Testimony of

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I am pleased to appear before the Committee today to present my views on the Feres Doctrine and its importance to the good order and discipline of the United States military. Others have discussed several reasons to support the Feres doctrine. It is my purpose to discuss only one of the commonly cited bases for this doctrine that prevents service members from suing the federal government, other service members, or other government employees for tortious injuries suffered incident to military service. I will discuss the good order and discipline of the Armed Forces and its relationship to the Feres doctrine

There are many elements of our national power - including the rule of law, industrial and mobilization capacity, the national will of our citizens, and the readiness and capability of our armed forces. But it is our armed forces that are fundamentally based upon our greatest national resource: the individual fighting man and woman. Our individual soldiers, sailors, airmen, and marines are cohesive and integral parts of the whole who are trained that operational success in the defense of this nation is predicated upon their individual initiative and capability tempered by their realization that success is accomplished most efficiently and effectively by teams, not individuals. Military good order and discipline is the glue that binds this team together. Congress recognized this need and has used the Uniform Code of Military Justice and its forerunners (Articles of War and Articles for the Government of the Navy) to criminalize acts which could be prejudicial to the good order and discipline. Failure to follow orders, disrespect to superiors, and conduct unbecoming an officer are some of the obvious examples of the Congressional recognition of the unique requirements of an effective military and the need for good order and discipline.

In 1946, after decades of debate, Congress enacted the Federal Tort Claims Act (FTCA), 28 U.S.C. sections 1346(b), 2671-2680, which with certain exceptions, waived sovereign immunity for common law torts committed by federal employees acting within the scope of their employment. In Feres v. United States, 340 U.S. 135 (1950), the Court did not judicially create a new exception to the FTCA. Rather, it looked at the legislation and concluded that Congress had not intended to waive sovereign immunity for injuries that arise incident to military service.

In the over 50 years Feres has been in place, the courts have continuously and properly continued to recognize its viability and importance. 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).

I would like to highlight one fairly recent Supreme Court case. In United States v. Shearer, 473 U.S. 52 (1985), the Supreme Court held that Feres barred suit against the government for the off-base, off-duty murder of one service member by another even if the government knew that the murderer had been convicted of a prior manslaughter overseas. The Court concluded that the plaintiff's allegation of negligent personnel practices relating to the murderer and the military's failure to warn others clearly implicates the concerns expressed in Feres in that such a suit would

require the civilian courts to second-guess military decision making. The Court in Shearer did not look to the injured service member's military status or the location of the incident in determining the applicability of the Feres doctrine, rather it rightly focused on whether the courts would have to evaluate military decisions and discipline. The focus of Shearer and its progeny is on the military's dealing with the alleged tortfeasor and challenges to the management of the military and questioning basic choices about discipline, supervision and control of one service member by another. Legislative repeal of the Feres doctrine would embroil the civilian courts in military decision making. More significantly, it could embroil civilian courts at an extremely low level of military decision making. Part of the Supreme Court's rationale in Feres, was concern for the effect upon military order, discipline, and effectiveness if service members were permitted to sue the government or each other for torts which are incident to service. It is the suit, not the recovery, that Feres prohibits. In 1939, Judge Learned Hand noted that public service is not an easy task and that allowing immunity for public officials is necessary to ensure the best good for the public as a whole: "The justification for doing so is that it is impossible to know whether the claim is well founded until the case has been tried, and that to subject all officials, the innocent as well as the guilty, to the burden of a trial and to the inevitable danger of its outcome, would dampen the ardor of all but the most resolute, or the most irresponsible, in the unflinching discharge of their duties." Gregoire v. Biddle 177 F.2d 579 at 581 (1939). I echo Judge Hand's concern; it is even more pertinent in our increasingly litigious society. Proscribing a soldier from bringing his or her superior or fellow soldiers, into court is necessary to ensure not only that orders are followed, but perhaps more significantly, that orders must be freely given. In my opinion, while Judge Hand's concern seemed to be related to the time, effort, and likely distraction of potential litigation, even greater should be our concern for the disproportionate leader aversion to risk that would ensue if the government were to waive its immunity in this category of cases.

I would like to draw your attention beyond the legalese of Feres to the facts of that case. In the 1940s, a soldier tragically died in a barracks fire in Pine Camp, now Fort Drum, New York, home of the 10th Mountain Division. His estate alleged negligence in quartering a soldier with a defective heating plant and an inadequate fire watch. Members of the Subcommittee, many of these same style barracks remain in use today around the country, not because commanders want to house troops in such areas but because fiscal realities require balancing our national assets. I lived in them in 1968 as an enlisted soldier in training. I worked in them in 1977 as a junior officer. I prepared for operational deployments in them in the 1990s as a senior leader. The fact is our soldiers are routinely billeted in less than optimum conditions by the very nature of our training and mission requirements. Even today, tents catch fire from heaters--but should leaders be embroiled in litigation because of such conditions?

Other examples further illustrate this issue. For instance, two soldiers in a military government vehicle, a Humvee, are in an accident. But for the Feres doctrine, the unit could be embroiled in discovery disputes concerning training and licensing procedures, maintenance records, depositions of unit mechanics - all when they should be focused on preparing to deploy to Bosnia...or Afghanistan...or...

A passing comrade-in-arms renders life-saving first aid to one of the injured soldiers in the same example, but she does so leaving the injured soldier with a permanent disability. Should the Good Samaritan soldier receive a medal for saving her buddy's life or a subpoena to appear in court to defend her actions?

The other soldier in the damaged Humvee seems fine and is not sent to the military doctor until

later, after his platoon sergeant realizes that the soldier's medical symptoms appear to be more severe than they first seemed. Must our sergeants become medical experts or risk being brought into court?

Military life is unique. Courts have said so. All service members sacrifice. They cannot always choose where to live; they cannot even choose their roommates. They give up certain 1st and 4th amendment and other rights that their civilian counterparts take for granted. It must be so. Training is rigorous and inherently dangerous. It's done in every kind of weather, every kind of geography, with heavy equipment, massive vehicles, live ammunition, and explosives. The military accepts young, inexperienced individuals, trains them in warfighting skills--difficult, demanding skills--and builds cohesive teams capable of accomplishing whatever missions the country deems critical to our national interests so that the rest of us remain secure. The training mission must approximate combat as closely as possible to ensure a ready, trained military that will achieve decisive victory wherever the country sends them. Examples of military training - simply guiding a 70 ton tank to its pad in the motor pool at Fort Knox, or working on the flight deck of an aircraft carrier during night flight operations off the Virginia coast, or refueling and re-arming a jet aircraft at Langely Air Force Base, or merely driving a 5 ton truck at Midnight in blackout conditions through the forest at a training base in North Carolina - highlight that military training is inherently dangerous. Military drivers don't simply hop into their semi-trailer and drive the interstate highway--as do their civilian counterparts. They must organize in convoys and coordinate driving at a certain speed and at a certain interval from each other--while driving the same interstate highway. Discipline and teamwork are always foremost considerations.

These are but a few examples that illustrate what we mean by a unique society, a unique culture. It is the nature of the mission--to deter aggression through combat readiness, to win the nation's wars when deterrence fails. This is the military culture and it must not change because it is why the military is ready to do the nation's work. In such an environment people--soldiers--make mistakes. To allow such mistakes to result in lawsuits pitting soldier against soldier would be counterproductive; it would undermine combat readiness; it would undermine our ability to deter aggression through readiness. Worse would be the opportunity for plaintiffs to use the elimination of the Feres bar frivolously to second guess leader decisions. Accountability is a key watchword in military society. Our leaders - commissioned officers, noncommissioned officers, and senior civilians - understand the awesome responsibility they have in caring for service members - our national treasure. All military leaders know that they owe the mothers and fathers of our service members the highest possible standard of care. Courts have deferred to the military's ability to conduct its unique business. Congress has provided legislation recognizing the unique nature of the military purpose to provide "for the defense of the United States."

Even more illustrative of the direct relationship between the Feres doctrine and military combat readiness is the observation of only one day of an infantry platoon's training to see the complexity and sheer volume of decisions made by section leaders, squad leaders, and platoon sergeants--all enlisted soldiers, not commissioned officers--involving weapons, ammunition, vehicles, movement of soldiers, day and night, in adverse weather and difficult terrain that would be subject to civilian courts if the Feres doctrine were legislatively repealed.

Another critical aspect of good order and discipline is that soldiers are treated fairly and equally. Under the remedies available in current law, a soldier who is injured in Virginia is treated the same as a soldier who is injured in Maryland, or Iowa, or Bosnia, or Saudi Arabia. Legislative repeal of the Feres doctrine would change that. Soldiers who are injured in similar circumstances

in the U.S. and overseas would be treated differently because the Federal Tort Claims Act does not apply outside the U.S. Just as noteworthy, soldiers injured in the U.S. would be treated differently based on where they are injured through the application of the various state tort laws and jurisprudence.

These types of suits would permit civilian courts to second guess military decisions - an area in which such courts lack expertise. I echo the Department of Justice testimony that permitting one soldier to sue another for the negligent performance of duty is anathema to the teamwork, mutual trust, and discipline upon which our military system operates. Litigation is by its very nature disruptive and time consuming. The litigation process itself ensures this result: military plaintiffs and witnesses will be summoned to attend depositions and trials, and they will be called from their regularly assigned duties to confer with counsel and investigators. They may 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.

Even more to the issue of readiness, military leaders at all levels make decisions daily, even hourly, that involve risk assessment. They must balance the demand for rigorous, realistic training against the safety and security of their troops. They are held rigorously accountable in this endeavor not only by their chain of command, but also other military institutions like the criminal investigative services, Inspectors General, Safety Officers, and Judge Advocates. To make them subject also to accountability in a civilian court system, which has no specialized knowledge of their unique challenges and requirements would undermine their ability to train the force effectively. It is yet another example of service to nation. Individuals give up certain rights so that the team is stronger and more capable.

In conclusion, I would like to refer to the words of General of the Army Douglas MacArthur when he was addressing soon to be commissioned U.S. Military Academy cadets: "And through all this welter of change and development, your mission remains fixed, determined, inviolable - it is to win our wars....All other public purposes, all other public projects, all other public needs, great or small, will find others for their accomplishment; but you are the ones who are trained to fight; yours is the profession of arms - the will to win, the sure knowledge that in war there is no substitute for victory; that if you lose, the nation will be destroyed; that the very obsession of your public service must be Duty - Honor - Country." [Address by General of the Army Douglas MacArthur upon his acceptance of the Sylvanus Thayer Award, 12 May 1962.]

Mr. Chairman and Members of the Committee, we must allow our service members to remain jointly focused on preparing for their mission and not separately preparing for civil trial as plaintiff and defendant. Thank you for affording me the time to address this Committee.