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THE *FERES* DOCTRINE:  
THE TIME HAS COME FOR ACTION  
BY THE CONGRESS

Testimony of  
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and Administrative Law  
Committee on the Judiciary  
U.S. House of Representatives

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

I very much appreciate being invited to testify about the *Feres* Doctrine. This is the second time I have testified on this subject, the first having been (incredibly) more than six years ago, before the Senate Judiciary Committee.\* My views have not changed; if anything, I feel more strongly than ever that Congress must act.

By way of introduction, I am a veteran, having served on active duty in the U.S. Coast Guard from 1969 to 1972. I have been practicing military law for many years, and have taught the subject at Yale and Harvard Law Schools and the Washington College of Law. I have led the National Institute of Military Justice (NIMJ) since 1991, and am currently

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\* *The Feres Doctrine: An Examination of Th[e] Military Exception to the Federal Tort Claims Act, Hearing before the Sen. Comm. on the Judiciary, 107th Cong., 2d Sess., Ser. No. J-107-109, at 14-15, 55-58 (2003).*

Florence Rogatz Visiting Lecturer in Law at Yale Law School. I am also of counsel at the Washington law firm of Feldesman Tucker Leifer Fidell LLP, where I have represented members and veterans of every branch of the service. My military clients have included not only patients, but also physicians, dentists, nurses, physician's assistants, physical therapists, and pharmacists. My work for them has included not only garden-variety personnel and disciplinary issues, but also issues relating to quality of care.

In 2001, NIMJ sponsored the Commission on the Fiftieth Anniversary of the Uniform Code of Military Justice. It soon became known as the Cox Commission, after its chair, former Chief Judge Walter T. Cox III of the U.S. Court of Appeals for the Armed Forces. This is what the Cox Commission said about the *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.

Now, the better part of a decade later, the time for study has passed. Congress has to bite the bullet and enact legislation that will prevent the unfairness that can result from the *Feres* Doctrine. I regularly receive phone calls from potential clients seeking to bring lawsuits for medical malpractice. Not infrequently these seem potentially meritorious—and not infrequently the facts are disturbing. Yet I must advise these callers that they are wasting their

time because of decision by the Supreme Court. The Court created the *Feres* Doctrine and it has long been clear that the Justices believe that if that doctrine is mistaken, Congress can easily fix it.

It is, and you should.

There is simply no reason why a military dependent or a retiree should be able to recover under the Federal Tort Claims Act but not a GI, for identical care at the identical military treatment facility. Last year, in the company of my dear friend, retired Captain Kevin J. Barry, I attended meetings of ABA committees in New York, at which a *Feres* resolution was considered. I was very disappointed that the armed services representatives who showed up in force did not support the proposal (although one privately revealed that he disagreed with the others). As Professor Saltzburg can attest, the resolution passed overwhelmingly in the House of Delegates. I hope that the new Administration will

have a different view of this issue and will work with Congress to fashion wise and workable legislation.

One point must be stressed very strongly: we can be proud of the overall quality of military medical care. Long ago, I was a beneficiary of that care for three years, seven months, and eight days, and still vividly recall the dedicated providers who attended to my needs. They were wonderful, caring, human beings and excellent clinicians. The current generation of military medical personnel also deserves thanks, especially given the stresses imposed by the heartbreaking cases they have had to deal with as a result of military operations in Iraq and Afghanistan. Nonetheless, no system for delivering health care is perfect, and, excellent as it is, the military health care system is no exception.

I will be happy to respond to your questions.