STATEMENT OF DWIGHT STIRLING

CHIEF EXECUTIVE OFFICER OF THE CENTER FOR LAW AND MILITARY POLICY

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SUBCOMMITTEE ON MILITARY PERSONNEL

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Good afternoon, Chairman Speier and other members of the Subcommittee.

I am the Chief Executive Officer of the Center for Law and Military Policy (CLMP), a nonprofit think tank dedicated to strengthening the legal protections of those who serve our nation in uniform. Based out of Huntington Beach, California, the CLMP aims to improve the lives of the nation's protectors by developing solutions for many of the most pressing problems that lead all too often to homelessness, unemployment, and suicide. I am also an adjunct law professor at the University of Southern California's Gould School of Law and a long-time JAG officer in the California National Guard. The primary focus of my legal research has been the *Feres* doctrine. I have written numerous academic articles on the doctrine and am the only academic to write a doctoral dissertation on the topic, a 2019 study entitled "The Feres Doctrine: A Comprehensive Legal Analysis."

Judicial review of the lawfulness of public employees' conduct is a fundamental American principle. The authority of judges to determine whether conduct complies with controlling legal norms, judicial review is an essential element of our governmental system. Not only was the subject a central theme of the Federalist Papers (Rossiter, 1961), the Constitution's most

important interpretative papers, it was enshrined as a part of the American way of life in the seminal case *Marbury v. Madison* (1803). Judicial review reflects the idea that courts are responsible for holding the executive and legislative branches accountable to the rule of law (Shane, 1993). Of such importance, the concepts of separation of powers and checks and balances would not have much practical meaning in its absence (Mashaw, 2005).

Consider what would happen if courts did not conduct judicial review of employees in the executive branch. In that event, the executive branch would be accountable only to itself, a self-regulating enclave able to call balls and strikes on its own conduct (Mashaw, 2005). Such a situation would give rise to the impression that public officials are "above the law" (Stirling, 2019). This type of dynamic—the exact one the Founders wanted to avoid—typically results in abuse of power and corruption (Peters, 2014).

For the most part, the judiciary robustly embraces its role as arbiter of governmental conduct. Case law is replete with instances where judges have declared public action inconsistent with the law, invalidating the behavior and ordering that remedial measures be taken to repair the damages (Shapiro, 2012). There is one context, however, where courts have kept themselves on the sidelines when reviewing wrongful conduct by members of the executive branch. This is when a member of the military is injured by a fellow service member. There, courts have elected not to exercise their jurisdiction, choosing instead to dismiss the cases without even doing a cursory review (*U.S. v. Johnson*, 1987).

In this way, courts do not hear *intra-military* claims, claims where service members have harmed other service members (Feldmeir, 2011). While readily reviewing civilians' allegations of military misconduct, judges have charted a course where they summarily throw out the allegations of misconduct service members make against each other (*U.S. v. Stanley*, 1987). The judiciary follows this path despite the fact Congress has authorized judicial oversight of non-combat-related wrongdoing (Burns, 1988).

Courts' refusal to hear intra-military suits stems from the *Feres* doctrine. The *Feres* doctrine comes from U.S. v. Feres, a 1950 Supreme Court decision. The doctrine is a product of the Supreme Court's interpretation of the Federal Torts Claims Act (FTCA), a statute from 1946 that waived most of the federal government's sovereign immunity. Under the FTCA, injured parties can file torts suits when governmental employees engage in wrongful conduct that causes harm. In U.S. v. Feres (1950), the Supreme Court held that Congress did not intend military personnel to be covered by the FTCA (Feldmeir, 2011). As a result of this ruling, service members cannot sue when wrongfully injured by injured by other service members, including when they receive incompetent medical care at an on-base hospital. According to the Supreme Court's holding in Feres v. U.S. (1950), Congress has never ceded sovereign immunity in the military context.

"For the past [sixty-nine] years, the *Feres* doctrine has been criticized by countless courts and commentators across the jurisprudential spectrum" (*Ritchie v. U.S.*, 2013 p. 874). The *Feres* Doctrine is considered by most scholars, lawyers, and appellate court justices to be an act of judicial legislation. Under the Constitution, the judicial branch's job is to interpret the law, not to write law (Rossiter, 1961). This rule notwithstanding, the consensus is that the Supreme Court

rewrote the language of the FTCA in its *Feres* ruling (Bahdi, 2010). Earlier versions of the bill directly excluded service members from the bill's scope, but these versions failed (Feldmeir, 2011). The version that passed included service members in the definition of government employee (28 U.S.C. § 2671). Only one aspect of service member-related conduct was excluded by the version that passed, injuries stemming from "combatant activities" (Zyznar, 2013). No injuries that occurred on the battlefield can serve as a basis for an FTCA claim (28 U.S.C. § 2680(j)). Scholars and lower courts believe that by excluding only one aspect of military activity from the statute's scope, Congress intended all other aspects to be covered (Banner, 2013).

The Supreme Court has sought to justify the *Feres* doctrine by saying the hands-off approach is good for military discipline (*U.S. v. Brown*, 1954). The high court asserts that judicial review of intra-military wrongdoing would disturb the superior-subordinate relationship, affecting good order and discipline within the ranks (Astley, 1988). It has offered no empirical evidence in support of this theory, one which has been harshly criticized by scholars and lower court judges (Turley, 2003). As Justice Scalia observed, a compelling argument can be made that the Court's approach gets it backwards. Denying military personnel their day in court damages discipline by undermining morale (*U.S. v. Johnson*, 1987). Widely considered unsound, concern about military discipline nevertheless remains the leading justification for the policy today (Bahdi, 2010).

The *Feres* doctrine affords wrongdoers within the military near total immunity from civil liability (Banner, 2013). The immunity applies to every kind of harm and bad behavior, from dormitories that catch on fire due to contractor's errors to unsanitary dining halls to medical

malpractice to off-duty car accidents (Feldmeir, 2011). The immunity also applies to intentional misconduct, such as sexual assault and soldier-on-solider murder (*Day v. Massachusetts National Guard*, 1999; *Perez v. Puerto Rico Nat. Guard*, 2013). As a result of the judiciary's refusal to adjudicate service members' suits, military officials handle the matters internally.

The *Feres* doctrine in many ways compels judges to become agents of injustice. The most vigorous criticism of the Feres doctrine has come from conservative justices and scholars, notably conservative icon Justice Scalia and Jonathan Turley, a law professor at George Washington University. In *U.S. v. Johnson* (1987), the Supreme Court narrowly upheld the *Feres* doctrine on a 5-4 vote. Justice Scalia wrote a scathing dissent in the case. In his dissent, Justice Scalia laid bare the philosophical errors underpinning the doctrine, the most powerful critique ever lodged against the nearly 70-year-old judicial policy. A strict constructionist who believed statutes should not be expanded beyond the words Congress used, Scalia said the *Feres* doctrine represented an untenable act of judicial legislation. "If the Act is to be altered," he said, "that is a function of the same body who adopted it," e.g., Congress (*U.S. v. Johnson*, 1987, p. 702). His criticism also touched upon the majority's claim that exposing military officials to civil liability undermines military discipline. Not only did Congress not believe this was the case, he said, the Supreme Court itself apparently did not think so either in its original *Feres* decision, never mentioning military discipline in *Feres v. U.S* (1950). Instead, the preservation of military discipline was a "later conceived of" rationale the Court developed to justify its improper intrusion upon the legislative prerogative (*U.S. v. Johnson*, 1987, p. 703). While certain types of lawsuits could theoretically affect the superior-subordinate relationship, Scalia expressed skepticism that the effect could be confidently predicted: "I do not think the effect

upon military discipline is so certain, or so certainly substantial, that we are justified in holding (if we can ever be justified in holding), that Congress did not mean what it plainly stated in the statute before us" (*U.S. v. Johnson*, 1987, p. 702). Until such time as Congress saw fit to modify the FTCA, the Supreme Court had no business changing the plain meaning of the words.

Professor Turley, a prominent conservative scholar, has also denounced the *Feres* doctrine. In an article entitled "Pax Militaris: The *Feres* Doctrine and the Retention of Sovereign Immunity in the Military System of Governance," Turley said the judicially-promulgated policy "was fundamentally flawed from its inception on both a constitutional and statutory basis" (Turley, 2003, p. 3). Utilizing a risk management perspective, Turley explained that when neither managers nor the organization they work for can be sued when managerial decisions cause injuries, the amount of risk managers take increases. The result, according to Turley, is as easy to predict as it is unconscionable: "[T]he level of malpractice and negligence in the military appears much higher than in the private sector" (p. 4), an arrangement where the value of service members' lives are lowered pursuant to a perverse cost-benefit analysis (Turley, 2003).

Turley said that blanket immunity also has had the second-order effect of encouraging military leaders to operate in areas better reserved to civilian contractors, the most problematic of which is medical services. While there is no operational reason to have military officials run large United States-based hospitals, the cost savings provided by medical staff being immune from malpractice suits inures in favor of keeping hospitals within direct military control, a more cost-effective approach than offloading these services to private medical personnel. Describing the development of the doctrine as poorly considered, Turley states that "*Feres* ultimately shows the

perils of judicial legislation meant to craft a special enclave" (2003, p. 6). By so doing, the judiciary has failed in its obligation of ensuring that all government officials are subject to the rule of law. Courts instead have authorized the military establishment to operate as a "separate society," an immoral abdication of responsibility that "has a terrible cost for the citizens of this pocket republic" (p. 6), exposing the men and women who protect the country in uniform to be abused by the personnel to whom they report (Turley, 2003).

The *Feres* doctrine must be considered against the backdrop of the civil-military gap and the fact that the well-to-do do not serve for the most part. A policy that takes away service members' right to sue—a right Americans take for granted—it is important to remember that most educated, well-to-do Americans have no idea the policy exists. Commentators have said the *Feres* doctrine reduces service members to second-class citizens (Woods, 2014). That service members are the only segment of society denied the right to sue when injured, combined with the fact that most service members come from disadvantaged backgrounds, creates an unsettling appearance of exploitation (Feaver & Kohn, 2000). While policy-makers readily send military personnel abroad to fight and die, they simultaneously condone a policy where the troops cannot sue their doctors when a towel marked "Property of the U.S. Army" is left in their stomach after a routine surgery (Feldmeir, 2011). While it is hard to imagine policy-makers allowing their children to attend a college where rape survivors cannot sue their assailants, these same people do not seem to mind that such a rule exists in the military (Banner, 2013). Seen through this lens, the *Feres* doctrine raises disturbing questions of class, power, and morality. As Professor Bacevich observed, "When those wielding power in Washington subject soldiers to serial abuse, Americans acquiesce. When the state heedlessly and callously exploits the same troops, the

people avert their gaze. Maintaining a pretense of caring about soldiers, state and society actually collaborate in betraying them" (2013, p. 14).

The *Feres* doctrine affects service members within the DoD in very different ways. Managers and others who possess organizational power benefit immensely. Under it, managers are unable to sued by their labor force, a dream scenario. Those at the bottom of the hierarchy are in a much different position. These personnel, the rank and file, cannot get outside the military system, obtaining an independent review, when harmed by a superior (Stirling, 2018). It is unlikely that policy makers would be comfortable with corporate executives operating outside the reach of the judicial system (Bahdi, 2010). A rule that immunizes senior executives from civil liability does not exists anywhere in the civilian world. Yet immunity has existed for nearly 70 years within the military.

Scholars and judges' criticisms of the *Feres* doctrine fall into three categories: the policy's lack of coherence, its unfair effect upon service members, and the moral injury it causes to the judges forced to implement it. Each is addressed in turn.

1. Lack of Coherence

Lower court judges' criticism of the *Feres* doctrine's logical soundness has been explicit, constant, and forceful (*Ritchie v. U.S.*, 2013). The language judges have used in lodging their critics is remarkable for its candor, fervor, and directness (*Atkinson v. U.S.*, 1987; *Daniel v. U.S.*, 2018). A good example is *Taber v. Maine*, a ruling from the Fifth Circuit in 1995. There, a

three-judge panel said that the Supreme Court's *Feres* jurisprudence constituted "a singular tangle of seemingly inconsistent rulings" that had "lurched toward incoherence" (*Taber v. Maine*, 1995, p. 1032). The doctrine's theoretical underpinnings were so jumbled that discerning its precise contours amounted to an impossibility: "We would be less than candid if we did not admit that the *Feres* doctrine has gone off in so many different directions that it is difficult to know precisely what the doctrine means today" (*Taber v. Maine,* 1995, p. 1032). The court said the source of incoherence stemmed from its origin as judge-made law. The Supreme Court's "reading of the FTCA was exceedingly willful and flew directly in the face of a relatively recent statute's language and legislative history" (*Taber v. Maine*, 1995, p. 1038). By creating the policy out of thin air, and by contradicting the letter of the law, the Supreme Court assumed the responsibility of fashioning a sound rationale for its action. On that, it had failed abjectly, the court concluded (*Taber v. Maine*, 1995).

Judges have said they are unable to discern any rationality in the policy. "We have reluctantly recognized, however, that a reconciliation of prior pronouncements on the [*Feres* doctrine] is not possible" (p.1477), the Ninth Circuit said in *Estate of McAllister* (1991). "It is entirely unclear which of the doctrine's original justifications survive" (p. 296), it said elsewhere (*Persons v. U.S.*, 1991).

Justice Ferguson, a well-known jurist, described the *Feres* doctrine's theoretical disarray:

"We have recognized the impossibility of applying the *Feres* rationales and instead retreated to the four-prong factual inquiry described by the majority in this case. We have, in short,

abandoned any pretense that there is a rational basis for the classifications drawn in the original *Feres* opinion, and yet we have continued to apply the "incident to service" test with little thought to the constitutional principles at stake._Nor have we been the only circuit to take this approach. This blind adherence has proved virtually unworkable…" (*Costo v. U.S.*, 2001, p. 876)

The primary driver of the policy's incoherence is the military discipline rationale. The "danger to discipline has been identified as the best explanation for *Feres*" (*Costo v. U.S.*, 2001, p. 866). The problem with the rationale is that it is entirely undercut by the Supreme Court's own actions, namely, the fact that the court allows civilians to sue when injured by service members' negligence or misconduct. "If the danger to discipline is inherent in soldiers suing their commanding officers, then *no* [italics in original] such suit should be permitted, regardless of whether the 'injuries arise out of or are in the course of activity incident to service" (*U.S. v. Johnson,* 1987, p. 699), Justice Scalia wrote in his famous dissent. "If the fear is that civilian courts will be permitted to second-guess military decisions, then even civilian suits that raise such questions should be barred. But they are not" (*Costo v. U.S.*, 2001, p. 867), the Ninth Circuit added. The selective application of the bar undercuts the discipline rationale's force and logic. Contending judicial scrutiny of military activities is harmful, while engaging in judicial scrutiny of judicial activities when the claimants are civilians, makes the Supreme Court's logic contradictory. The Supreme Court has never tried to explain the contradiction.

Judges' criticisms have been steady and enduring: "With all of this confusion and lack of uniform standards, it comes as no surprise that the *Feres* doctrine, while the law of the land, has

received steady disapproval…" (*Ortiz v. U.S.*, 2015, p. 822). Even the essence of the doctrine, the incident to service standard, has been disparaged: "The notion of 'incident to service' is a repository of ambiguity" (*Persons v. U.S.*, 1991, p. 295). The collective criticism has created a remarkable dissonance within the judicial branch, giving rise to a severe and pervasive disconnect between the higher and lower echelons of the court system. As one lower court observed, "[d]espite the development of elaborate policy reasons for the *Feres* doctrine, the basis for the exception has become the subject of some confusion. This confusion has led to widespread questioning of the *Feres* exception" (*Monaco v. U.S.*, 1981, p. 132).

2. Unfair Effect upon Service Members

Judges and scholars have also noted the harsh and unjust effect the *Feres* doctrine has on service members. Judges have repeatedly characterized their rulings as unfair, inequitable, and severe. In doing so, they have pointed out the unreasonableness of a policy that bars suits by injured service members yet allows injured civilians to sue. Negligence stemming from off-duty recreational activities frequently injury both service members and civilians. The civilians can sue but the service members cannot. The only distinction between the two categories of injured party is their military membership, a factor of little to no relevance in the context of recreational events. Judges have indicated that the distinction smacks of arbitrariness and unfairness. The sentiment is captured in *Costo v. U.S.* (2001). There, both service members and civilians were injured during an off-duty recreational river-rafting trip conducted under the sponsorship of a military welfare program. Finding the *Feres* doctrine barred the service members' suits, the court drew attention to the ruling's unfairness:

"As we noted at the outset, we apply the *Feres* doctrine here without relish. Nor are we the first to reluctantly reach such a conclusion under the doctrine. Rather, in determining this suit to be barred, we join the many panels of this Court that have criticized the inequitable extension of this doctrine to a range of situations that seem far removed from the doctrine's original purposes. But until Congress, the Supreme Court, or an en banc panel of this Court reorients the doctrine, we are bound to follow this well-worn path." (*Costo*, 2001, p. 869)

Dissenting, Justice Ferguson was struck by the arbitrariness of the distinction between how civilians and service members were treated. Calling the distinction irrational, he described the doctrine's internal contradictions:

"The holding today would have allowed any of the civilians injured or killed on the trip to sue, but barred such recourse to the military personnel, despite the fact that the two suits would have implicated virtually identical policy concerns regarding the law of the situs and military decision-making. On the other hand, had Costo and Graham participated in a similar rafting trip run entirely by civilians, they may have been able to sue, yet still collect veteran's benefits. I cannot find a rational basis for the court to engage in such line-drawing on the basis of an 'incident to service' test." (*Costo*, 2001, p. 875)

Atkinson v. U.S. (1987) underscores the inequity of the distinction. There, a service member died during childbirth due to military medical staff's negligence. Fortunately, the service member's child survived. A civilian, the child was allowed to file a claim under the FTCA, but the

mother's estate's suit was barred. Noting the irony, the court said: "So here the government settles the claim of the estate of Baby Atkinson and refuses the claim of the baby's mother" (*Atkinson v. U.S.*, 1987, p. 206). The court went on: "Common sense suggests that a single tortious act should not result in different legal consequences for different victims. But *Feres* dictates differently" (*Atkinson v. U.S.*, 1987, p. 206).

3. Moral Injury

A review of the case law suggests the *Feres* doctrine has a "corrupting effect" upon the jurists who have to deal with it. Judges have expressed deep feelings of guilt, remorse, and regret at having to implement the policy. To observe such a sentiment at the appellate level of the federal judiciary is truly remarkable. The view can be summarized as follows: Having to dismiss a righteous lawsuit filed by service member sickens us, but we have no choice—the Supreme Court's *Feres* line of cases requires us to do so, forcing us to act in a manner we consider both immoral and unjust.

The sentiment is observable in *Monaco*. "The result in this case disturbs us," the Ninth Circuit said. "If developed doctrine did not bind us we might be inclined to make an exception in cases such as this. Unfortunately, we are bound, and the decision of the district court must accordingly be AFFIRMED [emphasis in original]" (*Monaco v. U.S.*, 1981, p. 134. In *Persons v. U.S.* (1991), the court noted the "discomfort" judges experience when applying the policy: "It would be tedious to recite, once again, the countless reasons for feeling discomfort with *Feres" p. 299).* The court in *Persons v. U.S.* (1991) went on to say that reluctance accompanies the application

of the troubled doctrine: “In light of the foregoing, we must affirm. In so doing, we follow a long tradition of reluctantly acknowledging the enormous breadth of a troubled doctrine” (p. 299).

It is hard to characterize the fact that judges are bound to apply a policy they consider legally and morally wrong as anything other than piteous. “Seemingly manacled by precedent, this Circuit has repeatedly expressed its strong reservations [about the *Feres* doctrine] before ultimately overcoming them” (*Persons v. U.S.*, p. 299). The sentiment is likewise observable in *Daniel v. U.S.* (2018), a case where a Navy nurse died during childbirth. The nurse’s death stemmed from egregious negligence of Navy medical personnel. Dismissing the suit with great reluctance, the Ninth Circuit said: “Lieutenant Daniel served honorably and well, ironically professionally trained to render the same type of care that led to her death. If ever there were a case to carve out an exception to the *Feres* doctrine, this is it. But only the Supreme Court has the tools to do so” (*Daniel v. U.S.*, 2018, p. 982).

Scholars indicate that a moral injury is sustained when a person is obligated to act in a manner that violates their moral conscience (Litz, 2014). Moral injury can be the cause of profound emotional and spiritual shame (Shay, 1998). At the core of the concept is a sense of helplessness, of being unable to affect the outcome of a situation which is deemed to be indecent or inhumane (Vargas, 2013). Scholars have found the damage stemming from moral injuries to be most severe when people are forced to take part in the objectionable conduct, that is, when direct participation is required as opposed to observation (Brock, 2012).

Seen through this lens, it would appear that appellate judges are operating in an environment where moral injury is likely to occur. Compelled to override their strong reservations about the justness and propriety of the *Feres* doctrine, appellate judges are obligated to hand down rulings they believe to be repugnant. This includes denying the family of a Navy nurse who died in childbirth the opportunity to hold the negligent medical staff accountable (*Daniel v. U.S.*, 2018). It also includes preventing rape victims from holding the officials accountable who allowed the rapes to occur (*Cioca v. Rumsfeld,* 2013). If the scholarship in the field of moral injury is accurate, it can be expected that guilt and shame, along with feelings of self-contempt and disgust, are the psychological byproducts of these judicial rulings.

Arguments for the *Feres* Doctrine

Proponents of the *Feres* doctrine have traditionally made three standard arguments. Each is addressed in turn.

1. The Existing No-Fault Compensation System Is Sufficient

Proponents note that service members already have access to a no-fault compensation system through the VA. This argument, originally made by the Supreme Court in U.S. v. Feres (195), has since been expressly rejected by the Court. In United States v. Shearer (1985), the Supreme Court said the argument was so unpersuasive that it was being officially abandoned as "no longer controlling" (p. 58, n.4).

Justice Scalia also addressed the argument in U.S. v. Johnson (1987). There, Scalia said "the credibility of this rationale is undermined severely by the fact that before and after *Feres* we permitted inured servicemen to bring FTCA claims, even though they had been compensated by the VA" (p. 697). Scalia noted that in Brooks v. U.S. (1949), a pre-*Feres* decision, the Supreme Court allowed two service members injured off-duty by a civilian Army employee to sue under the FTCA. "The fact that they had already received VA benefits troubled us little," he said (p. 697). He also noted that in Brooks v. U.S. (1949), the Supreme Court said: "Nothing in the FTCA or the veterans' laws…provides for exclusiveness of remedy" (p. 53). VA disability compensation could of course be taken into account "in adjusting recovery under the FTCA," Scalia said (U.S. v. Johnson, 1987, p. 698). Scalia went on: "That Brooks remained valid after Feres was made clear in United States v. Brown (1954), in which we stressed again that because 'Congress had given no indication that it made the right to compensation [under the VA system] the veteran's exclusive remedy…the receipt of disability payments…did not preclude recovery under the FTCA'" (U.S. v. Johnson, 1987, p. 698).

Scalia also said that the VA disability compensation system is not "identical to federal and state workers' compensation statutes in which exclusivity provisions almost invariably appear" (U.S. v. Johnson, 1987, p. 698). "Recovery is possible under workers' compensation more often under the VA disability system, and VA benefits can be terminated more easily than can workers compensation" (U.S. v. Johnson, 1987, p. 698). Proving service-connection can also be difficult, he noted. Scalia's point can be observed when considering a hypothetical situation involving a botched appendectomy. Assume medical incompetence during the procedure caused numbness in the service member/patient's fingers after the fact. Also assume the service member applies

for VA disability compensation after leaving military service. What evidence would he have that the numbness was service-connected? That is, what evidence could he present that the numbness was the result of military-related act as a opposed to pre-existing condition? Showing service-connection is a prerequisite for approval of a VA disability claim. Competently performed appendectomies do not result in numbness. Yet the evidence of malpractice in this instance is entirely in the possession of the DoD healthcare system. DoD officials do not share information about medical errors with patients as a rule. Accordingly, the VA will likely deny the claim on the grounds the veteran cannot show causation. Unable to prove that the appendectomy was negligently performed, he will never be able to establish that the medical mistake caused the finger numbness. The only way to obtain the needed documentation is to initiate civil litigation. But litigation is barred by the *Feres* doctrine. The result is that the veteran would not be able to recover at all for the injuries, locked out of both systems. As the D.C. Circuit said: "The presence of an alternative compensation system neither explains nor justifies the *Feres* doctrine; it only makes the effect of the doctrine more palatable" (Hunt v. U.S., 1980, p. 326).

The argument is also undermined by the fact that veterans can file both FTCA claims *and* VA disability compensation claims if they are injured due to malpractice by a VA medical doctor. Why are veterans, e.g., former service members, treated differently from current service members with regard to being able to take these steps?

2. Amending Feres would unfairly create a remedy for a service member injured due to a medical mistake, but not one injured in combat.

The problem with this argument is that it conflates the combat environment with day-to-day life on a military base. No one wants commanders or leaders on the battlefield to be concerned about civil liability. This would lead to hesitation in an environment where decisiveness is required. It is largely agreed upon that this is precisely why Congress excluded "combatant activities" from the scope of the FTCA.

By contrast, day-to-day life on a military base is practically indistinguishable from civilian life, akin to being on a college campus. Going to a medical facility on a base is the same experience for all intents and purposes as seeing a campus doctor. The same privacy laws apply, preventing doctors from sharing medical information with the patient's military leadership without permission. Scholars have observed that there is no reason for service members not to have access to civilian-like remedies, including civil litigation, when injured by an on-base medical provider's incompetence. Different situations should be treated differently under the law. What is appropriate in a combat situation is not appropriate in an on-base health care situation.

In fact, as Justice Scalia pointed out, denying service members access to FTCA claims in non-combat situations most likely hurts service members' morale. In U.S. v. Johnson (1987), Scalia discussed the Feres' doctrine's negative effect on morale and discipline: "Or perhaps—most fascinating of all to contemplate—Congress thought that *barring* recovery by servicemen might adversely affect military discipline. After all, the moral of Lieutenant Commander Johnson's

comrades-in-arms will likely not be boosted by the news that his widow and children will only receive a fraction of the amount they might have recovered had he been piloting a commercial helicopter at the time of his death" (*U.S. v. Johnson*, 1987, p. 700) (italics in original).

3. Recovery via litigation would be dependent on the local tort laws where the service member was stationed.

The concern here is that FTCA litigation will lead to uneven results. Compensation should be standard, according to this argument, not dependent on variable state laws. The Supreme Court expressly rejected this argument in United States v. Shearer (1985), finding it unpersuasive. The problem with the argument is that, under existing policy via *Feres*, there is no compensation at all because service members are categorically barred from suing in civil court. In U.S. v. Johnson (1985), Justice Scalia said: "The unfairness to servicemen or geographically varied recovery is, to speak bluntly, an absurd justification, given that, as have pointed out in another context, nonuniform recovery cannot possibly be worse than uniform nonrecovery" (p. 695-696). "We have abandoned this peculiar rule of solicitude in allowing federal prisoners (who have no more control over their geographical location than servicemen) to recover under the FTCA for injuries caused by the negligence of prison authorities" (p. 696). Scalia went on: "There seems to me nothing 'unfair' about a rule which says that, just as a serviceman injured by a negligence civilian must resort to state law, so must a serviceman injured by a negligent government employee" (p. 696).

Conclusion

In a representative democracy, military officials do not call the shots on the policies that prevail in the military establishment. The military is accountable to the people and, by extension, to lawmakers. Winston Churchill once observed: "You can always count on Americans to do the right thing after they've tried everything else" (McSherry-Forbes, 2013). It is time for policy makers to revisit the sagacity of a policy that denies service members' standing to sue. The policy tarnishes everyone and everything it touches. Jurists are compelled to violate deeply held beliefs, injured service members are denied justice, military officials do not have to comply with civil legal standards, and society at large endures the shame of treating the men and women who protect it as second-class citizens. Imagine what it must it feel like to be told by your government that, although you have defended it with your life, you lack standing to file a civil lawsuit after an egregious medical error caused your child to due during delivery. Such a policy runs counter to everything America stands for. The time to correct the error, as much moral as legal, has arrived.

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