

Testimony of
Mr. Eugene Fidell

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Mr. Chairman and Members of the Committee:

My name is Eugene R. Fidell. I am a partner in the Washington law firm of Feldesman, Tucker, Leifer, Fidell & Bank LLP, and have long been involved in issues relating to military service. I served on active duty in the United States Coast Guard from 1969 to 1972. I have represented members and former members of the Armed Forces for over 30 years.

The Committee deserves great credit for concerning itself with the Feres Doctrine, which has been a blot on the record of the federal courts for decades, and has repeatedly been an engine of unfairness and mischief. There is no real lobby on this subject, so any legislative attention to the subject is noteworthy and laudable.

I would like to address the notion that adjustment or relaxation of the rule would compromise proper military interests by subjecting commanders and others in leadership positions to a welter of intrusive and distracting investigations. I have no doubt that this argument has been put forward in good faith, but there is little merit in it. It rests on a totally outdated notion of how commanders spend their time. Today's military--every branch--is a highly sophisticated post-industrial effort in which inquiries and investigations play a regular and entirely necessary role in ensuring accountability, efficiency, fairness, and--above all--the achievement of operational objectives.

Let me give you some examples. In every branch, commanders' inquiries are conducted on an infinite variety of subjects. In the Army, for example, these are conducted under Army Regulation 15-6, Boards, Commissions and Committees: Procedure for Investigating Officers and Boards of Officers (30 September 1996). Mishaps large and small can be and are investigated under this kind of regulation, and those in leadership positions may well find themselves called upon to become involved either as appointing officers, investigators, witnesses, or, at times, parties to the investigation. When I was on active duty I was involved in several such investigations. Since leaving the service, I have advised members of the service on their rights in investigations.

What happens when a ship runs aground or experiences a collision? Or a tank overturns? Or a new kind of aircraft experiences a problem, with property damage and/or injuries and loss of life? These matters are investigated. The investigation may be time-consuming and on some level a distraction, but the services have certainly accommodated themselves to the need for investigation--because it is a time-tested way of preventing recurrences, among other things. Congress long ago enacted legislation permitting GIs to file "Complaints of Wrongs." This is currently found in Article 138 of the Uniform Code of Military Justice, 10 U.S.C. § 938. Under it, a member has a right to ask that a complaint that is not redressed by the commanding officer be looked into by a general court-martial convening authority--usually a Flag or General Officer--whose report must be forwarded to the service secretary. According to the most recent published figures, there were 142 Article 138 complaints in FY2001. See 2001 Ann. Rep. Code Comm. & Judge Advocates Gen., 56 M.J. CIV (16 Army), CXVIII (96 Navy and Marine Corps),

CXXXIV (28 Air Force), CXLIV (2 Coast Guard). My hunch is that many more such complaints are filed, but they are resolved before they reach the general court-martial convening authority level.

While I have personally never seen much good come of an Article 138 investigation, Congress obviously thinks it is a worthwhile procedure, and worth the time and effort in terms of the potential distraction of officials from what they would otherwise be doing with their time and energy. The military has apparently been able to survive despite Article 138 for decades, and I have never heard any official complain that the time needed to deal with such complaints was unwarranted.

Nor, more to the point, has there been any sense that it either undermines the command structure or encourages insubordination to permit junior military personnel to put their superiors "on report" by means of an Article 138 complaint. Indeed, one could argue that permitting GIs to do so serves a useful purpose by affords them a socially-acceptable way to express their frustrations and move on.

These are far from the only settings in which commanders are required to make time for cooperation with official inquiries of one sort or another, oftentimes at the initiative of subordinates. Certainly commanders find themselves having to respond to inquiries from service or Department of Defense Inspectors General. They usually have to drop everything--or at least act very promptly--to respond to congressional inquiries prompted by letters from constituents who are either in uniform or have family members in uniform. And commanders may be called upon to provide information for such recognized purposes as responding to applications filed by present or former subordinates with the boards for correction of military and naval records, see 10 U.S.C. § 1552, or assisting agency and Department of Justice counsel in various kinds of litigation, such as cases under the Tucker Act, 28 U.S.C. § 1491, for pay or retirement matters or cases in the district courts seeking review of decisions of the correction boards under the Administrative Procedure Act, 5 U.S.C. § 706.

In short, there is nothing at all novel in the proposition that there are times when public policy requires military and naval officers to make time to cooperate with legal proceedings and inquiries, including those filed by military subordinates. While some who believe their time might be better spent on other matters may resent having to make room for them, officers in this day and age must be able to "multi-task," and I personally have no reason to believe that the demands associated with an adjustment of the Feres Doctrine would be intolerable or could not be accommodated by the Armed Forces in terms of the need to reconcile competing demands on limited time. Plainly, operational demands will always have priority, and the danger of excessive intrusion can be addressed by framing any Feres adjustment wisely.

I should also mention that these comments proceed on the assumption that commanders will continue to enjoy the broad personal immunity the law has long afforded them from civil actions brought by subordinates. *Chappell v. Wallace*, 462 U.S. 296 (1983). In other words, there is no reason to fear that adjustment of the Feres Doctrine will have any effect on the personal liability of any individual.

Thank you again, Mr. Chairman, for the opportunity to present these remarks. As always, it is a privilege to appear as a private citizen before a committee of this body. I would be happy to entertain any questions you might have, and if the Committee decides to proceed with legislation, I would welcome an opportunity to work with staff on the specifics.

EUGENE R. FIDELL

Mr. Fidell is a partner in the Washington law firm of Feldesman, Tucker, Leifer, Fidell & Bank LLP and president of the National Institute of Military Justice. He has served on the American Bar Association's Task Force on Treatment of Enemy Combatants, the Code Committee on Military Justice, the Advisory Board on the Investigative Capability of the Department of Defense, and the Rules Advisory Committee of the United States Court of Appeals for the Armed Forces. He is a graduate of Queens College, Harvard Law School, and the Naval Justice School.

Mr. Fidell served as a Coast Guard judge advocate from 1969 to 1972. He represents personnel in each of the armed forces as well as the U.S. Public Health Service in disciplinary and other personnel actions and related litigation.

Mr. Fidell has taught military justice as an adjunct at Yale Law School and has written widely on military law. He edited the National Institute of Military Justice Annotated Guide to Procedures for Trials by Military Commissions (LEXIS/NEXIS Matthew Bender 2002) and co-edited *Evolving Military Justice: An Anthology* (Naval Institute Press 2002) with Dwight H. Sullivan. His current work in progress (with Professors Michael F. Noone and Elizabeth L. Hillman) is a textbook, *Cases and Materials on Comparative Military Justice* (Anderson Publishing Co.).

Mr. Fidell lives in Bethesda, Maryland, with his wife and daughter.