Testimony of

Mr. Daniel Joseph

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

We represented Bonnie, as the executrix of the Estate of Kerryn O'Neill and as Kerryn's survivor, in litigation under the Federal Tort Claims Act in federal district court, the Court of Appeals for the Third Circuit, and the Supreme Court, in which we sought to recover under that Act, which we lost because of the Supreme Court's 1950 decision in Feres v. United States. Chief Judge Becker and Judges Sloviter and McKee of the Third Circuit said in dissenting from denial of rehearing in that case that the Feres decision was wrong and should be reviewed by the Supreme Court. Several years earlier, in dissenting from a decision in Johnson v. United States, Justice Scalia for himself and Justices Brennan, Marshall, and Stevens - I think that the Committee will agree that that is not a usual lineup of Justices - had concluded that Feres is not based upon the Federal Tort Claims Act and should be overruled. We strongly support legislative action that would remove the influence of the Feres decision and return the courts' treatment of suits brought by members of the military under the Federal Tort Claims Act to the statutory provisions of that Act without the additional and nonstatutory limitations now imposed by Feres.

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

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

1. For three major reasons the Supreme Court has no power under the Constitution to impose the

Feres doctrine. First, the doctrine has no foundation in the text of the FTCA and constitutes a judicially imposed limitation on a right to sue granted by Congress. The Sixth Circuit observed in Major v. United States, 835 F.2d 641, 645 n2 (6th Circuit), that as a result of Feres it had been persuaded that the phrase "any claim" in the FTCA now means "any claim but that of servicemen". But the Supreme Court has no power so to condition or partially repeal legislation passed by Congress. The Supreme Court lacks the power to change legislation of Congress that it does not like.

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

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

2. The Feres doctrine was unnecessary. The Federal Tort Claims Act was carefully crafted by Congress to take appropriate account of particular problems that might be raised by extending that Act to military activities. But in Feres the Supreme Court replaced these carefully drawn provisions with its own, much broader, restriction. Because of the Feres doctrine, which was imposed by the Court when the enactment of the Federal Tort Claims Act was still quite recent, the particular limitations that Congress imposed have never been allowed to work in the military context. But they would be effective to cure all of the problems that the Supreme Court says are the impetus for the Feres doctrine today. Those Congressionally crafted limitations are:

? Under § 2680 (j) there can be no liability for combatant activities of the military in time of war. This is complete surplusage under the Feres doctrine.

? Under § 2680(k) there can be no liability for a cause of action arising in a foreign country. This restriction was clearly aimed largely at freeing all military activities overseas from the threat of tort litigation.

? Under § 2680 (a) there can be no liability based on the performance or non-performance of any discretionary function, whether or not the discretion is abused. Thus decisions based upon military judgments are safe from interference or review by the courts under the FTCA, even without Feres.

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

3. At the same time, Feres clearly goes much further than it has to to protect military

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

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

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

The important point here is that this is not simply a confusion that the Court could clean up. It is actually a fundamental problem with the Feres doctrine. This problem flows from the fact that as the Court effectively admitted (in the Johnson decision) there is no provision in the Act that the Feres doctrine effectuates. There is nothing to look at upon which a court can base a decision of how to apply the incident-to-service test - there is no way to satisfy the Court's command that in applying the test a lower court should look to the purposes of the Federal Tort Claims Act. Thus

the confusion in the lower courts is the natural result of the fact that the incident-to-service test is a judicial creation that does not flow from the Tort Claims Act. The Court cannot openly admit that it made the doctrine up out of whole cloth, so the confusion in applying the doctrine is a built-in problem that cannot go away unless Feres is somehow replaced. This alone is a good reason for the Congress to act to abolish the doctrine.

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

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

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

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