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The Feres Bar: The Right Ruling for the Wrong Reason

Kelly L. Dill

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I. INTRODUCTION

Many courts throughout the country have forgotten that the Feres bar, a doctrine prohibiting service members from recovering for any injury that occurred incident to military service, serves a valid fiscal function. Service members are entitled to statutory compensation systems which resemble private workers’ compensation schemes. Therefore, they should not be eligible to recover further under the Federal Tort Claims Act (FTCA). The original purpose of the FTCA was to waive sovereign immunity and make the government answerable to citizens who were without a remedy, rather than to make additional provision for those already provided for. Service members should not be permitted to recover monetary damages when their loss has already been remedied.

This fiscal function rationale for the Feres doctrine has been cast aside and courts today rely on the military discipline rationale, based on a deferential theory that courts should not interfere with military matters. The military discipline rationale faces serious resistance in the lower courts because many of the suits involving service members do not directly impact the relationship with the chain of command or sensitive military matters. Judges have found it increasingly difficult to justify barring claims based on a military discipline rationale that

2. Id. at 140.
3. United States v. Shearer, 473 U.S. 52, 58 n.4 (1985) (characterizing the geographic uniformity and alternative benefits rationales as “no longer controlling”). In Shearer, the court emphasized: “Although the Court in Feres based its decision on several grounds, . . . Feres seems best explained by the ‘peculiar and special relationship of the soldiers to his superiors, the effects of the maintenance of such suits on discipline, and the extreme results that might obtain if suits under the Tort Claims Act were allowed for negligent orders given or negligent acts committed in the course of military duty.’” Id. at 57.
seems unfair when the justification for the bar does not fit the facts of particular cases. As a result, the courts have looked for ways around the Feres bar by distinguishing minor facts from case precedents.

Recent cases have permitted soldiers to recover for carbon monoxide poisoning in government housing because the incidents occurred on the weekend. In the original Feres case, government negligence resulted in a soldier's death in a barracks fire during the duty week. A judge in one jurisdiction stretched to make factual distinctions that allowed a newborn baby to recover for wrongful birth because the mother received negligent prenatal care while on active duty. In another case, a court reluctantly followed the Feres doctrine when civilians rafting in a military recreational boat could recover for the government's negligence, but sailors sitting beside them could not.

When courts fail to find the military discipline rationale as a convincing reason for their rulings upholding the Feres bar, they blatantly state that they are forced to follow Supreme Court precedent and beg for Congressional reform to the Federal Tort Claims Act. The Feres Bar does not need to be fixed, but the doctrine's rationale does. Courts have stretched the military discipline rationale too far. If courts focus more on the financial reasons for the doctrine it would become evident that both the interests of service members as well as taxpayers are adequately being served by the Feres doctrine in place. The Feres bar provides a significant fiscal function by capping the amount of recovery for service members similar to private organizations' efforts to limit liability through workers' compensation schemes. Courts should conduct an informed comparison that reviews the claimant's requested amount for damages versus the military benefits the service member will receive. If a court finds medical, disability

5. Hall v. United States, 130 F. Supp 2d. 825 (S.D. Miss. 2000) (finding that when a Naval petty officer died and four children from carbon monoxide poisoning in government quarters, the claim was not barred because it occurred on a weekend). See also, Elliot By and Through Elliot v. United States, 13 F.3d 1555 (11th Cir. 1994) (concluding when a serviceman suffered injuries from carbon monoxide poisoning while watching TV in government housing is not incident to service because the soldier was on leave status), reh'g granted and opinion vacated, 28 F.3d 1076 (11th Cir. 1994), on reh'g, 37 F.3d 617 (11th Cir. 1994).
6. Feres, 340 U.S. at 135 (establishing that the United States was not liable under the FTCA for the death of a serviceman by fire in the barracks while on active duty).
8. Costa v. United States, 248 F.3d 863 (9th Cir. 2001).
9. Id.
and veterans' benefits inadequate, it can recommend congressional reform to the statutory compensatory measures already in place rather than attacking the government's valid Feres bar defense.

II. WHAT IS THE FERES DOCTRINE?

In 1950, the Supreme Court created an exception to the Federal Tort Claims Act (FTCA) called the Feres doctrine, which bars service members from recovering for activities incident to service.\(^{10}\) Essentially, this doctrine provides that military personnel cannot sue the government for personal injuries suffered while performing their duties or when utilizing a privilege entitled to service members. Throughout the last fifty years, courts have questioned the logic and expansion of this doctrine.\(^{11}\) In order to understand the controversy, it is important to understand the congressional and judicial background of service members' rights to recover.

In 1946, Congress passed the Federal Tort Claims Act (FTCA) which permits citizens to file lawsuits against the United States for loss of property, personal injury, or death caused by the tortious conduct of a government employee who acted within the scope of his/her employment.\(^{12}\) This allows recovery against the government in circumstances where the United States would be liable if the government was a private person in accordance with the law of the place where the act or omission occurred.\(^{13}\) Several exceptions to the FTCA limit the United States' liability, including 28 U.S.C. §2680(j). This exception provides governmental immunity from service members' lawsuits "arising out of the combatant activity of the military or naval forces, or the Coast Guard, during time of war."\(^{14}\) The FTCA "contains no express provision barring claims of military personnel during peacetime."\(^{15}\)

In Feres v. United States, the Supreme Court created a peacetime exception by barring recovery when military personnel suffer injuries

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10. Feres, 340 U.S. at 135.
15. Elliot By and Through Elliot v. United States, 13 F.3d 1555, 1558 (11th Cir. 1994), reh'g granted and opinion vacated, 28 F.3d 1076 (11th Cir. 1994), on reh'g, 37 F.3d 617 (11th Cir. 1994).
arising from activities incident to their military service.\textsuperscript{16} The Court sent a message supporting sovereign immunity for military matters when it stated: "We know of no American law which ever has permitted a soldier to recover for negligence, against either his superior officers or the Government he is serving."\textsuperscript{17} The Court concluded by saying:

We do not think that Congress, in drafting this [Federal Tort Claims] Act, created a new cause of action dependent on local law for service-connected injuries or death due to negligence. We cannot impute to Congress such a radical departure from established law in the absence of express congressional command.\textsuperscript{18}

The \textit{Feres} case then established the rule of law "that the 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."\textsuperscript{19}

The reference to "incident to service" originated in \textit{Brooks v. United States}.\textsuperscript{20} There, a United States Army truck negligently struck two servicemen while they were traveling on a public highway in their privately owned vehicle while they were on furlough.\textsuperscript{21} The Court cautiously applied the Federal Tort Claims Act to the \textit{Brooks} case in 1949, declaring that servicemen could recover against the United States under the FTCA for injuries that were not sustained "incident to their military service."\textsuperscript{22}

One year later, the Supreme Court granted certiorari and combined three servicemen's lawsuits against the United States into \textit{Feres v. United States}, which established the Court's initial standard for barring incident to service claims.\textsuperscript{23} In Feres' suit, the executrix of a serviceman brought an action for her deceased husband who died in a fire while sleeping in military barracks.\textsuperscript{24} The suit alleged negligence for quartering him in barracks known to be unsafe and failure to maintain an adequate fire watch.\textsuperscript{25} In Jefferson's suit, the soldier received


\textsuperscript{17} Feres, 340 U.S. at 141.

\textsuperscript{18} Id. at 146.

\textsuperscript{19} Id.

\textsuperscript{20} Brooks v. United States, 337 U.S. 49 (1949).

\textsuperscript{21} Id.

\textsuperscript{22} Id.

\textsuperscript{23} Feres, 340 U.S. at 135 (combining Feres', Jefferson's and Griggs' claims into one case).

\textsuperscript{24} Id. at 137.

\textsuperscript{25} Id.
an abdominal operation while serving active duty in the Army. Eight months later during another operation, a U.S. Army towel was discovered in his stomach. The complaint alleged that an Army surgeon negligently left the towel there. In Griggs' case, an executrix alleged that the negligent and unskillful medical treatment utilized by Army surgeons caused her husband's death while he was on active duty. By barring all three cases where each claimant, on active duty and not on furlough, sustained injury due to the negligence of others in the Armed Forces, the Supreme Court created the Feres doctrine.

In United States v. Johnson, the Supreme Court summarized the three distinct rationales mentioned in the 1950 Feres opinion:

First, the distinctively federal character of the relationship between the Government and Armed Forces personnel necessitates a federal remedy that provides simple, certain, and uniform compensation, unaffected by the fortuity of the situs of the alleged negligence. Second, the statutory veterans' disability and death benefits system provides the sole remedy for service-connected injuries. Third, even if military negligence is not specifically alleged in a service member's FTCA suit, military discipline may be impermissibly affected by the suit since the judgments and decisions underlying the military mission are necessarily implicated, and the duty and loyalty that service members owe to their services and country may be undermined.

In 1954, the Supreme Court began to focus on the military discipline rationale in Brown v. United States. The Court emphasized those unique relationships and missions of the military that require the Court's deference. The "peculiar and special relationship of soldier to superiors, the effects of service member suits on discipline, and the extreme results that might obtain if suits under the FTCA were allowed for negligent orders given or negligent acts committed in the course of military duty" all support the rationale of the Feres doctrine, that the courts should not interfere with claims that were incident to service. While courts today continue to note the other original rea-

26. Id.
27. Id.
28. Id.
29. Id.
30. Id.
32. Brown v. United States, 348 U.S. 110 (1954) (distinguishing the injury in a veterans' hospital did not occur when the respondent was on active duty or subject to military discipline from the facts in the Feres case).
33. Id.
34. Id. at 112.
sons for the Feres bar, they do not give them much consideration because the other two rationales do not help determine whether the accident was incident to service. Therefore, the military discipline rationale has become the primary justification for the Feres doctrine.35

The doctrine's military discipline rationale led to expansion of the types of claims that have been barred. The Stencel case arose out of a National Guard fighter aircraft malfunction.36 When the plaintiff sued the manufacturer and the United States for joint negligence, the court denied the third party indemnity action against the United States.37 Recovery was unavailable for the same reasons that the service member could not sue the government himself—the claim would require interference with military affairs and the direct action by the service member would be barred under Feres.38 This case broadened the government's immunity and prevents recovery indirectly where it would be prohibited directly.

In 1983, the court adopted the "Genesis Test."39 In Hinkie v. United States, a widow brought suit for herself and her two children who suffered from birth defects as a result of the father's alleged exposure to radioactive materials while he was on active duty in the U.S. Army.40 The Feres doctrine prevented the father's recovery because the injury was caused incident to service and would cause investigation that would lead to interference with military discipline and decision making.41 In this case, the Third Circuit extended the bar to derivative claims—when the injury to a civilian has its 'genesis' in the injury suffered by the military personnel incident to service.42

A wide range of appellate cases involving service members consistently applied the Feres bar based primarily on the military discipline rationale, while many lower courts have struggled with that reasoning. Even though the other two rationales applied by the Supreme Court in the Feres decision (the distinctive federal relationship rationale and the presence of an alternative source of compensation system rationale) "regularly appear when Feres issues arise, they have lost much of their vitality, and provide no help in determining

37. Id.
38. Id.
41. Id.
42. Id.
when an injury occurs 'incident to service.'" As a result, when courts try to figure out if the claimant should be barred because he/she was acting incident to service, they focus on the effect of the lawsuit on the military disciplinary structure. Determining if an accident is incident to service is critical because if the claimant proves the accident was not related to his/her military service, then the service member can recover under the FTCA just as any other citizen. Due to the fact the three original policy rationales created by the Feres Court face serious criticism, many circuit courts have developed four factors to better define "incident to service." This factor-based approach allows those courts to get around the Feres bar when they find the military discipline rationale fails to support the facts in the case before them.

III. THE "INCIDENT TO SERVICE" LOOPHOLE

The Feres doctrine only bars those suits against the Government for injuries that "arise out of or in the course of activity incident to service." Deciding whether an injury is incident to military service is not a simple task because there is no bright line between whether an injury was or was not incident to the claimant's military service. The inquiry is fact specific and not easily susceptible to clear rules. Courts primarily look to four factors in determining whether the situation occurred "incident to service": (1) situs of injury; (2) nature of the plaintiff's activities at the time of the incident; (3) the duty status of the plaintiff at the time of the incident; and (4) the benefits accruing to the service member. None of these factors are dispositive. Courts focus on the "totality of the circumstances" and compare fact patterns to other cases applying the doctrine. Courts have successfully sidestepped the Feres bar by distinguishing minor facts and deciding events do not qualify as incident to service.

43. Elliot, 13 F.3d at 1559.
44. Id.
46. Costco, 248 F.3d at 867.
47. Feres, 340 U.S. at 146.
48. "The 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." United States v. Shearer, 473 U.S. 52, 57 (1985).
49. Id.
50. Costco, 248 F.3d at 867.
51. Id.
52. Id.
Precedents that have applied the Feres doctrine prove that the analysis is largely fact-driven.\textsuperscript{53} The pattern over the last fifty years indicates certain injuries are routinely barred as incident to service claims. This list includes personal injury or death arising from: negligent maintenance of government quarters,\textsuperscript{54} accidents while utilizing government recreational equipment,\textsuperscript{55} medical malpractice claims,\textsuperscript{56} radiation or exposure to chemicals,\textsuperscript{57} sexual harassment,\textsuperscript{58} and racial discrimination.\textsuperscript{59} In these cases damage would not have occurred \textit{but for} the service member’s military status.\textsuperscript{60}

Most courts consistently apply the Feres bar based on the military discipline rationale, but some judges who feel the case would not require examination of military decisions find exceptions to the rule with the incident to service factors. For instance, courts recognize that medical care is a military benefit and therefore medical malpractice cases are Feres barred.\textsuperscript{61} However, some courts question whether the relationship between the doctor and patient affect military discipline\textsuperscript{62} or whether the Feres bar extends to all benefits incident to military service.\textsuperscript{63} Courts have often found ways to bend the rules to avoid application of the Feres bar.

\textbf{IV. How Courts Bend the Rules to Get Around the Feres Bar}

Many courts are reluctant to impose the Feres doctrine and want to take advantage of every opportunity to avoid the government’s bar.

\textsuperscript{53} Id.
\textsuperscript{54} Feres, 340 U.S. at 135.
\textsuperscript{55} Costa, 248 F.3d at 863; Pringle v. United States, 208 F.3d 1220 (10th Cir. 2000).
\textsuperscript{56} Feres, 340 U.S. at 135; Atkinson v. United States, 485 U.S. 987 (1988); Persons v. United States, 925 F.2d 292 (9th Cir. 1991); Del Rio v. United States, 833 F.2d 282 (11th Cir. 1987).
\textsuperscript{57} Minns v. United States, 155 F.3d 445 (4th Cir. 1998).
\textsuperscript{58} Mackey v. United States, 226 F.3d 773 (6th Cir. 2000); Morse v. West, 975 F. Supp. 1379 (D. Colo. 1997).
\textsuperscript{59} Speigner v. Alexander, 248 F.3d 1292 (11th Cir. 2001).
\textsuperscript{60} Elliot, 13 F.3d at 1162 (11th Cir. 1994).
\textsuperscript{61} Smith v. Saraf, 148 F. Supp.2d 504, 514 (D.N.J. 2001) ("any injury experienced by an active duty service member as a result of treatment paid for or provided by the military is inherently "incident to service", even if the injury itself is unrelated to the service.").
\textsuperscript{62} Id. at 519.
\textsuperscript{63} Elliot, 13 F.3d at 1563 (refusing to apply the Feres bar to all military benefits and concluding that providing safe government housing does not involve “sensitive military issues” or the second-guessing of military orders so the Feres bar does not apply).
In *Hansen v. United States*, the plaintiff suffered injuries while shopping at a commissary and the district court dismissed the suit due to lack of jurisdiction. The decision was reversed on appeal to allow for discovery in order to show the *Feres* doctrine should not apply. As a general rule, "where pertinent facts bearing on the question of jurisdiction are in dispute, discovery should be allowed." The *Hansen* court stated:

If the discovery sought by the Hansens could conceivably have demonstrated that their suit is not barred by the *Feres* doctrine, then the suit should not have been dismissed before that discovery was complete. It is at least conceivable that the requested discovery would establish facts under which the Hansens would elude the *Feres* doctrine. Although the *Feres* doctrine has a broad reach, the discovery sought by the Hansens might establish that *Feres* does not bar their suit.

The Ninth Circuit ruled that the *Feres* doctrine should not be applied prematurely, and it also sent a message that it was willing to entertain ideas that shopping at a commissary may not be "incident to service" because the military relationship could be too tenuous.

Courts have also found ways to get around the service member's bar to recovery in medical malpractice cases involving negligent prenatal care. In *Smith v. Saraf*, the plaintiffs, Yvonne and Willie Smith, brought a medical malpractice suit against Dr. Saraf on behalf of themselves and their son, Elijah Smith. Plaintiffs alleged that as a result of Dr. Saraf's negligence in failing to ensure that Mrs. Smith received particular prenatal tests, the plaintiffs were prevented from discovering that Elijah would be born with a severe birth defect, and the Smiths were thereby deprived of the choice to terminate the pregnancy. Mrs. Smith was a service member on active duty status with the Air Force at the time of the alleged medical practice and the government paid for

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64. Hansen v. United States, 248 F.3d 1171 (9th Cir. 2001) (The *Feres* doctrine relates to sovereign immunity and even though it is used an affirmative defense, it is treated as a bar to jurisdiction).

65. *Id.*

66. *Id.*

67. *Id.*

68. *Id.* (the "Hansens' interrogatories would illuminate the nature of the agreement between McChord [Air Force Base] and the commissary, as well as the operations of the commissary, and might demonstrate that the commissary was so far removed from the military command—in terms of military regulations, staffing, funding, and management—that the act of shopping in the commissary is not "incident to service.").


70. *Id.*
her prenatal care.\textsuperscript{71} As a result, Mr. and Mrs. Smith's claim for wrongful birth were barred by the \textit{Feres} doctrine, but Elijah's claim for wrongful life was permitted.\textsuperscript{72}

\textit{Smith} classifies the fetus as a civilian under the \textit{Feres} doctrine who is entitled to recover damages for wrongful life under the Federal Tort Claims Act.\textsuperscript{73} Even though the wrongful life claim derived from the negligent prenatal care to the mother, the court granted recovery to the child.\textsuperscript{74} This court inadvertently established a direct duty between the doctor and the fetus,\textsuperscript{75} which enabled the court to distinguish its ruling from the well-established genesis theory. A definition of genesis theory is found in the case \textit{Minns v. United States}: "If a non-service-man's injury finds its 'genesis' in the injury suffered by a serviceman incident to [military] service, then the Feres doctrine bars the non-serviceman's suit."\textsuperscript{76} The courts consistently bar claims where babies are born with deformities caused by military acts or negligence such as overexposure to radiation or chemicals.\textsuperscript{77} \textit{Smith v. Saraf} illustrates the growing trend away from the genesis theory and reveals that "[c]ourts have been hesitant to [Feres] bar claims involving minor children."\textsuperscript{78}

In \textit{Hall v. United States}, the court permitted recovery for the surviving wife of Michael Shawn Johnston, a service member, who died of carbon monoxide poisoning while asleep in on-post housing provided by the government.\textsuperscript{79} The district court concluded that the service member, who was off-duty for the weekend at the time of his death, was not injured during the course of activity incident to his service, so the \textit{Feres} doctrine did not bar recovery.\textsuperscript{80} The opinion clearly outlined the three rationales that support the \textit{Feres} doctrine and the factors in determining its applicability, including the totality of the circum-

\begin{itemize}
\item \textsuperscript{71} \textit{Id}.
\item \textsuperscript{72} \textit{Id}.
\item \textsuperscript{73} \textit{Id}.
\item \textsuperscript{74} \textit{Id}.
\item \textsuperscript{75} \textit{Id}. at 519.
\item \textsuperscript{76} \textit{Minns v. United States}, 155 F.3d 445, 449 (4th Cir. 1998) (holding \textit{Feres} bar applies to wife and children who suffered when the child was born with birth defects that were allegedly caused by inoculations and exposure to toxins and pesticides administered by military to servicemen in anticipation of possible chemical attacks during the Persian Gulf War).
\item \textsuperscript{77} \textit{Id}.
\item \textsuperscript{78} \textit{Mack v. United States}, No. 00-2296, 2001 WL 179888, at *5 (D. Md. Feb. 21, 2001).
\item \textsuperscript{79} \textit{Hall v. United States}, 130 F. Supp.2d 825, 826 (S.D.Miss. 2000).
\item \textsuperscript{80} \textit{Id} at 829.
\end{itemize}
stances, but came up with a result opposite to that reached in the original Feres case.\footnote{Id.}

The court emphasized the duty status as the most important factor and went on to explain that there are 'degrees of active service.'\footnote{Id. at 827 (quoting Parker v. United States, 611 F.2d 1007 (5th Cir. 1980).} The court outlined a spectrum of duty status. At one end of the spectrum is an active duty service member performing duties within the scope of employment, which is clearly conduct incident to service. On the other end of the spectrum is an individual who has been discharged and therefore has civilian status.\footnote{Id. at 827.} "Between these extremes are degrees of active duty status ranging from furlough or leave to mere release from the day's chores."\footnote{Id.}

The judge compared the facts in Feres\footnote{Feres, 340 U.S. at 135.} and Elliot\footnote{Elliot, 13 F.3d at 1555 (11th Cir. 1994).} to this case because in all three cases, active duty servicemen were injured at their on base housing quarters, allegedly because of negligent maintenance by military personnel.\footnote{Hall v. United States, 130 F. Supp.2d 825 (S.D.Miss. 2000).} The court managed to distinguish this case because the injury occurred on a Sunday, while Johnston was off duty for the weekend.\footnote{Id. at 829.} In Feres the injured serviceman was off duty for the night, and in Elliot the service-man's injury occurred while he was on two-week leave status.\footnote{Id. at 600.}

After laboring over this minor distinction in the day of the week, the court sided with Kelly v. Panama Canal Commission,\footnote{Kelly v. Panama Canal Comm'n, 26 F.3d 597 (5th Cir. 1994).} and held that if the injury occurs on a weekend, then a serviceman's duty status is not a strong indicator of whether he was acting incident to service.\footnote{Id. at 600.} The Kelly court found that in the specific case of a serviceman whose work week was Monday to Friday and who was injured in an accident that occurred when he was off-duty for the weekend, "his duty status [fell] along the middle of the spectrum and [was] not a strong indicator of whether he was acting incident to service."\footnote{Id.}

The court in the Hall case then went on to focus on the fact that an on-post injury does not immediately trigger the application of Feres.\footnote{Hall v. United States, 130 F. Supp.2d 825 (S.D.Miss. 2000).} "If the injury occurred on the base, the Court must proceed to
the further inquiry of what function the soldier was performing at the
time of the injury in order to ascertain the totality of the circum-
stances."\textsuperscript{94} The \textit{Hall} opinion stated that even though "the injury at
issue occurred while Johnston was on base, the court ultimately [was]
not persuaded under the 'totality of the circumstances' that it occurred
incident to his military service. At the time of his injury, Johnston was
asleep while off duty for the weekend, a purely personal activity."\textsuperscript{95}
The only difference between this case and the original ruling in \textit{Feres}\textsuperscript{96}
appears to be the day of the week because both service members were
off duty, engaged in the 'purely personal activity' of sleeping!

This case demonstrates a court's ability to take advantage of the
fact the \textit{Feres} doctrine is not governed by bright-line rules\textsuperscript{97} and the
incident to service factors can be manipulated to permit recovery
when the court feels sympathy for claimants. While the tragic events
warrant compensation, the court should have considered the fact tax-
payers are going to pay for the statutory entitlements for the service
member in addition to the award granted in trial.

V. IS IT TIME FOR THE SUPREME COURT OR CONGRESS TO STEP IN?

In the past, when the United States Supreme Court discovered
inconsistent rulings throughout the circuits, it stepped in to restate its
unchanged position supporting the \textit{Feres} Bar. After a series of contra-
ddictory rulings, in the 1985 case \textit{United States v. Shearer}, the Supreme
Court clarified that "[u]nder the \textit{Feres} doctrine, situs of injury to a
serviceman is not nearly as important as whether a Federal Tort
Claims Act suit requires a civilian court to second-guess military deci-
sions and whether the suit might impair essential military disci-
pline."\textsuperscript{98} In the 1987 case, \textit{United States v. Johnson} the Court held that
the \textit{Feres} doctrine bars Federal Tort Claims Act action on behalf of

\textsuperscript{94} Id. at 828.
\textsuperscript{95} Id. at 829.
\textsuperscript{96} \textit{Feres}, 340 U.S. at 135.
\textsuperscript{97} Id. at 828.
\textsuperscript{98} \textit{United States v. Shearer}, 473 U.S. 52 (1985) (barring recovery of survivor of a
serviceman "who was murdered by fellow serviceman off base and off duty where
basis of liability was that military superiors negligently and carelessly failed to assert
sufficient control over the offending serviceman, who had previously been convicted
of murder, failed to warn others that he was at large and negligently and carelessly
failed to remove such serviceman from active military duty; plaintiff could not escape
the \textit{Feres} net by focusing only on the case with a claim of negligence and by
characterizing the claim as a challenge to a "straightforward personnel decision,"
because by whatever name it was called, the claim called into question a decision of
command").
service member killed during activity incident to service, even if alleged negligence is by civilian employee of federal government.\textsuperscript{99} In both of these cases, the majority ruled that the government will not be liable for its actions and re-emphasized the military discipline rationale.\textsuperscript{100}

In response to the majority opinion in the \textit{Johnson} case, Justice Scalia attacked the \textit{Feres} doctrine and its rationale in his dissent. He felt the original \textit{Feres} case was wrongly decided and that no rationale justifies the result.\textsuperscript{101} He noted the parallel private liability rationale had been rejected in earlier cases.\textsuperscript{102} He criticized the 'distinctively federal relationship' rationale promoting the military's need for uniformity is no longer controlling and feels that "nonuniform recovery cannot possibly be worse than (what \textit{Feres} provides) uniform nonrecovery."\textsuperscript{103} Justice Scalia classified the Veterans' Benefits Act (VBA) as an "upper limit on the Government's liability" and stated it is not really the exclusive remedy when those who are permitted to recover under the FTCA still receive compensation from the VBA.\textsuperscript{104} Therefore, "the VBA is not, as \textit{Feres} assumed, identical to federal and state workers' compensation statutes in which exclusivity provisions almost invariably appear."\textsuperscript{105} Also, due to the fact that this case was brought against a Federal civilian employee rather than another military member, Justice Scalia did not believe that military discipline would be undermined and there should not be any concern that civilian courts would be required to second-guess military decisions.\textsuperscript{106} He also noted that in many cases, civilians who bring suits based on the military's negligence conduct the same inquiry into military decision making, and the issue of the military discipline rationale is never contemplated.\textsuperscript{107}

\textsuperscript{99} United States v. Johnson, 481 U.S. 681 (1987) (Widow of deceased Coast Guard helicopter pilot brought wrongful death action against the United States when he received negligent instructions from a civilian Federal Government employee).

\textsuperscript{100} \textit{Id.}; Shearer v. United States, 473 U.S. 52 (1985).

\textsuperscript{101} \textit{Johnson}, 481 U.S. at 700.

\textsuperscript{102} \textit{Id.} at 695 (referring to Rayonier, Inc. v. United States, 352 U.S. 315, 319 (1957); Indian Towing Co. v. United States, 350 U.S. 61, 66-69 (1955)).

\textsuperscript{103} \textit{Id.} at 695-96.

\textsuperscript{104} \textit{Id.} at 698.

\textsuperscript{105} \textit{Id.}

\textsuperscript{106} \textit{Id.}

\textsuperscript{107} In Scalia's dissent he noted that "[i]f Johnson's helicopter had crashed into a civilian's home, the homeowner could have brought an FTCA suit that would have invaded the sanctity of the military decision-making no less than respondents." \textit{Johnson}, 481 U.S. at 700.
Many judges support Scalia's dissent and reluctantly follow *Feres*. As long as there is a loose fit between the facts of the cases and the military discipline rationale that justifies the *Feres* bar, judges will continue to struggle to support the Supreme Court. As judges analyze the cases, they rely on the military discipline rationale of the *Feres* doctrine as a disclaimer for their reluctant enforcement of the *Feres* bar. If they instead focused on the military entitlements the service member will receive, courts may conclude that even though the government is often negligent, the service member will be compensated in some form.

If the Supreme Court had maintained its position that service members could not recover because the government already provides compensation, lower courts might express more support for the *Feres* doctrine. Perhaps some of the most compelling reasons soldiers should not recover further under the FTCA are that all service members have a $250,000 life insurance policy called SGLI, and they receive free medical and health care benefits, veterans benefits, and disability benefits. Instead of relying on these reasons, the courts apply the military discipline rationale to many fact situations where it does not justify the reason for the bar when the alternative compensatory scheme reasoning would.

For instance, in *Richards v. United States*, the Third Circuit reluctantly determined that a soldier killed on base by a military truck while driving home occurred incident to service. The judges reached this conclusion by applying the *Feres* factors, i.e., looking at the service member's duty status, the site of the accident, and the nature of the member's activity at the time of the injury, while considering each of the factors in light of the totality of the circumstances. The court also referred to case precedents in similar fact situations and noted if the soldier had been half a mile off post or on furlough at the time of the accident, other case precedents would permit recovery. The court noted that Richards "would not, except in the event of the rarest coincidence, have been in the same place at the same time with the same purpose, had it not been incident to his active status in the

109. Id.
110. Id.
111. Id.
112. Richards, 176 F.3d at 656 (referring to Troglia v. United States, 602 F.2d 1334 (9th Cir. 1979), where the accident took place one-half mile outside the base, and Brooks v. United States, 337 U.S. 49 (1949), where two service members on furlough and on a public highway were determined to be on personal business).
The judge writing the majority opinion disapproved of the Feres bar because a civilian would be entitled to recover if a civilian had been hit by that military truck. The court then attempted to undermine the ruling, by relying on the military discipline rationale. The judge pointed out that an investigation into military affairs would occur and questions would be raised concerning military negligence and supervision, even when a civilian was involved in the accident. But the court failed to note the most relevant fact: that the civilian is not going to receive the benefits to which a service member is entitled.

The court bluntly stated its opinion of the Feres doctrine in the final statements of the opinion: "we are left with a counter-intuitive and inequitable result simply because of Private Richards's military status. It is because Feres too often produces such curious results that members of this court repeatedly have expressed misgivings about it." This court should not have been regretful for correctly concluding that the sole reason the Feres Bar applies rests upon the claimant's military status. After all of the court's philosophical debate, the simple fact that a person is on active duty status and eligible for compensatory benefits should alone be enough to enforce the Feres Bar. If this court was fully aware of the SGLI survivors' benefits, they may have been more confident that they made the right decision and in the light of fairness, the victim's survivor received compensation for the loss.

Costo v. United States is another case where the court resisted the rationale of the Feres doctrine, but upheld the bar based on case precedent. In this case, two sailors drowned on a rafting trip administered by the Morale Welfare and Recreation (MWR) program provided by the military. Cases consistently rule that recreational activities sponsored by the military fall within the Feres doctrine because the equipment and programs constitute a privilege incident to service which servicemen otherwise would not have access to. After applying the incident to service factors and comparing the case to facts of

113. Richards, 176 F.3d at 656.
114. Id.
115. Id.
116. Id.
117. Id. at 657.
118. Costa v. United States, 248 F.3d 863 (9th Cir. 2001).
119. Id.
120. See Pringle v. United States, 208 F.3d 1220 (10th Cir. 2000) (held that recreational activities sponsored by the military fall within the Feres doctrine).
similar cases, the court felt its only choice was to enforce the *Feres* bar. 121 The Ninth Circuit stated:

[W]e apply the *Feres* doctrine here without relish. Nor are we the first to reluctantly reach such a conclusion under the doctrine. Rather, in determining this suit to be barred, we join the many panels of this Court that have criticized the inequitable extension of this doctrine to a range of situations that seem far removed from the doctrine's original purposes. But until Congress, the Supreme Court, or an en banc panel of this Court reorients the doctrine, we are bound to follow this well-worn path. 122

The dissent in *Costo* adamantly attacked the *Feres* doctrine as a violation of service members' constitutional rights under the Fourteenth and Fifth Amendments and the constitutional separation of powers. 123 In his dissent, Judge Ferguson felt that the Federal Tort Claims Act was designed "to place all Americans on an equal footing in litigating the civil liability of the federal government for claims of tort injuries." 124 He criticized the interpretation of the FTCA and noted that "[i]t is not for 'the judiciary [to] sit as a superlegislature to judge the wisdom or desirability of legislative policy determinations made in areas that neither affect fundamental rights nor proceed along suspect lines.'" 125 While all Americans are equal, the judge failed to acknowledge that service members waive many of their rights and are treated differently in several aspects because they receive special benefits that eliminate the need for additional compensation under the FTCA.

As Judge Ferguson attacked each rationale of the *Feres* doctrine, when he approached the topic of compensatory measures already available to service members he simply restated a point made by Justice Scalia: " 'both before and after *Feres* [the Court] permitted injured servicemen to bring FTCA suits, even though they had been compensated under the [Veterans Benefit Act].' " 126 He acknowledged that the problem the courts found with the compensation already available to military members was that it was not the exclusive remedy. 127 This analysis should have gone a step further to realize the *Feres* bar does not need to be removed—the real problem is a compensation scheme that allows some individuals double recovery.

121. *Costo*, 248 F.3d at 863 (9th Cir. 2001).
122. *Id.* at 869 (citations omitted).
123. *Id.*
124. *Id.*
125. *Id.* at 870 (quoting City of New Orleans v. Dukes, 427 U.S. 297, 303 (1976)).
126. *Id.* at 875.
127. *Id.*
The negative message the lower courts send tends to neglect the fact that injured service members receive compensation from the government as a benefit to their service. The original Feres case perfectly demonstrated this fact. The Feres court found:

[the] primary purpose of the [Federal Tort Claims] Act was to extend a remedy to those who had been without; if it incidentally benefited those already well provided for, it appears to have been unintentional. Congress was suffering from no plague of private bills on behalf of military and naval personnel, because a comprehensive system of relief had been authorized for them and their dependents by statute.128

The Court also outlined the benefits claimants receive through the established administrative compensation systems: "The compensation system, which normally requires no litigation, is not negligible or niggardly, as these cases demonstrate. The recoveries compare extremely favorably with those provided by most workman's compensation statutes."129

The Feres court conducted a cost comparison for each of the injured servicemen which illustrated the compensation systems in place for service members in 1950 actually provided better benefits than State laws would have permitted for recovery.130 For example, "[i]n the Jefferson case, the District Court considered actual and prospective payments by the Veterans' Administration as diminution of the verdict. Plaintiff received $3,645.50 to the date of the court's computation and on estimated life expectancy under existing legislation would prospectively receive $31,947 in addition."131 The Feres court also noted:

[i]n the Griggs case, the widow, in the two-year period after her husband's death, received payments in excess of $2,100. In addition she received $2,695, representing the six months' death gratuity under the Act of December 17, 1919 . . . . It is estimated that her total future pension payments will aggregate $18,000. Thus the widow will receive an amount in excess of $22,000 from Government gratuities, whereas she sought and could seek under state law only $15,000, the maximum permitted by Illinois for death.132

If courts today would continue to quantify the dollar amounts service members and their survivors receive through benefits, lower courts would not feel they have committed such a grave injustice every

128. Feres, 340 U.S. at 140.
129. Id. at 145.
130. Id.
131. Id. at 145.
132. Id.
time they enforce the *Feres* bar. The judges beg for the Supreme Court and Congress to reconsider the *Feres* doctrine but fail to offer a remedy or consider alternatives.\textsuperscript{133} The courts ignore the compensation systems in place and the enormous cost that would be passed along to taxpayers if the *Feres* bar was lifted.

Service members are entitled to several benefits as a result of their military service. Courts need to become more familiar with the statutes governing the Veterans Administration benefits, disability compensation, life insurance (SGLI), and survivor benefits. Also, it has been suggested: the availability of guaranteed military medical care and the benefits available from the Physical Evaluation Board (PEB) process for "incident to service" injuries [which determines if a service member is eligible for disability benefits] is crucial to understanding the breadth of the compensation scheme available to all active duty service members, and such a discussion should be included in the litigation report for any claim of injury.\textsuperscript{134}

Congress created the Military Claims Act (MCA) to allow military members to recover for property damage just as civilians recover under the Federal Tort Claims Act.\textsuperscript{135} Service members are compensated under the MCA for claims arising out of non-combat activities (training) or claims brought by soldiers for property losses sustained incident to their service within the United States.\textsuperscript{136} This allows service members to receive a monetary settlement when a government employee negligently causes damage to a service member's property while acting within the scope of his/her employment.\textsuperscript{137} Therefore, if a government vehicle causes damage to a service member's privately owned car, the government will award the same settlement to a military member under the MCA that a civilian would receive under the FTCA. Also, whenever a service member's household goods are damaged during relocation, the government will reimburse the claimant for the replacement value. The fact Congress separately devised the Military Claims Act to ensure service members received compensation for their private property indicates a legislative intent to specifically

\textsuperscript{133} Costo v. United States, 248 F.3d 863 (9th Cir. 2001); O'Neill v. United States, 140 F.3d 564 (3d Cir. 1998); Elliot By and Through Elliot v. United States, 13 F.3d 1555 (11th Cir. 1994).

\textsuperscript{134} Major Boucher, *Feres Cases Need Investigation, Too*. Army Lawyer, July 1997, at 45.

\textsuperscript{135} U.S. Department of the Army, Regulation 27-30, Claims (31 Dec 1997) [hereinafter AR-27].

\textsuperscript{136} AR-27, Claims, Section 2-18, Determination of correct statute, (31 Dec 97).

\textsuperscript{137} AR 27-20, Chapter 3.
address the extent of tort liability for service members. The fact they do not include recovery for personal injury under the MCA is most likely because service members receive alternative compensation through military benefits and statutory entitlements.

The fairness of the Feres doctrine lies in the fact that the military benefits are similar to a workers' compensation plan which limits the government's liability. The service members have statutory remedies and therefore should not be entitled to double recovery under the Federal Tort Claims Act. While it is of the utmost importance to protect service members' rights, it is also significant that taxpayers fund the compensatory systems already in place for military personnel. It would be an injustice to raise taxes so service members could also seek damages in a court room for injuries sustained incident to service. If the benefits are inadequate, it should be the plaintiff service member's responsibility to justify why taxpayers should pay additional monies. This approach would pinpoint weaknesses in the compensatory systems, and the courts could then prove statutory entitlements are inadequate and send a clear message to Congress to take action.

In 1950, the Supreme Court recognized if the creation of the Feres Doctrine and interpretation of the FTCA was incorrect, then "Congress, as author of the confusion, [will be assigned] the task of qualifying and clarifying its language..." Congressional silence for fifty years should indicate that legislators do not object to the Feres doctrine prohibiting service members from recovering for injuries incident to service.

If Congress were to respond to the judicial branch's pleas, it should create a better system that resembles a workers' compensation scheme comparable to those of private companies rather than lift the Feres bar. The legislation in reference to service member recovery should improve the systems already in place and possibly limit the benefits for those service members who suffer injuries that are not within the definition of "incident to service" and therefore entitled to recover under the Federal Tort Claims Act.

In a Congressional Hearing on July 31, 2001, a compromise was proposed which would allow members of the Armed Forces to sue the United States for damages for certain injuries caused by improper medical care. This pending legislation suggests:

139. To amend chapter 171 of title 28, United States Code, to allow members of the Armed Forces to sue the United States for damages for certain injuries caused by improper medical care: Hearing on H.R. 2684 Before the Committee on the Judiciary, 107th Cong. (2001) (Statement by Mr. Frank).
[P]ayment of any claim of a member of the Armed Forces under this section shall be reduced by the present value of other benefits received by the member and the member's estate, survivors, and beneficiaries under Title X, Title XXXVII, or Title XXXVIII that are attributable to the physical injury or death from which the claim arose. 140

This provision would prevent overcompensation by suggesting that recovery under the FTCA be reduced by the value of the benefits service members already receive.

The Feres bar serves a fiscal function, keeping taxes down by limiting government liability. It is highly unlikely in today's economy that legislators who want to get re-elected will take any steps towards reaching further into their constituents' pockets. Improvements to the current compensatory system would be far less costly than opening the floodgate of litigation and damages that would result if service members were entitled to recover under the FTCA. In time, as recruiting and retention will remain hot issues in our voluntary military, the benefits entitled to service members will remain in effect. Therefore, as suggested by the recent Congressional hearings, if the FTCA were to allow service members to recover damages, Congress would likely reduce the damages by the value of benefits received.

If Congress revises the FTCA or if the Supreme Court overrules the Feres doctrine, many courts may still find reasons to bar claims. In Bruneau v. United States, a Massachusetts federal district court found that even though the government may have been negligent during Air Force training, and serviceman Bruneau's injuries were significant, the discretionary function exception barred his claim. 141 The court found that "[t]he decisions of the Air Force that allegedly caused plaintiff's injuries allowed room for the exercise of discretion, and were susceptible to policy-related analysis. They therefore [met] the requirements of the discretionary function exception and bar[red] his claim." 142 The discretionary exception provides sovereign immunity for decisions made by government employees, but holds the U.S. Government liable for those acts negligently carried out. 143 Therefore, many of the military decisions would be protected, but the government would be responsible every time a service member failed to exercise due care.

Another option recently exercised by a court was to find the suit non-justiciable. 144 When faced with a death due to Army National

140. Id.
142. Id. at 305.
Guard members negligently operating a truck during a summer training exercise, a Maryland court chose not to apply the *Feres* doctrine. Instead, the court found that the non-justiciability doctrine precluded judicial determination of whether the National Guard was liable. The court stated:

The non-justiciability doctrine is based on the notion that certain policy issues relating to military provisioning, duty assignments, and training are ordinarily matters committed to the Legislative and Executive Branches and, at least in the absence of a Constitutional authorization by them, may not be interfered with by judges and juries.

Courts have traditionally applied great deference to military matters and may substitute the *Feres* bar with the non-justiciability doctrine as a broader approach to apply regardless of the claimant’s military or civilian status and avoid cases that are sensitive to military matters.

Even courts that complain about applying the *Feres* bar to the facts in particular cases support the *Feres* doctrine’s military discipline rationale in a narrow set of circumstances. For example, in *Richards v. United States*, the Third Circuit stated:

One can imagine a hypothetical scenario in which the conduct or decisions of a service member’s superiors necessarily would come under scrutiny during the course of a putative lawsuit. Imagine, for instance, a case in which a soldier attempted to sue the commander of his platoon for injuries received during battle. Such a suit clearly would involve injuries that “ar[o]se out of or in the course of activity incident to military service.” . . . Therefore, this suit would implicate the ‘special relationship’ between the soldier and his superior that is contemplated in *Shearer* . . . and *Muniz* . . . No court would have difficulty in finding that *Feres* barred such a suit because the fit between the facts of the case and the rationales justifying *Feres* would be close.

Those courts seeking reform to the FTCA feel the need to limit its application because of the military discipline rationale. While the need to avoid interfering with military decisions may provide a valid reason to support the *Feres* doctrine, courts should look back to all of the original rationales and remember the military discipline rationale is not the only justification for its application.

145. *Id.*
146. *Id.* at 814.
147. *Id.*
VI. Conclusion

The Feres bar is a valid defense to bar claims for service members who already receive compensation from other Governmental sources. The lower courts continue to struggle with the Feres doctrine because the military discipline rationale does not seem to support the interest of fairness in several situations. It is time for the Supreme Court to step in and stop the lower courts' inconsistent rulings by reinstating the original alternative compensatory benefits rationale of the Feres doctrine and by establishing a better framework for analysis. The Court should focus on the fiscal function the Feres bar supplies and should create a test that weighs the loss incurred versus the benefits the service member will receive. If courts consistently find the remedy the Government provides to be inadequate, then claimants should cry out to Congress with their problems regarding the statutory compensatory systems presently in place.

Kelly L. Dill