

Testimony of
The Honorable Patrick Leahy

October 8, 2002

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

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

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

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

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

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

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