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ALTERNATIVES TO THE JUDICIALLY PROMULGATED *FERES* DOCTRINE

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Were the power of judging joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control, for the judge would then be legislator.[1]

I. Introduction

Army Specialist Sean Baker was a military police officer stationed at Guantanamo Bay, Cuba who "volunteered to play the part of an

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[1] THE FEDERALIST NO. 47 at 271 (James Madison) (Clinton Rossiter ed., 1961).

uncooperative detainee"[2] during a forced cell extraction training exercise on 24 January 2003 at Camp Delta, Guantanamo Bay.[3] Before the exercise began, First Lieutenant Shaw Locke, the officer in charge of Camp Delta's internal reaction force, instructed Specialist Baker to wear an orange jumpsuit, make noise in a cell, hide under a bed, and resist all verbal orders of the camp's internal reaction force team.[4] Lieutenant Locke further instructed Specialist Baker to comply with the team's orders once the team entered the cell and to say the codeword "red" if he felt threatened.[5]

After receiving his instructions from Lieutenant Locke, Specialist Baker donned an orange jumpsuit and squeezed under a bunk in a cell at the camp.[6] Once Specialist Baker heard the internal reaction force team approaching his cell, he began to yell.[7] As the internal reaction force team approached the cell door, the team's members began shouting verbal commands to Specialist Baker.[8] Specialist Baker ignored the commands.[9] The team entered the cell, grabbed Specialist Baker, and tried to physically restrain him.[10] Specialist Baker resisted and then muttered the codeword "red," signaling that the team was applying too much force.[11] The team ignored the code word, continued to physically restrain Specialist Baker, and beat him as he shouted "red" and "I am a U.S. [S]oldier!"[12] As a team member slammed Specialist Baker's head

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[2] Baker v. United States, 2006 U.S. Dist. LEXIS 38012, at *2 (E.D. Ky. 2006).

[3] *See id.* Specialist Baker was a member of the 438th Military Police Company, an Army National Guard unit from Kentucky. T. Bruce Simpson, Jr., The Beating of Specialist Baker in Guantanamo Bay, Cuba: a Report of Findings and a Request for Relief 1 (Dec. 2, 2004) (unpublished manuscript, on file with author).

[4] *See Baker*, 2006 U.S. Dist. LEXIS 38012, at *2. Lieutenant Locke was assigned to the 303d Military Police Company from Jackson, Michigan. Simpson, *supra* note 3, at 7.

[5] *See Baker*, 2006 U.S. Dist. LEXIS 38012, at *2. Prior to the internal reaction force team's forced cell extraction exercise, Lieutenant Locke allegedly told the team that Specialist Baker was "an unruly and uncooperative detainee" who had assaulted an Army sergeant. Lieutenant Locke also allegedly told the team that pepper spray had failed to subdue the "detainee." The evidence suggests that the internal reaction force team members "did not know this was a training exercise and they did not know that Sean Baker was a U.S. [S]oldier who was playing the role of a detainee dressed in an orange jumpsuit. They all believed this was a real-time mission." Simpson, *supra* note 3, at 24.

[6] *See Baker*, 2006 U.S. Dist. LEXIS 38012, at *2.

[7] *See id.*

[8] *See id.*

[9] *See id.*

[10] *See id.*

[11] *See id.*

[12] *See id.* at *3.

against the steel floor, one member of the team finally realized the "detainee" was a U.S. Soldier and the exercise ended.[13]

Shortly after the end of the exercise, Specialist Baker went to the Guantanamo Bay Naval Hospital and remained there for three days.[14] The military then medically evacuated Specialist Baker from Guantanamo Bay to the Portsmouth Naval Hospital for treatment of a traumatic brain injury he suffered during the cell extraction exercise.[15] Both the Walter Reed Army Medical Center and the Lexington, Kentucky Veterans Affairs Medical Center have also treated Specialist Baker.[16] The Army medically retired and honorably discharged him on 4 April 2004.[17] Because of the severity of his injuries, the Army awarded Specialist Baker one hundred percent service-connected disability pay.[18]

The U.S. Supreme Court, in *Feres v. United States*,[19] established the *Feres* doctrine to protect the Government from tort liability derived from military decisions, such as Lieutenant Locke's decisions related to the cell extraction exercise or the individual acts of the Soldiers involved in the exercise. The Court has often concluded that this function of the *Feres* doctrine—preserving military decision-making and discipline—is necessary for the effective and efficient functioning of the U.S. military.[20] Military decision-making entails balancing, among other things, the demands of the mission with the safety of the individual

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[13] *See id*. *See also* E-mail from T. Bruce Simpson, Jr., Legal Counsel for Sean D. Baker, Sr., Attorney at Law, McBrayer, McGinnis, Leslie & Kirkland, PLLC, Lexington, Kentucky (Feb. 27, 2007, 17:04 EST) (on file with author) ("The officers and enlisted men who were involved in the Sean Baker tragedy were never disciplined. No one was ever held accountable including the officers who covered it up.").

[14] *See* Simpson, *supra* note 3, at 16.

[15] *See Baker*, 2006 U.S. Dist. LEXIS 38012, at *3.

[16] *See id.*

[17] *See id.* at *3–*4.

[18] *See id.* at *4.

[19] 340 U.S. 135 (1950).

[20] *See* United States v. Johnson, 481 U.S. 681, 691 (1987) ("[A] suit based upon service-related activity necessarily implicates the military judgments and decisions that are inextricably intertwined with the conduct of the military mission."); United States v. Stanley, 483 U.S. 669, 682–83 (1987) ("A test for liability that depends on the extent to which particular suits would call into question military discipline and decisionmaking [sic.] would itself require judicial inquiry into, and hence intrusion upon, military matters."); United States v. Shearer, 473 U.S. 52, 57 (1985) ("[T]he situs of the murder is not nearly as important as whether the suit requires the civilian court to second-guess military decisions, . . . and whether the suit might impair essential military discipline . . . .").

service member and the safety of the unit.[21] Arguably, military leaders at all levels cannot afford to cloud their decisions with issues of potential governmental or personal tort liability. The Court averred that military leaders must be free to make policies and decisions without the fear that they will face judicial scrutiny in civil court.[22]

The *Feres* doctrine, however, is too broad in scope and goes beyond protecting military decision making and discipline. The *Feres* doctrine extends protection to all government personnel who, while acting within the scope of their employment, negligently harm or kill a service member. It goes beyond protecting the leader who decides to put a Soldier on point during a combat patrol or who plans a training exercise that harms a service member. It also protects the military surgeon who negligently leaves a towel in a service member's abdomen after surgery;[23] the civilian government employee who negligently operates a military morale, recreation, and welfare program;[24] the civilian mechanic at the Post Exchange garage who negligently repairs a service member's

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[21] When small unit leaders receive missions, they must develop tentative mission plans based on the following factors: mission, enemy, terrain and weather, time available, troops available, and civilian activity in the mission area. *See* U.S. DEP'T OF ARMY, FIELD MANUAL 4-01.45, TACTICAL CONVOY OPERATIONS ch. I (24 Mar. 2005) [hereinafter FM 4-01.45] (describing the convoy troop leading procedures small unit leaders must use to plan and execute a mission).

[22] *See Johnson*, 481 U.S. at 691 ("Suits brought by service members against the Government for service-related injuries could undermine the commitment essential to effective service and thus have the potential to disrupt military discipline in the broadest sense of the word."); *Stanley*, 483 U.S. at 682–83 ("A test for liability that depends on the extent to which particular suits would call into question military discipline and decisionmaking [sic.] would itself require judicial inquiry into, and hence intrusion upon, military matters.").

[23] *See* Jefferson v. United States, 178 F.2d 518, 519 (4th Cir. 1949), *aff'd sub nom.*, Feres v. United States, 340 U.S. 135 (1950) (barring a Soldier's suit against the Government for negligently performed surgery).

[24] *See* Costo v. United States, 248 F.3d 863 (9th Cir. 2001) (barring suit for the wrongful death of a Sailor during a negligently-operated Navy Morale, Welfare, and Recreation (MWR) program's rafting trip); Bon v. United States, 802 F.2d 1092 (9th Cir. 1986) (barring a Sailor's suit for injuries sustained while canoeing at a Navy MWR program's marina).

car;[25] and the government driver who, while negligently operating a government vehicle, kills a service member.[26]

When it promulgated the "incident to service" test in 1949, the U.S. Supreme Court had several tools at hand, in the form of the Federal Tort Claims Act's enumerated exceptions,[27] to prevent courts from intruding

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[25] *See* Sanchez v. United States, 878 F.2d 633 (2d Cir. 1989) (barring a Marine's suit for damages arising out of a vehicle accident caused by the Base Exchange garage's negligent repair of his car).

[26] *See* Richards v. United States, 176 F.3d 652 (3d Cir. 1999) (barring suit for the wrongful death of a Soldier in an accident with a negligently-operated government vehicle).

[27] *See* 28 U.S.C. § 2680 (2000).

> The provisions of this chapter [28 U.S.C. §§ 2671–2680] and section 1346(b) of this title [28 U.S.C. § 1346(b)] 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--
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> (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;
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> (2) the interest of the claimant was not forfeited;
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> (3) the interest of the claimant was not remitted or mitigated (if the property was subject to forfeiture); and
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> (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[.]
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> (d) Any claim for which a remedy is provided by sections 741–752, 781–790 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.

upon military decision making and discipline. Rather than creating the "incident to service" exception, the Court should have applied the Act's existing enumerated exceptions to ensure that it protected military discipline and decision making and also preserved service members' rights under the Federal Tort Claims Act. This article analyzes the nature of the Court's decisions in *Brooks v. United States*[28] and *Feres v. United States*[29] and concludes that the promulgation of the *Feres* doctrine was an act of judicial legislation that violated the principles of separation of powers. This article also addresses the need to critically look at the *Feres* doctrine and determine whether the Federal Tort Claims Act itself and its thirteen enumerated exceptions shield the Government from liability for most military leaders' decisions.

Section II of this article describes the history of the gradual abrogation of the United States' sovereign immunity, and Section III

> (f) Any claim for damages caused by the imposition or establishment of a quarantine by the United States.
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> . . . .
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> (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 [enacted March 16, 1974], out of assault, battery, false imprisonment, false arrest, abuse of process, or malicious prosecution. For the purpose of this subsection, "investigative or law enforcement officer" 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.
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> (i) Any claim for damages caused by the fiscal operations of the Treasury or by the regulation of the monetary system.
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> (j) Any claim arising out of the combatant activities of the military or naval forces, or the Coast Guard, during time of war.
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> (k) Any claim arising in a foreign country.
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> (l) Any claim arising from the activities of the Tennessee Valley Authority.
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> (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 co-operatives.

Id.

[28] 337 U.S. 49 (1949).

[29] 340 U.S. 135 (1950).

discusses the Federal Tort Claims Act. Section IV outlines the development of the *Feres* doctrine. Sections V and VI critique the rationales for and against the *Feres* doctrine. Section VII proposes applying the Federal Tort Claims Act's enumerated exceptions as an alternative to the *Feres* doctrine. Section VII then returns to Specialist Baker's case and other cases to demonstrate how applying the Act's enumerated exceptions can protect military discipline and decision making while also ensuring service members enjoy rights more commensurate with those of civilians under the Act. Finally, Section VIII addresses the possible future of the *Feres* doctrine, given the recent changes in the composition of the Supreme Court.

II. The Gradual Abrogation of the United States' Sovereign Immunity

The American doctrine of sovereign immunity has its roots in English law.[30] The English doctrine of sovereign immunity prohibited suit against the King, absent his consent.[31] During the U.S. Supreme Court's early jurisprudence, the Court rejected this English doctrine of sovereign immunity in *Chisholm v. Georgia*.[32] In response to the Supreme Court's decision in *Chisholm*, Congress "unanimously proposed"[33] and adopted the Eleventh Amendment to the Constitution prohibiting suits against a state by "citizens of another State."[34] Although the Eleventh Amendment precludes suits against a state, the Constitution is silent as to the United States' immunity from suit.

In *Cohens v. Virginia*,[35] the U.S. Supreme Court remedied this issue by assuming that the doctrine of sovereign immunity applied to suits against the United States.[36] Thus, the Court set forth the rule that the United States was immune from suit unless Congress consented to suit. When interpreting statutes that waive sovereign immunity, the Supreme Court has held that Congress decides the breadth of the waiver and courts

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[30] *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).
[31] Louis L. Jaffe, *Suits Against Governments and Officers: Sovereign Immunity*, 77 HARV. L. REV. 1, 1 (1963).
[32] 2 U.S. 419 (1793) (holding that an individual could sue a state).
[33] Hans v. Louisiana, 134 U.S. 1, 11 (1890).
[34] U.S. CONST. amend. XI.
[35] 19 U.S. 264 (1821).
[36] *See id.* at 411–12. *See* Jaffe, *supra* note 31, at 20.

must strictly interpret Congress's waiver of sovereign immunity;[37] therefore, courts cannot broaden a congressional grant of sovereign immunity.[38]

As a result of the United States' immunity from suit, "[i]ndividuals seeking redress for a wrongful act of the Federal Government, whether through contract or tort, could petition Congress to pass a private bill providing a special grant of relief."[39] "As the nation grew and the activities of the Government spread, inevitably the volume of claims against the Government rose sharply."[40] Therefore, the private relief bill burdened Congress. On 24 February 1855, Congress enacted the Court of Claims Act in an attempt to decrease this burden.[41] This Act initially granted the Court of Claims the power to prepare and submit bills to Congress[42] and the jurisdiction to hear "claims based on contract or federal law or regulation."[43]

Despite the Court of Claims Act, the number of private relief bills continued to burden Congress; this burden only increased with the

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[37] *See* Lane v. Pena, 518 U.S. 187 (1996) (holding that Congress must unequivocally waive sovereign immunity in a statute and courts cannot imply waivers of sovereign immunity); United States v. Kubrick, 444 U.S. 111, 118 (1979) (holding that in construing the Federal Tort Claims Act, the Court should not extend Congress's waiver of sovereign immunity); McMahon v. United States, 342 U.S. 25 (1951) (holding that courts must strictly construe, in favor of the sovereign, statutes that waive sovereign immunity); United States v. Sherwood, 312 U.S. 584 (1941) (holding that relinquishment of sovereign immunity is strictly interpreted); United States v. Shaw, 309 U.S. 495 (1940) (holding that courts cannot broaden a congressional waiver of sovereign immunity); Schillinger v. United States, 155 U.S. 163 (1894) (holding that courts cannot extend a congressional waiver of sovereign immunity).

[38] *See* Asher Bogin, *Rights of Servicemen Under the Federal Tort Claims Act*, 1 SYRACUSE L. REV. 87, 91 (1949). The Court, in fact, has refused to expand the Federal Tort Claims Act's exceptions. *See* United States v. Aetna Cas. & Sur. Co., 338 U.S. 366, 383 (1949) ("The exemption of the sovereign from suit involves hardship enough where consent has been withheld. We are not to add to its rigor by refinement of construction where consent has been announced."); United States v. Muniz, 374 U.S. 150 (1963) ("[w]e should not . . . narrow the remedies provided [in the Federal Tort Claims Act] by Congress."); Rayonier v. United States, 352 U.S. 315, 320 (1957) ("There is no justification for the United States Supreme Court to read exemptions into the Federal Tort Claims Act beyond those provided by Congress; if the act is to be altered, that is a function for the same body that adopted it.").

[39] Molash, *supra* note 30, at 319–20.

[40] LESTER S. JAYSON & ROBERT C. LONGSTRETH, ESQ., HANDLING FEDERAL TORT CLAIMS 2-6 (2006).

[41] *See* Act of Feb. 24, 1855, 10 Stat. 612.

[42] *See* United States v. Klein, 80 U.S. 128, 144 (1872).

[43] Dalehite v. United States, 346 U.S. 15, 25 n.10 (1953).

outbreak of the Civil War.[44] This increase prompted Congress in 1863 to empower the Court of Claims to enter final judgments and permit the U.S. Supreme Court to consider Court of Claims appeals.[45] The jurisdiction of the Court of Claims, however, remained limited to contractual issues because Congress had declined to broaden the court's jurisdiction.[46] During the 1880s, private relief bills continued to plague Congress.[47] In response, Congress passed the Tucker Act in 1887,[48] enlarging the court's jurisdiction "to include all cases for damages not sounding in tort."[49]

From the enactment of the Court of Claims Act until the passage of the Federal Tort Claims Act in 1946, Congress passed a series of statutes that provided limited tort relief and, thereby, gradually repudiated the United States' sovereign immunity in this respect.[50] Despite these statutes, the private relief bill continued to burden Congress, prompting Congress to try to enact a broader tort claims act.[51] Although the private relief bill burden remained steady between 1929 and 1942, Congress attempted but failed to enact a general tort claims act in an effort to relieve the private relief bill burden.[52]

The crash of a military aircraft into the Empire State Building on 28 July 1945 provided Congress with the impetus it needed to pass a broad tort claims act.[53] The crash killed fourteen people, injured several others, and caused approximately one million dollars in damage.[54] Victims of

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[44] *See* JAYSON & LONGSTRETH, *supra* note 40, at 2-10.
[45] *See Klein*, 80 U.S. at 144–45 n.22.
[46] *Id.* at 145.
[47] *See* JAYSON & LONGSTRETH, *supra* note 40, at 2-14 (stating that members of the House Committee on Claims estimated they had considered between 1000 and 2000 personal relief bills per session).
[48] Act of Mar. 3, 1887, 24 Stat. 505 (current version at 28 U.S.C. §§ 1346(a), 1491 (2000)).
[49] Dalehite v. United States, 346 U.S. 15, 25 n.10 (1953).
[50] Such statutes included the Military Claims Act (Act of July 3, 1943, 57 Stat. 372 (current version at 10 U.S.C. § 2376 (2000)) and the Small Tort Claims Act (42 Stat. 1066 (1922)). They also included statutes that permitted recovery for damage caused by naval vessels (Act of June 24, 1910, 36 Stat. 607), military operations (Act of Aug. 24, 1912, 37 Stat. 586), irrigation projects (Act of Mar. 3, 1915, 38 Stat. 859), aircraft (Act of July 11, 1919, 41 Stat. 109), and patent infringement (Act of June 25, 1910, 36 Stat. 851 (current version at 28 U.S.C. § 1498 (2004)).
[51] *See* JAYSON & LONGSTRETH, *supra* note 40, at 2-48 to 2-49.
[52] *See The Federal Tort Claims Act*, 56 YALE L. J. 534, 535 (1947).
[53] *See* JAYSON & LONGSTRETH, *supra* note 40, at 2-3.
[54] *See* Empire State Building Official Internet Site, http://www.esbnyc.com/tourism/tour

the crash and their families had no judicial recourse because Congress had not passed a tort claims act that broadly waived the United States' immunity from tort suits;[55] therefore, the private relief bill was the only relief available at the time to the victims and their families. On 2 August 1946, a year after the crash, Congress passed the Federal Tort Claims Act,[56] broadly waiving the United States' sovereign immunity for torts[57] and retroactively permitting the Empire State Building crash victims to file suit against the United States.[58]

III. The Federal Tort Claims Act

The Federal Tort Claims Act abrogated "the federal government's tort immunity in sweeping terms . . . ."[59] The current version of the Act provides that "[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 . . . ."[60] The Act permits recovery for death, personal injury, and property damage caused by negligent government employees acting within the scope of their employment.[61]

Congress, however, restricted this recovery in several ways. Claimants must first submit an administrative claim to the appropriate governmental agency for adjudication before filing suit for damages.[62]

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ism_history_timeline.cfm (last visited Mar. 11, 2007).

[55] *See* JAYSON & LONGSTRETH, *supra* note 40, at 2-3.

[56] Federal Tort Claims Act, 60 Stat. 843 (1946) (current version at 28 U.S.C. §§ 1346(b), 2671–2680 (2000)).

[57] *See id.* § 410(a) ("Subject to the provisions of this title, the United States shall be liable in respect of such claims to the same claimants, in the same manner, and to the same extent as a private individual under like circumstances . . . .").

[58] *See id.* (granting the district courts jurisdiction over claims accruing on or after 1 Jan. 1945).

[59] Molash, *supra* note 30, at 320.

[60] 28 U.S.C. § 2674 (2000).

[61] *See id.* § 1346(b).

[62] *See id.* § 2675(a) ("An action shall not be instituted upon a claim against the United States . . . unless the claimant shall have first presented the claim to the appropriate Federal agency and his claim shall have been finally denied by the agency in writing . . . ."). *See also* Kornbluth v. Savannah, 398 F. Supp. 1266, 1268 (E.D.N.Y. 1975) ("The purpose of requiring preliminary administrative presentation of a claim is to permit a government agency to evaluate and settle the claim at an early stage, both for the possibility of financial economy and for the sake of relieving the judicial burden of [Federal Tort Claims Act] . . . suits."); Robinson v. United States Navy, 342 F. Supp.

This remedy is generally exclusive[63] and bars tort claims against the individual officer who acted negligently.[64] If the claimant is not satisfied with the outcome of the administrative proceeding, he can file suit in federal court.[65] A federal judge, not a jury, hears the case,[66] and the plaintiff may not recover punitive damages or prejudgment interest.[67] Similarly, the Federal Tort Claims Act limits the amount of fees a plaintiff's attorney may charge.[68] Venue is established in the district in which the plaintiff resides or in which the negligent act or omission occurred.[69] Additionally, the substantive tort law of the state in which the act or omission occurred governs issues of tort liability.[70]

Moreover, the Federal Tort Claims Act currently contains thirteen enumerated exceptions which significantly limit the United States' liability under the Act.[71] One of these exceptions prohibits recovery for "any claim arising out of the combatant activities of the military or naval forces, or the Coast Guard, during time of war."[72] The Federal Tort Claims Act's legislative history does not explain this exception's rationale or scope.[73] Despite this lack of legislative history, the Supreme

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381, 383 (E.D. Pa. 1972) ("The purpose of 28 U.S.C. § 2675(a) is to spare the Court the burden of trying cases when the administrative agency can settle the case without litigation.").

[63] *See* 28 U.S.C. § 2679(b)(1) ("The remedy against the United States . . . is exclusive. . . . Any other civil action or proceeding for money damages arising out of or relating to the same subject matter against the employee or the employee's estate is precluded . . . .").

[64] *See id.* § 2676 ("The judgment in an action under section 1346(b) of this title . . . shall constitute a complete bar to any action by the claimant, by reason of the same subject matter, against the employee of the government whose act or omission gave rise to the claim.").

[65] *See id.* § 2675(a).

[66] *See id.* § 2402 ("any action against the United States under section 1346 . . . shall be tried by the court without a jury, except that any action against the United States under section 1346(a)(1) . . . shall, at the request of either party to such action, be tried by the court with a jury.").

[67] *See id.* § 2674.

[68] *See id.* § 2678 (limiting attorneys fees to twenty five percent of the judgment rendered).

[69] *See id.* § 1402(b) ("Any civil action on a tort claim against the United States under subsection (b) of section 1346 of this title . . . may be prosecuted only in the judicial district where the plaintiff resides or wherein the act or omission complained of occurred.").

[70] *See id.* § 1346(b).

[71] *See id.* § 2680. As it was passed in 1946, the Federal Tort Claims Act contained twelve enumerated exceptions. *See* Federal Tort Claims Act, 60 Stat. 843, § 421 (1946).

[72] 28 U.S.C. § 2680(j) (2004).

[73] Upon motion of Congressman A.S. Mike Monroney, the House inserted the word "combatant" into section 421(j) before the phrase "activities of the military or naval

Court extended this exception to prohibit service members' Federal Tort Claims Act claims for injuries incurred incident to service.[74] By creating what later became known as the *Feres* doctrine, the Court carved out a new Federal Tort Claims Act exception that barred service members' claims for injuries incurred incident to service.

IV. The Development of the *Feres* Doctrine

One can trace the *Feres* doctrine back to the U.S. Supreme Court's decision in *Brooks v. United States*.[75] In *Brooks*, a civilian Army employee, driving an Army truck while on duty, negligently struck two brothers who were both active duty Soldiers on ordinary leave from their duty station.[76] One brother died and the other brother sustained injuries from the accident.[77] The injured brother and the administrator of the dead brother's estate sued the United States under the Federal Tort Claims Act.[78] At trial, the Government moved to dismiss both brothers' claims;[79] it argued that the brothers could not sue for their injuries because they were in the military when the civilian employee harmed them.[80] The District Court for the Western District of North Carolina denied the Government's motion, found the civilian employee negligent, and allowed the brothers to recover.[81]

The Government appealed the decision, and the Court of Appeals for the Fourth Circuit reversed the district court's decision.[82] The Supreme Court granted certiorari and held that the Soldiers could recover because the accident was not "incident to the Brooks' service."[83] The Court stated:

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forces, or the Coast Guard, during time of war." 92 CONG. REC. 10,093 (1946). The amendment passed without discussion. *See id.*

[74] *See* Feres v. United States, 340 U.S. 135, 146 (1950) (barring service members' suits for injuries incurred incident to military service); Brooks v. United States, 337 U.S. 49, 52 (1949) (holding that service members could not recover for injuries sustained incident to military service).

[75] 337 U.S. 49 (1949).

[76] *See id.* at 50.

[77] *See id.*

[78] *See id.*

[79] *See id.*

[80] *See id.*

[81] *See id.*

[82] *See id.* at 51.

[83] *Id.* at 52.

> The Government envisages dire consequences should we reverse the judgment. A battle commander's poor judgment, an army surgeon's slip of the hand, a defective jeep which causes injury, all would ground tort actions against the United States. But, we are dealing with an accident which had nothing to do with the Brooks' army careers, injuries not caused by their service except in the sense that all human events depend upon what has already transpired.[84]

Thus, the Court set forth the rule that service members could recover under the Federal Tort Claims Act for injuries not sustained incident to military service.

Shortly after its *Brooks* decision, the U.S. Supreme Court applied the "incident to service" rule set forth in *Brooks* to deny relief in *Feres v. United States*.[85] *Feres* consisted of three cases consolidated on appeal to the U.S. Supreme Court.[86] The first case, *Feres v. United States*,[87] involved the death of an active duty Soldier in a barracks fire.[88] The decedent's executrix alleged that military officers negligently housed the deceased Soldier in barracks that it knew or should have known were unsafe because of a defective heating system.[89] The executrix also alleged negligence in failing to maintain an adequate fire watch.[90]

In *Jefferson v. United States*,[91] the second of the *Feres* cases, the plaintiff was an active duty Soldier who underwent abdominal surgery at an Army hospital.[92] Eight months after surgery, the plaintiff, no longer in the service, underwent another abdominal surgery;[93] doctors removed a towel thirty inches long and eighteen inches wide marked "Medical

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[84] *Id.*
[85] 340 U.S. 135 (1950).
[86] *See id.* at 136.
[87] 177 F.2d 535 (2d Cir. 1949), *aff'd*, 340 U.S. 135, 137 (1950).
[88] *See* 177 F.2d at 536.
[89] *Id.*
[90] *Id.*
[91] 178 F.2d 518 (4th Cir. 1949), *aff'd sub nom.*, Feres v. United States, 340 U.S. 135 (1950).
[92] *See Jefferson*, 178 F.2d at 519.
[93] *See Feres*, 340 U.S. at 137.

Department of the U.S. Army" from his stomach.[94] The former Soldier sued the United States under the Federal Tort Claims Act.[95]

The third case considered in the *Feres* appeal, *Griggs v. United States*,[96] also involved negligently performed surgery.[97] In *Griggs*, an active duty Soldier died because of "the negligent, careless and unskillful acts of members of the Army Medical Corps, while acting in the scope of their office or employment."[98] The deceased Soldier's widow sued for damages under the Federal Tort Claims Act.[99]

In its decision, the Supreme Court held that the common fact underlying these three cases was that each claimant was on active duty, not furlough, when another service member negligently injured or killed him.[100] This rendered the injuries incidental to the claimants' military service, and, hence, not compensable under the Federal Tort Claims Act.[101] In adopting this Federal Tort Claims Act exception, the Court first recognized that "few guiding materials [exist] for our task of statutory construction. No committee reports or floor debates disclose what effect the statute was designed to have on the problem before us, or that it even was in mind."[102] When analyzing the Federal Tort Claims Act's applicability to service members, the Court concluded that the Act "should be construed to fit, so far as will comport with its words, into the entire statutory system of remedies against the Government to make a workable, consistent and equitable whole."[103]

Looking to the Act's legislative history, the Court acknowledged "the fact that 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."[104] The Court also recognized that the Act's military combatant activities exception

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[94] *Id.*
[95] *See Jefferson*, 178 F.2d at 518–19.
[96] 178 F.2d 1 (10th Cir. 1949), *rev'd sub nom.*, Feres v. United States, 340 U.S. 135 (1950).
[97] *See Griggs*, 178 F.2d at 1.
[98] *Id.*
[99] *Id.*
[100] *See Feres*, 340 U.S. at 138.
[101] *See id.* at 146.
[102] *Id.* at 138.
[103] *Id.* at 139.
[104] *Id.* at 140.

indicated that Congress intended to include service members.[105] The Court then recalled that *Brooks*, "in spite of its reservation of service-connected injuries, interprets the Act to cover claims not incidental to military service, and it is argued that much of its reasoning is as apt to impose liability in favor of a man on duty as in favor of one on leave."[106] The Court stated that "[t]hese considerations, it is said, should persuade us to cast upon Congress, as author of the confusion, the task of qualifying and clarifying its language if the liability here asserted should prove so depleting of the public treasury as the Government fears."[107]

The Court, however, did not cast such a task upon Congress.[108] Rather, the Court held that service members injured incident to service could not maintain Federal Tort Claims Act suits; the Court then enumerated and discussed three rationales underpinning its decision in *Feres*. The Supreme Court's first rationale for its ruling rested upon the theory of double recovery. The Court first noted that the Federal Tort Claims Act marked "the culmination of a long effort to mitigate unjust consequences of sovereign immunity from suit."[109] It then asserted that the Government had already provided service members with veterans benefits to compensate them for injuries or their survivors for the service members' deaths.[110] The Court stated "[t]he primary purpose of the Act was to extend a remedy to those who had been without; if it incidentally benefited those already well provided for, it appears to be unintentional."[111] Thus, the Court suggested that, because veterans benefits compensate service members for their losses, allowing them to

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[105] *See id.* at 138.
[106] *Id.* at 139.
[107] *Id.*
[108] The Court in *Rayonier Inc. v. United States*, however, proclaimed that "[t]here is no justification for this Court to read exemptions into the Act beyond those provided by Congress. If the Act is to be altered that is a function for the same body that adopted it." Rayonier Inc. v. United States, 352 U.S. 315, 320 (1957) (citing United States v. Aetna Cas. & Sur. Co., 338 U.S. 366, 383 (1949)). *See also* Aetna Cas. & Sur. Co., 338 U.S. at 383 ("The exemption of the sovereign from suit involves hardship enough where consent has been withheld. We are not to add to its rigor by refinement of construction where consent has been announced."); United States v. Muniz, 374 U.S. 150 (1963) ("[w]e should not . . . narrow the remedies provided [in the Federal Tort Claims Act] by Congress.").
[109] *Feres*, 340 U.S. at 139.
[110] *Id.* at 140 ("Congress was suffering from no plague of private bills on the behalf of military and naval personnel, because a comprehensive system of relief had been authorized for them and their dependents by statute.").
[111] *Id.*

recover under the Federal Tort Claims Act would allow an inequitable double recovery.

The Court based its second rationale on the provision in 28 U.S.C. § 2674 that provides that the United States shall be liable "in the same manner and to the same extent as a *private individual* (emphasis added) under like circumstances . . . ."[112] The Court stated that "[o]ne obvious shortcoming in these claims is that the plaintiffs can point to no liability of a 'private individual' even remotely analogous to that which they are asserting against the United States."[113] The Court reasoned that the United States could not be held liable for the military's negligence because "no private individual has the power to conscript or mobilize a private army with such authority over persons as the Government vests in echelons of command."[114]

The Court's final reason for denying service members' claims for injuries incurred incident to service was that "[t]he relationship between the Government and members of its armed forces is distinctively federal in character . . . ."[115] The Federal Tort Claims Act provides that the tort law of the state in which the injury occurred governs Federal Tort Claims Act suits.[116] Thus, the Court believed that allowing service members to sue under the Act for injuries sustained incident to service would impose state law upon the relationship between the Government and its military.[117] The Court was also concerned that sheer luck of assignment location or state in which the injury occurred would determine the amount, if any, recoverable.[118] The Court suggested that the resulting geographically inconsistent recovery would disrupt the uniformity necessary to the effective operation of the armed forces.[119]

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[112] *Id.* at 139.
[113] *Id.* at 141.
[114] *Id.* at 141–42.
[115] *Id.* at 143.
[116] *See* 28 U.S.C. § 1346(b) (2000).
[117] *See Feres*, 340 U.S. at 143.
[118] *See id.* ("That the geography of an injury should select the law to be applied to . . . [service members'] tort claims makes no sense.").
[119] *See id.* ("It would hardly be a rational plan of providing for those disabled in service by others in service to leave them dependent upon geographic considerations over which they have no control and to laws which fluctuate in existence and value.").

After *Feres*, the federal courts continued to hear cases that required them to apply the incident to service test.[120] Just four years after *Feres*, in *United States v. Brown*, the Court clarified the incident to service test.[121] Brown, a discharged veteran, sued under the Federal Tort Claims Act for a Veterans Administration hospital's negligent treatment of his injured left knee.[122] Brown injured his knee while he was on active duty, and the military honorably discharged him because of the knee injury.[123] After his discharge, Brown sought treatment for his knee at Veterans Administration hospitals.[124] During surgery at a Veterans Administration hospital, a defective tourniquet used during the operation caused permanent nerve damage to Brown's left leg.[125] At trial, the district court concluded that Brown's "sole relief was under the Veterans Act and dismissed his complaint under the Tort Claims Act."[126] The Court of Appeals for the Second Circuit reversed the district court's decision, and the Supreme Court granted certiorari.[127]

In reaching its decision, the Supreme Court examined rationales similar to those discussed in *Feres*. The Court first considered the effect the suit would have on military discipline.[128] It concluded that Brown was not "on active duty or subject to military discipline."[129] Rather, the injury from the defective tourniquet occurred after Brown's honorable discharge from the service and "while he enjoyed a civilian status."[130] The Court then questioned whether the United States was "liable . . . in the same manner and to the same extent as a private individual under like

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120 *See, e.g.*, Archer v. United States, 217 F.2d 548 (9th Cir. 1954) (holding that a United States Military Academy cadet died incident to service in a military aircraft crash); O'Brien v. United States, 192 F.2d 948 (8th Cir. 1951) (holding that a United States Naval Reserve pilot died incident to service when his military jet crashed); Snyder v. United States, 118 F. Supp. 585 (D. Md. 1953) (holding that an off-duty service member did not die incident to service when a military plane crashed into his privately owned home and killed him); Brown v. United States, 99 F. Supp. 685 (S.D.W.V. 1951) (holding that a Sailor did not die incident to service when he drowned while on leave in a military pool).

121 348 U.S. 110 (1954).

122 *See id.* at 110.

123 *See id.*

124 *See id.*

125 *See id.* at 110–11.

126 *Id.* at 111.

127 *See id.*

128 *See id.* at 112.

129 *Id.*

130 *Id.*

circumstances."[131] The Court found that private hospitals are liable to their patients; therefore, government hospitals should be similarly liable to their patients.[132] Finally, the Court addressed veterans benefits and held that they were not an exclusive remedy.[133] Thus, the Court held that Brown could recover under the Federal Tort Claims Act for his injury because he did not incur the injury incident to his service.[134] As a result, the Court established that veterans could recover under the Federal Tort Claims Act for injuries incurred after their departure from military service.

In *Stencel Aero Engineering Corp. v. United States*, the Supreme Court again applied and defined the *Feres* doctrine's incident to service test.[135] In *Stencel*, a malfunctioning ejection system in an F-100 fighter aircraft injured Captain John Donham, a Missouri Air National Guard officer, during an in-flight emergency.[136] Stencel produced the ejection system using government specifications and certain government-provided components.[137] Although Captain Donham medically retired from the service and received a monthly lifetime pension of approximately $1,500 per month, he sued the United States and Stencel Aero Engineering Corporation, alleging "that the emergency eject system malfunctioned as a result of 'the negligence and carelessness of the defendants individually and jointly.'"[138] Stencel cross-claimed against the United States, seeking indemnity for any money it would have to pay Captain Donham.[139]

The district court held that *Feres* protected the United States from Donham's claim as well as the claim of a third party.[140] The Court of Appeals for the Eighth Circuit affirmed the district court's decision, and the Supreme Court granted certiorari.[141] The Supreme Court affirmed the district court's decision, holding "that the third-party indemnity

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131 *Id.*
132 *See id.*
133 *See id.* at 113.
134 *Id.*
135 431 U.S. 666 (1977).
136 *Id.* at 667.
137 *See id.* Stencel Aero Engineering Corporation contracted with the government prime contractor, North American Rockwell, to provide the F-100's pilot ejection system. *Id.* n.2.
138 *Id.* at 668.
139 *Id.*
140 *Id.* at 669.
141 *Id.*

action in this case is unavailable for essentially the same reasons that the direct action by Donham is barred by *Feres*."[142] The Court concluded that, regardless of who brought the suit, the suit would negatively affect military discipline.[143] Thus, the Supreme Court set forth the rule that *Feres* applied to third party indemnity actions.

Six years after holding that the *Feres* doctrine bars third party indemnity actions, the Supreme Court applied the *Feres* doctrine to bar alleged violations of service members' constitutional rights in *Chappell v. Wallace*.[144] In *Chappell*, the Court "granted certiorari to determine whether enlisted military personnel may maintain suits to recover damages from superior officers for injuries sustained as a result of violations of [c]onstitutional rights in the course of military service."[145] The respondents in *Chappell* were five enlisted men who alleged that their superior officers discriminated against them because of their race by subjecting them to severe penalties, poor evaluation reports, and undesirable duties.[146]

Although *Chappell* involved a *Bivens*[147] action seeking non-statutory damages, rather than a suit for damages under the Federal Tort Claims Act, the Supreme Court's analysis in *Feres* guided its analysis in *Chappell*.[148] The Court looked to the following *Feres* factors to determine whether the constitutional injuries occurred incident to service: the relationship between the Government and its military, the availability of veterans benefits, and the effects of suits on military discipline.[149] The Court focused on the negative effects the enlisted men's suit would have on military discipline and then barred their suit.[150] As a result, the Court held that the *Feres* doctrine's "policies . . . also bar suit by servicemen against other servicemen for [c]onstitutional torts."[151]

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[142] *Id.* at 673.
[143] *See id.* at 674.
[144] 462 U.S. 296 (1983).
[145] *Id.* at 297.
[146] *See id.*
[147] *See generally* Bivens v. Six Unknown Fed. Narcotics Agents, 403 U.S. 388 (1971) (finding a federal remedy exists when federal law enforcement agents conduct unlawful searches and arrests in violation of the Fourth Amendment).
[148] *See Chappell*, 462 U.S. at 299.
[149] *See id.*
[150] *See id.* at 304.
[151] F. McConnon, Jr. & Paul F. Figley, Torts Branch Monograph: The Feres doctrine 7 (1997) (unpublished monograph, on file with the U.S. Department of Justice, Civil Division).

A few years after its decision in *Chappell*, the Supreme Court decided a case that implicated the *Feres* doctrine and military decision making. In *United States v. Shearer*,[152] a German court convicted Army Private Andrew Heard, who was stationed in Germany, of manslaughter and sentenced him to four years confinement.[153] Upon Private Heard's release from German confinement, the Army transferred him to Fort Bliss, Texas.[154] At Fort Bliss, Private Heard kidnapped and murdered Private Vernon Shearer, who was off-duty and away from his duty station of Fort Bliss.[155] Private Shearer's mother filed a Federal Tort Claims Act suit. In her suit, Private Shearer's mother alleged that even though the Army knew that Private Heard posed a threat to others, the Army "negligently and carelessly failed to exert a reasonably sufficient control over Andrew Heard, . . . failed to warn other persons that he was at large, [and] negligently and carelessly failed to . . . remove Andrew Heard from active military duty."[156]

In its opinion in *Shearer*, the Supreme Court looked to the rationales cited in *Feres* and dismissed the following *Feres* rationales as no longer controlling: the prevention of double recovery and the intrusion of state law on the "Government's duty to supervise servicemen . . . ."[157] The Court rested its conclusion on what it believed to be the most important *Feres* rationale, preserving military discipline and preventing second-guessing of military decision making.[158] The Court concluded that the respondent's case "goes directly to the 'management' of the military; it calls into question basic choices about the discipline, supervision, and control of a serviceman."[159] The Court refused to reduce the *Feres* doctrine "to a few bright-line rules; each case must be examined in light of the statute as it has been construed in *Feres* and subsequent cases."[160] Thus, the Court held that Shearer's claim was *Feres*-barred.

Approximately two years after its decision in *Shearer*, the United States Supreme Court again clarified and reaffirmed the *Feres* doctrine in

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[152] 473 U.S. 52 (1985).
[153] *See id.* at 54.
[154] *See id.*
[155] *See id.* at 53.
[156] *See id.* at 58.
[157] *Id.* at n.4.
[158] *Id.* at 57.
[159] *Id.* at 58.
[160] *Id.* at 57.

United States v. Johnson.[161] In *Johnson*, Lieutenant Commander Horton W. Johnson, a United States Coast Guard helicopter pilot, embarked on a mission to rescue a vessel in distress during inclement weather.[162] As weather conditions worsened, Johnson requested assistance from Federal Aviation Administration civilian air traffic controllers.[163] Shortly thereafter, a civilian Federal Aviation Administration air traffic controller assumed radar control over Johnson's helicopter.[164] The helicopter subsequently crashed into a mountain, killing Johnson and his crew.[165] Johnson's widow sued the United States for the air traffic controller's negligence.[166] The Court barred Johnson's widow's suit, holding that the *Feres* doctrine bars suits against the United States that are based upon service members' service-related injuries.[167] In spite of the clear negligence of federal civilian air traffic controllers, the Court declined "to modify the doctrine at this date."[168]

In reaching its decision in *Johnson*, the Court articulated the following three rationales that underlie the *Feres* doctrine: the intrusion of state law upon the relationship between the Government and its military, the availability of veterans benefits, and the possible effects of service members' tort suits on military discipline.[169] These rationales are similar, but not identical, to those the Court outlined in its *Feres* opinion. The first rationale the Court discussed was the relationship between the Government and its military.[170] The Court commented that "it would make little sense to have the Government's liability to members of the Armed Services dependent upon the fortuity of where the [S]oldier happened to be stationed at the time of the injury."[171] This first rationale echoed the *Feres* rationale that the relationship between the Government and its armed forces is distinctly federal in nature and that state law should not intrude upon this relationship.[172]

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161 481 U.S. 681 (1987).
162 *See id.* at 683.
163 *See id.*
164 *See id.*
165 *See id.*
166 *See id.*
167 *See id.* at 687.
168 *Id.* at 688.
169 *See id.* at 689–92.
170 *See id.* at 689.
171 *Id.* at 684 n.2.
172 *See* Feres v. United States, 340 U.S. 135, 143 (1950).

The second *Johnson* rationale was that veterans benefits served as "a substitute for tort liability, a statutory 'no-fault' compensation scheme which provides generous pensions to injured servicemen, without regard to any negligence attributable to the Government."[173] The Court stated that the "existence of these generous statutory disability and death benefits is an independent reason why the *Feres* doctrine bars suit for service-related injuries."[174] This rationale paralleled the *Feres* rationale that allowing service members to sue the United States under the Federal Tort Claims Act would allow for double recovery.[175]

The third rationale the Court enunciated, that of military discipline, was not raised directly in *Feres*.[176] The Court in *Johnson* barred service members' claims for injuries incurred incident to service because of "the peculiar and special relationship of the [S]oldier to his superiors, the effects of the maintenance of such suits on discipline, and the extreme results that might obtain if suits under the Tort Claims Act were allowed for negligent orders given or negligent acts committed . . . ."[177] The *Feres* Court implicitly addressed this concern when it discussed the lack of comparable private individual liability and the authority over service members the Government vests in military leaders.[178] In *Johnson*, the Court elaborated on this concept and concluded that allowing service members to sue the United States would adversely affect the authority the Government vests in military leaders at all levels and, thereby, disrupt discipline.[179]

After addressing the three rationales underlying its decision, the Court concluded that "[t]here is no dispute that Johnson's injury arose directly out of the rescue mission, or that the mission was an activity

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[173] *Johnson*, 481 U.S. at 684 n.2.
[174] *Id.* at 689.
[175] *See Feres*, 340 U.S. at 140.
[176] The Court in *Shearer*, *Stencel*, and *Brown*, however, did address the effects service member's Federal Tort Claims Act suits would have upon military discipline. *See* United States v. Shearer, 473 U.S. 52, 57 (1985); Stencel Aero Eng'g Corp. v. United States, 431 U.S. 666, 674 (1977); United States v. Brown, 348 U.S. 110, 112 (1954).
[177] *Johnson*, 481 U.S. at 689 (citing *Stencel Aero Eng'g Corp.*, 431 U.S. at 671–72).
[178] *See Feres*, 340 U.S. at 141–42.
[179] *See Johnson*, 481 U.S. at 690 ("*Feres* and its progeny indicate that suits brought by service members against the Government for injuries incurred incident to service are barred by the *Feres* doctrine because they are the '*type[s]* of claims that, if generally permitted, would involve the judiciary in sensitive military affairs at the expense of military discipline and effectiveness.'") (citing *Shearer*, 473 U.S. at 55) (emphasis in original).

incident to his military service. Johnson went on the rescue mission specifically because of his military service."[180] Therefore, the Court concluded that Johnson died incident to his military service, and his survivors could not maintain a Federal Tort Claims Act suit.[181]

A little more than a month after its decision in *Johnson*, the Supreme Court applied the *Feres* doctrine to a service member's *Bivens*[182] claim in *United States v. Stanley*.[183] In February 1958, Master Sergeant James B. Stanley volunteered for a "program ostensibly designed to test the effectiveness of protective clothing and equipment as defenses against chemical warfare."[184] Rather than testing protective clothing and equipment, the Army administered doses of lysergic acid diethylamine (LSD) to Stanley four times during February 1958 as part of a secret plan to study the effects of drugs on humans.[185] Because of his exposure to LSD, Stanley suffered hallucinations and periods of incoherence and memory loss.[186] The LSD exposure also caused him to occasionally wake from sleep at night, beat his wife and children, and then later be unable to recall the violence.[187] As a result, Stanley's ability to perform his military duties decreased, and the Army discharged him from military service in 1969.[188] He divorced one year later because of the LSD-induced personality problems.[189]

On 10 December 1975, Stanley received a letter from the Army asking him to assist with a study of LSD's long term effects on the 1958 tests' voluntary participants.[190] This was the first time the Army informed Stanley of the true nature of the 1958 tests.[191] This notice prompted Stanley to file an administrative claim for compensation.[192]

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[180] *Johnson*, 481 U.S. at 691.
[181] *Id.* at 692. If, however, any civilians died in the helicopter crash, their survivors could likely maintain a Federal Tort Claims Act suit against the United States based upon the air traffic controller's negligence.
[182] *See generally* Bivens v. Six Unknown Fed. Narcotics Agents, 403 U.S. 388 (1971) (finding a federal remedy exists when federal law enforcement agents conduct unlawful searches and arrests in violation of the Fourth Amendment).
[183] 483 U.S. 669 (1987).
[184] *Id.* at 671.
[185] *See id.*
[186] *See id.*
[187] *See id.*
[188] *See id.*
[189] *See id.*
[190] *See id.*
[191] *See id.* at 672.
[192] *See id.*

After the Government denied his claim, Stanley filed suit under the Federal Tort Claims Act and alleged that the Government negligently administered and monitored the drug testing program.[193] Stanley later amended his complaint, adding claims that several unknown federal officers violated his constitutional rights.[194]

Although Stanley's action was a *Bivens* claim, the Court affirmed its decision in *Chappell* and found that the analysis is the same "in the *Bivens* and *Feres* contexts."[195] The Court then stated that

> Stanley underestimates the degree of disruption that would be caused by the rule he proposes. A test for liability that depends on the extent to which particular suits would call into question military discipline and decisionmaking [sic] would itself require judicial inquiry into, and hence intrusion upon, military matters. Whether a case implicates those concerns would often be problematic, raising the prospect of compelled depositions and trial testimony by military officers concerning the details of their military commands. Even putting aside the risk of erroneous judicial conclusions (which would becloud military decisionmaking [sic]), the mere process of arriving at correct conclusions would disrupt the military regime. The 'incident to service' test, by contrast, provides a line that is relatively clear and that can be discerned with less extensive inquiry into military matters.[196]

Therefore, the Supreme Court barred Stanley's claim. The holding in *Stanley* "is significant because it sanctioned a straightforward application of the incident to service test, without resort to the rationales enunciated in *Feres*."[197]

In creating the *Feres* doctrine, the Supreme Court has created a new exception to the Federal Tort Claims Act that bars service members' claims for injuries incurred incident to service. The Court's rationale for

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193 *See id.*
194 *See id.*
195 *Id.* at 677.
196 *Id.* 682–83.
197 McConnon & Figley, *supra* note 151, at 11.

this policy has remained fairly consistent. It has repeatedly asserted that permitting service members to sue under the Act would impose state law upon the relationship between the Government and its armed forces and would award service members double recovery. The third *Feres* rationale, that no private individual has the Government's power to organize a military, shifted to the *Johnson* rationale that allowing such suits would upset military discipline and decision making. Regardless of the rationales the Court has used to support the *Feres* doctrine, its overall effect is clear: it bars most service members' claims, even though a civilian in the same position would have a valid Federal Tort Claims Act claim.[198]

V. Discussion of the Rationales Against the *Feres* Doctrine

A. Ambiguous Standard

Despite the Supreme Court's suggestion in *Stanley* that the "incident to service" test is relatively straightforward,[199] federal courts have inconsistently applied the test.[200] The "incident to service" test focuses

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[198] *See* Costo v. United States, 248 F.3d 863 (9th Cir. 2001) (barring suit for the wrongful death of a Sailor who drowned during a Navy MWR program's rafting trip); Molnar v. United States, 200 U.S. App. Lexis 6417 (6th Cir. 2000) (barring a Sailor's suit for military physicians' medical malpractice); Richards v. United States, 176 U.S. 652 (3d Cir. 1999) (barring suit for the death of a Soldier in an accident caused by a negligently driven government vehicle); Jones v. United States, 112 F.3d 299 (7th Cir. 1997) (barring a Soldier's suit for military physicians' medical malpractice); Cutshall v. United States, 75 F.3d 426 (8th Cir. 1996) (barring a service member's suit for military physicians' failure to timely diagnose her cancer); Wake v. United States, 1996 U.S. App. LEXIS 35578 (2d Cir. 1996) (barring a Naval Reserve Officers Training Corps (NROTC) cadet from recovering from injuries sustained in the crash of a negligently-driven NROTC van); Walls v. United States, 832 F.2d 93 (7th Cir. 1987) (barring a service member's suit for injuries he sustained as a passenger in a military post's aero club plane when it crashed); Uptegrove v. United States, 600 F.2d 1248 (9th Cir. 1979) (barring a wrongful death suit for a service member killed in a military aircraft accident while on ordinary leave); Haas v. United States, 518 F.2d 1138 (4th Cir. 1975) (barring a Marine's suit for injuries he sustained at the base's horseback riding stables); United States v. Lee, 400 F.2d 558 (9th Cir. 1968) (barring suit for the death of a Marine who was a passenger in a military aircraft when it crashed).

[199] *See Stanley*, 483 U.S. at 683 ("The 'incident to service' test, by contrast, provides a line that is relatively clear and that can be discerned with less extensive inquiry into military matters.").

[200] *See* United States v. Johnson, 481 U.S. 681, 685 (1987) (granting certiorari to resolve the disparity among Federal Circuits' interpretations of the *Feres* doctrine). *Compare* Collins v. United States, 642 F.2d 217 (7th Cir. 1981) (barring an Air Force Academy

on the actions and status of the victim. This victim-based test provides an unclear and irregular standard to determine whether a service member has a valid Federal Tort Claims Act claim.[201] Additionally, no clear definition exists for the phrase "incident to service."[202] Because of the lack of a precise and straightforward definition, federal courts and practitioners in the tort law field have wrestled with how to determine whether a service member sustained an injury incident to his service.[203] As a result, federal courts have developed several different methods to determine if the *Feres* doctrine bars a service member's suit.

Some federal courts look to the *Feres* rationales to determine whether a service member's injury occurred incident to service.[204]

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cadet's suit for military physicians' medical malpractice), *with* Fischer v. United States, 451 F. Supp. 918 (E.D. N.Y. 1978) (permitting an Air Force Academy cadet's suit for military physicians' medical malpractice). *Compare* Parker v. United States, 611 F.2d 1007 (5th Cir. 1980) (permitting a claim for the wrongful death of a service member in an accident with a negligently-operated government vehicle), *with* Richards v. United States, 176 F.3d 652 (3d Cir. 1999) (denying a claim for the wrongful death of a service member in an accident with a negligently-operated government vehicle). *Compare* Flowers v. United States, 179 Fed. Appx. 986 (9th Cir. 2006) (holding that *Feres* barred a service member's Right to Financial Privacy Act claims against the United States), *with* Cummings v. Dep't of the Navy, 279 F.3d 1051 (D.C. Cir. 2002) (permitting a service member's Privacy Act claims against the United States).

[201] *See supra* note 200.

[202] The military does not use this phrase to classify the circumstances of a service member's injuries. Rather, when determining whether a service member is entitled to receive veterans benefits, the military looks to whether the service member's injuries were incurred in the line of duty. If a service member incurs an injury or disease while on active duty, the military presumes the service member incurred the injury or disease in the line of duty, unless substantial evidence demonstrates that the service member's own willful misconduct or drug or alcohol abuse caused the injury or disease. The military conducts line of duty investigations to determine whether a service member is entitled to disability retirement, severance pay, medical or dental care, or other veterans benefits. *See* 38 U.S.C. § 105(a) (2000); U.S. DEP'T OF ARMY, REG. 600-8-4, LINE OF DUTY POLICY, PROCEDURES, AND INVESTIGATIONS paras. 2-2 and 2-6b (15 Apr. 2004) [hereinafter AR 600-8-4].

[203] *See The Feres Doctrine and Military Medical Malpractice: Hearing on S. 489 and H.R. 3174 Before the Subcomm. on Admin. Practice and Procedure of the S. Comm. on the Judiciary*, 99th Cong. 63–64 (1986) [hereinafter *The Feres Doctrine and Military Medical Malpractice*] (statement of Michael E. Noone, Jr., Associate Dean, Columbus School of Law, Catholic University of America) ("The problem that we in the tort claims business have faced for the last 36 years is what does 'incident to the service' mean.").

[204] *See* United States v. Shearer, 473 U.S. 52 (1985) (barring a Soldier's claim because it raised issues of military decision making and discipline); *Flowers*, 179 Fed. Appx. 986 (barring a service member's Right to Financial Privacy Act suit against the United States because his claims implicated the *Feres* rationales); Shaw v. United States, 854 F.2d 360 (10th Cir. 1988) (barring a service member's claim because the service member would

Courts have commonly barred a service member's claims if the service member was eligible for veterans benefits, if the case involved military decision making and discipline, or if the case intruded upon the distinctly federal relationship between the Government and its military.[205] When applying the *Feres* rationales method of analysis, courts generally determine whether at least one of the *Feres* rationales applies to the case under consideration. If a court finds that a case implicates at least one of the *Feres* rationales, then the court will typically hold that the case is *Feres*-barred.[206]

Other federal courts recognize that applying the *Feres* rationales analysis provides little insight into whether a service member incurred an injury incident to service.[207] Thus, other federal courts have developed a totality of the circumstances method of analysis to determine whether a service member's claim may go forward under the Federal Tort Claims Act. In conducting a totality of the circumstances analysis, courts have looked to the victim's activities and duty status at the time of injury as

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receive veterans benefits and the case implicated military decision making); Major v. United States, 835 F.2d 641 (6th Cir. 1987) (barring two service members' claims because they raised issues of military decision making); Del Rio v. United States, 833 F.2d 282 (11th Cir. 1987) (applying the *Feres* rationales to bar a service member's own claim for negligent provision of prenatal care).

[205] *See Shearer*, 473 U.S. 52 (barring a Soldier's claim because it raised issues of military decision making and discipline); Brown v. United States, 462 F.3d 609 (6th Cir. 2006) (applying the *Feres* rationales to permit a child's claim of negligent provision of prenatal care to his service member mother); *Flowers*, 179 Fed. Appx. 986 (barring a Soldier's Right to Financial Privacy Act suit against the United States because his claims implicated the *Feres* rationales); Mossow v. United States, 987 F.2d 1365 (8th Cir. 1993) (permitting a service member's child's suit because the suit did not implicate the *Feres* rationales); *Shaw*, 854 F.2d 360 (barring a service member's claim because the service member would receive veterans benefits and the case implicated military decision making); *Major*, 835 F.2d 641 (barring two service members' claims because they raised issues of military decision making); *Del Rio*, 833 F.2d 282 (applying the *Feres* rationales to bar a service member's own claim for negligent provision of prenatal care).

[206] *See Shearer*, 473 U.S. 52 (barring a Soldier's claim because it raised issues of military decision making and discipline); *Shaw*, 854 F.2d 360 (barring a service member's claim because the service member would receive veterans benefits and the case implicated military decision making); *Major*, 835 F.2d 641 (barring two service members' claims because they raised issues of military decision making); *Del Rio*, 833 F.2d 282 (applying the *Feres* rationales to bar a service member's own claim for negligent provision of prenatal care).

[207] For example, a court that applied the *Feres* rationales method of analysis would have likely barred the Soldiers' suits in *Brooks* because the Soldiers were entitled to veterans benefits. However, even though the Soldiers in *Brooks* received veterans benefits, the Court permitted their suits under the Federal Tort Claims Act. Brooks v. United States, 337 U.S. 49, 54 (1949).

well as the location of the negligent act to determine whether a service member incurred an injury incident to service.[208]

When determining the nature of the service member's activity at the time of injury, courts consider whether the activity was related to the service member's military service or duties.[209] The further attenuated the activity is from the military, the more likely courts will find that the activity was not related to the service member's military duties.[210] When

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[208] *See* Richards v. United States, 176 F.3d 652 (3d Cir. 1999) (looking to the nature of a Soldier's activity at the time of his death and the location of the negligent act); Adams v. United States, 728 F.2d 736 (5th Cir. 1984) (analyzing the injured service member's duty status and activity as well as the location of the negligent act); Parker v. United States, 611 F.2d 1007 (5th Cir. 1980) (looking to the service member's duty status, nature of his activities at the time of his death, and location of the negligent act); Pierce v. United States, 813 F.2d 349 (11th Cir. 1987) (looking to the service member's duty status, nature of his activities at the time of his injury, and location of the negligent act); Bon v. United States, 802 F.2d 1092 (9th Cir. 1986) (analyzing the service member's duty status, nature of her activities at the time of injury, location of the negligent act, and the benefits accruing to the service member).

[209] Courts also look to whether a service member was enjoying a benefit of his military service, such as undergoing medical treatment at a military hospital or participating in a military recreational program such as river rafting or horseback riding. If the activity was related to the service member's military service, courts tend to bar the service member's claim. *See* Costo v. United States, 248 F.3d 863 (9th Cir. 2001) (barring suit for the drowning death of a Sailor in a Navy MWR program's rafting trip); Pringle v. United States, 208 F.3d 1220 (10th Cir. 2000) (barring a Soldier's suit for injuries he incurred in a fight in the parking lot of a military bar); *Richards*, 176 F.3d 652 (barring suit for the death of a Soldier in an accident with a negligently-operated government vehicle); Kitowski v. United States, 931 F.2d 1526 (11th Cir. 1991) (barring suit for the death of a service member during sea rescue training); Persons v. United States, 925 F.2d 292 (9th Cir. 1991) (barring suit for the death of a Sailor who killed himself after trying to obtain mental health counseling at a military hospital); Morey v. United States, 903 F.2d 880 (1st Cir. 1990) (barring a service member's claim for the military's failure to send him to a rehabilitation program for substance abuse); Appelhans v. United States, 877 F.2d 309 (4th Cir. 1989) (barring a Soldier's claim for military medical malpractice); *Bon*, 802 F.2d 1092 (barring a Sailor's claim for injuries suffered while canoeing in a Navy MWR program's marina); *Parker*, 611 F.2d 1007 (permitting suit for the death of a service member who died while on leave in an automobile accident with a government vehicle); Layne v. United States, 295 F.2d 433 (7th Cir. 1961) (barring suit for the death of a service member in a military jet crash); Pearcy v. United States, 2005 U.S. Dist. LEXIS 36671 (W.D. La. 2005) (barring a service member's wrongful death claim for the death of her baby caused by negligent prenatal care).

[210] *See Pierce*, 813 F.2d 349 (permitting a service member's suit against the Government for injuries sustained while off-duty in a motor vehicle accident with an on-duty Navy recruiter); *Adams*, 728 F.2d 736 (permitting suit for a service member who died as a result of medical malpractice in a Public Health Services hospital); Cooper v. Perkiomen Airways Ltd., 609 F. Supp. 969 (E.D. Pa. 1985) (permitting suit against the Government

considering the service member's duty status at the time of injury, some courts look to whether the injured service member was on leave or pass at the time of injury,[211] while other courts look to whether the service member was subject to military discipline when injured.[212] Because service members are subject to the Uniform Code of Military Justice at all times while on active duty,[213] this "subject to military discipline" analysis of duty status amounts to a complete bar.[214] Finally, when conducting a totality of the circumstances analysis, courts look to the place where the negligent act occurred.[215] On a case-by-case basis, courts assign importance to each of the three totality of the circumstances factors and then determine whether a service member's injuries occurred incident to service.[216]

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for the death of a service member killed in a civilian aircraft crash caused by negligent Federal Aviation Administration air traffic controllers).

[211] *See* Cortez v. United States, 854 F.2d 723 (5th Cir. 1988) (permitting a wrongful death suit for a Soldier who died while on the Temporary Disability Retired List); Walls v. United States, 832 F.2d 93 (7th Cir. 1987) (barring the suit of a service member injured while on pass in a military aero club airplane crash); *Parker*, 611 F.2d 1007 (permitting the wrongful death suit of a service member who was departing work and starting leave when he died in a crash with a government vehicle).

[212] *See Walls*, 832 F.2d 93 (barring a service member's suit because, among other things, he was subject to military jurisdiction when he was injured in a military aero club airplane crash); Uptegrove v. United States, 600 F.2d 1248 (9th Cir. 1979) (barring a wrongful death claim because the service member was subject to military discipline when he died in a military aircraft crash); Woodside v. United States, 606 F.2d 134 (6th Cir. 1979) (barring a wrongful death suit because, among other things, the service member was subject to military discipline when he died in a military aero club airplane crash); Haas v. United States, 518 F.2d 1138 (4th Cir. 1975) (barring a service member's suit for injuries sustained at a military horseback riding facility because, among other things, military patrons of the facility were subject to military discipline).

[213] UCMJ art. 2 (2005).

[214] *See supra* note 212.

[215] *See* Thomason v. Sanchez, 539 F.2d 955 (3d Cir. 1976) (barring a service member's Federal Tort Claims Act suit because the service member was injured on a military base and while on active duty); Richards v. United States, 176 F.3d 652 (3d Cir. 1999) (looking to the location of the negligent act, among other things, to determine if a Soldier died incident to service); Smith v. Morton Thiokol, Inc., 712 F. Supp. 893 (M.D. Fla. 1988) (looking to the service-member/victim's duty status and activity at the time of death and the location of the negligent act).

[216] *See* Elliott v. United States, 13 F.3d 1555 (11th Cir. 1994) (rejecting the location of the negligent act as controlling and permitting a service member's suit because, at the time of his injury, he was on leave and not engaged in an activity related to his military service); Flowers v. United States, 764 F.2d 759 (11th Cir. 1985) (rejecting the location of the negligent act as controlling and barring a service member's suit because his activity at the time of injury was related to his military service); Parker v. United States, 611 F.2d 1007 (5th Cir. 1980) (permitting a service member's suit even though the negligent act occurred on a military installation).

Even courts that apply the same analysis often reach disparate outcomes with similarly-situated plaintiffs.[217] Perhaps the best example of such disparity can be found in the decision the Court of Appeals for the Eleventh Circuit reached in *Del Rio v. United States*.[218] During an initial prenatal care visit to the Naval Aerospace and Regional Medical Center in Pensacola, Florida, Hospital Corpsman Second Class Laura Del Rio, an active duty Sailor, informed medical personnel that her medical history increased her risk of complications during pregnancy.[219] A month after her initial visit, Del Rio experienced severe nausea, cramping, and bleeding and sought treatment at the Naval Aerospace and Regional Medical Center.[220] Approximately four months later, Del Rio was admitted to the Naval Aerospace and Regional Medical Center and, two days later, "was transferred to Keesler Air Force Base for intensive prenatal care."[221] At Keesler, Del Rio delivered two boys, Frederick Wayne Del Rio and Michael Norman John Del Rio.[222] Frederick suffered permanent injuries, and Michael died five days after his birth.[223] Del Rio sued under the Federal Tort Claims Act for her physical injuries, Frederick's injuries, and Michael's death.[224] She alleged that the medical center staff in Pensacola ignored her medical history and failed to

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[217] *Compare* Parker v. United States, 611 F.2d 1007 (5th Cir. 1980) (permitting a wrongful death suit for a service member who was departing work and starting leave when he died in an accident with a government vehicle on a military installation), *and* Pierce v. United States, 813 F.2d 349 (11th Cir. 1987) (permitting an off-duty service member's suit for injuries sustained in a motor vehicle accident with an on-duty Navy recruiter), *with* Richards v. United States, 176 F.3d 652 (3d Cir. 1999) (denying a wrongful death suit for an off-duty service member who left work early and, while on his way home, died in a motor vehicle accident with a government vehicle).

[218] 833 F.2d 282 (11th Cir. 1987)

[219] *Id.* at 284 n.2. Specifically, Del Rio told medical personnel of her history of miscarriages and infertility, of her family's history of multiple births, and of her exposure to diethylstilbestrol (DES). *See id.* DES is a synthetic nonsteroidal estrogen that was given to women to prevent miscarriage and pregnancy complications between 1938 and 1971 in the United States. *See* Sarina Schrager & Beth E. Potter, *Diethylstilbestrol Exposure*, 69 AM. FAM. PHYSICIAN 2395, 2395 (2004). In 1971, the U.S. Food and Drug Administration warned about the use of DES during pregnancy after a relationship between exposure to DES and vaginal and cervical cancer was found in women whose mothers had taken DES during their pregnancies. *See id.* Women who were exposed in utero to DES also have pregnancy complications, infertility problems, and reproductive tract anomolies. *See id.* at 2398–99.

[220] *Del Rio*, 833 F.2d at 284.

[221] *Id.*

[222] *Id.*

[223] *Id.*

[224] *Id.*

properly treat her in July 1983 when she first reported her pregnancy complications.[225]

In its opinion, the Court of Appeals for the Eleventh Circuit individually addressed each claimant's injury. First, the court addressed Hospital Corpsman Second Class Del Rio's own claim. The court held that "[t]he rationales underlying the *Feres* doctrine preclude appellant's suit against the United States on the alleged prenatal treatment she received while on active duty in the [N]avy."[226] In reaching this conclusion, the court stated that Del Rio's own suit implicated the *Feres* factor of the relationship between the Government and its military to the greatest degree because Del Rio's "active military status permitted her to seek prenatal care at the military hospital."[227] The court also stated that Del Rio would continue to receive medical care for any injury sustained incident to her service; therefore, her case implicated the *Feres* double recovery factor.[228] Finally, the court concluded that Del Rio's suit would implicate the third *Feres* factor, that of avoiding involving the "judiciary in sensitive military affairs at the expense of military discipline and effectiveness."[229] As a result, Del Rio's claim for her own injuries failed.

After determining that the *Feres* doctrine barred Del Rio's own claim, the court addressed the twin sons' claims. Del Rio claimed that both of her sons' claims did not derive from her claim and were not, thus, barred.[230] The court agreed with Del Rio and held that "[t]he three [*Feres*] rationales clearly are not present in a suit by a child of a service person for the negligence of military medical staff."[231] With Fredrick's claim, the court concluded that he had no distinctly federal relationship with the Government and that he enjoyed no statutory benefits as a dependent of a service member.[232] The court stated that although Frederick's suit requires "the same type of inquiry into the physician's decisions as a suit by Ms. Del Rio, military discipline is not implicated to the same degree."[233] The court further declared that a civilian child's suit "for the negligent administration of prenatal care need not impair the

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225 *Id.*
226 *Id.* at 286.
227 *Id.*
228 *Id.*
229 *Id.*
230 *Id.*
231 *Id.* at 287.
232 *Id.*
233 *Id.*

esprit de corps necessary for effective military service, nor will it require the court to second-guess a decision by military personnel unique to the accomplishment of a military mission."[234] Thus, the court permitted Frederick to recover for his injuries.

After permitting Frederick's claim, the court addressed Del Rio's claim for the wrongful death of her other son, Michael. The court began its analysis of Michael's claim by looking to the Florida Wrongful Death Act.[235] It characterized the Florida Wrongful Death Act as creating "in the statutory beneficiaries an independent cause of action."[236] Therefore, the court concluded that Del Rio's claim for Michael's wrongful death provided her "as a surviving parent, with some relief from the death of her minor child. The effect of the Florida statute is to award damages to Ms. Del Rio, an active member of the armed forces, for an injury personal to her.[237] Thus, the court barred Del Rio's claim for the death of her son, Michael.

The results in *Del Rio* demonstrate the disparity in results that the *Feres* "incident to service" test has wrought. Del Rio's three suits arose out of the same medical malpractice. As Frederick's and Michael's mother, Del Rio pursued the suits for them and questioned the quality of military prenatal care provided to her and her unborn sons. Yet, the court permitted Frederick's suit because it did not threaten military discipline and decision making while, in the same opinion, it barred Del Rio's recovery because her own suit based upon the same negligent act required judicial inquiry that would threaten military discipline and decision making. The court's opinion in *Del Rio*, therefore, contradicts itself and demonstrates how the *Feres* victim-based test produces incongruous results.

Although the Supreme Court thought the Federal Tort Claims Act's "geographically varied recovery"[238] was unfair to service members, its incident to service test has resulted in recovery that varies.[239] Because no

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[234] *Id.*
[235] *Id.* at 288 (citation omitted).
[236] *Id.*
[237] *Id.*
[238] United States v. Johnson, 481 U.S. 681, 695 (1987).
[239] *Compare* Parker v. United States, 611 F.2d 1007 (5th Cir. 1980) (permitting a wrongful death suit for a service member who was departing work and starting leave when he died in an accident with a government vehicle on a military installation), *and* Pierce v. United States, 813 F.2d 349 (11th Cir. 1987) (permitting an off-duty service

clear definition for the phrase incident to service exists, federal courts have developed different tests to determine whether an injury occurred incident to service. As a result of the different types of analysis and the nebulous phrase incident to service, courts have reached inconsistent outcomes on similarly-situated plaintiffs, such as the plaintiffs in *Del Rio*.[240]

B. The Preventative Function of Tort Law

Although the Federal Tort Claims Act's function is compensatory in nature, it can serve a secondary tort law function of promoting institutional reform. "A recognized need for compensation is . . . a powerful factor influencing tort law."[241] Thus, compensation is, perhaps, the primary function of tort law. However, "[t]he prophylactic factor of preventing future harm has been quite important in the field of torts."[242] Therefore, tort law is concerned with compensating the victim and demonstrating to potential defendants that they may be liable for their own torts. In *Feres*, the Court focused on the compensation veterans benefits provide injured service members, thereby ignoring the preventative function tort law serves.[243]

Because Federal Tort Claims Act suits can focus judicial and public attention on an organization's shortcomings, government organizations facing suit for negligence under the Federal Tort Claims Act may be more inclined to take measures to prevent recurrences of such negligence. This could improve the efficient and safe operation of the agency. However, the *Feres* doctrine destroys this incentive to prevent future acts of negligence by allowing the Government to evade liability for injuries a negligent government employee inflicts upon a service member.

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member's suit for injuries sustained in a motor vehicle accident with an on-duty Navy recruiter), *with* Richards v. United States, 176 F.3d 652 (3d Cir. 1999) (denying a wrongful death suit for an off-duty service member who left work early and, while on his way home, died in a motor vehicle accident with a government vehicle).

[240] *See Richards*, 176 F.3d at 657 ("It is because Feres too often produces such curious results that members of this court repeatedly have expressed misgivings about it.").

[241] W. KEETON, D. DOBBS, R. KEETON, & D. OWEN, PROSSER AND KEETON ON TORTS 20 (5th ed. 1984).

[242] *Id.* at 25.

[243] *See* Feres v. United States, 340 U.S. 135, 140 (1950).

C. Violation of Separation of Powers

The Constitution provides that Congress has the power to pass all laws necessary and proper for executing its powers, to include paying the United States' debts.[244] The Constitution grants courts the power to interpret the laws that Congress enacts.[245] When interpreting legislation, the Supreme Court has held that courts must refuse to appraise the legislation's wisdom.[246] Yet, in determining the applicability of the Federal Tort Claims Act to service members' claims, the Supreme Court has consistently appraised the wisdom of the statute.[247] In promulgating the *Feres* doctrine, the Court overstepped its authority, acted as a legislative body, carved out a judicial exception to the Act, and violated the principles of separation of powers.

When interpreting congressional waivers of sovereign immunity, the Supreme Court has held that courts must strictly interpret waivers of sovereign immunity and must not broaden such waivers.[248] When

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[244] *See* U.S. CONST. art. I, § 8.

[245] *See id.* art III, § 2.

[246] *See* Tenn. Valley Auth. v. Hill, 437 U.S. 153, 194–95 (1978) ("Once the meaning of an enactment is discerned and its constitutionality determined, the judicial process comes to an end. . . . [Courts] . . . do not sit as . . . committee[s] of review, nor are . . . [they] vested with the power of veto.").

[247] *See* United States v. Johnson, 481 U.S. 681, 689 (1987) (stating that permitting the situs of the negligence to affect the Government's liability makes no sense) (citing Stencel Aero Eng'g Corp. v. United States, 431 U.S. 666, 672 (1977); *Stencel Aero Eng'g Corp.*, 431 U.S. at 672 ("it would make little sense to have the Government's liability to members of the Armed Services dependent on the fortuity of where the solider happened to be stationed at the time of the injury"); *Feres*, 340 U.S. at 143 ("That the geography of an injury should select the law to be applied to his tort claims makes no sense.").

[248] Even though the Court has consistently recognized that it must strictly construe congressional waivers of sovereign immunity, the Court has not applied this rule of strict construction "where the language of the statute itself is broad, as it is in the Tort Claims Act." *See* Bogin, *supra* note 38, at 91. The Court, in fact, has refused to expand the Federal Tort Claims Act's exceptions. *See* United States v. Muniz, 374 U.S. 150, 165–66 (1963) ("[w]e should not . . . narrow the remedies provided [in the Federal Tort Claims Act] by Congress."); Rayonier v. United States, 352 U.S. 315, 320 (1957) ("There is no justification for the United States Supreme Court to read exemptions into the Federal Tort Claims Act beyond those provided by Congress; if the act is to be altered, that is a function for the same body that adopted it."); United States v. Aetna Cas. and Sur. Co., 338 U.S. 366, 383 (1949) ("The exemptions of the sovereign from suit involves hardship enough where consent has been withheld. We are not to add to its rigor by refinement of construction to narrow the remedies provided [in the Federal Tort Claims Act] by Congress."). *See also* Lane v. Pena, 518 U.S. 187 (1996) (holding that Congress must unequivocally waive sovereign immunity in a statute and courts cannot imply waivers of sovereign immunity); United States v. Kubrick, 444 U.S. 111, 118 (1979) (holding that in

interpreting statutes, to include statutes that waive sovereign immunity, a strong presumption exists that the plain language of the statute expresses Congress's intent.[249] Only "rare and exceptional"[250] circumstances permit rebuttal of a statute's plain language.[251] Therefore, when interpreting a statute, courts first look to the statute's plain language; if the plain language is ambiguous, courts then consider the statute's legislative history to discern congressional intent.

In creating the incident to service test, the Supreme Court ignored the plain meaning of the Federal Tort Claims Act and created an additional exception to the Act. Apart from its anomalous line of *Feres* doctrine cases, the Court has found that the Act broadly waives sovereign immunity, and has repeatedly rejected judicial expansions of the Act's

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construing the Federal Tort Claims Act, the Court should not extend Congress's waiver of sovereign immunity); McMahon v. United States, 342 U.S. 25 (1951) (holding that legislation benefiting a certain group of people is construed liberally in their favor; however, courts must strictly construe, in favor of the sovereign, statutes that waive sovereign immunity); United States v. Sherwood, 312 U.S. 584 (1941) (holding that relinquishment of sovereign immunity is strictly interpreted); United States v. Shaw, 309 U.S. 495 (1940) (holding that courts cannot broaden a congressional waiver of sovereign immunity); Schillinger v. United States, 155 U.S. 163 (1894) (holding that courts cannot extend a congressional waiver of sovereign immunity).

[249] *See* Ardestani v. Immigration and Naturalization Serv., 502 U.S. 129, 135–36 (1991) (citing Rubin v. United States, 449 U.S. 424, 430 (1981)) ("The 'strong presumption' that the plain language of the statute expresses congressional intent is rebutted only in 'rare and exceptional circumstances.'"); Rubin v. United States, 449 U.S. 424, 430 (1981) (citing *Tennessee Valley Auth.*, 437 U.S. at 187 n.3) ("When we find the terms of a statute unambiguous, judicial inquiry is complete, except in 'rare and exceptional circumstances.'"); Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc., 447 U.S. 102, 108 (1980) ("We begin with the familiar canon of statutory construction that the starting point for interpreting a statute is the language of the statue itself. Absent a clearly expressed intention to the contrary, that language must ordinarily be regarded as conclusive."); *Tennessee Valley Auth.*, 437 U.S. at 187 ("the plain language of the statute, buttressed by its legislative history, shows clearly that Congress viewed the value of endangered species as 'incalculable'"); Canadian Aviator, Ltd. v. United States, 324 U.S. 215, 223 (1945) ("we think congressional adoption of broad statutory language authorizing suit was deliberate and is not to be thwarted by an unduly restrictive interpretation."); Crook v. Harrelson, 437 U.S. 55, 60 (1930) (holding that courts should override a statute's literal terms only in rare and exceptional circumstances).

[250] *Crook*, 437 U.S. at 60.

[251] *See Ardestani*, 502 U.S. at 135–36 ("The 'strong presumption' that the plain language of the statute expresses congressional intent is rebutted only in 'rare and exceptional circumstances.'") (citing *Rubin*, 449 U.S. at 430); *Rubin*, 449 U.S. at 430 ("When we find the terms of a statute unambiguous, judicial inquiry is complete, except in 'rare and exceptional circumstances.'") (citing *Tennessee Valley Auth.*, 437 U.S. at 187 n.3); *Crook*, 437 U.S. at 60 (holding that courts should override a statute's literal terms only in rare and exceptional circumstances).

exceptions.[252] Only a few months after its decision in *Brooks* and a year prior to promulgating the *Feres* doctrine, the Court, in *United States v. Aetna Casualty & Surety Co.*,[253] stated that

> the congressional attitude in passing the Tort Claims Act is more accurately reflected by Judge Cardozo's statement in *Anderson v. Hayes Construction Co.* . . . "The exemption of the sovereign from suit involves hardship enough where consent has been withheld. We are not to add to its rigor by refinement of construction where consent has been announced."[254]

In *Rayonier Inc. v. United States*,[255] the Court affirmed its decision in *Aetna* and declared that it had "no justification . . . to read exemptions into the [Federal Tort Claims] Act beyond those provided by Congress. If the Act is to be altered that is a function for the same body that adopted it."[256] Finally, in *Muniz v. United States*, the Court reaffirmed its holding in *Aetna* and stated that "[w]e should not, at the same time that state courts are striving to mitigate the hardships caused by sovereign immunity, narrow the remedies provided by Congress."[257] Although the Court in *Aetna*, *Rayonier*, and *Muniz* concluded that only Congress could expand the Federal Tort Claims Act's exceptions, the Court in *Feres* ignored the Act's plain language and expanded its exceptions.

Even the Supreme Court in *Brooks* was "not persuaded that 'any claim' [under the Federal Tort Claims Act] meant 'any claim but that of servicemen.'"[258] Rather, the Act's plain language unequivocally waives the United States' sovereign immunity and permits "*any* (emphasis in original) claim founded on negligence brought against the United

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[252] *See generally Muniz*, 374 U.S. 150; *Rayonier Inc.*, 352 U.S. 315; *Aetna Cas. & Sur. Co.*, 338 U.S. 366.

[253] 338 U.S. 366.

[254] *Id.* at 383 (quoting Justice Cardozo, Anderson v. Hayes Constr. Co., 153 N.E. 28, 30 (N.Y. 1926)). In *Aetna*, the Court held that an insurance company may bring suit in its own name against the Government for a claim that the company subrogated by paying an insured who had a valid Federal Tort Claims Act claim. *Aetna Cas. & Sur. Co.*, 338 U.S. at 368, 383.

[255] 352 U.S. 315 (1957).

[256] *Id.* at 320.

[257] *Muniz*, 374 U.S. at 165–66 (refusing to expand the Federal Tort Claims Act's exceptions to bar federal prisoners' suits under the Act).

[258] Brooks v. United States, 337 U.S. 49, 51 (1949) ("It would be absurd to believe that Congress did not have the servicemen in mind in 1946, when this statute was passed.").

States."[259] The Act contains limiting language; however, the language does not limit jurisdiction to any claim but that of service members harmed incident to service. Therefore, the Act's language allows service members' claims, regardless of service connection, and the Court should have refused to expand the Act's exceptions, as it refused to do in *Aetna*, *Rayonier*, and *Muniz*.

Assuming, as the Supreme Court did in *Feres*,[260] that the Federal Tort Claims Act's language does not unequivocally waive sovereign immunity, the legislative history indicates that Congress intended to permit service members' claims under the Act, regardless of whether their claims arose incident to their military service. Between 1942 and the passage of the Federal Tort Claims Act in 1946, Congress considered eighteen tort claims bills.[261] Of those bills, sixteen barred service members from recovery for injuries incurred in the line of duty.[262] The Federal Tort Claims Act as enacted, however, contained no such bar. The omission of such a bar, when one was considered and rejected in sixteen previous tort bills, clearly indicates that Congress did not intend to limit service members' ability to sue under the Federal Tort Claims Act.

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[259] *Id.*

[260] Feres v. United States, 340 U.S. 135, 139 (1950) ("These considerations [of the uncertainty concerning the extent of the Federal Tort Claims Act's waiver of sovereign immunity], it is said, should persuade us to cast upon Congress, as author of the confusion, the task of qualifying and clarifying its language if the liability here asserted should prove so depleting of the public treasury as the Government fears.").

[261] *See* H.R. 12178, 68th Cong. (2d Sess. 1925); H.R. 12179, 68th Cong. (2d Sess. 1925); S. 1912, 69th Cong. (1st Sess. 1925); H.R. 6716, 69th Cong. (1st Sess. 1926); H.R. 8914, 69th Cong. (1st Sess. 1926); H.R. 9285, 70th Cong. (1st Sess. 1928); S. 4377, 71st Cong. (2d Sess. 1930); H.R. 15428, 71st Cong. (3d Sess. 1930); H.R. 16429, 71st Cong. (3d Sess. 1931); H.R. 17168, 71st Cong. (3d Sess. 1931); H.R. 5065, 72d Cong. (1st Sess. 1931); S. 211, 72d Cong. (1st Sess. 1931); S. 4567, 72d Cong. (1st Sess. 1932); S. 1833, 73d Cong. (1st Sess. 1933); H.R. 129, 73d Cong. (1st Sess. 1933); H.R. 8561, 73d Cong. (2d Sess. 1934); H.R. 2028, 74th Cong. (1st Sess. 1935); S. 1043, 74th Cong. (1st Sess. 1935). *See also* Brooks v. United States, 337 U.S. 49, 51 (1949).

[262] *See* H.R. 12179, 68th Cong. (2d Sess. 1925); S. 1912, 69th Cong. (1st Sess. 1925); H.R. 6716, 69th Cong. (1st Sess. 1926); H.R. 8914, 69th Cong. (1st Sess. 1926); H.R. 9285, 70th Cong. (1st Sess. 1928); S. 4377, 71st Cong. (2d Sess. 1930); H.R. 15428, 71st Cong. (3d Sess. 1930); H.R. 16429, 71st Cong. (3d Sess. 1931); H.R. 17168, 71st Cong. (3d Sess. 1931); H.R. 5065, 72d Cong. (1st Sess. 1931); S. 211, 72d Cong. (1st Sess. 1931); S. 4567, 72d Cong. (1st Sess. 1932); S. 1833, 73d Cong. (1st Sess. 1933); H.R. 129, 73d Cong. (1st Sess. 1933); H.R. 2028, 74th Cong. (1st Sess. 1935); S. 1043, 74th Cong. (1st Sess. 1935).

Additionally, the bill that later became the Federal Tort Claims Act originally contained thirteen exceptions.[263] The Act as passed, however, contained twelve enumerated exceptions;[264] the omitted exception prohibited "any claim for which compensation is provided by the . . . World War Veterans' Act of 1924, as amended."[265] This omission is significant because it indicates that Congress intended to permit service members' claims under the Federal Tort Claims Act regardless of whether the injuries occurred incident to military service.

Similarly, "[t]he Federal Tort Claims Act expressly repealed the Military Personnel Claims Act of July 3, 1943, which authorized the Secretary of War to adjust claims of servicemen up to $1,000 when the claims were not incident to service."[266] This suggests that "Congress, when it deprived the servicemen of this limited remedy for torts committed by the Government, did so with the expectation and intent that this remedy be superseded by the rights granted by the . . . [Federal Tort Claims Act]."[267] Therefore, the Federal Tort Claims Act's repeal of the Military Personnel Claims Act demonstrates that Congress intended to permit service members unqualified recovery under the Federal Tort Claims Act.

The congressional discussions concerning the Federal Tort Claims Act also indicate that Congress was aware of the possibility that service members would file claims under the Federal Tort Claims Act. As members of Congress discussed the bill that later became the Federal Tort Claims Act, they also discussed the troubles disabled veterans faced at the time.[268] Shortly after the discussion, Congressman A.S. Monroney moved to insert the word "combatant" before the word "activities" in the exception that barred "[a]ny claim arising out of the activities of the military or naval forces, or the Coast Guard, during time of war."[269] The motion passed without discussion.[270] Some legal scholars have theorized that the term combatant "may have been inserted in view of the uncertain

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[263] *See* Bogin, *supra* note 38, at 91 n.29.
[264] *See* Federal Tort Claims Act, 60 Stat. 843, § 421 (1946) (current version at 28 U.S.C. § 2680 (2000)).
[265] *See* Bogin, *supra* note 38, at 91 n.29.
[266] *Id.* at 93.
[267] *Id*.
[268] *See* 92 CONG. REC. 10,091–92 (July 25, 1946) (statement of Rep. Rogers).
[269] 92 CONG. REC. 10,093 (July 25, 1946) (statement of Rep. Monroney).
[270] *See* 92 CONG. REC. 10,093 (July 25, 1946) ("The amendment was agreed to.").

meaning of the companion phrase 'during the time of war.'"[271] Regardless of why Congress inserted the term combatant into the military activities exception, this exception's presence in the Act demonstrates that Congress was aware of the potential for military claims and chose to exclude only certain military claims from the Act.

The Federal Tort Claims Act's plain language, buttressed by its legislative history, indicates that Congress intended to permit service members to recover under the Act, regardless of the "incident to service" test. Clearly, "Congress was cognizant of potential military claims when drafting the . . . [Federal Tort Claims Act] and, had it chosen to do so, could have explicitly excluded them."[272] However, it did not. Rather, the plain language of the Federal Tort Claims Act permits all claims against the United States, subject to the enumerated exceptions.[273] The omission of the exception that barred World War veterans from recovering under the Act, the Federal Tort Claims Act's repeal of the Military Claims Act, and the insertion of the word combatant into the military activities exception all demonstrate that Congress intended to permit service members to enjoy the same standing as civilians when suing under the Federal Tort Claims Act. Despite this, the Supreme

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[271] *The Federal Tort Claims Act*, *supra* note 52, at 548 n.99.

[272] Costo v. United States, 248 F.3d 863, 869 (9th Cir. 2001) (Ferguson, J., dissenting). Critics of this line of thought have pointed to the fact that, even though more than fifty years have lapsed since the *Feres* decision, Congress has not passed legislation abrogating the *Feres* doctrine. *See The Feres Doctrine: An Examination of this Military Exception to the Federal Tort Claims Act, Hearing Before the S. Committee on the Judiciary*, 107th Cong. 2d Sess. 24 (2002) [hereinafter *The Feres Doctrine*] (statement of Major General (MG) John Altenburg). Congress's failure to abrogate the *Feres* doctrine, however, does not change the fact that the Supreme Court overstepped its authority in *Feres* and created an additional exception to the Federal Tort Claims Act. "To say that because Congress hasn't done something that Congress agrees with [*Feres*] is really as much a non sequitur as the holding in *Feres* is from the case." *Id.* (statement of Senator Arlen Specter). Throughout the 1980s, Congress attempted several times to pass bills permitting service members to sue under the Federal Tort Claims Act for medical malpractice. *See* 134 CONG. REC. S929, 929 (Feb. 18, 1988) (statement of Sen. Sasser); 134 CONG. REC. H354, 356 (Feb. 17, 1988) (statement of Rep. Frank). One of the bills passed the House with a vote of 917–90; however, it failed to make it out of the Senate. *See* 134 CONG. REC. H354, 356 (Feb. 17, 1988) (statement of Rep. Frank). The bill never made it "out of the [Senate] Judiciary Committee because of the strong opposition of Senator Strom Thurmond, Republican of South Carolina, the committee's chairman." Linda Greenhouse, *Washington Talk; On Allowing Soldiers to Sue*, N.Y. TIMES, Dec. 16, 1986,http://query.nytimes.com/gst/fullpage.html?sechealth&res=9A0DE3DB123EF935A25751C1A960948260.

[273] *See* 28 U.S.C. §§ 1346(b), 2674, 2680 (2000).

Court elected to create the *Feres* doctrine, an additional exception to the Federal Tort Claims Act.

The *Feres* doctrine, therefore, is "a judicial re-writing of an unambiguous and constitutional statute. Even to the courts that have considered it, the [*Feres*] decision stands not for an interpretation of statute but rather a 'judicially created exception' to the [Federal Tort Claims Act] . . . ."[274] The *Feres* doctrine has amounted to an almost total bar to service members' claims, and it has become an additional exception to the Federal Tort Claims Act. Thus, when it promulgated the *Feres* doctrine, the Court assumed the role of the legislature, modified the Federal Tort Claims Act, and created a new exception to the Act. This act of judicial legislation runs counter to "our basic separation of powers principles . . . ."[275]

VI. Analysis of the Rationales in Support of the *Feres* Doctrine

A. The Relationship Between the Government and Its Armed Forces

The U.S. Supreme Court denied claims under the "incident to service" test because it considered the relationship between the Government and its armed forces to be distinctly federal in nature. Under the Federal Tort Claims Act, the tort law of the state in which an act or omission occurred governs both the United States' substantive tort liability and the amount of damages recoverable.[276] Therefore, the Court believed that allowing service members to sue under the Federal Tort Claims Act for injuries sustained incident to service would cause state law to intrude upon the relationship between the Government and its armed forces.[277]

State law, however, intrudes upon the relationship between the Government and its armed forces when civilians sue under the Federal Tort Claims Act for injuries inflicted by military employees and service members. State law governs civilians' ability to recover under the Act by providing the substantive tort law to establish the United States'

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[274] *Costo*, 248 F.3d at 871 (Ferguson, J., dissenting). *See* Schoemer v. United States, 59 F.3d 26, 28 (5th Cir. 1995); Pringle v. United States, 208 F.3d 1220, 1223 (10th Cir. 2000); Romero *ex rel.* Romero v. United States, 954 F.2d 223, 224 (4th Cir. 1992)).

[275] *Costo*, 248 F.3d at 871 (Ferguson, J., dissenting).

[276] *See* 28 U.S.C. § 1346.

[277] *See* Feres v. United States, 340 U.S. 135, 143 (1950).

liability for its employees' actions.[278] State law also governs the amount recoverable.[279] Civilians sue under the Federal Tort Claims Act and, as a result, government employees and service members face tort liability.[280] Because tort law varies from state to state, this can lead to varying tort standards for government employees and service members.

In *Feres*, the Court believed that this choice of law provision was "fair enough when the claimant is not on duty or is free to choose his own habitat and thereby limit the jurisdiction in which it will be possible for federal activities to cause him injury."[281] The Court, however, felt that service members had no such choice because the Government could assign them anywhere in the world.[282] Therefore, the Court concluded "[t]hat the geography of an injury should select the law to be applied to . . . [a service member's] tort claims makes no sense."[283]

Justice Scalia, in his dissent to the Court's opinion in *Johnson*, wrote that "[t]he unfairness to servicemen of geographically varied recovery is, to speak bluntly, an absurd justification, given that, as we have pointed out in another context, nonuniform recovery cannot possibly be worse than [what *Feres* provides] uniform nonrecovery."[284] Federal prisoners, just like service members, have no control over their location.[285] Yet, in *United States v. Muniz*,[286] the Court held that federal prisoners could sue under the Federal Tort Claims Act. Despite a similar lack of control of

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[278] *See* 28 U.S.C. § 1346.

[279] *See id. See also* Richards v. United States, 369 U.S. 1 (1962) (holding that the entire law of the state applies).

[280] *See* Brown v. United States, 348 U.S. 110 (1954) (permitting a discharged veteran's claim for medical malpractice at a Veterans Affairs hospital); Brown v. United States, 462 F.3d 609 (6th Cir. 2006) (permitting a child's suit for negligent provision of prenatal care to the service member mother); Mossow v. United States, 987 F.2d 1365 (8th Cir. 1993) (holding that a service member's child could maintain a suit for medical and legal malpractice); Adams v. United States, 728 F.2d 736 (5th Cir. 1984) (permitting a Soldier's suit for a Public Health Services hospital's medical malpractice that occurred while the Soldier was on excess leave and after he had received a notice of separation); Smith v. Saref, 148 F. Supp. 2d 504 (D. N.J. 2001) (permitting a service member's child's suit for medical malpractice); Graham v. United States, 753 F. Supp. 994 (D. Me. 1990) (permitting a child's suit for negligent provision of prenatal care to the service-member mother).

[281] *Feres*, 340 U.S. at 142–43.

[282] *See id.* at 143.

[283] *Id.*

[284] United States v. Johnson, 481 U.S. 681, 695–96 (1987) (Scalia, J. dissenting).

[285] *Id.*

[286] United States v. Muniz, 374 U.S. 150 (1963).

location, the Court narrowed service members' Federal Tort Claims Act remedies while it refused, in the context of federal prisoners, to "narrow the remedies provided by Congress."[287]

Just as the service member has little freedom to "limit the jurisdiction in which"[288] federal entities may injure him, also limited is the service member's family. Service members and their families move frequently to meet the needs of the military and enjoy little choice in assignment location. Even though service members' families have little choice of assignment when they accompany the service member sponsor to duty stations, the federal courts have permitted military family members to recover under the Federal Tort Claims Act.[289]

Because tort law varies from state to state, the amount a military family member recovers can vary depending upon where the family member sustained the injury. The military family member's injuries and the recovery gained under the Federal Tort Claims Act likely affect the service member's financial and familial situation. The variation from state to state in recovery, however, has not barred military family members from recovering for injuries caused by the Government's negligence.[290] Despite this variation in recovery, the federal courts have permitted such suits and do not appear concerned about state law's intrusion on the relationship between the Government and its armed forces, nor has there been any indication such an intrusion has occurred.

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[287] *Id.* at 165–66 (refusing to expand the Federal Tort Claims Act's exceptions to bar federal prisoners' suits under the Act). *See generally Johnson*, 481 U.S. at 695–96 (Scalia, J. dissenting) (citing *Muniz*, 374 U.S. at 162).

[288] *Feres*, 340 U.S. at 142–43.

[289] *See* Brown v. United States, 462 F.3d 609 (6th Cir. 2006) (permitting a child's suit for negligent provision of prenatal care to the service-member mother); Mossow v. United States, 987 F.2d 1365 (8th Cir. 1993) (holding that a service member's child could maintain a suit for medical and legal malpractice); Smith v. Saref, 148 F. Supp. 2d 504 (D.N.J. 2001) (permitting a service member's child's suit for medical malpractice); Graham v. United States, 753 F. Supp. 994 (D. Me. 1990) (permitting a child's suit for negligent provision of prenatal care to the service-member mother); Burke v. United States, 605 F. Supp. 981 (D. Md. 1985) (permitting suit for a military doctor's failure to timely diagnose a service member's dependent wife's cancer).

[290] *See supra* note 289 and accompanying text.

B. Lack of Comparable Private Liability

The Federal Tort Claims Act provides that "[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 . . . ."[291] The Court in *Feres* asserted that service members suing the Government for injuries incurred incident to service could point to no private individual's liability remotely similar to that of the U.S. military.[292] Therefore, the Court reasoned that the United States could not be liable for injuries service members incur incident to service because "no private individual has the power to conscript or mobilize a private army with such authorities over persons as the Government vests in echelons of command."[293]

The military, however, performs functions that private individuals also perform, such as providing medical, legal, retail, transportation, and recreational services.[294] Private individuals provide such services and are liable for negligent provision of such services.[295] Applying the Court's

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[291] 28 U.S.C. § 2674 (2000) (emphasis added).

[292] *See Feres*, 340 U.S. at 141.

[293] *Id.*

[294] *See* UCMJ arts. 27a,27b (2005); U.S. DEP'T OF DEFENSE, DIR. 1015.2, MORALE, WELFARE, AND RECREATION (MWR) (14 June 1995) [hereinafter DOD DIR. 1015.2]; U.S. DEP'T OF DEFENSE, INSTR. 1015.10, PROGRAMS FOR MORALE, WELFARE, AND RECREATION (MWR) (14 June 1995) (incorporating C1, 31 Oct. 1996) [hereinafter DODI 1015.10]; U.S. DEP'T OF THE ARMY, REG. 215-1, MILITARY MORALE, WELFARE, AND RECREATION PROGRAMS AND NONAPPROPRIATED FUND INSTRUMENTALITIES (24 Oct. 2006) [hereinafter AR 215-1]; U.S. DEP'T OF ARMY, REG. 27-10, MILITARY JUSTICE ch. 6 (16 Nov. 2005) [hereinafter AR 27-10]; U.S. DEP'T OF ARMY, REG. 27-3, THE ARMY LEGAL ASSISTANCE PROGRAM (21 Feb. 1996) [hereinafter AR 27-3]; U.S. DEP'T OF ARMY, REG. 40-1, COMPOSITION, MISSION, AND FUNCTION OF THE ARMY MEDICAL DEPARTMENT (1 July 1983) [hereinafter AR 40-1]; U.S. DEP'T OF ARMY, REG. 60-10, ARMY AND AIR FORCE EXCHANGE SERVICE (17 June 1988) [hereinafter AR 60-10]; Defense Commissaries Agency Home Page, http://www.commissaries.com/about_us.cfm [hereinafter DECA website] (last visited Mar. 15, 2007).

[295] *See* Dunbar v. Jackson Hole Mt. Resort Corp., 392 F.3d 1145, 1148 (10th Cir. 2004) (holding that private recreation companies can be liable for negligence if the harm is not a result of an inherent risk of the sport or recreational activity); Wien Alaska Airlines v. Simmonds, 241 F.2d 57 (9th Cir. 1957) (permitting suit against an airline for a death that occurred in an aircraft crash); Lloyd Noland Hosp. v. Durham, 905 So.2d 157 (Ala. 2005) (permitting a suit against a private hospital for medical malpractice); Richmond v. Nodland, 501 N.W.2d 759, 761 (N.D. 1993) ("The elements of a legal malpractice action against an attorney for professional negligence are the existence of an attorney-client relationship, a duty by the attorney to the client, a breach of that duty by the attorney, and damages to the client proximately caused by the breach of that duty."); Johnson v. Wagner Provision Co., 49 N.E.2d 925 (Ohio 1943) (permitting suit against owners of a

logic, because private entities can be held liable for negligent provision of medical, legal, retail, transportation, and recreational services, the United States could, similarly, be liable for the negligent provision of such services. In fact, civilians and military retirees have pursued Federal Tort Claims Act suits for negligent provision of such services.[296] Yet, active duty service members injured under the same or similar circumstances as civilians or retirees have no such cause of action.[297]

Additionally, the Supreme Court in *Johnson* did not directly address the issue of lack of comparable private liability raised in *Feres*. Instead, the Court's focus seemed to shift from lack of comparable private liability to the authority the Government vests in the chain-of-command and the need to preserve this authority in order to maintain the military's good order and discipline.[298] This shift in *Johnson* suggests that the issue of lack of comparable private liability is no longer a valid rationale.

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retail store); JCPenney Co. v. Robison, 193 N.E. 401 (Ohio 1934) (permitting suit against owners of a retail store); Halpern v. Wheeldon, 890 P.2d 562 (Wyo. 1995) (permitting suit against a company that provided horseback riding tours).

[296] *See* United States v. Brown, 348 U.S. 110 (1954) (holding that a discharged veteran could recover for negligent medical treatment at a Veterans Affairs hospital); Brown v. United States, 462 F.3d 609 (6th Cir. 2006) (holding that a service member's child could recover under the Federal Tort Claims Act for injuries caused by negligent prenatal care); Mossow v. United States, 987 F.2d 1365 (8th Cir. 1993) (holding that dependent children of active duty service members may have their own claims for medical and legal malpractice); Bryant v. United States, 565 F.2d 650 (10th Cir. 1977) (permitting suit for negligent supervision of children in a government boarding school); Piggott v. United States, 480 F.2d 138 (4th Cir. 1973) (permitting a mother's suit against the United States for the drowning deaths of her two children at the Jamestown National Historical Park).

[297] *See* United States v. Johnson, 481 U.S. 681, 703 (1987) (barring suit for a Coast Guard pilot's death in the crash of his helicopter); Costo v. United States, 248 F.3d 863 (9th Cir.) (barring suit for the wrongful death of a Sailor during a Navy MWR program's rafting trip); Richards v, United States, 176 F.3d 652 (3d Cir. 1999) (barring suit for the death of a Soldier killed in an accident with a negligently-operated government vehicle); Jones v. United States, 112 F.3d 299 (7th Cir. 1997) (barring a service member's suit for military medical malpractice); Cutshall v. United States, 75 F.3d 426 (8th Cir. 1996) (barring a service member's suit for military medical malpractice); Rayner v. United States, 760 F.2d 1217 (11th Cir. 1985) (barring suit for a service member's death caused by military medical malpractice); Uptegrove v. U.S., 600 F.2d 1248 (9th Cir. 1979) (barring suit for the death of a Navy officer killed while on leave and flying space-available on a military aircraft that crashed). *But see* Parker v. United States, 611 F.2d 1007 (5th Cir. 1980) (permitting suit for a Soldier's death in an accident with a negligently-operated military vehicle).

[298] *Johnson*, 481 U.S. at 692.

C. Prevention of Double Recovery

In *Feres*, the Supreme Court concluded that veterans benefits provide service members with a litigation-free remedy for injuries they incur incident to service and that veterans benefits compare satisfactorily to workers' compensation benefits.[299] The Court has continued to adhere to the *Feres* doctrine because it believes that veterans benefits compensate service members for their injuries.[300] Thus, the Court has concluded that allowing service members to sue the United States under the Federal Tort Claims Act for their injuries could lead to double recovery. This concern about double recovery, however, does not justify the broad, almost total bar to suit the *Feres* doctrine presents.

In its opinion in *Feres*, the Court characterized the veterans compensation system as one that "normally requires no litigation, is not negligible or niggardly . . . ."[301] The Court's emphasis on the fact that the veterans compensation system normally requires no litigation is misplaced. Perhaps at the time the Court decided *Feres*, the veterans compensation system swiftly and accurately awarded benefits. Today's service members pending medical retirement or discharge, however, are "stranded in administrative limbo. They are at the mercy of a medical evaluation system that's agonizingly slow, grossly understaffed and saddled with a growing backlog of cases."[302] Once a service member

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[299] Feres v. United States, 340 U.S. 135, 145 (1950).

[300] *See Johnson*, 481 U.S. at 689 ("[T]he existence of these generous statutory disability and death benefits is an independent reason why the *Feres* doctrine bars suit for service-related injuries."); *Feres*, 340 U.S. at 140 ("Congress was suffering from no plague of private bills on the behalf of military and naval personnel, because a comprehensive system of relief had been authorized for them and their dependents by statute.").

[301] *Feres*, 340 U.S. at 145. *See Johnson*, 481 U.S. at 689; Stencel Aero Eng'g Corp. v. United States, 431 U.S. 666, 673 (1977) ("[the Veterans Benefits Act] . . . provides a swift, efficient remedy for the injured serviceman . . . .").

[302] Kelly Kennedy, *Wounded and Waiting*, ARMY TIMES, Feb. 18, 2007, http://www.armytimes.com/news/2007/02/tnsmedboards070217/. *See Walter Reed Army Medical Center Outpatient Care: Hearing Before the Subcomm. on Nat'l Sec. and Foreign Aff., H. Comm. on Oversight and Gov't Reform*,,110th Cong. 9, 11 (2007) [hereinafter *Hearings on the Walter Reed Army Medical Center Outpatient Care*] (statement of Lieutenant General Kelvin C. Kiley, the Army Surgeon General), *available at* http://oversight.house.gov/Documents/2007030512.0611-72972.pdf (last visited Mar. 14, 2007) ("the total time from permanent profile to final disability rating is currently 208 days"); RICHARD BUDDIN & KANIKA KAPUR, AN ANALYSIS OF MILITARY DISABILITY COMPENSATION 88 (2005) (prepared for the Office of the Secretary of Defense by the National Defense Research Institute) ("In our view, the military disability system has become unduly complex. . . . These complexities mean that it is difficult to assess why a member has received a given disability rating and harder still to assess how this disability

leaves active duty, he will face the veterans compensation system, a large bureaucracy that slowly and inefficiently processes service members' claims.[303] The Veterans Benefits Administration's disability claims

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rating translates into some incremental monthly income."); *Army Surgeon General Puts in for Retirement*, NAVY TIMES, Mar. 13, 2007, http://www.navytimes.com/news/2007/03/TNSkiley070312/ ("'Our disability system has become a maze: overly bureaucratic, sometimes unresponsive, and needlessly complex,' . . . [acting Secretary of the Army] Geren said. 'A [S]oldier who fights the battle should not have to come home and fight the battle of bureaucracy.'"); Kelly Kennedy, *Who's Fit for Duty?*, ARMY TIMES, June 19, 2006, http://armytimes.com/legacy/new/0-ARMYPAPER-1827366.php ("From 2001 through 2004, the number of active-duty and reserve claims made with the Army Medical Evaluation and Physical Evaluation boards nearly doubled from 7,218 in 2001 to 13,748 in 2005."); Dana Priest & Anne Hall, *Soldiers Face Neglect, Frustration at Army's Top Medical Facility*, WASH. POST, Feb. 18, 2007, http://www.washingtonpost.com/wp-dyn/content/article/2007/0217/AR2007/021701172.html (describing a mother's struggles for fifteen months as she helped her injured son through the Army's medical evaluation process).

[303] *See* S.W. MELIDOSIAN ET AL., THE VETERAN: VA'S CUSTOMER: WHO CLAIMS BENEFITS AND WHY? 158 (1996) ("The [Veterans Claims Adjudication] Commission concluded that the problems with the existing [veterans claims] system are so many and so varied that it cannot be fine tuned into a system that will consistently produce timely and high-quality adjudicative products."). *See also* GENERAL ACCOUNTING OFFICE, DESPITE RECENT IMPROVEMENTS, MEETING CLAIMS PROCESSING GOALS WILL BE CHALLENGING 3 (2002) (testimony of Cynthia A. Bascetta, Director, Health Care—Veterans Health and Benefits Issues before the Subcommittee on Benefits, Committee on Veterans' Affairs, House of Representatives) ("VBA continues to experience problems processing veterans' disability compensation and pension claims. These include large backlogs of claims and lengthy processing times. As acknowledged by VBA, excessive claims inventories have resulted in long waits for veterans to receive decisions on their claims and appeals."); GENERAL ACCOUNTING OFFICE, CLAIMS PROCESSING TIMELINES PERFORMANCE MEASURES COULD BE IMPROVED 5 (2002) (report to the Chairman and Ranking Minority Member, Committee on Veterans' Affairs, U.S. Senate) (stating that in fiscal year 2002, the Veterans Administration took an average of 241 days to complete a disability compensation claim, 126 days to make a pension decision, and 172 days to complete a dependency and indemnification compensation claim); GENERAL ACCOUNTING OFFICE, PROBLEMS AND CHALLENGES FACING DISABILITY CLAIMS PROCESSING 2 (2000) (testimony of Cynthia A. Bascetta, Associate Director Veterans' Affairs and Military Health Issues, Health, Education, and Human Services Division before the Subcommittee on Oversight and Investigations, Committee on Veterans' Affairs, House of Representatives) ("For a number of years, VBA's regional offices have experienced problems processing compensation claims. These have included large backlogs of pending claims, lengthy processing times for initial claims, high error rates in claims processing, and questions about the consistency of regional office decisions."); BLUE RIBBON PANEL ON CLAIMS PROCESSING, PROPOSALS TO IMPROVE DISABILITY CLAIMS PROCESSING IN THE VETERANS BENEFITS ADMINISTRATION 3 (1993), *available at* http://www.vetscommission.org/displayContents.asp?id=4 [hereinafter BLUE RIBBON PANEL ON CLAIMS PROCESSING] ("While VA believes that veterans are now receiving better decisions, VA is acutely aware that the growing backlog has created additional and unacceptable delays for its clients.").

process is not easy.[304] Service members often require veterans' advocates to assist in filing claims for disability benefits.[305] Veterans filing claims for benefits must often provide "extensive proof and substantiation and, if connections between injuries and service are not appropriately made, benefits will be denied."[306]

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[304] *See* MELIDOSIAN ET AL., *supra* note 303, at 158 ("At the [veterans benefits] claims intake point, the application is lengthy, unfocused, and, in many instances, asks for information that is extraneous to the benefit sought."); *id.* at 192 (characterizing the Veterans Administration's adjudication and appeals process as procedurally complex); BLUE RIBBON PANEL ON CLAIMS PROCESSING, *supra* note 303, at 321 ("Survey respondents generally confirmed the Blue Ribbon Panel's conclusion that VA Form 21-526, used to apply for disability compensation and pension, is inadequate."); Marty Katz, *Representing Veterans in the Battle for Benefits*, TRIAL, Sept. 2006, at 30 (interview with Ronald B. Abrams, Joint Executive Director of National Veterans Legal Services Program) ("Each year, increasing numbers of veterans file claims for disability benefits from the Department of Veterans Affairs (VA). But the process is not easy . . . .").

[305] *See* Connolly v. Derwinski, 1 Vet. App. 566, 569 (1991) ("VA's duty to assist arises out of its long tradition of *ex parte* proceedings and paternalism toward the veteran."); MELIDOSIAN ET AL., *supra* note 303, at 158 ("The [Veterans' Claims Adjudication] Commission believes that VA's traditional paternalism is the source of much of its present difficulties. . . . A paternalistic system requires that claimants not be informed regarding such fundamental matters as the specific requirements for presenting and proving their claims."); Katz, *supra* note 304, at 31 ("After the veteran files a claim, the VA has a strange and almost Kafkaesque adjudication process.").

[306] Katz, *supra* note 304, at 30. *See* GENERAL ACCOUNTING OFFICE, HUMAN EXPERIMENTATION: AN OVERVIEW ON COLD WAR ERA PROGRAMS 2 (1994) (testimony of Frank C. Conahan, Assistant Comptroller General, National Security and International Affairs Division before the Legislation and National Security Subcommittee, Committee on Government Operations, House of Representatives) ("it has proven difficult for participants in government tests and experiments between 1940 and 1974 to pursue claims because little centralized information is available to prove participation or determine whether adverse effects resulted from the testing."); GENERAL ACCOUNTING OFFICE, VETERANS DISABILITY INFORMATION FROM MILITARY MAY HELP VA ASSESS CLAIMS RELATED TO SECRET TESTS 1 (1994) (report to the Chairman, Committee on Veterans Affairs, U.S. Senate) ("because there is only limited information available on [the military's secret chemical] test participants, VA will continue to have difficulty deciding whether veterans' claims are [service connected and therefore,] valid."); U.S. DEP'T OF VETERANS AFFAIRS, ANALYSIS OF PRESUMPTIONS OF SERVICE CONNECTION (1993) (discussing various medical conditions and the Veterans Affairs requirements to prove service connection); ECONOMIC SYSTEMS INC., VA DISABILITY COMPENSATION PROGRAM LEGISLATIVE HISTORY 19 (2004) [hereinafter ECONOMIC SYSTEMS INC.] (review prepared for the Veterans Administration Office of Policy, Planning, and Preparedness) ("[T]he issues of presumptions [of service-connection]—both for disease as well as Prisoner of War Effects—has become increasingly complex."); Patricia O. Jungreis, Comment*: Pushing the Feres Doctrine a Generation Too Far: Recovery for Genetic Damage to the Children of Servicemembers*, 32 AM. U.L. REV. 1039, 1040–41 (1983) ("Thousands of veterans have filed claims with the Veterans' Administration (VA) seeking compensation for their injuries [from exposure to hazardous materials]. The VA,

Moreover, veterans benefits are not as generous as the Court believed them to be.[307] A service member injured incident to service and medically retired from the military may receive his retirement pay.[308] Service members' benefits also include tax-free disability compensation[309] as well as free or subsidized medical care[310] and prescriptions.[311] Despite these and many other benefits, service members injured on active duty and their families often struggle financially.[312]

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however, has been generally unresponsive to these claims and reluctant to recognize that the injuries from exposure to hazardous materials are service related.").

[307] The Court in *Johnson* characterized veterans benefits as "generous." United States v. Johnson, 481 U.S. 681, 689 (1987). Military disability benefits, however, are not compensatory. Rather, they "supplement earnings on the assumption that those earnings are depressed as a result of disability." BUDDIN & KAPUR, *supra* note 302, at xx.

[308] A service member injured in the military and found not fit for duty will receive a disability rating. Kennedy, *supra* note 302. If the disability rating is lower than thirty percent, the service member will get a one time severance payment. *Id.* If the rating is thirty percent or more, the service member may receive lifelong medical benefits as well as the same percentage of his base pay. *Id.*

[309] U.S. DEP'T. OF VETERANS AFF., FEDERAL BENEFITS FOR VETERANS AND DEPENDENTS 17 (2006).

[310] *Id.* at ch. 1.

[311] *Id.* at 13–14.

[312] For example, Jerry Meagher was a twenty-two year old active duty service member who checked into Balboa Naval Hospital in 1974 to have a cyst removed from his left arm. As a result of Meagher's surgery, he became a severely brain-damaged quadriplegic who required twenty four hour a day care. Meagher's "mother testified before . . . [Representative Glickman's congressional] subcommittee that it takes all of the VA compensation that Jerry receives, plus $600 to $800 a month to take care of Jerry." *See The Feres Doctrine and Military Medical Malpractice*, *supra* note 203, at 17 (prepared statement of Dan Glickman, U.S. Representative from the State of Kansas). The Veterans Benefits Administration (VBA) rating schedules are slow to incorporate advances in medicine, which can result in under compensating some veterans while over compensating other veterans. Typically the VBA only updates rating schedules when veterans' service organizations or congressional staff raise the issue. Between 1978 and 1988, the VBA partially updated only four of the fourteen sections of the rating schedule. ECONOMIC SYSTEMS INC., *supra* note 306, at 58. *See* GOVERNMENT ACCOUNTABILITY OFFICE, DOD AND VA HEALTH CARE CHALLENGES ENCOUNTERED BY INJURED SERVICEMEMBERS DURING THEIR RECOVERY PROCESS (2007) (statement of Cynthia A. Bascetta, Director, Health Care before the Subcommittee on National Security and Foreign Affairs, Committee on Oversight and Government Reform, House of Representatives) ("Our work has shown that servicemembers injured in combat face an array of significant medical and financial challenges as they begin their recovery process in the DOD and VA health care systems."); Kelly Kennedy, *Officers Get More, Higher Disability Ratings*, ARMY TIMES, Mar. 8, 2007, *available at* http://www.armytimes.com /news/2007/03/TNSreedstats070308 ("VA benefits are much less [than military disability retirement benefits] and end with the death of the veteran if [the disability] isn't service-connected. There's no lifetime medical insurance for the spouse and for the children."); Simpson, *supra* note 3, at 15 ("When [Specialist Sean Baker] . . . arrived home in

The biggest distinction between civilian awards and military entitlements is that civilian awards take into account economic damages while military benefits do not. In personal injury cases, a civilian typically may recover for "lost earning capacity as substantiated by acceptable medical proof."[313] A service member who medically retires from the military will likely receive his retirement pay.[314] Nowhere in a service member's benefits is a calculation that accounts for an increased earning potential as he ages; rather, the retirement pay is calculated using the service member's pay rate when he was discharged from the service.[315] As a result, a service member's pay stagnates at the rank at which he departed the military[316] and only increases with cost of living adjustments.[317]

Civilians injured through the Government's negligence can also claim non-economic damages. These include past and future conscious pain and suffering, emotional distress, physical disfigurement, and loss of consortium.[318] A civilian decedent's survivors may recover for loss of monetary support, loss of ascertainable contributions, and loss of services.[319] The survivors may also recover for the civilian decedent's pre-death conscious pain and suffering; loss of companionship, comfort, society, protection, and consortium; loss of training, guidance, education and nurturing; and emotional distress.[320]

Veterans benefits provide no such compensation for non-economic damages. In situations involving the wrongful death of a service member, a military decedent's survivors and estate are limited to receiving the veteran's survivors benefits (see Appendix). One of the

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Georgetown, Kentucky, . . . despite the finding of the Physical Evaluation Board *seven months earlier that he was disabled*, there was no disability compensation awaiting Sean Baker. He was, at that time, unemployed, broke, on nine different prescription medications, and suffering from seizures and other traumatic brain injury maladies . . . .") (emphasis in original).

313 *See* U.S. DEP'T OF ARMY, REG. 27-20, CLAIMS para. 3-5b2d. (31 Dec. 1997) [hereinafter AR 27-20]. *See also* BUDDIN & KAPUR, *supra* note 302, at xx ("[Military disability benefits] supplement earnings on the assumption that those earnings are depressed as a result of disability.").

314 *See* 10 U.S.C. § 1201 (2000).

315 *See id.* § 1401.

316 *See id.*

317 *See* 38 U.S.C. § 1104 (2000).

318 *See* AR 27-20, *supra* note 313, para. 3-5b3.

319 *See id.* para. 3-5c2.

320 *See id.* para. 3-5c3.

first benefits the survivors receive is the military decedent's Servicemembers' Group Life Insurance. Servicemembers' Group Life Insurance provides $400,000 coverage of the service member, $100,000 coverage of the service member's spouse, and $10,000 coverage of each dependent child.[321] While this insurance is often considered a benefit, it is actually a contractual agreement between the Government and its service members. Service members automatically qualify for Servicemembers' Group Life Insurance coverage and must opt out if they do not want the coverage.[322] If a service member elects the coverage or fails to opt out of the coverage, the Government deducts a premium from the service member's base pay.[323]

Depending on the service member's rank at death, the service member's surviving spouse could receive dependency and indemnification compensation between $1033 and $2404 per month.[324] Each child under eighteen years of age is entitled to $257 per month; the surviving spouse is entitled to an additional $250 in dependency and indemnification compensation per month until the youngest child attains the age of eighteen.[325] Children may retain the dependency and indemnification compensation until age twenty-three if they are enrolled at an approved educational institution.[326]

Veterans' surviving spouses also face the possibility of losing their survivor benefits. "Prior to 1971, a veteran's surviving spouse who remarried was permanently barred from receiving benefits unless the remarriage was void or had been annulled."[327] Congress rescinded this bar in 1970[328] and then reinstated the bar in 1990.[329] In 2002, Congress

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[321] *See* 38 U.S.C. § 1967; *see also* E-mail from Doug Davis, Veterans Affairs Benefits Specialist, Armed Forces Services Corporation, to Major Deirdre G. Brou, student, 55th Judge Advocate Graduate Course, the Judge Advocate General's Legal Center and School (Mar. 12, 2007, 12:07 EST) (on file with author).

[322] *See id.*

[323] *See id.* § 1969.

[324] *See id.* § 1311(a).

[325] *See id.* § 1311(f).

[326] *See id.* § 1314(c).

[327] Turner v. Gober, 1997 U.S. App. LEXIS 17384, at *3 (Fed. Cir. 1997). *See also* Owings v. Brown, 1996 U.S. App. LEXIS 11368 (Fed. Cir. 1996) (holding that a remarried spouse was not entitled to reinstatement of dependency and indemnity compensation upon the termination of her remarriage); Carter v. Cleland, 207 U.S. App. D.C. 6 (D.C. Cir. 1980) (holding that wives who separated from their abusive military husbands but never divorced them were not entitled to receive their deceased husbands' veterans benefits because the estranged wives had children by other men).

[328] *Turner*, 1997 U.S. App. LEXIS at *3–*4.

again permitted remarried spouses to resume drawing benefits upon the termination of the remarriage by divorce or death.[330] A civilian's spouse faces no such potential loss of a Federal Tort Claims Act award upon remarriage; the award remains the property of the civilian's spouse, regardless of remarriage.

In addition to the Court's double recovery concern, the *Feres* Court also claimed that veterans benefits compared "extremely favorably with those provided by workmen's compensation statutes."[331] This logic mistakenly assumes that the *Feres* doctrine only bars the type of suits that would be barred under a typical workers' compensation scheme. Workers' compensation laws vary by state; typically, such laws provide workers' compensation as the exclusive remedy available to employees injured in accidents that arise out of and in the course of employment.[332] Generally, workers' compensation laws bar employees from suing for negligent treatment of a work-related injury.[333] Many of the injuries for which service members sue under the Federal Tort Claims Act involve

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[329] *Id.* at *4.

[330] Act of Dec. 6, 2002, Pub. L. No. 107-330, tit. I, § 101(b), 116 Stat. 2821 (current version at 38 U.S.C.S. § 103 (LEXIS 2007).

[331] United States v. Feres, 340 U.S. 135, 145 (1950).

[332] *See* GA. CODE ANN. § 34-9-1 (2007) ("'Injury' or 'personal injury' means only injury by accident arising out of and in the course of the employment and shall not, except as provided in this chapter, include a disease in any form except where it results naturally and unavoidably from the accident."); NEB. REV. STAT. § 48-101 (LEXIS 2007) ("When personal injury is caused to an employee by accident or occupational disease, arising out of and in the course of his . . . employment, such employee shall receive compensation therefor from his . . . employer if the employee was not willfully negligent at the time of receiving such injury."); N.J. STAT. ANN. § 34:15-1 (LEXIS 2007) ("When personal injury is caused to an employee by accident arising out of and in the course of his employment, . . . he shall receive compensation therefor from his employer, provided the employee was himself not willfully negligent at the time of receiving such injury, ..."); OR. REV. STAT. § 656.005 (2006) ("A 'compensable injury' is an accidental injury, or accidental injury to prosthetic appliances, arising out of and in the course of employment requiring medical services or resulting in disability or death.").

[333] *See* Wright v. United States, 717 F.2d 254 (6th Cir. 1983) (permitting a federal employee's suit under the Federal Tort Claims Act for negligent medical treatment of a tubal pregnancy that ruptured at work); Crisp Reg. Hosp., Inc. v. Oliver, 275 Ga. App. 578 (Ga. Ct. App. 2005) (holding that Georgia's workers' compensation laws provide benefits for a work-related injury that later becomes exacerbated or aggravated, therefore an injured employee could not bring an independent tort action against his employer for damages for worsening of the injury); Crosson v. Jamaica Med. Ctr., 14 A.D.3d 587 (N.Y. App. Div. 2005) (holding a hospital worker injured at work could not recover for the hospital-employer's negligent treatment of the work-related injury); Budd v. Punyanitya, 69 Va. Cir. 148 (Va. Cir. 2005) (holding that a hospital employee injured at work could not recover for the hospital-employer's negligent treatment of the compensable injury).

claims that would usually fall outside the realm of workers' compensation. This is primarily because the military provides medical treatment to service members for both work and non-work related injuries and conditions.[334]

Many service members' injuries also fall outside the realm of workers' compensation because the military performs many functions that can harm civilian and military personnel alike. As previously mentioned, the military provides comprehensive health care as well as legal, retail, and recreational services to military personnel.[335] It also operates fleets of vehicles and aircraft. Service members have been harmed in accidents caused by a base exchange garage's negligent repairs to vehicles;[336] off-duty service members have been injured while enjoying military-sponsored rafting trips,[337] canoeing trips,[338] and horseback rides;[339] off-duty service members have also died when military aircraft have crashed into their homes or government vehicles have crashed into their cars.[340] Workers' compensation would not cover

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[334] *See* Cutshall v. United States, 75 F.3d 426 (8th Cir. 1996) (holding that a Soldier could not recover for the military doctors' failure to timely diagnose her non-Hodgkins lymphoma); Schoemer v. United States, 59 F.3d 26 (5th Cir. 1995) (barring a service member's military medical malpractice suit for failure to diagnose him as having an abnormality of the pituitary gland); Appelhans v. United States, 877 F.2d 309 (4th Cir. 1989) (holding that a service member could not recover for negligent treatment of venous thrombosis); Del Rio v. United States, 833 F.2d 282 (11th Cir. 1987) (holding that a service member could not recover for negligent prenatal care); Rayner v. United States, 760 F.2d 1217 (11th Cir. 1985) (holding that a service member's widow could not recover for negligent treatment of the service member's back pain that resulted in death).

[335] *See supra* note 294.

[336] *See* Sanchez v. United States, 878 F.2d 633 (2d Cir. 1989) (barring a Marine's suit for damages sustained when his car wrecked because the base exchange garage had negligently repaired his car).

[337] *See* Costo v. United States, 248 F.3d 863 (9th Cir. 2001) (holding a Sailor's family could not recover for his drowning death during a Navy MWR program's rafting trip).

[338] *See* Bon v. United States, 802 F.2d 1092 (9th Cir. 1986) (holding that a Sailor could not recover for injuries sustained as a result of a negligently-operated Naval MWR program's boating and canoeing center).

[339] *See* Hass v. United States, 518 F.2d 1138 (4th Cir. 1975) (holding that a Marine could not recover for injuries sustained while riding a horse he rented from the Marine base's stables).

[340] *See* Richards v. United States, 176 F.3d 652 (3d Cir. 1999) (barring suit for the death of an active duty Soldier in an accident with a negligently-operated government vehicle); Parker v. United States, 611 F.2d 1007 (5th Cir. 1980) (permitting suit for the death of an active duty Soldier in an accident with a negligently-operated government vehicle); Orken v. United States, 239 F.2d 850 (6th Cir. 1956) (barring suit for the death of a military doctor killed when a military aircraft crashed into his on-base home in Guam).

any of the injuries in these scenarios because the injuries did not arise out of, or occur in, the course of employment.

Both the risk of double recovery and the belief that veterans benefits compare favorably to workers' compensation benefits do not justify the broad, almost total, bar to suit that the *Feres* doctrine imposes. Several options exist to prevent service members from receiving duplicate recovery. The Government can avoid double recovery by establishing the amount of damages through the administrative or judicial process. The Government can then off-set the amount of damages by the value of the veterans benefits the service member or his estate will receive. Another approach could permit the federal judge trying the case to factor veterans benefits into the damages calculations. Taking such steps to ensure the service member does not recover twice will ensure the service member is fairly and adequately compensated.

D. Effects on the Good Order and Discipline of the Military

The United States Supreme Court in *Johnson* emphasized its fear that allowing service members to sue the United States for a government employee's negligence would open the floodgates to challenges of all military decisions and policies.[341] Major General John D. Altenburg, formerly the U.S. Army's Assistant Judge Advocate General, echoed and expounded upon the Court's concerns when he spoke in support of the *Feres* doctrine before the U.S. Senate Committee on the Judiciary.[342] During his testimony, he specifically addressed the effect service members' Federal Tort Claims Act suits could have upon military order, discipline, and effectiveness.[343] In his testimony, Major General Altenburg posited that if the *Feres* doctrine was not in effect, two Soldiers from the same unit injured in a military vehicle accident could sue the United States, thus embroiling their unit "in discovery disputes concerning training and licensing procedures, maintenance records, [and] disposition of unit mechanics . . . ."[344]

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[341] United States v. Johnson, 481 U.S. 681, 690–91 (1987).

[342] *The Feres Doctrine*, *supra* note 272, at 11 (statement of MG John D. Altenburg, former Assistant Judge Advocate General, U.S. Army, Washington, D.C.).

[343] *Id.*

[344] *Id.* at 50 (prepared statement of MG John D. Altenburg, former Assistant Judge Advocate General, U.S. Army, Washington, D.C.).

Major General Altenburg also voiced the concern that while courts often focus on shielding the chain of command and superior officers from litigation, "the real divisiveness would come because of all the junior leaders that could eventually be involved in civilian litigation in instances like this."[345] He hypothesized that if a Soldier assigned to an infantry platoon was injured or killed during a platoon live fire ground assault exercise "potential defendants would include two team leaders probably between the ages of 19 and 22 years old, three squad leaders, and a platoon sergeant, and that is before we even get to officers."[346] Major General Altenburg summed up his concerns by stating that military

> [t]raining is rigorous and inherently dangerous. It's done in every kind of weather, every kind of geography, with heavy equipment, massive vehicles, live ammunition, and explosives. The military accepts young, inexperienced individuals, trains them in warfighting skills—difficult, demanding skills—and builds cohesive teams capable of accomplishing whatever missions the country deems critical to our national interests so that the rest of us remain secure. The training mission must approximate combat as closely as possible to ensure a ready, trained military that will achieve decisive victory wherever the country sends them. Examples of military training—simply guiding a 70 ton tank to its pad in the motor pool at Fort Knox, or working on the flight deck of an aircraft carrier during night flight operations off the Virginia coast, or refueling and rearming a jet aircraft at Langley Air Force Base, or merely driving a 5 ton truck at [m]idnight in blackout conditions through the forest at a training base in North Carolina—highlight that military training is inherently dangerous. Military drivers don't simply hop in their semi-trailer and drive the interstate highway—as do their civilian counterparts. They must organize in convoys and coordinate driving at a certain speed and at a certain interval from each other—while driving the

[345] *Id.* at 12 (statement of MG John D. Altenburg, former Assistant Judge Advocate General, U.S. Army, Washington, D.C.).
[346] *Id.*

> same interstate highway. Discipline and teamwork are always foremost considerations.[347]

Major General Altenburg clearly articulated and described the concern that lies at the heart of the issue of whether service members should be permitted to sue the United States for injuries incurred incident to military service. Military decision making often requires leaders to make decisions based on a limited amount of information and time;[348] timely decisions can save lives and ensure mission accomplishment. Allowing service members to question the decisions of their leaders and their fellow service members in civil court could cause leaders to second-guess their decisions before making them. It could also, theoretically, encourage insubordination and diminish unit cohesion. Carried to its logical conclusion, allowing such suits could diminish the legitimacy of a leader's orders during battle, training, or daily operations and encourage service members to believe they can choose which orders to follow. This could also affect military decision and policy making, which is what the *Feres* doctrine is designed to avoid.

Not all activities the military undertakes, however, implicate the concerns Major General Altenburg voiced. As previously mentioned, the military provides retail,[349] recreational,[350] and legal services[351] to service

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[347] *Id.* at 51 (prepared statement of MG John D. Altenburg, former Assistant Judge Advocate General, U.S. Army, Washington, D.C.).

[348] *See* FM 4-01.45, *supra* note 21, at ch. I (describing how to use the troop leading procedures to plan tactical convoys); U.S. DEP'T. OF ARMY, FIELD MANUAL 7-8, INFANTRY RIFLE PLATOON AND SQUAD para. 2-2 (1 Mar. 2001) [hereinafter FM 7-8] (describing the troop leading procedures).

[349] *See* AR 60-10, *supra* note 294; DECA website, *supra* note 294.

[350] Military morale, welfare, and recreation services include gymnasiums, pools, parks, riding stables, bowling centers, commercial travel, child and youth services, and high adventure activity trips. *See* Hass v. United States, 518 F.2d 1138 (4th Cir. 1975); Chambers v. United States, 357 F.2d 224 (8th Cir. 1966); DOD DIR. 1015.2, *supra* note 294; AR 215-1, *supra* note 294, at fig. 3-1. Although military garrison commanders and senior military leaders are generally responsible for the administration of MWR programs, civilian employees manage and oversee the programs. *See* Costo v. United States, 248 F.3d 863 (9th Cir. 2001); AR 215-1, *supra* note 294, at ch. 2.

[351] The United States is liable under the Federal Tort Claims Act for a government attorney's legal malpractice. The military provides legal services to military retirees, dependents of service members, and service members. Civilian clients harmed by a military attorney's legal malpractice have sued the United States under the Federal Tort Claims Act. Although there are no cases on point, the *Feres* doctrine would likely bar service members from recovering under the Federal Tort Claims Act for a military attorney's legal malpractice. *See* 10 U.S.C. § 1054(a) (2004); AR 27-10, *supra* note 294, at ch. 6; AR 27-3, *supra* note 294. *See also* Mossow v. United States, 987 F.2d 1365 (8th

members, their families, and military retirees. The provision of medical services is perhaps the best example of an activity the military undertakes that does not implicate the concerns Major General Altenburg voiced. Allowing service members to sue under the Federal Tort Claims Act for injuries or death due to a military doctor's medical malpractice does not harm military discipline or decision making. This is because military physicians rarely, if ever, serve as commanders or leaders.

Army Medical Corps officers typically serve two roles: staff officers who advise the command and health care professionals who provide medical services. An Army physician's professional duties relate to the physician's role as medical care provider[352] while the staff duties are "advisory [or] technical in supervision of all medical units of the command."[353] Army physicians' staff duties include advising the commander and his staff officers on medical matters affecting the command and assisting in planning military operations.[354] Army physicians serving as staff officers may recommend policies and programs;[355] however, the leadership decides whether and how to implement the recommended policies and programs.[356]

In rare cases, a Medical, Dental, or Veterinary Corps officer may serve as a commander.[357] Army Regulation 40-1, *Composition, Mission, and Function of the Army Medical Department*, states that "[a]dministrative directions of small outpatient health clinics may be vested in any qualified health care officer . . . . In certain Army health clinics, the senior position is designated as commander. These commanders will provide for disciplinary control over personnel assigned to these clinics."[358] One can easily draw a line between a Medical Corps officer's actions as a professional health care provider and those as a staff officer or commander; a doctor's breach of a

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Cir. 1993) (holding that a service member's dependent child could sue for legal malpractice under the Federal Tort Claims Act); Knisley v. United States, 817 F. Supp. 680 (S.D. Ohio 1993) (holding that the United States was not liable for an Army attorney's alleged legal malpractice because the malpractice occurred in Belgium; also holding that the discretionary function exception barred the claimant's suit against the United States).

[352] AR 40-1, *supra* note 294, para. 2-2b1.

[353] *Id.* para. 2-2b.

[354] *Id.*

[355] *Id.*

[356] *Id.*

[357] *Id.* para. 1-9.

[358] *Id.*

professional duty to a civilian patient exposes the United States to liability under the Federal Tort Claims Act. Likewise, it should expose the United States to liability if the patient is a service member.

Additionally, federal courts have, in fact, resolved suits that implicate the concerns Major General Altenburg voiced. Although federal courts have been reluctant to intrude upon military decision making,[359] they have reviewed *habeas corpus* suits alleging the military has violated its own regulations or challenging the constitutionality of military statutes, regulations, or executive orders.[360] Service members have filed *habeas corpus* suits to prevent involuntary enlistment into the military,[361] to stop the discharge of service members from the military,[362] to halt a Department of Defense (DOD) mandatory inoculation program,[363] and to review the military's denial of service members'

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[359] Federal courts have generally declined to entertain *habeas corpus* suits that involve military matters such as duty assignments. *See* Orloff v. Willoughby, 345 U.S. 83, 93 (1953).

[360] *See* Frontiero v. Sec'y of Defense, 411 U.S. 677 (1973) (holding that statutes that require a servicewoman to prove her spouse's dependency in order to obtain medical and housing benefits violated the Due Process Clause of the Fifth Amendment because the same statutes placed no such burden on a serviceman); Patton v. Dole, 806 F.2d 24 (2d Cir. 1986) (enjoining the Navy from involuntarily enlisting a Merchant Marine Academy midshipman who failed to successfully graduate from the Academy); Mindes v. Seaman, 453 F.2d 197, 200 (5th Cir. 1971) ("[Judicial] review is available where military officials have violated their own regulations . . . .") ("Judicial review has been held to extend to the constitutionality of military statutes, executive orders, and regulations . . . .").

[361] *See Patton*, 806 F.2d 24 (enjoining the Navy from involuntarily enlisting a Merchant Marine Academy midshipman who failed to successfully graduate from the Academy).

[362] *See* Guerra v. Scruggs, 942 F.2d 270 (4th Cir. 1991) (denying an injunction to stop the Army from separating a Soldier for cocaine use); Hartikka v. United States, 754 F.2d 1516 (9th Cir. 1985) (vacating a lower court's preliminary injunction halting the separation of a captain from the Air Force). *See also* Harmon v. Brucker, 355 U.S. 579 (1958) (finding the District Court for the District of Columbia had jurisdiction to review whether an Army commander erroneously considered the petitioners' pre-induction misconduct when deciding to characterize the petitioner Soldiers' service as other than honorable on their discharge certificates).

[363] *See* John Doe v. Rumsfeld, 341 F. Supp. 2d 1, 19 (D. D.C. 2004) (enjoining a mandatory DOD anthrax vaccination program)

> Congress has prohibited the administration of investigational drugs to service members without their consent. This Court will not permit the government to circumvent this requirement. The men and women of our armed forces deserve the assurance that the vaccines our government compels them to take into their bodies have been tested by the greatest scrutiny of all—public scrutiny.

requests for conscientious objector status.[364] Because such suits stop the military or a military leader from acting, they necessarily challenge the authority of the military and threaten discipline.[365] Yet, federal courts have reviewed such cases and, in some instances, enjoined the Department of Defense and individual commanders from acting.[366]

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[364] *See* Parisi v. Davidson, 405 U.S. 34, 54 (1972) ("In holding that the pendency of court-martial proceedings must not delay a federal district court's prompt determination of the conscientious objector claim of a serviceman who has exhausted all administrative remedies, we no more than recognize the historic respect in this Nation for valid conscientious objection to military service."); Hopkins v. Schlesinger, 515 F.2d 1224, (5th Cir. 1975) ("The Army's determination that a serviceman does not meet its test of a conscientious objector is final if there is a basis in fact for it."); Helwick v. Laird, 438 F.2d 959 (5th Cir. 1971) (reversing the district court's denial of a Soldier's request for *habeas corpus* and directing that the Soldier's request for conscientious objector status be granted); Pitcher v. Laird, 421 F.2d 1272 (5th Cir. 1970) (reversing the district court's denial of a Soldier's request for *habeas corpus* and directing that the Soldier's request for conscientious objector status be granted); Jashinski v. Holcomb, 2006 U.S. Dist. LEXIS 45061 (W.D. Tex. 2006) (finding that a basis of fact existed to support the Army's decision to deny a Soldier's request for discharge based on conscientious objector status); Bailey v. Sec'y of the Army, 1987 U.S. Dist. LEXIS 10804 (N.D. Al. 1987) (concluding that a basis of fact supported the Army's decision to deny a conscientious objector request).

[365] For example, a service member seeking conscientious objector status may remain at his home station during the pendency of his *habeas* suit while his unit deploys overseas. *See* Alhassan v. Hagee, 424 F.3d 518 (7th Cir. 2005) (finding the Marine Corps had a basis in fact to support its denial of Lance Corporal Alhassan's request for conscientious objector status); Andy Krevetz, *Marine's Appeal Denied—Reservist Had Applied for Conscientious Objector Status*, PEORIA J. STAR, Sept. 11, 2005, at B2 ("Capt. John Douglass of the Peoria County reserve unit said Alhassan, who did not go on either of the unit's deployments, is still a member of 'Charlie Company.'"). *See also* Jashinski v. Holcomb, 2006 U.S. Dist. LEXIS 45061 (W.D. Tex. 2006) ("On or about March 7, 2005, Specialist Jashinski's unit was deployed to Afghanistan, but she was allowed to remain at Fort Sam Houston because her CO application was still pending."). The service member who fails to deploy with his unit because of his request for conscientious objector status will likely harm the morale and readiness of his unit in several ways. First, the service member's failure to deploy will likely affect his unit's readiness because it has one less person to contribute to the unit's mission. Additionally, other service members in the unit likely know why the service member did not deploy. This could harm the other service members' morale and encourage other service members to file frivolous claims of conscientious objection in an attempt to evade deployment.

[366] *See Patton*, 806 F.2d 24 (enjoining the Navy from involuntarily enlisting a Merchant Marine Academy midshipman who failed to successfully graduate from the Academy); *Helwick*, 438 F.2d 959 (reversing the district court's denial of a Soldier's request for *habeas corpus* and directing that the Soldier's request for conscientious objector status be granted); *Pitcher*, 421 F.2d 1272 (reversing the district court's denial of a Soldier's request for *habeas corpus* and directing that the Soldier's request for conscientious objector status be granted); *John Doe*, 341 F. Supp. 2d 1 (enjoining a mandatory DOD anthrax vaccination program). *But see* Parrish v. Brownlee, 335 F. Supp. 2d 661

Thus, federal courts have granted relief to prevent potential harm to a service member under the same circumstances,[367] but, when considering negligent tort allegations, have applied the *Feres* doctrine to deny relief for actual harm the Government has caused its service members.[368]

As MG Altenburg suggested during his testimony, eliminating the *Feres* doctrine could permit questioning of military decisions. Such questioning may encourage insubordination and harm unit cohesion, thereby upsetting the good order and discipline that the *Feres* doctrine is designed to preserve. Even though the *Feres* doctrine protects this important interest, it is too broad. Applying the Federal Tort Claims Act's plain language and enumerated exceptions, such as the discretionary function exception, can preserve the military's decision and policy-making authority while affording service members rights commensurate with those of civilians under the Federal Tort Claims Act.

(E.D.N.C. 2004) (denying a preliminary injunction preventing the Army from calling a reserve officer to active duty).

[367] *See* Frontiero v. Sec'y of Defense, 411 U.S. 677 (1973) (holding that statutes that required a servicewoman to prove her spouse's dependency in order to obtain medical and housing benefits violated the due process clause of the Fifth Amendment because the same statutes placed no such burden on a serviceman); *Parisi*, 405 U.S. at 54 ("In holding that the pendency of court-martial proceedings must not delay a federal district court's prompt determination of the conscientious objector claim of a serviceman who has exhausted all administrative remedies, we no more than recognize the historic respect in this Nation for valid conscientious objection to military service."); *Harmon*, 355 U.S. 579 (finding the District Court for the District of Columbia had jurisdiction to review whether an Army commander erroneously considered the petitioners' pre-induction misconduct when deciding to characterize the petitioner Soldiers' service as other than honorable on their discharge certificates); *Patton*, 806 F.2d 24 (enjoining the Navy from involuntarily enlisting a Merchant Marine Academy midshipman who failed to successfully graduate from the Academy); *Helwick*, 438 F.2d 959 (reversing the district court's denial of a Soldier's request for *habeas corpus* and directing that the Soldier's request for conscientious objector status be granted); *Pitcher*, 421 F.2d 1272 (reversing the district court's denial of a Soldier's request for *habeas corpus* and directing that the Soldier's request for conscientious objector status be granted); *John Doe*, 341 F. Supp. 2d 1 (enjoining a mandatory DOD anthrax vaccination program).

[368] *See* United States v. Stanley, 483 U.S. 669 (1987); United States v. Johnson, 481 U.S. 52 (1985); Feres v. United States, 340 U.S. 135 (1950); Costo v. United States, 248 F.3d 863 (9th Cir. 2001); Richards v. United States, 176 F.3d 652 (3d Cir. 1999); Cutshall v. United States, 75 F.3d 426 (8th Cir. 1996); Del Rio v. United States, 833 F.2d 282 (11th Cir. 1987); Millang v. United States, 817 F.2d 533 (9th Cir. 1987); Knoch v. United States, 316 F.2d 532 (9th Cir. 1963).

VII. Alternatives to the *Feres* Doctrine

When the Supreme Court promulgated the *Feres* doctrine it had several tools at hand, in the form of the Federal Tort Claims Act's enumerated exceptions, to prevent courts from intruding upon military decision making and discipline. When Congress enacted the Federal Tort Claims Act in 1946, the Act included twelve enumerated exceptions; the exceptions barred recovery for claims arising out of the exercise of a discretionary function, claims arising in a foreign country, claims arising from intentional torts, and claims arising out of the combatant activities of the military during a time of war.[369] Of the enumerated exceptions, these latter four exceptions most directly apply to the military, and they would likely bar most Federal Tort Claims Act suits that implicate military decision making and discipline.

The Federal Tort Claims Act exception barring claims arising in a foreign country would bar service members' claims for injuries incurred overseas in places such as Germany, Iraq, Korea, Cuba, and Afghanistan.[370] Likewise, the combatant activities exception removes the threat of service members suing the United States for acts that occurred during combatant activities in a declared war.[371] Additionally, the assault and battery exception would likely shield the United States from liability for intentional torts its employees commit against service members.[372]

For purposes of addressing alternatives to the *Feres* doctrine, the most significant exception is the discretionary function exception. The discretionary function exception provides that the FTCA waiver of immunity shall not apply to

> [a]ny 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

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[369] The Federal Tort Claims Act, § 421, 60 Stat. 843 (current version at 28 U.S.C. § 2680 (2000)).

[370] *See* 28 U.S.C. § 2680(k) (2000).

[371] This exception may not preclude service members from suing for injuries that occurred during combatant activities when war is not declared; however, the claims arising in a foreign country exception would prohibit such a claim if the claim arose overseas. *See id.* § 2680(j).

[372] *See id.* § 2680(k).

> 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.[373]

The U.S. Supreme Court has interpreted and applied this exception to bar Federal Tort Claims suits that question the discretionary acts of government employees.

One of the U.S. Supreme Court's initial cases addressing the discretionary function exception was *Dalehite v. United States*.[374] This case examined the nature and scope of the discretionary function exception. In *Dalehite*, the Court consolidated on appeal numerous claims for damages against the United States arising out of an explosion of ammonium nitrate fertilizer in the port of Texas City, Texas.[375] The United States directed production and distribution of this fertilizer for export to areas the United States and its Allies occupied in Europe and Asia following World War II.[376] The claimants contended numerous governmental acts and decisions were negligent.[377] Among these were the executive-level decision to institute the fertilizer program, the failure to adequately test the fertilizer to determine the likelihood of explosion, the manufacturing plan for the fertilizer, and the lack of government supervision of the fertilizer storage, transport, and loading.[378]

The U.S. Supreme Court concluded that the discretionary function exception protected the decision to implement the fertilizer export program as well as the subsequent acts taken to execute the program.[379] The Court barred the claims because the discretionary function exception protected "the discretion of the executive or the administrator to act according to one's judgment of the best course, a concept of substantial historical ancestry in American law."[380] The discretionary function exception protected not only the executive decision to initiate programs and activities; it also protected "the acts of subordinates in carrying out

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[373] *Id.* § 2680(a).
[374] 346 U.S. 15 (1953).
[375] *See id.* at 17.
[376] *See id.* at 19.
[377] *See id.* at 23.
[378] *See id.* at 23–24.
[379] *See id.* at 42.
[380] *Id.* at 34.

the operations of government in accordance with official directions . . . ."[381] *Dalehite*, however, "did not provide an easy test for distinguishing discretionary from nondiscretionary acts; its test sought to distinguish between immune actions at the 'planning level' and non-immune actions at the 'operational level.'"[382]

A few years after its *Dalehite* decision, the Court again addressed the discretionary function exception in *Indian Towing Co. v. United States*.[383] *Indian Towing* involved a claim for cargo damaged when a tugboat and its barge ran aground, allegedly due to the failure of the light in a Coast Guard light house.[384] The claimants alleged that the Coast Guard negligently inspected, maintained, and repaired the light.[385] The Supreme Court ruled that the Coast Guard did not have to undertake the lighthouse service.[386] However, once it decided to operate a light on the island, it "engendered reliance on the guidance afforded by the light . . . ."[387] As a result, it "was obligated to use due care to make certain the light was kept in good working order, and, if the light did become extinguished, then the Coast Guard was further obligated to use due care to discover this fact and to repair the light or give warning that it was not functioning."[388]

In *United States v. Varig Airlines*,[389] the U.S. Supreme Court rejected the *Dalehite* "'operational/planning' level distinction"[390] for a test that focused on the nature of the conduct in question.[391] In *Varig Airlines*, the Court consolidated on appeal two separate cases involving airplane crashes.[392] Both claimants contended that the Federal Aviation Administration negligently formulated and implemented a spot-check program for airplane development, production, and operational

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[381] *Id.* at 36.
[382] ADMINISTRATIVE & CIVIL LAW DEP'T, THE JUDGE ADVOCATE GENERAL'S SCHOOL, U.S. ARMY, JA 241, THE FEDERAL TORT CLAIMS ACT V-2 (Apr. 1999) [hereinafter JA 241].
[383] 350 U.S. 61 (1955).
[384] *Id.* at 62.
[385] *Id.*
[386] *Id.* at 69.
[387] *Id.*
[388] *Id.*
[389] 467 U.S. 797 (1984).
[390] JA 241, *supra* note 382, at V-3.
[391] *Id.*
[392] *Varig Airlines*, 467 U.S. at 800.

inspection.[393] As a result, the claimants asserted that the Federal Aviation Administration negligently certified the aircraft for commercial use, which led to the aircraft crashes.[394]

The U.S. Supreme Court enunciated and employed a two-step analysis to determine whether the discretionary function exception barred the claims.[395] In its analysis, the Court first looked to the nature of the conduct, to determine whether the actor had discretion to act.[396] The Court then conducted a public policy inquiry and addressed "whether the challenged acts of a Government employee—whatever his or her rank—are of the nature and quality that Congress intended to shield from tort liability."[397] The Court barred the claims and concluded that the discretionary function exception was "intended to encompass the discretionary acts of the Government acting in its role as a regulator of the private conduct of private individuals."[398]

In *United States v. Berkovitz*,[399] the U.S. Supreme Court applied the two-part test it set forth in *Varig Airlines* to determine whether the discretionary function exception barred suit against the United States. The Supreme Court granted certiorari "to resolve a conflict in the Circuits regarding the effect of the discretionary function exception on claims arising from the Government's regulation of polio vaccines."[400] In addressing the claims, the Court first looked to the challenged conduct's nature to determine "whether the action is a matter of choice for the acting employee."[401] The Court remarked that the discretionary function exception does not shield the Government from liability if a regulation, statute, or policy requires a specific course of action.[402] If the conduct, however, "involves an element of judgment, a court must determine whether that judgment is of the kind that the discretionary function exception was designed to shield."[403] The Court found that Congress crafted the discretionary function exception to shield "the Government from liability if the action challenged in the case involves

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393 *See id.* at 819.
394 *See id.* at 799.
395 *See id.* at 816.
396 *See id.* at 813.
397 *Id.*
398 *Id.* at 813–14.
399 486 U.S. 531 (1988).
400 *Id.* at 534.
401 *Id.* at 536.
402 *See id.*
403 *Id.*

the permissible exercise of policy judgment."[404] The Court concluded that federal officials who violate statutes or regulations have no discretion to act; therefore, the discretionary function exception does not shield the United States from liability for such actions.[405]

In *United States v. Gaubert*,[406] the Supreme Court again applied the two part test it set forth in *Varig Airlines* to determine whether the discretionary function exception shielded the United States from liability for decisions made by federal banking regulators. In *Gaubert*, federal banking regulators facilitated the merger of Thomas M. Gaubert's Texas-chartered and federally insured savings and loan association with "a failing Texas thrift."[407] Gaubert's financial situation concerned the federal regulators; therefore, Gaubert resigned from management of the savings and loan and posted a $25 million interest in real property to personally guarantee the savings and loan's net worth.[408] Approximately two years after the merger, the savings and loan's board of directors and management resigned at the behest of the federal regulators.[409] The federal regulators recommended the individuals who later replaced the directors and managers.[410] Soon after taking over, the new directors disclosed that the savings and loan had a negative net worth, prompting Gaubert to file an administrative claim for his losses.[411] Upon denial of his administrative claim, Gaubert filed suit seeking "damages for the alleged negligence of federal officials in selecting new officers and directors and in participating in the day-to-day management of [Gaubert's savings and loan] . . . ."[412]

The Supreme Court granted certiorari and applied the two part *Varig Airlines* test. In reaching its decision, the Court first looked to "whether the challenged actions were discretionary, or whether they were instead controlled by mandatory statutes or regulations."[413] The Court concluded that the federal banking regulators "were not bound to act in a particular way; the exercise of their authority involved a great 'element of

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404 *Id.* at 537.
405 *See id.* at 547–48.
406 499 U.S. 315 (1991).
407 *Id.* at 319.
408 *See id.*
409 *See id.*
410 *See id.* at 320.
411 *Id.*
412 *Id.*
413 *Id.* at 328.

judgment or choice.'"[414] The Court then looked to the regulators' actions to determine if they were the type of actions that Congress intended to protect with the discretionary function exception.[415] The Court acknowledged that

> [t]he federal regulators here had two discrete purposes in mind as they commenced day-to-day operations at . . . [Gaubert's savings and loan]. First, they sought to protect the solvency of the savings an loan industry at large, and maintain the public's confidence in that industry. Second, they sought to preserve the assets of . . . [Gaubert's savings and loan] for the benefit of depositors and shareholders, of which Gaubert was one.

Consequently, the Court barred Gaubert's claim, holding that the federal banking regulators' challenged actions "involved the exercise of discretion in furtherance of public policy goals . . . ."[416]

Through its cases interpreting the Federal Tort Claims Act's discretionary function exception, the Supreme Court has established a two-part test to determine whether the Federal Tort Claims Act's discretionary function exception shields the United States from suit for its employees' negligence. Part one of the test requires a court to determine whether statutes, regulations, or policies require certain action. If a statute, regulation or policy requires certain action, government employees have no discretion to act; therefore, when a government employee violates such a law, regulation, or policy, the United States is generally liable for the employee's action.[417] If an employee had the discretion to act, part two of the test requires a court determine whether Congress intended to protect the conduct or the conduct is based upon or susceptible to public policy considerations.[418] If Congress intended to protect the conduct or if the conduct involved policy considerations, the

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[414] *Id.*
[415] *See id.* at 332.
[416] *Id.* at 334.
[417] *See Gaubert*, 499 U.S. 315 (holding that the discretionary function exception protects policy-making decisions and daily operational decisions); Berkovitz v. United States, 486 U.S. 531 (1980) (holding that the discretionary function exception does not shield the Government from liability when a federal agency does not comply with mandatory rules.); *see also* JA 241, *supra* note 382, at V-5.
[418] United States v. Varig Airlines, 467 U.S. 797, 813 (1984).

discretionary function exception generally bars recovery under the Federal Tort Claims Act.[419]

Courts can apply this two-part discretionary function test to protect the military's decision making process and its discipline. Although hierarchical in nature, the military delegates authority from its most senior leaders to that level where decision making must take place immediately. This often empowers low ranking service members with the authority and discretion to make decisions on the spot. The Army's leadership method of "mission command"[420] demonstrates the concept of how the military, as a whole, makes and implements decisions.

> Under mission command, commanders provide subordinates with a mission, their commander's intent and concept of operations, and resources adequate to accomplish the mission. Higher commanders empower subordinates to make decisions within the commander's intent. They leave details of execution to their subordinates and require them to use initiative and judgment to accomplish the mission.[421]

This method "allows Army forces to adapt and succeed despite the chaos of combat."[422] This delegation of authority leadership concept permeates all areas of the military, not just combat operations. Military commanders at all levels possess great authority and discretion to train units,[423] mete out military justice,[424] and manage people.[425] If applied to

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[419] *See id.*

[420] U.S. DEP'T OF ARMY, FIELD MANUAL 1, THE ARMY para. 3-33 (14 June 2005) [hereinafter FM 1].

[421] *Id.*

[422] *See id.*

[423] *See* U.S. DEP'T OF ARMY, FIELD MANUAL 7-0, TRAINING THE FORCE para. 6-1 (22 Oct. 2002) [hereinafter FM 7-0] ("Assessment is the commander's responsibility. It is the commander's judgment of the organization's ability to accomplish its wartime operational mission. Assessment is a continuous process that includes evaluating training, conducting an organizational assessment, and preparing a training assessment."); U.S. DEP'T OF ARMY, FIELD MANUAL 25-4, HOW TO CONDUCT TRAINING EXERCISES 6 (10 Sept. 1984) [hereinafter FM 25-4] ("During the planning phase of training management, commanders at each echelon determine the need for training exercises and identify the types they will use."); U.S. DEP'T OF ARMY, FIELD MANUAL 7-1, BATTLE FOCUSED TRAINING para. 1-4 (15 Sept. 2003) [hereinafter FM 7-1] ("While senior leaders determine the direction and goals of training, it is the officers and [noncommissioned officers] who ensure that every training activity is well planned and rigorously executed."); *id.* para. 2-1 ("Using the Army Training Management Cycle, the commander

the military context, the Federal Tort Claims Act's enumerated exceptions, particularly the discretionary function exception, can protect this leadership concept from judicial second-guessing while also preserving service members' rights under the Act.

Consider the following scenarios: an active duty Sailor drowns during a negligently operated Navy Morale, Welfare, and Recreation Program's white water rafting trip;[426] a U.S. Military Academy cadet returning to the Academy on official travel orders sustains serious injuries when a fellow cadet wrecks the car in which they are traveling;[427] an Army surgeon negligently leaves a towel in a Soldier's stomach during surgery.[428] Courts have held that the *Feres* doctrine bars all of these service members' suits under the Federal Tort Claims Act.[429] If a court were to apply the Act's enumerated exceptions, however, these service members may be able to recover under the Act.

Applying the enumerated exceptions to these situations, a court would first determine whether any of the alleged negligence occurred overseas or in combat. If the negligence occurred overseas or in combat, a court would likely conclude that the service members could not recover under the Federal Tort Claims Act. If however, a court determines the alleged negligence occurred in the United States and not during combat,

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continuously plans, prepares, executes, and assesses the state of training in the unit. This cycle provides the framework for commanders to develop their unit's METL [mission essential task list], establish training priorities, and allocate resources.").

424 *See* AR 27-10, *supra* note 294, para. 3-4 (stating that a commander must personally exercise discretion during the nonjudicial punishment process by evaluating the case to determine what proceedings are appropriate, determining whether the Soldier committed the offenses, and determining the amount and nature of the punishment); *see also* U.S. DEP'T OF ARMY, FIELD MANUAL 6-22, ARMY LEADERSHIP para. 2-12 (12 Oct. 2006) [hereinafter FM 6-22] ("In Army organizations, commanders set the standards and policies for achieving and rewarding superior performance, as well as for punishing misconduct. In fact, military commanders can enforce their orders by force of criminal law.").

425 *See* U.S. DEP'T OF ARMY, REG. 623-3, EVALUATION REPORTING SYSTEM (15 May 2006) [hereinafter AR 623-3] (prohibiting certain comments and narratives on military evaluation reports and permitting raters and senior raters broad discretion to assess each rated Soldier's performance and potential); U.S. DEP'T OF ARMY, REG. 635-200, ENLISTED ADMINISTRATIVE SEPARATIONS (6 June 2005) [hereinafter AR 635-200] (affording Army commanders broad discretion to determine whether to administratively separate Soldiers).

426 *See* Costo v. United States, 248 F.3d 863, 864 (9th Cir. 2001).

427 *See* Tobin v. United States, 170 F. Supp. 2d 472, 474–75 (D. N.J. 2001).

428 *See* Feres v. United States, 340 U.S. 135, 137 (1950).

429 *See generally Feres*, 340 U.S. 135; *Costo*, 248 F.3d 863; *Tobin*, 170 F. Supp. 472.

the court could then look to whether the discretionary function exception barred suit.

When determining whether the discretionary function exception would bar suit for the Sailor's drowning death, a court would first look to the nature of the alleged negligent act. Assume the deceased Sailor's family alleges that a civilian employee had reconnoitered the rafting route, identified a hazardous condition, and yet failed to take measures to mitigate the hazard. The court would first determine whether the civilian employee violated any statutes, regulations, or policies that required certain action. If such a violation occurred, the court would likely find that the employee lacked the discretion to act and the service member's suit could go forward under the Federal Tort Claims Act.

If, on the other hand, a court finds that the civilian employee had the discretion to act, the court would then analyze the questionable conduct and determine whether Congress intended to protect the conduct or whether the conduct is susceptible to policy considerations. This analysis would permit the court to determine whether the employee's negligence implicated sensitive areas of military affairs while also preserving the deceased Sailor's family's rights under the Federal Tort Claims Act.

Looking at the cadet injured as a passenger in an automobile accident en route to the Military Academy, a court would first address the actions of the cadet driving the automobile. Assume that, prior to embarking on their return trip to the Military Academy, both cadets received safety briefings from their Army leaders instructing them to drive safely, comply with all motor vehicle laws, and stop if they get tired.[430] If the driver fell asleep while driving, a court would likely determine that the driver did not have the discretion to act. Therefore, a court would likely permit suit by the injured cadet who was a passenger in the vehicle.

Finally, when determining whether the discretionary function exception would bar suit for the Soldier harmed during surgery, a court would first look to the nature of the conduct in question. If a court finds that the allegedly negligent Army surgeon had the discretion to act, the court would then consider whether Congress intended to shield the conduct or whether the conduct is susceptible to policy considerations. Civilians are permitted to pursue Federal Tort Claims Act suits based

[430] *See Tobin*, 170 F. Supp. 2d at 475.

upon military physicians' medical malpractice; this suggests that Congress did not intend to shield the Government from liability for such malpractice and such suits do not implicate policy concerns. Therefore, the Soldier could likely maintain his Federal Tort Claims Act suit based upon the surgeon's negligence.

Turning to the case presented at the outset of this article, the District Court for the Eastern District of Kentucky held that the *Feres* doctrine barred Specialist Baker's claims alleging negligent planning and execution of the cell extraction exercise.[431] The court could have reached the same outcome if it had applied the Federal Tort Claims Act's enumerated exceptions. First, a court could look to the situs of the alleged negligent acts—Guantanamo Bay, Cuba. Because the acts took place outside the United States, the enumerated exception barring claims arising in a foreign country[432] would likely bar Specialist Baker's suit. Even if the negligent acts occurred in the United States, Specialist Baker's suit would likely fail under the Federal Tort Claims Act. If Specialist Baker based his suit on the actions of the Soldiers who beat him, the enumerated exception barring suits arising out of an assault or battery[433] would likely bar Specialist Baker's suit.

If, however, Specialist Baker alleged that Lieutenant Locke negligently planned and executed the exercise, a court could apply the discretionary function exception[434] to bar Specialist Baker's suit. The court would first look to the nature of Lieutenant Locke's conduct. As previously discussed,[435] the Government affords military leaders vast authority and wide discretion to plan and execute training. Therefore, Lieutenant Locke, as the officer in charge of the internal reaction force team, likely possessed wide discretion to train the team. Because Lieutenant Locke had the discretion to act, a court would then look to the nature of his conduct and determine whether Congress intended to shield the Government from liability for his negligence or whether his acts implicated policy concerns. Judicial questioning of military leaders' training decisions likely intrudes upon the management of the military, thus implicating policy concerns. As a result, a court would likely hold that the discretionary function exception bars Specialist Baker's suit that

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431 *See* Baker v. United States, 2006 U.S. Dist. LEXIS 38012, at *10-*11 (E.D. Ky. 2006).
432 *See* 28 U.S.C. § 2680k (2000).
433 *See id.* § 2680h.
434 *See id.* § 2680a.
435 *See supra* notes 430–35 and accompanying text.

alleges Lieutenant Locke negligently planned and executed the training exercise.

Since the promulgation of the *Feres* doctrine, federal courts have applied the "incident to service" test to deny Federal Tort Claims Act recovery to service members who, but for their military status, could likely have recovered under the Act.[436] The Supreme Court's decision in *Boyle v. United Technologies Corp*[437] demonstrates that this doctrine is unnecessary because courts can apply the discretionary function exception's two part test to preclude judicial second guessing of military

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[436] *See* Costo v. United States, 248 F.3d 863 (9th Cir. 2001) (barring suit for the drowning death of a Sailor while on a Navy MWR program's rafting trip); Cutshall v. United States, 75 F.3d 426 (8th Cir. 1996) (barring a service member's suit for military medical malpractice); Appelhans v. United States, 877 F.2d 309 (4th Cir. 1989) (barring suit for a service member who died as a result of military medical malpractice); Sanchez v. United States, 878 F.2d 633 (2d Cir. 1989) (barring a serviceman's suit for the Base Exchange garage's negligent repairs of his car that caused an automobile accident); Del Rio v. United States, 833 F.2d 282 (11th Cir. 1987) (barring a servicewoman's suit for negligent provision of prenatal care); Bailey v. DeQuevedo, 375 F.2d 72 (3d Cir. 1967) (barring a service member's suit for military medical malpractice); Orken v. United States, 239 F.2d 850 (6th Cir. 1956) (barring suit for the wrongful death of a military doctor who died when a military aircraft crashed into his home).

[437] 487 U.S. 500 (1988). Other federal courts have also applied the discretionary function exception to bar civilians' Federal Tort Claims Act suits that allege military negligence. *See* Hawes v. United States, 409 F.3d 213 (4th Cir. 2005) ("we find that the district court did not err in finding that the decisions in question [Staff Sergeant Raventos' maintenance decisions concerning a military obstacle course] were protected by the discretionary function exception.") (barring a civilian's suit for damages for injuries sustained on a military obstacle course); Nieves-Rodriguez v. United States, 1997 U.S. App. LEXIS 28640 (1st Cir. 1997) (applying the discretionary function exception to bar a civilian's Federal Tort Claims Act suit that challenged a decision to erect a steel pole barrier in front of an air base and challenged the air base's failure to warn of the steel pole's presence); Angle v. United States, 1996 U.S. App. LEXIS 16085 (6th Cir. 1996) ("failure to remove lead-based paint from military housing or to warn residents of the dangers of such paint came within the discretionary function exception."); Goldstar v. United States, 967 F.2d 965 (4th Cir. 1992) (finding the discretionary function exception barred suit for damages arising out of the looting and rioting that followed the United States' invasion of Panama); Creek Nation Indian Hous. Auth. v. United States, 905 F.2d 312 (10th Cir. 1990) (applying the discretionary function exception to bar civilians' suits for damages caused by the allegedly negligent design of bombs); Medina v. United States, 709 F.2d 104 (1st Cir. 1983) (upholding a commander's decision to revoke a civilian's permit to enter a naval station because the decision was discretionary: "A base commander has wide discretion as to whom he may exclude from the base . . . ."); Knisley v. United States, 817 F. Supp. 680 (S.D. Oh. 1993) (applying the discretionary function exception to bar a service member's wife's Federal Tort Claims Act suit for legal malpractice because the suit questioned the manner in which the Army trained its attorneys).

decision making.[438] In *Boyle*, the Court considered whether service members could sue government contractors for injuries sustained because of military equipment design defects.[439] David A. Boyle, a United States Marine helicopter pilot, died when his Marine helicopter crashed off the coast of Virginia.[440] Although Boyle survived the crash, he drowned because he could not escape from the helicopter.[441] Boyle's father sued the Sikorsky Division of United Technologies Corporation and alleged that the company had defectively repaired the helicopter and, thus, caused the crash.[442] Boyle's father also claimed "that Sikorsky had defectively designed the copilot's emergency escape system: the escape hatch opened out instead of in (and was therefore ineffective in a submerged craft because of water pressure), and access to the escape hatch was obstructed by other equipment."[443]

On appeal to the Supreme Court, the Court applied the Federal Tort Claims Act's discretionary function exception to bar Boyle's father's suit, even though the suit was a suit against the government contractor rather than a Federal Tort Claims Act suit against the Government. The Court then held that "the selection of the appropriate design for military equipment to be used for our Armed Forces is assuredly a discretionary function within the meaning of [the discretionary function exception] . . . ."[444] Designing military equipment requires not only "engineering analysis, but judgment as to the balancing of many technical, military, and even social considerations, including the trade-off between greater safety and greater combat effectiveness."[445] The Court felt that judicial second-guessing of these judgments would financially burden defense contractors who would, in turn, pass the financial burden to their customer, the U.S. Government.[446] The Court, therefore, barred the claim and concluded "that state law which holds Government contractors liable for design defects in military equipment does in some circumstances present a 'significant conflict' with federal policy and

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[438] *See* Boyle v. United Techs. Corp., 487 U.S. 500, 511 (1988) ("[T]he selection of the appropriate design for military equipment to be used for our Armed Forces is assuredly a discretionary function within the meaning of [the discretionary function exception] . . . .").
[439] *See id.* at 503.
[440] *See id.* at 502.
[441] *See id.* at 503.
[442] *See id.*
[443] *Id.*
[444] *See id.* at 511.
[445] *See id.*
[446] *See id.* at 511–12.

must be displaced."[447] The holding in *Boyle* demonstrates how courts can apply the discretionary function exception to preclude judicial second-guessing of military decisions while also preserving service members' rights under the Federal Tort Claims Act.

Because of the military's leadership emphasis on delegation of authority, the discretionary acts of military leaders must be shielded from judicial second-guessing in order to ensure the proper functioning of the military. The *Feres* doctrine protects military decision making and discipline from such judicial second-guessing at the expense of service members' rights under Federal Tort Claims Act. This doctrine is too broad in scope and should be supplanted by the Federal Tort Claims Act's enumerated exceptions. If applied to the military context, the Federal Tort Claims Act's enumerated exceptions—and particularly the discretionary function exception—can protect the military's decision making and discipline while also preserving service members' rights under the Federal Tort Claims Act. Therefore, the Act's enumerated exceptions can serve as reasonable alternatives to the overly-broad *Feres* doctrine.

VIII. The Future of the *Feres* Doctrine

Since the Supreme Court's decisions in *Brooks*[448] and *Feres*,[449] federal courts have broadened the incident to service test, creating an almost total bar to service members' Federal Tort Claims Act suits.[450] Courts have even gone so far as to extend the *Feres* doctrine's

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[447] *Id.* at 512. The Court held that

> [l]iability for design defects in military equipment cannot be imposed, pursuant to state law, when (1) the United States approved reasonably precise specifications; (2) the equipment conformed to those specifications; and (3) the supplier warned the United States about the dangers in the use of equipment that were known to the supplier but not to the United States. *Id.*

[448] Brooks v. United States, 337 U.S. 49 (1949).

[449] Feres v. United States, 340 U.S. 135 (1950).

[450] *See, e.g.*, Major v. United States, 835 F.2d 641, 644–45 (6th Cir. 1987) ("[I]n recent years the Court has embarked on a course dedicated to broadening the *Feres* doctrine to encompass, at a minimum, *all* injuries suffered by military personnel that are even remotely related to the individual's *status* as a member of the military . . . .").

application to privacy statutes.[451] Despite the expansion of the incident to service test, members of the federal judiciary at all levels have questioned the *Feres* doctrine and called for its abrogation.[452] Most notably, Supreme Court Justice Scalia, in his dissent in *United States v. Johnson*,[453] described the *Feres* decision as "clearly wrong" and the source of "unfairness and irrationality."[454] Former Supreme Court Justices Brennan and Marshall and current Justice Stevens joined Justice Scalia in his dissent. Since that 1987 decision, the Court has changed significantly. Justice Stevens and Justice Scalia are the only Justices from the *Johnson* Court who remain on the Supreme Court. With the appointment of a new Chief Justice in 2005 and Associate Justice in 2006, the Court could abrogate its precedent in *Feres*. However, given the judicial temperament of Chief Justice John Roberts and that of Justice Samuel Alito, the Court will likely affirm its decision in *Feres*.

Chief Justice Roberts and Justice Alito hold similar positions on what constitutes statutory ambiguity and how courts should clarify statutory ambiguity. In his confirmation hearings before the Senate Committee on the Judiciary, Chief Justice Roberts stated,

> [y]ou don't look to legislative history to create ambiguity. In other words, if the text is clear, that is what you follow, and that's binding. And you don't look beyond it to say, well, if you look here, though, maybe this clear word should be interpreted in a different way.[455]

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[451] *See* Flowers v. United States, 289 F. Supp. 2d 1213 (D. Haw. 2003) (holding that the *Feres* doctrine barred a service member's claims against the United States under the Right to Financial Privacy Act when an Army trial counsel requested financial records from the service member's bank for use at an Article 32, Uniform Code of Military Justice hearing and the bank released the records without complying with the Right to Financial Privacy Act); *but see* Cummings v. United States, 279 F.3d 1051 (D.C. Cir. 2002) (reversing a district court's holding extending the *Feres* doctrine to bar service members' Privacy Act lawsuits).

[452] *See* Boyle v. United Techs Corp., 487 U.S. 500 (1988); United States v. Johnson, 481 U.S. 681 (1987) (Scalia, J, dissenting); Costo v. United States, 248 F.3d 863 (9th Cir. 2001); Day v. Massachusetts Air Nat'l Guard, 167 F.3d 678 (1st Cir. 1999); O'Neill v. United States, 140 F.3d 564 (3d Cir. 1998) (Becker, C.J., dissenting) (denying petition for rehearing); Taber v. Maine, 67 F.3d 1029 (2d Cir. 1995); Atkinson v. United States, 825 F.2d 202 (9th Cir. 1987); Lee v. United States, 261 F. Supp. 252 (C.D. Cal. 1966).

[453] United States v. Johnson, 481 U.S. 681 (1987) (Scalia, J., dissenting).

[454] *Id.* at 703 (Scalia, J., dissenting).

[455] *See Nomination of John G. Roberts, Jr. to be Chief Justice of the United States: Confirmation Hearing Before the S. Comm. on the Judiciary*, 98th Cong. 319 (2005)

Similarly, during his confirmation hearings before the Senate Committee on the Judiciary, Justice Alito stated, "[w]hen I interpret statutes . . . where I start and often where I end is with the text of the statute. And if you do that, I think you eliminate a lot of problems involving legislative history and also with signing statements."[456] Therefore, both Justices believe that the Court should look to legislative history only when a statute is ambiguous on its face. Both Justices also believe, however, that the Supreme Court's constitutional decisions are more important than its decisions involving statutory interpretation. This is primarily because Congress can correct inaccurate statutory interpretations;[457] according to Chief Justice Roberts, "short of amendment, only the Court can fix the constitutional precedents."[458]

Given both Justices' belief that judges should not read ambiguity into a statute where none exists, both Justices may likely disagree with the Court's decision in *Brooks* and *Feres*. The Federal Tort Claims Act contained a clear waiver of sovereign immunity, allowing tort recovery to those injured by the Government. Congress qualified the waiver with several enumerated exceptions;[459] Congress also limited the Government's liability to "the same manner and to the same extent as a private individual under like circumstances."[460] Yet, in *Brooks* and *Feres*, the Supreme Court expanded the exceptions to the Act.[461] Regardless of whether Chief Justice Roberts and Justice Alito believe *Brooks* and *Feres* were correctly or incorrectly decided, the "incident to

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[hereinafter *Chief Justice Roberts's Confirmation Hearings*] (statement of John G. Roberts, Jr., nominee, Chief Justice of the United States).

[456] *Nomination of Samuel A. Alito, Jr. to be an Associate Justice of the Supreme Court of the United States: Confirmation Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 350 (2006) [hereinafter *Justice Alito's Confirmation Hearings*] (statement of Samuel A. Alito, Jr., nominee, Associate Justice of the Supreme Court of the United States).

[457] *See Chief Justice Roberts's Confirmation Hearings*, *supra* note 455, at 164 ("[t]he Court has frequently explained that stare decisis is strongest when you're dealing with a statutory decision. The theory is a very straightforward one that if the Court gets it wrong, Congress can fix it. And the Constitution, the Court has explained, is different."); *Justice Alito's Confirmation Hearings*, *supra* note 456, at 343 ("a constitutional decision of the Supreme Court has a permanency that a decision on an issue of statutory interpretation doesn't have.").

[458] *Chief Justice Roberts's Confirmation Hearings*, *supra* note 455, at 164.

[459] *See* Federal Tort Claims Act, 60 Stat. 843, § 421 (1946) (current version at 28 U.S.C. § 2674 (2000)).

[460] *Id.* § 410.

[461] *See generally* Feres v. United States, 340 U.S. 135 (1950); Brooks v. United States, 337 U.S. 49 (1949).

service" test has become precedent that will likely guide both Justices' decisions on the Supreme Court.

Both Chief Justice Roberts and Justice Alito share similar philosophies on stare decisis. Both Justices believe that the doctrine of stare decisis is important because it ensures "evenhandedness, predictability, [and] stability"[462] in the judicial system. That is, stare decisis engenders reliance and preserves settled expectations in the judicial system.[463] Chief Justice Roberts and Justice Alito agree that, if a prior precedent exists in a case, a judge should first look to the prior precedent in reaching a decision.[464] They both believe that a judge cannot overturn precedent simply because he feels it is flawed;[465] rather a judge must consider the following factors when deciding to revisit a precedent: whether the particular precedent has become "unworkable,"[466] whether subsequent developments have eroded the decision's doctrinal basis,[467] the initial vote on the case that set the precedent,[468] the length of time the precedent has been in place,[469] whether other cases have reaffirmed the case on stare decisis grounds,[470] and the nature and extent of reliance on the precedent.[471]

If the Court considers a case that implicates the *Feres* doctrine, both Justices will likely adhere to the principle of stare decisis. The Court has applied the incident to service test ever since its *Brooks* decision in 1949 and held that, generally, service members cannot recover under the Federal Tort Claims Act for service-related injuries. As a result, the *Feres* doctrine has become an established part of the law and has been reaffirmed countless times; it is a doctrine that both government and

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462 *See Chief Justice Robertss' Confirmation Hearings*, *supra* note 455, at 144.
463 *See id.* at 142; *Justice Alito's Confirmation Hearings*, *supra note* 456, at 318.
464 *See Justice Alito's Confirmation Hearings*, *supra* note 456, at 319.
465 *See Chief Justice Roberts's Confirmation Hearings*, *supra* note 455, at 144; *Justice Alito's Confirmation Hearings*, *supra* note 456, at 435 and 601 ("in general, courts follow precedents. They need a special—the Supreme Court needs a special justification for overruling a prior case.").
466 *See Chief Justice Roberts's Confirmation Hearings*, *supra* note 455, at 142; *Justice Alito's Confirmation Hearings*, *supra* note 456, at 399.
467 *See Chief Justice Roberts's Confirmation Hearings*, *supra* note 455, at 142*; Justice Alito's Confirmation Hearings*, *supra* note 456, at 400 ("Sometimes changes in the situation in the real world can call for the overruling of a precedent.").
468 *See Justice Alito's Confirmation Hearings*, *supra* note 456, at 399.
469 *See id.*
470 *See id.*
471 *See id.*

plaintiffs' attorneys rely upon when advising clients and deciding how to dispose of cases. The *Feres* doctrine has not proven "unworkable;" rather, it has provided a fairly bright line rule to determine whether a service member's case can go forward under the Federal Tort Claims Act.

Lower courts' varying definitions of "incident to service" have led to some inconsistency in recovery; however, courts commonly accept that they must look to the duty status and activities of the victim when determining whether an injury occurred incident to service. Given the length of time the *Feres* doctrine has been in force and the reliance the legal community has placed upon it, the *Feres* doctrine has become a strong precedent. Additionally, given Chief Justice Roberts's and Justice Alito's belief that Congress can correct an inaccurate interpretation of a statute, both Justices will likely continue to apply the *Feres* doctrine and only seek to clarify the doctrine in future cases, as the Court did in *Stanley* and *Johnson*.

Finally, both Justices' judicial record suggests that neither will advocate for the abrogation of the *Feres* doctrine. Chief Justice Roberts served as a judge on the Court of Appeals for the District of Columbia from June 2003 until his confirmation hearings for Chief Justice of the United States in September 2005.[472] During that short period of time, two cases implicating the *Feres* doctrine came before the court. In the first case, *James v. United States*,[473] a service member appealed the district court's holding that the *Feres* doctrine barred his claim. On January 14, 2004, the Court of Appeals for the District of Columbia denied the request for rehearing and affirmed the holding of the District Court for the District of Columbia.[474] On 7 April 2004, after the service member filed another request for rehearing and a motion for appointment of an attorney, the court of appeals again denied the service member's petition.[475] Chief Justice Roberts was one of the judges who heard both petitions.

Chief Justice Roberts did not hear the second *Feres* case that came before the Court of Appeals for the District of Columbia. In *Schnitzer v.*

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[472] *See Chief Justice Roberts's Confirmation Hearings*, *supra* note 455, at 58 (employment record, question 7, questionnaire of John G. Roberts, Jr., nominee, Chief Justice of the United States).

[473] James v. United States, 85 Fed. Appx. 777 (D.C. Cir. 2004) (rehearing denied).

[474] *Id.*

[475] James v. United States, 2004 U.S. App. LEXIS 7002, *1 (D.C. Cir. 2004) (rehearing denied).

Harvey,[476] the Court of Appeals for the District of Columbia affirmed the district court's dismissal of a military prisoner's Federal Tort Claims Act claim. The prisoner filed a Federal Tort Claims Act suit after a portion of the ceiling at the United States Disciplinary Barracks fell on him, causing him permanent injuries.[477] The District Court for the District Columbia held that it lacked subject matter jurisdiction over the prisoner's case because the *Feres* doctrine barred the claim.[478] After hearing arguments, the Court of Appeals for the District of Columbia considered the following three factors to determine whether the prisoner sustained his injuries incident to his military service: the prisoner's duty status when injured, where the injury occurred, and the nature of the prisoner's activity at the time of injury.[479] The Court of Appeals for the District of Columbia concluded the prisoner sustained his injuries incident to his military service and affirmed the district court's decision.[480]

Justice Alito possesses a more developed record as a judge than Chief Justice Roberts. Justice Alito served as a judge on the Court of Appeals for the Third Circuit from June 1990 until his confirmation hearings in January 2006.[481] During his tenure as an appellate court judge, Justice Alito heard two cases that directly addressed the *Feres* doctrine. In the first case, *O'Neill v. United States*,[482] the mother of a Navy ensign murdered by another Navy ensign sued the Government under the Federal Tort Claims Act for her daughter's wrongful death.[483] The murdered ensign's mother alleged the Navy negligently failed to follow up on personality tests it administered to the murderer prior to the murder.[484] The court denied the mother's request for a rehearing, affirming the lower court's dismissal of the mother's cause of action.[485] One judge, Judge Becker, dissented from the court's denial of a rehearing and stated his objections to the *Feres* doctrine.[486] Justice Alito did not join in the dissent.[487]

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476 Schnitzer v. Harvey, 389 F.3d 200 (D.C. Cir. 2004).
477 *See id.* at 201.
478 *See id.*
479 *See id.* at 203.
480 *See id.* at 205–06.
481 *See Justice Alito's Confirmation Hearings*, *supra* note 456, at 59.
482 140 F.3d 564 (3d Cir. 1998) (petition for rehearing denied).
483 *See id.* at 565.
484 *See id.*
485 *See id.* at 564.
486 *See id.* at 564–66.
487 *See id.*

Richards v. United States[488] was the second *Feres* case the Court of Appeals for the Third Circuit heard during Justice Alito's tenure. In *Richards*, the negligent driver of a government vehicle killed a Soldier on his way home from work at the end of the duty day.[489] The Soldier's widow sued under the Federal Tort Claims Act, alleging the driver's negligence caused her husband's death.[490] The lower court dismissed the widow's claim for lack of subject matter jurisdiction after applying the *Feres* doctrine.[491] On appeal to the Court of Appeals for the Third Circuit, Judges Roth, Lewis, and Garth heard and denied the widow's initial request for rehearing.[492] Richards' widow petitioned the court again for rehearing, en banc.[493] Justice Alito, Chief Judge Becker, and Judges Sloviter, Mansmann, Greenberg, Scirica, Nygaard, Roth, Lewis, McKee, Rendell, and Garth heard the second request.[494] The court denied the second request because the claim arose incident to the deceased Soldier's service;[495] again, only Chief Judge Becker dissented and urged "the Supreme Court to grant certiorari and revisit what we have wrought during the nearly fifty years since the Court's pronouncement in Feres."[496]

In addition to hearing two *Feres* doctrine cases, Justice Alito wrote the Third Circuit Court of Appeal's opinion in *Bolden v. Southeastern Pennsylvania Transportation Authority*.[497] Bolden, an employee of the Southeastern Pennsylvania Transportation Authority, tested positive for marijuana use during a mandatory employment-related drug test.[498] As a result, the Southeastern Transportation Pennsylvania Authority terminated Bolden's employment.[499] Bolden filed suit against the Southeastern Pennsylvania Transportation Authority in federal district court, alleging the Southeastern Pennsylvania Transportation Authority "violated his Constitutional rights by subjecting him to an unreasonable search and seizure and by discharging him without a prior hearing."[500] In

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[488] 176 F.3d 652 (3d Cir. 1999), *reh'g denied*, 180 F.3d 564 (3d Cir. 1999).
[489] *See id.* at 653–54.
[490] *See id.* at 653.
[491] *See id.*
[492] *See id.*
[493] *See id.* at 564.
[494] *See id.*
[495] *See id.*
[496] *Id.* at 565.
[497] 953 F.2d 807 (3d Cir. 1991).
[498] *See id.* at 810–11.
[499] *See id.* at 811.
[500] *Id.*

his written opinion, Justice Alito characterized the Southeastern Pennsylvania Transportation Authority as a hybrid governmental entity.[501] As such, he concluded that it enjoyed immunity from the punitive damages Bolden sought.[502] In his written opinion, Justice Alito cited to *Feres* to support his proposition that both state governments and the federal government enjoy absolute sovereign immunity absent a waiver of the immunity.[503] Justice Alito's use of *Feres* to support his proposition suggests that he views *Feres* as valid law.

Both Chief Justice Roberts' and Justice Alito's decisions while serving as appellate court judges suggest that they consider the *Feres* doctrine to be valid law today. This indication, coupled with their shared belief that stare decisis is a fundamental principle of the U.S. judicial system, suggests that neither Justice favors abrogating the *Feres* doctrine. As both Justices stated in their confirmation hearings, Congress can always enact legislation to correct the Court's inaccurate interpretation of a statute;[504] therefore, Congress, not the judiciary, will dismantle the *Feres* doctrine, if it is to be eliminated.

IX. Conclusion

At the time the Supreme Court enunciated the *Feres* doctrine, it had at its disposal the enumerated exceptions to the Federal Tort Claims Act. It could have applied several of the enumerated exceptions to bar service members' suits under the Federal Tort Claims Act. Most significantly, the Court could have applied the discretionary function exception to bar service members' claims that questioned the lawful discretionary decisions their leaders made. Had the Court applied the discretionary function exception to *Feres v. United States*[505] and its progeny, it could have precluded the judicial second guessing of military decisions it

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501 *See id.* at 830.
502 *See id.*
503 *See id.*
504 *See Chief Justice Roberts's Confirmation Hearings*, *supra* note 455, at 164 ("The Court has frequently explained that stare decisis is strongest when you're dealing with a statutory decision. The theory is a very straightforward one that if the Court gets it wrong, Congress can fix it. And the Constitution, the Court has explained, is different."); *Justice Alito's Confirmation Hearings*, *supra* note 456, at 343 ("[I]f a case is decided on statutory grounds, there's a possibility of Congress amending the statute to correct the decision if it's perceived that the decision is incorrect or it's producing undesirable results.").
505 Feres v. United States, 340 U.S. 135 (1950).

sought to avoid. Yet, contrary to its refusal in *Muniz* and *Rayonier* to broaden the Federal Tort Claims Act's exceptions, the Court carved out a new exception to the Act and barred virtually all service members from recovering for injuries incurred incident to service.

The *Feres* doctrine serves the important function of preserving military decision making and preventing legal liability considerations from tainting the military decision making process. This is arguably vital to the discipline and effective functioning of the U.S. military. But, this broad-sweeping protection also prohibits service members from recovering under circumstances where a civilian could recover. Applying the enumerated exceptions to the Federal Tort Claims Act, including the discretionary function exception, can preserve the chain-of-command's military decision-making and policy-making authority while affording service members rights more commensurate with those of civilians under the Federal Tort Claims Act. Therefore, the enumerated exceptions, especially the discretionary function exception, provide a reasonable balance between the need to protect military decision making and the need to protect service members' interests in receiving full and fair compensation for their service-related injuries.