) that H.R. 1478 proposes a "discriminatory favoritism among service members?

As I understand General Altenburg's argument, it is that it would be anomalous to afford a damage remedy for malpractice that injures a soldier who has never seen combat whereas another soldier who has been injured in combat while performing heroically would have no such damage remedy. His point is well taken: there is unfairness in that disparity. The risk of injury and death in combat is clearly something military personnel know to expect; it is the heart of the matter and why we honor our service personnel. But medical malpractice is not a part of the mission; it is something that happens (unfortunately) in civilian life, and when it does, our system of tort law permits recovery for, among other things, pain and suffering. To the extent that there is nothing peculiarly military to medical malpractice, the better analogy is to the treatment afforded to all Americans, rather than the quite different treatment the law provides to serving personnel for combat-related injuries. No system of law achieves perfect fairness, and the FTCA is no exception. The fact that we do not afford a damage remedy for death or injury for death at the hands of the enemy is not a reason to deny such a remedy to GIs who have no effective choice of medical providers.

LETTER FROM STEPHEN A. SALTZBURG, PROFESSOR, THE GEORGE WASHINGTON UNIVERSITY LAW SCHOOL, WASHINGTON, DC

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April 6, 2009

The Honorable Stephen Cohen
Chairman
Subcommittee on Commercial and Administrative Law
Committee on the Judiciary
United States House of Representatives
Washington, DC 20515

Dear Mr. Chairman:

During the March 24, 2009 hearings before your subcommittee on H.R. 1478, Professor Fidell said that he understands that punitive damages are not provided for under the Federal Tort Claims Act (FTCA). I said I was not certain if that is true. Since the hearings were held, I have had the opportunity to double-check this and Professor Fidell is correct that the FTCA specifically excludes punitive damages. As I said during the hearing, state law generally applies to the cases brought under the FTCA. This is the case since 28 U.S.C. § 1346(b) (1) of the FTCA provides that the federal government would be liable if a private person would be "liable to the claimant in accordance with the law of the place where the act or omission occurred." However, there are exceptions to that rule. One of the exceptions is the bar on punitive damages appearing in 28 U.S.C. § 2674. Section 2674 provides in the relevant part that "[t]he United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages."

I request that this letter be included in the record of the hearings. Thank you for giving me the opportunity to testify on behalf of the ABA in support of H.R. 1478.

Sincerely,

Stephen Saltzburg

cc: Thomas M. Susman
Lillian B. Gaskin

LETTER FROM ADELE CONNELL, PH.D., COLONEL, UNITED STATES ARMY

Colonel Adele Connell
798 Country Club
Stansbury Park, Utah 84074

March 24, 2009

The Honorable John Conyers
Chairman, House Judiciary Committee
2138 Rayburn House Office Building
Washington, DC 20515

The Honorable Steve Cohen
Chairman, Subcommittee on Commercial and Administrative Law
2138 Rayburn House Office Building
Washington, DC 20515

SUBJECT: H.R. 1478, the Carmelo Rodriguez Military Accountability Act of 2009

Dear Chairmen Conyers and Cohen:

The purpose of this letter is threefold:

- To share my story regarding medical malpractice treatment I received at Walter Reed Army Medical Center;
- To respectfully request your help in support of H.R. 1478, the Carmelo Rodriguez Military Accountability Act of 2009; and
- To plead for the improvement of medical care of our Soldiers such that it will help improve the medical care for my three Soldier children as well as all Soldiers serving today.

A Soldier's Story about Malpractice

My story is about the shocking lack of attention to detail, poor medical care and "wrong-sided" operation that I received as a patient at Walter Reed Army Medical Center ("Walter Reed") in December 2008. My story is not unlike hundreds of other stories about Soldiers who have been poorly treated at a military medical institution. While I believe that the vast majority of medical care is good, there are many examples of ways in which the military medical system has failed in its mission to help Soldiers.

As you read my story, I ask you to consider it as one of the many, many stories that could easily be told with endings even more devastating than mine. These stories have come and gone; and (in some cases) the stories are about Soldiers who can no longer speak for themselves.

My Background

I am a Soldier with 34 years of military service, having served in every component of the Army: on active duty for nearly 8 years; in the Army National Guard for 5 years; and in the Army Reserve for 21 years. My active duty service was in Texas, Alabama, Indiana, Germany, and at the Pentagon in Washington, DC. All of my Guard and Reserve Army service has taken place in Utah. Among my awards and medals is the Legion of Merit, the fourth highest honor that the US Army can bestow on a Soldier.

It is also important for you to know that I am a divorced mother of four and that three out of my four children serve in the military today. One of the key reasons that I am writing this letter is so that in case any one of my children experiences the devastating and traumatic medical malpractice that I did, he or she can have some recourse. To see any of my children treated in a way that I was treated would be completely unbearable for me, as a mother. I feel it is my duty, as a mother, to try and make the Army a better place for not only my own children but for all Soldiers serving today and in the future.

In December of 2007, I was asked by the Chief of the US Army Reserve to serve as the Director for the 100th Anniversary Task Force, responsible for the world-wide celebration and commemoration of the 100th Anniversary of the Army Reserve. I was assigned to the Office, Chief of the Army Reserve (OCAR) and helped Soldiers all over the world celebrate in numerous anniversary events during 2008. I was assigned to Washington, DC for this prestigious assignment and left my home in Utah to fulfill this assignment.

Finding Breast Cancer

When my assignment ended, during medical out-processing, I learned in November of 2008 that I had breast cancer. I was told that the cancer was in my left breast, which measured 7 mm. I was deeply grateful for the small size of the cancer which meant that my survival rate would be increased. I also hoped that the need to remove my lymph nodes (because of the small size of the cancer) would be decreased.

I requested permission to return home and be operated on so that I could be taken care of by family members. My request was denied. Instead, the Army offered to bring one family member (at a time) to take care of me in Washington. While I am grateful for this help from the Army, it was far from satisfactory because it resulted in me taking care of myself for at least half of my recovery.

Dr. Copeland and Walter Reed Army Medical Center

After my request to be treated in Utah was denied, I learned about Dr. Ann Copeland. She is a retired Army Colonel and I was told that she graduated from Yale University. Her education seemed excellent, so I was hopeful that she would do a good job.

I made an appointment to see her, but (unfortunately) she did not see me. Instead, she sent her assistant (an Intern) to examine me. I was disturbed that she didn't make time to see me so I made a second appointment to see her. Once again, when the time of the appointment came, I was told that she was too busy to see me. This was the second time she was supposed to see me. So, in the exam room, I expressed my disappointment and dressed to leave. It was only when I was dressed and leaving the examination room that Dr. Copeland came in to examine me. Her lack of attention to me made me feel little more than a second-rate patient. After all, I was dressed and leaving the exam room before Dr. Copeland found the time to see me.

Because I had breast reduction surgery in September of 2006, I was told that Lt. Col. Barry Martin, Chief of Plastic Surgery at Walter Reed and National Naval Medical Center (Bethesda) would be the physician who would operate on me. I met with Dr. Martin at least two or three times prior to the surgery date and was told (by Dr. Martin) that it is normal operating policy and procedure. The reason plastic surgeons do the surgery when a patient has previously undergone breast reconstruction is that (in the words of Dr. Martin), "only one patient in 50,000 has a breast reduction and then a mastectomy, so because of the scarring on the breasts that already exists from the reduction, it is best that plastic surgeons do the incisions for the mastectomy."

On 23 December 2008, two days before Christmas, I was operated on for breast cancer at Walter Reed. I elected to have a double mastectomy because I felt it would be best to avoid possible future breast cancer.

As mentioned, because of the numerous scars that are already on my breasts, it was preferable to have a plastic surgeon do the surgery. On the day of surgery, I was prepared to have Dr. Martin do the cutting. This is what I was told and this is what I was prepared to experience. Unfortunately, this didn't happen. The result has been a very poor surgical result. I have been told by plastic surgeons from Huntsman Medical Center in Salt Lake City, Utah, that I will require additional surgery because Dr. Copeland elected to do the initial surgery and a Plastic Surgeon was not given the opportunity to do this. When I asked Dr. Martin why

he didn't perform the surgical cutting, as was agreed to and planned, he simply stated that Dr. Copeland (who is superior to him in the hierarchical structure at Walter Reed) stated that she would do all of the cutting.

A Shocking Revelation

My oldest daughter, Melanie Hall, a Sergeant in US Air Force, was at Walter Reed to help me through the surgery. She was waiting in the hallway during the surgery when Dr. Copeland and another Army doctor approached. Dr. Copeland announced proudly to Melanie, "We have removed all of the cancer from your mother's right breast." Melanie responded in shock, "But, my mother's cancer is in the **left** breast!" Drs. Copeland and Callaghan said nothing, but looked extremely disturbed, turned around and walked away without another word.

Dr. Copeland did not know she had operated on the wrong side until my daughter told her. **This suggests that Dr. Copeland did not look at my medical records or check the pathology report before, during, or following the surgery!**

Getting the Bad News

When I awoke and was still "foggily conscious," Dr. Copeland and Dr. Martin were in my room telling me that a terrible mistake had been made. Dr. Copeland explained to me that she had removed all of the lymph nodes from the wrong side of my body. She removed 16 lymph nodes from the right side of my body which is virtually all of the lymph nodes on the right side (from under the arm). The result of this "wrong-sided" surgery is that I now have severe and constant burning and tingling in half of my right arm at all times. Additionally, I must to be meticulous about the right side of my body and take extra care because there are no lymph nodes there to protect it from infection. ***This devastating condition, known as lymphedema, impacts almost every aspect of my life. There is no cure, there is no effective treatment. I will suffer its effects for the rest of my life.*** In addition to the physical consequences of the botched operation, my psychological health has been damaged; I have recently been diagnosed with Post Traumatic Stress Disorder caused by this surgical misadventure.

Clueless at Walter Reed

Once I had time to gather my thoughts after the surgery, I asked for Dr. Copeland to come and see me privately. In my room, several days following surgery, I asked her what had happened. I asked her why she had not looked at the pathology report which I knew was only two pages in length. Looking at this two-page report would have enabled her to operate on the correct breast. She simply stated that what took place "never should have happened". I said to Dr. Copeland, "why didn't you look at the pathology report?" "Why wasn't it in the operating room?" Once again, she simply stated she didn't know why. When I

finally got a copy of the medical records almost two months later, I read in the Narrative Summary and Discharge Summary that there were SIX surgeons in the operating room and that "the attending surgeon (Dr. Copeland) incorrectly believed the known invasive cancer was on the right side." The Operative Report describes a "mindset" that led to an "error" being made that resulted in removing the lymph nodes "on the right where no breast cancer had been diagnosed." To this date, I have not been told how or why this "error" was made or who is responsible. In deed, no one takes responsibility and the Army is hiding behind the Feres shield to keep me from successfully making a claim.

Impact on Families

The impact on my own family has been extensive. As I mentioned, I am a divorced mother of four. Three of my children are in the military and serve in the Air National Guard, Air Reserve, and Army Reserve. My children have full-time jobs and military responsibilities. To take care of me and take me to and from my numerous medical appointments has required great financial and professional sacrifice on their part. Simply put, my medical problems have caused them as family members their own unique set of problems. Their jobs and careers have been negatively impacted because of me and there is no consideration from the military because of the unique help from family members.

The Feres doctrine is wrong. If one of its purposes is to protect the rank structure such that those who are lesser in rank cannot possibly threaten those who are superior in rank with law suits, then rationale is useless in my case as I out-ranked all of those in the operating room. I was an active duty Colonel and no one in that room out-ranked me.

An Argument for Equity

It is a privilege to serve in the military. But, service should not mean that we consign our rights away. We who have fought and died for rights ought to have every right that every citizen of the United States has. The Feres doctrine does not help or support our Soldiers or our military families.

To ask us to fight and die for freedom and then take away our right to ask questions, get records, face those who wrong us, and get help for our families to support us once we are disabled by the military – is a disgrace. Even those who are hurt or killed in combat from "friendly fire" get a hearing and can be given information. The basic "right to information" seems to be protecting the military medical establishment at the expense of Soldiers and their families.

But, more importantly, no Soldier, regardless of rank, should have to feel like a second class citizen. No Soldier should feel that he or she cannot be entitled to the same rights as every other American. Even a convict in prison has more rights than a US Soldier! How can this be? How can we let our Soldiers have

fewer rights than a convicted criminal? It is not right and those of us in the military today deserve equity – because at the very foundation of our commitment and duty it is we who are asked to give our lives to protect the basic rights of all those in America today.

Summary

I am the victim of a botched operation at Walter Reed Army Medical Center. The military wants to deny me the right to seek compensation through a legal system that protects everyone except active duty servicemen and women. If I had been a convicted murderer and suffered the same negligent care, I would be able to sue for my injuries. If preserving military order and morale is the objective of the Feres doctrine, it is an utter failure. Something must be done to change things as they are. Making the US accountable for the damage its military doctors cause to its Soldiers, Sailors, Marines, and Airmen and Airwomen is imperative. Congress must step up to protect those who protect America!

Sincerely,

Adele Connell

Adele Connell, Ph.D.
Colonel, US Army

LETTER FROM ALEXIS WITT

March 23, 2009

The Honorable John Conyers
Chairman, House Judiciary Committee
2138 Rayburn House Office Building
Washington, D.C. 20515

The Honorable Steve Cohen
Chairman, Subcommittee on Commercial and Administrative Law
2138 Rayburn House Office Building
Washington, D.C. 20515

Dear Chairmen Conyers and Cohen:

My name is Alexis Witt, and I'm writing today in support of H.R. 1478, the Carmelo Rodriguez Military Accountability Act of 2009. My husband, SSGT Dean Patrick Witt, died needlessly as of a result of medical malpractice that stemmed from a routine appendix removal that he received while serving in the United States Air Force.

I've read stories about twins who were linked by an uncanny ability to feel if the other was in pain or in trouble, even from miles away. This is one of those stories. When my husband, Dean went into surgery at David Grant Medical Center at Travis Air Force Base to have his appendix removed, I was standing on the back porch of my friend's home. Standing there, my eyes focused on a crack in the brickwork of the house. It was crumbling. I picked at part of the mortar and then everything became quiet. I felt a strong urge to go home.

When I arrived home, I received what would be the first of a string of calls that would alter the course of my life. I do not remember the entire conversation. I do remember being told the surgery went well, and that Dean had gone without oxygen for "awhile" and they were observing him. It had not been conveyed, nor did I understand that something was seriously wrong with Dean. Nothing in Dr Gerloch's tone of voice made me suspect that anything had gone seriously wrong. I would not learn until early the next morning that Dean was not expected to live more than twelve hours.

The answers to many questions would go unexplained for nearly a month, and even then, many answers to basic and relevant questions were refused me as "confidential information". The staff involved in the incident was given specific orders not to speak of what happened to Dean under threat of court martial. The investigation file was "confidential" and I would never see it. Our families were told by the command that we would never find out what happened in the recovery room.

In spite of the Air Force's bar on information about what happened to Dean, through perseverance we have managed to find out a few facts about the case: For nearly fifteen minutes Dean was deprived of oxygen. The nurse whose name was withheld was found at fault, for removing Dean's airway too soon after surgery leading to a "laryngospasm" (muscles in his throat constricted), and then inexplicably leaving her post in the recovery room and leaving him without care. Later, the staff attempted to use pediatric equipment to revive Dean. After a second attempt, Dean was intubated properly and an airway was established, but by then Dean was demonstrating signs of an anoxic brain injury.

Dean's once impressive athletic build atrophied and he became a mere shell of his former existence. His body weight dramatically reduced to less than a hundred pounds. The silhouette of his skull was visible under the thin layer of skin on his face. His gray blue eyes sunk far into his head. He had no voluntary use of his limbs. His arms postured near his chest in a decorticate position, rigidly flexed and twisted at the elbows and wrists. His face grimaced in a pain like expression.

Three different neurologists confirmed that except for reflexes Dean would know little else for the remainder of his life. He would always require around the clock attention and a feeding tube. He would never be able to recognize his family, communicate, dress, feed, take a walk, or care for his own personal needs.

Dean was irretrievably and massively brain damaged. His condition was terminal. I requested Dean's care be terminated. It would be two months before the hospital ethics board granted our request.

The knowledge that Dean wanted to be let go was a comfort. I knew he did not want to be confined to a hospital bed for the remainder of his life. Just ten months earlier, Dean had expressed to me that he would never want

live on the dependency of a machine. Waiting for days to witness his last breath and to watch a life end is shockingly unforgettable. He was only twenty-five years old.

Although Dean's life is now over and he has been laid to rest, the struggles and challenges for the survivors have just begun. Grief changes people. It changed me. The woman who married my husband died along with him. There was a loss of Dean, but the life I had planned on creating with him is now gone too. I suffered crippling anxiety attacks that would come without warning. The domino effect of Dean's death did not end there.

Now that our children are getting older, their loss too, is more apparent. Our daughter, Hannah, age 7, recently attended a father-daughter event at her school. My father volunteered to take her. I knew my daughter appreciated her grandfather stepping in, but I could tell by the look in her eye she was really missing having her father.

I am concerned for our son Noah, age 5. I often wonder how not having male role model will affect his development. As a single mother raising two young children, life is difficult. I often can't believe that, at such a young age, I am a widow. Hannah, Noah, and I are doing our best to cope.

As I think of Dean, long list of superlative thoughts come to mind. Dean was so many things to us. He was a dedicated and romantic husband and attendant father. He was a leader, a professional and patriot. He had a great personal side too. When he wanted to be, he was a closet comedian who would make me laugh. He was impulsive and athletic. He was an intimidating wide receiver. He was the morning phone call just to check in, and the pleasant sound of the garage door opening at the end of the day announcing his return home to his family. He was a family man who did his absolute best to support us and serve his country.

I look back on our terribly "out of tune" karaoke duet and the two-step lessons in the kitchen. I will never forget the expression on his face while witnessing the birth of our daughter or his happy and celebratory shouting in the quiet hospital corridor when he heard the radiologist confirm the blip on the ultrasound screen meant our second child was to be a boy. Of course, the memories between a husband and wife are endless.

Dean was so very proud that he was serving his country. He demonstrated his pride and enthusiasm at every step of his military training. The John Levitow Honor is the highest award presented to the top professional military education graduate demonstrating outstanding leadership and scholastic qualities. The award selection is based on overall performance evaluation, academic ranking, and peer and staff ratings. The award is given to the most outstanding student in the Airman Leadership class. Upon graduating Airman Leadership School, Dean was awarded the John Levitow Honor.

Dean was also selected as the Distinguished Graduate because he blew away the competition in every area (speech, performance and academics.)

I would like to share Dean's enthusiasm for the Air Force and his undying patriotism in his own words

> "I've always known that serving my country through the Air Force is a great honor for me. But I realize that it is a privilege too. I think a lot of America has forgotten about patriotism. I think it's important for us to know what patriotism is. I think it's important for everyone in the Air Force to know. Every time we put on this uniform, we are saying that no one is going to hurt us, our families, or the freedom by which we live. Be proud that you serve. As you all know, not everyone can join our service. Stand tall, because without you and hundreds of thousands serving across the globe, none of us would be free. We are the world's protectors. No one come close."

Dean also found it important to give back to the community. He was often a blood and plasma donor. He spent time with and mentored a young boy who was being raised in an unforgiving environment in Salt Lake City through the Big Brothers Big Sister Program. He wanted to give back because he had been given so much.

When I reflect on the needless, tragic loss of my husband and father of our two young children, I recognize that the deep sense of loss felt by us is not just our own. Dean was many wonderful things to many people. Dean was a husband, father, son, uncle, brother, Airman, friend, neighbor, mentor, and teammate. Each of us who knew Dean saw Dean in a different context. A similar letter from any of us would have numerous differences, but there

would be several common threads – goodness, responsibility, pride, and patriotism.

The Feres Doctrine is the root of the problem undermining the standard of medical care military men and women receive. Feres provides sovereign immunity for health care providers in the military to literally walk away from their patients after committing malpractice, often with no consequences or accountability. Not even their names are revealed. The cloak of "confidentiality" falls and nothing is revealed. And why are these facts so "confidential" that they cannot be revealed even to the closest next of kin with full authority to act on behalf of the patient? The obvious reason is that this version of "confidentiality" is nothing more than a self-serving blockade of information meant to protect the wrongdoers. The facts of even egregious cases become difficult, if not impossible to piece together. More often than not, there is no relevant investigation. Even when an investigation ensues, it is brought by the very agency that has committed the wrongdoing. Then, the results of the investigation are "confidential".

SSGT Dean Witt had nothing to do with military health care. He was an Airman. He was recruited into the military with the promise of good health benefits for himself and his family. He became ill with appendicitis, and like anyone else, he sought medical care under the medical plan provided by his employer. In Dean's case, his medical plan required him, except in the most urgent emergency, to first seek care on base. He did so. The appendectomy went fine. In recovery, while he was unconscious, egregious malpractice occurred that caused him devastating brain damage and ultimately took his life.

There is no judicial remedy simply because Dean was active duty and any meaningful action on our part is barred by the Feres Doctrine. As a result we have only been allowed to learn what the Air Force wants us to learn. There is nothing that is inherently confidential about what happened to Dean. Had I been the patient instead of Dean, the general principles of American law would have applied and confidentiality would have been allowed only where demonstrably necessary. Transparency and accountability are the underpinnings of improving all medical systems, especially the military medical system.

The rationales behind the Feres Doctrine are thin and often meaningless. Neither Feres, nor its rationales are mentioned in the text,

footnotes, or legislative history of the Federal Tort Claims Act. The legislative intent of Congress was clearly not to generate the result experienced by my husband and my family. Instead, the notion of uncertain recovery has been substituted with certain non-recovery. For the sake of improving the standard of care at our military medical facilities and to provide recourse and reasonable answers to those, like my family, who have been affected, I strongly urge Congress to, at a minimum; enact a health care exception to the Feres Doctrine.

Thank you for holding a hearing on H.R. 1478 and bringing much attention to how the Feres Doctrine hurts members of the armed forces and their families. I urge you to support the bill and enact this important legislation.

Respectfully yours,

Alexis Witt

Alexis Witt
9073 S. 300 East
Sandy, UT 84093

LETTER FROM L. RICHARD FRIED, JR., ESQ.,
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April 13, 2009

The Honorable Steve Cohen
Chairman, Subcommittee on Commercial
and Administrative Law
Committee on Judiciary
United States House of Representatives
2128 Rayburn House Office Building
Washington, DC 20515

Re: Feres Doctrine

Dear Representative Cohen:

I write as someone who has dealt with cases involving military facilities for at least 30 years. I understand there is finally an opportunity to undo the unbelievably harsh aspects of the Feres Doctrine. We, (the U.S. Government), tell active duty personnel that they will be covered for medical care, but yet we don't tell them that if they are malpracticed on in a free standing military hospital, they have no rights. Dependents of these same active duty personnel have the right to file a complaint for medical negligence that the active duty people themselves don't have. Certainly, anybody would understand that you don't want a Sergeant sued for sending the troops over the wrong hill, but a freestanding military hospital provides the same care as any civilian hospital. Active duty military personnel, who are probably more entitled than any of us to good care, are prohibited from bringing an action if they receive substandard care.

In a case of mine, Atkinson v. USA, the Ninth Circuit Court of Appeals decided that the Feres Doctrine was unfair, should be reversed, and did so. However, a subsequent case from another circuit had certiorari granted by the U.S. Supreme Court, which affirmed this terrible doctrine. The citation for my case, Atkinson v. USA, is 825 F.2d 202, and was decided over 20 years ago. It is finally time to eliminate this unfair and illogical doctrine. If there is anything that I can provide to assist, I would be more than happy to do so.

Very truly yours,

L. Richard Fried, Jr.

LRF:lo

LETTER FROM BARB CRAGNOTTI, VERPA CHAIR/LEGISLATIVE COORDINATOR

VETERANS EQUAL RIGHTS PROTECTION ADVO

~VERPA~
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Medford, OR 97504-0225

"Veterans & Families for Equal Justice Under Law."
Inc. December 1999

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March 24, 2009

VIA ELECTRONIC MAIL

Honorable Steve Cohen, Chairman
Committee on the Judiciary
Subcommittee on Commercial and Administrative Law
362 Ford House Office Building
Washington, DC 20515

Re: Hearing on H.R. 1478, the "Carmelo Rodriguez Military Medical Accountability Act of 2009"

Dear Chairman Cohen,

On behalf of Veterans Equal Rights Protection Advocacy, Inc (VERPA) and all of our supporters, we would like to thank the Subcommittee for holding hearings on the subject matter H. R. 1478, the "Carmelo Rodriguez Military Medical Accountability Act of 2009."

We are pleased to have the opportunity to submit this letter as our statement for the record. VERPA, Inc is a national Veterans advocacy organization with a mission to repeal or abolish the *Feres* doctrine. We have supporters from all over the world, as can be seen on our on-line petition at verpa.us.

It is time to resolve the *Feres* doctrine issues with the administration of our government. It is time that they recognize the Civil and Human Rights of our active duty Military and Veteran citizens by making Case Law.

When American Citizens and legally inducted residents of the United States of America swear to protect and defend the Constitution, they are unknowingly stripped of "equal protection and due process" of the Constitution without their knowledge or consent. Any gross/criminal act or omission arising "*incident to service*" in the United States Armed Forces resulting in injury or death to a service member; is barred First Amendment redress within the United States Government under the judicially created *Feres* doctrine.

VERPA asserts the strongest argument, that supports our mission to abolish the *Feres* doctrine and shonld encourage the United States Congress to end this 58-year atrocity, arises from the dissenting opinion of U.S. Supreme Court Justice Scalia who stated in the case of *United States v. Johnson*, (1987):

> ***"Feres was wrongly decided and heartily deserves the widespread, almost universal criticism it has received." Furthermore, "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."***

The *Feres* doctrine is a dangerous threat to the national security of the United States and the preservation of our Citizen's human and constitutional rights serving in the United States Armed Forces for the following reasons;

Whereas, the *Feres* doctrine's exemption under the Federal Tort Claims Act (FTCA) of 1946, and its judicial grant of "sovereign immunity" violates the separation of powers, equal protection and due process clauses of the United States Constitution;

Whereas, the President of the United States and Congress are well aware of America's veterans and families pleas for redress of human and constitutional rights abuses arising "incident to military service" within the command, legal and medical systems of the Department of Defense (DOD) and military, serious public trust issues barred from redress under the *Feres* doctrine's exemption to the FTCA of 1946;

Whereas, the United States Supreme Court has continually placed the burden on Congress to remedy the *Feres* doctrine injustice for the past 58 years. Congress has failed to act resulting in individual and systemic abuses, arising in the DOD and military, to go unremedied. Only Congress can make laws under our Constitution.

Whereas, the dangers of the *Feres* doctrine have been presented to the United States Congress via: 1. The Rockefeller Senate VA Report of December 1994, recognizing the doctrine does allow uninformed consent human experimentations of Americans; 2. The Cox Commission Report on May 25, 1999, the 50th Anniversary of the Uniform Code of Military Justice, recognizing 'non-legitimate' military decision are violating the constitutional rights of Americans to redress wrongful acts and omission in the military command, legal, and medical systems; 3. VERPA's Official Statement for the Record, re: October 8, 2002, Senate Judiciary Hearings on the *Feres* doctrine, providing substantial claims from independent veterans'organizations and individuals asserting human and constitutional rights abuses with the DOD and VA. 4. VERPA's petition to President Bush and all members of Congress, during the week of September 7, 2007, on behalf of VERPA and all of our supporters, asking them to revisit the *Feres* issues.

The Federal Tort Claims Act must be restored. The "incident to service" bar must be changed to "incident to combat". We must have a law that holds accountable, those

individuals in our military whose "gross negligence" causes injury or death to our military members. Individuals in our military are abusing their power, with no accountability, allowed by the *Feres* doctrine.

For the record, we do not argue for lawsuits arising from combat nor negligence per se, and do not wish to open the courthouse doors to frivolous lawsuits. However, a "safety net" judicial provision to hold accountable individuals who injure other service members via "gross/criminal" acts and omissions, is what we have long worked to accomplish at VERPA.

Sgt. Carmelo Rodriguez, who was a decorated Marine and platoon leader in Iraq, died of skin cancer last year after a series of extraordinary mistakes and misdiagnoses made by military medical personnel. His family, however, has no recourse for this tragedy due to the *Feres* doctrine.

We appreciate Congressman Hinchey NY, for introducing H.R. 6093. We support his efforts improve military medical care. It is about "*individual accountability*" and serious crimes beir committed against American service members, which also negatively impact their families. What happened to Carmelo Rodriguez, his family and so many other military members and t families; should not be experienced by anyone else.

We believe in our military and for their need. However, we also believe onr military member deserve the same Constitntional and Human Rights we enjoy, the very rights they fight for, o behalf, which they are stripped of, once they sign on the dotted line.

Please do not allow one more person in our military to suffer, at the hands of an individual in our military abusing their power, with no accountability, due to the *Feres* doctrine.

We ask that the Congress and President Obama act as quickly as possible to amend *Feres*.

We thank the Committee for its consideration of our views.

Sincerely,

Barb Cragnotti
VERPA Chair/Legislative Coordinator

Cc: Matthew Wiener,

"When we assumed the Soldier, we did not lay aside the Citizen"
General George Washington, New York Legislature, 1775

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