NO. 10-2077

IN THE
United States Court of Appeals
FOR THE FOURTH CIRCUIT

BRADFORD SCOTT HANCOX,
ADMINISTRATOR OF THE ESTATE OF LATIECE RENEE REID GLENN,

Plaintiff-Appellant,

v.

PERFORMANCE ANESTHESIA, P.A.,
AND UNITED STATES OF AMERICA,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA

REPLY BRIEF OF APPELLANT

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ARGUMENT

I. THE DISTRICT COURT ERRED IN GRANTING THE MOTION TO DISMISS FOR LACK OF SUBJECT MATTER JURISDICTION UNDER THE FERES DOCTRINE BASED ON THE FACTS OF THIS CASE.

The United States misconstrues the Plaintiff's arguments to reach a conclusion that is not justified by the undisputed facts of this case in a misguided effort to convince this Court that dismissal of the Plaintiff's action is "mandated by Feres." This point is illustrated by the fact that the first 20 pages of the Government's brief are devoted to points that the Plaintiff has conceded in its Opening Brief:

1) In light of the Attorney General's certification that the named defendants were acting within the scope of their employment, Plaintiff's sole remedy is under the FTCA;
2) Defendants Hand, Coneen, and Brezinski, although private contractors, are deemed to be federal employees as a matter of law, pursuant to the Gonzales Act, 10 U.S.C. 1089, for purposes of the FTCA, because they were hired under a personal services contract with the Government that specifically designated them as such;

3) Defendant Major Eichelberger, a student intern with Performance Anesthesia, P.A., is a government employee by virtue of his active duty military status at the time of the alleged malpractice;

4) The United States' substitution for the named defendants in this case and removal of the action from the state to the district court under the FTCA was proper;[1] and

5) The viability of the Plaintiff's FTCA claim against the United States is governed by the Supreme Court's decision in Feres, which has been interpreted generally to bar claims for medical malpractice in military hospitals against military healthcare providers as "incident to service."

These concessions notwithstanding, the dismissal of the Plaintiff's action is not mandated by, and would be a misapplication of, the Feres doctrine. Contrary to the Government's assertions, the Plaintiff seeks the proper application of the Feres doctrine, not an unwarranted "limitation" of

[1] Contrary to the Government's assertion, the Plaintiff did not suggest that the United States improperly substituted itself in this case for the individual defendants so the matter could be removed to federal district court and the individual defendants insulated from liability. The Plaintiff appropriately filed this action against the private contractors in state court; only the United States was in a position to certify and scope the defendants as employees acting within the scope of their federal employment. When the United States made that determination, this action was properly removed to the district court and the substitution was proper.

its scope. As stated in Plaintiff's Opening Brief, and illustrated in the Government's Brief, this is a case of first impression involving Feres. It cannot be disposed of, as the Government seeks, in a cut and dried manner simply because Corporal Glenn was an active duty military service member and the situs of the injury was at a military hospital.

As the Fourth Circuit stressed in Kendrick v. United States 877 F.2d 1201, 1203 (4th Cir. 1989), Feres "is concerned with when and under what circumstances the negligent act occurred." (citations omitted). In Kendrick, the court concluded that all of the medical treatment arose out of an activity incident to service while Kendrick was on active duty in a military hospital under the care of military physicians. Similarly, in Rayner v. United States 760 F.2d 1217 (11th Cir. 1985), which the Government claims is "indistinguishable" from this case, the court concluded that Feres barred the tort claim of a serviceman allegedly caused by the military doctors and military staff of a military hospital. Those are not the circumstances of this case. While the status of the tortfeasor is not controlling, as the Court in United States v. Johnson made clear, 481 U.S. 681, 686 (1987), it cannot be ignored in a Feres analysis where it is part of the surrounding circumstances of the alleged negligence. Notably in Johnson, the alleged tortfeasor was a

civilian employee of the Federal Aviation Administration, a category of employee expressly included in the FTCA's definition of employee.

In the case at bar, the alleged tortfeasors are deemed to be federal employees by virtue of their personal services contract with the Department of Defense, according to the Gonzales Act.[2] As the Plaintiff argued in its Opening Brief, the proper application of the Feres doctrine in this case requires a careful examination of the circumstances under which the alleged negligence occurred, and satisfaction of the three rationales underlying the Feres doctrine, which the Government ignores until page 20 of its 30 page brief. This is indeed a Feres case of first impression in which the Government seeks to apply, and extend by contract, the Feres doctrine, a judicially created exception to the FTCA's waiver of sovereign immunity, some 51 years later to further erode the rights of military service members seeking lawful recovery for torts committed against them and their families by private contractors. An analysis of Congress' intent in enacting the Gonzales Act and the fundamental rationales behind the Feres doctrine

[2] In light of the Government's certification of Major Eichelberger as an active duty federal employee at the time of the alleged malpractice, an FTCA claim against him is barred under Feres. However, as a student intern, practicing under the licenses of private contractors Hand, Coneen, and Brezinski, and not a certified registered nurse anesthetist, Major Eichelberger is not responsible for the alleged malpractice in this case.

reveal that Feres should not be a bar to Plaintiff's claim against the United States.

A. The Gonzales Act Confers Immunity From Liability to the Private Contractor Defendants in This Case But Does Not Extend Feres Immunity to the Government.

The United States argues that the designation of the named defendants as "federal employees" under the Gonzales Act means that any injuries that Corporal Glenn sustained as a result of their medical care in a military hospital were necessarily service-related injuries barred by the Feres doctrine. This simply cannot be the case.

Employee immunity conferred by the Gonzales Act and Feres immunity are wholly separate issues. The Gonzales Act covers substitution and payment immunity by the Government for military and civilian employees and personal services contractors. The Gonzales Act does not by its express terms bar lawsuits by service members against the federal Government. The Feres doctrine is an entirely different judicially created immunity that bars lawsuits by service members only if the three service-related policy rationales apply. An examination of the legislative history of the Gonzales Act bears out this critical distinction.

The Gonzales Act, also known as the Medical Malpractice Immunity Act, 10 U.S.C. § 1089, provides medical malpractice immunity to medical employees of the Armed Forces. Section 1089 makes the FTCA the exclusive remedy for victims of medical malpractice committed by medical "employees" of the government. In introducing this bill to Congress in 1975, Representative Henry B. Gonzales testified about the climate that existed at that time – the increasing incidence of personal malpractice suits being brought against medical personnel; a shortage of military doctors; and, concern that the military would be unable to attract doctors to the all-volunteer Army unless Congress granted personal immunity from civil tort liability to military doctors for acts performed within the scope of their employment with the federal Government.[3]

Over the ensuing months, Representative Gonzales' bill was modified to cover full time federal civilian employees, medical personnel employed under personal services contracts, and others, but the purpose and effects of the bill remained unchanged – to cover all potential financial liability of Defense Department medical personnel, to eliminate their need to secure

[3] Hearings before the Subcommittee on Military Personnel, House Committee on Armed Services on H.R. 3954 and S. 1767 and H.R. 7496 (Identical Bills), 94th Cong., 1st Sess., 3-8 (1975) (testimony of Henry B. Gonzales).

private liability insurance, and to make the FTCA the exclusive remedy for medical malpractice within the scope of their duties for the Department of Defense.[4] An expansion of the Feres doctrine to private contractors was never discussed or contemplated by Congress in enacting the Gonzales Act in 1976, nor was consideration given in the Congressional record to the attendant implications on the tort liability of the United States under the Feres doctrine of deeming private contractors to be federal employees.[5]

Thus, as applied to this case, the Gonzales Act only protects the individual defendants from bearing personal liability for their malpractice. The Gonzales Act says that the federal Government, not the individual defendants, must bear that liability. Application of the Feres doctrine to bar Plaintiff's malpractice claim against the Government under the FTCA as "activity incident to service" is a separate question requiring separate analysis. In enacting the FTCA, Congress' focus was on the extent of the Government's liability for the actions of its *employees.* United States v.

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[4] Senate Report to accompany H.R. 3954 of the Senate Committee on Armed Services, 94th Cong., 2nd Sess., 1-12 (1976).

[5] See, remainder of the legislative history for the Gonzales Act: Hearings before the House Committee on Armed Services on H.R. 3954, 94th Cong., 2nd Sess., (1976); Hearings before the Subcommittee on General Legislation, Senate Committee on Armed Services on S. 1395 and H.R. 3954, 94th Cong., 2nd Sess. (1976).

Shearer, 473 U.S. 52, 56-57 (1985). As such, each Feres case must be examined in light of the FTCA as it has been construed in Feres and subsequent cases. Id. at 57.

B. The Proper Application of the Feres Doctrine Requires an Examination of the Private Contractor's Available Defenses.

Contrary to the Government's assertion, the Plaintiff seeks not an "end-around" of the Feres doctrine, but rather its proper application. Plaintiff's argument that the private contractor defendants should not be allowed to "piggy back" on the Feres defense of the United States is supported by the 8th Circuit's decision in Knowles v. United States, 91 F.3d 1147 (8th Cir. 1996).

In Knowles, the plaintiffs, parents of a child who was permanently injured by negligent treatment from military medical specialists at Ellsworth Air Force Base Hospital in South Dakota, sued the United States under the FTCA for malpractice. The United States admitted liability but moved for damages to be limited by the South Dakota malpractice damages cap. The Knowles court clarified that the United States stands in the shoes of its employees when determining its liability under the FTCA. Id. at 1150. In doing so, the court interpreted the express language of the FTCA, which

makes the United States "liable … in the same manner and to the same extent as a private individual under like circumstances." Id.

In evaluating the impact of the Gonzales Act, the court in Knowles noted that this statute removed liability from the Government's employees and placed it on the Government, and as such the Government is "liable [under the FTCA] to the same extent the employees would have been absent immunity from suit." Id. This Circuit in Starns v. United States, 923 F.2d 34 (4th Cir. 1991), reached the same conclusion: "The FTCA assures the federal government of that treatment accorded private parties." Id. at 37.

While the Feres doctrine was not at issue in these cases, the courts' interpretation of the plain language of the FTCA is squarely on point. In Knowles, this meant that the Government did not have the benefit of the malpractice damages cap because it was not available to the individuals under South Dakota law. In the FTCA case at bar, this means that the Government can only avail itself of Feres immunity if the principles underlying the judicially-created Feres doctrine apply to the actions of the individual defendant private contract medical "employees."

As the military increasingly outsources its medical services to private contractors, it cannot be allowed to extend to those private contractors the unique defense of Feres immunity, which is grounded in military tradition

and deference to military decision-making, where those policy rationales do not apply. The actions of the private contractor defendants in this case caused the tragic wrongful death of a 21-year old service member and, if properly applied, the Feres doctrine does not bar Plaintiff's claim.

C. Corporal Glenn's Injuries Are Not Barred as "Incident to Service" Under Feres Because the Policy Rationales Supporting the Proper Application of Feres Are Not Present in This Case.

The Supreme Court in Feres carved out an exception to the FTCA's waiver of sovereign immunity "for injuries to servicemen where the injuries arise out of or are in the course of activity incident to service" caused by the negligence of any employee of the government. Feres v. United States, 340 U.S. 135, 146 (1950). As demonstrated in Plaintiff's Opening Brief, courts interpreting the Feres bar have long cautioned that the "incident to service" question cannot be answered with a rote application of a baseline rule, such as the Plaintiff's active duty status and treatment in a military hospital. See Parker v. United States, 611 F.2d 1007, 1014 (5th Cir. 1980) (in determining the incident to service question, courts must examine the totality of circumstances, to include the three Feres rationales); Haas v. United States, 518 F.2d 1138, 1141 (4th Cir. 1975) (the incident to service determination is a question of fact requiring consideration of all relevant facts).

This Court should reject the Government's hollow Feres analysis that focuses only on the status of Corporal Glenn receiving the medical care at issue at Womack Army Hospital from the Gonzales Act-designated medical employees. Such a construction would improperly stretch Feres immunity well beyond the Supreme Court's holding in light of the three rationales underlying this judicially created doctrine.

Contrary to the Government's argument, this Court cannot dispose of Plaintiff's complaint based on the Supreme Court's conclusions in United States v. Johnson, 481 U.S. 681 (1987). Johnson involved a suit against the Government and full time civilian employees of the Federal Aviation Administration acting in their official capacities. Johnson is therefore inapposite. Permanent federal civil service employees of our armed services, with all the attending federal civil service laws, benefits and obligations, should not be viewed as the same type of employee as a temporary private civilian contractor under Johnson without a substantive Feres analysis. In fact, the Government has cited no case to support what it asks this Court to do: apply the Feres doctrine to immunize Gonzales Act federal "employees" from suit while ignoring their true status as private contractors and the judicial rationales for Feres. As demonstrated by the Government's cursory treatment of the rationales, Plaintiff's claims against

the private contract medical "employees" should not be dismissed as activity incident to service on Feres grounds because none of the three Feres rationales are satisfied.

1. The First Feres Rationale Does Not Apply.

Under the first Feres rationale, immunity only applies if it will protect the distinctly federal relationship between service members and the Government, which makes application of local tort law pursuant to the FTCA inappropriate. Johnson, 481 U.S. at 689 (Government should face a "uniform rule of liability" for injuries sustained by soldiers incident to service, because the "relationship between the Government and members of its armed forces is distinctly federal in character.") The Government argues that in claiming this rationale does not apply to the instant case, the Plaintiff disregards that (1) defendant Major Eichelberger was an Army Major on active duty, and (2) that the remaining individual defendants were employed under a personal services contract with Government. In fact, to the contrary, Plaintiff relies on precisely these factors to refute the applicability of this first rationale.

Major Eichelberger, the student intern anesthetist, is not an employee upon which the Government's liability can attach in his case, given the Government's certification of his active duty status at the time of the alleged

malpractice, which is unrefuted. Notwithstanding, Major Eichelberger was only involved in Corporal Glenn's medical care in the role of a student intern. As such, he was practicing under the professional supervision, licensing and medical credentialing of his instructor preceptors, private contractors defendants Hand, Coneen, and Brezinski, and he is, therefore, not medically or legally responsible for the injuries to Corporal Glenn and her resulting death. In short, he is immaterial to the Plaintiff's FTCA claim.[6]

In contrast, the remaining defendants Hand, Conneen, and Brezinski, were licensed, certified, registered nurse anesthetics, responsible for Corporal Glenn's injuries and resulting death in this case and there was no genuine "distinctly federal relationship" between them and the federal Government beyond their personal services contract to provide anesthesia services at Womack Army Hospital. In determining whether personal services contractors like the remaining defendants possess the "distinctly federal relationship" envisioned by the Feres Supreme Court, their "employee" status as conferred by the Gonzales Act is not controlling.

The terms of the Government contract under which the individual Defendants were hired by Performance Anesthesia are inconsistent with a

[6] Plaintiff has consistently maintained this position concerning Major Eichelberger in pleadings opposing the Government's Motion to Dismiss.

"distinctly federal relationship," as is the manner in which the individual defendants treated the Plaintiff. The contract refers throughout to Performance Anesthesia as the "Contractor" and to "Contract employees" and contractor employees" of Performance Anesthesia, such as the individual defendants. (J.A. 41). Individual defendants Hand, Conneen, and Brezinski affixed the following stamp next to each and every one of their entries in Corporal Glenn's medical records identifying themselves to Corporal Glenn and to anyone else viewing her records as private contractors:

> Walter R. Hand, CRNA
> Contract Anesthetist
> Performance Anesthesia, PA
>
> Robert Conneen, CRNA
> Contract Anesthetist
> Performance Anesthesia, PA
>
> Raymond Brezinski, CRNA
> Contract Anesthetist
> Performance Anesthesia, PA

(J.A. 4, Dkt. No. 17, Ex. 3). In such circumstances, courts have held that a private contractor is not the Government, and not a Government employee, because "[t]he congruence of professional interests between the contractors and the Federal Government is not complete because the contractors remained distinct entities pursuing private ends, and their actions remained

commercial activities carried on for profit." Chapman v. Westinghouse Elec. Corp., 911 F.2d 267 (9th Cir. 1990).

Beyond their Gonzales Act "employee" designation as personal services contractors, nothing about the individual defendants is "distinctively federal in character." Performance Anesthesia had a routine, commercial relationship with the Government, whereby Performance Anesthesia and its employees contracted to provide medical services at a Government healthcare facility.[7] There are literally thousands of such commercial contracts in place at hospitals, ambulatory surgery centers, and other health care facilities in this country. Similarly, Corporal Glenn had a routine patient-contractor health care provider relationship with the individual defendants.

There is no legitimate policy reason for this Court to extend Feres immunity to give the Government, which voluntarily substituted itself under the Gonzales Act for the individual defendants, a "rule of uniform liability" when a non-military federal agency is not afforded the same treatment. When the defendant in an FTCA case is a Government agency other than the

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[7] Performance Anesthesia's duties included maintaining a sterile operating room environment and monitoring post-operative anesthesia complications – the two areas implicated in Corporal Glenn's death — and supervising and training Government employees such as student intern Major Eichelberger.

military, the Government does not have the benefit of the Feres bar, and it must face the non-uniform tort law of the various states. Private contractor "employees" such as the defendants do not have a need for a "uniform rule of liability" that is more pressing than a gigantic federal agency that is not protected by Feres. See McMahon v. Presidential Airways, Inc., 502 F.2d 1331 (11th Cir. 2007) ("We also note that private companies in general must face the varying tort law of the fifty states. Presidential [the defendant] has not provided any reason why it is in a different position from any other private corporation, or should receive special treatment."). In fact, a private contractor's need for uniformity is far less than that of a non-military Government agency. A private contractor is subject to liability in only those states in which it chooses to do business; a federal agency is subject to liability in every state. The first Feres rationale, therefore, does not apply to private contractor Gonzales Act "employees" such as the individual defendants.

Corporal Glenn and service members like her should not be barred from a cause of action simply because the Government chooses to contract under the Gonzales Act with private medical providers. This is not the kind of sacrifice our Government expects, or the Feres doctrine envisioned, of service members when they voluntarily come on active duty to serve their

country, and obtain routine medical care stateside from private contractors hired by the Government to perform their contracted-for services in military hospitals.

When Feres was decided in 1950, the Supreme Court applied the Feres rationales in a pre-outsourcing environment to interpret the Government's liability under the FTCA for the negligence or wrongful act or omission of its employees, including military personnel. Unlike permanent federal civilian employees, however, Government contractors were expressly excluded from the FTCA's definition of employee. 28 U.S.C. § 2671. See United States v. Orleans, 425 U.S. 807, 814 (1976); Robb v. United States, 80 F.3d 884, 887 (4th Cir. 1996). This Court, therefore, should not find that a contractual relationship with the Government is sufficient to justify extension of the Feres doctrine on grounds of this first rationale.

2. The Second Feres Rationale Does Not Apply.

The second Feres rationale is the availability of statutory death benefits to service members such as Corporal Glenn as the "cap" on the Government's liability for service-related injuries. Johnson, 481 U.S. at 690 (the Feres doctrine limits the injured service member to the benefits that are already available to her under various statutes other than the FTCA). The

Government argues that there is nothing about the private contractual relationship between the Government and the named defendants that should impact making the statutory benefits available to all military service members for service-related injuries their exclusive remedy. It rejects the Eleventh Circuit's analysis of this second Feres rationale in McMahon v. Presidential Airways, Inc., 502 F.2d 1331 (11th Cir. 2007), solely based on the existence of a personal services contract in this case, which was not present in McMahon, without providing any analysis of this second rationale as required by Feres. The Government's argument ignores the indisputable facts of this case.

The "cap" policy, of course, has no application to private entities that have a contract with the Government, such as the named defendants. Unlike the Government, the defendants have not paid anything to the Plaintiff under other federal statutes, and the Government, which stands in their shoes, will be immune from liability on their behalf unless the Plaintiff is permitted to maintain this FTCA suit. The Government's thin attempt to distinguish McMahon based solely on the presence of a personal services contract, fails because it lacks any substantive analysis of the merits of this second Feres rationale, and fails to explain how and why it should be properly applied to private personal service contractors to justify barring Plaintiff's claim.

From the above, it is clear in this case that the first two reasons for invoking *Feres* do not apply. As stated in McMahon, 502 F.3d at 1347, these policy rationales:

> Serve to protect distinctively *sovereign* interests -- ensuring that the government is not crippled by a non-uniform standard for soldiers' injuries incurred incident to service, and ensuring that the government's liability is capped at the amount of statutory benefits it provides to injured soldiers. The Supreme Court has itself implicitly recognized these two Feres policies do not apply to individuals, such as private contractors.

3. The Third Feres Rationale Does Not Apply.

The third Feres rationale is that it protects against judicial interference with military discipline and sensitive military judgments. Johnson, 481 U.S. at 690. The Government argues that Plaintiff's claim would involve the judiciary in sensitive military affairs at the expense of military discipline and effectiveness because the named defendants were serving under a personal services contract with the Army. It posits that the terms of the contract included day-to-day supervision of the contractor employees; a quality control evaluation role by the Government; a provision for Government pre-approval of contractors selected to work under the contract; and the possibility of military witnesses being called to testify in the case. None of these factors support the third Feres rationale in this case.

The possibility of military medical personnel being called to testify in the Plaintiff's case certainly does not implicate military decision-making or effectiveness, as the Government argues. There is a possibility of military medical witnesses being called to testify in any FTCA medical malpractice case against the Government, including claims for injuries to military dependents and retirees that are never Feres barred.

Likewise, the inclusion of contract provisions permitting quality assurance review, contractor staff credentials review and selection, and performance evaluation, does not transform medical contractors into military employees for purposes of the FTCA. Robb v. United States, 80 F.3d at 893-94. Whether in this context an individual is a federal employee is determined by federal law, and an inquiry is made into various factors such as the power of the federal Government to control the detailed physical performance of the individual. See United States v. Orleans, 425 U.S. 807, 814 (1976); Logue v. United States, 412 U.S. 521, 527-28 (1973); Wood v. Standard Products Co., 671 F.2d 825, 829 (4th Cir. 1982). As relates to the Government's real ability to provide day-to-day supervision and control the work of contract physicians, however, it is well established in this Circuit and others that because of the nature of their work, physicians, like the individual defendant nurse anesthetists, cannot be subject to external control

of their medical judgment; they are independent contractors and not employees of the Government for FTCA purposes. Robb v. United States, 80 F.3d at 888-91; Wood v. United States, 671 F.2d 825, 831 (4th Cir. 1982); Lilly v. Fieldstone, 876 F.2d 857, 860 (10th Cir 1989).

It is well settled that "military discipline" impact concerns do not apply in a tort lawsuit by a service member against a private contractor. McMahon. 502 F.3d at 1349 ("We are confident in our judgment that there is no substantial impact on military discipline from soldiers recovering for torts of private contractors"); Shaw v. Grumman Aerospace Corp., 778 F.2d 736 (11th Cir. 1985) (suit against military contractor allowed because it did not challenge act or order of superior officer, and possibility that members of military might testify on opposite sides of case is no significant threat to military discipline); see also Johnson, 481 U.S. at 699-700 (dissenting opinion) (arguing that discipline policy of Feres does not even apply strongly to government itself).

In addition, allowing Plaintiff's claim to proceed will not apply a tort law standard to "sensitive military judgments," and thus result in judicial second-guessing of military judgments. This is a straightforward medical malpractice case against the substandard professional judgment of private contractors, who exercised absolutely no military judgment, sensitive or

otherwise, when they provided anesthesia services to Corporal Glenn. The decisions at issue here are routine medical decisions that confront thousands of doctors, nurse anesthetists and other healthcare providers who are involved every day in the placement of epidural catheters during childbirth, and management of ensuing infections. Because the relevant judgments are the medical decisions of the individual defendant contractors, military judgments will not be implicated by judicial scrutiny of their conduct. This is not a case of negligent credentialing or supervision against the military where sensitive military decision-making of military health care executives, or military supervisors might be impacted.

In evaluating this third rationale, the Eleventh Circuit in McMahon held that there was insufficient ground to justify the application of Feres immunity to a private contractor who was involved in transporting soldiers in the war zone in Afghanistan. If sensitive military judgments not are involved during combat operations in an overseas war zone by private contractor transport pilots, to be sure there can be no sensitive military judgments involved in providing anesthesia services by private contractors during childbirth at a stateside military hospital.

None of the Feres policy rationales would be advanced in applying the doctrine to bar a tort claim where negligence by private contractors is

fundamentally at issue, as here. The only adverse effect on good order and discipline would be for other service members at the military medical facility to witness the effect of Corporal Glenn's wrongful death by the negligence of these private contractors and then see her and her family excluded under a misapplication of the Feres doctrine from judicial remedy by the very Government she volunteered to serve in the military.

CONCLUSION

This Court should end the Government's attempted false construction of the Gonzales Act as conferring Feres immunity on the Government to avoid liability for the negligence of its private contractors. Dismissal of this case would be an unwarranted and unjustified extension of the Feres doctrine unsupported by any of its underlying policy rationales. The immunity from liability that is afforded to personal services contractors under the Gonzales Act does not eliminate the Government's liability in tort for the negligent acts of these contractor medical providers, who are for all other purposes independent contractors at common law.

The Feres doctrine is at its core a judicial deference and recognition that military service comes with limitations on rights and that the rights of service members and their families to file tort claims and seek recovery for injuries and death only end when they conflict with the need for military

discipline and other rationales supporting Feres. Because those rationales do not apply to the facts of this case where the Government has voluntarily contracted with and substituted itself in place of private contract medical providers of anesthesia services, dismissal of the Plaintiff's case on Feres grounds is not warranted.

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January 7, 2011

/s/ Bruce J. Klores
Bruce J. Klores, Esquire

CERTIFICATE OF SERVICE

In accordance with Rule 25 of the Rules of the United States Court of Appeals for the Fourth Circuit, I hereby certify that on this 7th day of January, 2011, required copies of the foregoing Reply Brief of Appellant were filed in the Office of the Clerk of the United States Court of Appeals for the Fourth Circuit, via hand delivery, and have electronically filed the Reply Brief of Appellant using the Court's CM/ECF system which will send notification of such filing to the following counsel, and have mailed a copy via U.S. Postal Service, First Class Mail, postage paid to:

R.A. Renfer, Jr.
Assistant United States Attorney
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310 New Bern Avenue, Suite 1100
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January 7, 2011

/s/ Bruce J. Klores
Bruce J. Klores, Esquire