
Case No. 09-15339

In the

United States Court of Appeals

For the Ninth Circuit

ALEXIS WITT, ON BEHALF OF THE ESTATE OF DEAN WITT,
Plaintiff-Appellant

v.

UNITED STATES OF AMERICA
Defendant-Appellee

**On Appeal from the United States District Court for the
Eastern District of California**

BRIEF OF APPELLANT

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JURISDICTIONAL STATEMENT

Alexis Witt filed her complaint pursuant to Title 28 U.S.C. §§ 2672 and 2675(a). Mrs. Witt's claims were filed with and presented administratively to the United States' agency, the United States Air Force on August 25, 2005 on behalf of the estate of Dean Witt, deceased. On March 7, 2008, the United States Air Force denied the claim. Mrs. Witt filed suit on August 28, 2008 in the United States District Court for the Eastern District of California. Mrs. Witt complied with all jurisdictional prerequisites and conditions precedent to commencement and prosecution of this litigation. The United States filed a motion to dismiss for lack of subject matter jurisdiction, claiming the suit is barred under *Feres v. United States*, 340 U.S. 135 (1950) and its progeny.

This is an appeal of a final order entered by the United States District Court for the Eastern District of California. The district court reluctantly granted the United States' motion to dismiss and entered final judgment for the United States on February 10, 2009. Mrs. Witt timely filed her notice of appeal pursuant to the FRAP 3 and FRAP 4(a)(1)(B) on February 17, 2009. The Ninth Circuit has jurisdiction over this appeal pursuant to 28 U.S.C. §1291.

ISSUES FOR PRESENTED FOR REVIEW

1. Whether the plain language of the Federal Tort Claims Act allows claims by active duty service members for medical negligence.
2. Whether the district court erred by failing to apply the Ninth Circuit's four-part incident to service test.
3. Whether the Ninth Circuit's incident to service test weighs in favor of allowing this claim.
4. Whether the underlying rationales of the *Feres* doctrine weigh in favor of allowing this claim.
5. Whether the *Feres* Doctrine is unconstitutional for violating the principles of Equal Protection and the Separation of Powers doctrine.

STATEMENT OF THE CASE

This is an appeal of a dismissal granted in a wrongful death case arising out of medical malpractice. Alexis Witt, on behalf of the Estate of Dean Witt, sued the United States of America pursuant to the Federal Tort claims Act (“FTCA”) for damages resulting from the wrongful death of Dean Witt at the age of 25 following a routine appendectomy at David Grant Medical Center (“DGMC”) at Travis Air Force Base in California.

Appellee, the United States of America, filed a motion to dismiss based on lack of subject matter jurisdiction. The trial court granted dismissal, and this appeal follows.

STATEMENT OF FACTS

The district court below acknowledged that the facts alleged in this claim are “so egregious and the liability of the Defendant seems so clear...” ER 000007. On October 10, 2003, 25 year-old Dean Patrick Witt was admitted to the David Grant Medical Center for acute appendicitis. At the time of this incident, Dean Witt was in the process of moving to California pursuant to a Permanent Change of Station (“PCS”) Order. ER 000043. Dean Witt was on leave and not scheduled to report to his commander for his new assignment until October 30, 2003. *Id.* Dean Witt had no official military duties at any time relevant to this claim. *Id.*

Moreover, at all times relevant to this claim, Dean Witt could not have performed any military duties because he presented to DGMC in an emergent condition and subsequently suffered a severe and permanent brain injury as a result of negligence by medical providers. *Id.*

1. Gross Medical Negligence Resulted in the Brain Injury and Death of Dean Witt.

Dean Witt was admitted to DGMC after presenting to the emergency room for acute appendicitis. ER 000046-000050, Declaration of Loretta Manuel, CRNA. A routine appendectomy was performed, during which CRNA Rachel Delaporte served as primary anesthetist. *Id.* at 000047. The appendectomy was performed without incident or complications according to a narrative summary written by the attending physician. *Id.*

Following surgery, CRNA Delaporte concluded Dean Witt met criteria for extubation. *Id.* Just prior to extubation, CRNA Delaporte instructed a student registered nurse assistant (“SRNA”) to administer a final dose of 50 mcg Fentanyl. *Id.* The SRNA extubated Dean Witt and placed him on a 100% oxygen mask for transport to the post-anesthesia care unit (“PACU”). *Id.*

Dean Witt was transported approximately 50 feet to the PACU by the student registered nurse anesthetist, a general surgical resident, and a medical assistant. ER 000047. The supervising CRNA stayed behind to gather supplies

used during surgery, and was approximately 20 paces behind the SRNA and resident. *Id.*

During transport, the resident noticed that Witt was sleeping heavily with shallow breathing and administered a sternal rub. *Id.* Dean attempted to breathe without any air movement and became cyanotic (blue in color). *Id.* Upon arrival in the PACU, the SRNA attempted to open the airway and ventilate Dean. *Id.* Upon her arrival in the PACU, CRNA Delaporte took over from the SRNA and was joined by an M.D. anesthesiologist. *Id.*

Dean was brought into the closest bay in the PACU, a pediatric recovery area. ER 000047. CRNA Delaporte attempted to ventilate Dean with a pediatric ambu bag with an adult mask attached, and was not successful due to the insufficient capacity of the pediatric ambu bag. *Id.*

CRNA Delaporte then attempted a direct laryngoscopy endotracheal intubation but Dean's color did not improve. ER 000048. The M.D. anesthesiologist extracted the prior intubation tube, and did another direct laryngoscopy, confirming that the prior intubation attempt had been esophageal – the tube had been incorrectly placed in the esophagus rather than in the trachea. *Id.* Re-intubation resulted in a return of normal color and breath sounds. *Id.*

During this delayed resuscitation, Dean Witt developed bradycardia (slow heart rate). *Id.* He was given atropine and epinephrine, which resulted in

tachycardia (rapid heart rate) with an abnormal ventricular rhythm. *Id.* As a result of substandard medical care, Dean was without oxygen for an estimated 7-10 minutes. *Id.* Consequently, Dean suffered a severe, permanent brain injury, and subsequently died three months later. ER 000050.

In response to the United States' motion to dismiss, Mrs. Witt has attached the Declaration of Loretta Manuel, CRNA. In her expert opinion, the CRNA responsible for caring for Dean Witt breached the standard of care in a number of ways, resulting in his brain injury and untimely death. *Id.* at 000046-000050. CRNA Manuel documented nineteen (19) separate breaches in the standard of care, as follows:

The CRNA failed to properly observe and recognize Dean Witt's condition, as evidenced by:

1. Failing to formulate an anesthesia plan for airway management of a patient with history and treatment of sore throat pre-op and post-op.
2. Extubation of Dean Witt with a rapid sequence induction (RSI), and 50 micrograms Fentanyl administration immediately prior to emergence from general anesthesia. Fentanyl is a potent narcotic analgesic that rapidly appears (within 30 seconds) in the CNS. And 25% of Fentanyl administered goes to the lungs after injection. Fentanyl is 150 times more potent than Morphine, causes prominent bradycardia, and truncal rigidity compared to other narcotics.
3. Ventilation attempts on an adult post-operatively with a pediatric ambu bag. The CRNA responsible for Dean's care used pediatric equipment suitable for use only on a child to attempt a resuscitation of an adult male.

4. Intubation of the esophagus instead of the trachea thereby allowing Dean Witt to become blue, and lack breath sounds; and failing to monitor his vital signs (blood pressure, pulse, pulse oximeter) or improvement in Dean Witt's color.
5. Code Blue was not called during the 7-10 minute period while Dean Witt was apneic and pulse was less than 2 beats per minute. ER 000048-000049.

Unsafe anesthesia decision and poor anesthesia skills by the CRNA were evidenced by:

6. Giving an emergency dose of 50 micrograms of Fentanyl.
7. Leaving a newly emerged patient in the care of a student nurse anesthetist ("SRNA") and surgical resident during transport to PACU.
8. Use of improper equipment (pediatric ambu) at a critical time.
9. Failure to recognize esophageal intubation with no action taken to correct the unsuccessful airway management.
10. No action taken to correct deteriorating vital signs. Failure to recognize vital signs for 7-10 minutes that resulted in anoxic brain injury and non-recoverable neurological damage to Dean Witt. ER 000049.

Extremely poor delegation of anesthesia tasks to an unprepared and incapable SRNA and surgical resident:

11. Failure to supervise Dean Witt as he was transported to PACU.
12. Improper training and supervision of a SRNA after administration of 50 micrograms of Fentanyl to an emerging patient.

13. Failure to monitor for Fentanyl side effects, including bradycardia and truncal rigidity, both of which occurred in Dean Witt's case.
14. Using improper resuscitation equipment (pedi ambu) in a critical airway management situation in the presence of subordinate staff.
15. Improper placement of endotracheal tube in a critical airway management situation, with no correction, in the presence of subordinate staff. ER 000049.

Failure to act as a patient advocate in a circumstance requiring immediate action to improve an emerging patient's deteriorating condition:

16. Giving 50 micrograms of Fentanyl upon Dean Witt's immediate emergence and then extubating.
17. Abandoning Dean Witt, upon emergence, to gather paperwork, leaving Dean Witt in the unprepared care of a subordinate SRNA and surgical resident.
18. Failing to arrive in PACU until Dean Witt was unable to breathe, then using improper equipment (pedi ambu) for ventilating an adult patient.
19. Failing to monitor and treat Dean Witt in the presence of pulse less than 2 beats per minute and hypoxia for 7-10 minutes resulting in anoxic brain injury and non-recoverable neurological damage. ER 000049-000050.

CRNA Loretta Manuel concluded that but for these breaches in the standard of care, Dean Witt would be alive today.¹ ER 000050. In addition to Dean Witt's

¹ The United States did not produce any controverting evidence concerning the standard of care violations alleged in Witt's petition or CRNA Manuel's declaration.

medical records, CRNA Manuel reviewed disciplinary papers pertaining to CRNA Delaporte before the California Board of Nursing. *Id.* Delaporte admitted to the California Board of Nursing that she was guilty of gross negligence and/or incompetence in caring for Dean Witt and surrendered her Nurse Anesthetist License. *Id.*

2. Procedural History

Alexis Witt's claims were filed with and presented administratively to the United States' agency, the United States Air Force on August 25, 2005 on behalf of the estate of Dean Witt, deceased. ER 000079. On March 7, 2008, the United States Air Force denied the claim. *Id.* Mrs. Witt filed suit on August 28, 2008 in the United States District Court for the Eastern District of California. ER 000077. The United States filed a motion to dismiss for lack of subject matter jurisdiction, claiming the suit is barred under *Feres v. United States*, 340 U.S. 135 (1950) and its progeny. ER 000053.

Calling the application of *Feres* to this case "particularly unfair" and "wrongheaded," the district court "reluctantly" granted the United States' motion to dismiss and entered final judgment for the United States on February 10, 2009. ER 000008. The district court encouraged the Ninth Circuit to consider *Feres* en banc "in light of the inequitable result of its application to this case." The district court joined "in Judge Ferguson's plea to the Supreme Court in *Costo* that now is

the time to revisit the *Feres* doctrine. Otherwise, *Feres* will once again have led to a result that can only be characterized as unfair and irrational.” *Id.*, citing *Costo v. United States*, 284 F.3d 863, 869 (9th Cir. 2001) (Ferguson, J. dissenting). Following dismissal, Mrs. Witt timely filed her notice of appeal pursuant to FRAP 3 and FRAP 4(a)(1)(B) on February 17, 2009. ER 000001.

SUMMARY OF THE ARGUMENT

The district court’s grant of dismissal should be reversed. The plain language of the Federal Tort Claims Act (“FTCA”) does not bar medical negligence claims by active duty service members. On the contrary, courts universally recognize the right of active duty service members to recover damages arising out of medical negligence at military hospitals when dependents are injured. Despite the plain language of the FTCA, courts have barred some claims brought by active duty service members under the *Feres* doctrine.

The United States Supreme Court last addressed *Feres* in *United States v. Johnson*, 481 U.S. 681 (1987). Post-*Johnson*, circuit courts now conduct a case-by-case analysis of the three rationales underlying *Feres* and decline to bar claims unless all three rationales are present. The Ninth Circuit adopted a four-factor test for determining whether an injury is incident to service, applied on a case-by-case basis. Applying the four-factor test to these circumstances weighs in favor of allowing this claim. In addition, the rationales behind *Feres* weigh against

dismissal. Finally, *Feres* is unconstitutional in that it violates the principles of Equal Protection and the Separation of Powers doctrine. The district court reluctantly ruled that *Feres* bars this claim, despite acknowledging that “its application to this case seems particularly unfair.” ER 000008. The district court concluded by urging the Ninth Circuit and the United States Supreme Court to revisit *Feres* in this case to avoid “a result that can only be characterized as unfair and irrational.” *Id.*

ARGUMENT

I. THE PLAIN LANGUAGE OF THE FEDERAL TORT CLAIMS ACT DOES NOT BAR CLAIMS OF ACTIVE DUTY SERVICE MEMBERS.

The district court’s grant of dismissal should be reversed. Whether the *Feres* doctrine applies to the facts in the record is reviewed de novo. *Dreier v. United States*, 106 F.3d 844, 847 (9th Cir. 1997). Factual findings are reviewed de novo, with all disputed facts resolved in favor of the non-moving party. *Id.* The Federal Tort Claims Act (“FTCA”) waives sovereign immunity and provides a judicial remedy to those who are injured or damaged as a result of the negligence of employees of the United States government. 28 U.S.C. §§ 1346(b)(1) and 2674. No part of the FTCA should be read in isolation; instead the FTCA must be viewed as a whole and interpreted with respect to its object and policy. *See Richards v.*

United States, 369 U.S. 1, 11 (1962). The language of the statute must be given its plain and natural meaning, “without placing a thumb on the scale for the benefit of the sovereign.” See *Andrews v. United States*, 441 F.3d 220, 223 (4th Cir. 2006); see also *Blair v. IRS*, 304 F.3d 861, 868 & n.4 (9th Cir. 2002) (noting the FTCA must be construed so as to achieve its remedial purpose despite recent decisions emphasizing pro-government construction). The FTCA creates fourteen (14) enumerated exceptions to the waiver of sovereign immunity, including, “Any claim arising out of the combatant activities of the military or naval forces...during time of war.” 28 U.S.C. §2680(j). This narrow exception suggests that active duty service members may sue the United States for other claims.

A. Active Duty Service Members Currently Sue the United States Under the FTCA.

Nothing in the FTCA expressly bars active duty service members on leave from suing the United States for medical malpractice. “Read as it is written, this language renders the United States liable to *all* persons, including servicemen.” *United States v. Johnson*, 481 U.S. 681, 692 (1987) (Scalia, J., dissenting). Nor are active duty service members barred as a class of plaintiffs from suing the government under the Federal Tort Claims Act. Active duty service members are recognized as legitimate individual plaintiffs in medical negligence claims against the United States for care provided on military bases to their dependent spouses

and children. *See, e.g., Bravo v. United States*, 532 F.3d 1154 (11th Cir. 2008) (active duty Naval service member recovered loss of consortium damages as a result of medical negligence to dependent son at Navy hospital); *Dickerson v. United States*, 280 F.3d 470 (5th Cir. 2002) (active duty Air Force service member individually recovered damages for injury to child at Air Force hospital); *see also Scott v. United States*, 884 F.2d 1290 (9th Cir. 1989) (parents recovered for loss of love and companionship from injury to child at birth in military hospital); *see also Lebron v. United States*, 279 F.3d 321 (5th Cir. 2002) (active duty service member recovered for economic damages and loss of consortium as a result of medical malpractice to child at Army hospital).

The district court attempted to distinguish medical negligence claims brought by active duty service members on behalf of their dependents, stating that in claims based on dependent's injuries, "the *Feres* doctrine is not implicated." ER 000006. But whether the injured patient happens to be a dependent is a distinction without a difference. Any medical care received by a dependent at a military hospital is no less "incident to service" than medical care received by an active duty service member at the same hospital. But for the military service of a plaintiff, a dependent would not receive care at a military medical facility. Yet every court allows active duty service members to file claims and recover individual damages based on medical negligence at military hospitals, so long as

the central victim is a dependent. Likewise, claims brought by active duty personnel for their own injuries would have no greater impact on military discipline than claims brought by the same service member for their dependent's medical negligence injuries. The bare assertion that claims based on a dependent's injuries are different does not make it so.

B. The Evolution of the *Feres* Doctrine Weighs in Favor of This Claim.

Despite the plain language of the FTCA, courts have barred some claims of active duty service members against the United States. In *Feres v. United States*, the Supreme Court held that the United States is not liable under the FTCA for “injuries to servicemen where the injuries arise out of or are in the course of activity incident to service.” *Feres v. United States*, 340 U.S. 135, 146 (1950). Crafting a judicially-created exception to the government's waiver of sovereign immunity now commonly known as the “*Feres* doctrine,” the Supreme Court articulated two policy reasons for its holding: first, that the relationship between the government and members of the armed forces is distinctly federal, and second, that the government already has a no-fault statutory compensation plan for military personnel under the Veterans' Benefit Act. *Id.*, 340 U.S. at 143-145. Adding a third factor in *United States v. Brown*, the Court noted that the *Feres* doctrine is necessary to protect and preserve military discipline. *United States v. Brown*, 348 U.S. 110, 112 (1954).

The Supreme Court addressed *Feres* again in *U.S. v. Johnson*, 481 U.S. 681 (1987). In *United States v. Johnson*, the Supreme Court clarified the *Feres* doctrine, concluding that all three rationales should be weighed equally. *Id.*, 481 U.S. at 685. The Court stated clearly that it “has emphasized three broad rationales underlying the *Feres* decision” and decided the case before it only after applying each *Feres* factor in detail to the facts of the case. *Johnson*, 481 U.S. at 688-691. Dissenting in *Johnson*, Justice Scalia, joined by three other justices, called for the complete elimination of the *Feres* bar. *Id.* By a narrow majority, the Court held that active duty service members cannot bring tort actions against the government for injuries that “arise out of or are in the course of activity incident to service.” *Id.*, 481 U.S. at 686.

Subsequently, circuit courts have held that *Feres* will bar suit only if all three of its rationales are applicable (the special relationship with the government, the availability of a statutory compensation scheme, and the maintenance of the suit might impair military discipline). See *Del Rio v. United States*, 833 F.2d 282 (11th Cir. 1971). Post-*Johnson*, the Ninth Circuit adopted a four-factor test for determining whether an injury is incident to service, applied on a case-by-case basis of whether policy rationales articulated by the Supreme Court in creating the *Feres* doctrine are applicable. The four factors are: 1) the place where the negligent act occurred; 2) the duty status of the plaintiff when the negligent act

occurred; 3) the benefits accruing to the plaintiff because of his status as a service member; and 4) the nature of the plaintiff's activities at the time the negligent act occurred. *See Costo v. United States*, 248 F.3d 863, 867 (9th Cir. 2001) (citing *Dreier v. United States*, 106 F.3d 844, 848 (9th Cir. 1997) (internal citations omitted)).

II. THE DISTRICT COURT ERRED BY FAILING TO APPLY THE NINTH CIRCUIT'S FOUR-PART INCIDENT TO SERVICE TEST.

The district court erred by failing to apply the Ninth Circuit's four-part test to determine whether this claim is incident to service. An examination of the four-part test on these facts weighs in favor of allowing the claim in spite of *Feres*. Mrs. Witt respectfully requests that this Court weigh the factors present in this case and decline to follow the line of cases presuming an absolute bar on FTCA claims filed by off-duty active duty service members for their own injuries sustained as a result of medical negligence.

A. The Ninth Circuit's Four-Part Test Weighs in Favor of Allowing This Claim.

In applying its four-part incident-to-service test, the Ninth Circuit has warned that no single factor is dispositive and courts must consider the totality of circumstances. *See id.*, (citing *Dreier*, 106 F.3d 844, 852) and *Millang v. United*

States, 817 F.2d 533,535 (9th Cir. 1987). Each of the four considerations applied to these facts weigh in favor of this claim.

1) The Negligent Act Occurred in a Hospital.

As discussed in Section C.1. *supra*, active duty service members are already allowed to file suit for their own damages incurred as a result of medical negligence at military base hospitals – so long as that negligence injures a dependent spouse or child. *See, e.g., Bravo v. United States*, 532 F.3d 1154 (11th Cir. 2008); *Dickerson v. United States*, 280 F.3d 470 (5th Cir. 2002). But who suffers as the victim of the medical negligence is a distinction without a difference. In this scenario, Dean Witt’s hospital stay is not distinguishable in any way from the hospitalization of his wife or children. Dean Witt presented in an emergent condition to David Grant Medical Center on October 10, 2003 and underwent emergency surgery. ER 000047. Immediately following his surgery, and before he regained consciousness, the government’s medical negligence rendered him severely brain injured. ER 000050. The law upholds Dean Witt’s right to sue the United States for the same medical negligence committed at the same hospital, by the same government medical providers, so long as the providers harm his wife or children. The outcome should not be different for the same negligent acts committed by the same providers, simply because a service member was the victim of the negligent medical care.

Courts have allowed active duty service members to bring claims against the United States for medical negligence injuring a dependent on a military base because the *Feres* rationales are not brought into play by medical care that occurs outside of a battlefield setting. Military discipline is unaffected by an unconscious patient suffering as a silent victim of medical negligence. On leave and unconscious in the hospital, Dean Witt was not under any military orders, and could not have executed any military orders in his condition. The *Feres* Court was concerned with whether military discipline would be impeded if the government's conduct is litigated in a civil action. *Brown v. United States*, 739 F.2d 362 (8th Cir. 1984). But military discipline is not impeded by an active duty service member bringing a civil suit for the identical conduct committed by identical tortfeasors in an identical military base hospital when the injured victim is a military dependent. The Ninth Circuit recognized that this "glaring anomaly" of allowing suit for a dependent's claim still involves "second guessing military orders" but is nonetheless allowed. *Persons v. United States*, 925 F.2d 292, 299 (9th Cir. 1991).

The notion that military rank and questioning of officers by subordinates enters into the calculus of medical care in a military base is a farce. Is this Court to conclude that in a military hospital setting, a five-star general could refuse medical treatment ordered by a captain because of the chain of command, but Dean Witt, as a staff sergeant, would be unable to question orders from a superior officer?

Military discipline is not implicated in a hospital setting, particularly with an unconscious patient like Dean Witt, unable to consent to or refuse medical care.

2) Dean Witt Was On Leave When the Negligent Act Occurred.

Dean Witt was on leave and completely unconscious following an emergency surgery when the medical negligence occurred. ER 000047-000050. He was not subject to any military orders or duties and could not have executed any commands. Where a serviceman's off-duty activities are no different than a civilian's, the Ninth Circuit has emphasized that there is no relevant relationship between the serviceman's conduct and the military interests that might be jeopardized by civil suits. *Johnson v. United States*, 704 F.2d 1431 (9th Cir. 1983). Dean Witt's hospital stay is indistinguishable from a civilian military dependent presenting to DGMC for an appendectomy.

The evidence attached to the government's motion to dismiss further establishes that Dean Witt was not on active duty status on October 10, 2003. The Special Order attached to the government's motion to dismiss states, "Effective 10 October 2003 [Dean Witt is] *relieved from active duty*, above organization and station of assignment." ER 000063, Special Order (emphasis added). On the following page, the Certificate of Release or Discharge from Active Duty shows Dean Witt's separation date as October 10, 2003 under section 12(b). ER 000064. In both documents, there is no reference to what time Dean Witt was relieved from

active duty. In the declaration signed by Christine Saalbach, created by the government in response to this lawsuit, the government claims the exact hour of Dean Witt's separation was midnight, October 10, 2003. ER 000061. The Declaration goes on to state that Dean was transferred to the "Temporary Disability Retired List" ("TDRL") on October 11, 2003. *Id.* This hour of separation is not indicated in any document created prior to this litigation.

The United States has the exclusive power to control Dean Witt's duty status to avoid liability, and is manipulating his duty status for purposes of this litigation. But it is clear from the record that Dean Witt was on leave at the time he entered the hospital, was never under military orders or able to execute military orders during his hospital stay, and was relieved from active duty by the government on the day of the incident, October 10, 2003. The district court erred in concluding that Dean Witt's duty status barred his wrongful death claim.

Courts have drawn a distinction between the military status of "off-duty" and "on leave/furlough," allowing many claims for service members "on leave" under *Brooks v. United States*, 337 U.S. 49, 53-54 (1949). *See Stansberry v. Middendorf*, 567 F.2d 617(4th Cir. 1978) (naval personnel were temporarily "off duty" as opposed to on leave or furlough and were *Feres* barred); *see also Mariano v. United States*, 444 F. Supp. 316, 319 (E.D. Va. 1977) (injured serviceman was on liberty, not on leave or furlough; test of whether *Brooks* applies as opposed to

Feres is whether plaintiff was on furlough or active duty when injured). Dean Witt was not merely “off duty” but on leave when the negligence occurred.

This case is analogous to *Parker v. United States*, where a serviceman was given a four-day furlough to move to another home off the military base. The serviceman was on furlough and on his way home when a military vehicle collided with his on an Army road and within the confines of the military base. *See Parker v. United States*, 611 F.2d 1007 (5th Cir. 1980). After considering the evolution of the *Brooks* and *Feres* doctrines, the court concluded in order to determine whether an activity was “incident to service,” it must consider the “totality of the circumstances.” *See id.*, 611 F.2d at 1014. The court noted that the serviceman was not performing any military function, was on furlough, had no business on the base, and was merely driving home in an activity not related to his military service. *Id.* The Fifth Circuit concluded that his activities were not incident to service and *Brooks* rather than *Feres* applied and allowed the claim. *Id.*

The Ninth Circuit reached a similar result just last year in *Schoenfeld v. Quamme*, 492 F.3d 1016 (9th Cir. 2007). In *Schoenfeld*, a soldier was on liberty for the weekend, not on furlough. *Id.* He was injured in a car accident on base while heading off base to do personal errands. *Id.* The Ninth Circuit concluded that since the road was open to the public, driving on the road was not a benefit of military service. *Id.* The court also found that the serviceman’s activities leading

up to the accident were indistinguishable from a civilian's, suggesting a minimal impact on military discipline. *Schoenfeld*, 492 F.3d at 1023. The Ninth Circuit also noted that the situs of the accident was less important than the nature of these activities under the Ninth Circuit's fact-specific, totality of circumstances test. *Id.*, 492 F.3d at 1019, 1023 (*but see Veillette v. United States*, 615 F.2d 505 (9th Cir. 1980) (barring off-duty service member's medical negligence claim). Given that Dean Witt's hospital stay is indistinguishable from a civilian's hospital stay, this claim should fall under the *Brooks* doctrine.

3) Dean Witt and His Dependents Share Identical Medical Benefits Because of His Service.

Although Dean Witt received care at DGMC because of his service, his wife and children share the same medical benefits at DGMC because of his service and are not barred from suing the United States for negligent care. Even Dean Witt, while on active duty, had the right to sue for his own individual damages resulting from negligent medical care provided to his family at the same military hospital. It is well-settled law that these claims are allowed by active-duty personnel, even though the medical care to the dependent occurred as a benefit provided from the service member's military career – *incident to service*. Medical care provided to Dean Witt is indistinguishable from medical care provided to his military dependents.

Further, if Dean Witt were a veteran, as opposed to on military leave, he might receive care at DGMC as a military benefit, but unquestionably have the right to sue the United States for negligent medical care. There is no material difference between a veteran and a service member on leave, unconscious following surgery in the hospital. It does not follow that Dean Witt on leave should be legally at odds with Dean Witt as veteran; nor should he be stripped of legal rights enjoyed by his family members who are subject to the same military benefits.

4) Dean Witt Was On Leave and Medically Unable to Follow Any Military Orders at the Time of the Negligent Act.

The Ninth Circuit has stated that a plaintiff's duty status is not dispositive or to be mechanically applied to answer the "incident to service" question, but rather "the important question is whether the service member on active duty status was engaging in an activity that is related in some relevant way to his military duties". *Johnson v. United States*, 704 F.2d 1431, 1437-1438 (9th Cir. 1983). The United States does not dispute that at all times relevant to this claim, Dean Witt was not subject to any military orders. Nor can the United States argue that Dean Witt could have been called into military action at any time relevant to this claim, because the medical negligence occurred before he ever regained consciousness from surgery. The district court erred in mechanically dismissing Dean Witt's

claim based on his duty status without applying the four-factor test created by this Court.

III. THE *FERES* RATIONALES WEIGH AGAINST DISMISSAL.

The three *Feres* rationales do not support dismissal on these facts. While military discipline would not be impeded by Dean Witt filing a civil suit on behalf of his own injuries sustained from medical negligence, the other factors in *Feres* applied to the case at bar also weigh against dismissal. The *Johnson* Court explained the “special relationship” factor “is implicated to the greatest degree when a service member is performing activities incident to his federal service.” *Johnson*, 481 U.S. 681, 689 (1987). Dean Witt was on leave and unable to perform any activities incident to service at the time of his injury.

Nor should the Veteran’s Benefit Act (“VBA”) preclude Dean Witt’s family from recovering the full measure of damages available to them under California law. The VBA offers a reduced monthly stipend with no additional compensation to families for damages such as loss of consortium, mental anguish, or full compensation for a lifetime loss of earning capacity. Moreover, the VBA does not preclude veterans from recovering for medical negligence under the FTCA; it is unclear why active duty service members should be shut out of the legal system on this basis while retired service members receiving identical benefits are not precluded from filing suit.

IV. THE *FERES* DOCTRINE IS UNCONSTITUTIONAL.

Congress did not specifically exclude active duty service members from filing suit against the government under the FTCA. In waiving the government's sovereign immunity, Congress provided rights to all Americans for the negligent activities of government employees, with specific and clearly defined exceptions. *See generally*, 28 U.S.C. §§ 1346(b)(1) and 2671-2680. The judicially created *Feres* doctrine re-wrote the FTCA to exclude certain claims brought by service members. *United States v. Johnson*, 481 U.S. 681, 692 (1987) (Scalia, J., dissenting). This exclusion violates the equal protection clause by barring service members from equal access to laws available to civilian citizens. Further, the Supreme Court violated constitutional separation of powers principles by creating an exception that Congress did not write into the FTCA.

A. The *Feres* Doctrine Violates the Constitutional Principles of Equal Protection.

The *Feres* doctrine violates the equal protection clauses of the Fifth and Fourteenth amendments of the United States Constitution.² With passage of the

² The Fifth Amendment provides, in relevant part: “No person shall be...deprived of life, liberty, or property without due process of law.” UNITED STATES CONSTITUTION, AMENDMENT V.

The Fourteenth Amendment provides, in relevant part: “[N]or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.” UNITED STATES CONSTITUTION, AMENDMENT XIV.

FTCA, Congress waived the United States' sovereign immunity and rendered it liable "for money damages...for injury or loss of property, or personal injury or death, caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment...." 28 U.S.C. § 1346(b). As written, the FTCA renders the United States liable to *all* persons, service members included, injured by negligent government employees. In considering the exceptions to the government's liability, Congress only excluded service member suits for 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). This exception for service members in combat demonstrated that "Congress specifically considered, and provided what it thought needful for, the special requirements of the military." *United States v. Johnson*, 481 U.S. at 693. By barring a service member's suit against the Federal government far beyond what the FTCA provides, the *Feres* doctrine created a class of persons (service members) who are unable to receive protection under the law (recovery under the FTCA) equal to that provided to regular citizens (non service members). As such, the *Feres* doctrine violates the equal protection clauses of the Fifth and Fourteenth Amendments of the United States Constitution.

Had Dean Witt been a civilian admitted to the DGMC and, as here, been subject to negligent medical care, he would be able to file suit against the

government under the FTCA. Civilian status therefore confers rights that service members do not have. The *Feres* doctrine declared that “the members of the United States military are not equal citizens, as their rights against the government are less than the rights of their fellow Americans.” *See Costo v. United States*, 284 F.3d 863, 870 (9th Cir. 2001) (Ferguson, J. dissenting). By doing so, the *Feres* doctrine violates the equal protection rights of military service men and women.

Indeed, as discussed in Section I.A. *supra*, Dean Witt as an active duty service member would be a proper plaintiff in an FTCA suit had his civilian dependent wife or child been victimized by the government’s same negligent medical care. *See, e.g., Scott v. United States*, 884 F.2d 1290 (9th Cir. 1989). Thus, the *Feres* doctrine has wrought a system in which the courts have created a special class within a class undeserving of equal protection under the laws (an active duty service member may or may not sue for the same negligent conduct against the same military personnel in the same military facility, depending on the factual circumstance of being a patient or a loved one of a patient). This inequitable and arbitrary application of the laws to active duty service members violates the equal protection clauses of the Fifth and Fourteenth amendments.

B. The *Feres* Doctrine Violates the Separation of Powers Doctrine.

Courts should never overrule the plain language of Congress unless there is a constitutional violation. *See Marbury v. Madison*, 5 U.S. 137, 177-79 (1803).

The *Feres* doctrine neither resolved a constitutional violation (as none existed) nor clarified an ambiguous statute. Even the *Feres* Court noted that Congress considered the potential for military claims when drafting the FTCA and could have specifically excluded them. *See Feres v. United States*, 340 U.S. 135, 138-139 (1950). Congress did not do so.

Despite the statute's clarity and absence of any constitutional violation, the *Feres* decision re-wrote the FTCA by placing a judicially created exception into the congressional statute. Congress carefully considered the waiver of its sovereign immunity and specifically considered the role of military claims against the government. By creating a narrow exception for claims arising out of combatant activities, Congress' intent to bar service member suits only in such a limited circumstance could not be clearer. *See* 28 U.S.C. 2680(j). The *Feres* decision took this fairly small, clearly defined legislative classification and greatly expanded it. *See Costo v. United States*, 248 F.3d 863, 869 (9th Cir. 2001) (Ferguson, J. dissenting).

The *Feres* Court injected its own "individual appraisal of the wisdom or unwisdom of a particular course consciously selected by the Congress." *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 194-195 (1978). It is not for the judiciary, however, to "sit as a superlegislature to judge the wisdom or desirability of legislative policy 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 (1976). The *Feres* Court substituted its judgment for that of the legislature and created judicial exceptions to the FTCA. Therefore, the *Feres* decision constitutes a violation of constitutional separation of powers.

CONCLUSION

The Ninth Circuit has reluctantly applied the *Feres* doctrine in limited circumstances, and noted that “countless courts and commentators” have a “general distaste” for the doctrine. *Persons v. United States*, 925 F.2d 292, 295 (9th Cir. 1991). As Judge Mendez noted below, “Several noted jurists and academics have raised objection to the *Feres* doctrine, *see, e.g., Costo*, 248 F.3d at 869 (Ferguson, J. dissenting); *Johnson*, 481 U.S. at 692 (Scalia, J. dissenting), and its application to this case seems particularly unfair.” ER 000008. Had Dean Witt suffered the same medical negligence at a private hospital, his widow and children could have sued and recovered for their loss. Had one of Dean Witt’s dependents suffered his fate at the same military hospital, Dean Witt himself could bring a claim for his own damages arising out of medical negligence. As Judge Mendez concluded, “A 25 year old man who devoted his life to serving his county is dead through no fault of his own and his widow cannot sue to recover for her loss. Instead, she is limited to a fraction of the recovery she might otherwise have received because of the *Feres* doctrine.” ER 000007-000008, *citing United States*

v. Johnson, 481 U.S. 681, 701 (1987) (Scalia, J., dissenting). Mrs. Witt joins the district court below in urging this Court to revisit the *Feres* doctrine. Appellant urges this Court to instead apply the *Brooks* doctrine to the civilian-like conduct of a service member on leave and under no military orders, and allow this claim to proceed. For all of these reasons, Mrs. Witt respectfully requests that this Court reverse the district court's judgment and remand the case for further proceedings.

Certificate of Compliance Pursuant to Fed. R. Ap. P. 32(a)(7)(C) and Circuit Rule 32-1 for Case Number 07-16975

I certify that:

- 2. The attached brief is **not** subject to the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) because
- This brief complies with Fed. R. App. P. 32(a)(1)-(7) and is a principal brief of no more than 30 pages.

Date July 14, 2009

/s/ Laurie M. Higginbotham
Signature of Attorney

Certificate of Service

I hereby certify that on July 14, 2009, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

I further certify that I have sent a paper copy of the foregoing document by Federal Express to:

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Statement of Related Cases

Pursuant to Circuit Rule 28-2.6, there are no other cases in this Court related to the instant case, pending at this time.

July 14, 2009
Date

/s/ Laurie M. Higginbotham
Signature of Attorney