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THE *FERES* DOCTRINE: SHOULD IT CONTINUE TO BAR FTCA ACTIONS BY SERVICEMEN WHO ARE INJURED WHILE INVOLVED IN ACTIVITIES INCIDENT TO THEIR SERVICE?

STEVEN R. SMITH

I. INTRODUCTION

THE DOCTRINE OF sovereign immunity bars suits against a government by its citizens unless the government consents to be sued.1 For many decades, the primary device used to seek redress for wrongs caused by the United States government and its employees was the private congressional bill.2 In response to the strain that private bills exerted on its workload,3 Congress passed the Federal Tort Claims Act (FTCA) in 1946.4 The FTCA provided, with

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2 A private bill is legislation for the special benefit of an individual citizen. BLACK'S LAW DICTIONARY 1076 (5th ed. 1979); W. WRIGHT, THE FEDERAL TORT CLAIMS ACT 2 (1957). *See infra* text and accompanying notes 37-38.


twelve express exceptions,\(^5\) for a general waiver of sovereign immunity.\(^6\) Since the twelve exceptions did not include claims by one serviceman for the injuries caused by the negligence of another serviceman,\(^7\) the FTCA seemed to give servicemen the same protection as private citizens. The Supreme Court in *Feres v. United States*,\(^8\) however, provided a judicial exception excluding servicemen's claims under the FTCA for injuries arising out of activities *incident to service*.\(^9\) In *Feres* the Supreme Court held that "[t]he Government is not liable under the Federal Tort Claims Act for injuries to servicemen where the injuries arise out of or are in the course of activity incident to service."\(^10\)

This exception, known as the *Feres* doctrine, has great implications for a nation which as of 1980 had an estimated 2,045,000 active members in its armed forces.\(^11\) In addition to active personnel there are 30 million veterans\(^12\) that possibly could have claims against the government for injuries caused by radiation exposure\(^13\) or exposure to chemicals like agent orange.\(^14\) Furthermore, members of the Armed Forces are exposed to a host of other possible injuries which range...
from an army surgeon's negligence during an operation to unsafe living quarters. The application of the Feres doctrine has been far from uniform. As a result of this uneven application many courts and commentators have asked for a re-evaluation of the Feres doctrine and the policies behind it. This comment will review the development of the Feres doctrine and examine the policies supporting it in order to suggest an answer to the question: Should the Feres doctrine continue to bar FTCA actions by servicemen who are injured while engaged in activities incident to their service?

15 For examples see infra text accompanying notes 65-66, 88-90, 127-130.
16 For example see infra text accompanying notes 96-107.
17 For examples see infra text accompanying notes 251-299. See Harten v. Coons, 502 F.2d 1363 (10th Cir. 1974), where a serviceman brought an action under the FTCA for negligently performed vasectomy. The court stated that the serviceman's claim depends on his "status at the time of the injury." Id. at 1365. The court held that the serviceman was on active duty when injury occurred and therefore was barred from bringing suit under the FTCA. Id. at 1365; Hale v. United States, 452 F.2d 668 (6th Cir. 1971), where a serviceman was injured while returning to the base from a valid pass when ordered by the military police into their truck after the MP's had observed plaintiff hitchhiking. The court held plaintiff barred from an FTCA action because he had "re-entered a direct disciplinary relationship with his army command." Id. at 669.; Hall v. United States, 451 F.2d 353 (1st Cir. 1971), where plaintiff's alleged injury was caused by the negligence of an army doctor. The court states that "Feres required no nexus between discipline and injury." Id. at 354.
18 See Jocaby, The Feres Doctrine, 24 HASTINGS L.J. 128 (1969); Rhodes, The Feres Doctrine After Twenty-Five Years, 18 A.F.L. REV. 24 (1976) (Feres should be limited to cases that occur within the scope of the serviceman's normal duty assignment); Note, The Effect of the Feres Doctrine on Tort Actions Against the United States by Family Members of Servicemen, 50 FORDHAM L. REV. 1241 (1982) (the FTCA should be read broadly to allow family members of servicemen to recover) [hereinafter cited as Note, The Effect]; Note, From Feres to Stencel: Should Military Personnel Have Access to FTCA Recovery?, 77 MICH. L. REV. 1099 (1979) (Feres is only a judicially created exception to the FTCA and has no support in the Act's language); Note, Torts Rights of Servicemen Under Federal Tort Claims Act, 45 N.C. L. REV. 1129 (1967) (must wait for Congress to change Feres); Note, The Federal Tort Claims Act: A Cause of Action For Servicemen, 14 VAL. U.L. REV. 527 (1980) (Feres is not supported by the rationale provided by the Feres court) [hereinafter cited as Note, The Federal Tort Claims Act]; Note, In Support of the Feres Doctrine and a Better Definition of "Incident to Service," 56 ST. JOHN'S L. REV. 485 (1982) (Congress should act to change Feres and if not the Court should redefine "incident to service" so that it operates fairly to avoid needless application of Feres); Comment, Malpractice Protection for Military Personnel and the Feres Doctrine: Constitutional Tension for the Military Plaintiff?, 12 U.S.F.L. REV. 525 (1978) (examination of Feres' application to military medical malpractice which indicates that Feres does not violate the equal protection or the due process clauses of the Constitution).
II. HISTORICAL BACKGROUND

A. Sovereign Immunity — Its Development In The United States

The doctrine of sovereign immunity originated in England during the 13th century.\(^1\) The doctrine of sovereign immunity was transplanted to the American political system during the formation of our republic.\(^2\) Alexander Hamilton wrote that “[i]t is inherent in the nature of the sovereignty not to be amenable to the suit of an individual without [the sovereign’s] consent.”\(^2\)

The Supreme Court in 1793 expressed a very different view of the doctrine of sovereign immunity in *Chisholm v. Georgia*.*\(^2\)\(^2\) In *Chisholm*, the state of Georgia was sued for damages resulting from its failure to pay for war supplies received in 1777.\(^2\)\(^3\) The Court, in a four to one decision, decided that a state could be sued without that state’s consent.\(^2\)\(^4\) Reaction to the Court’s decision in *Chisholm* led to the passage of the eleventh amendment.\(^2\)\(^5\) The eleventh amendment provides that “[t]he

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\(^{1}\) See C. Jacobs, supra note 1, at 5-8; Attorneys General, supra note 1, at 1. The doctrine of sovereign immunity as it developed in England meant that the courts could not hear an action against the king. The doctrine was reflected in the adage that “the king can do no wrong.” The doctrine actually was a jurisdictional principle which was based on the assumption that the courts had no jurisdiction over the king because they were his creation and subject to his will. Id. Nevertheless, remedies and procedures that allowed citizens to bring suits against the government developed. See generally Holsworth, *The History of Remedies Against the Crown*, 38 Law Q. Rev. 141 (1922), for a review of the remedies that developed in England to redress the wrongs committed by the Crown.

\(^{2}\) Attorneys General, supra note 1, at 1.

\(^{3}\) The Federalist No. 81, at 487 (A. Hamilton)(C. Ressiter ed. 1961), quoted in Attorneys General, supra note 1, at 1.

\(^{4}\) 2 U.S. (2 Dall.) 419 (1793).

\(^{5}\) C. Jacobs, supra note 1, at 47. The facts of *Chisholm v. Georgia* were not officially reported at the time of the case. The contract under which the merchant supplied the goods required for payment of 63,605 pounds in South Carolina currency which was never paid. Id.

\(^{2}\) 2 U.S. (2 Dall.) at 479. There was no majority opinion, as each of five justices, Iredell, Blair, Wilson, Cushing, and Chief Justice Jay, wrote separate opinions. Id. at 429, 449, 453, 466, 469. A default judgment was entered against the state for failing to appear by the first day of the next term as the court had ordered. The state, however, settled the claim within a year. C. Jacobs, supra note 1, at 55.

\(^{2}\) U.S. Const. amend. XI; W. Wright, supra note 2, at 1. There are two theories that explain why the eleventh amendment was passed. First, the passage reaffirmed a general understanding that existed at the Constitutional convention. The understanding was that the states were immune from suits by private individuals despite the pro-
judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State or by Citizens or Subjects of any Foreign State.  

In 1834, the Supreme Court confronted for the first time the issue of whether sovereign immunity applied to the federal government in United States v. Clarke. Clarke sued the United States seeking to quiet title to some 16,000 acres of land in Florida, which he had received under a grant from the Spanish government before Florida was ceded to the United States in 1819. Chief Justice John Marshall, writing for the Court, stated that "[a]s the United States are not suable of common right, the party who institutes such suit must bring his case within the authority of some act of Congress, or the Court cannot exercise jurisdiction over it."  

The Supreme Court reaffirmed the Clarke holding in United States v. McLemore, stating that "the government is not liable to be sued, except with its own consent, given by law." Thus, the holdings reached in Clarke and McLemore indicated that sovereign immunity applied to the federal government without providing an explanation of policies supporting its application to the federal government. In 1869, the Supreme Court, nearly twenty-five years after McLemore, finally attempted to justify the application of sovereign immunity to the federal government. The Court stated that "[t]he principal is fundamental [as] apply[ed] to every sovereign power, and but for the protection it affords, the government would be unable to perform the various duties for
which it was created.\textsuperscript{34} In 1907, Justice Oliver Wendell Holmes explained that the doctrine of sovereign immunity was based on the "logical and practical ground that there can be no legal right as against the authority that makes the law on which the right depends."\textsuperscript{35}

**B. Development of the Federal Tort Claims Act**

Despite the fact that sovereign immunity is a doctrine that is well established in the American political system, methods developed by which the federal government addressed private claims.\textsuperscript{36} For example, as early as 1792, private bills could be introduced in Congress to satisfy the claims of private individuals.\textsuperscript{37} As the nation grew, however, Congress' duties also grew; and private bills to remedy the wrongs committed by the federal government constituted a mounting burden on the time and energy of the Congress.\textsuperscript{38}

In 1861, President Lincoln requested Congress to devise a more convenient way to handle claims against the federal government.\textsuperscript{39} He stated that "[i]t is as much the duty of the Government to render prompt justice against itself in favor of its citizens as it is to administer the same between private individuals."\textsuperscript{40} In 1855, Congress established the Court of Claims, which provided citizens with a forum to sue the United States on claims arising under government contracts or federal law.\textsuperscript{41}

\textsuperscript{34} Id. at 126.
\textsuperscript{35} Kawananakoa v. Polyblank, 205 U.S. 349, 353 (1907).
\textsuperscript{36} W. Wright, supra note 2, at 2-5.
\textsuperscript{37} Id. at 2. The first private bill for a tort claim was granted to an individual for damages to his home when federal troops occupied it. The bill became effective April 13, 1792. Id.
\textsuperscript{38} Id. at 3 n.7.
\textsuperscript{39} Id. at 3.
\textsuperscript{40} Id.
\textsuperscript{41} Act of February 24, 1855, ch. 122, 10 Stat. 612 (codified at various sections of 28 U.S.C. (1976)). See W. Cowen, P. Nichols & I. Bennett, The United States Court of Claims—A History—Part II (1978). The original bill provided the Court of Claims with nationwide jurisdiction over claims founded on any law of Congress, any regulation of the executive department and any contract, expressed or implied, with the United States government. The Court of Claims could also hear claims referred to it by either the House or Senate. Id. at 96.
Nearly one hundred years later, Congress passed the Federal Tort Claims Act (FTCA), which established a more convenient process for handling claims against the United States arising under tort law. The FTCA was the culmination of over two decades of unsuccessful action by Congress to remove sovereign immunity as a bar to recovery by private individuals for injuries and damages caused by the tortious acts of the federal government and its employees. Passage of the FTCA resulted from the culmination of four factors. First, Congress, in the interest of justice, desired a scheme that would allow a private citizen to satisfy his legal claims for injury and damage suffered because of tortious actions of a government employee acting within the scope of his employment. Second, Congress desired to reduce the burden imposed on it by the thousands of private bills requesting relief from the tortious acts of government employees. Third, Congress perceived an advantage to both the claimant and the government in providing an impartial judicial forum that could discover the facts. Finally, Congress desired a scheme which would expedite the payment of just claims.

The FTCA provides for a general waiver of sovereign immunity by granting the district courts exclusive jurisdiction over civil claims against the United States which:

accru[e] on and after January 1, 1945, for injury or loss of property or personal injury or death caused by the negligence or wrongful act or omission of any employee of the government while acting within the scope of his office or employment, under circumstances where the United States, if a


\[\text{See Gottlieb, The Federal Tort Claims Act—A Statutory Interpretation, 35 GEO. L.J. 1, 2 (1946). There were fifteen separate tort claims bills introduced in Congress starting with the 69th Congress and ending with the 74th Congress. No tort claims bills were introduced in the 75th Congress, but tort claims bills were introduced every Congress thereafter until the 79th Congress passed the Federal Tort Claims Act in 1946. Id.}\]

\[\text{ATTORNEYS GENERAL, supra note 1, at 43.}\]

\[\text{Id.}\]

\[\text{Id.}\]

\[\text{Id.}\]

\[\text{Id.}\]
private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

The FTCA's general waiver of sovereign immunity is limited by several enumerated exceptions. Among the most important exceptions are those which relate to discretionary functions, intentional torts, combatant activities, and claims arising in foreign countries. The discretionary function exception to the FTCA excludes any claim that:

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51 28 U.S.C. § 2680(a) (1976). The two primary United States Supreme Court cases dealing with the discretionary exception to the FTCA are Dalehite v. United States, 346 U.S. 15 (1953), and Indian Towing Co. v. United States, 350 U.S. 61 (1955). In Dalehite, plaintiffs were injured in the explosion of an ammonium nitrate fertilizer container aboard a ship. Dalehite, 346 U.S. at 17. The container was under the control of the United States and was part of its program to ship fertilizer to Europe after the war to increase food supplies. Id. at 19. The Court excluded the claims under the discretionary function exception to the FTCA. Id. at 44. In Indian Towing, the Coast Guard was held to be accountable to plaintiff for its negligent operation of a lighthouse. Indian Towing, 350 U.S. at 70. The Court did not apply the discretionary function exception, stating that once the Coast Guard had undertaken the operation of the lighthouse it was required to exercise due care in its operation. Id. at 69. See generally Harris, Federal Tort Claims Act: Discretionary Function Exception Revisited, 31 U. MIAMI L. REV. 161 (1976); Note The Discretionary Function Exception to the Federal Tort Claims Act, 42 ALB. L. REV. 721 (1978).
52 28 U.S.C. § 2680(h) (1976). See United States v. Neustadt, 366 U.S. 696 (1961). The Court held the Federal Housing Administration was not liable for a negligently prepared inspection and appraisal report that induced plaintiff to pay in excess of the fair market value. Id. at 711. The Court held that the intentional tort exception for misrepresentation applied even though the misrepresentation was the result of negligence. Id. at 706-07. See also Redmon v. United States, 528 F.2d 811 (7th Cir. 1975) (SEC officials were not liable when they permitted plaintiff to be defrauded by a con-man because the misrepresentation exception was applied); Fitch v. United States, 513 F.2d 1013 (6th Cir.) (action for wrongful induction into the armed forces was held barred by the misrepresentation exception), cert. denied, 423 U.S. 866 (1975); Hoesl v. United States, 451 F. Supp. 1170 (N.D. Cal. 1978) (when psychiatrist employed by the United States negligently reported that the plaintiff was suffering a mental disability, plaintiff's action was barred on the exception for defamation). See generally Boger, The Federal Tort Claims Act Intentional Torts Amendment: An Interpretative Analysis, 54 N.C.L. REV. 497 (1976).
53 28 U.S.C. § 2680(j) (1976). See Johnson v. United States, 170 F.2d 767 (9th Cir. 1948) (action for damages to clam farm barred under the combatant activities exception because damages had occurred in 1945 as the result of naval ships leaking oil into Discovery Bay in Washington).
[is] 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.55

The exception for discretionary functions has been the subject of much litigation.56 Some courts have limited the discretionary exception to basic policy decisions involving planning level activities.57 Nevertheless, there appears to be "little concrete guidance in locating the lower limit"58 on planning activities beyond which the government will be held liable.59 The exception for intentional torts bars an FTCA action for claims "arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights."60 The combatant activities exception applies to "any claim arising out of combatant activities of the military or naval forces, or the Coast Guard during time of war."61 The exceptions for claims occurring in a foreign country mean that the tort must have been committed within the

55 See generally Attorneys General, supra note 1, at 43; supra note 48 and accompanying text. See also Downs v. United States, 522 F.2d 990 (6th Cir. 1975) (negligent handling of airplane hijacking by FBI); Ingham v. Eastern Airlines, 373 F.2d 227 (2d Cir.) (negligent operation of airport control tower not protected by discretionary exception), cert. denied, 389 U.S. 931 (1967); Estrada v. Hills, 401 F. Supp. 429 (N.D. Ill. 1975) (mismanagement of government property).

56 Attorneys General, supra note 1, at 43; Ingham v. Eastern Airlines, 373 F.2d 227 (2d Cir.), cert. denied, 389 U.S. 931 (1967). Where the United States decided to establish and operate air traffic control system, the court held that action under the FTCA was barred by discretionary function exception because it was a policy decision that was the exercise of discretion at the planning level. Id.

57 Blessing v. United States, 447 F. Supp. 1160 (E.D. Penn. 1978) ("the critical inquiry [in deciding the applicability of the discretionary function exception is] not whether judgment was exercised but also whether the nature of the judgment called for policy considerations").

58 Id.


60 Id.

United States or its possessions and territories. Despite these and other exceptions, the FTCA has produced a large volume of suits against the United States. At this time there are over three thousand FTCA suits pending before the federal courts and the total damages sought have approached the five billion dollar mark.

III. THE APPLICATION OF THE FTCA TO CLAIMS BY MILITARY PERSONNEL

A. The Early Cases

In 1948, Jefferson v. United States became the first case to address the application of the FTCA to military personnel. The plaintiff in Jefferson brought a FTCA action against the government because of the alleged negligence of an army doctor in leaving a towel inside the plaintiff after a gall bladder operation. The district court found that the traditional exceptions to the FTCA were not present. The district court, however, recognized that there was an implied exception based on the special relationship which had traditionally existed between the government and the members of its armed forces. The district court also observed that the FTCA repealed section 223b of the Military Claims Act (MCA), which had authorized the Secretary of the Army to decide and settle any claims not exceeding one thousand dollars which were caused by "military personnel or civilian em-

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64 Id.
67 See supra text accompanying notes 50-62.
68 77 F. Supp. at 712.
69 Id. at 712-14.
ployees of the Department of the Army." The plaintiff argued that this repeal of section 223b of the MCA, which recognized military claims, was evidence of such claims being thereafter covered comprehensively by the provisions of the FTCA. The government, however, argued that repeal of section 223b of the MCA indicated a general policy determination by Congress "not to recognize claims by military personnel for injuries occurring incident to their service, other than through pensions or Veterans disability allowances." The district court agreed with the government's position that the policy of Congress was not to provide for servicemen other than through the general statutory provisions for pensions and veterans benefits.

The United States Supreme Court, in 1949, first addressed the issue of whether the FTCA should apply to military personnel in Brooks v. United States. In Brooks, two brothers and their father were riding in a car when it collided with an United States Army truck. One brother died and the other brother and their father were seriously injured. The district court found that the driver of the truck was negligent. The government, however, moved to dismiss the claims as to the two brothers, arguing that both of the brothers were members of the armed services at the time of the accident. The government contended the brothers should be barred from recovery despite the fact they were on furlough at the time of

71 77 F. Supp. at 714.
72 Id.
73 Id.
74 Id.
76 337 U.S. at 50.
77 Id.
79 337 U.S. at 50.
the accident.\textsuperscript{80} The district court denied the motion to dismiss\textsuperscript{81} but the Fourth Circuit Court of Appeals, citing \textit{Jefferson}, reversed.\textsuperscript{82}

The Supreme Court, however, was not persuaded that "any claim" meant "any claim but that of servicemen."\textsuperscript{83} The Court noted that among the expressed exceptions to the FTCA was the combatant activities exception and stated "it would be absurd to believe that Congress did not have servicemen in mind in 1946, when this statute [FTCA] was passed."\textsuperscript{84} The Court further stated that "the overseas and combatant activities exceptions make this plain."\textsuperscript{85} Thus, the Supreme Court stated that the plaintiffs' actions "were well founded."\textsuperscript{86} In dicta, the Court noted that had the accident occurred while the brothers were not on furlough, "a wholly different case would be presented."\textsuperscript{87}

In \textit{Griggs v. United States}\textsuperscript{88} the Court of Appeals for the Tenth Circuit was "asked to decide [the] question directly presented and decided in [\textit{Jefferson}] and discussed but not decided in [\textit{Brooks}]",\textsuperscript{89} namely whether the FTCA bars claims by servicemen injured incident to their service. In \textit{Griggs} an army officer's death was caused by an army doctor's alleged negligently performed surgery.\textsuperscript{90}

The plaintiff, executrix of the army officer's estate, brought a wrongful death action against the United States under the FTCA.\textsuperscript{91} The Tenth Circuit Court of Appeals reversed the

\begin{footnotes}
\item[80] 169 F.2d at 841.
\item[81] 337 U.S. at 50. The court denied the motion and awarded $25,425 to the deceased brother's estate and $4,000 to the surviving brother. \textit{Id}.
\item[82] 169 F.2d at 845-46.
\item[83] 337 U.S. at 51.
\item[84] \textit{Id}.
\item[85] \textit{Id}.
\item[86] \textit{Id}.
\item[87] \textit{Id}. at 54. The Court did remand the case to determine whether the amounts received under the FTCA should be adjusted by the amounts received under the pension and compensation acts. \textit{Id}.
\item[88] \textit{Id}. at 52. See \textit{infra} text accompanying notes 96-137.
\item[90] \textit{Id} at 1-2.
\item[91] \textit{Id}. at 2.
\end{footnotes}
district court’s dismissal of the action.  The court considered the Jefferson holding but stated “[we] fail to find anything in the context of the Act [FTCA] or its legislative history justifying judicial limitation upon the claims of servicemen.” The court concluded that, based on the Brooks rationale, only one of the twelve expressed exceptions could bar this claim under the FTCA. Additionally, the court found persuasive, as pointed out in Brooks, that there were eighteen tort claims bills introduced in Congress prior to the passage of the FTCA and sixteen of them contained exceptions excluding servicemen’s claims. Nevertheless, the court noted that when the FTCA was passed it contained no provision excluding servicemen’s claims. The court of appeals stated that “the only logical” explanation for this was that Congress deliberately kept from excluding servicemen’s claims under the FTCA. The court concluded that if dire results were to follow from allowing servicemen to file FTCA actions, then it “[was] for Congress and not [the] Court to provide rational limitations.”

B. The Wholly Different Case — Feres v. United States

A “wholly different case,” Feres v. United States, reached the Supreme Court in 1950. Feres was actually the consolidation of three cases. First, in Feres v. United States, a ser-

92 Id. at 3.
93 Id.
94 Id.
95 337 U.S. at 51-52.
96 178 F.2d at 3.
97 Id.
98 Id.
99 Id.
101 340 U.S. at 135.
102 Id.
103 177 F.2d 535 (2d Cir. 1949).
viceman died in a fire that destroyed his barracks while he was on active duty. The complaint alleged that the United States was negligent for housing servicemen in barracks known to be unsafe due to a defective heating plant. The district court dismissed the action, and the Second Circuit Court of Appeals affirmed. The second case was Jefferson v. United States, where the district court found an implied exception excluding servicemen's claims under the FTCA and the Fourth Circuit Court of Appeals affirmed. The third case was Griggs v. United States, where the district court dismissed the complaint, but the Tenth Circuit Court of Appeals, after considering Brooks and Jefferson, reversed the lower court, holding that the plaintiff had a cause of action under the FTCA.

The United States Supreme Court in Feres, considering whether the FTCA applied to servicemen on active duty, held that the "[g]overnment is not liable under the Federal Tort Claims Act for injuries to servicemen where the injuries arise out of or are in the course of activity incident to service." The Court based its holding on three distinct factors. First, the Court reviewed the FTCA's language, which states that "[t]he United States shall be liable . . . in the same manner and to the same extent as a private individual under like circumstances . . . ." The Court noted that Congress did not enact the FTCA to create a new cause of action, but rather to remove sovereign immunity as a bar to existing

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104 177 F.2d at 536.
105 Id.
106 Id. at 536-38.
108 See supra text accompanying notes 69-74.
109 178 F.2d at 520.
111 178 F.2d at 2.
112 Id. at 3. See supra text accompanying notes 92-99.
113 340 U.S. at 146.
114 Id. at 141. See 28 U.S.C. § 1346(b) (1976). See supra text accompanying note 49.
causes of action in tort.\textsuperscript{115} The Court noted that the plaintiffs could point to "no liability of a private individual even remotely analogous to that which they [plaintiffs] are asserting against the United States."\textsuperscript{116} The Court observed that no American court had permitted "a soldier to recover for negligence, against either his superior officers or the Government [incident to his service]."\textsuperscript{117} The Court found that there could be no analogy to private individuals because no private individual has the power to form and maintain an army and therefore such a cause of action did not exist before the passage of FTCA.\textsuperscript{118}

The Court also noted that the FTCA requires the law of the state where the "act or omission occurred" to govern the liability.\textsuperscript{119} The Court, however, reasoned that the Government's relationship with its armed forces is "distinctively federal in character."\textsuperscript{120} Thus, the Court concluded that since a serviceman has no control over where he is stationed, it makes no sense that the "geography of an injury should select the law to be applied."\textsuperscript{121}

Second, the Court found that it could not "escape attributing some weight to the various enactments by Congress which provide systems of simple, certain, and uniform compensation for injuries or death of those in the armed services."\textsuperscript{122} The Court suggested four alternative methods for handling dual claims under the FTCA and the other various military

\textsuperscript{115} 340 U.S. at 141. See infra text accompanying notes 152-155.
\textsuperscript{116} 340 U.S. at 141. See Goldstein v. State, 281 N.Y. 396, 24 N.E.2d 97 (1939) (plaintiff injured while actively serving state militia but state not held liable despite its waiver of sovereign immunity).
\textsuperscript{117} 340 U.S. at 141-42.
\textsuperscript{118} Id.
\textsuperscript{119} Id. at 142-43. See 28 U.S.C. § 1346(b) (1976).
\textsuperscript{120} 340 U.S. at 143. See United States v. Standard Oil Co., 332 U.S. 301, 301-02 (1947), where the United States brought an action for indemnity for losses caused due to injury to a serviceman by a third party. The Court stated that the government-soldier relationship was distinctively and exclusively a creation of federal law and no reason existed to vary the government's rights by applying the various states' laws. Id. at 305-06. See Note, The Federal Torts Claims Act, supra note 18 at 544-45.
\textsuperscript{121} 340 U.S. at 143. See infra text accompanying notes 149-154.
\textsuperscript{122} 340 U.S. at 144.
compensation and pension schemes. Nevertheless, the Court found persuasive the fact that the FTCA lacked any provisions for adjusting possible amounts received under a FTCA suit, if allowed, by the amounts, if any, received under the pension and compensation acts. Due to the lack of an adjustment procedure, the Court concluded that Congress was not aware that the "[FTCA] might be interpreted to permit recovery for injuries incident to military service" because if Congress had been aware then it would have provided for such adjustments.

Finally, the Court in *United States v. Brown* expressly articulated that military discipline was the primary premise for its decision in *Feres*. In *Brown* the plaintiff suffered a knee injury which led to an honorable discharge. Following the discharge the plaintiff underwent two operations on his knee at a Veterans Administration Hospital. During the second operation a defective tourniquet caused permanent damage to the nerves in the plaintiff's leg. The Supreme Court agreed to hear the case to resolve the issue of whether *Brooks* or *Feres* applied. The Court held that the

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123 Id. First, the Court said the claimant could enjoy the amount accorded under the FTCA in addition to amounts paid under the acts providing for injuries to servicemen. Second, the Court said that the claimant could elect between the FTCA and other available provisions. Third, the Court said that the claimant could be allowed to take the larger recovery less a credit for other amounts received under the various provisions. Finally, the Court stated that the compensation and pension provisions could be considered the sole remedy for servicemen injured while on active duty. Id.

124 Id. See supra note 86 and accompanying text; infra text accompanying notes 127-137.

125 340 U.S. at 144.


127 348 U.S. at 112.

128 Id.

129 Id. at 110-11.

130 See supra text accompanying notes 75-87.

131 See supra text accompanying notes 96-125.

Brooks rationale applied because the injury occurred after the plaintiff's discharge, and thus, the plaintiff was neither on active duty nor subject to military discipline. The Court stated that "[t]he Feres decision did not disapprove of the Brooks case," but rather, "merely distinguished it." The Court explained the rationale of Feres, stating that:

[t]he peculiar and special relationship of the soldier 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 [FTCA] were allowed for negligent orders given or negligent acts committed in the course of military duty, led the Court [in Feres] to read that Act [FTCA] as excluding claims of that character.

C. The Later Cases — Further Explanation of the Feres Rationale

Since Brown, the Supreme Court has had the opportunity to explain the rationale behind Feres four times. First was United States v. Muniz, a consolidation of two cases brought by two federal prisoners because of injuries they received during their confinement in federal prison. The Court, after carefully reviewing the legislative history of the FTCA, determined that Congress intended to permit federal prisoners to sue under the Act. The government had argued that there was an implied exception excluding federal prisoners

134 348 U.S. at 112.
135 Id.
136 Id.
137 Id.
140 374 U.S. at 152-58.
141 Id.
from using the FTCA under the rationale of *Feres*.142

The Supreme Court examined the reasons behind the holding in *Feres* and applied them to federal prisoners.143 First, it considered the lack of analogous or parallel liability in the private context.144 The Court stated that “[t]he government’s liability is no longer restricted to circumstances in which government bodies have traditionally been responsible for misconduct of their employees”,145 rather “[the FTCA] extends to novel and unprecedented forms of liability as well.”146 Nevertheless, Chief Justice Earl Warren, writing for the Court, found that analogous forms of liability existed.147 The Chief Justice noted that several states had allowed prisoners to recover against prison employees or the state directly.148

The Supreme Court further considered the consequences of subjecting federal prisoners to various state laws under the FTCA provision that the law of the state where the act or omission occurs is the law to be applied in deciding liability.149 It recognized that variations of state law might hamper the “uniform administration of federal prisons,”150 but nevertheless the Court concluded that there were no “concrete examples” of how applying the various states’ tort law would affect the prison system.151 The Court added that “[e]ven a matter such as improper medical treatment can be judged under the varying state laws of malpractice without violent dislocation of prison routine.”152 The government had argued that applying different states’ tort law as required by the FTCA would prejudice the federal prisoners by subjecting them to varying standards even though they have no

142 *Id.* at 159.
143 *Id.* at 159-64.
144 *Id.* at 159. See supra text accompanying notes 115-116.
145 374 U.S. at 159.
146 *Id.*
147 *Id.*
148 *Id.* at 159-60.
149 *Id.* See supra text accompanying notes 119-121.
150 374 U.S. at 161.
151 *Id.*
152 *Id.* at 162.
control over their location. The Court, however, pointed out that denying recovery altogether would be even a greater prejudice.

Next, the Supreme Court considered the second rationale of *Feres*, availability of compensation and pension payments to which servicemen are entitled under various acts of Congress. The Court referred to Brown as an example of allowing a veteran to file an FTCA suit despite the fact that he also was eligible for benefits under the Veteran's Benefit Act. The Court, however, noted that federal prisoners, unlike servicemen, do not have compensation and pension benefits available to them. Thus, the availability of compensation and pension plans was not a factor when considering federal prisoners’ ability to sue under the FTCA.

Finally, the Court discussed what it said “best explained” the *Feres* decision, the need for military discipline. The Court, with this determining factor in mind, considered the effects which allowing FTCA suits by federal prisoners would have on prison discipline. The Court noted that FTCA actions by federal prisoners against the government were subject to the discretionary function or the intentional tort exceptions provided in the FTCA itself. Thus, the Court concluded that the government would be protected by these exceptions in many of the actions brought by federal prisoners. Furthermore, the Supreme Court stated that the “Federal Rules of Procedure are not so inflexible that clearly frivolous suits need embarrass prison officials or burden the United States Attorney’s offices.”

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153 *Id.*
154 *Id.*
155 See supra text accompanying notes 122-125.
156 374 U.S. at 160. See supra text accompanying notes 127-137.
157 374 U.S. at 160.
158 *Id.*
159 *Id.* at 162. See supra text accompanying notes 127-137.
160 374 U.S. at 163.
161 *Id.* See supra text accompanying notes 55-59.
162 *Id.* See supra text accompanying note 60.
163 *Id.* See supra text accompanying note 55-60.
164 374 U.S. at 164.
165 *Id.*
therefore, concluded that prison discipline, unlike military discipline, would not be adversely affected by allowing federal prisoners to bring suits under the FTCA.166

In 1977 the United States Supreme Court again discussed the Feres decision in Stencel Aero Engineering Corp. v. United States.167 In Stencel, a national guard pilot was permanently injured when the ejection system of his F-100 jet fighter malfunctioned.168 The pilot was awarded a lifetime pension of $1500 per month under the Veteran’s Benefit Act.169 The pilot later brought suit against Stencel, the manufacturer of the ejection system, and the United States under the FTCA.170 Stencel cross-claimed for indemnity from the United States, alleging that the government had provided faulty specifications for the ejection equipment171 and that the United States at all times after manufacture had exclusive control and custody of the ejection system.172 The government, citing Feres, moved for summary judgment against both the pilot’s FTCA claim and Stencel’s cross-claim.173 The district court granted the motion,174 which the Court of Appeals for the Eighth Circuit affirmed.175 The Supreme Court granted certiorari to resolve the conflict between the circuit courts on the issue of whether Feres bars third party indemnity claims against the United States arising out of injuries to servicemen during activities “incident to service.”176

166 Id.
168 431 U.S. at 666.
170 431 U.S. at 668.
171 Id.
172 Id.
173 Id.
174 Id.
175 Stencel Aero Eng’g Corp. v. United States, 536 F.2d 765 (8th Cir. 1976).
176 431 U.S. at 66-67. For example, see United Air Lines v. Weiner, 335 F.2d 379, 404 (9th Cir.) (Feres does not allow third party indemnity claims), cert. dismissed, 379 U.S. 951 (1964); Adams v. General Dynamics Corp., 535 F.2d 489, 491 (9th Cir. 1976) (United States must be liable to plaintiff for third party indemnity claim to be al-
The Supreme Court examined the three factors that supported the holding in *Feres* and applied those factors to third party indemnity claims.\(^{177}\) The Court, considering the application of varying states' laws to third party indemnity claims involving servicemen injured incident to their service, stated that "[t]he relationship between the government and its suppliers of ordinance is certainly no less distinctively federal in character\(^{178}\) than the relationship between the government and servicemen.\(^{179}\) The Court noted that the military has a national scope involving frequent moves of large numbers of personnel and equipment around the country, creating a significant risk that accidents or injuries might occur.\(^{180}\) Thus, the Court concluded that:

[i]f, as the Court held in *Feres*, it makes no sense to permit the fortuity of the situs of the alleged negligence to affect the liability of the Government to a serviceman who sustains service-connected injuries . . . [i]t makes equally little sense to permit that situs to affect the Government's liability to a Government contractor for the identical injury.\(^{181}\)

The second factor the Court considered was the availability of payments under the Veteran's Benefit Act.\(^{182}\) It held that the military compensation scheme provides the upper limits which the United States should bear for service related injuries.\(^{183}\) The court stated that "to permit [Stencel] to proceed . . . here would be to judicially admit at the back door that which has been legislatively turned away at the front door."\(^{184}\)

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\(^{177}\) 431 U.S. at 670.
\(^{178}\) Id. at 672.
\(^{179}\) See supra text accompanying notes 119-121.
\(^{180}\) 431 U.S. at 672.
\(^{181}\) Id.
\(^{182}\) Id. at 672-73. See supra text accompanying notes 122-125.
\(^{183}\) 431 U.S. at 673.
\(^{184}\) Id. at 673. See supra text accompanying notes 127-137.
In consideration of the third factor, the effect that permitting the action would have on military discipline, the Court stated that allowing Stencel to bring its indemnity action would have the same effect on military discipline as if the serviceman had brought the action.\textsuperscript{185} The Court further stated that "[t]he trial would, in either case, involve second-guessing of military orders, and would often require members of the Armed Services to testify in court as to each other's decisions and actions."\textsuperscript{186} The Court concluded that second-guessing of military orders "weighs against permitting any recovery by [the] petitioner [Stencel] against the United States."\textsuperscript{187} Thus, the Court held that third-party indemnity cases involving servicemen injured incident to service are barred for the same reasons that the holding in \textit{Feres} bars direct actions by servicemen injured incident to their service.\textsuperscript{188}

Finally and most recently, the Court addressed the \textit{Feres} doctrine in \textit{Chappell v. Wallace}.\textsuperscript{189} In \textit{Chappell} several navy enlisted men brought an action for damages and other relief\textsuperscript{190} against their superior officers.\textsuperscript{191} The enlisted men alleged that their superior officers had discriminated against them on the basis of race in making duty assignments, performance evaluations and the imposition of penalties.\textsuperscript{192} The district court dismissed the complaint because it considered the actions by the superior officers as nonreviewable military decisions.\textsuperscript{193} Furthermore, the district court found that the enlisted men had failed to exhaust their administrative remedies.\textsuperscript{194}

The Court of Appeals for the Ninth Circuit, however, re-

\begin{enumerate}
\item [185] 431 U.S. at 673.
\item [186] Id.
\item [187] Id.
\item [188] Id.
\item [189] 76 L.Ed. 2d 586 (June 13, 1983).
\item [190] Id. The enlisted were seeking injunctive relief and a declaratory judgment in addition to damages. Id.
\item [191] Id.
\item [192] Id.
\item [193] Wallace v. Chappell, 661 F.2d 729, 731 (9th Cir. 1981).
\item [194] Id.
\end{enumerate}
versed,\textsuperscript{195} based on the assumption that the United States Supreme Court's decision in \textit{Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics}\textsuperscript{196} authorized the award of damages for the constitutional violations alleged by the enlisted men.\textsuperscript{197} The court put forth various tests for deciding whether the military actions involved were reviewable by a civilian court and whether if reviewable the superior officers were immune from suit.\textsuperscript{198} The court remanded the case back to the district court for the application of the tests.\textsuperscript{199} The Supreme Court, however, granted certiorari.\textsuperscript{200}

The Supreme Court reversed the actions of the court of appeals.\textsuperscript{201} The Court recognized that \textit{Bivens} did authorize a suit for damages against federal officers who violated an individual's constitutional rights.\textsuperscript{202} The Court, however, noted that in \textit{Bivens} it had expressly warned that such a remedy will not be available when "special factors counseling hesitation" are present.\textsuperscript{203} The Court turned to \textit{Feres} in examining the "special factors" involved in a \textit{Bivens} type suit against military officers by those under their command.\textsuperscript{204} The Court pointed out that military discipline was the primary, if not, sole concern.\textsuperscript{205} The Court stated:

The need for special regulations in relation to military discipline, and the consequent need and justification for a special and exclusive system of military justice, is too obvious to require extensive discussion; no military organization can function without strict discipline and regulation that would be

\textsuperscript{195} \textit{Id.} at 738.

\textsuperscript{196} 403 U.S. 388 (1972) In \textit{Bivens} the Court reversed its earlier holding in \textit{Bell v. Hood}, 327 U.S. 678 (1945) and held that there is a federal cause of action when federal agents acting under the color of their authority commit constitutional violations. \textit{Id.} at 389. See generally Note, \textit{Bivens v. Six Unknown Names Agents: A New Direction In Federal Polic Immunity}, 24 Hastings L.J. 987 (1973); Note, \textit{Constitutional Law}, 50 Tex L. Rev. 798 (1972).

\textsuperscript{197} 661 F.2d at 735-738.

\textsuperscript{198} \textit{Id.}

\textsuperscript{199} \textit{Id.} at 738.

\textsuperscript{200} Chappell v. Wallace, 103 S. Ct. 292 (1982).

\textsuperscript{201} 76 L. Ed. 2d at 594.

\textsuperscript{202} \textit{Id.} at 589.

\textsuperscript{203} \textit{Id.}

\textsuperscript{204} \textit{Id.} at 590.

\textsuperscript{205} \textit{Id.} (citing U.S. v. Muniz, 374 U.S. 150).
unacceptable in a civil setting.\textsuperscript{206} The court added that "the inescapable demands of military discipline and obedience to orders cannot be taught on the battlefield; the habit of immediate compliance with military procedures and orders must be virtually reflex with no time for debate or reflection."\textsuperscript{207} The Court in holding that enlisted military personnel cannot sue superior officers for alleged constitutional violations did note Chief Justice Warren's statement in a 1962 law review article that "our citizens in uniform may not be stripped of basic rights simply because they have doffed their civilian clothes."\textsuperscript{208} The Court added that it had never held nor was it now holding that servicemen are precluded from all suits in civilian courts for constitutional violations suffered while in the service.\textsuperscript{209}

IV. Evaluation of the Rationale Behind Feres

A. Non-Uniformity of State Law and Lack of Analogous Situations

The Court in \textit{Feres} found that it was illogical to have the various laws of the states determine liability as required by the FTCA because servicemen have no control over where they are stationed.\textsuperscript{210} That differing state law would produce inconsistent and different results in identical situations is a factor that is not disputed.\textsuperscript{211} Justice Marshall, dissenting in \textit{Stencel}, stated that:

It is true, of course, that the military performs a unique, nationwide function but so do the Bureau of the Census, the Immigration and Naturalization Service and many other agencies of the federal government. These agencies, like the military, may have personnel and equipment in all parts of the country. Nevertheless, Congress has made private rights

\textsuperscript{206} Id. at 590.
\textsuperscript{207} Id.
\textsuperscript{208} Id. at 593 (citing E. Warren, \textit{The Bill of Rights and the Military}, 37 N.Y.U. L. Rev. 181, 188 (1962)).
\textsuperscript{209} Id. .
\textsuperscript{210} 340 U.S. at 143. See supra text accompanying notes 119-121.
against the government depend on 'the law of the place where
the act or omission occurred' . . . and presumably the Court
agrees that this provision governs the rights of suppliers to
nonmilitary agencies. Nothing in the Court's opinion ex-
plans why it concludes that the relationship between the
Government and those suppliers differs from its relationship
to purveyors of military equipment.\textsuperscript{212}

The Supreme Court in \textit{Muniz}\textsuperscript{213} allowed federal prisoners
to bring actions under the FTCA even though, like service-
men, they had no control over their location.\textsuperscript{214} The Court
concluded that denying the plaintiffs any recovery would
prejudice them far more than granting a recovery that was
subject to the laws of the various states.\textsuperscript{215} In addition, as one
commentator has noted, "local tort law already applies to
military dependents in suits for damages for physical injuries
incurred independently of any injury to servicemen, even
when these actions depend upon the fortuitous placement of
the serviceman.\textsuperscript{216} Finally, under the FTCA, the claims of
civilians injured by the military are subject to the law of the
state where the injury occurred.\textsuperscript{217} Thus, the military is sub-
ject to the law of the various states and in suits by servicemen
injured in activities not incident to their service.\textsuperscript{218} Because
the military is already subject to the various laws of the states
in determining its liability under the FTCA, for most situa-
tions it makes little sense to exclude servicemen on that
basis.\textsuperscript{219}

The decision in \textit{Feres} was partly based on the lack of analog-
gous situations in the private sector with which to compare

\textsuperscript{212} 431 U.S. at 675.
\textsuperscript{213} 374 U.S. 150 (1963).
\textsuperscript{214} Id. at 162. \textit{See supra} text accompanying notes 149-154.
\textsuperscript{215} 374 U.S. at 162.
\textsuperscript{217} 28 U.S.C. § 1346(b) (1976).
\textsuperscript{219} \textit{See supra} text accompanying notes 215-219.
the injuries suffered by servicemen incident to their service. The Court, relying heavily on the fact that no private individual could raise and maintain an army, refused to analogize situations involving military doctor and servicemen with the private doctor and patient or the housing of military personnel with private landlord and tenant arrangements. Instead, the Court considered the circumstance of military service as a situation complete in itself without taking a closer look at the individual functions carried out in the service before comparing it with like circumstances in the private sector. Thus, the Court in Feres was considering the government's status as a sovereign as a separate and total circumstance when trying to find an appropriate analogy.

One commentator has stated that the Feres Court's interpretation that the sovereign status of the United States is a circumstance to be considered when looking for a like circumstance in the private sector frustrates the very purpose of the FTCA, which was to remove sovereign immunity as a bar to suits by citizens against the government. He points out that only four out of forty-eight states had waived sovereign immunity by 1946; thus, if the FTCA meant to have the United States' liability determined to the same extent as a "like sovereign," then only individuals in the four states that had waived sovereign immunity would be able to sue under the FTCA. Individuals in the other states, which had not waived sovereign immunity, would be barred because the FTCA applies only to the same extent like sovereigns would be liable. Thus, the Court in Feres is locked into a circular argument, namely that the FTCA was enacted to remove the sovereign immunity bar, yet the Court considered this same sovereign status when looking for an analogous situation.

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220 340 U.S. at 137-40. See supra text accompanying notes 115-118.
224 Id. at 539.
225 Id.
226 Id.
B. The Availability of Other Benefits

The Court in *Feres* also found that the availability of compensation and pension payments under various acts was a factor that supported its holding which barred servicemen from the use of the FTCA. Justice Marshall in his dissent in *Stencel* noted that the Veteran's Benefits Act (VBA) does not contain any provision declaring that the VBA is the servicemen's exclusive remedy against the government for injury or death. The Court in *Feres* reasoned that because the FTCA contains no adjustment procedure for payments under various military claims acts, Congress did not and could not have intended the FTCA to cover servicemen. This implies that whenever a serviceman is injured, regardless of whether he is injured incident to his service, his recovery would be limited to benefits under the VBA. Nevertheless, cases like *Brooks* and *Brown* indicate that servicemen may seek FTCA remedies in addition to VBA compensation and pension payments to which they are entitled.

One commentator has suggested that the Court in *Feres* ignored Congressional intent. In *Brooks*, the Court stated that "[w]e are not persuaded that 'any claim' means 'any claim but that of servicemen.'" The Court in *Feres*, however, indicated that the "any claim" language was unclear, but did not provide any explanation for its statement in *Brown*.

Additionally, it has been suggested that the Supreme Court ignored the rule of statutory construction that "appropriate matters not expressly included within the enactment

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227 340 U.S. at 144. See supra text accompanying notes 122-125.
228 431 U.S. at 675.
229 See Note, The Effect, supra note 18, at 1255.
231 348 U.S. 110, 113 (1954), discussed supra in text accompanying notes 126-137.
232 See Note, The Effect, supra note 18, at 549.
233 Note, The Federal Tort Claims Act, supra note 18, at 54-56.
234 See supra text accompanying notes 83-85.
235 340 U.S. at 140-41.
236 Note, The Federal Tort Claims Act, supra note 18, at 549.
are not to be considered within its scope." It has been argued that because the twelve expressed exceptions to the FTCA do not exclude claims of servicemen, Congress must have intended to include servicemen's claims for injuries arising out of activities incident to their service. The Court in Brooks noted that sixteen of the eighteen torts bills presented to Congress before the passage of the FTCA contained exceptions which excluded servicemen from their provisions. Thus Congress was aware of servicemen and their possible claims under a tort claims act and yet Congress did not include a servicemen's exception to the FTCA.

C. Military Discipline

The Supreme Court in Muniz stated that the possible effects that allowing FTCA suits by servicemen would have on military discipline was the factor that best explained Feres. That discipline is one of the most important factors in any military organization is beyond debate and something which the Court pointed out in Chappell. Courts and commentators have not been able to agree on what that effect might be. The Supreme Court in Stencel feared that allowing FTCA action would involve the "second-guessing" of military orders and the taking of testimony of members of the armed forces concerning each other's decisions, which would lead to adverse effects on military discipline. The Supreme Court in Chappell pointed out that the courts were ill-equipped to decide the impact that "any particular intru-

237 Id. This rule of statutory construction was first recognized by the United States Supreme Court in George Moore Ice Cream Co. v. Rose, 289 U.S. 373, 377 (1933).
239 337 U.S. at 57.
240 See supra text accompanying notes 83-85, 236-240.
241 374 U.S. at 150, 162 (1963), discussed supra in text accompanying notes 138-166.
242 In re Grimley, 137 U.S. 147 (1890); Rhodes, The Feres Doctrine After 25 Years, 18 A.F.L. REV. 24, 42 (1976).
243 See supra notes 17-18 and accompanying text.
244 431 U.S. 666, 673 (1977), discussed supra in text accompanying notes 167-188. See supra text accompanying notes 185-187.
sion upon military authority might have." Nevertheless, the pivotal question is to determine the effect that allowing an FTCA action by a serviceman injured incident to his service would have on military discipline. Justice Marshall, dissenting in *Stencel*, however, noted that when the military’s negligence causes injury to a civilian, there is the “same chance that a trial would involve second-guessing military orders and would . . . require members of the Armed Services to testify in courts as to each other’s decisions and actions.”

Justice Marshall went on to state that “[y]et there would be no basis, in *Feres* or in the Tort Claims Act for concluding that the [civilian’s suit] [would be] barred because of the nature of the evidence to be produced at [the] trial.

D. Application of the Feres Doctrine by the Lower Federal Courts

The courts have not approached the application of *Feres* and its underlying rationale, the effect on military discipline, on a uniform basis. In *Coffey v. United States* a serviceman on his way to off-base liberty was killed in an automobile accident within the base. The Court of Appeals for the Ninth Circuit dismissed the claim citing *Feres*. The court concluded that although the serviceman was on his way to an off-base liberty, he was still physically present on the base when the accident occurred.

The Fifth Circuit reached a different result in *Parker v. United States*. The plaintiff, an army officer, had decided to move his family to New Mexico. He requested and received permission to take a few days to move, his leave com-

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246 76 L. Ed. 2d at 594.
248 431 U.S. at 676-77 (dissenting opinion).
249 Id.
250 See supra note 18 and accompanying text.
251 324 F. Supp. 1087 (S.D. Cal. 1971), aff’d per curiam, 455 F.2d 1380 (9th Cir. 1972).
252 Id. at 1087.
253 Id. at 1088.
254 Id.
255 611 F.2d 1007 (5th Cir. 1980).
256 Id. at 1008.
mencing at the end of his normal duty shift. Upon completing his duty assignment, he left his post and drove toward the front gate, but before he could get outside the gate he collided head-on with a military vehicle and was killed. The court allowed the plaintiff's wife to recover on a wrongful death action under the FTCA. The court concluded that Parker's leave was equivalent to the two brothers' furlough in Brooks and therefore was not barred by Feres. Furthermore, the court said that although Parker's death occurred on a military base, the district court should have looked at the function that Parker was performing at the time of his death. The court concluded that Parker was not acting incident to his service.

The courts have recently faced the Feres question in the context of injuries resulting from servicemen's exposure to radiation. In Monaco v. United States, Daniel J. Monoco was stationed at the University of Chicago from May 1943, to February 1946, where he participated in a special army training program. The special training program required Monoco to perform calisthenic exercises at the University's

257 Id.
258 Id.
259 Id. at 1015.
260 Id. See supra text accompanying notes 75-83.
261 611 F.2d at 1011.
262 Id. at 1015.
263 661 F.2d 129, 130 (9th Cir. 1981), cert denied, 456 U.S. 989 (1982). For a case decided with Monaco, see Broudy v. United States, 661 F.2d 125 (9th Cir. 1981). In Broudy, the military ordered a marine officer to participate in military exercises within the vicinity of two atmospheric nuclear tests conducted in Nevada during the summer of 1957. Id. at 126. The officer left the Marines in 1960, but continued to receive medical treatment for various health problems at military facilities. Id. In 1976 military doctors diagnosed the officer as having cancer due to exposure to low levels of radiation. Id. The officer died of cancer in 1977. The officer's wife attempted to file an FTCA action alleging that her husband was negligently exposed to radiation by the military. Id. The court dismissed on the basis of the Feres doctrine, but the court stated that if the wife could "allege and prove an independent, post-service negligent act on the part of the government her claim would be cognizable under the FTCA." Id. at 128-29. The court suggested that the government's failure to monitor and warn the officer of the possible injuries due to radiation exposure might constitute an actionable post-service claim provided that the government became aware of the dangers of radiation exposure after the officer left the service. Id. at 128-29.
264 Id. at 130.
During this time the United States government was conducting experiments in atomic reactions in an underground laboratory located beneath the football field. The experiments were part of the “Manhattan Project,” which developed the world’s first atomic weapons. In July of 1971, Monaco was informed that he had contracted radiation-induced cancer of the colon and that radiation was also responsible for a birth defect in his daughter known as arterio-venous anomaly of the brain.

Monaco and his daughter filed claims under the FTCA, alleging that Monaco’s cancer and his daughter’s birth defect were caused by Monaco’s exposure to radiation while he was serving in the military. The district court dismissed the actions, relying on the Supreme Court’s decision in Feres. The court found that Monaco’s injuries and his daughter’s birth defects were the result of activities incident to his service and therefore were barred by Feres. The United States Court of Appeals for the Ninth Circuit affirmed the district court’s dismissal, stating that “[t]he Feres doctrine today stands on shaky ground with its precise justification somewhat confused.” The court further stated that “[t]he result in this case disturbs us, particularly with respect to [the daughter].” Nevertheless, the Ninth Circuit stated that it

265 Id.
266 Id.
267 Id.
268 Id.
269 Id. Arterio-venous anomaly in the brain is the intrauterine development of the brain’s arteries and veins which is abnormal with reference to form, structure, or position. TABER’S CYCLOPEDIC MEDICAL DICTIONARY 90, 123 (1981). The condition induced three brain hemorrhages, aphasia and other permanent damage to the daughter. 661 F.2d at 130.
270 661 F.2d at 130. See generally L. JAYSON, HANDLING FEDERAL TORT CLAIMS (1982)(general review of the procedures involved in handling FTCA suits).
271 661 F.2d at 130-31.
272 Id. at 134.
273 Id. at 134.
274 Id. See also Hunt v. United States, 636 F.2d 580 (D.C. Cir. 1980) (stating that the “Feres doctrine clearly lives, although its theoretical bases remain subject to serious doubt”).
275 661 F.2d at 134. In the daughter’s case the court stated that “avoiding examination of events long past [military orders], and involving her behavior in no respect, appears to be complete denial of recovery.” Id.
"unfortunately" felt bound by the Feres doctrine, but it encouraged the daughter to pursue any legislative channels available to her.

A result contrary to the Monaco decision was reached by a United States district court in Hinkie v. United States. In Hinkie a serviceman was exposed to radiation from nuclear testing being conducted by the United States Army in Nevada during 1955. The plaintiffs, two sons of the serviceman, alleged that their father’s exposure to radiation while in the Army caused their various birth defects. The district court allowed the plaintiffs to bring an action under the FTCA despite the Feres doctrine. The Court of Appeals for the Third Circuit, however, reversed stating that “[W]e are forced once again to decide a case where ‘we sense the injustice . . . of [the] result’ but where nevertheless we have no legal authority, as an intermediate appellate court to decide

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276 Id. See Veillette v. United States, 615 F.2d 505 (9th Cir. 1980). The court in Veillette observed the anomalies created by the judicially made exceptions to the FTCA. The court concluded that “[n]onetheless, unless Congress acts to limit or abrogate the Feres doctrine, we must continue to draw a line between military personnel and civilians . . . .” Id. at 507.

277 661 F.2d at 134.


279 Id. at 278.

280 Id. at 279. The sons alleged that their father’s exposure to radiation caused a breakage in the chromosomes and various chromosomal alterations such as inversions and partial displacement not amounting to total breakage of the chromosomes. This alteration of the father’s chromosomes caused the various birth defects in the two sons. Id.

281 Id. at 284-85. The court did not attempt to distinguish Feres, but rather considered the three underlying principles supporting the Feres doctrine. Id. at 282-84. First, the court considered the fact that the FTCA applies the law of the state where the act or omission occurred which caused the injury. Id. at 282-83. The court found that the two sons’ relationship with the government was simply not federal in character and concluded that the first of the Feres policies did not apply. Id. at 283. Second, the court considered the availability of benefits under other acts of Congress. Id. at 283-84. The court noted that it was doubtful that the father would have any claim for chromosomal damages and the two sons had no claims at all for other benefits. Id. Thus, the court concluded that the second Feres factor was “inadequate” for barring the sons’ claim. Id. at 284. Then the court considered the effects that allowing the claim would have on military discipline. Id. The court noted that claims by civilians subject military orders to second guessing and are not barred under the FTCA. Id. The court concluded that the adverse effect on military discipline by itself did not warrant dismissal of the claim. Id.
the case differently.\textsuperscript{282} The court felt foreclosed from any other option because of the controlling precedent, \textit{Feres}.\textsuperscript{283}

The Third Circuit presents a good example of the tension that \textit{Feres} has caused within a circuit. In \textit{Peluso v. United States},\textsuperscript{284} the death of a serviceman resulted from the alleged negligent diagnosis of an abdominal condition.\textsuperscript{285} The Third Circuit Court of Appeals stated that "[t]he case [\textit{Feres}] [was] controlling."\textsuperscript{286} The court conceded that only the Supreme Court could reverse \textit{Feres} but noted that it "would welcome that result."\textsuperscript{287}

In 1980, another interesting case had reached the Third Circuit, \textit{Jaffee v. United States}.\textsuperscript{288} Jaffee, an army officer, was stationed in Nevada during 1953.\textsuperscript{289} Jaffee was ordered to stand in an open field while nuclear tests were conducted close by, resulting in Jaffee's exposure to radiation.\textsuperscript{290} Jaffee alleged that his exposure to radiation while in the military caused his inoperable breast cancer.\textsuperscript{291} He brought suit against the United States and individual military officers, not under the FTCA but rather alleging an "intentional tort of human experimentation conducted without military authority . . . in wilful violation of his constitutional [due process] rights."\textsuperscript{292} The district court dismissed the action holding that \textit{Feres} was an absolute bar of suits against the government and military officers for wilful violation of constitutional rights as well as negligence.\textsuperscript{293} The Third Circuit Court of Appeals, however, reversed stating that "[the] \textit{Feres}
opinion simply cannot be read, as the district court read it to suggest an absolute intra-military immunity from liability for intentional torts.294 The Third Circuit's decision caused one commentator to ask whether the "Feres doctrine was at the cliff's edge."295 It was believed that Jaffee had created a direct conflict over whether Feres provided an absolute or limited intra-military immunity between the circuits which the Supreme Court would have to resolve.296 The promise that Jaffee would provide the Supreme Court with the opportunity to reevaluate the Feres doctrine did not last long, however, because the Third Circuit reversed itself after rearguments in 1980.297 The Third Circuit reconsidered the Feres decision and its application to the FTCA in order to determine how the United States Supreme Court would decide the issue of an intra-military immunity for intentional constitutional torts.298 The court concluded that, for the same reasons that Feres barred FTCA actions by servicemen injured incident to their service, claims for intentional constitutional torts should also be barred.299

V. CONCLUSIONS

The doctrine of intra-military tort immunity needs clarification.300 Many courts and commentators have attacked the underlying factors supporting Feres, and only the concern for military discipline retains any substantial validity.301 In fact, the Supreme Court has twice held that military discipline is the most important factor.302 Thus, any modification or clarification of Feres must focus on the effects which allowing

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294 No. 70-1044 slip op. at 6 (3d Cir. 1981) vacated, 663 F.2d 1226 (3d Cir. 1981).
296 Id. at 115-16.
298 Id. at 1230-38.
299 Id. at 1235-37, 1239-40.
300 See supra text accompanying notes 210-299.
301 See supra text accompanying notes 17-18 and accompanying text; supra text accompanying notes 274-276, 286-287.
302 See supra text accompanying notes 159, 203-206.
claims of servicemen under the FTCA for injuries resulting from activities incident to service will have on military discipline.\textsuperscript{303} In attempting to clarify \textit{Feres}, the Court should strive to derive a workable definition of “incident to service.”\textsuperscript{304} The definition of “incident to service” should include those things that are traditionally military in nature such as war games and battlefield training because those are the activities during which the need for military discipline is at its peak.\textsuperscript{305} Any definition, however, should exclude activities of the military having analogous counterparts in the private sector like traditional doctor and patient relationships, landlord and tenant relationships, and negligent maintenance of various forms of equipment because the connection that these relationships and situations, although carried out by the military, have to military discipline are tenuous at best.\textsuperscript{306} The effects on military discipline should be the focus - not military discipline in and of itself.

As an alternative to defining “incident to service,” the Court should consider the existing exceptions to the FTCA and how they apply to the military to determine whether most of the concerns for military discipline are not already protected by these provisions without relying on \textit{Feres}.\textsuperscript{307} The discretionary function exception to the FTCA might be read as covering situations when military personnel are forced to make discretionary judgments, whereas situations such as routine service of an aircraft would fall outside the exception.\textsuperscript{308} If the Court were able to dispell its fears concerning FTCA actions by servicemen injured incident to their service by looking solely at the FTCA and its expressed exceptions, the Court will avoid being accused of ignoring the legitimate concern of providing servicemen a fair and full compensation when they are injured.\textsuperscript{309}

\textsuperscript{303} See supra text accompanying notes 247-249.
\textsuperscript{304} Id.
\textsuperscript{305} See supra text accompanying notes 220-224.
\textsuperscript{306} Id.
\textsuperscript{307} See supra text accompanying notes 50-64.
\textsuperscript{308} Id.
\textsuperscript{309} See supra text accompanying notes 224-226, 233-240.