Testimony of

The Honorable Paul Harris

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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. (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.

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.

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 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.