Testimony of

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

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

While there are several factors that underlie the rationale of what has become known as the "Feres Doctrine", I will limit my statement to the doctrine's importance for continued military discipline and morale in the Armed Forces, in its broadest sense. Our soldiers, sailors, marines and airmen perform a service that has no counterpart in civilian life. Theirs is not an eight to five job; rather, it is a way of life. They are called upon to make great sacrifices in performing their assigned duties and missions--often the ultimate sacrifice. The special trust placed in members of our Armed Forces, is so clearly demonstrated by missions they are called upon to perform and the lethality of the weapons systems committed to their use. The relationship among members of the Armed Forces, and between such members and their superiors, is indeed special and unique. There are certain absolutes in this regard, such as-- strict obedience to orders; total loyalty to one's organization, one's service and our Nation; total loyalty up and down the chain of command; complete trust among and between members of one's organization; and discipline. Indeed, unit cohesiveness , essential to success on the battlefield, requires such attributes.

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

It is not difficult to imagine the adverse impact on unit cohesiveness which would result from subjecting these decisions to judicial scrutiny. Commanders and other military members would, in many instances, be deposed and summoned into court to justify their decisions. It may also engender the belief among the force that no order or decision is final until the courts have issued a ruling. Trust, one of the essential ingredients for unit cohesiveness would be undermined--trust not only among individual service members, but also between the members and their organization. To allow service members to sue their government for damages related to military service implies that the military has failed its own and that only by taking the "boss" to court can

justice be attained. Fostering such an attitude within a community that demands uncompromising trust and teamwork has dire implications.

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

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

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

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

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

I share fully the deep concern for those injured, and the families of those whose lives are lost, while serving their country. Regardless of whether the injuries or deaths result from events such as training mishaps, automobile accidents, medical malpractice, friendly fire, or hostile fire, the injury or loss to the individual member or next of kin is no less real. What then is the basis for providing disparate compensatory actions predicated primarily on the situs of the injury or death? If the rationale underlying the proposed amendment to the FTCA is the inadequacy of compensation and other benefits under the current statutory scheme, then that may be a matter which should be analyzed, not in relation to tort litigation, but instead on behalf of all military members. Authorizing monetary compensation through tort litigation, however, is the wrong answer. We should not throw the victims to the bar--we should not say that widows and children are left to hire personal injury lawyers to obtain adequate compensation for the deaths of their loved ones serving in the Armed Forces. A grateful Nation should take care of them fairly, without subjecting them to litigation and all the associated turmoil.

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