No. _____

In The
Supreme Court of the United States

COLTON J. READ AND JESSICA G. READ,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In 1948, Congress enacted the Federal Tort Claims Act ("FTCA"), 28 U.S.C. § 1346 et seq. The FTCA provides a broad waiver of sovereign immunity, but contains an exception by which the federal government withholds consent to be sued for "any claim arising out of the combatant activities of the military or naval forces or the Coast Guard during time of war." 28 U.S.C. § 2680(j).

Two years later, the exception was significantly broadened by this Court in *Feres v. United States*, 340 U.S. 135 (1950), and this broad judicially-created exception is called the "*Feres* doctrine." The *Feres* doctrine bars active-duty military personnel from bringing claims against the government for injuries arising out of activity incident to service. Despite this Court's reaffirmance of the doctrine in *Johnson v. United States*, 481 U.S. 681 (1987), it has been widely criticized, and only reluctantly followed by the lower courts. It has not only generated inconsistent and inequitable outcomes for more than 60 years, but has also resulted in the lowering of medical care standards for military personnel.

The Questions Presented are:

Should the Court remove the *Feres* doctrine and restore equity in medical malpractice claims for active military servicemembers and their families, when the plain meaning of the FTCA contains no support for the doctrine?

QUESTIONS PRESENTED – Continued

Should the Court remove the *Feres* doctrine in medical malpractice cases brought under the FTCA by active military servicemembers, when the doctrine violates the principles of the Equal Protection and Separation of Power doctrines of the United States Constitution?

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

The parties to the proceeding in the Fifth Circuit, whose judgment is sought to be reviewed, are:

- Colton J. Read and Jessica G. Read, plaintiffs, appellants below, and petitioners here.
- United States of America, defendant, appellee below, and respondent here.

No corporations are involved in this proceeding.

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Colton J. Read and Jessica G. Read respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

INTRODUCTION

On July 9, 2009, 19-year-old Air Force Airman Colton Read was admitted to a military hospital in California for routine laparoscopic gallbladder surgery, to be performed by a military supervising general surgeon and a surgical resident-in-training, in preparation for deployment to Afghanistan. During the surgery, the surgical resident improperly lacerated Read's abdominal aorta resulting in massive internal bleeding, and the supervising surgeon improperly repaired the laceration by surgically causing a total or inadequate lack of blood supply to his legs. Postoperatively, the surgeons and other health care providers failed to recognize and treat the total or inadequate loss of blood circulation to Read's legs in a timely and proper manner, and, as a result, he eventually required amputations of most of both of his legs. Although this was an outrageous outcome for such a routine surgical procedure, Airman Read was left with no legal recourse. The surgeons and health care providers who had negligently caused Airman Read to lose both of his legs due to a botched gallbladder operation and failure to timely and properly recognize the loss of blood flow to his legs were federal government surgeons and health care

providers, and, as a result, Read and his wife have been barred by the lower courts from pursuing their meritorious medical malpractice claim against the federal government.

The inequity of disallowing the Reads' damage claims arising from this medical negligence stems from an illogical, unfair, unjust, and widely criticized reading of the Federal Tort Claims Act ("FTCA"), 28 U.S.C. § 1346 et seq., known as the *Feres* doctrine. This case presents the Court with an opportunity to remove the *Feres* doctrine and to enable courts to interpret the FTCA according to its plain language, which would allow active military servicemembers who, like Airman Read, are injured by the medical negligence of government physicians and health care providers to recover money damages for their injuries, harm, and damages.

Enacted in 1948, the FTCA constitutes a broad waiver of sovereign immunity from tort liability for the negligent or wrongful acts of federal government employees. Although Congress armed the FTCA with a list of specific exceptions to this expansive waiver of immunity, *see* 28 U.S.C. § 2680, none of these exceptions preclude all medical malpractice claims by active members of the military. In fact, the only statutory exception to the FTCA that mentions military personnel creates a limited exception for "[a]ny claim arising out of the combatant activities of the military or naval forces, or the Coast Guard, during time of war." 28 U.S.C. § 2680(j). Nonetheless, in *Feres*, this Court held that active servicemembers

cannot bring claims under the FTCA against the government for injuries that "arise out of or are in the course of activity incident to service." 340 U.S. at 146. In the 65 years since the creation of the *Feres* doctrine, lower courts have struggled to apply the ruling without performing manifest injustice. The lower courts, legal commentators, and many in the general public, have noted the inequities created by *Feres*.

In spite of the over-six-decade "antiquity" of the *Feres* decision, the *Feres* doctrine should be wisely revisited and overruled in the context of medical malpractice claims of active-duty military service men and women for the above-mentioned reasons, because "[W]isdom too often never comes, and so one *ought not to reject it merely because it comes late*" (emphasis added). *Henslee v. Union Planters Nat. Bank & Trust Co.,* 335 U.S. 595, 600 (1949) (Frankfurter, J., dissenting).

OPINIONS BELOW

The Fifth Circuit's opinion, filed July 19, 2013, the subject of this petition, is reported at ___ Fed. Appx. ___, 2013 WL 3784351, 2013 U.S. App. LEXIS 14800. (App. 1-6). The district court's November 26, 2012 order granting defendant and respondent's motion to dismiss was not published in the official reports. (App. 7-11). The order can be found at 2012 U.S. Dist. LEXIS 166897.

JURISDICTION

The court of appeals entered its judgment on July 19, 2013. (App. 14-28). This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Petitioners brought the underlying action under the FTCA, 28 U.S.C. § 1346 et seq., which states

> "[T]he United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages."

28 U.S.C. § 2674 (App. 18).

Respondents moved for dismissal under Federal Rule of Civil Procedure 12(b)(1) for lack of jurisdiction, arguing that Petitioners' claim is barred by the *Feres* doctrine's exception to the FTCA. Specifically, the FTCA provides that sovereign immunity is not waived as to "any claim arising out of the combatant activities of the military or naval forces or the Coast Guard during time of war." 28 U.S.C. § 2680(j) (App. 18-22).

STATEMENT OF THE CASE

On July 9, 2009, 19-year-old U.S. Air Force Airman First Class Colton Read was admitted to David Grant Medical Center, Travis Air Force Base, California for routine laparoscopic gallbladder surgery in preparation for deployment to Afghanistan. (App. 2). The surgery was performed by two Air Force surgeons, a supervising general surgeon and a surgical resident-in-training. (App. 2, 32).[1] While introducing a surgical instrument into Airman Read's abdominal area during the surgery, the surgical resident improperly lacerated Read's abdominal aorta, resulting in massive bleeding. (App. 2, 7, 32). The supervising surgeon negligently and improperly repaired this surgical injury, resulting in prolonged obstruction of the blood supply to Airman Read's legs that went unrecognized and untreated postoperatively for several hours. (App. 2, 32-33). By the time the supervising surgeon made the decision to transfer Airman Read to another hospital for treatment by a vascular surgeon, it was too late to save his legs. (App. 37-42). Related complications eventually required that both of Airman Read's legs be amputated. (App. 2, 42). In March of 2012, Airman Read

[1] Respondent attacked the district court's subject matter jurisdiction by challenging the sufficiency of the complaint, i.e., a facial attack. *Paterson v. Weinberger*, 644 F.2d 521, 523 (5th Cir. 1998). In such challenges, the court is to assume all facts in the complaint are true. *Id.*

was classified as permanently disabled and relieved from active duty. (App. 2-3, 76).

On March 30, 2012, after their claim was presented to and denied by the United States' agency, the United States Air Force, the Reads filed suit against the United States under the FTCA in the United States District Court for the Northern District of Texas, Fort Worth Division. (App. 3). In their suit, the Reads sought damages resulting from the medical malpractice of the military physicians and health care providers treating Mr. Read at the military hospital. (App. 3). The United States filed a motion to dismiss for lack of subject matter jurisdiction, claiming the Reads' suit is barred under *Feres v. United States*, 340 U.S. 135 (1950) and its progeny, or alternatively, a motion to transfer to the Western District of Texas or Eastern District of California. The Northern District Court granted the alternative motion to transfer on September 25, 2012, and this case was transferred to the Western District, San Antonio Division on September 26, 2012.

In its analysis of the United States' motion to dismiss under *Feres,* the District Court noted that it "tend[ed] to agree with [the Reads'] argument that the usual medical malpractice claim will not damage the military discipline structure," but found it was "nevertheless bound by Supreme Court and Fifth Circuit authority," and granted the United States' motion to dismiss and entered final judgment for the United States on November 26, 2012. (App. 10). The District Court held that the Reads' claims against the

United States are barred under the *Feres* doctrine, citing Supreme Court and Fifth Circuit authority holding that the receipt of medical care in a military facility by members of the military on active duty is "activity incident to service." (App. 10). The District Court also recognized the Fifth Circuit's rulings that *Feres* applies even if the underlying ailment was not "caused or aggravated by military activity or duty, and the surgery was elective and not necessary in order for the service member to be returned to any of his responsibilities within the military." (App. 10-11).[2]

The Reads timely appealed to the Fifth Circuit, urging that the *Feres* doctrine conflicts with the plain language of the FTCA, and therefore the doctrine should be overturned. The Reads also argued that the *Feres* doctrine is unconstitutional because it violates the principles of Equal Protection and Separation of Powers. The Fifth Circuit affirmed the dismissal of the Reads' claims, citing its duty to be bound to the *Feres* doctrine by stare decisis. (App. 4).

REASONS TO GRANT THE PETITION

"It is safe to say that no doctrine has generated more open contempt or confusion among courts and

[2] *Citing Hayes v. U.S. on Behalf of U.S. Dept. of Army*, 44 F.3d 377, 378 (5th Cir. 1995).

commentators [than] the *Feres* doctrine."[3] The *Feres* doctrine has been roundly, and rightly, pilloried from all fronts for decades because it is legally indefensible, practically unworkable, and manifestly unjust. It should be overruled.

I. This Court Should Overrule *Feres v. United States* in Medical Malpractice Claims Brought by Active-Duty Military Servicemembers

A. The Feres "Incident to Military Service" Test

The FTCA[4] allows the imposition of liability:

> 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.

28 U.S.C. § 1346(b).

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[3] Jonathan Turley, *Pax Militaris: The Feres Doctrine and the Retention of Sovereign Immunity in the Military System of Guidance*, 71 GEO. WASH. L. REV. 1, at 71-72 (2003) (hereinafter "Turley").

[4] 28 U.S.C. §§ 1346, 2671-2680.

This broad waiver contains thirteen limited exceptions outlining circumstances under which the federal government has expressly withheld consent to be sued. One of those excepted circumstances – the only one to expressly mention potential claims by members of the military – is, understandably, injuries sustained by soldiers in combat; the FTCA precludes "any claim arising out of the combatant activities of the military or naval forces or the Coast Guard during time of war." 28 U.S.C. § 2680(j) (emphasis added). Two years later, however, this narrow exception was significantly broadened by this Court in *Feres v. United States*, 340 U.S. 135 (1950).

In *Feres*, this Court consolidated three lawsuits – two medical malpractice claims and a wrongful death claim arising out of a barracks fire – brought by members of the military against the United States.[5] The plain language of the FTCA notwithstanding, the Court held that "the Government is not liable under the [FTCA] for injuries to servicemen where the injuries arise out of or are in the course of activity

[5] *Feres v. United States*, 340 U.S. 135 (1950) involved an FTCA lawsuit brought by the surviving wife of a military serviceman who was killed when his military barracks burned down. In hearing the *Feres* case, the Supreme Court consolidated it with two medical malpractice cases brought by military servicemen under the FTCA against the federal government for alleged negligence by their military physician in *Jefferson v. United States*, 178 F.2d 518 (4th Cir. 1949), *aff'd sub nom., Feres v. United States*, 340 U.S. 135 (1950), and *Griggs v. United States,* 178 F.2d 1 (10th Cir. 1949) *rev'd sub nom., Feres v. United States*, 340 U.S. 135 (1950).

incident to service[,]" a holding typically referred to as the *Feres* doctrine. *Feres*, 340 U.S. at 146.

In the years since its creation, the *Feres* doctrine has inspired "widespread, almost universal criticism. . . ." *United States v. Johnson*, 481 U.S. 681, 701 (1987) (Scalia, J., dissenting) (citations omitted). The doctrine has been sharply condemned as not merely wrongly decided but "unfounded, unfair, and even un-American"[6] by jurists,[7] academics[8] and public media.[9]

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[6] Turley, *supra* note 2, 2 & n.6.

[7] *Purcell v. United States,* 656 F.3d 463, 465-66 (7th Cir. 2011); *McConnell v. United States*, 478 F.3d 1092, 1098 (9th Cir. 2007), *cert. denied*, 552 U.S. 1038 (2007); *Matreale v. N.J. Dep't of Military & Veterans Affairs,* 487 F.3d 150, 159 (3d Cir. 2007) (Smith, J., concurring); *Overton v. New York State Div. of Military and Naval Affairs,* 373 F.3d 83, 100 (2d Cir. 2004) (Pooler, J., concurring); *Costo v. United States,* 248 F.3d 863, 866 (9th Cir. 2001); *Day v. Massachusetts Air Nat'l Guard*, 167 F.3d 678, 683 (1st Cir. 1999); *Taber v. Maine*, 67 F.3d 1029, 1040 (2d Cir. 1995); *Anderson v. U.S.,* 976 F.2d 736 (9th Cir. 1992); *Persons v. United States*, 925 F.2d 292, 294 (9th Cir. 1991); *Estate of McAllister v. United States*, 942 F.2d 1473, 1480 (9th Cir. 1991); *Bowers v. United States*, 904 F.2d 450, 452 (8th Cir. 1990); *Atkinson v. United States*, 825 F.2d 202, 206 (9th Cir. 1987), *cert. denied*, 485 U.S. 987, 108 S.Ct. 1288, 99 L.Ed.2d 499 (1988); *Sanchez v. United States,* 813 F.2d 593, 595 (2d Cir. 1987), modified, 839 F.2d 40 (2d Cir. 1988); *Bozeman v. United States,* 780 F.2d 198, 200 (2d Cir. 1985); *Hinkie v. United States*, 715 F.2d 96, 97 (3d Cir. 1983); *Scales v. United States*, 685 F.2d 970, 974 (5th Cir. 1982); *Kohn v. United States,* 680 F.2d 922, 925 (2d Cir. 1982); *LaBash v. U.S. Dep't of the Army*, 668 F.2d 1153, 1156 (10th Cir.), *cert. denied*, 456 U.S. 1008 (1982); *Monaco v. United States*, 661 F.2d 129, 132 (9th Cir. 1981), *cert. denied*, 456 U.S. 989, 102 S.Ct. 2269, 73 L.Ed.2d 1284 (1982); *Hunt v. United States*, 636 F.2d 580, 583-89 (D.C. Cir. 1980).

[8] Dan B. Dobbs, Paul T. Hayden and Ellen M. Bublick, DOBBS LAW OF TORTS §340, *Feres: criticism and reform* (2013); Major Edward G. Bahdi, *A Look at the Feres Doctrine as it Applies to Medical Malpractice Lawsuits: Challenging the Notion that Suing the Government Will Result in a Breakdown of Military Discipline*, 2010 NOV. ARMY LAWYER 56 (2010); Barry Bennett, *The Feres Doctrine, Discipline and the Weapons of War*, 29 ST. LOUIS U. L.J. 383, 407-11 (1985); Deirdre G. Brou, *Alternatives to the Judicially Promulgated Feres Doctrine*, 192 MIL. L. REV. 1, 4 (2007); Helen D. O'Conor, *Federal Tort Claims Act is Available For OIF TBI Veterans, Despite Feres*, 11 DEPAUL J. HEALTH CARE L. 273 (Summer 2008); Captain Robert L. Rhodes, *The Feres Doctrine After Twenty-Five Years*, 18 A.F. L. REV. 24 (1976); David E. Seidelson, *The Feres Exception to the Federal Tort Claims Act: New Insight into an Old Problem*, 11 HOFSTRA L. REV. 629, 632 (1983); Turley, supra note 2; Jonathan P. Tomes, *Feres to Chappell to Stanley: Three Strikes and Servicemembers Are Out*, 25 U. RICH. L. REV. 93 (1990); Brian P. Cain, Note, *Military Medical Malpractice and the Feres Doctrine*, 20 GA. L. REV. 497 (1986); Melissa Feldmeier, Comment, *At War With the Feres Doctrine: The Carmelo Rodriguez Military Medical Accountability Act of 2009*, 60 CATH. U. L. REV. 145 (Fall 2010); Eric Juergens, Note, *Feres And The Privacy Act: Are Military Personnel Records Protected?* 85 ST. JOHN'S L. REV. 313 (Winter 2011); Nicole Melvani, Comment, *The Fourteenth Exception: How the Feres Doctrine Improperly Bars Medical Malpractice Claims of Military Service Members*, 46 CAL. W. L. REV. 395, 420 (2010); William S. Myers, Comment, *The Feres Doctrine: Has It Created Remediless Wrongs for Relatives of Servicemen?* 44 U. PITT. L. REV. 929-53 (1983); Anne R. Riley, Note, *United States v. Johnson: Expansion of the Feres Doctrine to Include Service Members' FTCA Suits Against Civilian Government Employees*, 42 VAND. L. REV. 233, 244 (1989); David Saul Schwartz, Note, *Making Intramilitary Tort Law More Civil: A Proposed Reform of the Feres Doctrine*, 95 YALE L.J. 992-1016 (1986); John B. Wells, Comment, *Providing Relief to the Victims of Military Medicine: A New Challenge to the Application of the Feres Doctrine in Military Medical Malpractice Cases*, 32 DUQ. L. REV. 109 (1993); Jennifer L. Zyznar, Comment, *The Feres*

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Doctrine: "Don't Let This Be It. Fight!", 46 J. MARSHALL L. REV. 607 (Winter 2013); Note, *From Feres to Stencel: Should Military Personnel Have Access to FTCA Recovery?* 77 MICH. L. REV. 1099, 1106-08 (1979).

[9] Philip M. Boffey, *Defects Reported in Military Care*, N.Y. TIMES (Jan. 18, 1985), http://www.nytimes.com/1985/01/18/us/defects-reported-in-military-care.html (reporting "serious deficiencies in appointing and evaluating doctors" in the military); Joe Celentino, *Navy Can't Be Sued over Young Officer's Suicide*, Wounded Times Weblog (Aug. 24, 2011, 9:02 AM), http://woundedtimes.blogspot.com/2011/08/navy-cant-be-sued-over-young-officers.html; Andrew Cohen, *Quietly, U.S. Moves to Block Lawsuits by Military Families,* THE ATLANTIC, Jan. 30, 2012, http://www.theatlantic.com/national/archive/2012/01/quietly-us-moves-to-block-lawsuits-by-military-families/252171/ (questioning how much Americans really care about military and their families in light of *Feres*); Rebecca Huval, *Feres Doctrine and the Obstacles to Justice for Military Rape Victims*, Independent Lens Blog (May 9, 2013), http://www.pbs.org/independentlens/blog/feres-doctrine-and-the-obstacles-to-justice-for-military-rape-victims (*Feres* is "not only a judicial invention, but . . . the seed of an ever-increasing body of flawed doctrinal offspring"); Rachel Natelson, *The Unfairness of the Feres Doctrine*, TIME MAGAZINE (Feb. 25, 2013), http://nation.time.com/2013/02/25/the-unfairness-of-the-feres-doctrine (*Feres* deprives "military personnel of basic civil rights"); Byron Pitts, *This is a Tough One*, Couric & Co., Field Notes (Jan. 31, 2008), http://www.cbsnews.com/8301-500803_162-3776293-500803.html; Byron Pitts, *Outrage Over Soldier's Cancer*, CBS News (May 19, 2008), http://www.cbsnews.com/video/watch/?id=4109515n (military overlooked soldier's medical condition because they needed enlistees to fight in Iraq); Byron Pitts, *A Question Of Care: Military Malpractice?* CBS News (Feb. 11, 2009, 3:30 PM), http://www.cbsnews.com/stories/2008/01/31/eveningnews/main3776580.shtml (military case involved "major screw-up" but parties without any remedy); Byron Pitts, *Fighting For Carmelo*, CBS News (Mar. 24, 2009), http://www.cbsnews.com/video/watch/?id=4890716n; Walter F. Roche, Jr., *Willing to Die, but Not this Way*, L.A. TIMES (Apr. 20,

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Opinions from nearly every federal circuit (more than one from most circuits) have expressed frustration with the doctrine and criticized its underlying reasoning.[10]

Even three sitting members of this Court have denounced the doctrine as, among other things,

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2008), http://articles.latimes.com/2008/apr/20/nation/na-feres20 (*Feres* results in lack of accountability); Beth Ford Roth, *U.S. Supreme Court Refuses to Hear Military Malpractice Case*, HomePost (June 27, 2011, 11:14 AM), http://homepost.kpbs.org/news/2011/jun/27/us-supreme-court-refuses-to-hear-military/; Leo Shane III, S*upreme Court Deals Devastating Blow to Feres Doctrine Opponents*, STARS AND STRIPES (June 27, 2011), http://www.stripes.com/news/supreme-court-deals-devastating-blow-to-feres-doctrine-opponents-1.147604 ("servicemembers [should] enjoy the same protections and remedies against governmental negligence as their civilian counterparts); Jonathan Turley, *The Feres Doctrine: What Soldiers Really Need Are Lawyers*, Jonathan Turley Blog (Aug. 18, 2007, 11:47 AM), http://jonathanturley.org/2007/08/18/the-feres-doctrine-what-soldiers-really-need-are-lawyers/ (because of *Feres*, military are victims of "grotesque forms of negligence"); Steve Vladeck, *Justice Thomas and the Feres Doctrine*, Lawfare Blog, (June 27, 2013, 7:11 PM), http://www.lawfareblog.com/2013/06/justice-thomas-and-the-feres-doctrine/; CBS Evening News with Katie Couric, *Marine's Cancer Misdiagnosed?* (CBS television broadcast Aug. 6, 2008), http://www.cbsnews.com/video/watch/?id=3776975n&tag=related;photovideo; Eye to Eye with Katie Couric, *Misdiagnosed?* (CBS television broadcast Aug. 6, 2008), http://www.cbsnews.com/video/watch/?id=3777186n&tag=related; photovideo; *see also* Russell Carollo and Jeff Nesmith, *Unnecessary Danger: Military Medicine*, DAYTON DAILY NEWS (October 5, 1997 (1998 Pulitzer Prize Winner for National Reporting), http://www.pulitzer.org/archives/6156 (disclosed dangerous flaws and mismanagement in the military health care system).

[10] *Supra* note 7.

completely unmoored from the plain text of the FTCA, and a fourth member, as a lower court judge, joined an opinion that explicitly noted a reluctance to apply it.[11]

B. *Feres* Was Decided Wrongly, And For The Wrong Reasons

As an example of statutory construction, the *Feres* opinion is a travesty. There is no basis in either the text or the legislative history of the FTCA for the *Feres* doctrine, and the Court has conceded as much by, in subsequent opinions, abandoning the only rationale supporting the *Feres* holding that was even arguably derived from the statute's text. *See Johnson*, 481 U.S. at 694-95 (Scalia, J., dissenting); *see also Rayonier, Inc. v. United States*, 352 U.S. 315, 319 (1957); *Indian Towing Co. v. United States*, 350 U.S. 61, 66-69 (1955).

Justice Scalia's surgical analysis of the FTCA, contained within his powerful dissenting opinion in *United States v. Johnson*, demonstrates how straightforward the text of the statute is – and how wrong the *Feres* Court was:

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[11] *See Johnson*, 481 U.S. at 692-703 (Scalia, J., dissenting); *Lanus ex rel. Lanus v. United States*, 133 S.Ct. 2731 (2013) (Thomas, J., dissenting from denial of certiorari); *Lombard v. United States*, 690 F.2d 215, 228-30, nn.6 & 7, 233 (D.C. Cir. 1982), *cert. denied*, 462 U.S. 1118 (1983) (Ginsburg, J., concurring and dissenting); *Veillette v. United States*, 615 F.2d 505, 506 (9th Cir. 1980) (Fletcher, J., joined by Kennedy, J.).

> Read as it is written, [the FTCA] renders the United States liable to *all* persons, including servicemen, injured by the negligence of Government employees. Other provisions of the Act set forth a number of exceptions, but none generally precludes FTCA suits brought by servicemen. One, in fact, excludes "[a]ny claim arising out of the *combatant activities* of the military or naval forces, or the Coast Guard, *during time of war*," demonstrating that Congress specifically considered, and provided what it thought needful for, the special requirements of the military.

Johnson, 481 U.S. at 693 (Scalia, J., dissenting) (emphasis in original) (internal citation omitted).

By its plain language, then, the FTCA, as applicable to members of the military, explicitly bars those suits – and only those suits – arising out of combat injuries. Further, as even the *Feres* Court noted,

> eighteen tort claims bills were introduced in Congress between 1925 and 1935, and all but two expressly denied recovery to members of the armed forces; but the bill enacted as the present Tort Claims Act, from its introduction, made no exception.

Feres, 340 U.S. at 139.

Somehow, the *Feres* Court nevertheless found a general bar on all claims by members of the military "where the injuries arise out of or are in the course of activity incident to service." *Feres*, 340 U.S. at 146.

Aside from the subsequently abandoned textual argument (that the parallel private liability required by the FTCA was absent), the *Feres* opinion gave two reasons for its holding: (1) that Congress could not have intended for the "distinctively federal" relationship between the Government and the members of its armed forces to be governed by local, and inconsistent, tort law; and (2) that Congress could not have intended for members of the military to both receive veterans' benefits as compensation for injuries incident to service and have a tort remedy for those same injuries. *Feres*, 340 U.S. at 142-45. A subsequent case crafted another rationale for the *Feres* doctrine: that maintenance of suits for service-related injuries would have a detrimental effect on military discipline. *United States v. Brown*, 348 U.S. 110, 112 (1954). None of these "frail" rationales justifies abandoning the plain text of the FTCA, and the inconsistency with which the rationales have been explained and applied has rendered them, and the doctrine they support, incomprehensible. *See Johnson*, 481 U.S. at 694-701 (Scalia, J., dissenting).

1. Uniformity

First, the Court has many times seen fit to allow FTCA suits involving other relationships that are seemingly just as "distinctively federal" in character as that between the Government and its military personnel. *See, e.g., United States v. Muniz*, 374 U.S. 150 (1963) (federal prison officials and prisoners); *Indian Towing Co. v. United States*, 350 U.S. 61

(1955) (Coast Guard and vessels relying on its lighthouse). There is no evidence in either the statutory language or the legislative history that Congress intended for the FTCA to create "(what *Feres* provides) uniform nonrecovery" instead of "nonuniform recovery" for military personnel, nor is there any indication in the text that uniformity "is indispensable for the military, but not for the many other federal departments and agencies that can be sued under the FTCA for the negligent performance of their unique, nationwide functions." *See Johnson,* 481 U.S. at 695-96 (citations omitted) (Scalia, J., dissenting). The need for a uniform law governing military servicemembers' tort remedies – especially a uniform law effectively leaving those servicemembers without any such remedy – is discussed nowhere in the text of the FTCA, which in fact expressly invokes local tort law, and was purely a brainchild of the *Feres* Court. *See* 28 U.S.C. § 1346(b)(1) (App. 15-16).

Moreover, the *Feres* Court's stated aim of creating a uniform law to govern servicemembers' tort claims against the Government is subverted, not furthered, by the *Feres* opinion and its progeny, whose attempts to justify and explain the "incident to service" test have created a wildly divergent patchwork of incoherent jurisprudence in the various federal circuits. *See Estate of McAllister v. United States*, 942 F.2d 1473, 1476-77 (9th Cir. 1991) ("Precisely how a court should apply the *Feres* doctrine to the facts of a given case, therefore, remains unclear. A reconciliation of prior pronouncements on the subject is not

possible"). When determining whether an injury is "incident to service," for instance, the Third and Fifth Circuits[12] compare numerous factors, including (1) the service member's duty status; (2) the site of the accident; and (3) the nature of the service member's activity at the time of injury, all "in light of the totality of the circumstances[,]" while the Eighth Circuit simply examines the facts in light of the three *Feres* rationales (all but the long-abandoned "parallel private liability" rationale) reaffirmed in *Johnson*. *See Richards v. United States*, 176 F.3d 652, 655 (3d Cir. 1999); *Kelly v. Panama Canal Comm'n*, 26 F.3d 597, 600 (5th Cir. 1994); *Brown v. United States*, 151 F.3d 800, 804 (8th Cir. 1998). The Second Circuit determines whether *Feres* applies "by considering the same question that would determine whether the plaintiff would be entitled to receive standard workers' compensation payments for his injury[,]" while the Sixth Circuit has expressly declined to follow that approach. *Taber v. Maine*, 67 F.3d 1029, 1050 (2d Cir. 1995); *Skees v. United States*, 107 F.3d 421, 425 n.3 (6th Cir. 1997). The Ninth Circuit has its own four-factor test but, stymied by "conflicting messages" from the *Feres* jurisprudence, has thrown up its hands and resorted to the "intellectually unsatisfying" method of simply "compar[ing] fact patterns to

[12] In medical malpractice cases, the Fifth Circuit replaces the third prong (activity the service member was performing) with "whether the serviceman's treatment was intended to return him to military service." *Schoemer v. United States*, 59 F.3d 26, 29 (5th Cir. 1995).

outcomes in cases that have applied the *Feres* doctrine[.]" *McAllister*, 942 F.2d at 1476-77; *see also Dreier v. United States*, 106 F.3d 844, 848-49 (9th Cir. 1996).

Unable to wring a workable set of legal principles from the *Feres* line of cases, the circuit courts have by and large taken to simply applying the *Feres* doctrine as broadly as possible, in effect immunizing the government from lawsuits for money damages by members of the military. Turley, *supra* note 2 at 27-28 ("The *Feres* doctrine is a striking example of courts achieving uniformity in application at the cost of incoherence in theory. . . . [I]t is not uncommon for courts to expressly ignore the doctrine's lack of foundation and to apply it regardless of its inconsistency with the original rationales cited by the Supreme Court."). As a result, the only "uniformity" created by the *Feres* doctrine is the "uniform nonrecovery," justly decried by Justice Scalia, for servicemembers who are injured incident to their military service by the negligence of others – a creation fundamentally at odds with what was obviously intended to be a remedial statute.

In any event, the Court has "effectively disavowed this 'uniformity' justification – and rendered its benefits to military planning illusory – by permitting servicemen to recover under the FTCA for injuries suffered not incident to service, and permitting *civilians* to recover for injuries caused by military negligence." *Johnson*, 481 U.S. at 696 (Scalia, J., dissenting) (emphasis in original). That contradiction,

common to all of the rationales supporting *Feres*, exposes the logical bankruptcy of the doctrine.

2. Government Benefits

The rationale that Congress could not have intended for servicemembers to have both veterans' benefits and a tort remedy similarly wilts under scrutiny, as, "both before and after *Feres*, [the Court] permitted injured servicemen to bring FTCA suits, *even though they had been compensated under the* [*Veterans' Benefits Act*]." *Johnson*, 481 U.S. at 698 (Scalia, J., dissenting) (*citing Brooks v. United States*, 337 U.S. 49 (1949) and *United States v. Brown*, 348 U.S. 110 (1954)). And the Court was right to do so, because Congress has "given no indication" that it made veterans' benefits an exclusive remedy that precluded recovery under the FTCA. *Brown*, 348 U.S. at 113. The Court's suggestion in those cases for harmonizing veterans' benefits and tort recovery was well-conceived and easy to implement: to the extent that a servicemember's recovery under the FTCA was duplicative, the amount payable in veterans' benefits could be used to adjust the amount recovered under the FTCA. *Brooks*, 337 U.S. at 53-54; *Brown*, 348 U.S. at 111 & n. Since neither *Brooks* nor *Brown* has been overruled, the Court's "inconsistent treatment" of the alternative-compensation rationale has rendered it "nebulous" and useless as either an explanation or a justification for the *Feres* doctrine – it seems to exist solely to "make[ ] the effect of the doctrine more

palatable." *Hunt v. United States*, 636 F.2d 580, 598 (D.C. Cir. 1980).

3. Military Discipline

The last living rationale for the *Feres* doctrine – and the one deemed the "best" by the Court, *United States v. Shearer*, 473 U.S. 52, 57 (1985) – was not even mentioned in the *Feres* opinion, let alone in the FTCA; it was first articulated four years after *Feres*, in *Brown*, 348 U.S. at 112. Absent the *Feres* bar, the reasoning goes, lawsuits by servicemembers would inject civilian courts into military decisionmaking and undermine military discipline. Congress must have assumed this, despite what it said in the FTCA. But this justification ignores the fact that military decisionmaking, even with the *Feres* doctrine in place, frequently gives rise to civil suits – many of them under the FTCA – scrutinizing those decisions.

Civilian plaintiffs, for example, can bring tort actions against the military under the FTCA, despite those actions' possible examination of or effect on military decisionmaking; and "servicemembers often provide sworn testimony as to how such torts were committed during depositions or at trial."[13] A soldier

[13] Major Edward G. Bahdi, *A Look at the Feres Doctrine as It Applies to Medical Malpractice Lawsuits: Challenging the Notion that Suing the Government Will Result in a Breakdown of Military Discipline*, The Army Lawyer, Nov. 2010, 56, 66 (hereinafter "Bahdi"); *see also Johnson*, 481 U.S. at 700 (Scalia, J., dissenting).

who is not injured "incident to service" can sue the government under the FTCA, as *Brooks* has never been overruled. *Johnson*, 481 U.S. at 700 (Scalia, J., dissenting). And a soldier whose service-connected injury is caused by a civilian's negligence can sue that civilian, even though the civilian may claim contributory negligence and subpoena other military personnel to testify. *Johnson*, 481 U.S. at 700 (Scalia, J., dissenting).

Moreover, "[w]hile blindly adhering to the *Feres* doctrine in tort cases seeking monetary damages, courts often allow servicemembers to sue over deprivations of constitutional rights" – and such lawsuits have challenged "the full range of possible military decisions and policies." Turley, *supra* note 2 at 21 & n.140; *see also Wilkins v. United States*, 279 F.3d 782, 787 (9th Cir. 2002) (collecting cases). Those lawsuits have the blessing of this Court, which has relied on *Feres* to bar the recovery of money damages by servicemembers for alleged constitutional violations arising out of their military service but has also explicitly held that there is no such prohibition on lawsuits that only seek "redress designed to halt or prevent the constitutional violation," such as injunctive or declaratory relief. *United States v. Stanley*, 483 U.S. 669, 683 (1987); *see also Chappell v. Wallace*, 462 U.S. 296, 304-05 (1983). A lawsuit seeking an injunction is, of course, no less invasive to the inner sanctum of military decisionmaking than one seeking money damages, yet one is allowed and the other

precluded, simply because the Court felt compelled to apply *Feres*.

Justifying *Feres* on the basis of concerns about the effect of servicemembers' lawsuits on the military's ability to maintain discipline is equally befuddling, not least because, as noted above, servicemembers can bring all manner of lawsuits challenging military policy judgments despite *Feres*, so long as those lawsuits do not seek money damages. Several servicemembers, for instance, attempted to have the federal judiciary strike down the military's "Don't Ask, Don't Tell" policy – a Department-of-Defense-wide policy explicitly implemented to preserve "morale, good order and discipline, and unit cohesion" – on Constitutional grounds. *See, e.g., Able v. United States*, 155 F.3d 628 (2d Cir. 1998); *Richenberg v. Perry*, 97 F.3d 256 (8th Cir. 1996); *Steffan v. Perry*, 41 F.3d 677 (D.C. Cir. 1994) (en banc). Because the servicemembers sought only injunctive and declaratory relief, the lawsuits, one of which involved a four-day trial and three appeals, were not precluded under *Feres*. On the other hand, because money damages are being sought, a medical malpractice lawsuit like Airman Read's is unequivocally barred by *Feres*, even though

> [m]ilitary negligent malpractice lawsuits rarely, if ever, question policy decisions made by Army Medical Corps officers in their capacity as a commander or staff officer. Instead, they question the diagnosis and medical care rendered by physicians, physician

> assistants, and nurses to the servicemember, and whether such decisions/treatment met the standard of care – nothing more.

Bahdi, *supra* note 10, at 66.

Airman Read testified that, although he understood that he needed to follow his military doctors' proper advice concerning their medical diagnosis, care, and treatment of his gallbladder problems, subject to his informed consent, he had no military command relationship with his treating physicians at the time of his injury. (App. 72).

The *Feres* doctrine's concern about litigation cultivating insubordination, then, is necessarily founded on the premise that actions for money damages, specifically, impair the military's ability to preserve order. If that were a universally accepted notion, the doctrine might be on firmer footing, although certainly not firm enough to justify ignoring the plain language enacted by Congress. But, as Justice Scalia has pointed out, the effect of such actions upon military discipline "has long been disputed." *Johnson*, 481 U.S. at 699 (Scalia, J., dissenting).[14] One cannot, therefore, confidently assume that Congress believed that actions for money damages should be barred. It is in fact equally (or more) plausible to assume that the suits most likely to be disruptive to military discipline (combat command

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[14] *Citing* Barry Bennett, *The Feres Doctrine, Discipline, and the Weapons of War*, 29 ST. LOUIS U. L. J. 383, 407-411 (1985).

decisions, in particular) were recognized by Congress in the FTCA's explicit exemptions; or that Congress felt that any harm done to order by damages awards would be minimized by the FTCA's imposition of liability on the Government, rather than individuals; or that *not* allowing servicemembers to sue for money damages would cripple morale. *Johnson*, 481 U.S. at 699 to 700 (Scalia, J., dissenting).[15] There is no reason, in other words, to assume that Congress did not mean exactly what it said in the FTCA.

4. Judicial Legislation

At bottom, the *Feres* Court's reasoning, as Justice Guido Calabresi of the Second Circuit aptly phrased it, not only "flew directly in the face of [the FTCA's] language and legislative history" but did so simply because the Court wanted "to make the FTCA 'fit' the legal landscape of the time." *Taber v. Maine*, 67 F.3d 1029, 1038 (2d Cir. 1995). The "legal landscape" to which Justice Calabresi referred was one in which civilian workers' compensation statutes typically barred tort suits against employers by employees whose injuries arose out of or in the course of employment; and the *Feres* Court in turn deliberately

[15] As Justice Scalia astutely observed of the plaintiff in *Johnson*: "After all, the morale of Lieutenant Commander Johnson's comrades-in-arms will not likely be boosted by news that his widow and children will receive only a fraction of the amount they might have recovered had he been piloting a commercial helicopter at the time of his death." *Johnson,* 481 U.S. at 700.

read the FTCA, as applied to members of the military, as it would have read statutes comprising a civilian workers' compensation framework. *Taber*, 67 F.3d at 1038-39 & n.6.[16] That Congress clearly did not *write* the FTCA to provide such a framework "apparently did not trouble the Court much – intent, as it was," to "preclude suits by servicemembers against the government because, as military employees, they received government disability and death benefits[.]" *Taber*, 67 F.3d at 1038. In other words, the *Feres* Court, in its quest to "make the entire statutory system of remedies against the Government . . . a workable, consistent and equitable whole[,]" acted as a superlegislature – it simply "revise[d]" the FTCA on the basis of nothing more than "disembodied estimations of what Congress *must* (despite what it enacted) have intended." *Johnson*, 481 U.S. at 693-95, 701 (Scalia, J., dissenting) (emphasis in original) (*citing Feres*, 340 U.S. at 139).

Given that the Court ignored the plain text of a purely remedial statute in order to graft an ill-defined workers' compensation scheme onto it, it should come as little surprise that the resulting doctrine has proven unjust, unworkable, and incoherent. The only way to undo the harm is to overrule *Feres*.

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[16] *See also* Paul C. Weiler, *Workers' Compensation and Product Liability: The Interaction of a Tort and a Non-Tort Regime*, 50 OHIO ST. L. J. 825, 852 (1989).

C. The *Feres* Doctrine Has Lowered The Quality Of Medical Care Received By Our Military

One particularly harmful side effect of *Feres*, starkly illustrated by this case, has been the *Feres* doctrine's shielding of military doctors from medical malpractice claims brought by their military patients, which has had a detrimental effect on the medical care provided to members of the military. As a leading expert on military law has observed, the *Feres* doctrine:

> greatly diminishes the influence of liability on deterring unreasonable conduct. As a result, there is evidence of a higher level of negligent conduct in areas like medical malpractice. . . . Medical malpractice is generally viewed as rampant in the military, which has been widely criticized for failing to adopt standards and systems that are common to the civilian sector. The longstanding failure of the military to respond adequately to these problems suggests a sharp difference in the risk/benefit analysis between the military and civilian medical systems.

Turley, *supra* note 2 at 5-6, 57.

A substantial number of military medical malpractice cases, for instance, have arisen out of the "lack of minimal professional standards of conduct in hiring and supervision" and the "failure to take minimal steps to confirm an applicant's background and to require minimal professional standing before

entering military practice." Turley, *supra* note 2 at 62-63.

In a Pulitzer-Prize-winning investigative series, reporters Russell Carollo and Jeff Nesmith documented how military medical facilities were employing personnel and engaging in conduct that would expose a private facility to tremendous civil, if not criminal, liability. Dr. Leon Fowler failed the standard state medical license exam 18 times in five different states and was expelled from his residency program at Oral Roberts University; Dr. Dae Oh Kang failed the license exam 30 times, taking it nearly once every six months between 1973 and 1992; and Dr. Washington E. Moscoso failed 14 times, leading one medical board to declare that his test results "raise serious issues as to the applicant's ability to practice medicine and surgery with reasonable skill and safety." Turley, *supra* note 2 at 62-63 & n.431.[17] All found employment as physicians. In a number of cases, nurses, including nurses whose errors had previously caused brain injury to patients, were allowed to serve as anesthesiologists. Turley, *supra* note 2 at 62-63 & n.429.[18]

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[17] *See also* Russell Carollo & Jeff Newsmith, *Special Licenses for Some Doctors*, Dayton Daily News, Oct. 8, 1997, at 1.

[18] *See also* Russell Carollo & Jeff Nesmith, *The Man in the White Coat Was No Doctor*, Dayton Daily News, Oct. 10, 1997, at 1, http://www.pulitzer.org/archives/6161.

These practices have had predictably dire consequences. In a case similar to Airman Read's, a 16-year-old woman named Leigh Clark lost the use of her right leg after the surgeon severed her femoral artery during a routine laparoscopic procedure. The surgeon who performed the operation was unlicensed in the state, had previously been suspended at another military hospital due to allegations of malpractice, and had been hired by another unlicensed physician with a long history of disciplinary action and malpractice charges. Turley, *supra* note 2 at 62-63 & n.429.[19] In another case, a 25-year-old soldier seeking treatment at a military clinic for a bee sting died after he was given nine times the proper dosage of a drug. The physician who administered the drug was unlicensed, the head nurse was not licensed in advanced life-support techniques, and an essential piece of emergency equipment was missing a part. Turley, *supra* note 2 at 63, n.436.[20] Multiple patients, including babies being delivered, have suffered brain damage because nurses serving as anesthesiologists committed errors. Turley, *supra* note 2 at 62-63 & n.429.[21]

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[19] *See also* Russell Carollo & Jeff Nesmith, *Routine Procedure Has Dire Consequences for Teen,* Austin American-Statesman, Oct. 6, 1997, at A1.

[20] *See also* Russell Carollo & Jeff Nesmith, *Laws and Rulings Shield Doctors*, Dayton Daily News, Oct. 11, 1997, at 1, http://www.pulitzer.org/archives/6162.

[21] *See also* Russell Carollo & Jeff Nesmith, *The Man in the White Coat Was No Doctor*," Dayton Daily News, Oct. 10, 1997, at 1.

In this case, Petitioner Read was admitted for a simple gallbladder procedure, but was operated on by a first-year postgraduate surgical resident in training to become a surgeon. (App. 31). The resident punctured Mr. Read's abdominal aorta when inserting the first surgical trocar port, but neither the resident nor the supervising surgeon recognized the traumatic injury to the aorta until later in the surgery. (App. 32). The supervising surgeon noted some arterial bleeding, took over the surgery, and looked into Mr. Read's abdomen for several minutes for the source of the bleeding (App. 32). At the same time, Mr. Read's blood pressure dropped, and the anesthesiologist assumed that there was a mechanical problem with the blood pressure monitoring equipment, so a new blood pressure cuff was attached. (App. 33). The supervising surgeon then performed an open laparotomy surgery to find the source of the bleeding, and it was discovered that the abdominal aorta had been lacerated. (App. 34). This surgeon attempted to repair the laceration, but it was determined that the blood flow to Mr. Read's legs was either absent, inadequate, or less than optimal. (App. 35-36). Despite attempts to further repair the laceration, Mr. Read's condition continued to deteriorate, and he was eventually transferred to another non-military facility for diagnosis and treatment by a vascular surgeon. (App. 37-39). It was determined that due to the ischemia caused by lack of blood flow due to the laceration of the abdominal aorta, Mr. Read required amputation of both legs. (App. 42).

Outcomes and practices like those described above can and should be avoided. Negligence, now protected by *Feres*, in the medical malpractice context has nothing to do with the particular difficulties presented by the military setting. Medical malpractice cases do not in any way implicate sensitive military policy decisions, pose difficult questions of military readiness or discipline, or threaten the preservation of the chain of command. They arise, instead, entirely out of the care rendered by medical providers, which is why,

> [w]hen one returns to the logic of the Supreme Court cited in support of the creation and maintenance of the Feres doctrine, the medical malpractice cases seem like the most implausible of defense theories. How protecting negligent doctors from malpractice teaches "military discipline and obedience" is beyond comprehension.

Turley, *supra* note 2 at 64, n.440 (citation omitted).[22] The claims of the Reads are in keeping with the spirit of George Washington's proclamation that "[w]hen we assumed the soldier, we did not lay aside the citizen." Gen. George Washington, Address to Legislature of New York, Jun. 26, 1775.

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[22] *See also* Bahdi, *supra* note 10 at 66.

D. Stare Decisis Should Not Protect *Feres* And Its Progeny

Stare decisis is neither "an inexorable command" nor "a mechanical formula of adherence to the latest decision," but a "principle of policy." *Citizens United v. Fed. Election Comm'n*, 130 S.Ct. 876, 920 (2010) (Roberts, C.J., concurring).[23] The relevant factors that are considered by the Court when it is deciding whether to apply the principle of stare decisis include the workability and antiquity of the questioned precedent, the reliance interests at stake, and whether the decision was well-reasoned. *Citizens United*, 130 S.Ct. at 912. The Court also examines "whether experience has pointed up the precedent's shortcomings." *Citizens United*, 130 S.Ct. at 912.[24] An additional concern, especially relevant to an examination of the *Feres* doctrine, is whether the reasoning bolstering the challenged precedent has remained consistent – stare decisis does not control "when the precedent's underlying reasoning has become so discredited that the Court cannot keep the precedent alive without jury-rigging new and different justifications to shore up the original mistake." *Citizens United* at 921 (Roberts, C.J., concurring).[25]

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[23] *Citing Lawrence v. Texas*, 539 U.S. 558, 577 (2003) and *Helvering v. Hallock*, 309 U.S. 106, 119 (1940).

[24] *Citing Pearson v. Callahan*, 129 S.Ct. 808, 816 (2009).

[25] *Citing Pearson*, 129 S.Ct. at 817 and *Montejo v. Louisiana*, 129 S.Ct. 2079, 2088-89 (2009).

These factors militate heavily in favor of overruling *Feres*. As chronicled above, academics and judges alike have long, and uniformly, regarded the *Feres* opinion as at best poorly reasoned and at worst willfully so; and the opinion's unworkable "incident to service" test has contorted a statute clearly meant to waive sovereign immunity for military servicemembers into a statute that waives it for everyone but them. Additionally, "[p]rivate reliance interests on a decision that precludes tort recoveries by military personnel are nonexistent[.]" *Lanus*, 133 S.Ct. at 2731 (Thomas, J., dissenting from denial of certiorari) (emphasis omitted). No one endorses the *Feres* opinion's absurd reading of the FTCA except that reading's sole beneficiary: the Government.

Stare decisis also should not save *Feres* because the *Feres* doctrine has seen the rationales supporting it shift to a degree and with a frequency that few, if any, other judicial doctrines have. *Feres* originally gave three reasons for its holding: (1) that the parallel private liability required by the FTCA was absent; (2) that Congress could not have intended for the "distinctively federal" relationship between the Government and the members of its armed forces to be governed by local, and inconsistent, tort law; and (3) that Congress could not have intended for members of the military to both receive veterans' benefits as compensation for injuries incident to service and have a tort remedy for those same injuries. *Feres*, 340 U.S. at 142-45. *Brown*, issued several years after *Feres*, added a fourth rationale, later deemed the

"best" one: that maintenance of suits for service-related injuries would have a detrimental effect on military discipline. *Brown*, 348 U.S. at 112.[26]

The first rationale supporting the *Feres* holding, the only rationale even "purport[ing] to be textually based," was soon rejected in *Rayonier* and *Indian Towing*. *Johnson*, 481 U.S. at 694-95 (Scalia, J., dissenting).[27] The second and third rationales were then later deemed "no longer controlling," *Shearer*, 473 U.S. at 58, n.4, leaving only the fourth, which was not even mentioned in *Feres*, to prop up the doctrine. A few years after deeming them "no longer controlling," however, the Court decided that it liked the second and third rationales after all and reaffirmed them. *Johnson*, 481 U.S. at 688-90. Of course, none of these rationales truly justifies the *Feres* opinion's revision of the FTCA, nor do all of them together. But the Court's frequent creation, rejection, and resurrection of various rationales over the years merely highlights the insupportability of the *Feres* doctrine and the poor reasoning that created it.

Feres represents exactly the sort of precedent to which stare decisis should not apply. The case should be overruled, and the doctrine should be abandoned in military medical malpractice cases in favor of the FTCA's plain language.

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[26] *See also Shearer*, 473 U.S. at 57.

[27] *See also Rayonier*, 352 U.S. at 319; *Indian Towing*, 350 U.S. at 66-69.

II. The *Feres* Doctrine Violates The Equal Protection Guarantee And The Separation Of Powers Doctrine

The *Feres* doctrine violates both the guarantee of equal protection of the law and the doctrine of separation of powers.

A. Equal Protection

In passing the FTCA, Congress decided to establish a waiver of sovereign immunity and put all Americans on "equal footing" in litigating the civil liability of the United States for claims of tort injuries, harm, or death. 28 U.S.C. § 1346; *Costo v. United States,* 248 F.3d 863, 869 (9th Cir. 2001) (Ferguson, J., dissenting). Congress excluded FTCA claims arising out of a number of federal government activities, including "any claims arising out of the combatant activities of the military or naval forces, or the Coast Guard, during time of war." 28 U.S.C. § 2680(j). The *Feres* doctrine represents a judicially created expansion of those exclusions, an expansion effectively declaring that the members of the federal government's armed forces, including Colton Read, are "not equal citizens, as their rights against their government are less than the rights of their fellow Americans." *Costo*, 248 F.3d at 870 (Ferguson, J., dissenting) (collecting cases).

The piece of judicial legislation that is the *Feres* doctrine runs afoul of the Equal Protection guarantees of the Fifth and Fourteenth Amendments. U.S.

CONST. amends. V, XIV. As the *Feres* court itself recognized, Congress was aware of potential military servicemembers' claims when drafting the FTCA and, could have expressly excluded them if it had chosen to do so. *Feres*, 340 U.S. at 138-39. Similarly, as Congress enacted the FTCA, its decision to bar claims by military servicemembers arising in combat during time of war readily passed equal protection scrutiny, because service men and women are not a suspect class and their access to federal courts under the FTCA is not a fundamental right, *Miller v. United States,* 73 F.3d 878, 881 (9th Cir. 1995), and Congress' classification needed simply to be rationally related to a lawful government interest. *Vacco v. Quill*, 521 U.S. 793, 799-801 (1997).[28] But the rational basis standard does not permit the courts to "substitute" their "personal notions of good public policy for those of Congress." *Schweiker v. Wilson*, 450 U.S. 221, 234 (1981); *Costo*, 248 F.3d at 870 (Ferguson, J., dissenting). Importantly, it is *not* for the judiciary to "sit as a superlegislature to judge the wisdom or determinations made in areas that neither affect fundamental rights nor proceed along suspect lines[.]" *City of New Orleans v. Dukes*, 427 U.S. 297, 303 (1973).[29]

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[28] *See also Costo,* 248 F.3d at 870 (Ferguson, J., dissenting).

[29] *See also Johnson*, 481 U.S. at 702 (Scalia, J., dissenting) (arguing that the only possible justification for the confusion created by the *Feres* doctrine would be if it reflected a decision grounded in the democratic process rather than an "unauthorized rationalization gone wrong").

Ultimately, there is no rational basis for the *Feres* doctrine's treatment of military servicemembers, and the doctrine violates the guarantee of equal protection. *Costo,* 248 F.3d at 874-76 (Ferguson, J., dissenting).

B. Separation Of Powers

The *Feres* doctrine represents a judicial revision of "an unambiguous and Constitutional statute" rather than a mere interpretation of legislative action. *Costo*, 248 F.3d at 871 (Ferguson, J., dissenting).[30] Federal courts uniformly recognize that the *Feres* doctrine involves not a clarification of the FTCA but a judicially created exception to it.[31] Such "judicial re-writing" of the FTCA "runs against our basic separation of powers principles and complicates a[n] equal protection analysis of the resulting *Feres* doctrine." *Costo*, 248 F.3d at 871 (Ferguson, J., dissenting); *see* U.S. CONST. art. I, §§ 1, 7, art. II, § 1, art. III, § 1.[32]

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[30] *See also Johnson*, 481 U.S. at 702-03 (Scalia, J., dissenting).

[31] *See, e.g., Stencel Aero Eng'g Corp. v. United States*, 431 U.S. 666, 674 (1977) (Marshall, J., dissenting); *Saudi Arabia v. Nelson*, 507 U.S. 349, 374 (1993) (Kennedy, J., concurring and dissenting); *Schomer v. United States*, 59 F.3d 26, 28 (5th Cir. 1995); *Pringle v. United States*, 208 F.3d 1220, 1223 (10th Cir. 2000); *Romero by Romero v. United States*, 954 F.2d 223, 224 (4th Cir. 1992).

[32] *See also* THE FEDERALIST NO. 47 (James Madison) ("Were the power of judging joined with the legislative, the life and liberty of the subject would be exposed to arbitrary controul, for

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When confronted with an ambiguous statute, courts may be forced to take a more active role than they typically do in matters of statutory interpretation. *See Comm'r of Internal Revenue v. Asphalt Prod. Co., Inc.* 482 U.S. 117, 121 (1987). Additionally, legislative silence on an issue may also require courts to ascertain, through history or analogy, the most appropriate legal rule in a particular legislative situation. *See, e.g., Georgia-Pacific Corp. v. United States Envir. Prot. Agency,* 671 F.2d 1235, 1240 (9th Cir. 1982); *Farouki v. Emirates Bank Int'l, Ltd.,* 14 F.3d 244, 250 n.17 (4th Cir. 1994). However, federal courts should not overrule the plain language of Congressional legislation unless there is a Constitutional violation. *See Marbury v. Madison*, 5 U.S. 137, 177-179 (1803). As Justice Ferguson's dissenting opinion in *Costo v. United States* forcefully and eloquently explains, the FTCA presented the *Feres* Court with "neither ambiguity nor constitutional violation nor legislative silence." *Costo*, 248 F.3d at 871 (Ferguson, J., dissenting). Rather, the language and reasoning of *Feres* "reveal[ ] that the Court simply did not agree with Congress" after "re-evaluat[ing] the law." *Costco*, 248 F.3d at 873.[33]

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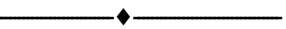
the judge would then be the legislator") (quoting Montesquieu); *City of Cleburne v. Cleburne Living Ctr.*, 423 U.S. 432, 441-42 (1985); *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 194-95 (1978).

[33] *See also* Turley, *supra* note 2 at 68 (*Feres* "represented a total departure from principles of judicial restraint and deference to the political branches" and "remains one of the most

(Continued on following page)

Feres represents a fundamental violation of separation-of-powers principles and is completely illegitimate as a result.



CONCLUSION

FOR THE ABOVE-STATED REASONS, the Petitioners, Colton J. Read and Jessica G. Read, respectfully request that certiorari be granted.

DATED: October 17, 2013

Respectfully submitted,

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Colton J. Read and
Jessica G. Read

---

extraordinary examples of the Court acting as a 'super-legislature' ")

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 13-50057
Summary Calendar

COLTON J. READ; JESSICA G. READ,

Plaintiffs-Appellants

v.

UNITED STATES OF AMERICA,

Defendant-Appellee

Appeal from the United States District Court
for the Western District of Texas
USDC No. 5:12-CV-910

(Filed Jul. 19, 2013)

Before KING, CLEMENT, and HIGGINSON, Circuit Judges.

PER CURIAM:*

Plaintiffs Colton and Jessica Read sued the United States under the Federal Tort Claims Act,

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* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4

28 U.S.C. §§ 1346(b), 2671-80, alleging that Colton Read, while on active duty in the United States Air Force, suffered injuries due to medical malpractice by military surgeons. The district court dismissed the Reads' action for lack of subject matter jurisdiction pursuant to the *Feres* doctrine, which jurisdictionally bars actions brought under the Federal Tort Claims Act for military service-related injuries to military servicemembers. *Feres v. United States*, 340 U.S. 135 (1950). The Reads argue that *Feres* was wrongly decided because, *inter alia*, it conflicts with the plain language of the Federal Tort Claims Act, and that the *Feres* doctrine is unconstitutional. Accordingly, the Reads ask us not to follow *Feres* and to reverse the district court's dismissal. For the reasons that follow, we affirm the district court's dismissal of the Reads' complaint.

I. FACTS AND PROCEDURAL HISTORY

While on active duty, Colton Read underwent laparoscopic gallbladder surgery to restore his condition such that he would be ready for deployment to Afghanistan. The surgery was performed by two Air Force surgeons at David Grant Medical Center and resulted in an injury to Colton Read's descending abdominal aorta. This injury was unsuccessfully repaired, and restricted the blood supply to Colton Read's legs. Related complications eventually required that both of Colton Read's legs be amputated. In March 2012, after extensive medical and rehabilitative

therapy, Colton Read was classified as permanently disabled and relieved from active duty.

Colton Read and his wife, Jessica Read, (the "Reads"), filed suit against the United States under the Federal Tort Claims Act ("FTCA") in federal court, each seeking damages for Colton's surgery-related injuries and disability. The United States filed a motion to dismiss for lack of subject matter jurisdiction pursuant to the *Feres* doctrine. Acknowledging that it was bound by *Feres* and our precedent, the district court held that the Reads' claims were barred under the *Feres* doctrine because (1) Colton Read's surgery was "incidental to military service" – since Colton Read was on active duty status when the surgery was performed, his surgery was intended to return him to military service, and his injury occurred at a military installation site – and (2) his receipt of medical care in a military facility by active duty military members was "activity incident to service." Accordingly, the district court granted the motion to dismiss and entered final judgment for the government.

The Reads timely appealed. On appeal, the Reads make no attempt to distinguish their case from those encompassed by the *Feres* doctrine. Rather, they ask us to disregard the doctrine and reverse the district court's dismissal, arguing that *Feres* was wrongly decided, that the *Feres* doctrine conflicts with the plain language of the FTCA, and that the doctrine is unconstitutional.

II. STANDARD OF REVIEW

As a "strict stare decisis court," we "are in no position to challenge the statutory construction utilized by the Supreme Court in [*Feres*]," nor may we disregard or overrule Supreme Court precedent. *Ballew v. Cont'l Airlines, Inc.*, 668 F.3d 777, 782 (5th Cir. 2012) (internal citations and quotation marks omitted). "The Supreme Court has sole authority to overrule its own decisions, meaning that [we] must follow the Supreme Court's directly controlling precedent." *Id.* Thus, the sole question before us is whether the district court properly dismissed the Reads' case pursuant to the *Feres* doctrine.

We review a dismissal for lack of subject matter jurisdiction *de novo*, resolving all disputed facts in favor of the nonmovant. *See United States v. Renda Marine, Inc.*, 667 F.3d 651, 655 (5th Cir. 2012); *see also Hayes v. United States*, 44 F.3d 377, 378 (5th Cir. 1995) ("[W]hether the district court properly applied *Feres* . . . to preclude Hayes's claim is a question of law which we review *de novo.*").

III. DISCUSSION

The FTCA allows the United States to be sued in federal court for the negligent or wrongful acts of its employees. 28 U.S.C. § 1346(b). It is a limited waiver of the sovereign immunity of the United States and has been strictly construed in favor of the United States. *See Vernell v. U.S. Postal Serv.*, 819 F.2d 108, 111 (5th Cir. 1987). The Supreme Court has set forth

an exception to the FTCA waiver of immunity called the "*Feres* doctrine," which holds that the government is not liable under the FTCA for injuries to servicemembers in the military whose alleged injuries arise out of or are in the course of activity incident to service. *Feres*, 340 U.S. at 146.

Irrespective of criticism of the *Feres* doctrine, the Supreme Court since *Feres* has clearly held that the government remains immune from suits by servicemembers for injuries arising out of or suffered in the course of activity incident to service. *See United States v. Johnson*, 481 U.S. 681, 692 (1987). Consistent with this rule, we have held that the *Feres* doctrine bars actions brought under the FTCA for injuries sustained by a servicemember on active duty from surgery performed by military doctors. *See Hayes*, 44 F.3d at 378-79 ("Medical malpractice by a physician employed by the military, in a military hospital, and in the course of treatment of a person in active military service has been clearly held to fall within 'the course of activity incident to service.'" (citation omitted)). The Reads have conceded that Colton Read's injuries arose out of activity incident to his military service. Thus, for the reasons articulated by the district court,[1] we find that Colton Read's

[1] In summary, the district court found that it is "undisputed that Airman Read was on active duty status at the time of his injury," and "also undisputed that he was injured at a military installation." Further, the district court found that Airman Read was ill, and that gallbladder surgery was necessary to restore him to military readiness.

injuries were "incident to service" and not actionable under the FTCA.

IV. CONCLUSION

For the foregoing reasons, we *AFFIRM* the district court's judgment.

United States District Court,
W.D. Texas,
San Antonio Division.
Colton J. READ and Jessica G. Read, Plaintiffs,
v.
UNITED STATES of America, Defendant.

Civil Action No. SA-12-CV-910-XR.
Nov. 26, 2012.

ORDER

XAVIER RODRIGUEZ, District Judge.

On this day came on to be considered Defendant's motions to dismiss (docket no. 19).

Background

At the time of this incident, Colton Read was an airman in the United States Air Force. On or about July 9, 2009, he was admitted as a patient at Travis Air Force Base's David Grant Medical Center. He was scheduled to undergo a laparoscopic *gallbladder surgery*. He alleges in his complaint that during his procedure the surgical resident, a military doctor, lacerated an aorta that resulted in massive bleeding. Ultimately as a result of the alleged medical malpractice his legs were amputated. He, and his wife, bring suit under the Federal Tort Claims Act, 28 U.S.C.A.

§§§ 1346, et seq. The Government argues that the Plaintiffs' claims are barred by the *Feres*[1] doctrine.

Analysis

Plaintiffs argue that the *Feres* doctrine lacks any basis in the language of the FTCA. They further argue that the "incident to military service" exception should be disregarded for the reasons set forth in various dissenting opinions.[2] Finally, they argue that in lieu of the *Feres* doctrine, courts should apply the discretionary function exception of the FTCA to medical malpractice claims because military discipline is not adversely affected when a service member recovers in a medical malpractice claim.

In *Kelly v. Panama Canal Com'n*, 26 F.3d 597 (5th Cir.1994), Captain James Kelly, a U.S. Army Officer assigned to Fort Kobbe in the Republic of Panama, was killed when the mast of the catamaran he was sailing struck hanging electrical wires. Captain Kelly was on active duty, but off-duty at the time. He obtained the catamaran from the Rodman-Marina Sailing Club, which was a civilian-run club

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[1] *Feres v. United States*, 340 U.S. 135, 71 S.Ct. 153, 95 L.Ed. 152 (1950).

[2] *See Johnson v. U.S.*, 481 U.S. 681, 688-700, 107 S.Ct. 2063, 95 L.Ed.2d 648 (1987) (Scalia, J. dissenting); *Costo v. U.S.*, 248 F.3d 863, 869-70 (9th Cir.2001) (Ferguson, J. dissenting); *O'Neil v. U.S.*, 140 F.3d 564, 565 (3d Cir.1998) (Becker, C.J.dissenting).

located on the Rodman Naval Station, for his recreational trip.

The Panama Canal Commission argued that the *Feres* doctrine applied because the injuries arose out of or were in the course of activity incident to service. In rejecting the Commission's argument, the Fifth Circuit restated "three rationales for the *Feres* doctrine: 1) the distinctively federal nature of the relationship between the government and members of its armed forces, which argues against subjecting the government to liability based on the fortuity of the situs; 2) the availability of alternative compensation systems; and 3) the fear of damaging the military disciplinary structure. *See Stencel Aero Eng. Corp. v. United States*, 431 U.S. 666, 671-72, 97 S.Ct. 2054, 2057-58, 52 L.Ed.2d 665 (1977)." In this case, the Fifth Circuit noted that Captain Kelly was injured outside the military installation and engaged in the purely recreational activity of sailing a catamaran rented from a civilian-run marina.

Courts have been directed to "examine the totality of the circumstances to determine whether a serviceman's injury was incident to military service. *Parker v. United States*, 611 F.2d 1007, 1013 (5th Cir.1980). In particular, we consider: (1) the serviceman's duty status; (2) the site of his injury; and (3) the activity he was performing. *Id.* at 1013-15." *Schoemer v. U.S.*, 59 F.3d 26, 28 (5th Cir.1995).

In this case it is undisputed that Airman Read was on active duty status at the time of his injury. It

is also undisputed that he was injured at a military installation. Although not directly addressed by either party, it appears uncontested that he was ill (in need of *gallbladder surgery*), and that such surgery was necessary to restore him to military readiness. The Fifth Circuit treats "the serviceman's duty status as the most important factor because it indicates the nature of the nexus between the serviceman and the Government at the time of injury." *Id.* at 28-29. In addition, in medical malpractice cases, the Fifth Circuit replaces the third prong (activity the service member was performing) with "whether the serviceman's treatment was intended to return him to military service." *Id.* at 29.

Although this Court tends to agree with Plaintiffs' argument that the usual medical malpractice claim will not damage the military disciplinary structure, this Court is nevertheless bound by Supreme Court and Fifth Circuit authority. The majority opinions in these cases hold that receipt of medical care in military facilities by members of the military on active duty is activity incident to service.[3] In addition, the Fifth Circuit has held that *Feres* applies even if the underlying ailment was not caused or aggravated by any military activity or duty, and the surgery was elective and not necessary in order for

[3] *See also Hudson v. U.S.*, 461 Fed. Appx. 541 (9th Cir.2011); *Hancox v. Performance Anesthesia, P.A.*, 455 Fed. Appx. 369 (4th Cir.2011); *France v. U.S.*, 225 F.3d 658 (6th Cir.2000); *Sloan v. U.S.*, 208 F.3d 218 (8th Cir.2000).

the service member to perform any of his responsibilities within the military. *See Hayes v. U.S. on Behalf of U.S. Dept. of Army*, 44 F.3d 377 (5th Cir.1995).

Conclusion

The Government's motion to dismiss (docket no. 19) is granted and this case is DISMISSED. The Clerk is directed to enter judgment according to Rule 58.

It is so ORDERED.

AO 450 (Rev. 01/09) Judgment in a Civil Action

UNITED STATES DISTRICT COURT
for the
Western District of Texas

COLTON J. READ and JESSICA G. READ *Plaintiff* v. UNITED STATES OF AMERICA *Defendant*	)))))))	Civil Action No. SA-12-CV-910-XR

JUDGMENT IN A CIVIL ACTION

The court has ordered that *(check one):*

☐ the plaintiff *(name)* _____ recover from the defendant *(name)* _____the amount of _____ dollars ($_____), which includes prejudgment interest at the rate of _____%, plus postjudgment interest at the rate of _____%, along with costs.

☐ the plaintiff recover nothing, the action be dismissed on the merits, and the defendant *(name)* _____ recover costs from the plaintiff *(name)* _____

☐ other:

This action was *(check one):*

☐ tried by a jury with Judge _____ presiding, and the jury has rendered a verdict.

☐ tried by Judge _____ without a jury and the above decision was reached.

☑ decided by Judge Xavier Rodriguez GRANTING the Government's Motion to Dismiss.

Date: 11/26/2012 *CLERK OF COURT*

WILLIAM G. PUTNICKI

/s/ Rosanne M. Garza
Rosanne M. Garza
Signature of Clerk or Deputy Clerk

United States Statutes

Title 28. JUDICIARY AND JUDICIAL PROCEDURE

Part IV. JURISDICTION AND VENUE

Chapter 85. DISTRICT COURTS; JURISDICTION

Current through P.L. 112-90

§ 1346. United States as defendant

(a)

The district courts shall have original jurisdiction, concurrent with the United States Court of Federal Claims, of:

(1)

Any civil action against the United States for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, or any penalty claimed to have been collected without authority or any sum alleged to have been excessive or in any manner wrongfully collected under the internal-revenue laws;

(2)

Any other civil action or claim against the United States, not exceeding $10,000 in amount, founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United

States, or for liquidated or unliquidated damages in cases not sounding in tort, except that the district courts shall not have jurisdiction of any civil action or claim against the United States founded upon any express or implied contract with the United States or for liquidated or unliquidated damages in cases not sounding in tort which are subject to sections 7104(b)(1) and 7107(a)(1) of title 41. For the purpose of this paragraph, an express or implied contract with the Army and Air Force Exchange Service, Navy Exchanges, Marine Corps Exchanges, Coast Guard Exchanges, or Exchange Councils of the National Aeronautics and Space Administration shall be considered an express or implied contract with the United States.

(b)

(1)

Subject to the provisions of chapter 171 of this title, the district courts, together with the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, 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.

(2)

No person convicted of a felony who is incarcerated while awaiting sentencing or while serving a sentence may bring a civil action against the United States or an agency, officer, or employee of the Government, for mental or emotional injury suffered while in custody without a prior showing of physical injury.

(c)

The jurisdiction conferred by this section includes jurisdiction of any set-off, counterclaim, or other claim or demand whatever on the part of the United States against any plaintiff commencing an action under this section.

(d)

The district courts shall not have jurisdiction under this section of any civil action or claim for a pension.

(e)

The district courts shall have original jurisdiction of any civil action against the United States provided in section 6226, 6228(a), 7426, or 7428 (in the case of

the United States district court for the District of Columbia) or section 7429 of the Internal Revenue Code of 1986.

(f)

The district courts shall have exclusive original jurisdiction of civil actions under section 2409a to quiet title to an estate or interest in real property in which an interest is claimed by the United States.

(g)

Subject to the provisions of chapter 179, the district courts of the United States shall have exclusive jurisdiction over any civil action commenced under section 453(2) of title 3, by a covered employee under chapter 5 of such title.

Cite as 28 U.S.C. § 1346

United States Code Annotated Currentness

TITLE 28. JUDICIARY AND JUDICIAL PROCEDURE (REFS & ANNOS)

PART VI. PARTICULAR PROCEEDINGS

CHAPTER 171. TORT CLAIMS PROCEDURE (REFS & ANNOS)

§ 2674. Liability of United States

The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages.

If, however, in any case wherein death was caused, the law of the place where the act or omission complained of occurred provides, or has been construed to provide, for damages only punitive in nature, the United States shall be liable for actual or compensatory damages, measured by the pecuniary injuries resulting from such death to the persons respectively, for whose benefit the action was brought, in lieu thereof.

With respect to any claim under this chapter, the United States shall be entitled to assert any defense based upon judicial or legislative immunity which otherwise would have been available to the employee of the United States whose act or omission gave rise to the claim, as well as any other defenses to which the United States is entitled.

With respect to any claim to which this section applies, the Tennessee Valley Authority shall be entitled to assert any defense which otherwise would have been available to the employee based upon judicial or legislative immunity, which otherwise would have been available to the employee of the Tennessee Valley Authority whose act or omission gave rise to the claim as well as any other defenses to which the Tennessee Valley Authority is entitled under this chapter.

United States Statutes

Title 28. JUDICIARY AND JUDICIAL PROCEDURE

Part VI. PARTICULAR PROCEEDINGS

Chapter 171. TORT CLAIMS PROCEDURE

Current through P.L. 112-90

§ 2680. Exceptions

The provisions of this chapter and section 1346(b) of this title 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 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.[1]

(d)

Any claim for which a remedy is provided by chapter 309 or 311 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.

[(g)

Repealed. Sept. 26, 1950, ch. 1049, §13(5), 64 Stat. 1043.]

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[1] So in original.

(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, out of assault, battery, false imprisonment, false arrest, abuse of process, or malicious prosecution. For the purpose of this subsection, "investigative or law enforcement office" 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 cooperatives.

Cite as 28 U.S.C. § 2680

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

COLTON J. READ AND JESSICA G. READ,	§	
Plaintiffs,	§	**CIVIL ACTION NO.**
VS.	§	
UNITED STATES OF AMERICA,	§	**4-12-CV-191A**
Defendant.	§	

PLAINTIFFS' ORIGINAL COMPLAINT

(Filed Mar. 30, 2012)

TO THE HONORABLE JUDGE OF SAID COURT:

COME NOW, Plaintiffs Colton J. Read and Jessica G. Read (collectively the "Plaintiffs") and file this their Plaintiffs' Original Complaint against Defendant United States of America (the "Defendant United States") in the above numbered and entitled civil action (the "civil action" or "case"), and would respectfully show the Court as follows:

I. INTRODUCTION

A. SUMMARY OF ACTION

1. This is a civil action brought by the Plaintiffs Colton J. Read and Jessica G. Read against Defendant United States of America (the "United States") for personal injuries, damages, interest, court costs,

and general relief under the Federal Tort Claims Act ("FTCA"), 28 U.S.C. §§ 1346, 2671-2680. In this complaint, the Plaintiffs seek damages from Defendant United States, by and through its agency, the United States Air Force ("USAF"), arising from a laparoscopic cholecystectomy surgical procedure initiated and converted to an emergent exploratory laparotomy through a mid-line abdominal incision performed on 20-year old Airman First Class Colton Read by United States Air Force ("USAF") physicians and/or health care providers who punctured, or lacerated, and/or surgically injured and/or failed to repair or bring about repair of Colton Read's descending abdominal aorta in a timely, proper, and adequate manner, resulting in significant internal bleeding, loss of blood supply and/or adequate blood supply to his lower extremities, and eventual above-the-knee and mid-thigh amputations of his right and left legs. In this civil action, Plaintiffs assert their claims in keeping with the spirit of George Washington's proclamation that "[W]hen we assumed the soldier, we did not lay aside the citizen."

B. PARTIES

2. Plaintiff Colton J. Read ("Colton Read") is an individual and citizen of the State of Texas.

3. Plaintiff Jessica G. Read ("Jessica Read") is an individual and citizen of the State of Texas.

4. Defendant United States of America (the "United States") may be served by delivering a copy of the summons and complaint to the United States

Attorney for the Northern District of Texas at 801 Cherry Street, Suite 1700, Fort Worth, Texas 76102; and by sending a copy of the summons and of the Plaintiffs' Original Complaint by registered or certified mail to the Attorney General of the United States, Eric H. Holder, Jr., 950 Pennsylvania Avenue, NW, Washington DC, 20530-0001; and by also sending a copy of the summons and Plaintiffs Original Complaint by registered or certified mail to the officer or agency whose action is attacked in this suit but who is not made a party to this suit in accordance with Fed. R. Civ. P. 4(i)(1).

C. JURISDICTION AND VENUE

5. The Court has jurisdiction over the subject matter of this civil action under the Federal Tort Claims Act ("FTCA") 28 U.S.C. § 1346(b) because this action involves a claim by the Plaintiffs against the Defendant United States for personal injury caused by the negligent and/or wrongful acts and/or omissions of federal government officers or employees while acting within the scope of their offices and/or employment.

6. Venue is proper in this judicial district under 28 U.S.C. § 1402(b) because the Plaintiffs Colton Read and Jessica Read reside in this judicial district.[1]

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[1] *See* 28 U.S.C. § 1402(b) ("Any civil action or a tort claim against the United States under subsection (b) of section 1346 of this title . . . may be prosecuted only in the judicial district

(Continued on following page)

D. CONDITIONS PRECEDENT

7. Plaintiffs Colton Read and Jessica Read, by and through their attorneys, timely presented this claim in writing to the Defendant United States, through the United States Air Force ("USAF") in accordance with the Federal Tort Claims Act, 28 U.S.C. §§ 2401(b), 2675(a). Defendant United States denied the Plaintiffs' claim; and this civil action is filed within six (6) months of the Defendant United States' final written notice of its denial of the claim.

II. FACTUAL BACKGROUND

A. IMPROPERLY PERFORMED LAPAROSCOPIC GALLBLADDER SURGERY ON AIRMAN READ RESULTING IN AORTIC INJURY AND LACK OF BLOOD SUPPLY TO HIS LEGS

8. On or about the morning of July 9, 2009, Airman Colton Read,[2] accompanied by his wife, Jessica Read, traveled from Beale Air Force Base, California,

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where the plaintiff resides or wherein the act or omission complained of occurred").

[2] Plaintiff Colton Read was 19 years old when he enlisted in the United States Air Force on or about July 7, 2007. After completing his basic training at Lackland Air Force Base, Texas, he received further training at Goodfellow Air Force Base, Texas from on or about September 1, 2007 to March 23, 2008. Airman Read was assigned to duty and transferred to Beale Air Force Base, California ("Beale AFB") on or about April 2008, where he served as an Airman First Class and where he performed duties and responsibilities of an imagery analyst.

to the David Grant Medical Center ("DGMC") located at 60 Medical Group (AMC), 101 Bodin Circle, Travis Air Force Base, California ("Travis AFB"), where Airman Read was admitted to DGMC as a patient for a laparoscopic cholecystectomy surgical procedure, also commonly known as, laparoscopic gallbladder surgery, to be performed on that date. As of June-August 2009, DGMC was the United States Air Force's ("USAF") largest inpatient medical facility on the West Coast of the United States, the largest inpatient military treatment facility of the Air Mobile Command ("AMC"), the second largest such facility in the USAF, and included several other major features.[3]

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[3] As of June-August 2009, the DGMC served approximately 85,000 military beneficiaries throughout eight western states; as a Joint Commission on Healthcare Organization Accreditation ("JCHOA") accredited teaching hospital, the DGMC provides postgraduate training programs in family medicine, radiology, surgery transitional year, dentistry, oral surgery nurse anesthesia, pharmacy, and social work, as well as training for technicians and clinical nurses; the DGMC provided or arranged for comprehensive community and referral medical and health care, readiness, education, research, teleradiology services, aeromedical staging and Department of Defense/Veterans Affairs joint ventures; the DGMC encompassed over 808,475 net square feet with approximately 3,662 rooms; the DGMC operated with an annual budget of approximately $119 million and was staffed by nearly 2,500 personnel, which included almost 600 active duty officers, over 1,000 enlisted personnel, nearly 70 Individual Mobilization Augmentee reservists, over 260 Civil Service Civilians, nearly 350 contractors, over 70 red Cross workers and 160 dedicated military retiree volunteers; the DGMC was described by the USAF as a "state-of-the-art" medical center in 1988 at a cost of $193 million; the DGMC is over 808,475 square

(Continued on following page)

9. At material times involved in this civil action and the present, the United States Air Force was and is an agency of the Defendant United States; and the Defendant United States, by and through its agency, the USAF, owned, operated, and controlled the above-mentioned DGMC health care institution and facilities at Travis AFB, and by and through its agency, the USAF, staffed the DGMC with its employees, agents, and servants, including physicians, nurses, and other health care providers.

10. After admission to the DGMC, Airman Read received preoperative care including administration of drugs in preparation for his laparoscopic gallbladder surgical procedure. At approximately 8:40 a.m. on or about July 9, 2009, Airman Read was taken to a DGMC operating room ("OR") where he was placed under general anesthesia and rendered unconscious and insensitive to pain for the laparoscopic gallbladder procedure. The operating team consisted of USAF Major Kullada O. Pichakron, M.D. ("Dr. Pichakron"), a general surgeon, Captain Ryan J. Schutter, M.D. ("Dr. Schutter"), a first-year postgraduate general surgery resident, as well as a physician anesthesiologist, nurses, and other health care providers. With

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feet with 3,662 rooms; and it was staffed to operate 84 inpatient beds (expandable to 176) and 16 aeromedical staging flight beds (expandable to 40); DGMC was divided into 3 separate patient zones composed of inpatient nursing units, diagnostic and treatment areas, and outpatient clinics all designed around 5 large courtyards, which provide orientation for staff and patients, as well as natural lighting and views for patient rooms.

laparoscopic cholecystectomy under the applicable standards of reasonable and prudent medical and surgical care and technique, Airman Read's gall-bladder was to be surgically removed by instruments through tubes that were to be inserted through small incisions or portals (ports) in his abdominal wall. These incisions and portals were to be made by use of surgical trocar device(s) and system(s) and/or Verres needle(s) instruments. The entire procedure was to be performed on Airman Read with the assistance of a camera called a "laparoscope," that also was intended to be placed in his abdomen through the incisions or ports.[4]

11. In the laparscopic cholecystectomy procedure which began at or about 9:24 a.m., Dr. Pichakron was the operating surgeon, and, unbeknownst to Airman Read, she was assisted in the surgery by Dr. Schutter, a first-year postgraduate general surgery resident in training to become a general surgeon. During this laparscopic cholecystectomy procedure, the following events occurred:

a. Under Dr. Pichakron's supervision, the surgical resident, Dr. Schutter, started the

[4] Laparoscopic cholecystectomy was initially introduced as a form of gallbladder surgery in the United States in 1990 and in a very brief time it revolutionized surgical gallbladder removal practice among general surgeons. As of 2009, approximately 90 percent of cholecystectomies (gallbladder surgeries) were performed laparoscopically. Laparoscopic cholecystectomy as of 2009 had lessened postoperative discomfort, shortened the hospital stay, and reduced sick leave of patients undergoing the operation.

procedure by making an incision just below Colton Read's umbilicus and inserting the first surgical trocar port into his abdomen in an improper manner which resulted in the trocar's traumatic puncture, laceration, or injury to the lower section of Airman Read's aorta just above the point where his aorta divided into the two iliac arteries that supplied blood to his legs. This aortic puncture, laceration, or injury was about 9 to 11 millimeters (mm) in length, and it caused massive bleeding in Airman Read's retroperitoneal area, a condition also referred to as a "retroperitoneal hematoma." However, Dr. Pichakron and Dr. Schutter did not recognize this traumatic injury to Airman Read's aorta until later in the surgery. At that point, as Dr. Pichakron observed Dr. Schutter's insertion of the trocar, she became concerned about how quickly the trocar went into Colton Read's abdomen, the amount of pressure that Dr. Schutter had used when inserting the trocar; and with the placement of the trocar, there was noted to be some arterial bleeding. Dr. Pichakron intervened and directed Dr. Schutter to stop inserting the trocar. At that point, however, Dr. Schutter had already punctured, lacerated, or otherwise injured Colton Read's aorta with the trocar. Dr. Pichakron took over performing the surgery on Colton Read. She removed the trocar obturator, inflated Airman Read's abdomen with carbon dioxide gas, put a camera through the surgical port and looked inside his abdominal cavity. While Dr. Pichakron

and Dr. Schutter indicated that they saw some blood in Airman Read's abdominal cavity, they did not notice any arterial bleeding. Initially, both Dr. Pichakron and Dr. Schutter indicated that they saw no large or sustained accumulation of blood, they assumed the bleeding was from a source somewhere in the connective tissue that attached Airman Read's intestine to his abdominal wall which also contained the blood and lymphatic system. Dr. Pichakron placed three more surgical ports under Colton Read's right rib cage for surgical instruments and she placed another port for instrument access to assist her in looking for the bleeding source. Dr. Pichakron looked in Airman Read's abdomen for several minutes, but she could not find a specific source of bleeding. While Dr. Pichakron was looking into Airman Read's abdomen for the bleeding source, the anesthesia team noticed the appearance of inconsistent readings on the non-invasive blood pressure cuff providing vital signs which they believed to be a mechanical malfunction. The anesthesia team evaluated connections and replaced the blood pressure cuff that appeared to be malfunctioning. After applying a replacement blood pressure cuff, the anesthesia team was still unable to get Colton Read's blood pressure readings at or about 9:40 a.m., and a member of the team noticed that Airman Read's body appeared to be turning pale in color. Dr. Pichakron was notified by the anesthesia team about Airman Read's blood pressure problem and they discussed

giving him a constrictive medication to raise his blood pressure.

b. At or about 9:43 a.m., Dr. Pichakron converted the laparoscopic gallbladder surgery to an open "exploratory laparotomy" surgery with a large incision in Colton Read's abdomen to continue looking inside his abdominal cavity for the bleeding source. A call was also made for additional surgeons and anesthesiologists to assist in Airman Read's surgery. While Dr. Pichakron was looking inside Airman Read's abdominal cavity during the exploratory laparotomy, she recognized a large contained collection of blood in the back of Airman Read's abdominal cavity behind his abdominal organs, and she assessed an injury to his artery or vein consisted of a "retroperitoneal hematoma." Dr. Pichakron found the retroperitoneal hematoma extended from just below the point where Airman Read's arteries branched off from his aorta to his kidneys down to his aortic bifurcation. She also found that the retroperitoneal hematoma looked like a blood-filled balloon that was about 5 to 7 inches in length and 3 to 5 inches wide. Shortly thereafter, Dr. Pichakron surgically entered into the retroperitoneal hematoma to locate the specific site of bleeding and saw a large amount of bleeding. However, Dr. Pichakron did not locate the exact site of the bleeding. About 2500 cubic centimeters (cc) of blood was suctioned from Airman Read's abdomen during this time of the surgery. Eventually, Dr. Pichakron got manual control of Colton Read's bleeding by

putting direct pressure on the bleeding area and the anesthesia team administered intravenous (IV) fluids and blood products to Airman Read. She also tried to control Airman Read's bleeding by attempting to put a vascular clamp above his aortic injury to stop the bleeding and allow her to see the extent of the injury so it could be repaired. Her first attempt at placing a clamp on the upper portion of his aorta was unsuccessful, and she successfully put a clamp on his aorta in her second attempt. This clamping significantly reduced the bleeding. Next, Dr. Pichakron saw and found that the source of Colton Read's bleeding was a 9 to 11mm laceration to his "distal aorta" just above the aortic bifurcation, and she put a clamp on the "middle section" of his aorta to control his bleeding.

c. Following this aortic clamping, Dr. Pichakron then tried to repair Colton Read's aortic laceration injury with sutures. According to Dr. Pichakron's written operation report, the "injury was debrided and repaired using a 3-0 Prolene suture closing the arteriotomy transversely in an interrupted fashion," and her written transfer summary states that Airman Read's aortic injury was "repaired primarily with a 3-0 interrupted Prolene suture." After putting in the sutures, Dr. Pichakron's operative report and sworn statement states that at or about 10:42 a.m., she removed the aortic clamps to test her attempted repair of Airman Read's aortic injury, saw "a little bit of continued bleeding and additional Prolene sutures were placed."

Actually, Dr. Pichakron had departed from applicable standards of medical care by attempting to repair Colton Read's aortic injury in that she failed to timely, properly, and adequately repair his aortic injury in a manner which resulted in a loss or significant reduction of adequate blood supply to his right and left legs. During Dr. Pinchekron's attempt to repair Airman Read's aortic injury, the anesthesia team worked to resuscitate him and maintain his vital signs. And although Dr. Pichakron indicated that she assessed measurable blood flow with a pulse in both common iliac arteries that took blood to Airman Read's right and left legs, one or more anesthesia team or operative team members assessed that he did not have adequate blood flow to his legs. While Dr. Pichakron was out of the operating room visiting with Colton Read's wife, Jessica Read, the anesthesia or operative team performed pulse exams on his lower extremities and assessed that his toes were white, pulses in his feet could not be felt, Doppler ultrasound attempts to find pulses in his feet were unsuccessful and his feet were very cold to touch. Other members of the operating and/or anesthesia team evaluated and assessed that the blood flow to his legs was either absent, inadequate, or less than optimal. These concerns about the absent or inadequate blood flow to Airman Read's lower extremities were conveyed to Dr. Pichakron, but she either denied being told about the possible change in the pulse exams of his lower extremities or she assessed that

his blood flow problems were due to his loss of blood and the medication used to maintain his blood pressure during the surgery. Dr. Pichakron then examined Airman Read's abdominal area, assessed he had no other injuries, irrigated and drained his abdomen, placed topical anti-bleeding agents on the area where she attempted to repair his aortic injury, packed his abdomen with gauze and the large abdominal incision was not closed with sutures since a vacuum dressing was used to temporarily close his abdomen that would allow later surgical re-entry of his abdominal cavity without having to make another large incision. At the end of the surgery, Colton Read had lost an estimated 3500 cc's or 3.5 liters of blood, but he was assessed as stable due to the anesthesia team's resuscitation efforts. Colton Read's gallbladder was not removed during this surgery. The surgery on Colton Read ended at or about 11:07 a.m.

12. Postoperatively, Colton Read was transported in critical condition to the Intensive Care Unit ("ICU") for additional resuscitation and observation. While Airman Read was in the ICU, Dr. Pichakron planned to continue resuscitation and further treatment until he had stabilized from the blood loss, shock, and the surgery. It was Dr. Pichakron's assessment and belief that any further surgery such as removing his gallbladder or closing his abdomen would cause unnecessary delay and potential complicate his resuscitation. Dr. Pichakron also planned to allow an adequate

period of observation and once Airman Read was stable, she intended to take him back to the operating room for a second look at his abdomen to check the aortic repair she believed that she had performed, remove his gallbladder, and suture his abdomen closed.

13. As time progressed with Colton Read in the ICU, the condition of his lower extremities did not improve and the ischemic condition of his right and left legs worsened. Assessments by his physicians, nurses, and other health care providers of his legs continued to deteriorate from pale to mottled as time passed. An ultrasound study was performed on Airman Read in the ICU at or about 12:15 p.m. and it revealed abnormal non-pulsing blood flow in both of his legs. At that time, a decision was made to further investigate the cause of this condition in Airman Read's legs using an angiogram which was a special x-ray test that used dye injected through the arterial system to show the anatomy of that system. Airman Read was transported from the ICU to the Interventional Radiology ("IR") area for an angiogram study that began at or about 1:35 p.m. During the angiogram in the IR area, a DGMC medical staff cardiothoracic surgeon (the "CT surgeon") arrived in the IR area to assist with Airman Read's care, where he was informed about Airman Read's lower extremities ischemic condition and he had discussions with an interventional radiologist, Ezall Askew, M.D., and Dr. Pichakron concerning Airman Read's aortic injury, Dr. Pichakron's belief that she had repaired the injury, the interpretation of the femoral angiogram study

performed, and whether they should transfer Airman Read to University of California-Davis Medical Center ("UCDMC") in Sacramento, California, to ascertain the specific cause of his decreased blood flow and perfusion to his lower extremities. These physicians discussed whether Airman Read's lower extremities ischemia was due to a blood clot versus dissection of his right and/or left femoral arteries. Dr. Pichakron, the CT surgeon, and Dr. Askew, and perhaps other physicians, decided to continue to treat Airman Read at the DGMC. Based on the results of the angiogram, Dr. Eskew conveyed to Dr. Pichakron that he could not offer a stent or TPA for Airman Read and that he probably needed the services of a vascular surgeon. It was eventually determined by Dr. Pichakron that a vascular surgeon was required to address the complications identified at and below the site of Airman Read's aortic injury and perceived surgical repair. At or about 2:30 p.m., a decision was made by Dr. Pichakron to transport Airman Read to the UCDMC for further medical diagnosis, assessment, care, and treatment by a vascular surgeon. Administrative steps were initiated to transfer Airman Read to UCDMC as the Interventional Radiology staff prepared him for transport back to the ICU.

B. Transfer of Airman Read to UCDMC and Amputation of His Legs

14. At or about 3:10 p.m. on July 9, 2009, a Reach Air Ambulance (RAA) helicopter was arranged to transport Colton Read to the UCDMC in

Sacramento, California after both a receiving physician had been confirmed and a bed secured for Airman Read at UCDMC. The Reach Air Ambulance helicopter arrived and landed at Travis AFB at or about 3:36 p.m. The RAA transport crew arrived in the DGMC ICU at or about 3:50, and the transport crew and ICU staff proceeded to prepare and transfer Airman Read to the helicopter medical support equipment. Airman Read was taken out of the ICU at or about 4:43 p.m., transported to the RAA helicopter and the helicopter was airborne and heading to UCDMC at or about 5:01 p.m.

15. At or about 5:17 p.m., the RAA helicopter with Colton Read aboard arrived at the UCDMC in Sacramento, California. On arrival in the UCDMC ICU, Airman Read was assessed as hemodynamically stable, but found to have no pulses at the femoral arteries or distally in his lower extremities. He was intubated and sedated and a detailed motor and sensory was not possible, but it was medically assessed that he had rigor of his right leg and his right knee could not be bent. He was also assessed with rigor of the left calf, with inability to bend his left ankle. Airman Read's lower extremities were pale and cool with no obtainable Doppler signals of any pulses. He was found to have an open abdomen with a vacuum dressing in place. A medical assessment was made that Airman Read had severe lower extremity ischemia, and a review of the radiology imaging studies that were forwarded with him suggested aortic occlusion at the level of his aortic injury. Colton Read was

taken to an operating room where he was managed with general anesthesia and he had previously been intubated. On surgical exploration by David L. Dawson, M.D., a vascular surgeon, there was approximately 500 ml of clotted blood in his pelvis and abdomen. There was no active bleeding, and his stomach was distended. A defect was observed in the mesentery of the ileum suggestive of a site where a surgical instrument or trocar had been passed; and several puncture wounds on the lateral abdomen consistent with iatrogenic wounds were also found. The large intestine was found to be normal and there was some hemorrhagic staining of the omentum. Retroperitoneal hematoma and ecchymotic discoloration was found at the base of the mesentery. Airman Read's aorta had been exposed in the retroperitoneum below the renal arteries, evidence of prior supraceliac crossclamping was noted, and there were multiple large Prolene sutures in the distal portion of his abdominal aorta just proximal to the aortic bifurcation. Airman Read's aorta was found to be pulsatile above that level and non-pulsatile below that level. After gaining vascular control and opening the aorta by removing the previously placed sutures, Dr. Dawson encountered a plug of thrombus that was completely occluding the aorta. Dr. Dawson removed the thrombus and his inspection of the inner lumen of the aorta showed that there was a disruption of the intima of the posterior wall and subintimal staining, and there did not appear to be an elevated intimal flap or dissection. Intraoperative assessment found aortic occlusion and distal limb artery thrombosis in

Airman Read; and surgical exploration of the muscle compartments of his legs revealed evidence of severe ischemia. A thrombectomy of the femoral, popliteal, and infrapopliteal arteries, along with four compartment fasciotomies, were performed on Airman Read's left leg. With the medical determination that Airman Read's right leg was not viable and he appeared to be developing systemic complications from myonecrosis, amputation of his right leg was deemed indicated. A through-knee amputation of Colton Read's right leg was then performed, and his left leg wounds were partially closed with silastic tapes and vacuum assisted dressing was applied.

16. Later on or about July 10, 2009, a through the knee amputation was performed on Airman Read's left leg and his right leg was further amputated to above the knee. Over the next few weeks, Colton Read underwent major limb salvage surgeries to save part of his legs for prosthetics and he became a double above the knee amputee, with his right leg amputated through his thigh and his left leg amputated just above his knee, and he subsequently underwent multiple surgical revisions on his amputated legs.

C. TRANSFER OF AIRMAN READ TO THE CENTER FOR THE INTREPID

17. On or about August 6, 2009, Colton Read was discharged from UCDMC and he was transferred to the Center for the Intrepid (CFI), located at the Brooke Army Medical Center (BAMC), Fort Sam

Houston, Texas for rehabilitation and therapy due to his double amputation condition. At the CFI and BAMC, Colton Read has received extensive medical and health care diagnosis care and treatment, including prosthetics and physical/occupational rehabilitation for his right and left leg amputation conditions, surgical treatment of hemorrhoids that developed from almost always being in a sitting position, implantation of a dorsal column stimulator, and eventual gallbladder removal surgery on or about February 9, 2010, and other medical health care and treatment.

III. COUNT 1 – PLAINTIFFS CLAIM AGAINST DEFENDANT UNITED STATES UNDER THE FEDERAL TORT CLAIMS ACT

A. THE FEDERAL TORT CLAIMS ACT

18. The Federal Tort Claims Act ("FTCA"), 28 U.S.C. §§ 1346, 1402, 1504, 2110, 2401, 2402, 2411, 2412, 2671-2680[5] eliminated the total freedom from litigation the United States government had long enjoyed under the common law doctrine of "sovereign immunity"[6] and abrogated "the federal government's

[5] The Federal Tort Claims Act was enacted by Congress on August 2, 1946. *See Federal Tort Claims Act*, 60 Stat. 843 (1946). In 1948, the FTCA was repealed and re-enacted in its current form under the same FTCA name 28 U.S.C. §§ 1291, 1346(b), 1402, 1504, 2110, 2401, 2402, 2411, 2412, and 2671-2680 when Title 28 of the United States Code was recodified.

[6] For general background on the doctrine of sovereign immunity *See* Louis L. Jaffe, *Suits Against Governments and Officers: Sovereign Immunity*, 77 HARV. L. REV. 1, 1 (1963).

(Continued on following page)

tort immunity in sweeping terms."[7] Under the current FTCA, the statute broadly waives the federal government's immunity from tort suits, *see* 28 U.S.C. § 1346(b) (2009), but reserves thirteen significant government activities where immunity is preserved.

The early U.S. Supreme Court rejected the Enlgish [sic] doctrine of sovereign immunity in *Chisholm v. Georgia*, 2 U.S. 419 (1793), by holding an individual could sue a state. In response, Congress adopted the Eleventh Amendment to the Constitution prohibiting suits against a state by cities of another state. *See* U.S. Const. Amend. XI. While the Eleventh Amendment precludes suits against a state, the Constitution is silent as to the United States immunity from suit. This issue was remedied in *Cohens v. Virginia*, 19 U.S. 264 (1821) where the U.S. Supreme Court ruled that the United States is immune from suit unless Congress consented to suit and waived sovereign immunity. *See* 19 U.S. 411-12. *See also* Jaffe, HARV. L. REV. 1, 20 (1963). Between 1821 and 1945, Congress enacted a series of statutes that provided limited tort remedies for individuals and, these laws gradually repudiated immunity to some extent. After July 28, 1945 the crash of a military aircraft into the Empire State Building, killing and injuring several people and causing about $1 million in damage, Congress passed the Federal Tort Claims Act ("FTCA") on August 2, 1946. *See* Lester S. Jayson & Robert C. Longstreth, *Handling Federal Tort Cairns*, 2-6 (2006); Federal Tort Claims Act, 60 Stat. 843 (1946); *see also* http://en.wikipedia.org/wiki/B-25_Empire_State_Building_crash and http://www.npr.org/templates/story/story.php?storyId=92987873 (Last visited March 30, 2012); The FTCA of 1946 broadly waived the United States' sovereign immunity for torts and retroactively allowed the Empire State Building military aircraft crash victims to file suit for damages against the United States. *See* FTCA, 60 Stat. 843 § 410(a).

[7] *See* R. Matthew Molash, *Transition: If You Can't Save Us, Save Our Families: The Feres Doctrine and Servicemen's Kin, 1983* U. ILL. L. REV. 317, 319 (1983).

See 28 U.S.C. § 2680 (2009). The FTCA generally provides for the payment of money damages for persons or property injured as a result of the negligent actions of federal government officers or employees acting within the scope of their office or employment. *See* 28 U.S.C. § 1346(b) (2009). Further, the FTCA provides that the federal government is liable "in the same manner and to the same extent as a private individual under like circumstances," *see* 28 U.S.C. § 2674 (2009), meaning that, if the same negligent conduct would subject a private person to liability, the federal government also would be liable. *See* 28 U.S.C. § 1346(b) (2009).

19. The FTCA, however, restricts a plaintiff-claimant's recovery in several ways. Claimants are initially required to submit an administrative claim to the appropriate federal governmental agency before filing a civil suit for damages. *See* 28 U.S.C. § 2675(a). This FTCA remedy is generally exclusive, *see* 28 U.S.C. § 2679(b)(1); and the statute bars tort claims against the individual federal governmental officer or employee who acted negligently in harming the claimant. *See* 28 U.S.C. § 2676. If the claimant is dissatisfied with the outcome of the administrative proceeding, the claimant may file a civil suit in federal court. *See* 28 U.S.C. 2675(a). A federal district court judge, rather than a jury, hears the plaintiff-claimant's case against the United States under the FTCA. *See* 28 U.S.C. § 2402. Moreover, the plaintiff-claimant is not allowed to recover punitive damages or prejudgment interest. *See* 28 U.S.C. § 2674. Venue

is established in the judicial district in which the plaintiff-claimant resides or in which the negligent act or omission complained of occurred. *See* 28 U.S.C. § 1402(b). FTCA further provides that the substantive tort law or omission occurred controls issues of the United States' tort liability to the plaintiff-claimant. *See* 28 U.S.C. § 1346(b).

B. Liability of Defendant United States Under the FTCA.

20. On the occasion(s) in question in this civil action, the Defendant United States, by and through the United States Air Force ("USAF") and/or David Grant USAF Medical Center ("DGMC") and their/its officers or employees, Captain Kullada O. Pichakron, M.D. ("Dr. Pichakron"),[8] Captain Ryan J. Schutter, M.D. ("Dr. Schutter"),[9] Christopher Florentino, RN, K. Delk, RN, and other physicians and health care providers, who were acting in the course and scope of their offices or employment, each had a duty under applicable law to exercise ordinary and reasonable

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[8] Dr. Pichakron graduated from Boston University School of Medicine with a Medical Doctor (M.D.) degree, completed a five (5) year residency training program in general surgery, and had been practicing as a general surgeon for approximately four (4) years as of July-August 2009.

[9] Dr. Schutter graduated from Uniformed Services University of the Health Sciences medical school with a Medical Doctor (M.D.) degree in 2008 and he was in his first year of postgraduate training as a resident in the DGMC and University of California-Davis general surgery residency program as of July 9, 2009.

care and act as a reasonable and prudent general surgeon, first-year general surgery resident, physician, and/or health care provider, respectively, under the same or similar circumstances in their medical, surgical, nursing, or other health care diagnosis, assessment, care, and treatment of the Plaintiff Colton Read's gallbladder disorder, in the performance of the laparoscopic cholecystectomy procedure on Colton Read, the surgical assessment and repair of the intraoperative aortic injury of Colton Read, and the postoperative injury(ies), illness(es), and/or condition(s) of Colton Read. Defendant United States, by and through the USAF and/or DGMC and their/its officers or employees, Dr. Pichakron, Dr. Schutter, Christopher Florentino, RN, K. Delk, RN, and other physicians and health care providers, breached these duties by engaging in one or more acts or omissions, singularly or in combination with others, constituting negligence and/or gross negligence, as follows:

a. In that Defendant United States, by and through the USAF and/or DGMC, failed to govern or supervise the quality of medical, surgical, nursing, and health care services to and for Plaintiff Colton Read's gallbladder disorder, and the laparoscopic cholecystectomy surgical procedure that was attempted to be performed as well as the assessment and management of the puncture, laceration, or injury to his abdominal aorta and the intraoperative and postoperative diagnosis, assessment, care, and treatment of his hemodynamic and vascular and neurological

conditions, including without limitation such conditions of his aorta and lower extremities.

b. In that Defendant United States, by and through the USAF and/or DGMC, failed to timely, properly, and/or adequately formulate, adopt, and enforce appropriate policies, rules, and procedures necessary for the protection and safety of patients undergoing laparoscopic cholecystectomies that (1) required operating general surgeons to schedule and perform nonemergent laparoscopic cholecystectomies on patients only when one or more DGMC medical staff vascular surgeons was or were on stand-by or readily accessible to provide vascular surgical diagnosis, care, and treatment of serious vascular injuries or complications including injuries to the major blood vessels, including without limitation, the aorta; (2) required appropriate training and supervision for general surgery residents in training to perform various general surgical procedures, including laparoscopic cholecystectomies and avoidance or prevention of complications associated with such surgeries including injuries to the major blood vessels, including without limitation, the aorta; and (3) required operating surgeons to convert from laparoscopic cholecystectomies on a patient to open cholecystectomies or open exploratory laparotomies if there was or were problems that could not be solved readily and easily using the laparoscopic technique.

c. In that Defendant United States is vicariously liable to the Plaintiffs, Colton Read and

Jessica Read for their injuries, harm, and damages, and/or aggravation of their injuries, harm, and damages because of the negligence and/or negligence of its officers or employees acting within the course and scope of their offices or employment in their medical, nursing and/or health care diagnosis, assessments, care, and treatment of Colton Read's illnesses, injuries and/or conditions as follows:

(1) In that Dr. Pichakron negligently failed to timely, properly, and/or adequately supervise Dr. Schutter, a surgical resident in training, in performing the insertion of the trocar into the abdomen of Colton Read;

(2) In that Dr. Schutter negligently failed to perform the insertion of the trocar into the abdomen of Colton Read in a timely, proper, and adequate manner;

(3) In that Dr. Schutter negligently failed to perform the insertion of the trocar into the abdomen of Colton Read in a timely, proper, and adequate manner to avoid the puncture, laceration, or injury to Airman Read's abdominal aorta;

(4) In that Dr. Schutter negligently inserted the trocar into the abdomen of Colton Read in an untimely, improper, and/or inadequate manner which resulted in the puncture, laceration, and/or injury to Airman Read's abdominal aorta;

(5) In that Dr. Schutter negligently failed to recognize, detect, assess, and report his probable or potential puncture, laceration, or injury to Colton Read's abdominal aorta with a trocar in a timely, proper, and/or adequate manner;

(6) In that Dr. Pichakron negligently failed to recognize, detect, and/or assess the source of the bleeding from the trocar induced puncture, laceration, or injury to Colton Read's abdominal aorta in a timely, proper, and/or adequate manner;

(7) In that Dr. Pichakron negligently failed to seek and obtain a consultation with a vascular surgeon specialist concerning the diagnosis, care, and treatment of the puncture, laceration, or injury to Colton Read's abdominal aorta in a timely, proper and/or adequate manner when she knew, or reasonably should have known, that the services of a vascular surgeon specialist were indicated for the diagnosis, care, and treatment of Colton Read's abdominal aortic puncture, laceration, or injury;

(8) In that Dr. Pichakron negligently failed to surgically repair the puncture, laceration, or injury to Colton Read's abdominal aorta in a timely, proper, and/or adequate manner;

(9) In that Dr. Pichakron negligently performed an attempted repair of the

puncture, laceration, or injury to Colton Read's abdominal aorta in a manner which resulted in a loss or reduction of adequate blood supply to his right and left legs;

(10) In that Dr. Pichakron negligently failed to diagnose and/or assess the loss or reduction of blood supply to Colton Read's right and left legs after her attempted surgical repair of the puncture, laceration, or injury to his abdominal aorta during and after the completion of the open exploratory laparotomy surgery on Airman Read;

(11) In that Dr. Schutter negligently failed to timely, properly, and/or adequately assist in the diagnosis and/or assessment of the loss or reduction of blood supply to Colton Read's right and left legs after Dr. Pichakron's attempted surgical repair of the puncture, laceration, or injury to his abdominal aorta during and after the completion of the open exploratory laparotomy surgery on Airman Read, and failed to timely, properly, and/or adequately report an assessment of the loss of blood supply to Colton Read's right and left legs during and after such surgery;

(12) In that one or more members of the operating and/or anesthesia team failed to assess and report the loss or reduction of blood supply to Colton Read's right

and left legs during and/or after the completion of the open exploratory laparotomy surgery on Airman Read;

(13) In that Dr. Pichakron and other physicians negligently failed to diagnose and assess the loss or reduction of blood supply to Colton Read's right and left legs in a timely, proper, and/or adequate manner;

(14) In that Dr. Pichakron negligently failed to order or bring about the performance of appropriate interventional radiology studies or tests or other medical studies or tests to determine or assess the vascular and neurological conditions of Colton Read's lower extremities, including without limitation the loss or significant reduction of blood supply and or ischemia to his lower extremities, and the neurological signs and symptoms of such conditions, in a timely, proper, and/or adequate manner;

(15) In that one or more other USAF physicians negligently failed to order, recommend, or bring about the performance of appropriate interventional radiology studies or tests or other medical studies or tests to determine or assess the vascular and neurological conditions of Colton Read's lower extremities, including without limitation the loss or significant reduction of blood supply and or ischemia to his lower extremities, and

the neurological signs and symptoms of such conditions, in a timely, proper, and adequate manner;

(16) In that Dr. Eskew and/or other physician radiologists negligently failed to perform, interpret, and/or report the radiology and/or interventional radiology studies performed on Colton Read in a timely, proper, and adequate manner;

(17) In that Dr. Pichakron and/or one or more other USAF/DGMC medical staff and/or consulting physicians negligently failed to diagnose, assess, recognize and/or become concerned or sufficiently concerned about the loss or reduction of blood flow to Colton Read's lower extremities in a timely, proper, and/or adequate manner;

(18) In that Dr. Pichakron and/or Dr. Schutter and/or one or more other USAF/DGMC medical staff and/or consulting physicians negligently failed to establish blood flow and/or sufficient blood flow to Colton Read's lower extremities after he sustained a puncture, laceration, or injury to his abdominal aorta in a timely, proper, and/or adequate manner;

(19) In that Dr. Pichakron and/or one or more other USAF/DGMC medical staff and/or consulting physicians negligently failed to seek and obtain a consultation with a vascular surgeon specialist

concerning Colton Read's postoperative ischemic lower extremities conditions and/or refer and transfer Airman Read to a vascular surgeon specialist for diagnosis, assessment, care, and treatment of his ischemic lower extremities conditions in a timely, proper, and/or adequate manner;

(20) In that Dr. Pichakron, the CT surgeon, and/or other USAF/DGMC medical staff and/or consulting physicians negligently failed to decide to transfer and bring about the transfer of Colton Read to UCDMC for vascular surgical diagnosis, care, and treatment of the cause or causes of his ischemic lower extremities in a timely, proper, and/or adequate manner;

(21) In that Dr. Pichakron negligently failed to assess the need for transferring Colton Read to UDMC and/or other appropriate medical center or hospital with medical staff vascular surgeons for vascular surgical diagnosis, care, and treatment of the cause or causes of his ischemic lower extremities in a timely, proper, and/or adequate manner and failing to bring about such transfer of Airman Read to UCDMC in a timely, proper, and/or adequate manner;

(22) In that Dr. Pichakron and/or other USAF and/or DGMC physician and/or health care provider officers or employees

negligently failed to transfer and/or bring about the transfer of Colton Read to UCDMC and/or another appropriate medical center or hospital with medical staff vascular surgeons for vascular surgical diagnosis, care, and treatment of his ischemic and limbs threatening lower extremities conditions in a timely, proper, and/or adequate manner; and

(23) In that Christopher Florentino, RN, K. Delk, R.N., and/or other ICU nurses negligently failed to assess Colton Read's lower extremities ischemia and limbs threatening conditions and advocate for their patient, Airman Read, for Dr. Pichakron to consult with and transfer him to UCDMC and/or another appropriate medical center or hospital with medical staff vascular surgeons for vascular surgical diagnosis, care, and treatment of his ischemic and limbs threatening lower extremities conditions in a timely, proper, and/or adequate manner, and in negligently failing to use the DGMC nursing chain of command to bring about an appropriate medical evaluation of Airman Read's ischemic and limbs threatening lower extremities conditions and transfer to UCDMC and/or another appropriate medical center or hospital with medical staff vascular surgeons for vascular surgical diagnosis, care, and treatment of his ischemic and limbs threatening

lower extremities conditions in a timely, proper, and/or adequate manner.

21. Defendant United States', by and through the USAF and/or DGMC, breach of the above-described legal duty or duties proximately caused the occurrence or incident, injuries, harm, and/or aggravation of injuries or conditions of Plaintiff Colton Read which resulted in the injuries, harm, and damages, and/or aggravation of injuries, harm, and damages of Plaintiff Colton Read as set forth below with more specificity in Paragraph V. A of this Complaint.

22. Defendant United States', by and through the USAF and/or DGMC, breach of the above-described legal duty or duties proximately caused the occurrence or incident, injuries, harm, and/or aggravation of injuries or conditions of Plaintiff Colton Read and/or Jessica Read which resulted in the injuries, harm, and damages, and/or aggravation of injuries, harm, and damages of Plaintiff Jessica Read as set forth below with more specificity in Paragraph V, B of this Complaint.

23. Under the laws of the State of California, a private person would be liable to the Plaintiffs Colton Read and Jessica Read for the above-described negligence and/or gross negligence of the Defendant United States, by and through the USAF and/or the DGMC and their/its officers or employees Dr. Pichakron, Dr. Schutter, Christopher Florentino, RN, K. Delk, RN, and other physicians and health care providers. Under the FTCA, 28 U.S.C. § 2674, the Defendant

United States is liable to the Plaintiffs Colton Read and Jessica Read for their damages resulting from the injuries and/or aggravation of injuries described above and below in Paragraph V, A and B of this Complaint.

C. THE "*FERES* DOCTRINE" IS NEITHER APPLICABLE NOR ENFORCEABLE SINCE IT WAS NOT A PROVISION UNDER THE FTCA AND HAS NO BASIS IN THE LANGUAGE AND LEGISLATIVE HISTORY OF THE FTCA

24. Plaintiffs Colton Read and Jessica Read assert that the judicial expansion and broadening of the Foreign Combatant Exception, also referred to as the "incident to military service exception" of the FTCA to encompass all injuries sustained by military personnel "where the injuries arise out of or are in the course of activity incident to service" in *Feres v. United States*, 340 U.S. 135, 146 (1950), and its progeny, also referred to as the "*Feres* Doctrine, was not a legislative provision under the FTCA and has no foundation in the language and legislative history of the FTCA, and therefore, the *Feres* doctrine is not entitled to any application or enforcement by this or any other Court. This assertion by the Plaintiffs is a nonfrivolous argument for modifying or reversing existing law or establishing new law.

D. PLAINTIFFS CONSTITUTIONAL CHALLENGES TO THE FTCA'S JUDICIALLY IMPOSED "*FERES* DOCTRINE"

25. Plaintiffs Colton Read and Jessica Read assert that the judicial expansion and broadening of the Foreign Combatant Exception,[10] also referred to as the "incident to military service exception," of the FTCA to encompass all injuries sustained by military personnel "where the injuries arise out of or are in the course of activity incident to service" in *Feres v. United States*, 340 U.S. 135, 146 (1950), and its progeny also referred to as the "*Feres* doctrine," violates the Plaintiffs Colton Read and Jessica Read's rights under the United States Constitution, including the separation of powers, equal protection and the due process clause for the following reasons:

a. For the reasons set forth in the dissenting opinion by Judge Warren J. Ferguson in *Costo v. United States*, 248 F.3d 863, 869-70 (9th Cir. 2001) (Ferguson, J., dissenting);

b. For the reasons set forth in the dissenting opinion by Justice Scalia criticizing the rational for the *Feres* doctrine in *Johnson v. United States*, 481 U.S. 681, 688-700 (1987) (Scalia, J., dissenting);

c. For the reasons set forth in the dissenting opinion by Chief Justice Becker in *O'Neil v.*

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[10] *See* 28 U.S.C. § 2680(j) (2009). (Prohibiting recovery for "any claim arising out of the combatant activities of the military or naval forces, or the Coast Guard, during time of war.").

United States, 140 F.3d 564, 565 (3d Cir. 1998) (Becker, C.J., dissenting) (recognizing widespread criticism of the *Feres* doctrine and "urg[ing] the Supreme Court to grant *certiorari* and reconsider *Feres*");

d. For the reasons set forth in *Johnson v. United States*, 749 F.2d 1530, 1532-35 (11th Cir. 1983) (reviewing history and development of *Feres* doctrine, and noting "widespread, almost universal criticism" of the doctrine); and *Johnson v. United States*, 704 F.2d 1431, 1435 (9th Cir. 1983) (original rational for *Feres* doctrine has been undercut and abandoned);

e. For the reason that the *Feres* doctrine creates two different classes, composed of active duty military service personnel and civilians, who are disporately [sic] treated despite the fact that they are similarly situated with respect to the FTCA and the intent of Congress.

26. These assertions by Plaintiffs Colton Read and Jessica Read are nonfrivolous arguments for modifying or reversing existing law or establishing new law.

E. Alternative Assertion For the Court to Adopt the Discretionary Function Exception as an Alternative to the "*Feres* Doctrine" Under the FTCA

27. Alternatively, without waiver of the foregoing, Plaintiffs Colton Read and Jessica Read assert that the Court should apply the Discretionary Function

Exception of the FTCA[11] to their above-described medical malpractice claim against the Defendant United States, in lieu of the *Feres* doctrine, for the following reasons:

a. The discretionary function exception to the FTCA, instead of the *Feres* doctrine, provides a fair balance between the Plaintiff Colton Read and Jessica Read's/tort victim recovery and federal governmental immunity in medical malpractice cases;

b. Military discipline is not adversely affected when a military service member and his/her spouse, including the Plaintiffs Colton Read and Jessica Read, recovers from the federal government after a United States military physician negligently caused an injury to the military service member, including the Plaintiff Colton Read;

c. Since the discretionary function exception to the FTCA and the *Feres* doctrine attempt to protect a unique relationship between the federal government and its officers or employees, the federal government actually needs only one test to establish governmental immunity in medical malpractice cases, including the Plaintiffs' above-described medical malpractice claim against the United States; and the discretionary function exception to the FTCA is a fairer approach than the *Feres* doctrine for establishing governmental

[11] *See* 28 U.S.C. § 2680(a) (2009) ("any claim . . .)

immunity in medical malpractice cases, including the Plaintiffs above-described medical malpractice claim, and should be the only test applied in military service member and civilian claims alike.

IV. COUNT 2 – PLAINTIFFS CLAIM AGAINST DEFENDANT UNITED STATES FOR DECLARATORY RELIEF AS TO THE FEDERAL ORT CLAIMS ACT

28. Plaintiffs Colton Read and Jessica Read realledge [sic] and incorporate herein by reference as though fully set forth, each and every allegation contained in Paragraphs 1 through 27 of this Complaint.

29. Recognizing that the Court may believe it is bound to uphold the *Feres* doctrine as a matter of *stare decisis*, the Plaintiffs Colton Read and Jessica Read nevertheless seek a declaration from the Court that the *Feres* doctrine is unconstitutional for the reasons set forth with more specificity in Paragraphs 25 and 26 of this Complaint.

30. This claim by the Plaintiffs Colton Read and Jessica Read for declaratory relief is a nonfrivolous argument for modifying or reversing existing law or establishing new law.

V. PLAINTIFFS CLAIM FOR DAMAGES AND ATTORNEY FEES

A. Actual Damages of Plaintiff Colton Read

31. As a proximate cause of the Defendant United States negligence, gross negligence, and other wrongful conduct, as set forth in Paragraphs III, 20 through 23 of this Complaint, the Plaintiff Colton Read has suffered and is entitled to recover fair and reasonable compensation for the below-listed and described injuries, damages, and/or aggravation of injuries and damages, as follows:

a. Physical pain and mental anguish sustained by Colton Read in the past in a fair and reasonable amount of at least $4,000,000.00;

b. Physical pain and mental anguish that, in reasonable probability, Colton Read will sustain in the future in the fair and reasonable amount of at least $7,000,000.00;

c. Loss of earning capacity and/or earnings of Colton Read sustained in the past in the fair and reasonable amount of at least $300,000.00;

d. Loss of earning capacity and/or earnings that, in reasonable probability, Colton Read will sustain in the future in the fair and reasonable amount of at least $3,000,000.00;

e. Disfigurement sustained by Colton Read in the past in the fair and reasonable amount of at least $2,000,000.00;

f. Disfigurement that, in reasonable probability, Colton Read will sustain in the future in the fair and reasonable amount of at least $4,000,000.00;

g. Physical impairment sustained by Colton Read in the past in the fair and reasonable amount of at least $2,000,000.00;

h. Physical impairment that, in reasonable probability, Colton Read will sustain in the future in the fair and reasonable amount of at least $400,000,000.00;

i. The reasonable value of necessary medical and health care services, products, and/or goods to and/or for Colton Read, in the past, resulting from his injuries caused by the occurrence(s) and/or incident(s) made the basis of this civil action in the fair and reasonable amount of at least $66,442.28;

j. The reasonable value of necessary medical and health care services, products, and/or goods that, in reasonable probability, will be necessary for Colton Read in the future, resulting from his injuries caused by the occurrence(s) and/or incident(s) made the basis of this civil action in the fair and reasonable amount of at least $2,000,000.00;

k. Loss of enjoyment of life or loss of capacity to enjoy life sustained by Colton Read in the past in a fair and reasonable amount of at least $2,000,000.00;

l. Loss of enjoyment of life or loss of capacity to enjoy life that, in reasonable probability, will be sustained by Colton Read in the future in a fair and reasonable amount of at least $4,000,000.00;

m. All other actual, consequential, and/or special damages allowed by law sustained by Colton Read in the past in a fair and reasonable amount; and

n. All other actual, consequential, and/or special damages allowed by law that, in reasonable probability, Colton Read will sustain in the future in a fair and reasonable amount.

B. Actual Damages of Plaintiff Jessica Read

32. As a proximate cause of the Defendant United States negligence, gross negligence, and other wrongful conduct, as set forth in Paragraphs III, 20 through 23 of this Complaint, the Plaintiff Jessica Read has suffered and is entitled to recover fair and reasonable compensation for the below-listed and described injuries, damages, and/or aggravation of injuries and damages, as follows:

a. Loss of household services of Colton Read sustained by Jessica Read in the past in a fair and reasonable amount of at least $500,000.00;

b. Loss of household services of Colton Read that, in reasonable probability, Jessica Read

will sustain in the future in a fair and reasonable amount of at least $2,000,000.00;

c. Loss of consortium with Colton Read sustained by Jessica Read in the past in a fair and reasonable amount of at least $3,000,000.00;

d. Loss of consortium with Colton Read that, in reasonable probability, Jessica Read will sustain in the future in a fair and reasonable amount of at least $5,000,000.00;

e. Loss of enjoyment of life or loss of capacity to enjoy life sustained by Jessica Read in the past in a fair and reasonable amount of $1,000,000.00;

f. Loss of enjoyment of life or loss of capacity to enjoy life that, in reasonable probability, will be sustained by Jessica Read in the future in a fair and reasonable amount of at least $4,000,000.00;

g. Mental anguish of Jessica Read sustained in the past due to depression, severe anxiety, panic attacks, nightmares and abnormal fertility process in a fair and reasonable amount of $1,000,000.00;

h. Mental anguish that, in reasonable probability, Jessica Read will sustain in the future due to depression, severe anxiety, panic

attacks, nightmares and abnormal fertility process in a fair and reasonable amount of $4,000,000.00;

i. All other actual, consequential, and/or special damages allowed by applicable law sustained by Jessica Read in the past in a fair and reasonable amount; and

j. All other actual, consequential, and/or special damages allowed by applicable law that, in reasonable probability, Jessica Read will sustain in the future in a fair and reasonable amount.

C. Attorney Fees, Costs, and/or Expenses

33. Plaintiffs Colton Read and Jessica Read are entitled to recover an award of reasonable attorney fees, costs, and/or expenses under 28 U.S.C. § 2412 and other applicable law.

VI. PRAYER

34. FOR THESE REASONS, the Plaintiffs Colton J. Read and Jessica G. Read, pray that the Defendant United States of America be cited and summoned to appear and answer herein, that the Court set this case for a nonjury trial, and, on final trial or other applicable final judicial proceeding, that Plaintiffs Colton and Jessica Read have judgment in their favor and against the Defendant United States of America for the following:

a. That Plaintiff Colton Read recover judgment from Defendant United States for his above-described actual economic and noneconomic damages in a fair and reasonable amount of at least $34,366,442.28;

b. That Plaintiff Jessica Read recover judgment from Defendant United States for her above-described actual economic and noneconomic damages in a fair and reasonable amount of at least $20,500,000.00;

c. That Plaintiffs Colton Read and Jessica Read recover on their Count 2 cause of action for declaratory relief as to the Federal Tort Claims Act in favor of the Plaintiffs as requested and for the above-stated reasons;

d. That Plaintiffs Colton Read and Jessica Read recover reasonable attorney fees, costs, and/or expenses incurred in this civil action pursuant to 28 U.S.C. § 2412 and any other applicable law;

e. That Plaintiffs Colton Read and Jessica Read recover postjudgment interest as allowed by 28 U.S.C. § 2674 and/or other applicable law;

f. That Plaintiffs Colton Read and Jessica Read recover their taxable costs of court as allowed by applicable law;

g. That Plaintiffs Colton Read and Jessica Read recover such other relief as the Court deems just and proper.

Dated: March 30, 2012.

RESPECTFULLY SUBMITTED,

/s/ Darrell L. Keith

DARRELL L. KEITH
State Bar of Texas No. 11186000

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ATTORNEYS FOR PLAINTIFFS
COLTON J. READ AND
JESSICA G. READ

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

COLTON J. READ AND JESSICA G. READ,	:	
Plaintiffs,	:	
VS.	:	**CIVIL ACTION NO. 4:12-CV-191-A**
UNITED STATES OF AMERICA,	:	
Defendant,	:	

AFFIDAVIT OF COLTON J. READ

STATE OF TEXAS §
§
COUNTY OF COMAL §

BEFORE ME, the undersigned notary public, personally appeared, Colton J. Read, the Affiant, a person whose identity is known to me. After I administered the oath to Affiant, Cohen J. Read, Affiant testified:

1. My name is Colton James Read. I am over eighteen (18) years of age, of sound mind, and capable of making this affidavit. The facts stated in this affidavit are within my personal knowledge, unless otherwise stated and are true and correct.

2. I was born at a hospital in Ft. Worth, Texas and lived in Arlington, Texas from birth until age

seven. From age seven until age ten I lived out of state with my mother. I moved back to Arlington while I was in the fifth and sixth grades and then moved to Durant, Oklahoma for two years. I moved back to Arlington, Texas when I was a freshman in high school and, with the exception of one semester during that time, I attended Sam Houston High School, Arlington, Texas. I graduated from Sam Houston High School in December 2006. During my senior high school year, in October, 2006, I met my future wife, Jessica Hines. At that time, I was a permanent resident in Arlington, Texas, and I intended for Arlington be my permanent residence unless I later made a decision to leave or abandon my Arlington residence and actually did so.

3. I enlisted in the United States Air Force in Sherman, Texas in early 2006. After watching the tragedy of September 11, 2001 unfold, I decided to join the United States Air Force and I told my entire family about my decision when I got home from school that day. I felt very strongly that I wanted to serve my country in the Air Force to try to help assure that something that terrible would never happen to the United States of America again. I also decided that I wanted to gather intelligence for the Air Force so I could have an integral part in the prevention of further terrorist attacks on our country. However, when I enlisted in the Air Force in 2006, I was too young for active duty and training, so as soon as I graduated from high school in December 2006, I left for training with the United States Air Force in

July 2007. My basic training was at Lackland Air Force Base in San Antonio, Texas and I completed it in August 2007. During my basic training, I was temporarily stationed at Lackland Air Force Base and I temporarily resided in a barrack there. When I joined the Air Force, I planned to serve my country by making a career in the Air Force up until retirement over the next twenty years, but it was my understanding that I would be able to separate from the Air Force earlier if it became necessary for me to do so. After my planned twenty-year Air Force commitment ended, I planned to become a police officer in the Dallas-Fort Worth area and I had discussed my plan with police recruiters in the Arlington and Dallas police departments through the time I was stationed in California at Beale.

4. After I completed my basic training, I was transferred to Goodfellow Air Force Base, San Angelo, Texas from September 2007 until March 2008 for more extensive training in my field as an imagery analyst. Jessica and I married on November 5, 2007 in San Angelo while I was going thru additional training. During my imagery analyst training, my wife and I established our permanent residence at the home of her parents at 2133 Oakwood Lane, Arlington, Texas, and my wife and I intended for that address to be our permanent residence unless we later left or abandoned it to go some other permanent location. While at Goodfellow Air Force Base, we temporarily resided at 2133 Colorado Avenue in San Angelo, Texas. In April 2008 I was transferred to and

stationed at Beale Air Force Base in California as an imagery analyst as was planned. In June 2009 I volunteered for deployment to Afghanistan during my service at Beale Air Force Base, my wife and I temporarily resided in 3641 Secret Lake Trial in Plumas Lake, California.

5. While I was awaiting orders for deployment to Afghanistan, approximately late June or early July 2009 I began to have problems with my gallbladder in June or early July 2009. After seeing military doctors, including USAF Major Kullada O. Pichakron, M.D. (Dr. Pichakron), my gallbladder condition required surgery that was scheduled to be performed on July 9, 2009 at the David Grant Medical Center (DGMC), Travis Air Force Base, California. At the time, I sought medical attention for my abdominal symptoms that were medically diagnosed as gallbladder problems in need of surgery, and when I was scheduled to have gallbladder surgery at the DGMC, I was not subject to the requirements of any military orders or performing any type of military mission or assignment. I understood that I needed to follow my military doctors orders concerning their medical diagnosis, care, and treatment of my gallbladder problems but there was no military command relationship that existed between me and my treating physicians. I was not made aware of any military considerations that regulated my medical treatment and I did not believe that there were any such military considerations that governed the medical care I received and

would continue to receive regarding my gallbladder surgery.

6. On July 9, 2009, my wife and I traveled from our temporary residence at 3641 Secret Lake Trail at Beale, to DGMC. Although I was still an active duty airman in the USAF, I was off duty at the time I went for gallbladder surgery at the DGMC. After my admission to DGMC on the morning of July 9, 2009, I underwent laparoscopic gallbladder surgery performed by Dr. Pichakron and she was assisted by USAF Captain Ryan J. Schutter, M.D. (Dr. Schutter). During my gallbladder surgery I suffered an injury to my descending abdominal aorta, resulting in a loss of blood supply to my right and left legs over several hours at DGMC. Eventually, on the afternoon of July 9, 2009, I was transported by an air ambulance helicopter from DGMC to the University of California-Davis Medical Center (UCDMC), in Sacramento, California for further medical care and treatment of my injury and problems associated with a lack of blood supply to my right and left legs. At UCDMC, I was primarily under the care of David L. Dawson, M.D. (Dr. Dawson), a vascular surgeon, who provided medical care and treatment for my conditions. Dr. Dawson performed an abdominal exploratory operation on me, found that my descending abdominal aorta had been previously sutured in a way that caused blood clotting and complete blockage of my aorta, which had cut off the blood supply or inadequate blood supply to my right and left legs. Also, Dr. Dawson removed the blood clots and repaired my

aortic injury. After several attempts by Dr. Dawson and other doctors to save my legs were unsuccessful, I eventually underwent a through the knee amputation of my right leg, and later a through the knee amputation on my left leg. Later, I underwent multiple surgical procedures on my right and left legs that eventually resulted in amputation through the thigh of my right leg and amputation of my left leg above the knee and later just below my hip. I also underwent multiple surgical revisions on what was left of my amputated right and left legs. During my hospitalization and medical care and treatment at UCDMC, I was a patient at the hospital from July 9, 2009 to August 6, 2009.

7. On about August 6, 2009, I was discharged from UCDMC in Sacramento, California, and I temporarily transferred and stationed at Lackland Air Force Base, San Antonio, Texas and and I was admitted as an outpatient at the Center for the Intrepid (CFI) located at 3551 Roger Brooke Drive, Fort Sam Houston, in San Antonio, Texas. At the CFI, I received extensive rehabilitation and therapy for my double amputation condition and I have received extensive medical and healthcare treatment, including prosthetics, physical and occupational rehabilitation for my amputated right and left leg conditions, wheelchair training and use, surgical treatment of hemorrhoids that developed from almost being in a sitting position, implanting of a dorsal column simulator, and eventual gallbladder removal surgery, and other medical and rehabilitation therapy. Since

August 6, 2009 to March 29, 2012, I have received medical and rehabilitative at the CFI. During this period of time, my wife and I temporarily resided in a house at 821 Chaffee and 3461 Chaffee in two rental houses at Fort Sam Houston, San Antonio, Texas.

8. At the time, I received medical and surgical care and treatment at DGMC, including my gallbladder surgery and post surgical course of care and treatment at that military hospital, I sought medical attention for my abdominal symptoms that were eventually diagnosed as gallbladder problems and when I was scheduled to have gallbladder surgery at the DGMC, I was not subject to the requirements of any military orders or performing any type of military mission or assignment. I understood that I needed to follow my military doctor's orders concerning their medical diagnosis, care, and treatment of my gallbladder problems during and after my gallbladder surgery, if I was unaware of any improper care which they gave me. However, there was no military command relationship that existed between me and my treating physicians, Dr. Pichakron, Dr. Schutter, and any other doctors, nurses or health care personnel involved in my care and treatment. My military commanders at the time were Colonel Tim Woliver, Master Sergeant Aaron Todd Dawson, Lieutenant Nancy Herbut Cerna Schwab, and Master Sergeant Larry Hancock. I was not made aware of any military considerations that regulated my medical care and treatment during and after my gallbladder surgery, and I did not believe that there were any military

considerations that governed the medical care I received and would continue to receive regarding my gallbladder surgery, surgical aortic injury, and lack of blood supply to my legs.

9. While I was awaiting orders for deployment to Afghanistan, approximately late June or early July 2009 I began to have problems with my gallbladder in June or early July 2009. After seeing military doctors, including USAF Major Kullada O. Pichakron, M.D. (Dr. Pichakron), my gallbladder condition required surgery that was scheduled to be performed on July 9, 2009 at the David Grant Medical Center (DGMC), Travis Air Force Base, California. At the time, I sought medical attention for my abdominal symptoms that were eventually diagnosed as gallbladder problems and when I was scheduled to have gallbladder surgery at the DGMC, I was not subject to the requirements of any military orders or performing any type of military mission or assignment.

10. Although I had initially planned on a lengthy career in the Air Force, I decided to accept a permanent disability retirement from the Air Force, because of my right and left leg amputations situation and in order to get on with my life with my wife and daughter and getting additional education to pursue a career in psychology or counseling. On March 29, 2009, I became permanently disability retired from the USAF and I was relieved from active duty in the Air Force and station assignment at Lackland Air Force Base, San Antonio, Texas.

11. While my wife, Jessica and I, were temporally residing in a house at 3461 Chaffee at Fort Sam Houston, San Antonio, Texas, we were approached by Operation Finally Home, sponsored by Bay Area Builders and offered a gift of building a new transitional house structure due to my double amputation disability. Because Jessica and I could not afford to build a house anywhere, we accepted the offer with the intention to continue to live in the house on a temporary basis with our permanent residence still at 2133 Oakwood Lane, Arlington, Texas in 2011 Jessica and I moved into the house located at 2336 Appleton, New Braunfels, Texas that was a gift from Bay Area Builders owing to my disability. The house belongs to Jessica and me and we possess a free and clear title on the house. Bay Area Builders supplied the house to me and Jessica as an aid and assistance to us in our struggle to go onward with our lives with our new challenges, develop a plan for the future, and move on from there. We chose to have the house as a temporary transitional residence because I had planned to go to school at Texas State University in San Marcos, Texas to get my bachelors and masters degrees in either psychology or counseling and the location would be and is convenient to attending Texas State University and receiving my counseling at North Central Clinic in San Antonio. After I complete my education at Texas State University, I intend to sell the house at 2336 Appellation, and return to the Dallas-Fort Worth area to begin a career in the psychology field hopefully in law enforcement. Neither Jessica nor I have ever intended to leave or

abandon our residence at 2133 Oakwood Lane, Arlington, Texas, and we have always intended to live temporarily at 2336 Appellation, New Braunfels, Texas until I complete my education and we move back to the Dallas-Fort Worth area to our permanent residence at 2311 Oakwood Lane, Arlington, Texas. Both my and Jessica's family and close acquaintances all live in the Dallas-Fort Worth area and Jessica and I have always considered Arlington, Texas as our permanent residence and we still do. My father has lived in Arlington since I was born and each summer I would stay with him there while I was growing up. My goal is to get a job with a police department in the Dallas-Fort Worth area using my psychology and counseling degree.

12. The residential address at 2133 Oakwood Lane, Arlington, Texas, is the address of Jessica's parents, Tom and Lisa Hines, and Jessica and I have always regarded and intended this location to be our permanent residential address until we such time as we decide to establish another permanent residential location. A whole area of the house at 2133 Oakwood Lane, Arlington, Texas, has been remodeled, including handicap accommodations for me. We generally visit Jessica's parents Arlington bi-monthly and usually spend a week to ten days each time at our permanent residence at 2133 Oakwood Lane. We visit with family and friends. My father lives in Arlington, as well as all my relatives, sister, aunts and uncle, and cousins. Only my mother lives elsewhere. All of Jessica's family lives in Arlington. I am currently a

member of St. Andrews Methodist Church on Green Oaks Boulevard in Arlington, Texas and have an active membership in the Arlington chapter of Demolays since 2005.

13. Attached to this Affidavit are true and correct copies of the below listed and described photographs that I have previously seen, noticed their distinctive characteristics which fairly and accurately depict scenes of me or me and my wife, Jessica Read, and me and other persons in the photographs with me, and I presently recall each of the following photographs and each of the photographs are fully incorporated by reference into this affidavit:

Description of Item **Pages**

1. Affidavit of Colton J. Read..... 00001-00005
2. Affidavit of Jessica G. Reed 00006-00008
3. Photograph of Colton J. Read in USAF Uniform Prior to July 9, 2009 Laparoscopic Gallbladder Surgery at David Grant Medical Center, Travis Air Force Base, California 00009
4. Photograph of Colton J. Read and Jessica G. Read Prior to July 9, 2009 Laparoscopic Gallbladder Surgery on Colton Read 00010
5. Photograph of Colton J. Read in Hospital Room After January 9, 2009 Laparoscopic Gallbladder Surgery and Amputation of Both of His Legs 00011

SIGNED on the 21st day of June, 2012.

/s/ Colton J. Read
Colton J. Read

SUBSCRIBED AND SWORN to before me on this 21st day of June, 2012, to certify witness my hand and seal of office.

/s/ Vicki L. Lassere
Notary Public for the State of Texas
My Commission Expires: 07-01-2014

VICKI L. LASSERE
[SEAL] Notary Public
STATE OF TEXAS
My Comm. Exp. 07-01-2014