AMERICAN BAR ASSOCIATION

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STATEMENT OF

STEPHEN A. SALTZBURG, MEMBER

HOUSE OF DELEGATES

Presented on behalf of the

AMERICAN BAR ASSOCIATION

Before the

SUBCOMMITTEE ON COMMERCIAL AND ADMINISTRATIVE LAW

COMMITTEE ON JUDICIARY

of the

U.S. HOUSE OF REPRESENTATIVES

Concerning

H.R. 1478 the "Carmelo Rodriguez Military Medical Accountability Act of 2009"

March 24, 2009

Chairman Cohen, Ranking Member Franks, and Members of the Subcommittee:

Introduction

My name is Stephen Saltzburg and I am a member of the House of Delegates of the American Bar Association (ABA). I am also Co-Chair of the Military Justice Committee of the Criminal Justice Section. I am appearing on behalf of the ABA, at the request of its President, H. Thomas Wells, Jr., in order to support enactment of H.R. 1478, the "Carmelo Rodriguez Military Medical Accountability Act of 2009." I am also here to present the ABA's views concerning the *Feres* doctrine (a judicially created doctrine announced in *Feres v. United States*, 340 U.S. 135 (1950)) and to provide you with the reasons why that doctrine does a great disservice to the men and women who wear the uniform of the United States. As I shall explain, the ABA has urged Congress to take a look at the *Feres* doctrine in its entirety, but the thrust of my remarks will focus on medical malpractice claims which are the subject of the proposed legislation.

The American Bar Association 1987 Resolution and Report

The *Feres* doctrine is not new to the Congress nor to the ABA. At its August 1987 annual meeting, the ABA adopted a resolution supporting a modest amendment to the doctrine. That resolution read as follows:

> RESOLVED, That the American Bar Association supports H.R. 1054 (99th Congress) or similar legislation which would partially overturn the doctrine enunciated in *Feres v. United States* and allow members of the armed services to sue the United States for damages under the Tort Claims Act for non-combat related injuries caused by negligent medical or dental treatment.

As the report (1987 report) considered by the ABA House of Delegates (HOD) when it adopted the 1987 resolution [1] noted, Justice Scalia explained persuasively in his

[1] The reports considered by the ABA House of Delegates do not constitute ABA policy. Only the resolution adopted by the HOD constitutes ABA policy. Nevertheless those background reports often explain the reasons for the policy that was adopted by the HOD.

dissenting opinion in *United States v. Johnson*, 481 U.S. 681, 692-699 (1987), joined by Justices Brennan, Marshall and Stevens, that none of the rationales withstand even modest, let alone careful, scrutiny. The four dissenters argued that *Feres* was a "clearly wrong decision," and noted the "unfairness and irrationality that decision has bred."[2]

United States v. Johnson **Dissent**

Justice Scalia outlined the three reasons given for the holding in *Feres*, as well as a subsequently developed rationale and concluded that none had merit. Any analysis of the rationales for *Feres* must be analyzed in light of the words of the Federal Tort Claims Act (FTCA), which renders the Government liable

> for money damages . . . for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.[3]

The first rationale is that "parallel private liability" does not exist. The Act states that the United States is liable under the FTCA "in the same manner and to the same extent as a private individual under like circumstances."[4] Since private individuals cannot raise armies, the argument is there can be no liability for the government. Justice Scalia pointed out, however, that civilians can sue under FTCA for tortious acts of the military; it is only military members who are barred. Justice Scalia also pointed out that such reasoning would make many of the Act's exceptions superfluous, since there are many things that private individuals cannot do -- for

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[2]United States v. Johnson, 481 U.S. 681, 703 (1987).

[3]28 U.S.C. § 1346(b); *Johnson*, 481 U.S. at 692.

[4]28 U.S.C. 2674.

example, regulate the monetary system.[5] Not content with simply demonstrating the inadequacy of the rationale, Justice Scalia added a controlling point: i.e., the Court has itself subsequently rejected this rationale.[6]

The second rationale is that Congress "could not have intended that local tort law govern the 'distinctively federal' relationship between the government and enlisted personnel."[7] Justice Scalia called this an "absurd" justification, and reasoned that "nonuniform recovery cannot possibly be worse than (what *Feres* provides) uniform nonrecovery."[8] He added that the Court, while not outright rejecting this rationale, has found it "no longer controlling."[9]

The reality is that state law already intrudes upon the relationship between the Government and its armed forces when civilians (including family members who are dependents of military personnel) sue under the Federal Tort Claims Act for injuries inflicted by military employees and service members. State law (which obviously can vary from state to state) governs civilians' ability to recover under the Act by providing both the substantive tort law to establish the United States' liability for its employees' actions and the measure of damages.

The third rationale – that "Congress could not have intended to make FTCA suits available to servicemen who have already received veterans benefits to compensate for injuries suffered incident to service"[10] has also been found "no longer controlling."[11] Justice Scalia noted that the "credibility of this rationale is undermined severely by the fact that, both before and after *Feres*, we permitted

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[5]28 U.S.C. 2680 (i); *Johnson*, 481 U.S. at 694.

[6]*Johnson*, 481 U.S. at 694-5, *citing* Rayonier, Inc. v. United States, 352 U. S. 315, 319 (1957); Indian Towing Co. v. United States, 350 U. S. 61, 66-69 (1955).

[7]*Johnson*, 481 U.S. at 694.

[8]*Johnson*, 481 U.S. at 695-6.

[9]*Johnson*, 481 U.S. at 695, *citing* United States v. Shearer, 473 U. S. 52, 58, n. 4 (1985).

[10]*Johnson*, 481 U.S. at 694.

[11]*Johnson*, 481 U.S. at 697, *citing* United States v. Shearer, 473 U. S. 52, 58, n. 4 (1985).

injured servicemen to bring FTCA suits, even though they had been compensated under the VBA."[12] Justice Scalia ended his discussion by noting that the "foregoing three rationales -- the only ones actually relied upon in *Feres* -- are so frail that it is hardly surprising that we have repeatedly cited the later-conceived-of 'military discipline' rationale as the 'best' explanation for that decision."[13]

Justice Scalia also rejects the more recent military discipline argument for *Feres*. Although he acknowledges the "possibility that some suits brought by servicemen will adversely affect military discipline,"[14] he looks to the clear language of the statute and suggests:

> It is strange that Congress' "obvious" intention to preclude *Feres* suits because of their effect on military discipline was discerned neither by the *Feres* Court nor by the Congress that enacted the FTCA (which felt it necessary expressly to exclude recovery for combat injuries). Perhaps Congress recognized that the likely effect of *Feres* suits upon military discipline is not as clear as we have assumed, but in fact has long been disputed. * * * Or perhaps Congress assumed that the FTCA's explicit exclusions would bar those suits most threatening to military discipline, such as claims based upon combat command decisions, 28 U.S.C. § 2680(j); claims based upon performance of "discretionary" functions, § 2680(a); claims arising in foreign countries, § 2680(k); intentional torts, § 2680(h); and claims based upon the execution of a statute or regulation, § 2680(a). Or perhaps Congress assumed that, since liability under the FTCA is imposed upon the Government, and not upon individual employees, military decisionmaking was unlikely to be affected greatly. Or perhaps -- most fascinating of all to contemplate --

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[12] *Johnson*, 481 U.S. at 695, *citing* Brooks v. United States, 337 U. S. 49 (1949) and United States v. Brown, 348 U.S. 110 (1954).

[13] *Johnson*, 481 U.S. at 698.

[14] *Johnson*, 481 U.S. at 699.

Congress thought that barring recovery by servicemen might adversely affect military discipline.[15]

Pre-*Johnson* Criticisms

The 1987 report noted that before Justice Scalia criticized the *Feres* doctrine other courts and commentators had assailed it. See *Labash v. United States Dept. of Army*, 668 F.2d 1153, 1156 (10th Cir. 1982) (citing cases); *Monaco v. United States*, 661 F.2d 129, 134 (9th Cir. 1981), cert. denied, U.S. 456, U.S. 989 (1982); *Broudy v. United States*, 661 F.2d 125, 127-128 (9th Cir. 1981) (citing cases); *Hunt v. United States*, 636 F.2d 580, 589 (D.C. Cir. 1980); See generally *Note, From Feres to Stencel: Should Military Personnel Have Access to FTCA Recovery*? 77 Mich. L.Rev.1099, 1100 n.7 (1979).

The Focus on Medical Malpractice Cases

The reach of the 1987 resolution was limited. Its focus was on medical malpractice because the ABA was supportive of then-proposed H.R. 1054 which would have amended or modified the *Feres* doctrine as it applies to medical malpractice cases.

The 1987 report concluded that "[t]he distinction in the rights of members of the armed services treated in a civilian institution by civilian personnel and those treated in a government hospital by government or civilian employees of the government, cannot be justified on any of the three grounds given for the doctrine." The report offered five reasons why this is so.

"First, the government no-fault compensation scheme does not provide a quid pro quo for the right to sue. Members of the armed forces who suffer medical malpractice, when treated in a civilian hospital for injuries incurred in the line of duty, are still eligible for benefits under the government no-fault compensation scheme. 38 USC, §331.

"Second, honorably discharged service personnel may bring an action for malpractice against the government where the malpractice occurs in a government facility in the course of treatment of a previous service-connected injury. H.R. 1054 would merely put active duty military personnel on a footing with non-active duty

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[15] *Johnson*, 481 U.S. at 699-700.

personnel who suffer medical malpractice in a government hospital. U.S. v. Brown, 348 U.S. 110 (1954).

"Third, civilian physicians employed by the government generally carry or can be required to carry, medical malpractice coverage; so that the grant of immunity only favors an insurance carrier at the expense of service personnel.

"Fourth, a bar to damage actions insulates the military from investigation and accountability for negligent and incompetent medical care and undermines confidence in the quality of health care provided non-combat military service personnel.

"Fifth, the grant of immunity to the government will encourage armed forces members, where feasible, to seek treatment in private institutions."

American Bar Association 2008 Resolution and Report

Although the 1987 report is now more than twenty years old, the arguments it made remain sound. At its August 2008 annual meeting the House of Delegates approved a resolution that attacked the *Feres* doctrine more broadly than the 1987 resolution. The 2008 resolution reads as follows:

> RESOLVED, That the American Bar Association urges Congress to examine the "incident to service" exception to the Federal Tort Claims Act (FTCA) created by the Supreme Court in *Feres v. United States*, 340 U.S. 135 (1950), provide that only the exceptions specifically provided in the Act limit active duty military members' access to the courts when they are victims of tortious government conduct, and amend the Act to provide that the exception limiting access for conduct that occurs in combatant activities applies "during time of armed conflict" rather than "during time of war."

The 2008 resolution has two main goals: (1) most importantly to urge Congress to specifically provide that only exceptions found in the FTCA limit the right of service members to sue and to reject the overbroad "incident to service" exception created by the Supreme Court; and (2) to make clear that the exception for conduct that occurs during military action extends to all "armed conflict" and not only "wars." The resolution was balanced in the sense that it urged Congress to examine

the cases in which service members are denied the right to sue without good reason and to clarify in the FTCA that the Supreme Court went too far in *Feres* while simultaneously recognizing the importance of barring suits for decisions made as part of combatant activities.

As was true in 1987, the report (2008 report) considered by the HOD when it adopted the 2008 resolution does not constitute ABA policy as only the 2008 resolution constitutes policy. But, the 2008 report makes a strong case for congressional action. Despite the fact that the 2008 resolution is broader than the 1987 resolution and reaches beyond medical malpractice claims, every argument made in support of the resolution certainly applies to medical malpractice claims.

As one who had a hand in moving the 2008 resolution forward, I feel free to and do borrow heavily in this testimony from the 2008 report including supporting footnotes:

Background of *Feres*

The 2008 report began with a description of how the *Feres* doctrine came into being:

> For more than a half-century, active duty members of the armed forces have been the only class of persons denied the benefits of the waiver of sovereign immunity contained in the Federal Tort Claims Act (FTCA), under which Congress endeavored to make the United States liable in tort for the negligence of its employees. This special military exclusion was not part of the statutory language adopted by Congress (other than for combatant activities in time of war), but was the result of a decision of the Supreme Court,[16] that held that members of the armed forces harmed incident to military service (*i.e.,* on active duty) may not recover damages under this Act. This decision has often been challenged but never overruled. The Court's ruling, known ever since as the "Feres Doctrine," has resulted in a form of "lawful discrimination" that has resulted in active duty service members being treated differently than all other persons. If there ever was justification for

[16] Feres v. United States, 340 U.S. 135, 138 (1950).

denying service personnel the benefits of this statute, there appear now to be overwhelming reasons to reexamine the issue and to once again include those who defend our freedoms on the field of battle among those who may recover for injuries incurred, at least for injuries unrelated to combatant or combatant related activities or otherwise excluded from coverage under the Act, such as claims that raise the discretionary function exception.

The Cox Commission

The 2008 report relied upon the work done in 2001 by the Commission on the Fiftieth Anniversary of the Uniform Code of Military Justice (UCMJ), commonly known as the "Cox Commission," after its Chair, Senior Judge Walter T. Cox, III, former Chief Judge of the Court of Appeals for the Armed Forces. The Commission was established by the National Institute of Military Justice which I have served since 1991 as General Counsel. The Cox Commission had not intended to examine *Feres* but ultimately found that the operation of the "Feres Doctrine" was so detrimental and unfair that it warranted its comment and its recommendation. The Cox Commission's recommendation reads as follows.

> C. Feres Doctrine. The Commission was not chartered with the idea that our study would include matters such as the Feres Doctrine. However, given that it was articulated the same year that the UCMJ was adopted, and that many former servicemembers have been frustrated by its constraints on their ability to pursue apparently legitimate claims against the armed forces, many of which bear little if any relation to the performance of military duties or obedience to orders on their merits, the Commission believes that a study of this doctrine is warranted. An examination of the claims that have been barred by the doctrine, and a comparison of servicemembers' rights to those of other citizens, could reform military legal doctrine in light of present day realities and modern tort practice. Revisiting the Feres Doctrine would also signal to servicemembers that the United States government is committed to

promoting fairness and justice in resolving military personnel matters.[17]

Kevin J. Barry's Law Review Article

The 2008 report also relied upon two law review articles which post-dated the Cox Commission. The first was a 2002 law review article[18] commenting on the recommendations of the Cox Commission. I quote from the article with the original footnotes set forth but renumbered:

> In 1950, the Supreme Court decided the case of *Feres v. United States*,[19] and this case and its progeny have wrought untold injustice in the half-century since. The case interpreted the Federal Tort Claims Act (FTCA),[20] under which the United States has waived sovereign immunity, and accepted liability for the tortious conduct of U.S. government employees. The Court determined that a member of the military is barred from collecting damages for injuries under the FTCA whenever those injuries are "incident to the [member's] service."[21] The problem is that virtually *everything* a military member does, unless perhaps she is absent without leave or engaging in substantial misconduct, is incident to military service.

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[17] *See* Honorable Walter T. Cox III et al., *Report of the Commission on the 50th Anniversary of the Uniform Code of Military Justice* § IV.C. (May 2001), *available at* http://www.badc.org/html/militarylaw_cox.html.

[18] Kevin J. Barry, *A Face-Lift (and Much More) for an Aging Beauty: The Cox Commission Recommendations to Rejuvenate the Uniform Code of Military Justice*, 2002 L. Rev. M.S.U.-D.C.L. 57, 119-21. The author of this article is a member of the Military Law Committee of the Bar Association of the District of Columbia.

[19] 340 U.S. 135 (1950).

[20] 28 U.S.C. §§ 1346(b), 2671-2680 (1994 & Supp. V 1999).

[21] Feres v. United States, 340 U.S. 135, 138 (1950).

> The FTCA itself contains no such limitation. The Act bars only liability on any claim arising out of the combatant activities of the military during time of war.[22] Nonetheless, the Supreme Court, in *Feres*, held that the family of a servicemember who died in a barracks fire which resulted from the government's clear negligence was barred from any recovery under the Act.[23] The ruling has since been applied to virtually all claims for damages by a military member, including injuries that had virtually no relationship to any military duty. For example, military prisoners who suffer cruel and unusual punishment in a confinement facility cannot recover damages, although civilian prisoners under identical circumstances can do so.[24]
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> The reasons articulated to deny military members damages under circumstances that have little relationship to any military duty include concern that such claims would affect the military senior-subordinate relationship and thus interfere with discipline, that there are adequate statutory compensation schemes for military personnel who are injured or disabled, and that it is inappropriate for military members to be subjected to a multitude of state tort law schemes, which would give different results, depending on the location of the tort. If such arguments ever had strong merit, they clearly seem not to today.

Major Deidree G. Brou's Law Review Article

The second law review article was written by Major Deirdree G. Brou in 2007 and is the most recent criticism of *Feres*. It builds upon the arguments made by Justice Scalia in the *Johnson* case. I quote from the article with the original footnotes set forth but renumbered:

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[22]*See* 28 U.S.C. § 2680(j).

[23]*See Feres*, 340 U.S. at 146.

[24]*See, e.g.*, United States v. Sanchez, 53 M.J. 393, 398 (C.A.A.F. 2000) (citing Marrie v. Nickels, 70 F. Supp. 2d 1252 (D. Kan. 1999)).

The U.S. Supreme Court, in *Feres v. United States*,[25] established the *Feres* doctrine to protect the Government from tort liability derived from military decisions . . . or the individual acts of [members of the armed forces] involved in [executing military decisions]. The Court has often concluded that this function of the *Feres* doctrine--preserving military decision-making and discipline--is necessary for the effective and efficient functioning of the U.S. military.[26] Military decision-making entails balancing, among other things, the demands of the mission with the safety of the individual service member and the safety of the unit.[27] Arguably, military leaders at all levels cannot afford to cloud their decisions with issues of potential governmental or personal tort liability. The Court averred that military leaders must be free to make policies and decisions without the fear that they will face judicial scrutiny in civil court.[28]

The *Feres* doctrine, however, is too broad in scope and goes

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[25]340 U.S. 135 (1950).

[26]*See* United States v. Johnson, 481 U.S. 681, 691 (1987) ("[A] suit based upon service-related activity necessarily implicates the military judgments and decisions that are inextricably intertwined with the conduct of the military mission."); United States v. Stanley, 483 U.S. 669, 682-83 (1987) ("A test for liability that depends on the extent to which particular suits would call into question military discipline and decisionmaking [sic.] would itself require judicial inquiry into, and hence intrusion upon, military matters."); United States v. Shearer, 473 U.S. 52, 57 (1985) ("[T]he situs of the murder is not nearly as important as whether the suit requires the civilian court to second-guess military decisions, ... and whether the suit might impair essential military discipline ....").

[27]When small unit leaders receive missions, they must develop tentative mission plans based on the following factors: mission, enemy, terrain and weather, time available, troops available, and civilian activity in the mission area. *See* U.S. DEP'T OF ARMY, FIELD MANUAL 4-01.45, TACTICAL CONVOY OPERATIONS ch. I (24 Mar. 2005) [hereinafter FM 4-01.45] (describing the convoy troop leading procedures small unit leaders must use to plan and execute a mission).

[28]*See Johnson*, 481 U.S. at 691 ("Suits brought by service members against the Government for service related injuries could undermine the commitment essential to effective service and thus have the potential to disrupt military discipline in the broadest sense of the word."); *Stanley*, 483 U.S. at 682-83 ("A test for liability that depends on the extent to which particular suits would call into question military discipline and decisionmaking [sic.] would itself require judicial inquiry into, and hence intrusion upon, military matters.").

beyond protecting military decision making and discipline. The *Feres* doctrine extends protection to all government personnel who, while acting within the scope of their employment, negligently harm or kill a service member. It goes beyond protecting the leader who decides to put a Soldier on point during a combat patrol or who plans a training exercise that harms a service member. It also protects the military surgeon who negligently leaves a towel in a service member's abdomen after surgery;[29] the civilian government employee who negligently operates a military morale, recreation, and welfare program;[30] the civilian mechanic at the Post Exchange garage who negligently repairs a service member's car;[31] and the government driver who, while negligently operating a government vehicle, kills a service member.[32]

When it promulgated the "incident to service" test in 1949, the U.S. Supreme Court had several tools at hand, in the form of the Federal Tort Claims Act's enumerated exceptions,[33] to prevent courts

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[29]*See* Jefferson v. United States, 178 F.2d 518, 519 (4th Cir. 1949), *aff'd sub nom.*, Feres v. United States, 340 U.S. 135 (1950) (barring a Soldier's suit against the Government for negligently performed surgery).

[30]*See* Costo v. United States, 248 F.3d 863 (9th Cir. 2001) (barring suit for the wrongful death of a Sailor during a negligently-operated Navy Morale, Welfare, and Recreation (MWR) program's rafting trip); Bon v. United States, 802 F.2d 1092 (9th Cir. 1986) (barring a Sailor's suit for injuries sustained while canoeing at a Navy MWR program's marina).

[31]*See* Sanchez v. United States, 878 F.2d 633 (2d Cir. 1989) (barring a Marine's suit for damages arising out of a vehicle accident caused by the Base Exchange garage's negligent repair of his car).

[32]*See* Richards v. United States, 176 F.3d 652 (3d Cir. 1999) (barring suit for the wrongful death of a Soldier in an accident with a negligently-operated government vehicle).

[33]*See* 28 U.S.C. § 2680 (2000).
The provisions of this chapter [28 U.S.C. §§ 2671-2680] and section 1346(b) of this title [28 U.S.C. § 1346(b)] shall not apply to--
(a) Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.
(b) Any claim arising out of the loss, miscarriage, or negligent transmission of letters or postal matter.
(c) Any claim arising in respect of the assessment or collection of any tax or customs duty, or the detention of any goods, merchandise, or other property by any officer of customs or excise or any other law enforcement officer, except that the provisions of this chapter and section 1346(b) of this title apply to any

from intruding upon military decision making and discipline. Rather than creating the "incident to service" exception, the Court should have applied the Act's existing enumerated exceptions to ensure that it protected military discipline and decision making and also preserved service members' rights under the Federal Tort Claims Act. This article analyzes the nature of the Court's decisions in *Brooks v. United States*[34] and *Feres v. United States*[35] and concludes that the promulgation of the *Feres* doctrine was an act of judicial legislation that violated the principles of separation of powers. This article also addresses the need

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claim based on injury or loss of goods, merchandise, or other property, while in the possession of any officer of customs or excise or any other law enforcement officer, if--
(1) the property was seized for the purpose of forfeiture under any provision of Federal law providing for the forfeiture of property other than as a sentence imposed upon conviction of a criminal offense;
(2) the interest of the claimant was not forfeited;
(3) the interest of the claimant was not remitted or mitigated (if the property was subject to forfeiture); and
(4) the claimant was not convicted of a crime for which the interest of the claimant in the property was subject to forfeiture under a Federal criminal forfeiture law[.]
(d) Any claim for which a remedy is provided by sections 741-752, 781-790 of Title 46, relating to claims or suits in admiralty against the United States.
(e) Any claim arising out of an act or omission of any employee of the Government in administering the provisions of sections 1-31 of Title 50, Appendix.
(f) Any claim for damages caused by the imposition or establishment of a quarantine by the United States.
....
(h) Any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights: Provided, That, with regard to acts or omissions of investigative or law enforcement officers of the United States Government, the provisions of this chapter and section 1346(b) of this title shall apply to any claim arising, on or after the date of the enactment of this proviso [enacted March 16, 1974], out of assault, battery, false imprisonment, false arrest, abuse of process, or malicious prosecution. For the purpose of this subsection, "investigative or law enforcement officer" means any officer of the United States who is empowered by law to execute searches, to seize evidence, or to make arrests for violations of Federal law.
(i) Any claim for damages caused by the fiscal operations of the Treasury or by the regulation of the monetary system.
(j) Any claim arising out of the combatant activities of the military or naval forces, or the Coast Guard, during time of war.
(k) Any claim arising in a foreign country.
(l) Any claim arising from the activities of the Tennessee Valley Authority.
(m) Any claim arising from the activities of the Panama Canal Company.
(n) Any claim arising from the activities of a Federal land bank, a Federal intermediate credit bank, or a bank for co-operatives.
Id.

[34]337 U.S. 49 (1949).

[35]340 U.S. 135 (1950).

> to critically look at the *Feres* doctrine and determine whether the Federal Tort Claims Act itself and its thirteen enumerated exceptions shield the Government from liability for most military leaders' decisions.[36]

Major Brou proposed to substitute the exceptions set forth in the FTCA, in place of the "incident to service" rule of *Feres*, and this is the approach that the ABA House of Delegates approved. The doctrine of *stare decisis* makes it unlikely that after all this time courts will overrule the doctrine on its own. That is why legislation is needed.

Although the 2008 ABA resolution and the two law review articles all support a comprehensive review of *Feres*, the need to deal with medical malpractice claims has been apparent for many years, as the next section of this testimony demonstrates.

Past Congressional Efforts at Reform

Major Brou's article is a reminder that Congress has in the past considered remedial legislation, which once came close to passing.

> Throughout the 1980s, Congress attempted several times to pass bills permitting service members to sue under the Federal Tort Claims Act for medical malpractice. *See* 134 CONG. REC. S929, 929 (Feb. 18, 1988) (statement of Sen. Sasser); 134 CONG. REC. H354, 356 (Feb. 17, 1988) (statement of Rep. Frank). One of the bills passed the House with a vote of 317-90; however, it failed to make it out of the Senate. *See* 134 CONG. REC. H354, 356 (Feb. 17, 1988) (statement of Rep. Frank). The bill never made it "out of the [Senate] Judiciary Committee because of the strong opposition of Senator Strom Thurmond, Republican of South Carolina, the committee's chairman." Linda Greenhouse, *Washington Talk; On Allowing Soldiers to Sue*, N.Y. TIMES, Dec. 16, 1986,

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[36]Brou, *supra* note 11, at 3-6.

http://query.nytimes.com/gst/fullpage.html?sechealth&res=9A0DE3DB123EF935A25751C1A960948260.[37]

Congress again considered legislation to ameliorate the egregious effects of the doctrine in medical malpractice cases in 2001. H.R. 2684 was introduced in the 107th Congress to provide that the doctrine would not apply to claims of members of the armed forces for damages as a result of medical or dental care provided in a "fixed medical treatment facility" operated by the Secretary of Defense, or in a "fixed medical facility" operated by the United States. That bill would have permitted active duty military members to bring the same types of claims under the FTCA that retired members of the military and of dependents of both retired and active members of the military can now bring.

On May 20, 2008, Representative Maurice D. Hinchey (D-NY) introduced H.R. 6093, the "Carmelo Rodriguez Military Medical Accountability Act of 2008." This bill would have amended the FTCA to allow claims for damages to be brought against the United States for personal injury or death of a member of the Armed Forces arising out of a negligent or wrongful act or omission in the performance of medical, dental, or related health care functions that: (1) takes place other than in the context of combat; and (2) is provided by persons acting within the scope of their office or employment by or at the direction of the Armed Forces, whether inside or outside the United States. The bill provided for a reduction of claims by the present value of other benefits attributable to such death or injury received by the member and by that member's estate, survivors, and beneficiaries pursuant to other federal law.[38] H. R. 6093 died at the end of the last Congress and was introduced in this Congress by Representative Hinchey as H.R. 1478. H.R 1478 adds a new section that

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[37]Brou, *supra* note 11, at 39, note 272.

[38] Carmelo Rodriguez was a service member whose death in 1997 resulted directly from gross negligence in failing to order treatment when his melanoma was first diagnosed in 1997, and later in either misdiagnosing his condition or again failing to order treatment, and instead telling the member to have it looked at on his return from Iraq to the United States five months hence (in 2005). The case has been widely reported in the press. *See, e.g.*, http://cbs2chicago.com/national/Carmelo.Rodriguez.marine.2.643002.html.

provides that claims shall not be reduced by the amount of any benefit received under the Servicemembers Group Life Insurance and that the legislation shall not apply to any claim arising out of the combatant activities of the Armed Forces during time of armed conflict.

The Current Position of the American Bar Association

The current position of the ABA is that at a minimum legislation such as H.R. 1478 should be enacted in order to repeal the *Feres* doctrine as it applies to military medical malpractice cases.

In adopting its 2008 resolution, the ABA House of Delegates was fully aware of the argument that repeal of *Feres* would endanger the chain of command by allowing service members to, in effect, sue their commanders. The House of Delegates ultimately was persuaded by the resolution's sponsors that the current exceptions in the FTCA provide ample protection to any actions which challenge discretionary command decisions or any tortious acts resulting therefrom, or acts that arise out of combatant activities. Moreover, as noted above, in recognition of the fact that most combatant activities arise in armed conflicts other than declared wars, we recommended, and the House of Delegates approved, a call to modify the "combatant activities . . .during time of war" exception to apply to any combatant activities occurring in any armed conflict.

It is especially difficult to see how repealing *Feres* in medical malpractice cases could have any negative impact on the chain of command. Dealing now with medical malpractice cases would not prevent Congress from taking a more comprehensive view of *Feres* at a later time.

Those of us who sponsored the 2008 ABA resolution were aware that there are no hard data available to enable an accurate prediction as to the cost of such a change in the law. There is a strong argument that any increased costs pale in significance to the costs of maintaining the armed forces and conducting combat operations, and to the gains to be made by remedial legislation. But, Congress certainly could conduct a cost-benefit analysis in the course adopting legislation.

The sponsors of the 2008 ABA resolution ended their report with this call to action: "It is time for the current separate and unequal status and treatment of military

personnel to be acknowledged as unnecessary, unwarranted, and patently unfair and unjust. The sponsors urge that Congress enact statutory changes to resolve such inequities by restoring the original intent of the FTCA, and requiring the application of the exceptions in the FTCA rather than the 'incident to service' rule of *Feres*." This call to action reiterates calls for reform of medical malpractice claims that have been made for decades. The time to act is now.

Thank you for the opportunity to appear before you today to present the views of the ABA. I would be happy to answer any questions you may have.