Journal of Air Law and Commerce

Volume 51 | Issue 4 Article 10

1986

Casenotes and Statute Notes

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FEDERAL TORT CLAIMS ACT — GOVERNMENT LIABILITY FOR PERSONAL INJURIES TO MILITARY PERSONNEL — The *Feres* doctrine does not bar recovery by a serviceman under the FTCA when the claim does not involve or compromise a military relationship and when the suit will not encroach upon the military disciplinary structure. *Johnson v. United States*, 749 F.2d 1530 (11th Cir.), *vacated for reh'g en banc*, 760 F.2d 244 (11th Cir. 1985), *reinstated*, No. 83-5764 (11th Cir. Jan. 13, 1986) (per curiam).

On January 7, 1982, the Hawaiian offices of the United States Coast Guard[1] dispatched a helicopter to search for a civilian boat in distress.[2] Horton W. Johnson, an active-duty member of the Coast Guard, piloted the helicopter assigned for the rescue operation. During the course of the mission, Johnson encountered inclement weather conditions and requested radar assistance[3] from civilian air controllers employed by the Federal Aviation Administration (FAA).[4] Shortly after the FAA personnel assumed control of Johnson's flight path, the helicopter crashed

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[1] 14 U.S.C. § 1 (1982) provides that the Coast Guard operates as "a military service and a branch of the armed forces of the United States at all times."

[2] Coastal rescue missions constitute one of the Coast Guard's primary duties under federal law. *See id.* at § 2 ("The Coast guard shall . . . maintain and operate . . . rescue facilities for the promotion of safety on, under, and over the high seas . . . .").

[3] Federal regulations require a pilot to utilize radar assistance when poor visibility conditions exist. *See generally* 14 C.F.R. § 91.105 (1984). Military pilots must comply with these regulations except in cases of "military emergency or urgent military necessity, [and] when appropriate military authority so determines, and prior notice thereof is given to the Secretary of Transportation." 49 U.S.C. § 1348(f) (1982).

[4] The FAA functions as a civilian administration, under the auspices of the Department of Transportation (DOT). *See* Act of Jan. 12, 1983, Pub. L. No. 97-449, 1983 U.S. CODE CONG. & AD. NEWS (96 Stat.) 2413, 2416 (to be codified at 49 U.S.C. § 106(a)) (revising without substantive change 49 U.S.C. § 1341(a)(1982)). Interestingly, the Coast Guard also operates as a service in DOT except in times of war. 14 U.S.C. §§ 1, 3 (1982). Therefore, Johnson and the air controllers (the alleged tortfeasors in this case) were employees of the same department.

into the side of a mountain on Molokai Island. Johnson died in the crash.

Johnson's widow, Frieda Joyce Johnson, instituted an action against the United States under the Federal Tort Claims Act (FTCA).[5] Mrs. Johnson's complaint alleged that the FAA controllers acted negligently by vectoring Johnson's helicopter into the mountainside. The Government moved to dismiss the complaint, urging that it failed to state a claim upon which relief could be granted. The Government contended that since Johnson's death occurred incident to his military service, the *Feres* doctrine[6] barred recovery under the FTCA. The district court agreed, and dismissed the action with prejudice.[7]

Mrs. Johnson appealed the dismissal to the United States Court of Appeals for the Eleventh Circuit. She argued that the *Feres* doctrine did not apply to her case, since no military relationship existed between the decedent and the civilian employees of the FAA. *Held, reversed and remanded*: The *Feres* doctrine does not bar recovery by a serviceman under the FTCA when the claim does not involve or compromise a military relationship and when the suit will not encroach upon the military disciplinary structure. *Johnson v. United States*, 749 F.2d 1530 (11th Cir.), *vacated for reh'g en banc*, 760 F.2d 244 (11th Cir. 1985), *reinstated*, No. 83-5764 (11th Cir. Jan. 13, 1986) (per curiam).

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[5] 28 U.S.C. §§ 1346, 2671-80 (1982). For the pertinent language of the FTCA, see *infra* note 13 and accompanying text. *See also infra* notes 8-18 and accompanying text (discussing the legislative history and purpose behind the FTCA).

[6] The *Feres* doctrine originated in the landmark case of Feres v. United States, 340 U.S. 135 (1950). Briefly stated, the doctrine holds that the FTCA does not waive the federal government's sovereign immunity for injuries to military personnel, if the injuries arise out of or are incident to military service. *See infra* notes 33-55 and accompanying text, for a complete discussion of *Feres*.

[7] Technically, the district court erred by dismissing the action for failure to state a claim. Such a dismissal reflects a disposition on the merits, but a defense based on *Feres* rests on the notion that the court lacks jurisdiction to adjudicate the merits of the case. *See* Johnson v. United States, 749 F.2d 1530, 1532 n.2 (11th Cir. 1985). In light of the circuit court's holding, however, this error proved "of no consequence." *Id.*

I. THE *FERES* DOCTRINE — A TROUBLED HISTORY

The *Feres* doctrine finds its roots in common law concepts of sovereign immunity. Briefly stated, "sovereign immunity" refers to the idea that a litigant cannot assert an otherwise meritorious claim against a sovereign state unless the sovereign consents to suit.[8] Originally, this principle shielded the United States from liability for its own tortious conduct, as well as for torts committed by its agents.[9] In 1946, however, the United States Congress passed the FTCA in an effort to mitigate the harsh consequences[10] often produced by sovereign immunity.[11]

The FTCA waives the government's sovereign immunity in certain contexts, making the United States amena-

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[8] The doctrine of sovereign immunity grew out of sixteenth-century metaphysical concepts regarding the nature of the feudal state as it existed in England at that time. The lord of a feudal manor could not be subjected to suit in his own courts. The King of England, the supreme feudal lord, enjoyed this same protection. Muskopf v. Corning Hosp. Dist., 55 Cal. 2d 211, 212 n.1, 359 P.2d 457, 458 n.1, 11 Cal. Rptr. 89, 90 n.1 (1961). For a more extensive discussion of the doctrine, see *id. See also* Pound, *The Tort Claims Act: Reason or History?*, 30 NACCA L.J. 404, 406-09 (1963).

[9] *See Feres*, 340 U.S. at 139. The English version of the sovereign immunity doctrine rested largely upon the notion that the king enjoyed immunity in his courts as a matter of personal, royal prerogative. Borchard, *Government Liability in Tort*, 34 YALE L.J. 1, 3 (1924). Given the absence of a sovereign in the United States, adoption of the doctrine in this country remains somewhat of a mystery. *Id.* at 4-5.

[10] Exceptions and alternative remedies had been created in England to prevent the injustice which sometimes occurred through strict application of sovereign immunity principles. *Muskopf*, 55 Cal. 2d at 212 n.1, 359 P.2d at 458 n.1, 11 Cal. Rptr. at 90 n.1. For example, a claimant always could seek equitable relief through the Court of Exchequer since the king was thought to be the fountain of equity. *Id.* Furthermore, a citizen of the Crown could obtain legal relief through a "petition of right" if he could show a legal right to redress. *Id.* When the United States adopted common law sovereign immunity, it failed to devise similar exceptions and alternatives. Blind application of the rule by American courts frequently resulted in grossly inequitable denials of relief to legitimate claimants. *See* Borchard, *supra* note 9, at 5.

[11] *Johnson*, 749 F.2d at 1532 (citing *Feres*, 340 U.S. at 139). Several earlier attempts were made to provide detours for bypassing the sovereign immunity barrier. *See Feres*, 340 U.S. at 139-40. Before enactment of the FTCA, a private citizen's only recourse for injuries suffered through government negligence was to seek a private relief bill from Congress. The FTCA sought to alleviate the burdens this placed both on private claimants and Congress. H.R. REP. No. 1287, 79th Cong., 1st Sess. 2 (1946).

ble to suit in federal court for conduct which would subject a private individual to tort liability.[12] Specifically, the FTCA provides that the United States shall be liable for "injury or . . . death caused by [the negligence of any government employee] under circumstances where the United States, if a private person, would be liable to the claimant."[13] The Supreme Court's initial reactions to the FTCA were somewhat schizophrenic.[14] In one case the Court offered a very broad interpretation of the FTCA, suggesting that the preclusion of tort claims through more narrow interpretations might frustrate the purpose of the statute.[15] In another instance, the Court balked at a liberal reading of the FTCA, fearful of going beyond the boundaries of the FTCA and the sovereign immunity the FTCA waived.[16] Despite the confusion, one fact remained clear: the FTCA did not impose blanket liability.[17] On the contrary, Congress included specific exceptions in the statute, which retained the government's immunity for certain types of activities.[18] Much of the aforementioned uncertainty sprang out of attempts to define the parameters of these exceptions.[19]

Questions about the role the FTCA should play in the

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[12] *See supra* note 5.

[13] 28 U.S.C. § 1346(b) (1982).

[14] *See* Note, *From Feres to Stencel: Should Military Personnel Have Access to FTCA Recovery?* 77 MICH. L. REV. 1099, 1102 (1977) [hereinafter cited as Note, *From Feres to Stencel*].

[15] *See* Indian Towing Co. v. United States, 350 U.S. 61 (1955) (holding that the Coast Guard's operation of a lighthouse beacon does not constitute a "discretionary function" for which the government remains immune from suit). For the statutory text of the "discretionary function" exception, see *infra* note 19.

[16] *See* Dalehite v. United States, 346 U.S. 15 (1953) (holding that the government's adoption of a fertilizer export plan amounted to a "discretionary" activity under the FTCA; hence, the government could not be held liable for injuries caused by a negligently induced explosion of dangerous fertilizer chemicals).

[17] *Johnson*, 749 F.2d at 1532.

[18] 28 U.S.C. § 2680 (1982) lists the express exceptions to the FTCA. These exceptions include claims arising out of negligent postal handling, most intentional tort claims, claims arising out of military combat activities, and claims arising in a foreign country. *Id.*

[19] The immunity which the government retained for "discretionary functions," for example, presented one of the most troubling exceptions for the courts. *See supra* notes 15-16. 28 U.S.C. § 2680 (1982) contains this exception, providing

military context added still more fuel to the fires of confusion.[20] The Supreme Court has long recognized that cases involving the military present special issues and concerns distinct from those found in a typical civilian lawsuit.[21] Accordingly, the Court has declared that Congress enjoys the liberty of legislating with greater breadth when prescribing laws directed at the armed services.[22]

The language employed in the FTCA offers little assistance in solving the military problem.[23] The FTCA does exclude "any claim arising out of the combatant activities of the military or naval forces, or the Coast Guard, during time of war."[24] Yet the statute does not exclude *all* actions by members of the military; specifically; it does not exclude those actions arising out of non-combatant activities.[25] Nevertheless, the courts soon "rushed in where legislators feared to tread."[26] This judicial intrepidity found expression in the *Feres* doctrine — a court-implied exception to the FTCA, barring claims arising out of or incident to military service.[27]

Congressional omission of FTCA language to deal with claims by military personnel arising out of non-combatant duties left a legislative gap in the structure of the FTCA.[28]

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that the FTCA does not apply to claims based upon "a discretionary function or duty on the part of . . . the Government."

[20] *See infra* notes 24 -27 and accompanying text.

[21] *See, e.g.*, Parker v. Levy, 417 U.S. 733 (1974) (refusing to subject the Uniform Code of Military Justice to the same rigorous constitutional scrutiny applied to civilian criminal codes, because of unique disciplinary concerns present in military situations). *Parker* stated that the "military is, by necessity, a specialized society separate from civilian society." *Id.* at 743. This distinction stems from the "primary business of armies and navies to fight . . . wars should the occasion arise." *Id.* (quoting United States *ex rel* Toth v. Quarles, 350 U.S. 11, 17 (1955)). *See also* Gilligan v. Morgan, 413 U.S. 1, 10 (1973) ("[C]omplex, subtle, and professional decisions as to the composition, training . . . and control of a military force are essentially professional military judgments . . . .").

[22] *Parker*, 417 U.S. at 756.

[23] *See infra* note 24 and accompanying text. *See also* Note, *From Feres to Stencel, supra* note 14.

[24] 28 U.S.C. § 2680(j) (1982).

[25] *Johnson*, 749 F.2d at 1532.

[26] *Id.* (quoting Parker v. United States, 611 F.2d 1007 (5th Cir. 1980)).

[27] *See supra* note 6.

[28] *See infra* note 43 and accompanying text.

The Supreme Court's first occasion to address this gap arose in *Brooks v. United States*.[29] In *Brooks*, a United States Army truck, driven by a civilian employee of the Army, struck a car carrying Welker Brooks and his brother, Arthur.[30] Arthur Brooks died in the crash, and his brother Welker suffered severe injuries.[31] Both men served in the armed forces, but were not on duty when the accident occurred.[32] The Brookses sued the United States under the FTCA, alleging negligence on the part of the Army truck driver.[33] The Supreme Court upheld the Brookses' FTCA claims, on the ground that the accident had nothing to do with their army careers.[34] According to the Court, Congress would have been more explicit in its legislation if it intended to bar FTCA claims by servicemen in *all* situations.[35] The Court expressly reserved opinion on how to handle a case involving injuries incident to service under the FTCA.[36]

Just one year later in *Feres v. United States*,[37] the Supreme Court came face-to-face with the question it had been able to avoid in *Brooks*.[38] *Feres* involved three consolidated cases.[39] Claims by servicemen in two of these cases alleged medical malpractice on the part of United States Army physicians.[40] The third case involved the claim of a serviceman killed in a barrack destroyed by fire.[41] In each case, the claimant sustained his injury while on active

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[29] 337 U.S. 49 (1949).

[30] *Id.* at 50.

[31] *Id.*

[32] *Id.*

[33] *Id.*

[34] *Id.* at 52.

[35] *Id.* at 51.

[36] *Id.* at 52 ("Were the accident incident to the Brooks' service, a wholly different case would be presented. We express no opinion as to it . . . .").

[37] 340 U.S. 135 (1950).

[38] *See supra* note 36 and accompanying text.

[39] *Feres*, 340 U.S. at 135.

[40] Griggs v. United States, 178 F.2d 1 (10th Cir. 1949), *rev'd sub nom.*, Feres v. United States, 340 U.S. 135 (1950); and Jefferson v. United States, 178 F.2d 518 (4th Cir. 1949), *aff'd sub nom.*, Feres v. United States, 340 U.S. 135 (1950).

[41] *Feres*, 340 U.S. at 135.

duty, at the hands of others in the armed forces.[42] In deciding whether or not the FTCA imposed government liability in such situations, the Court stated:

> There are few guiding materials 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. Under these circumstances, no conclusion can be above challenge, but if we misinterpret the Act, at least Congress possesses a ready remedy.[43]

In this absence of legislative direction, the *Feres* Court proceeded to a cautious interpretation of the FTCA, establishing what has proven to be the only judicially-created exception to the FTCA.[44] The Court refused recovery by the servicemen, holding that "the Government is not liable under the [FTCA] for injuries to servicemen where the injuries arise out of or are in the course of activity incident to service."[45]

The *Feres* Court gave several reasons why the FTCA did not impose liability for claims "incident to service."[46] First, it noted that the FTCA imposes governmental liability only to "the same extent as a private individual under like circumstances."[47] Because no law had ever permitted an American soldier to sue the federal government for negligence, and because private citizens have no authority to raise an army, the Court found an absence of the requisite "parallel private liability."[48] Second, the Court pointed out that the FTCA relies on the substantive law of the state where the accident occurred for determining the extent of the government's liability.[49] Since servicemen

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[42] *Id.* at 138.

[43] *Id.*

[44] Note, *From Feres to Stencel*, *supra* note 14, at 1102.

[45] *Feres*, 340 U.S. at 146.

[46] *See infra* notes 47-52 and accompanying text.

[47] *Feres*, 340 U.S. at 141 (quoting 28 U.S.C. § 2674 (1982)).

[48] *Feres*, 340 U.S. at 141-42.

[49] *Id.* at 142. *See* 28 U.S.C. § 1346(b) (1982) ("the law of the place where the act or omission occurred" governs liability under the FTCA).

have little or no choice of habitat, application of the FTCA to their claims would result in an unfair, non-uniform claims system.[50] Additionally, the Court suggested that application of state law to claims brought by soldiers would be an encroachment on the "distinctively federal" character of the relationship between the government and its armed forces.[51] Finally, the Court reasoned that Congress already provided a sufficient compensation scheme in the form of veterans' benefits.[52]

Feres and its progeny reflected the judicial conviction that some rule must exist to block certain FTCA claims by military personnel, even in some non-combat situations.[53] Accepting *arguendo* the premise that such a rule should exist,[54] two closely-related questions remained unanswered: (1) *When* the rule should be applied, and (2) *Why* the rule should be applied. The conflicting decisions rendered since the inception of the *Feres* doctrine, as well as the widespread criticism the doctrine has received,[55] suggest that the courts have yet to produce a satisfactory response to either question.[56]

A. *When* Feres *Should Be Applied — "The Incident to Service" Problem*

In attempts to answer the "when" question, the most plaguing difficulty faced by the courts has been classification *vel non* of an activity as "incident to service."[57] In *Brooks*,[58] the pre-*Feres* decision discussed above, the

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[50] *Feres*, 340 U.S. at 143.

[51] *Id.*, at 143-44.

[52] *Id.* at 144.

[53] *See supra* notes 42-52 and accompanying text.

[54] Some commentators have suggested that the need for such a rule does not exist. *See, e.g.*, Note, *From Feres to Stencel*, *supra* note 14, at 1125-26.

[55] *See, e.g.*, In re "Agent Orange" Product Liability Litigation, 580 F. Supp. 1242, 1246-47 (E.D.N.Y. 1984) (citing a laundry list of sources criticizing the *Feres* rule, and refusing to apply it to bar FTCA claims by military wives and children injured indirectly by former servicemen's contact with agent orange).

[56] *See infra* notes 57 &74 and accompanying text.

[57] *See* Note, *From Feres to Stencel*, *supra* note 14, at 1099-1100 nn.6-7.

[58] 337 U.S. 49 (1949).

Supreme Court allowed FTCA recovery by servicemen injured during a furlough period when a military vehicle struck their private car. The *Brooks* Court concluded that the plaintiffs were not acting incident to service, stating that the accident "had nothing to do with [the plaintiffs'] army career[s]."[59]

Since *Feres*, some courts have adopted a *Brooks*-like approach, barring claims only if the serviceman suffered the injury while on active duty.[60] Other courts have based the "incident to service" determination on whether the claimant sustained the injuries on-base or off-base.[61] These considerations, however, have provided little assistance in the vast majority of cases.[62] Most courts have placed a primary emphasis on the type of activity which gave rise to the injury, looking for relevant links between the activity and the claimant's military duties.[63]

The range of activities considered incident to service

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[59] *Id.* at 52.

[60] *See, e.g.*, Hass v. United States, 518 F.2d 1138 (4th Cir. 1975) (barring an FTCA claim by a marine injured while riding a horse rented from a military-operated stable, since his active-duty status made the injury "incident to service"); Henninger v. United States, 473 F.2d 814 (9th Cir.) (denying FTCA recovery by a Navy enlisted man for injuries sustained by the negligence of Navy physicians, since the injury occurred while the claimant was on active duty), *cert. denied*, 414 U.S. 819 (1973).

[61] *See, e.g.*, Chambers v. United States, 357 F.2d 224 (8th Cir. 1966) (pointing out the on-base situs of the accident in denying FTCA recovery to the parents of an Air Force enlisted man who died at a swimming pool on the base); Zoula v. United States, 217 F.2d 81 (5th Cir. 1954) (precluding FTCA claims by servicemen injured in a collision with an Army ambulance, since the accident occurred on a military reservation).

[62] Parker v. United States, 611 F.2d 1007, 1009 (5th Cir. 1980) (allowing FTCA recovery to the family of a soldier killed in an off-duty car crash with a vehicle driven by another serviceman, and stating, "The Supreme Court cases under [Feres] do not provide many clear signposts to the parameters of 'incident to service.' ").

[63] *See, e.g.*, Hale v. United States, 416 F.2d 355 (6th Cir. 1969) (vacating and remanding the dismissed case of a serviceman suing under the FTCA when he was struck by a car after being haled to the middle of a highway where a military police vehicle was stopped); Schwager v. United States, 279 F. Supp. 262 (E.D. Pa. 1968) (denying the Government's motion for summary judgment in an FTCA case instituted by the widow of a sailor who died because of the alleged negligence of naval hospital agents).

may be fairly broad.[64] For example, the courts have barred FTCA claims for injuries sustained while riding a horse rented from a military-operated stable,[65] playing "donkey softball,"[66] swimming in an on-base swimming pool,[67] and riding a bus to a beach party sponsored by the military.[68] And, of course, *Feres* itself found claimants' injuries incident to service when they resulted from the alleged medical malpractice of Army physicians.[69]

B. *Why* Feres *Should Be Applied — The Rationales and Their Demise*

Much of the difficulty in determining when to apply *Feres* occurs because of uncertainty about "why" the rule should be applied. Several different rationales have been offered to support the *Feres* doctrine.[70] These include the absence of a "parallel private liability"[71]; the notion that since state tort law must be consulted under the FTCA,[72] recovery by servicemen would be irrationally dependent upon geographic considerations beyond the victim's sphere of control[73]; the possible adverse effects FTCA claims might have on military discipline[74]; the existence of

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[64] *See infra* notes 65-68 and accompanying text.

[65] *Hass*, 518 F.2d at 1141-42.

[66] Keisel v. Buckeye Donkey Ball, Inc., 311 F. Supp. 370 (E.D. Va. 1970) (finding that the military-sponsored ball game, despite its recreational nature, constituted an activity "incident to service").

[67] Chambers v. United States, 357 F.2d 224 (8th Cir. 1966).

[68] Degentesh v. United States, 230 F. Supp. 763 (N.D. Ill. 1964) (concluding that despite the pleasurable nature of the beach party in question, it still constituted an activity "incident to service" due to the military sponsorship involved).

[69] *See Feres*, 340 U.S. at 137.

[70] *See* Note, *From Feres to Stencel*, *supra* note 14, at 1101; *Johnson*, 749 F.2d at 1532-33; *Feres*, 340 U.S. at 141-46.

[71] *Feres*, 340 U.S. at 141-42.

[72] *See supra* note 49 and accompanying text.

[73] *Feres*, 340 U.S. at 142-43.

[74] While the *Feres* Court may have based its decision partly on the military discipline concern, it did not articulate this reasoning. Four years after *Feres*, however, the Supreme Court explicitly recognized the discipline factor as one of the foundation stones of the *Feres* doctrine. United States v. Brown, 348 U.S. 110, 112 (1954). In an opinion refusing to bar a veteran's claim for medical malpractice by an Army surgeon, the *Brown* Court made the following statement:

> The peculiar and special relationship of the soldier to his superiors,

an alternative compensation scheme for service personnel[75]; and the "distinctively federal" relationship in military cases.[76] Over the rocky road of *Feres'* thirty-five year history, these rationales have been knocked down and reasserted, analyzed and reanalyzed.[77]

1. *Parallel Private Liability*

The "parallel private liability" rationale became the first theoretical predicate of *Feres* to fall prey to criticism.[78] *Feres* had suggested that the express language of the FTCA barred military claims since they lacked a parallel, or an analogy, in the private sector.[79] The Court reasoned that to interpret the FTCA otherwise would "visit the Government with novel and unprecedented liabilities,"[80] a visitation which the Court believed Congress did not intend.[81] Despite the force of this argument in *Feres*, the Supreme Court later rejected the parallel liability test completely.[82] In *Indian Towing Co. v. United States*,[83] the Court held the United States liable on an FTCA claim

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> 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 in the course of military duty, led the [*Feres*] Court to read that Act as excluding claims of that character.

Id. at 112.

[75] *Feres*, 340 U.S. at 144.

[76] *Id.* at 143-44.

[77] *See infra* notes 78-130 and accompanying text. *See also Johnson*, 749 F.2d at 1533-35.

[78] *Johnson*, 749 F.2d at 1533.

[79] *Feres*, 340 U.S. at 141-42. The "parallel private liability" theory relies specifically on that portion of the FTCA which provides that the government will be liable "under circumstances where the United States, if a private person, would be liable." 28 U.S.C. § 1346(b) (1982). Stated simply, the theory argues that the foregoing provision impliedly retains sovereign immunity where the case involves tortious activity unique to the government, such that no parallel private liability exists in state law. Logically, most military-related injuries would fit into this category since no private individual enjoys the power to raise an army. *See* Note, *From Feres to Stencel*, *supra* note 14, at 1103.

[80] *Feres*, 340 U.S. at 142.

[81] *Id.*

[82] *See infra* note 83 and accompanying text.

[83] 350 U.S. 61 (1955).

for loss of a barge by a towing company resulting from negligent operation of a Coast Guard lighthouse.[84] The Court concluded that it "would be attributing bizarre motives to Congress [to predicate FTCA liability on] the presence or absence of identical private activity."[85] Shortly after *Indian Towing*, the Supreme Court delivered the final *coup de grace* to the parallel liability test in *Rayonier, Inc. v. United States*.[86] In allowing FTCA recovery for property destroyed by fire through the negligence of the United States Forest Service, the *Rayonier* Court expressly rejected the parallel liability test as a misinterpretation of the FTCA.[87] As a result of these decisions, application of the *Feres* doctrine today requires more than the absence of "parallel private liability."[88]

2. *The Uniformity Argument*

A second *Feres* rationale which quickly succumbed was the idea that the FTCA "law of the place"[89] requirement creates an unfair non-uniformity when applied to servicemen who have no choice of habitat.[90] The *Feres* Court reasoned that the resort to state tort law required by the FTCA:

> perhaps is 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. But a soldier on active duty has no such choice. . . . That the geography of an injury should select the law to be applied to his tort claims makes no sense.[91]

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[84] *Id.* at 68-70.

[85] *Id.* at 67.

[86] 352 U.S. 315 (1957).

[87] *Id.* at 319. The Court concluded that "the very purpose of the [FTCA] was to waive the Government's traditional all-encompassing immunity from tort actions and to establish novel and unprecedented governmental liability." *Id.*

[88] *See Johnson*, 749 F.2d at 1533; Note, *From Feres to Stencel*, *supra* note 14, at 1104.

[89] *See supra* note 49 and accompanying text.

[90] *Johnson*, 749 F.2d at 1534.

[91] *Feres*, 340 U.S. at 142-43.

But the Supreme Court rejected a similar argument in *United States v. Muniz*,[92] allowing a federal prisoner to pursue an FTCA claim despite the prisoner's lack of control over his environment.[93] The *Muniz* Court pointed out that complete denial of *any* tort recovery presents far greater prejudice to the claimant than application of non-uniform state laws.[94] Thus, the uniformity argument seems to have fallen to the wayside along with the parallel liability test.[95]

3. *The Discipline Factor*

Although the remaining rationales have fared much better,[96] these pillars of support have not escaped criticism.[97] Several courts have suggested that the military discipline rationale constitutes the most important and defensible reason for application of the *Feres* doctrine.[98] The discipline rationale rests on a fear that FTCA claims by servicemen might place a chilling effect on the exercise of military expertise and discretion in carrying out military operations.[99] The hindering effect FTCA liability might have on an officer's willingness to issue commands might strain the military's need for discipline, both on the battlefield and in training.[100] Furthermore, such claims might prompt a subordinate to disobey or challenge an order issued by his superior.[101] Although at least one

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[92] 374 U.S. 150 (1963).

[93] *Id.* at 164-65.

[94] *Id.* at 162. Although *Muniz* dealt with a federal prisoner and not with a serviceman, the case can be seen as further erosion of the uniformity rationale in the military context as well. *See Johnson*, 749 F.2d at 1533. Soldiers and prisoners are in similar circumstances with respect to their choice of forum in a lawsuit, since the government chooses the habitat for both.

[95] For a more extensive discussion of the uniformity problem, see Note, *From Feres to Stencel, supra* note 14, at 1118-21.

[96] *See infra* notes 98-130 and accompanying text.

[97] *See* Note, *From Feres to Stencel, supra* note 14, at 1104-18.

[98] *See, e.g., Johnson*, 749 F.2d at 1533 (citing *Brown*, 348 U.S. at 112, for the proposition that the discipline factor best explains the *Feres* rule).

[99] *See* Note, *From Feres to Stencel, supra* note 14, at 1118.

[100] Brown v. United States, 739 F.2d 362, 365 (8th Cir. 1984).

[101] *See Brown*, 348 U.S. at 112.

scholar has advocated rejection of the discipline factor as a rationale for the *Feres* rule,[102] it continues to enjoy the favor of most courts.[103]

4. *Existence of Alternative Compensation*

A subject of greater criticism has been the "existence of alternative compensation" rationale.[104] The *Feres* Court breathed life into this rationale by concluding that Congress did not intend the FTCA to apply to the military, since legislation had already been enacted providing for disability payments to injured servicemen.[105] The FTCA's legislative history revealed no congressional utterances on this issue.[106] The Court, however, found this silence indicative of congressional intent to make the existing veterans' compensation scheme an exclusive remedy.[107]

One of the criticisms leveled at alternative compensation focuses on the Supreme Court's inconsistent treatment of the rationale.[108] The Court has also been condemned for assuming that disability payments offer a

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[102] Note, *From Feres to Stencel*, *supra* note 14, at 1104-09, and the sources cited therein.

[103] *See, e.g.*, Hunt v. United States, 636 F.2d 580, 598-99 (D.C. Cir. 1980) (allowing Swine Flu Act recovery by servicemen who contracted disease after receiving swine flu shots, and noting that "the protection of military discipline . . . serves largely if not exclusively as the predicate for the *Feres* doctrine"); *Johnson*, 749 F.2d at 1539 (allowing prosecution of plaintiff's claim since it "cannot conceivably involve or compromise . . . the military disciplinary structure").

[104] *See, e.g.*, Note, *From Feres to Stencel*, *supra* note 14, at 1104-09.

[105] *Feres*, 340 U.S. at 144. When the Court handed down the *Feres* decision, disability payments to veterans were awarded pursuant to various laws included in Title 38 of the United States Code. These laws have since been completely revised by the Veterans' Benefits Act, Pub. L. No. 85-857, § 1, 72 Stat. 1105 (1958).

[106] *Feres*, 340 U.S. at 138.

[107] *Id.* at 140. The *Feres* Court concluded that Congress passed the FTCA to extend compensation to the remediless, not to those who already enjoyed a comprehensive system of relief. *Id. See* Note, *From Feres to Stencel*, *supra* note 14, at 1105-06, for a further discussion of why the Court reached this conclusion.

[108] *See, e.g.*, *Parker*, 611 F.2d at 1011-12; Brief of Appellant at 12, Johnson v. United States, 749 F.2d 1530 (11th Cir. 1985) [hereinafter cited as Brief of Appellant]. As an example of this inconsistent treatment, compare Brooks v. United States, 337 U.S. 49, 53 (1949) (veterans' benefits should be set off against but should not bar FTCA recovery), with *Feres*, 340 U.S. at 144 (veterans' benefits preclude FTCA recovery).

"simple, certain and uniform"[109] alternative to FTCA recovery.[110] Unlike most other compensation schemes, which create a vested right in the beneficiary, veterans' awards are conditional in nature.[111] Temporary or permanent forfeiture of the award can occur for a number of reasons, including imprisonment, treason, subversive activities, conscientious objection, and homosexuality.[112]

Because of the attacks upon the alternative compensation rationale, some courts have come close to rejecting the rationale as a valid justification for the *Feres* doctrine.[113] While one of the Supreme Court's most recent opinions reaffirmed the alternative compensation rationale,[114] the Court has questioned its viability in the past.[115] This questioning exemplifies the Supreme Court's inconsistent treatment of the alternative compensation rationale.[116] In some cases, the Court has nearly ignored the rationale, while in other decisions the Court lists the rationale as a major foundation for the *Feres* doctrine.[117]

5. *Distinctively Federal Character*

The vitality of the somewhat nebulous "distinctively federal character" rationale has also been questioned.[118] Closely related to both the discipline and uniformity concerns, this leg of the *Feres* doctrine stands on the unique

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[109] *Feres*, 340 U.S. at 144.

[110] *See* Note, *From Feres to Stencel*, *supra* note 14, at 1106-08 (suggesting that veterans' benefits are not as certain as some have assumed).

[111] *Id.* at 1107-08.

[112] *See id.* at nn.51-57 and accompanying text.

[113] *See, e.g.*, *Hunt*, 636 F.2d at 595.

[114] Chappell v. Wallace, 462 U.S. 296, 298 (1983). For a complete discussion of the *Chappell* case, see *infra* notes 145-153 and accompanying text.

[115] *See Brown*, 348 U.S. at 113 (noting that in *Brooks*, 337 U.S. at 53, the Court concluded that Congress did not intend to make veterans' benefits an exclusive remedy).

[116] *See infra* note 117 and accompanying text.

[117] *Compare* Stencel Aero Eng'g Corp. v. United States, 431 U.S. 666, 671-73 (1977) (listing the alternative compensation provided by veterans' benefits as one of three rationales for invoking the *Feres* doctrine), *with Brown*, 348 U.S. at 112 (refusing to apply *Feres* although the plaintiff was eligible for veterans' benefits, since the case did not involve a threat to military discipline).

[118] *See* Note, *From Feres to Stencel*, *supra* note 14, at 1110-12.

relationship which exists between the United States and its service personnel.[119] Courts have usually given deference to military autonomy and the unique role of the American military.[120] The constitutional duopoly enjoyed by the executive and legislative branches with respect to the military,[121] the need to safeguard the military disciplinary structure for national security,[122] and other military-unique concerns[123] played a part in prompting the judicial restraint found in *Feres*.[124]

Despite the judiciary's reluctance to involve itself with military cases, the "distinctively federal" argument has been criticized.[125] To begin with, the Supreme Court has become increasingly willing to review court-martial and military administrative decisions.[126] One author has asserted that military autonomy issues in tort cases would be identical to military autonomy questions in court-martial and administrative review cases.[127] Hence, the federal relationship issue should not bar judicial review of FTCA claims made by soldiers.[128] Secondly, the "distinctively federal" argument could be made just as forcefully with

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[119] *Feres*, 340 U.S. at 143.

[120] *See supra* note 21 and accompanying text. *See also* Barker, *Military Law — A Separate System of Jurisprudence*, 36 U. CIN. L. REV. 223, 226-37 (1967).

[121] U.S. CONST. art. I, § 8 gives Congress the power to raise and support armies, to maintain a navy, to make rules for the government of the armed forces, and to organize, train and equip a militia. U.S. CONST. art. II, § 2 cl. 1 makes the President the "Commander in Chief of the Army and Navy of the United States."

[122] *See* Sherman, *Legal Inadequacies and Doctrinal Restraints in Controlling the Military*, 49 IND. L. J. 539, 540-41 (1974). Sherman asserts that courts frequently back away from judicial review of military cases because the "very survival of the nation" rests in the hands of the military. *Id.* at 540.

[123] *See generally* Note, *From Feres to Stencel*, *supra* note 14, at 1109-12 (noting that frequently allowing FTCA claims by injured servicemen raises fears that soldiers will begin to "second-guess" orders, or that discipline could be affected by the testimony of one soldier against another).

[124] *See Feres*, 340 U.S. at 141-46.

[125] Note, *From Feres to Stencel*, *supra* note 14, at 1109-12.

[126] *Id.* at 1114-17. *See, e.g.*, Reid v. Covert, 354 U.S. 1 (1956) (sharply curtailing Uniform Code of Military Justice jurisdiction over civilians); Harmon v. Brucker, 355 U.S. 579 (1958) (broadening the path to civilian court review of military administration decisions).

[127] Note, *From Feres to Stencel*, *supra* note 14, at 1114-17.

[128] *Id.* at 1118.

respect to other federal agencies that do not enjoy immunity from FTCA claims.[129] Despite these criticisms, the Supreme Court continues to cling to the "distinctively federal" rationale.[130]

C. *A Revival of the* Feres *Rationales?*

1. *Stencel Aero Engineering Corp.* v. *United States*

By the mid-1970's, disgruntlement with the *Feres* doctrine prompted expectations that the Supreme Court might discard the rule.[131] At the very least, one might have expected the Court to deliver a death blow to the widely-discredited "distinctively federal" and "alternative compensation" rationales.[132] The expected mortal wounds never came.[133] Instead, the Supreme Court breathed new life into the *Feres* doctrine with the 1977 case of *Stencel Aero Engineering Corp. v. United States*.[134] In

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[129] Jaffe v. United States, 663 F.2d 1226, 1233 n.7 (3d Cir. 1981) (en banc), *cert. denied*, 456 U.S. 972 (1982). In a case barring tort recovery to a former soldier injured in radiation tests of a nuclear device, the *Jaffe* court noted that the "distinctively federal" argument probably serves only to reinforce the other *Feres* rationales. *Id.* at 1233. A major weakness of the "distinctively federal" rationale is that similar arguments could be made regarding the " 'Bureau of the Census, the Immigration and Naturalization Service, and many other agencies of the Federal Government' " not immune from FTCA liability. *Id.* at 1233 (quoting *Stencel*, 431 U.S. at 675 (Marshall, J., dissenting)).

[130] *See, e.g.*, *Stencel*, 431 U.S. at 672, stating that "the ['distinctively federal character' rationale] considered in *Feres* operates with equal force in this case." *Id.*

[131] *See, e.g.*, Veillette v. United States, 615 F.2d 505, 507 (9th Cir. 1980) (rejecting an FTCA claim filed by the parents of a serviceman whose death was allegedly attributable to naval hospital negligence, the court concluded that it had no choice but to follow *Feres*, despite the doctrine's anomalies); Peluso v. United States, 474 F.2d 605, 606 (3d Cir.) *cert. denied*, 414 U.S. 879 (1973) (reluctantly rejecting the FTCA claim brought by the parents of a national guardsman killed by the alleged negligence of an Army hospital, and stating, "[I]f the matter were open to us we would be receptive to the appellants' argument that *Feres* should be reconsidered."); Hitch, *The Federal Tort Claims Act and Military Personnel*, 8 RUTGERS L. REV. 316 (1954); Rhodes, *The Feres Doctrine After Twenty-Five Years*, 18 A.F.L. REV. 24 (1976).

[132] *See generally* Brief of Appellant, *supra* note 108, at 11-17. The Appellant quoted *Hunt*, 636 F.2d at 599: "[T]he protection of military discipline . . . serves *largely if not exclusively* as the predicate for the *Feres* doctrine." Brief of Appellant, *supra* note 108, at 13 (emphasis added).

[133] *See infra* note 134 and accompanying text.

[134] 431 U.S. 666 (1977).

Stencel, a National Guard officer received permanent injuries when his fighter aircraft's ejection system malfunctioned during a mid-air crisis.[135] The disabled pilot filed suit against both the Government and Stencel, the manufacturer of the ejection system.[136] Stencel brought a cross-claim against the United States, seeking indemnity for its own liability to the pilot.[137] The lower courts barred both the pilot's and Stencel's claims against the Government, and Stencel appealed.[138] The Supreme Court, applying the *Feres* doctrine, affirmed the denial of FTCA recovery by the manufacturer.[139] The Court not only reaffirmed the *Feres* doctrine, but "dusted off and reasserted"[140] the "distinctively federal" and "alternative compensation" rationales.[141] These rationales, in addition to the "military discipline" consideration, were recognized in *Stencel* as the analytical triad upon which *Feres* rested.[142]

2. *Chappell v. Wallace*

The *Stencel* Court's cursory treatment of the *Feres* doctrine's rationales[143] has prompted suggestions that the decision amounts to a judicial aberration, which should be overturned.[144] However, in *Chappell v. Wallace*,[145] the

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[135] *Id.* at 667.

[136] *Id.* at 668.

[137] *Id.*

[138] *Id.*

[139] *Id.* at 673-74. For an extensive discussion of how the *Feres* rule affects U.S. defense contractors, see Note, *Stencel Aero Engineering Corp. v. United States: An Expansion of the Feres Doctrine to Include Military Contractors, Subcontractors, and Suppliers*, 29 HASTINGS L.J. 1217 (1978).

[140] *Parker*, 611 F.2d at 1011.

[141] *Stencel*, 431 U.S. at 671-73.

[142] *Id.*

[143] Chief Justice Burger's majority opinion accepted the *Feres* rationales without any apparent analysis of their merit. *Id.* at 669-74. Despite an exhaustive dissent, *id.* at 674-77, the majority failed to acknowledge any of the criticisms directed at the doctrine during its twenty-five year history.

[144] *See In re "Agent Orange,"* 580 F. Supp. at 1246-47 (citing several post-*Stencel* cases which apply *Feres* "reluctantly" and question the continuing viability of its theoretical bases). *See also* Brief of Appellant, *supra* note 108, at 17-19.

[145] 462 U.S. 296 (1983).

Supreme Court recently gave implicit approval to the reasoning in *Stencel*.[146] In *Chappell*, five Navy enlisted men sued their superior officers for alleged unconstitutional discrimination.[147] The plaintiffs urged that because of their minority race, the defendant officers failed to assign them desirable duties and gave them low performance evaluations.[148] The Court noted that the remedy sought depended on the absence of "special factors counselling hesitation."[149] The Court identified these "special factors" as the same *alternative compensation*, *distinctively federal*, and *military discipline* factors enunciated in *Stencel* as the backbone of the *Feres* doctrine.[150] Finding these factors were present, the *Chappell* Court denied recovery by the enlisted men.[151] For the moment at least,[152] the *Chappell* reasoning indicates that *Stencel's* reaffirmation of *Feres* and its theoretical underpinnings "is beyond question . . . the

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[146] *See id.* at 299.

[147] *Id.* at 297. While federal officials generally are immune from such suits, the Supreme Court has authorized recovery against federal agents whose actions amount to a serious violation of an individual's constitutional rights. *See* Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388 (1971) (holding agents of the Federal Bureau of Narcotics liable for the warrantless entry of the petitioner's apartment, since it clearly violated his fourth amendment right to privacy).

[148] *Chappell*, 462 U.S. at 297.

[149] *Id.* at 298 (quoting *Bivens*, 403 U.S. at 396).

[150] *Id.* at 298-99.

[151] *Id.* at 305.

[152] The Supreme Court's most recent admonition on the application of *Feres* appears in United States v. Shearer, 105 S. Ct. 3039 (1985). In *Shearer*, the Court concluded that *Feres* barred FTCA recovery by a mother whose Army private son was murdered by a fellow soldier while off duty and away from the base. *Id.* at 3041. The Court saw the plaintiff's allegation that the Army negligently failed to exercise control over the murderer as a claim which "goes directly to the 'management' of the military [calling] into question basic choices about . . . discipline." *Id.* at 3043. Although it cited *Stencel* with approval, the Court skirted the "distinctively federal" and "alternative compensation" rationales endorsed by *Stencel*. The *Shearer* majority did assert, however, that "[t]he *Feres* doctrine cannot be reduced 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." *Id.* The Supreme Court handed down the *Shearer* opinion shortly after the panel decision in *Johnson*. The per curiam opinion from the en banc rehearing in *Johnson* relied on the *Shearer* language quoted above to support its reinstatement of the panel decision. *See infra* note 211 and accompanying text.

law."[153]

II. THE STATUS OF THE TORTFEASOR: PAVING THE WAY FOR INTERCIRCUIT CONFLICT

In *Uptegrove v. United States*,[154] the Ninth Circuit denied FTCA recovery on facts "strikingly similar"[155] to those in *Johnson*.[156] The *Uptegrove* court barred an FTCA suit by the widow of a Navy Lieutenant killed in the crash of an Air Force C-141 transport, allegedly caused by the negligence of three civilian FAA air traffic controllers.[157] The *Uptegrove* court did not consider the tortfeasors' *civilian* status important, stating that "the status of the deceased or injured person controls."[158] The *Uptegrove* decision followed an earlier Ninth Circuit case, *United States v. Lee*,[159] which employed similar reasoning in denying FTCA recovery to two active-duty marines killed in an airplane crash that allegedly resulted from FAA controller negligence.[160] A decision from the Seventh Circuit, *Layne v. United States*,[161] also refused to consider the status of the tortfeasor in applying *Feres*.[162] The *Layne* court refused to allow an FTCA proceeding by the widow of an Air National Guardsman killed in a training flight accident, although the alleged tortfeasors were civilian employees of the FAA.[163]

Cases from three other federal circuits have also disregarded the status of the tortfeasor in analyzing FTCA claims by service personnel, although these cases differ

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[153] *Johnson*, 749 F.2d at 1535.

[154] 600 F.2d 1248 (9th Cir. 1979), *cert. denied*, 444 U.S. 1044 (1980).

[155] *Johnson*, 749 F.2d at 1539.

[156] *Uptegrove*, 600 F.2d at 1251.

[157] *Id.*

[158] *Id.* (quoting United States v. Lee, 400 F.2d 558, 562 (9th Cir. 1968), *cert. denied*, 393 U.S. 1053 (1969)).

[159] 400 F.2d 558 (9th Cir. 1968), *cert. denied*, 393 U.S. 1053 (1969).

[160] *Id.* at 562.

[161] 295 F.2d 433 (7th Cir. 1961), *cert. denied*, 368 U.S. 990 (1962).

[162] *Id.* at 436.

[163] *Id.*

factually from *Uptegrove*, *Lee* and *Layne*.[164] In *Potts v. United States*,[165] a Sixth Circuit case, a medical corpsman received injuries while aboard a Navy landing craft when a cable used to hoist the craft onto a Navy ship snapped and struck him.[166] The crewmen responsible for operating the hoist were civilians.[167] The injured corpsman sued the United States.[168] The Sixth Circuit, applying the *Feres* doctrine, denied recovery without even mentioning the civilian status of the hoist operators.[169]

The Tenth Circuit in *Carter v. City of Cheyenne*,[170] relied on a *Stencel*-type application of *Feres* to preclude a third-party claim against the United States by the City of Cheyenne, Wyoming.[171] The City sought indemnity after being named a defendant in an action brought by the family of an Air Force Thunderbird pilot killed in a runway crash at the municipal airport in Cheyenne.[172] The court cited *Uptegrove* and agreed that "the status of the deceased or injured person . . . controls in determining whether the claimant may recover under the Tort Claims Act."[173] Hence, the court concluded that the Air Force pilot could not have sued the United States successfully and, under *Stencel*, it necessarily followed that the City should not be allowed to recover.[174]

In *Hass v. United States*,[175] a United States Marine received injuries while riding a horse rented from a stable

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[164] *See infra* notes 165-179 and accompaning text.

[165] 723 F.2d 20 (6th Cir. 1983), *cert. denied*, 104 S. Ct. 2172 (1984).

[166] *Id.*

[167] *Id.*

[168] *Id.* The plaintiff actually sued under the Public Service Vessels Act, 46 U.S.C. §§ 781-90 (1982), and the Suits in Admiralty Act, 46 U.S.C. §§ 741-52 (1982), rather than the FTCA. The court concluded, however, that *Feres* applied with equal force to suits by military personnel under these acts. *Potts*, 723 F.2d at 22.

[169] *Potts*, 723 F.2d at 22.

[170] 649 F.2d 827 (10th Cir. 1981).

[171] *Id.* at 831.

[172] *Id.* at 827.

[173] *Id.* at 830.

[174] *Id.* at 830-31.

[175] 518 F.2d 1138 (4th Cir. 1975).

owned and operated by the government.[176] The stable managers were civilian employees of the government.[177] The United States Court of Appeals for the Fourth Circuit held that the *Feres* doctrine barred the injured marine's FTCA claim against the government.[178] As to the civilian status of the alleged tortfeasors, the court stated:

> Although relevant to the ultimate fact inference to be drawn, it is not, we think, essential to application of the *Feres* doctrine that the injury to the serviceman have been caused by another member of the military rather than a civilian employee of the military. [In this case the stable managers'] civilian status did not affect their job performance . . . we hold that their civilian status does not operate to prevent application of the *Feres* doctrine.[179]

III. *JOHNSON V. UNITED STATES* — THE COURT'S ANALYSIS

The *Johnson* court confronted the issue of whether the *Feres* doctrine bars an FTCA suit for the death of an active-duty serviceman, allegedly caused by the negligent conduct of civilian employees of the FAA.[180] After wading through the doctrine's murky history,[181] the court addressed the arguments raised by both parties.

The court discussed the erosion of the "distinctively federal" and "alternative compensation" rationales in *Brown* and *Muniz*,[182] but refused to accept the plaintiff's contention that the "military discipline" concern provides the only solid ground for an application of *Feres*.[183] The plaintiff argued that while *Chappell* discussed all three of the *Feres* rationales reaffirmed in *Stencel*, the reasoning in

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[176] *Id.* at 1139.
[177] *Id.* at 1141.
[178] *Id.* at 1142.
[179] *Id.* at 1141.
[180] *Johnson*, 749 F.2d at 1531.
[181] *Id.* at 1532-35.
[182] *Id.* at 1533-34.
[183] *Id.* at 1534-35. *See* Brief of Appellant, *supra* note 108, at 20, for a more thorough treatment of the plaintiff's argument on this issue.

Chappell emphasizes the "military discipline" rationale and "implicitly disavows the first two makeweights historically mustered in support of the *Feres* doctrine."[184] The court rejected this assertion, noting that *Chappell* did not confine itself to the "military discipline" factor, but also considered the "alternative compensation" and "distinctively federal character" rationales.[185] The court also rejected an argument that their earlier decision in *Parker v. United States*,[186] although denying FTCA recovery, had discarded the widely-criticized rationales.[187]

Finally, the *Johnson* court considered the plaintiff's proposition as requiring an analysis of the discipline factor on a case-by-case basis.[188] The court stated that this approach would prove impractical, since "the Armed Services would be faced with maintaining a claims department."[189] The court acknowledged the willingness of some jurisdictions to adopt this approach,[190] but concluded that a case-by-case inquiry serves efficiency only when a case presents a factual situation "radically different from the typical *Feres* doctrine case."[191] If such a situation exists, the rationales of the doctrine must be

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[184] Reply Brief of Appellant at 6, Johnson v. United States, 749 F.2d 1530 (11th Cir. 1985) [hereinafter cited as Reply Brief of Appellant]. The plaintiff based this argument on *Chappell's* recognition that " '[i]n the last analysis, *Feres* seems best explained by the . . . effects on the maintenance of such suits on discipline.' " *Chappell*, 462 U.S. at 301 (quoting *Muniz*, 374 U.S. at 162).

[185] *Johnson*, 749 F.2d at 1535 n.4.

[186] 611 F.2d 1007 (5th Cir. 1980).

[187] The plaintiff suggested that *Parker* had rejected the "distinctively federal" and "alternative compensation" rationales. The author of the *Johnson* opinion, Judge Fay, also wrote the *Parker* opinion. While *Parker* is a Fifth Circuit decision, it acts as binding precedent on Eleventh Circuit cases (such as *Johnson*), thanks to a recent reorganization of the federal circuit court system. *See* Fifth Circuit Court of Appeals Reorganization Act of 1980, Pub. L. No. 96-452, 94 Stat. 1994 (codified as amended at 28 U.S.C. § 41 (1982)). While acknowledging *Parker's* force, the *Johnson* court rejected the plaintiff's assertion that *Parker* had departed from the original *Feres* doctrine. *See Johnson*, 749 F.2d at 1537 n.7.

[188] *Johnson*, 749 F.2d at 1536 n.6.

[189] *Id.* (quoting Hall v. United States, 451 F.2d 353, 354 (1st Cir. 1971)).

[190] *See, e.g.*, Johnson v. United States, 704 F.2d 1431 (9th Cir. 1983) (rejecting application of *Feres* although both claimant and tortfeasor were active-duty servicemen, since the claims involved could not possibly affect military discipline).

[191] *Johnson*, 749 F.2d at 1537 n.6.

consulted to ascertain its applicability.[192] However, when the standard *Feres* paradigm presents itself — *i.e.*, when both the victim and tortfeasor are employees of the armed services — the sole question is whether or not the injuries were incurred incident to service.[193]

In *Johnson*, the court concluded that the events surrounding the decedent's crash made the case factually dissimilar to *Feres*.[194] The court agreed with the plaintiff[195] that the civilian status of the FAA ground controllers required more than a blind application of the *Feres* rule.[196] This finding precluded the Government's argument that "[t]he status of the deceased, not the status of the tortfeasor, controls."[197]

Finding the facts in *Johnson* distinguishable from the *Feres* paradigm, the court proceeded to analyze the case in light of the policies supporting the *Feres* doctrine.[198] Although the court refused to accept the plaintiff's contention that the first two rationales for the doctrine were no longer viable,[199] the court recognized that the discipline factor "serves largely if not exclusively as the predicate for the *Feres* doctrine."[200] Applying the *Feres* policies to the *Johnson* facts, the court concluded that not only could the conduct of the civilian tortfeasors be scrutinized without implicating the military services, but the case presented no danger of compromising military discipline.[201] The court then decided that the plaintiff's FTCA

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[192] *Johnson*, 749 F.2d at 1537.

[193] *Id.*

[194] *Id.* at 1537-39.

[195] Reply Brief of Appellant, *supra* note 184, at 3.

[196] *Johnson*, 749 F.2d at 1539.

[197] Brief for the United States at 9, Johnson v. United States, 749 F.2d 1530 (11th Cir. 1985).

[198] *Johnson*, 749 F.2d at 1535-39.

[199] *See supra* notes 186-187 and accompanying text.

[200] *Johnson*, 749 F.2d at 1539 (quoting *Hunt*, 636 F.2d at 599).

[201] *Id.* In an initial Petition for Rehearing (which the court denied, *id.* at 1530), the Government accused the court of focusing solely on the discipline factor, at the expense of the other rationales the opinion expressly acknowledged. *See* Petition for Rehearing and Suggestion for Rehearing En Banc at 8, Johnson v. United States, 749 F.2d 1530 (11th Cir. 1985) [hereinafter cited as Petition for Rehear-

claim should be allowed to proceed.[202]

The court criticized the conflicting opinion of the Ninth Circuit in the *Uptegrove* case decided on facts similar to those in *Johnson*.[203] According to *Johnson*, the *Uptegrove* court had applied the *Feres* doctrine blindly by ignoring the civilian status of the tortfeasor.[204] The court concluded that the Ninth Circuit approach "has the virtue of easy application, [but is not] the better jurisprudential course."[205] Furthermore, recent developments in the *Feres* area raised doubts about the continuing force of the *Uptegrove* approach, even within the Ninth Circuit.[206]

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ing]. The Eleventh Circuit Court of Appeals later granted a second request by the Government for an en banc rehearing in the *Johnson* case. 760 F.2d 244 (11th Cir. 1985). This action temporarily vacated the original panel opinion analyzed in this casenote. Following en banc review, a majority of the full court decided to reinstate the panel opinion. Johnson v. United States, No. 83-5764 (11th Cir. Jan. 13, 1986) (per curiam). For a complete discussion of the per curiam and dissenting opinions following the en banc rehearing, *see infra* notes 207-215 and accompanying text.

[202] *Johnson*, 749 F.2d at 1539.

[203] *Id.* at 1539-40.

[204] *Id.* at 1540.

[205] *Id.* (quoting Brown v. United States, 739 F.2d 362, 366 (8th Cir. 1984)).

[206] *Johnson*, 749 F.2d at 1540 n.12. *See, e.g.*, Johnson v. United States, 704 F.2d 1431 (9th Cir. 1983) (allowing the FTCA claim of an active-duty serviceman injured by another active-duty serviceman in an after-hours car wreck, since the suit would not affect military discipline); Brown v. United States, 715 F.2d 463 (9th Cir. 1983) (refusing to apply *Feres* in an FTCA suit by active-duty servicemen for injuries sustained from mandatory swine flu innoculations, and rejecting the Government's contention that application of the *Feres* doctrine depends strictly upon the plaintiff's status). The plaintiff argued that both of these recent Ninth Circuit cases undermined that circuit's earlier postion. *See* Brief of Appellant, *supra* note 108, at 13-15.

It should be noted that the Ninth Circuit may soon foreclose further speculation on its continued adherence to the *Uptegrove* approach. Lieutenant Johnson's fellow crew member, Mr. Gilardy, also died in the helicopter crash on Molokai Island. Mr. Gilardy's estate has appealed a *Feres*-based denial of FTCA recovery, and that appeal is pending before the Ninth Circuit. *See* Gilardy v. United States, No. 84-2269 (9th Cir. filed Oct. 12, 1984). Following the Eleventh Circuit's decision to rehear *Johnson* en banc, *see supra* note 201, the Ninth Circuit issued an order deferring resolution of the *Gilardy* appeal " 'pending the filing of the Eleventh Circuit's en banc decision in *Johnson*.' " Supplemental Brief of Appellant on Rehearing En Banc at 5 n.2, Johnson v. United States, 749 F.2d 1530 (11th Cir. 1985) (quoting the unpublished order from the Ninth Circuit). On February 10, 1986, less than thirty days after the Eleventh Circuit handed down the en banc opinion in *Johnson*, the Ninth Circuit notified the parties in *Gilardy* that the court was ready to resume deliberation on the *Gilardy* appeal. Telephone conversation

Subsequent to filing of the panel opinion in *Johnson*, the Government sought review by the full court of the Eleventh Circuit.[207] The court denied the Government's original motion for rehearing en banc, but granted a second, similar request.[208] This action temporarily vacated the panel opinion.[209] Following rehearing, however, a majority of the court issued a per curiam opinion reinstating the panel opinion.[210] The court stated:

> [W]e find that the panel opinion has given proper consideration to the *Feres* factors with particular attention to whether or not the claims asserted here will implicate civilian courts in conflicts involving the military structure or military decisions. The claims presented here are based solely upon the conduct of civilian employees of the [FAA]. The fact that the decedent was a helicopter pilot for the United States Coast Guard is not sufficient, standing alone, to activate the *Feres* preclusion.[211]

Three judges joined in dissent from the decision to rein-

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with Don Salem, counsel for Mr. Gilardy's estate (Feb. 24, 1986). Since the panel opinion in *Johnson* now has been upheld by a majority of the full court, the Ninth Circuit presumably will have to determine whether it will follow the *Johnson* lead or reaffirm its *Uptegrove* position on the tortfeasor status issue.

[207] *See supra* note 201.

[208] Johnson v. United States, 760 F.2d 244 (11th Cir. 1985). *See supra* note 201.

[209] *See supra* note 201.

[210] Johnson v. United States, No. 83-5764 (11th Cir. Jan. 13, 1986) (per curiam).

[211] *Id.* The court found support for the *Johnson* approach in Shearer v. United States, 105 S. Ct. 3039 (1985). The Supreme Court handed down the *Shearer* decision after the panel opinion had been filed in *Johnson*. Although *Shearer* differed factually from *Johnson*, en banc review in *Johnson* led to a conclusion that the panel opinion comports with the *Shearer* suggestion that " '[t]he *Feres* doctrine cannot be reduced 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.' " Johnson v. United States, No. 83-5764 (11th Cir. Jan. 13, 1986) (per curiam) (quoting *Shearer*, 105 S. Ct. at 3043). The dissent in the *Johnson* rehearing argued that the majority of the full court had misinterpreted the *Shearer* language as a mandate for case-by-case application of the *Feres* rationales. *Id.* (Johnson, J., dissenting). The dissent read the quoted passage as simply a reaffirmance that "each case should be examined in light of the traditional application of the exception — *not* that each case should be scrutinized under each *Feres* rationale." *Id.* For additional discussion of the dissenting opinion, *see infra* notes 212-215 and accompanying text.

state the panel opinion.[212] The dissent argued that the majority reinstatement reflects "a novel way to evade the commands [of binding precedent] to allow recovery."[213] The dissent insisted on a traditional "incident to service" inquiry, stating that "cases in which a serviceman was injured incident to service by a civilian government employee are hardly novel. This fact pattern has appeared consistently over the years. And just as consistently, no court until now has allowed recovery against the government in this sort of suit."[214] The true "*Feres* factual paradigm," according to the dissent, includes all situations involving injuries incident to military service, regardless of the government tortfeasor's civilian or military status.[215]

IV. THE IMPLICATIONS OF *JOHNSON*

Those who have ventured into the *Feres* jungle are all too familiar with the quicksands awaiting one who would explore the implications of a case like *Johnson*.[216] Despite the anomalies of the *Feres* doctrine, some cautious observations can be made about the effects of the *Johnson* holding. First, *Johnson* admittedly stands in direct conflict with the decisions of another federal circuit.[217] A closer examination of the circuits suggests that at least two, and perhaps as many as five circuits, have reached a result opposite from that reached in *Johnson*.[218] Resolution of this conflict may require guidance from the United States

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[212] Johnson v. United States, No. 83-5764 (11th Cir. Jan. 13, 1986) (Johnson, J., dissenting).

[213] *Id.*

[214] *Id.* The dissent cited a number of cases to support this statement, including the *Uptegrove*, *Lee*, *Layne*, *Potts*, *Carter*, and *Hass* decisions discussed *supra* notes 154-178 and accompanying text.

[215] *Id.*

[216] *See* Veillette v. United States, 615 F.2d 505, 507 (9th Cir. 1980) (admitting that *Feres* sometimes creates anomalies).

[217] *See Johnson*, 749 F.2d at 1539.

[218] *See supra* notes 158-178 and accompanying text. *Johnson* did not address these other decisions.

Supreme Court.[219]

Next, the *Johnson* decision does little to remove the confusion surrounding the *Feres* doctrine, its rationales, and its applicability. For example, the case does not offer guidance as to whether the doctrine can be invoked without a nexus between the claim and military discipline. Similarly, *Johnson* provides no certain directive on what course to take if the suit would affect military discipline, but one or both of the first two rationales are missing. If anything, *Johnson* adds to the confusion. While purporting to recognize the continuing viability of all three *Feres* rationales, the opinion arguably focused solely on the discipline factor to reach its result.[220]

The case undoubtedly increases the government's exposure to FTCA liability. By the same stroke, it opens up new avenues of compensation for injured military personnel. At least in the Eleventh Circuit, the government no longer will be able to rely on boilerplate arguments when sued by an active-duty serviceman injured at the hands of a civilian federal employee. The United States will be able to block such claims only by showing that the rationales for *Feres* apply. *Johnson* probably will not adversely affect military discipline, despite government contentions to the contrary,[221] since it requires a fresh analysis of the discipline factor each time the *Johnson* paradigm arises. When the tortfeasor is a civilian employee of the government, *Johnson* refuses to implicate the discipline rationale auto-

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[219] *See* Dombroff, *Commentary on Johnson v. United States*, AV. LITIG. REP., Feb. 17, 1986, at 4608, 4609. Dombroff offers the following observation on the *Johnson* decision:

> It appears that the Supreme Court will once again have the opportunity to consider the liability of the United States. There is little doubt but that intensive discussions are presently on-going in the Justice Department regarding the question of taking the Eleventh Circuit decision in *Johnson* to the Supreme Court. Obviously, if certiorari is not sought or is denied, a profound change will have been made to the complexion of government litigation. The real excitement, however, will arise if certiorai is granted.

Id. at 4609.

[220] *See supra* notes 200-202 and accompanying text.

[221] Petition for Rehearing, *supra* note 201, at 12.

matically as it would in a typical *Feres* paradigm.[222] Instead, an examination of the *Feres* rationales as they apply to the particular facts must ensue.[223] The *Johnson* reasoning presumably would still allow application of the *Feres* doctrine if FTCA recovery would adversely affect military discipline under the circumstances.[224]

Finally, *Johnson's* overall impact on the *Feres* doctrine remains uncertain. Since it concededly involves a fact situation different from the typical *Feres* case,[225] the government may argue that *Johnson* should be dismissed as inapposite in future *Feres* analyses. On the other hand, it may be seen as further erosion of an already much-criticized doctrine.[226]

V. CONCLUSION

Despite its own assertion to the contrary,[227] *Johnson* represents a fresh and novel approach to FTCA claims by military personnel. Granted, other courts have taken the position that the *Feres* rationales must be analyzed when the facts at hand present a twist not found in the *Feres* paradigm.[228] *Johnson*, however, stands alone for the proposition that if the serviceman received his injury at the hands of a *civilian* government employee, the case does not fall automatically into the *Feres* web.

This willingness to break new ground is one of the more admirable attributes of *Johnson*. The opinion serves as a reminder that Congress and the courts have a long way to go in perfecting a system which provides fair and adequate compensation to service personnel victimized by government negligence. It also illustrates the kind of judicial creativity courts have had to employ to avoid the harsh consequences of *Feres*. Certainly the case adds its

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[222] *Johnson*, 749 F.2d at 1540.
[223] *See id.* at 1538.
[224] *See id.* at 1538-40.
[225] *See supra* note 194 and accompanying text.
[226] *See supra* note 55.
[227] *Johnson*, 749 F.2d at 1537-38.
[228] *See, e.g., Stencel*, 431 U.S. at 670.

voice to the chorus of *Feres* criticism, and sounds the reveille for reanalysis of the law in this area.[229]

For the aforementioned reasons, *Johnson* represents a step in the right direction. Nonetheless, the case has some weaknesses. First, the court ignored its opportunity to clarify the probative force of each *Feres* rationale. This omission leaves a cloak of mystery wrapped around the *Feres* rationales. No one knows whether the three rationales are conjunctive requirements, or if one or more can support *Feres* independently.

Another weakness in the opinion lies in the court's reluctance to accept the argument that the military discipline factor must be considered each time the *Feres* defense arises. The court reached the nonsensical conclusion that the discipline rationale must be analyzed when the case involves a *civilian* tortfeasor, but implicates itself automatically when a serviceman receives injuries incident to service at the hands of a fellow serviceman.[230] If it is inappropriate to focus solely on the victim's status in cases like *Johnson*,[231] it becomes equally inappropriate to assume that the rationales are applicable simply because the tortfeasor occupies a military position. The court offers a poor excuse for not requiring analysis of the applicability of the rationales even in a typical *Feres* paradigm, when it suggests that a case-by-case discipline analysis would force the Armed Services to maintain a claims department.[232] This kind of reasoning leads to application of a rule without reason — an approach which the *Johnson* court emphatically rejected.[233] For example, one has difficulty seeing how a claim for injuries received en route to

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[229] While *Johnson* does not expressly criticize the *Feres* rule, a careful reading of the case leaves the impression that the court agrees with many of the criticisms leveled at the doctrine. Similarly, the court at least implicitly acknowledges the need to take a fresh look at *Feres*.

[230] *Johnson*, 749 F.2d at 1537.

[231] *Id.* at 1539-40.

[232] *See id.* at 1536 n.6 (citing *Feres*, 340 U.S. at 146).

[233] *See id.* at 1540. Note that similar blind applications of the sovereign immunity doctrine led to its ultimate downfall. *See supra* note 10 and the sources cited therein.

an optional, military-sponsored beach party[234] has greater adverse effects on discipline than the claim in *Johnson*.[235]

In summary, *Johnson* offers servicemen greater access to the federal compensation system. More importantly, it sheds new light on the problems created by the *Feres* doctrine, and encourages a deeper probe into the rationales supporting *Feres* when new situations arise. Unfortunately, it does not advocate a similar analysis for actions brought by servicemen *qua* servicemen. Hopefully, the *Johnson* decision will prompt new guidance from the Supreme Court, and will not be viewed merely as an exception to the exception.

Mark Lloyd Smith

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[234] *See Degentesh*, 230 F. Supp. at 764.

[235] *Johnson* concluded that the claim in question could not "conceivably impinge on the military disciplinary structure." *Johnson*, 749 F.2d at 1539 n.11. However, given the military's reliance on its close working relationship with the FAA, *see supra* notes 3-4 and accompanying text, the court perhaps dismissed the discipline rationale too quickly and should have given more scrutinous consideration to the role of air traffic controllers in the disciplinary context. According to one observer, however, the relationship between FAA controllers and Coast Guard pilots differs little from the relationship between FAA controllers and civilian pilots. Conversation with Lieutenant Commander Richard Norat, Command Flight Safety Officer, United States Coast Guard Aviation Training Center, Mobile, Alabama (Feb. 27, 1986). Lieutenant Commander Norat, who knew Horton Johnson personally, also suggests that the *Johnson* opinion actually may improve discipline. Norat bases this suggestion on the fact that many Coast Guard pilots familiar with the case have greater confidence in a system which acknowledges and deals with controller negligence instead of trying to conceal or ignore such negligence. *Id.*