



1988

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Recommended Citation

Thomas M. Gallagher, *Servicemembers' Rights under the Feres Doctrine: Rethinking Incident to Service Analysis*, 33 Vill. L. Rev. 175 (1988).

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1988]

Notes

SERVICEMEMBERS' RIGHTS UNDER THE *FERES* DOCTRINE: RETHINKING "INCIDENT TO SERVICE" ANALYSIS

I. INTRODUCTION

Two recent decisions of the United States Supreme Court demonstrate that the "incident to service" test of *Feres v. United States*¹ will stand as the threshold requirement for recovery for servicemembers injured by negligence or constitutional torts at the hands of any government employee, whether military or civilian.² Specifically, any servicemember attempting to recover under the Federal Tort Claims Act (FTCA)³ or seeking redress for a constitutional violation, must bear the difficult burden of proving that the injury was not "incident to service."⁴ However, there is no universal definition of the phrase "incident to service."⁵ Consequently, injured servicemembers are subject to diverse in-

1. 340 U.S. 135, 146 (1950). For a full discussion of the facts and holding in *Feres*, see *infra* notes 25-44 and accompanying text.

2. *United States v. Stanley*, 107 S. Ct. 3054, 3063 (1987); *United States v. Johnson*, 107 S. Ct. 2063, 2069 (1987). For a full discussion of these decisions, see *infra* notes 67-75 & 77-85 and accompanying text.

It is important to note that "[t]he Supreme Court has never held that the *Feres* doctrine is applicable to intentional torts." However, in view of these recent decisions, there is little doubt that the doctrine would bar such a cause of action. Comment, *Expansion of the Feres Doctrine*, 32 EMORY L. J. 237, 255 (1983); see *Jaffee v. United States*, 663 F.2d 1226, 1234-35 (3d Cir. 1981) (intentional tort action barred by *Feres* doctrine). This Note will not treat the topic of intentional torts by government employees, and will focus solely on the "incident to service" exception for suits in negligence and constitutional torts.

3. 28 U.S.C. §§ 2671-2680 (1976). The statute states: "The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgement or for punitive damages." *Id.* § 2674.

The original Federal Tort Claims Act (FTCA), ch. 753, §§ 401-424, 60 Stat. 842 (1946), was repealed in 1948 and reenacted in its present form at 28 U.S.C. §§ 1346(b), 2401(b) and 2671-2680. For further discussion of the Federal Tort Claims Act, see Note, *Military Medical Malpractice and the Feres Doctrine*, 20 GA. L. REV. 492, 501 n.14 (1986).

4. *Feres*, 340 U.S. at 146.

5. See *Miller v. United States*, 643 F.2d 481, 483 (8th Cir. 1980), *rev'd en banc*, 643 F.2d 490, 494 (8th Cir. 1981) (servicemember who was given permission to perform part-time construction work on base barred from recovery because he was not on leave, was on the base to which he was assigned, and the work was related to the military mission); *Parker v. United States*, 611 F.2d 1007, 1013 (5th Cir. 1980) (degrees of active duty status range from furlough or leave to mere release from day's chores. A servicemember with permission to be absent from duties for four days and five nights is closer to former than latter.);

terpretations of this language, wherever they may serve. This inconsistency has resulted in incongruous and often inequitable results. Consider, for instance, the off-duty servicemember attending to personal business, who is injured by a negligently driven military vehicle when it collides with his privately owned motorcycle. On these facts, the victim may recover FTCA damages in Georgia, yet be denied relief in Texas.⁶ Because of its inequities, this doctrine has received heavy criticism from courts and legal commentators.⁷ Nevertheless, it is unlikely that Congress will displace this doctrine.⁸ Therefore, the injured servicemember must rely on the Supreme Court of the United States to

Woodside v. United States, 606 F.2d 134, 141 (6th Cir. 1979) (where servicemember's activity and the Armed Forces are closely associated and naturally related, activity will be deemed "incident to service"), *cert. denied*, 445 U.S. 904 (1980); Henninger v. United States, 473 F.2d 814, 815-16 (9th Cir.) (recovery for injury to soldier already processed for discharge barred as incident to service because soldier still on active status), *cert. denied*, 414 U.S. 819 (1973); *see also* Comment, *Solving the Feres Puzzle: A Proposed Analytical Framework For "Incident to Service"*, 15 PAC. L.J. 1181, 1183 (1984) (irratic application of factors by lower courts has resulted in inconsistent court decisions).

6. Compare Pierce v. United States, 813 F.2d 349 (11th Cir. 1987) (off-duty servicemember riding motorcycle off base was *not* injured incident to service) with Mason v. United States, 568 F.2d 1135 (5th Cir. 1978) (off-duty servicemember riding motorcycle on base was injured incident to service).

7. *See* Bozeman v. United States, 780 F.2d 198, 200 (2d Cir. 1985) ("The *Feres* doctrine is a blunt instrument The original rationales for the holding in *Feres* have been undercut."); Hinkie v. United States, 715 F.2d 96, 97 (3d Cir. 1983) ("We are forced once again to decide a case where 'we sense the injustice . . . of [the] result.'"), *cert. denied*, 465 U.S. 1023 (1984); Scales v. United States, 685 F.2d 970, 974 (5th Cir. 1982) (applying *Feres* "reluctantly" and "regret[ting] the effects" of conclusion), *cert. denied*, 460 U.S. 1082 (1983); Henninger v. United States, 473 F.2d 814, 815 (9th Cir. 1973) ("The precise rationale for the *Feres* rule and its continuing validity have been the source of some confusion."); *In re "Agent Orange" Prod. Liab. Litig.*, 580 F. Supp. 1242, 1247 (E.D.N.Y. 1984) ("Perhaps a pathbreaking appellate court might discern enough emanations of Supreme Court disquiet to predict that Court's future conduct in limiting *Feres*."); Bennett, *The Feres Doctrine, Discipline and the Weapons of War*, 29 St. Louis U. L.J. 383, 385 (1984) ("disciplinary considerations that underlie the [*Feres*] doctrine in fact demand its reversal."); Schwartz, *Making Intramilitary Tort Law More Civil: A Proposed Reform of the Feres Doctrine*, 95 YALE L. J. 992, 992-99 (1986) (overly restrictive *Feres* doctrine should be replaced to allow claims against more serious misconduct); Comment, *The Feres Doctrine: Has It Created Remediless Wrongs For Relatives of Servicemen?*, 44 PITT. L. REV. 929, 952-53 (1983) (courts indiscriminately dismiss claims by servicemembers by improperly analyzing *Feres* and its underlying policies); Note, *From Feres to Stencil: Should Military Personnel Have Access to FTCA Recovery?*, 77 MICH. L. REV. 1099, 1099-1100, 1102 (1979) (*Feres* doctrine unnecessarily deprives military personnel of redress for harms in the name of policies already fulfilled by express exceptions to FTCA).

8. In recent years Congress has discussed proposed legislation that would modify the FTCA and permit servicemembers to bring medical malpractice actions against the United States. *See* H.R. REP. No. 279, 100th Cong., 1st Sess. (1987) (accompanying H.R. 1054); H.R. 1161, 99th Cong., 1st Sess. (1985); H.R. 1942, 98th Cong., 1st Sess. (1983). However, the legislature has reacted just as slowly as the judiciary in recognizing at least some rights of recovery for the servicemember. *See also* Chappell v. Wallace, 462 U.S. 296, 299 (1983). For

determine a specific definition of "incident to service" based on the underlying rationales for the *Feres* doctrine, in order to achieve fairness and predictability.⁹

This Note will examine the development of the underlying rationales for the *Feres* doctrine and the current treatment of negligence and constitutional torts under the doctrine.¹⁰ Several of the rationales originally proposed appear to have eroded over time, and today the "best explanation" for the doctrine is to protect the military disciplinary structure.¹¹ Secondly, this Note will analyze the various definitions of "incident to service" employed by lower federal courts.¹² Finally, this Note will propose a test which balances the needs of the military command and disciplinary structure against the need to make an appropriate remedy available to injured servicemembers.¹³

II. BACKGROUND

The United States government enjoyed the protection of the sovereign immunity doctrine for many years.¹⁴ A United States citizen in-

a full discussion of the *Chappell* decision, see *infra* notes 63-66 and accompanying text.

The most recent proposed modification to the FTCA would allow servicemembers to recover for injuries sustained by medical malpractice in "fixed military medical facilities." H.R. REP. NO. 279, 100th Cong., 1st Sess. 4 (1987). The Judiciary Committee's report concluded that "there is no reason why military personnel bringing suit on their own behalf for medical malpractice should result in any breakdown in military discipline." *Id.* The Committee further concluded that this legislation would lead to (1) improved military medical care due to the threat of suit, and (2) "improved morale within the military establishment." *Id.*

For further discussion of military medical malpractice reform, see Note, *supra* note 3.

9. See generally Note, *In Support of the Feres Doctrine and a Better Definition of "Incident to Service"*, 56 ST. JOHN'S L. REV. 485 (1982).

10. See *infra* notes 14-85 and accompanying text.

11. See *United States v. Shearer*, 473 U.S. 52, 57 (1985). *But see* *United States v. Johnson*, 107 S. Ct. 2063, 2068 (1987) (Supreme Court relied on "three broad rationales" to support *Feres* doctrine). For a full discussion of the facts and holding in *Shearer* and *Johnson*, see *infra* notes 77-85 & 92-100 and accompanying text.

12. See *infra* notes 101-89 and accompanying text.

13. See *infra* notes 194-213 and accompanying text.

14. See *Cohens v. Virginia*, 19 U.S. (Wheat.) 264, 411-12 (1821) (dictum); *see, e.g.*, *United States v. Sherwood*, 312 U.S. 584, 586 (1941). The sovereign immunity doctrine evolved in English common law and was based on the theory that the King, an individual sovereign, could not be sued in his own judicial system. American courts adopted this doctrine to shield the government from suits arising from its employees' conduct. Only Congress could waive this immunity. *See also* W. KEETON, D. DOBBS, R. KEETON, & D. OWEN, *PROSSER & KEETON ON THE LAW OF TORTS* § 131, at 1033 (5th ed. 1984); Jaffee, *Suits Against Governments and Officers: Sovereign Immunity*, 77 HARV. L. REV. 1 (1963). For a discussion of sovereign immunity and the FTCA, see Note, *supra* note 3, at 499-502.

jured in tort by a government employee had the singular remedy of petitioning Congress to pass a private bill for relief.¹⁵ Eventually, this unwieldy system proved to be an inadequate method of handling tort claims against the government. Compelled to act, Congress enacted the Federal Tort Claims Act (FTCA).¹⁶ Through the FTCA, the government waived sovereign immunity and exposed itself to liability for personal injury and property damage caused by the negligence of any government employee "acting within the scope of his office or employment."¹⁷ This waiver of sovereign immunity was not absolute, however, since statutory exceptions were expressly included in the Act, including exceptions for claims arising from "combatant activities" or "in a foreign country."¹⁸ It is significant that while military personnel were ex-

15. *Feres*, 340 U.S. at 140. For a full discussion of the procedures for enacting such a bill, see Holtzoff, *The Handling of Tort Claims Against the Federal Government*, 9 LAW & CONTEMP. PROBS. 311, 311 (1942). See also Gelhorn & Lauer, *Congressional Settlement of Tort Claims Against the United States*, 55 COLUM. L. REV. 1 (1955).

16. 340 U.S. at 140; see S. REP. NO. 1400, 79th Cong., 2d Sess. 1, 29 (1946); S. REP. NO. 1011, 79th Cong., 2d Sess. 1, 24 (1946); H.R. REP. NO. 1287, 79th Cong., 1st Sess. 1, 1-2 (1945); see also Note, *supra* note 9, at 488-90.

17. 28 U.S.C. § 2671. Section 1346(b) waives sovereign immunity against suits for money damages due to the tortious conduct of government employees.

18. *Id.* § 2680(j)-(k). The specific exceptions to the Federal Tort Claims Act are as follows:

(a) Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abuse.

(b) Any claim arising out of the loss, miscarriage, or negligent transmission of letters or postal matter.

(c) Any claim arising in respect of the assessment or collection of any tax or customs duty, or the detention of any goods or merchandise by any officer of customs or excise or any other law-enforcement officer.

(d) Any claim for which a remedy is provided by sections 741-752, 781-790 Title 46, relating to claims or suits in admiralty against the United States.

(e) Any claim arising out of an act or omission of any employee of the Government in administering the provisions of sections 1-31 of Title 50, Appendix.

(f) Any claim for damages caused by the imposition or establishment of a quarantine by the United States.

...
(h) Any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit or interference with contract rights. . . .

(i) Any claim for damages caused by the fiscal operations of the Treasury or by the regulation of the monetary system.

(j) Any claim arising out of the combatant activities of the military or naval forces, or the Coast Guard, during time of war.

(k) Any claim arising in a foreign country.

pressly addressed by these statutory exceptions, these exceptions did not appear to bar all claims by military personnel.¹⁹

The United States Supreme Court addressed this issue in *Brooks v. United States*,²⁰ and interpreted the FTCA to allow at least some claims by injured servicemembers.²¹ In *Brooks*, two servicemembers, on authorized leave and accompanied by their father, were riding in a private vehicle on a public highway. They were injured in a collision with an Army vehicle which had been negligently driven by a federal civilian employee.²² The *Brooks* Court found no evidence of any Congressional intent to completely bar military claims under the FTCA, and permitted the servicemembers to recover, after concluding that their injuries were not sustained incident to service.²³ In its analysis, the Court cited the specific exceptions for claims arising in a foreign country or out of combatant activities as evidence that Congress did *not* intend to foreclose all servicemembers' suits under the FTCA.²⁴

One year later, in *Feres*,²⁵ the Court addressed the specific issue of

(l) Any claim arising from the activities of the Tennessee Valley Authority.

(m) Any claim arising from the activities of the Panama Canal Company.

(n) Any claim arising from the activities of a Federal land bank, a Federal intermediate credit bank, or a local bank of cooperatives.

Id. § 2680.

19. *See id.*; *see also* *Heller v. United States*, 776 F.2d 92, 97 (3d Cir. 1985) (servicemember's suit for wife's wrongful death at military hospital in Republic of the Philippines barred by foreign country exception of FTCA); *Broadnax v. United States Army*, 710 F.2d 865 (D.C. Cir. 1983) (per curiam) (claim arising out of medical malpractice in Army hospital in West Germany barred by foreign country exception of FTCA).

20. 337 U.S. 49 (1949).

21. *Id.* at 51-52. "The statute's terms are clear. They provide for District Court jurisdiction over *any* claim founded on negligence brought against the United States. We are not persuaded that 'any claim' means 'any claim but that of a serviceman.'" *Id.* at 51.

22. *Id.* at 50.

23. *Id.* at 54. The Court distinguished the *Brooks*' car accident from "[a] battle commander's poor judgment, an army surgeon's slip of hand, [and] a defective jeep which causes injury." *Id.* at 52. This distinction was an initial attempt by the Supreme Court to define what events comprise "incident to service."

It is interesting to note that James Brooks, the father of the two servicemembers, who was also injured, recovered under the FTCA in his own right without contest from the Government. *Id.* at 50 n.1.

24. *Id.* at 51; *see also* Note, *supra* note 8, at 491 n.51 (statutory construction principles dictate that express exception precludes implication of other exceptions). It is important to note, however, that the *Brooks* Court cautioned, in dicta, that a servicemember's claim for recovery for injuries suffered "incident to . . . service" would present a "wholly different case," and in such an instance, the results could be so "outlandish" that recovery could not be permitted. 337 U.S. at 52-53.

25. 340 U.S. 135 (1950). All three cases considered by the *Feres* Court were factually similar in that "each claimant, while on active duty and not on furlough,

whether a military servicemember could sue the sovereign for injuries sustained incident to service, which under other circumstances would be an actionable wrong.²⁶ Rudolph Feres, an active duty naval officer, perished by fire in his military barracks.²⁷ His widow alleged that the government was negligent in quartering Feres in an unsafe barracks with a defective heating plant, and in failing to maintain a proper firewatch.²⁸ The *Feres* case was combined with two medical malpractice cases.²⁹ The Court concluded that the government was not liable under the FTCA for injuries to servicemembers when the "injuries arose out of or in the course of activities incident to service."³⁰ This decision stands as the only judicial exception to the FTCA.³¹ It is particularly significant that

sustained injury due to negligence of others in the armed forces." *Id.* at 138. In addition, these three cases raised the common legal issue of "whether the [Federal] Tort Claims Act extends its remedy to one sustaining 'incident to the service' what under other circumstances would be an actionable wrong." *Id.*

26. *Id.* at 138. "This is the 'wholly different case,' reserved from our decision in *Brooks* . . ." *Id.* (citation omitted).

27. *Id.* at 137.

28. *Id.*

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

In *Jefferson*, plaintiff underwent an abdominal operation in an Army hospital. Eight months after his discharge, in the course of another operation, a towel, "marked 'Medical Department U.S. Army' was discovered and removed from his stomach." *Feres*, 340 U.S. at 137. Plaintiff was denied recovery. *Id.*

In *Griggs*, the district court dismissed the complaint of *Griggs'* executrix, which alleged that *Griggs* died due to the negligent and unskilled medical treatment by Army surgeons. *Id.* The United States Court of Appeals for the Tenth Circuit reversed and held that the FTCA allowed a cause of action. *Id.*

30. *Feres*, 340 U.S. at 146.

31. See Note, *supra* note 7.

It is interesting to note that the Congressman who drafted the FTCA did not intend to preclude servicemembers. Representative Emmanuel Celler delivered the following oral statement to the YALE LAW JOURNAL in November, 1948:

The opinion of the Fourth Circuit [in *Jefferson*] is utterly erroneous when it says that it was the intent of Congress to exclude a member of the Armed Forces from the benefits of the Tort Claims Act. I am the author of the bill, and I piloted it through the Subcommittee of the House Judiciary Committee, the House Judiciary Committee, and the House. Prior to its passage I worked on this bill for many years, and I repeatedly offered it to successive Congresses before its final passage. I had more to do with it than any other member. I never intended to preclude a suit by a soldier. Despite the fact that the latter might have various and sundry remedies for compensation, pensions, hospitalization, preferences, etc., these benefits had nothing whatsoever to do with, and are utterly unrelated to the right to sue under the Federal Tort Claims Act. . . . We start off with the proposition in general that the Government deliberately removes the defense of sovereignty, except in the cases where the Act specifically makes an exception. The exception cannot be implied; it must be expressed. The court cannot read the exceptions into the law.

the *Feres* Court did not overrule its decision in *Brooks*.³² Rather, the Court carefully distinguished the facts comprising the two decisions. The injuries sustained by the Brooks brothers were not sustained "incident to service" because the two servicemembers were "on furlough, driving along the highway, under compulsion of no orders or duty and on no military mission," unlike injuries sustained by the servicemember performing duties under orders.³³ This distinction between *Feres* and *Brooks* was the Court's first meaningful attempt to clarify the "incident to service" definition.³⁴

In *Feres*, the Court relied on three rationales for its decision.³⁵ The first *Feres* rationale, termed the "parallel private liability" rationale, recognized that the United States was liable under the FTCA "in the same manner and to the same extent as a private individual under like circumstances."³⁶ The Court asserted that no parallel private liability could exist since, inter alia, no American law has ever "permitted a soldier to recover for negligence, against either his superior officers or the government he is serving."³⁷ Additionally, the Court stated that there could be no liability "'under like circumstances'" since "no private individual has power to conscript or mobilize a private army."³⁸ This parallel private liability rationale was quickly recognized as a weak argument in support of the doctrine and was rejected by the Supreme Court.³⁹

The second *Feres* rationale maintained that the "distinctively federal" relationship between the United States and its enlisted military personnel would be undermined if the federal government was exposed to local and geographically diverse tort laws as applied under the FTCA.⁴⁰ It was further suggested that "[i]t would hardly be a rational

Note, *Military Personnel and the Federal Tort Claims Act*, 58 YALE L.J. 615, 621 n.26 (1949).

32. 340 U.S. at 146. The Court distinguished the facts in *Brooks* by pointing to the "vital distinction" that the Brooks' relationship to military service "was not analogous to that of a soldier injured while performing duties under orders." *Id.*

33. *Id.*

34. For further discussion of the Court's imprecise definition of "incident to service," see *supra* note 5 and accompanying text.

35. 340 U.S. at 141-44. For a discussion of the three *Feres* rationales, see *infra* notes 36-44 and accompanying text.

36. 340 U.S. at 141 (quoting 28 U.S.C. § 2674).

37. *Id.* (footnote omitted).

38. *Id.*

39. See *Rayonier, Inc. v. United States*, 352 U.S. 315, 319 (1957) (injured party cannot be deprived of his rights by resort to alleged distinction between government's actions in "proprietary" capacity and in "uniquely governmental capacity"); *Indian Towing Co. v. United States*, 350 U.S. 61, 66-69 (1955) ("[W]e would be attributing bizarre motives to Congress were we to hold that it was predicating liability on such a completely fortuitous circumstance—the presence or absence of identical private activity.").

40. 340 U.S. at 142-44. The Court reasoned that servicemembers are not free to choose where they will serve, and are frequently ordered to move from

plan of providing for those disabled in service . . . to leave them dependent upon geographic considerations over which they have no control. . . ."⁴¹

The third rationale for the *Feres* doctrine focused on the existence of a compensation system for injured military personnel,⁴² the Veterans Benefits Act (VBA), which was deemed an exclusive remedy for service-related injuries.⁴³ The *Feres* Court thought it unlikely that Congress intended to permit additional recovery under the FTCA.⁴⁴

Later, in *United States v. Brown*,⁴⁵ the Court recognized a fourth rationale. In *Brown*, a discharged veteran was allowed to recover damages for a military doctor's negligence in the treatment of a knee injury, sustained while on active duty, but negligently aggravated after his discharge.⁴⁶ However, the *Brown* Court stated that Congress did not intend to allow suits for injuries incident to military service because of the potential undue interference with military discipline.⁴⁷ The Court

one duty station to another. *Id.* at 142. Therefore, "it makes no sense" and "would hardly be a rational plan . . . [to leave servicemembers] . . . dependent upon geographic considerations over which they have no control and to laws which fluctuate in existence and value." *Id.* at 143.

41. *Id.* at 142-43. The Court recognized that the diverse substantive laws of the several states would be "fair enough when the claimant is not on duty or is free to choose his own habitat." *Id.* at 142.

42. Veterans' Benefits Act, 72 Stat. 1118, *as amended*, 38 U.S.C. §§ 301-362 (1982 & Supp. III 1985) (VBA grants survivor benefits and disability compensation without regard to "incident to service" inquiry).

43. 340 U.S. at 144-45. Thus, the exclusive compensation statute available to the armed services (currently embodied in the VBA), as an exclusive remedy, precluded further recovery under the FTCA. *Id.*

44. *Id.* The Court noted that the absence of any provision to adjust between the two compensation systems was "persuasive [evidence] that there was no awareness that the Act might be interpreted to permit recovery for injuries incident to military service." *Id.* at 144.

This rationale was questioned by the Court four years later. *United States v. Brown*, 348 U.S. 110 (1954). The *Brown* Court noted that Congress had given no indication that recovery under the VBA was an exclusive remedy. *Id.* at 113. In addition, the Court indicated that the proper treatment of the two existing remedies was to offset the FTCA recovery by the amount received under the VBA. *Id.* at 111. This approach was also endorsed by the Court in the *Brooks* decision. 337 U.S. at 53-54. Also, a similar approach is taken in the proposed military medical malpractice reform legislation. For a discussion of this approach, see *supra* note 8.

Moreover, the Court in *Brooks* and *Brown* distinguished the VBA from workman's compensation statutes, where Congress had expressly provided for exclusiveness of remedy. See *Brooks*, 337 U.S. at 53; *Brown*, 348 U.S. at 113.

45. 348 U.S. 110, 111 (1954). Peter Brown, while on active duty, injured his knee, which rendered him unfit for further service. *Id.* While receiving medical treatment after his discharge, the injury was aggravated by medical negligence. *Id.* The Supreme Court decided that this injury did not occur incident to service, since the negligence occurred after Brown's discharge, and allowed recovery. *Id.* at 112.

46. *Id.* at 110-11.

47. *Id.* at 112.

suggested that if servicemembers could bring suit alleging negligence against other servicemembers, military discipline would be undermined and civilian courts would be required to second guess military decision making.⁴⁸ Specifically, the *Brown* Court asserted 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 were allowed for negligent orders given or negligent acts committed in the course of military duty, led the Court to read that Act as excluding claims of that character.⁴⁹

Neither the FTCA nor the *Feres* Court identified military discipline as a rationale for the *Feres* doctrine, yet the dicta in *Brown* has earned recognition as the doctrine's most important rationale.⁵⁰

In *Stencel Aero Engineering Corp. v. United States*,⁵¹ the Court reaffirmed its holding in *Feres* and asserted that three of the doctrine's four rationales remain valid. The Court relied on two original *Feres* rationales and the military discipline rationale. Specifically, the Court relied upon the following three rationales: (1) "distinctively federal relationship," (2) alternate compensation eligibility, and (3) impact on military discipline.⁵² Moreover, the *Stencel* Court favored the military discipline rationale as the strongest argument in support of the doctrine.⁵³ Additionally, in recent years, the Supreme Court has noted that the "distinctively federal relationship" and "alternative compensation" arguments are "no longer controlling."⁵⁴ Thus, the Court has repeatedly cited the

48. *Stencel Aero Eng'g Corp. v. United States*, 431 U.S. 666, 671-72 (1977). For a discussion of the holding in *Stencel*, see *infra* notes 51-53 and accompanying text.

49. *Brown*, 348 U.S. at 112 (citing *Feres*, 340 U.S. at 141-43).

50. For a discussion of this "military discipline" rationale, see *infra* notes 92-100 and accompanying text.

51. 431 U.S. 666 (1977). An Air Force Reserve pilot, while flying a military aircraft, executed an emergency ejection procedure. The aircraft's ejection mechanism malfunctioned, and the pilot sustained severe and permanent injuries. *Donham v. United States*, 536 F.2d 765, 767 (8th Cir. 1976), *aff'd sub nom.*, *Stencel Aero Eng'g Corp. v. United States*, 431 U.S. 666 (1977). The pilot sued the manufacturer, *Stencel* and the United States. *Stencel* cross-claimed against the government for negligence in the maintenance of the aircraft, which had been in the government's exclusive custody. 431 U.S. at 668. The Supreme Court held that the *Feres* doctrine barred both the plaintiff's claim and the manufacturer's cross-claim against the government. *Id.* at 672-74.

52. *Stencel*, 431 U.S. at 672-74. For further discussion of the Court's decision in *Stencel*, see Comment, *supra* note 2, at 247-49; Note, *supra* note 7.

53. 431 U.S. at 672-74. One author observed: "Although the Supreme Court clearly favors the preservation of the military discipline rationale for the *Feres* doctrine, the *Feres* Court's other rationales, with the exception of the parallel private liability requirement, have not been totally abandoned in subsequent Supreme Court decisions." See Comment, *supra* note 2, at 247.

54. *United States v. Shearer*, 473 U.S. 52, 58 n.4 (1985). For a complete

“military discipline” rationale as the “best explanation” for the doctrine.⁵⁵ However, the precise status of the three rationales remains unclear in light of the recent Supreme Court decision in *United States v. Johnson*.⁵⁶ The five member majority of the *Johnson* Court articulated the “three broad rationales” as the basis for its holding, without indicating the weight to be accorded to each factor.⁵⁷

A. *Feres Doctrine and Constitutional Torts: United States v. Stanley*

In *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*,⁵⁸ the Court authorized a damages suit against federal officials whose actions violated an individual’s fourth amendment rights, even though Congress had not expressly authorized such suits.⁵⁹ The *Bivens* Court noted further that such a remedy would not be available when “special factors counselling hesitation” were present.⁶⁰ The Court soon ex-

discussion of the legal arguments in *Shearer*, see *infra* notes 92-100 and accompanying text.

55. See *United States v. Johnson*, 107 S. Ct. 2063, 2073 (1987) (Scalia, J., dissenting); *Shearer*, 473 U.S. at 57; *Chappell v. Wallace*, 462 U.S. 296, 299 (1983); *United States v. Muniz*, 374 U.S. 150, 162 (1963); Comment, *supra* note 2, at 245 & n.41.

56. 107 S. Ct. 2063, 2068 (1987) (Court “emphasized three broad rationales” underlying the *Feres* decision: (1) distinctively federal character of Government-soldier relationship, (2) alternate compensation eligibility, (3) impact of suits on military discipline).

57. *Id.* at 2068-69. However, Justice Scalia, in dissent, characterized the three original underlying rationales of *Feres* as so frail, that the military discipline rationale emerged as the best explanation for the doctrine. *Id.* at 2073 (Scalia, J., dissenting).

58. 403 U.S. 388 (1971).

59. *Id.* at 389. Petitioner, *Bivens*, alleged that agents of the Federal Bureau of Narcotics “acting under claim of federal authority . . .” entered and searched his apartment, manacled the petitioner, and arrested him, without a warrant for either the search or the arrest. *Id.* The acts were further alleged to have been effected without probable cause. *Id.* at 389 n.1.

60. *Id.* at 396. The “special factors” exception to the *Bivens* remedy is based on the deference afforded Congress in matters of policy decisions. In addressing the “special factors counselling hesitation,” the *Bivens* Court referred to two cases which illustrate that the judicially created remedy should not be extended to situations where Congress has plenary power to make policy decisions. *Id.*; see *United States v. Gilman*, 347 U.S. 507, 511-13 (1954) (selection of policy “involves a host of considerations that must be weighed and appraised. That function is more appropriately for those who write the laws, rather than for those who interpret them.”); *United States v. Standard Oil Co.*, 332 U.S. 301, 305-06, 316 (1947) (“[T]he scope, nature, legal incidents and consequences of the relation between persons in service and the Government are fundamentally derived from federal sources and governed by federal authority.” This Government-soldier relationship is properly within Congress’ controls.); see also Case-note, *Constitutional Law—Military Enlisted Personnel May Not Recover Damages From Superior Officers for Violations of Constitutional Rights*, *Chappell v. Wallace*, 103 S. Ct. 2362 (1983), 13 U. BALT. L. REV. 356, 362 (1984) (“In all cases in which the Supreme Court has found the existence of special factors counselling hesitation, the factors related to a possible judicial intrusion into areas the Court consid-

panded the *Bivens* remedy to include remedies for other constitutional violations,⁶¹ but limited its application to situations without the presence of "special factors counselling hesitation."⁶²

In *Chappell v. Wallace*,⁶³ the Court addressed the issue of whether "special factors" counselled hesitation in a constitutional tort case in which five United States Navy sailors sued their superiors, alleging racial discrimination in the treatment they received aboard ship.⁶⁴ The Court concluded that "[t]aken together, the unique disciplinary structure of the Military Establishment and Congress' activity in the field constitute 'special factors' which dictate that it would be inappropriate to provide enlisted military personnel a *Bivens*-type remedy against their superior officers."⁶⁵ This analysis was particularly significant because the Court

ered reserved to Congress."). For further discussion of "special factors," see Brodsky, *Chappell v. Wallace: A Bivens Answer to a Political Question*, 35 NAV. L. REV. 1, 16 (1986).

61. See *Carlson v. Green*, 446 U.S. 14 (1980) (federal officials deliberately ignored medical needs of inmate in violation of eighth amendment); *Davis v. Passman*, 442 U.S. 228 (1979) (plaintiff alleged Congressman discriminated on basis of sex in violation of due process clause of fifth amendment).

62. See *Bush v. Lucas*, 462 U.S. 367, 378 (1982) (relationship between federal government and civil service employees was special factor counselling against judicial recognition of *Bivens* remedy for violation of first amendment rights).

63. 462 U.S. 296 (1983).

64. *Id.* at 297. Five United States Navy enlisted personnel brought action against the Commanding Officer, four Lieutenants and three noncommissioned officers of the U.S. Navy warship to which they were assigned. *Id.* These five enlisted members alleged "that because of their minority race petitioners failed to assign them desirable duties, threatened them, gave them low performance evaluations, and imposed penalties of unusual severity." *Id.* The sailors alleged that this racial discrimination violated their rights to equal protection of the laws under the fifth amendment and the civil rights conspiracy statute. *Wallace v. Chappell*, 661 F.2d 729, 730 (9th Cir. 1981), *rev'd*, 462 U.S. 296 (1983).

65. 462 U.S. at 304. Congress has exercised its plenary constitutional authority to govern military affairs, by creating a military justice system. This system serves as the proper forum for servicemembers to air grievances. The *Chappell* Court considered the military justice system to be an appropriate mechanism to address service-related claims of abusive or discriminatory treatment. *Id.* at 302-03. Specifically, the Court identified article 138 of the Uniform Code of Military Justice and the Board for the Correction of Naval Records (BCNR) as available remedies for the servicemember. *Id.*; see 10 U.S.C. § 938 (1982) (article 138 of UCMJ affords formal complaint procedure to wronged servicemember); 10 U.S.C. § 1552(a) (1982) (BCNR is civilian board authorized to correct servicemember's military record due to error or injustice). These intramilitary remedies are consistent with both the traditional deference afforded Congress in the control over military affairs, and the judiciary's reluctance to interfere with the military. See *Rostker v. Goldberg*, 453 U.S. 57, 64-65 (1981) (Congress afforded greatest deference in context of its authority over national defense and military affairs); *Gilligan v. Morgan*, 413 U.S. 1, 10 (1973) ("[t]he complex, subtle, and professional decisions as to the composition, training, equipping, and control of a military force are" properly controlled by Congress and not within the competence of courts); *Orloff v. Willoughby*, 345 U.S. 83, 94 (1953) ("[T]he military constitutes a specialized community governed by separate discipline

noted that “[t]he ‘special factors’ . . . also formed the basis of this Court’s decision in *Feres* . . . [and] the Court’s analysis in *Feres* guides our analysis in this case.”⁶⁶ In recognition of the military’s unique disciplinary structure and Congress’ plenary authority to govern certain military affairs, the *Chappell* Court adopted the *Feres* rationales as the basis for denying a *Bivens* remedy to a servicemember alleging a constitutional tort.

In *United States v. Stanley*,⁶⁷ the Court reversed a narrow interpretation of *Chappell* and defined the “special factors” analysis using the *Feres* “incident to service” language.⁶⁸ The Court considered the case of James B. Stanley, who was secretly administered doses of lysergic acid diethylamide (LSD) under the guise of an unrelated Army equipment test.⁶⁹ As a result of the LSD exposure, Stanley suffered hallucinations, periods of incoherence, memory loss and impaired military performance.⁷⁰ Severe personality changes caused the dissolution of his marriage, and in 1969 he was discharged from the Army.⁷¹ Stanley was first notified of these surreptitious LSD experiments in 1975. In an attempt to recover damages, he first brought a negligence claim against the government and later filed a claim for violation of his constitutional rights.⁷² The United States Court of Appeals for the Eleventh Circuit interpreted *Chappell* to permit enlisted military personnel to bring a *Bivens* claim, if such claim did not compromise the officer-subordinate relationship.⁷³ The Supreme Court, however, concluded that the bar to a

. . . . Orderly government requires that the judiciary be as scrupulous not to interfere with legitimate Army matters as the Army must be scrupulous not to interfere in judicial matters.”).

66. 462 U.S. at 298-99. The *Chappell* Court adopted the *Feres* rationales to bar servicemembers’ claims for violations of constitutional rights that occur “incident to service.” *Id.*

67. 107 S. Ct. 3054 (1987).

68. *Id.* at 3063. The Court reaffirmed the *Chappell* reasoning and noted that the “‘special factors counselling hesitation’” included “‘the unique disciplinary structure of the Military Establishment and Congress’ activity in the field.’” *Id.*

69. *Id.* at 3057.

70. *Id.*

71. *Id.*

72. *Id.* at 3058. The Supreme Court reversed the appellate courts’ decision to award recovery and denied relief to Stanley, asserting that “no . . . remedy is available for injuries that ‘arise out of or are in the course of activity incident to service.’” *Id.* at 3063 (quoting *Feres*, 340 U.S. at 146). The Court clearly asserted that the “incident to service” bar to recovery was as extensive in a *Bivens* action as in a negligence claim under the FTCA. *Id.*

73. *Id.* at 3059. The district court decided that *Chappell* did not “totally ba[r] *Bivens* actions by servicemen for torts committed against them during their term of service.” 574 F. Supp. 474, 478 (S.D. Fla. 1983). The court of appeals affirmed on essentially the same grounds. *Stanley v. United States*, 786 F.2d 1490, 1499 (11th Cir. 1986). The Eleventh Circuit’s opinion attempted to characterize the “special factors” identified in *Chappell* (unique disciplinary structure of the military establishment) as limited to the officer-subordinate relationship. *Id.* at 1495. The court distinguished *Chappell*, and asserted that “[t]he special

servicemember's suit for a constitutional injury is "as extensive as the exception to the FTCA established by *Feres* and *United States v. Johnson*."⁷⁴ Consequently, the Court held "that no *Bivens* remedy is available for injuries that 'arise out of or are in the course of activity incident to service.'"⁷⁵

B. *Feres Doctrine and Negligent Torts: United States v. Johnson*

Unlike the situation in *Stanley*, involving a constitutional tort claim, "incident to service" has long been the standard requirement for recovery in servicemembers' suits against the United States based on the negligence of government employees.⁷⁶ Thus, in *United States v. Johnson*,⁷⁷ the Court granted certiorari to review a reformulation of the *Feres* doctrine which focused on the distinction between a *civilian* governmental tortfeasor and a fellow servicemember.⁷⁸ In *Johnson*, Lieutenant Commander Horton Johnson was on a Coast Guard rescue mission over Hawaii.⁷⁹ While under the positive radar control of the Federal Aviation Administration (FAA), Johnson crashed into the side of a mountain, thereby killing himself and his entire crew. Johnson's widow brought a wrongful death action against the United States alleging that the FAA flight controllers negligently caused her husband's death.⁸⁰ Because Johnson died "during the course of activity incident to military service," the Supreme Court reversed the appellate court's decision and denied FTCA relief.⁸¹ The Court refused to create an exception to the "incident to service" test by distinguishing suits alleging negligence on the part of *civilian* employees of the Federal Government.⁸² Rather, the Court applied the test previously set forth and asserted that the status of

nature of military life, the need for unhesitating and decisive action by military officers and equally disciplined responses by enlisted personnel" were not implicated by the facts in this case. *Id.* (quoting *Chappell*, 462 U.S. at 304).

74. *Stanley*, 107 S. Ct. at 3063.

75. *Id.* (citation omitted).

76. *See supra* notes 25-30 and accompanying text.

77. 107 S. Ct. 2063 (1987).

78. *Id.* at 2066. This distinction was a source of conflict among the Circuit courts. The Eleventh Circuit acknowledged that the Ninth Circuit, in a "strikingly similar" case, reached the opposite conclusion. *Johnson v. United States*, 749 F.2d 1530, 1539 (11th Cir. 1985); *see, e.g., Uptegrove v. United States*, 600 F.2d 1248 (9th Cir. 1979) (widow of naval officer was barred by *Feres* in suit against government, which alleged negligence of three FAA air traffic controllers in controlling military aircraft), *cert. denied*, 444 U.S. 1044 (1980).

79. 107 S. Ct. at 2064-65.

80. *Id.* at 2065.

81. *Id.* at 2069. In support of its holding, the Court demonstrated that (1) Johnson was engaged in the specific military mission that caused his death because of his military status, (2) Mrs. Johnson received and continues to receive statutory benefits and (3) Johnson was acting in accordance with Coast Guard standard operating procedures, which indicate that a suit would substantially implicate military discipline. *Id.*

82. *Id.* at 2066-67 (emphasis added).

the tortfeasor had no bearing on the *Feres* analysis.⁸³ Relying on the “three broad rationales,”⁸⁴ the Court affirmed its holding in *Feres* and denied relief to Johnson’s widow.⁸⁵

As this background demonstrates, the right of a servicemember to sue the federal government for negligence under the FTCA or to recover a *Bivens* remedy for a constitutional tort depends on successfully clearing the “incident to service” hurdle. Recovery will be awarded in either case if a military plaintiff can show that the injury sustained was *not* “incident to service.” In analysis, this Note will address how the lower courts have defined this broad language, and a workable definition for the Supreme Court to adopt will be proposed based on its underlying rationales for the doctrine.

III. ANALYSIS

The Supreme Court announced in *Stanley* that the threshold requirement for recovery for servicemembers injured by constitutional torts hinged on the broad “incident to service” rule introduced by the *Feres* doctrine over thirty-six years ago.⁸⁶ Unfortunately, the test used to determine the fate of the servicemembers’ constitutional rights has not been satisfactorily defined by the Court.⁸⁷ Additionally, in the absence of any definition or analytical framework, the lower federal courts have not agreed on what constitutes “incident to service.”⁸⁸ This inconsistency, resulting from the Supreme Court’s nebulous definition of the critical “incident to service” language, has forced military plaintiffs to go forward with FTCA suits, often unnecessarily, since it is difficult to predict the outcome of such claims based on *stare decisis*.⁸⁹

A. *The Supreme Court’s Treatment of “Incident to Service”*

The Supreme Court has never explicitly defined the term “incident to service.” Rather, it has concentrated on refining and explaining the underlying foundation of the *Feres* doctrine.⁹⁰ Lower federal courts have relied on these rationales to shape a definition of “incident to ser-

83. *Id.* at 2066 & n.7.

84. *Id.* at 2068-69. The Court acknowledged “three broad rationales” for the *Feres* doctrine, but the Court has also frequently identified the military discipline rationale as the most important rationale for the doctrine. For a full discussion of these three broad rationales, reaffirmed in *Stencel* and cited in this case, see *supra* notes 35-50 and accompanying text.

85. 107 S. Ct. at 2069.

86. For a discussion of the facts and holding in *Stanley*, see *supra* notes 67-75 and accompanying text.

87. See *supra* note 5 and accompanying text.

88. For a discussion of the numerous approaches to “incident to service” by the lower federal courts, see *infra* notes 101-89 and accompanying text.

89. See Comment, *supra* note 5, at 1183; Note, *supra* note 7, at 1118-26.

90. See *supra* note 5. For a discussion of the development of the underlying foundation of the *Feres* doctrine, see *supra* notes 35-57 and accompanying text.

vice.”⁹¹ The Court’s decision in *United States v. Shearer*,⁹² which shifted the balance among the three underlying rationales, has been used by numerous federal courts to reform their “incident to service” tests.⁹³

In *Shearer*, the Court asserted that “[t]he *Feres* doctrine cannot be reduced to a few bright-line rules”⁹⁴ However, the Court held that the most important rationale for the *Feres* doctrine was the “military discipline” rationale. The Court further identified the components of this rationale: (1) “whether the suit requires [a] civilian court to second-guess military decisions . . . and” (2) “whether the suit might impair essential military discipline.”⁹⁵ Although not expressly overruling the other two *Feres* rationales, the Court further stated that they were “no longer controlling.”⁹⁶ The *Shearer* Court’s attempt to articulate how to properly weigh each of the *Feres* rationales sent a signal to lower courts to rely primarily on the “military discipline” rationale in their formulation of an “incident to service” test.⁹⁷ However, even after *Shearer*, the lower courts have differed in their approaches, and several did not adopt the *Shearer* dicta as controlling.⁹⁸ In addition, the *Johnson* Court appears to have breathed new life into the rationales deemed “no longer controlling” in *Shearer*.⁹⁹ Consequently, the Court has sent an ambiguous

91. For a discussion of the various lower court definitions of “incident to service,” see *infra* notes 101-89 and accompanying text.

92. 473 U.S. 52 (1985). Private Shearer, who was off duty and away from base, was kidnapped and murdered by another servicemember. *Id.* at 53. Respondent, Shearer’s mother, brought suit under the FTCA, alleging that the Army “negligently and carelessly failed to exert a reasonably sufficient control over” the alleged murderer and “failed to warn other persons that he was at large.” *Id.* at 53-54. The Court held that “[t]his allegation goes directly to the ‘management’ of the military; it calls into question basic choices about the discipline, supervision, and control of a serviceman.” *Id.* at 58 (footnote omitted). As a result, respondent was denied recovery. *Id.* at 59.

93. For a discussion of *Shearer*’s impact on an “incident to service” definition among lower federal courts, see *infra* notes 163-89 and accompanying text.

94. 473 U.S. at 57.

95. *Id.* (citations omitted).

96. *Id.* at 58 & n.4. For a full discussion of the (1) distinctively federal relationship and (2) the alternative compensation rationales, see *supra* notes 40-44 and accompanying text.

97. *Jones v. La Riviera Club, Inc.*, 655 F. Supp. 1032, 1035-36 (D.P.R. 1987) (key factor and chief rationale of *Feres* is Supreme Court’s mandate that civilian courts must not “second-guess military decisions.”). For a discussion of the post-*Shearer* “incident to service” definitions, see *infra* notes 163-89 and accompanying text.

98. For a discussion of the disparity among the circuits concerning the “incident to service” test, see *infra* notes 101-89 and accompanying text.

99. *Johnson*, 107 S. Ct. at 2068-69. Despite the endorsement of the “three broad rationales” in *Johnson*, it is unclear whether the Court intended to diminish the importance it had previously placed on the “military discipline” rationale. See *Shearer*, 473 U.S. at 57 (military discipline rationale is best explanation for *Feres* doctrine); *Chappell*, 462 U.S. at 299-300 (*Feres* is best explained by military discipline rationale); see also *Johnson v. United States*, 704 F.2d 1431, 1436 (9th Cir. 1983) (safeguarding military discipline is fundamental rationale for im-

signal to the lower courts with regard to the definition of "incident to service."¹⁰⁰ Specifically, the question of how much weight should be accorded each rationale in the *Feres* analysis has been left open for debate.

B. *The "Incident to Service" Confusion Among the Federal Courts:
Evolution of a Definition*

Some federal courts take a simplistic approach to the *Feres* doctrine by defining "incident to service" as any injury occurring while the plaintiff is serving on active duty. This restrictive approach effectively denies servicemembers a remedy for any injury.¹⁰¹ Other courts employ a more sophisticated analysis and consider some or all of the following factors in determining whether an injury has occurred incident to service: (1) duty status of the injured party, (2) place of the injury, (3) nature of the activity engaged in at the time of the injury and (4) whether the plaintiff was under orders or compelled to act.¹⁰² After *Shearer*, some courts have further refined the analysis by focusing primarily on the effect of a suit on military discipline and the amount of second-guessing required by a civilian court.¹⁰³ However, there is still no uni-

munity); *Monaco v. United States*, 661 F.2d 129, 132 (9th Cir. 1981) ("[T]he protection of military discipline . . . serves largely if not exclusively as the predicate for the *Feres* doctrine Only this factor can truly explain the *Feres* doctrine and the crucial line it draws" (quoting *Hunt v. United States*, 636 F.2d 580, 599 (D.C. Cir. 1980)), *cert. denied*, 456 U.S. 989 (1982).

100. Compare *Atkinson v. United States*, 804 F.2d 561 (9th Cir. 1986), *withdrawn*, 825 F.2d 202 (9th Cir. 1987) with *Reilly v. United States*, 665 F. Supp. 976 (D.R.I. 1987). For a discussion of *Atkinson* and *Reilly*, see *infra* notes 174-89 and accompanying text.

101. See *Hass v. United States*, 518 F.2d 1138, 1140 (4th Cir. 1975) (controlling factor under *Feres* is whether servicemember is on active duty and not on furlough, rather than whether suit would tend to interfere with military discipline); *Harten v. Coons*, 502 F.2d 1363 (10th Cir. 1974) (defining "incident to service" as injury sustained on active duty and stemming from military relationship). For a discussion of *Hass*, see *infra* notes 110-16 and accompanying text. For a discussion of *Harten*, see *infra* notes 106-49 and accompanying text.

102. See *Pierce v. United States*, 813 F.2d 349 (11th Cir. 1987); *Stubbs v. United States*, 744 F.2d 58 (8th Cir. 1984), *cert. denied*, 471 U.S. 1053 (1985); *Brown v. United States*, 739 F.2d 362 (8th Cir. 1984); *Shearer v. United States*, 723 F.2d 1102 (3d Cir. 1983); *Parker v. United States*, 611 F.2d 1007 (5th Cir. 1980). For a discussion of *Pierce*, see *infra* notes 136-43 and accompanying text. For a discussion of *Brown*, see *infra* notes 149-56 and accompanying text. For a discussion of *Stubbs*, see *infra* notes 157-62 and accompanying text. For a discussion of *Shearer*, see *supra* notes 92-100 and accompanying text. For a discussion of *Parker*, see *infra* notes 124-35 and accompanying text.

103. See *Sanchez v. United States*, 813 F.2d 593 (2d Cir. 1987); *Bois v. Marsh*, 801 F.2d 462 (D.C. Cir. 1986); *Satterfield v. United States*, 788 F.2d 395 (6th Cir. 1986); *Bynum v. FMC Corp.*, 770 F.2d 556 (5th Cir. 1985). For a discussion of *Sanchez*, see *infra* notes 166-70 and accompanying text. For a discussion of *Bois*, see *infra* note 173. For a discussion of *Satterfield*, see *infra* note 172. For a discussion of *Bynum*, see *infra* note 171.

formity among these courts in defining "incident to service."¹⁰⁴

1. *The "Active Duty" Test*

The "active duty" test is the most restrictive interpretation of "incident to service," and is often employed to bar servicemember's suits in medical malpractice cases.¹⁰⁵ It is defended on the grounds that because a servicemember takes advantage of military benefits, such as medical care and recreational facilities solely because of his status as an active duty servicemember, any injury related to these benefits is *per se* "incident to service." In *Harten v. Coons*,¹⁰⁶ in which the military plaintiff alleged negligence in the performance of an unsuccessful elective vasectomy operation, the United States Court of Appeals for the Tenth Circuit articulated this test, which focused on the "status" of the plaintiff at the time of the injury.¹⁰⁷ In denying recovery, the court asserted that "when a serviceman on active duty sustains an injury stemming from the military relationship . . ." recovery will be denied under the Act.¹⁰⁸ The *Harten* Court concluded that "[s]urgery . . . is 'incidental to service' when performed upon a serviceman on active duty, because the serviceman is taking advantage of medical privileges granted only to military personnel."¹⁰⁹

The United States Court of Appeals for the Fourth Circuit took a similar approach in *Hass v. United States*.¹¹⁰ First Lieutenant Hass was injured while riding a horse he had rented from a stable owned and operated by the Marine Corps.¹¹¹ In a FTCA action, Hass alleged that the stable managers had been negligent in failing to warn him of the "horse's dangerous propensity to break its gait and bolt"¹¹² Broadly interpreting the "incident to service" language in *Feres*,¹¹³ the

104. For a discussion of the various approaches to "incident to service" among the lower federal courts, see *infra* notes 101-89 and accompanying text.

105. *Harten v. Coons*, 502 F.2d 1363, 1365 (10th Cir. 1974).

106. *Id.* at 1363. Thomas Harten, an active duty servicemember, received a follow-up report following his vasectomy indicating that he was sterile. *Id.* at 1364. Subsequently, his wife became pregnant and bore a child. *Id.* The Hartens filed suit, alleging negligence in both the performance of the operation and in the writing of the sterility report. *Id.*

107. *Id.* at 1365. "Thus, if a claimant is on leave, or on an inactive status at the time of the injury, or if the injury is not the product of a military relationship, suit under the [Federal Tort Claims] Act may be allowed." *Id.* (footnotes omitted).

108. *Id.*

109. *Id.* (citations omitted).

110. 518 F.2d 1138 (4th Cir. 1975). In *Hass*, Marine First Lieutenant Hass filed suit against the civilian manager and assistant manager of the stable, as well as the United States as their employer. The court held that the United States and the civilian managers were immune from suit under the *Feres* doctrine and denied the Marine recovery. *Id.* at 1143.

111. *Id.* at 1139.

112. *Id.*

113. *Id.* at 1140.

court asserted that the "relatively mechanical" test devised by *Feres* hinged on the active duty status of the plaintiffs,¹¹⁴ even though this plaintiff had off-duty status at the time of the accident.¹¹⁵ Significantly, the court also identified three other factors that contributed to its conclusion, all of which highlighted the special relationship between the plaintiff and the military-owned and operated stable.¹¹⁶

A district court in the Fourth Circuit held that suits are precluded "by military personnel 'while on active duty and not on furlough, who are injured due to the negligence of others in the armed forces,' regardless of whether or not the injury to the claimant arises out of activities related specifically to military duty."¹¹⁷ In *Davis v. United States Department of Army*,¹¹⁸ the military plaintiff, who was 24 weeks pregnant, gave birth to a female fetus weighing 650 grams. The fetus died soon after birth, and pursuant to hospital policy, the fetus was classified as a surgical specimen and disposed of rather than preserved.¹¹⁹ The court dismissed the plaintiff's claim for emotional distress damages¹²⁰ based on the grant of immunity required by the *Feres* doctrine.¹²¹ The *Davis* court stated that "it is . . . compelled to apply the Fourth Circuit's strict interpretation of the *Feres* doctrine."¹²² In addition to its reliance on the plaintiff's active duty status, the court recognized the impact of such a suit on military discipline as "the most persuasive rationale for applying

114. *Id.* at 1140. The *Hass* court noted that in the three cases embodied in the *Feres* decision: "[t]he common fact underlying the three cases is that each claimant, while on active duty and not on furlough, sustained injury due to negligence of others in the Armed Forces." *Id.* (citing *Feres*, 340 U.S. at 138).

115. *Id.* at 1139. The court distinguished the successful plaintiffs in *Brooks* and *Brown* by stating that "the claimants in those cases were not on active duty, the soldiers in *Brooks* being on furlough and the claimant in *Brown* having been discharged." *Id.* at 1140.

116. *Id.* at 1139. The appellate court affirmed the district court's "incident to service" analysis:

In reaching this conclusion the judge relied upon his findings that (1) *Hass* was on active duty though in an "off-duty" status at the time of the accident; (2) the government owned and operated the stable for the benefit of servicemen like *Hass*; (3) the stable was organized pursuant to military order, the Marine Special Services Officer had responsibility for its management and regulation pursuant to Special Services rules, and *Hass* and other servicemen were subject to disciplinary measures for violation of the rules; (4) and the government "obviously" supported the stable financially.

Id.

117. *Davis v. United States Dep't of Army*, 602 F. Supp. 355, 358 (D. Md. 1985) (citing *Hass v. United States*, 518 F.2d 1138 (4th Cir. 1975) (quoting *Feres*, 340 U.S. at 138)).

118. *Id.* at 355.

119. *Id.* at 356.

120. *Id.*

121. *Id.* at 361.

122. *Id.* at 358. For a full discussion of this interpretation, see *supra* notes 110-16 and accompanying text.

the *Feres* doctrine to suits against the various branches of the armed services."¹²³

2. *The Three-Pronged Parker Analysis*

In *Parker v. United States*,¹²⁴ the United States Court of Appeals for the Fifth Circuit fashioned a three-part test which analyzed the totality of the circumstances to "determine[] whether [an] activity [is] incident to service."¹²⁵ Dismissing the "active duty" or "but for" test,¹²⁶ the court asserted that "[m]ore is needed for the activity to be incident to military service."¹²⁷ The first prong of the *Parker* analysis concerned the duty status of the individual.¹²⁸ An individual on active duty and either on duty or merely temporarily off duty is acting "incident to service."¹²⁹ While at the other extreme, a discharged servicemember or one on leave or furlough is normally not acting "incident to service."¹³⁰

The second *Parker* prong examines the situs of the injury.¹³¹ Generally, an on-base injury is more likely to be considered an activity incident to service than an off-base injury.¹³² However, it is significant that courts have allowed FTCA actions even though the injuries occurred on military property.¹³³ The final *Parker* element turned on what the ser-

123. *Davis*, 602 F. Supp. at 359 (footnote omitted).

124. 611 F.2d 1007 (5th Cir. 1980). Specialist Five Jack Parker, U.S. Army, on authorized leave for four days, was killed, while driving home to his personal residence, by a fellow servicemember negligently operating a military vehicle. *Id.* at 1008. The military vehicle crossed the center line and collided head-on with Parker's vehicle in Parker's lane of traffic. *Id.* Parker's widow filed suit pursuant to the FTCA. *Id.* The court held that Parker's activities were not incident to service, and thus he was allowed recovery under the FTCA. *Id.* at 1015.

125. *Id.* at 1013. The three-part *Parker* test examines the following factors to determine whether an activity is incident to service: (1) duty status of the plaintiff, (2) place of the injury, and (3) the activity of the plaintiff at the time of the injury. *Id.* at 1013-15.

126. For a discussion of the "active duty" or "but for" analysis, see *supra* notes 105-23 and accompanying text.

127. 611 F.2d at 1011. "The test is not a purely causal one; one cannot merely state that but for the individual's military service, the injury would not have occurred." *Id.*

128. *Id.* at 1013.

129. *Id.*

130. *Id.*; see, e.g., *United States v. Brown*, 348 U.S. 110 (1954); *Watt v. United States*, 246 F. Supp. 386 (E.D. N.Y. 1965) (retired veteran is not in active military service, and, therefore, is not barred by *Feres* doctrine). For a discussion of *Brown*, see *supra* notes 45-50 and accompanying text.

131. 611 F.2d at 1014.

132. *Id.* The court recognized that this factor "should not be emphasized above all other factors." *Id.* In addition, the court noted that the injured servicemember in *Brooks* proceeded with a FTCA claim for his injury suffered "off the military reservation." *Id.*

133. *Id.*; see, e.g., *Hand v. United States*, 260 F. Supp. 38 (M.D. Ga. 1966) (plaintiff recovered for injuries sustained in accident on highway passing through military reservation); *Downes v. United States*, 249 F. Supp. 626 (E.D.

vicemember "was doing at the time he was injured."¹³⁴ This third factor was principally concerned with the activity's relationship to the military service or mission itself.¹³⁵

The three-pronged *Parker* analysis was also employed by the United States Court of Appeals for the Eleventh Circuit.¹³⁶ In *Pierce v. United States*,¹³⁷ the court expressly indicated that "this circuit has adopted [the] three part [*Parker*] test for determining whether the activity of a serviceman is 'incident to service.'" ¹³⁸ In *Pierce*, the military plaintiff was off base, driving a private motorcycle and attending to personal business.¹³⁹ He was injured in a collision between his motorcycle and a military vehicle which was negligently operated by a military servicemember.¹⁴⁰ This injury left Pierce with a 70% disability rating, and he was declared unfit for active duty.¹⁴¹ In applying the *Parker* analysis, the court allowed recovery because the plaintiff's injury did not arise in the course of activities "incident to service."¹⁴² The court further recognized that *in addition to* the *Parker* analysis, the court could find additional justification for its conclusion based on the *Shearer* analysis concerning the "threat [of a suit] to the military disciplinary structure."¹⁴³

3. Third Circuit Adds a Fourth Dimension to Parker Test

In *Shearer v. United States*,¹⁴⁴ the United States Court of Appeals for the Third Circuit articulated a four-part test that added a significant

N.C. 1965) (plaintiff recovered for on-base injury when exiting base on an overnight pass).

134. 611 F.2d at 1014. The third *Parker* element focuses on the activity of the servicemember, specifically asking whether he was "under military control," "performing any military mission," or even engaging in military-sponsored "recreational activities." *Id.*

135. *See id.*

136. *Pierce v. United States*, 813 F.2d 349, 352 (11th Cir. 1987).

137. *Id.*

138. *Id.* at 352 (citing *Parker*, 611 F.2d at 1013-15); *see also* *Flowers v. United States*, 764 F.2d 759, 760-61 (11th Cir. 1985) (active duty servicemember in off-duty status collided with negligently driven military vehicle; *Parker* analysis resulted in denial of recovery). The *Pierce* court questioned the precedential value of *Flowers* since it was decided so soon after the U.S. Supreme Court decision in *Shearer*. 813 F.2d at 352 n.4. For a full discussion of the facts and holding in *Shearer*, *see supra* notes 92-100 and accompanying text.

139. 813 F.2d at 350-51.

140. *Id.*

141. *Id.* at 351.

142. *Id.* at 354.

143. *Id.* The court concluded that Pierce's claim posed no threat to the military disciplinary structure. *Id.*

144. 723 F.2d 1102 (3d Cir. 1983). For a discussion of the facts in *Shearer*, *see supra* note 92.

fourth element to the *Parker* analysis.¹⁴⁵ In addition to the three familiar *Parker* factors, the court considered “whether the injured party was acting under orders or compulsion,” which implicated military discipline concerns.¹⁴⁶ As in the *Parker* analysis, no distributive weight was assigned to any of the four factors, but the court did note that “[t]he status and activity of the injured serviceman often seem to be the controlling factors.”¹⁴⁷ The Supreme Court ultimately reversed this holding on precisely the question of the relative weight to be afforded each of the factors. The Court held that military discipline was the most important factor.¹⁴⁸

The United States Court of Appeals for the Eighth Circuit employed a similar four-part analysis, which it conceded was a broad construction of the *Feres* doctrine.¹⁴⁹ In *Brown v. United States*,¹⁵⁰ the court articulated a two-part test that also considered all four factors identified in *Shearer*.¹⁵¹ In *Brown*, a National Guardsman participating in training exercises was allegedly the victim of a racially motivated “mock lynching.”¹⁵² The plaintiff asserted that this incident had caused him to suffer deep mental depression, which ultimately led to a suicide attempt and severe and permanent injury.¹⁵³ The court denied recovery and held that the plaintiff’s “claims against the United States and his superior officers for failing to prevent the incident, and against his superiors for failing to perform a proper investigation, are barred by the *Feres* doctrine.”¹⁵⁴ Unlike previous tests, the *Brown* analysis placed substantially greater weight on the impact of a servicemember’s suit on military disci-

145. *Shearer*, 723 F.2d at 1105. The Third Circuit added the fourth element of “whether the injured party was acting under orders or compulsion.” *Id.*

146. *Id.*

147. *Id.* The court further stated that “[a]pplication of [*Feres*] doctrine focuses on the relationship between the serviceman and the military at the time and place the injury was sustained.” *Id.*

148. *See* *United States v. Shearer*, 473 U.S. 52, 57-58 (1985). For a full discussion of the Supreme Court’s decision in *Shearer*, see *supra* notes 92-100 and accompanying text.

149. *See* *Brown v. United States*, 739 F.2d 362, 366-69 (8th Cir. 1984). “[T]he better jurisprudential course, in our view, is to examine the facts of each case as they arise and determine whether they fall within the reasons given by the Supreme Court for its conclusion in *Feres*.” *Id.* at 366 (emphasis supplied by court) (quoting *Miller v. United States*, 643 F.2d 481, 491 (8th Cir. 1981) (en banc)).

150. 739 F.2d 362 (8th Cir. 1984).

151. *Id.* at 367-69. The court’s analysis focused on (1) whether there is a relevant relationship between the servicemember’s activity and the military service, and (2) whether military discipline will be impeded if the challenged conduct is litigated in a civil action. *Id.* The first question is answered by analyzing the three factors familiar to both the *Parker* and *Shearer* analyses: (1) duty status, (2) location of the injury and (3) the nature of the activity. *Id.* at 367.

152. *Id.* at 363.

153. *Id.*

154. *Id.* at 369.

pline.¹⁵⁵ Specifically, the court asserted that “the preservation of military discipline is at the heart of the *Feres* doctrine.”¹⁵⁶

In *Stubbs v. United States*,¹⁵⁷ the United States Court of Appeals for the Eighth Circuit employed the *Brown* analysis, and reemphasized the importance of the military discipline factor.¹⁵⁸ The case involved a U.S. Army private, who claimed that she had been sexually harassed and assaulted by her drill sergeant during basic training.¹⁵⁹ This incident, coupled with a prior (pre-service) rape, caused Private Stubbs tremendous anxiety and emotional distress.¹⁶⁰ She ultimately committed suicide.¹⁶¹ The *Stubbs* court denied relief to the family of the suicide victim, based on the relevant relationship between her activity at the time of the incident and her military service, and the harmful impact of a suit on military decision-making and discipline.¹⁶²

4. *The Post-Shearer Trend Toward a “Military Discipline” Test*

The trend among federal courts after the Supreme Court’s decision in *Shearer* has been to confine the “incident to service” analysis to primarily a “military discipline” analysis.¹⁶³ The *Shearer* Court emphasized that the primary focus in a *Feres* analysis is whether the suit requires a civilian court to second guess military decisions and whether it will impair essential military discipline.¹⁶⁴ Although the *Shearer* Court did not articulate a specific test to guide the incident to service analysis, its opinion has done much to shape the future of incident to service analysis.¹⁶⁵

In *Sanchez v. United States*,¹⁶⁶ Private Pablo Sanchez, USMC, sustained serious injuries in an automobile accident, while on authorized liberty and riding as a passenger in the private vehicle of a fellow marine.¹⁶⁷ The car overturned allegedly because the employee of a government-owned service station had been negligent in the servicing of the vehicle’s brakes.¹⁶⁸ Because of the unlikelihood that such action would either impair military discipline or allow civilian second guessing

155. *Id.* at 367-69. The two-part *Brown* test gives the military discipline factor the same emphasis as the combined effect of the other three factors. *Id.*

156. *Id.* at 368.

157. 744 F.2d 58 (8th Cir. 1984).

158. *Id.* at 60-61.

159. *Id.* at 59.

160. *Id.*

161. *Id.*

162. *Id.* at 60-61.

163. *See infra* notes 166-89 and accompanying text.

164. 473 U.S. at 57 (citing *Stencel*, 431 U.S. 666, 673 (1977); *Chappell*, 462 U.S. 296, 300, 304 (1983)).

165. *See infra* notes 166-89 and accompanying text.

166. 813 F.2d 593 (2d Cir. 1987).

167. *Id.* at 594.

168. *Id.* The court held that Sanchez’ claim was not so clearly barred by the *Feres* doctrine as to permit preliminary dismissal. *Id.* at 596.

of military decisions, the United States Court of Appeals for the Second Circuit held that the *Feres* doctrine did not bar the servicemember's cause of action.¹⁶⁹ Specifically, the *Sanchez* court identified the military discipline rationale as the primary rationale of the *Feres* doctrine.¹⁷⁰ Similar approaches have been adopted by the United States Court of Appeals for the Fifth Circuit,¹⁷¹ the Sixth Circuit,¹⁷² and the District of Columbia Circuit.¹⁷³

In *Atkinson v. United States*,¹⁷⁴ Specialist Four Joyce Atkinson, U.S. Army, during the second trimester of her pregnancy, was misdiagnosed and poorly treated for pre-eclampsia, a life threatening condition.¹⁷⁵ Allegedly, due to this negligent treatment, she delivered a stillborn child and suffered physical injuries and emotional distress.¹⁷⁶ The United States Court of Appeals for the Ninth Circuit, relying on *Shearer*, held that the *Feres* doctrine did not bar the suit because plaintiff's claim had no harmful impact on military discipline.¹⁷⁷ The court explicitly identified the "military discipline" inquiry as determinative in the analysis.¹⁷⁸

The *Atkinson* court reversed its direction, however, in light of the Supreme Court's emphasis on "three broad rationales" in *Johnson*.¹⁷⁹ It withdrew its opinion in *Atkinson* and affirmed the district court's decision: barring the suit based on *Feres* and *Johnson*.¹⁸⁰ The court stated that, "[a]lthough we believe that the military discipline rationale does not support application of the *Feres* doctrine in this case, the first two

169. *Id.* at 595-96.

170. *Id.* at 595.

171. See *Bynum v. FMC Corp.*, 770 F.2d 556, 562 (5th Cir. 1985) ("[I]t has become clear that the third [military discipline] factor . . . is the principal justification for the *Feres-Stencel* doctrine.').

172. *Satterfield v. United States*, 788 F.2d 395, 397-98 (6th Cir. 1986) (appellant's death, like *Shearer's*, was incident to service because cause of action would threaten military discipline, supervision and control).

173. *Bois v. Marsh*, 801 F.2d 462, 470 (D.C. Cir. 1986) (intramilitary damages actions are barred by *Feres* when such would entail second-guessing military decisions and getting testimony of command personnel on command decisions).

174. 804 F.2d 561 (9th Cir. 1986), *withdrawn*, 825 F.2d 202 (1987).

175. *Id.* at 561-62.

176. *Id.* at 562.

177. *Id.* at 565. The court held that the previously employed *per se* bar to military medical malpractice claims was improper. *Id.* at 564; see *Veillette v. United States*, 615 F.2d 505, 507 (9th Cir. 1980); *Henninger v. United States*, 473 F.2d 814, 815 (9th Cir.), *cert. denied*, 414 U.S. 819 (1973). For a discussion of proposed military medical malpractice reform legislation, see *supra* note 8.

178. 804 F.2d at 563. "[T]he overriding concerns of the doctrine are with the effect of a tort suit in the second-guessing of military decisions or in the impairment of military discipline." *Id.* (citing *Shearer*, 473 U.S. 52, 57 (1985)). Moreover, "[i]n light of the Supreme Court's unequivocal instruction to look at each case independently . . .," the court rejected the longstanding *per se* rule prohibiting medical malpractice claims and employed the military discipline analysis to establish FTCA eligibility. *Id.*

179. *Atkinson*, 825 F.2d at 206.

180. *Id.*

rationales support its application."¹⁸¹ In deference to the United States Supreme Court, the court withdrew its military discipline analysis and employed the longstanding *per se* bar to all medical malpractice claims.¹⁸²

Not all lower courts, however, were persuaded that *Johnson's* enunciation of the three rationales was determinative of the issue. In *Reilly v. United States*,¹⁸³ the court interpreted *Johnson* to have no effect on its military discipline analysis.¹⁸⁴ Serviceman Reilly and his wife brought a medical malpractice action under the FTCA on behalf of themselves and their baby daughter.¹⁸⁵ Reilly alleged that negligent treatment during labor and delivery by the military obstetrician resulted in devastation of the baby's brain.¹⁸⁶ The court concluded that the *Feres* doctrine did not bar the servicemember's claim for injuries suffered by witnessing the agony of his daughter in delivery.¹⁸⁷ Relying on the "military discipline" analysis articulated in the first *Atkinson* decision,¹⁸⁸ the court stated that *Johnson* did nothing more than repeat the basic tenets of the *Feres* doctrine.¹⁸⁹

C. Clarifying the "Incident to Service" Confusion

The Supreme Court has asserted that "[t]he *Feres* doctrine cannot be reduced to a few bright-line rules."¹⁹⁰ However, in reality, the numerous tests are often employed in a *per se* manner to bar causes of action.¹⁹¹ In light of the Supreme Court's guidance in *Shearer* and *Johnson*

181. *Id.*

182. *Id.*

183. 665 F. Supp. 976 (D.R.I. 1987).

184. *Id.* at 1016. "To the extent that *Johnson* merely repeats without reformulating the basic tenets of the *Feres* doctrine, the decision does not alter my analysis of the doctrine's inapplicability to the present case." *Id.*

185. *Id.* at 978.

186. *Id.* at 978-79. In addition to damages for the baby's future care and loss of earning capacity, the parents sought damages for the loss of their daughter's enjoyment of quality of life; future pain and suffering; their own emotional distress; their loss of their daughter's love, society and affection; and loss of each other's love, society and affection. *Id.* at 983. The court awarded over eleven million dollars in damages for the injuries to the baby. *Id.* at 1020. The claims of the parents rested on an unresolved question of state law concerning a bystander's right to recover for emotional distress without suffering physical injury. *Id.* Therefore, a ruling on these claims was deferred. *Id.* at 1020-21.

187. *Id.* at 1016.

188. *Id.* at 1015-16; see *Atkinson*, 804 F.2d 561 (9th Cir. 1986). This decision was subsequently withdrawn by the court in light of the Supreme Court's decision in *Johnson*. See *Atkinson*, 804 F.2d 561 (9th Cir. 1986), *withdrawn*, 825 F.2d 202 (1987).

189. *Reilly*, 665 F. Supp. at 1016. "[B]y no stretch of logic can [plaintiff's injury] be considered service-related." *Id.*

190. *Shearer*, 473 U.S. at 57.

191. See *Rayner v. United States*, 760 F.2d 1217, 1219 (11th Cir.) (provision of exclusively military medical care benefits is *per se* "activity incident to service,"

and the apparent trend toward a "military discipline" analysis, the question of what is "incident to service" is ripe for review by the Court.¹⁹² Therefore, in anticipation of such review, this Note offers several recommendations in an attempt to clarify the "incident to service" analysis in order to preserve the military disciplinary structure and to protect the rights of United States military personnel.

One universal definition of "incident to service" is not a guarantee that these competing interests will necessarily be better served. However, such a definition will promote predictability and ease of application, and will neither expose the government to varying standards of liability nor expose servicemembers to remedies that "fluctuate in existence and value."¹⁹³

The "incident to service" definition should hinge precisely on the relationship of the injured party to military duty and the impact of a cause of action on military discipline.¹⁹⁴ Such a standard must necessarily focus on the chain-of-command implications of the servicemember's suit. Was the member injured by a military person within the same chain of command? Will the cause of action negatively impact the military good order, discipline or morale of either the injured party's command or the alleged tortfeasor's command? Will the suit impose direct scrutiny by the civilian courts of a military commander's decisions which were within the scope of his employment?¹⁹⁵ If any one of these questions is answered affirmatively, it is submitted that a proper "incident to service" test would preclude the suit.¹⁹⁶ In addition, the "discretionary functions" exception to the FTCA already serves as a protection for government employees acting within the scope of their employment.¹⁹⁷ This exception protects most non-combat military decisions that affect

therefore, medical malpractice claims are barred by *Feres* doctrine), *cert denied*, 474 U.S. 851 (1985); *Heath v. United States*, 633 F. Supp. 1340, 1341 (E.D. Cal. 1986) (two medical malpractice cases consolidated in *Feres* decision are conclusive that all such claims are barred as "incident to service.'). For examples of decisions that apply the doctrine in this *per se* manner, see *supra* notes 105-23 and accompanying text.

192. See *supra* notes 163-89 and accompanying text.

193. A singular definition of "incident to service" will remedy the concern articulated in *Feres*, that servicemembers who have no control over where they will serve should not be dependent on varying state laws for an appropriate remedy. *Feres*, 340 U.S. at 143.

194. See *supra* notes 92-100 and accompanying text. It is suggested that the approach taken by the Ninth Circuit in its first *Atkinson* decision properly considered the relevant factors and resulted in a fair analysis of the competing concerns. *Id.*

195. For a discussion of other relevant considerations in the "military discipline" analysis, see Note, *supra* note 7, at 1123-25.

196. This test would reach the identical result as the Supreme Court in *Johnson*, since *Johnson* was acting within the scope of his employment, on duty and following the Coast Guard's standard operating procedures. For a discussion of the *Johnson* decision, see *supra* notes 76-85 and accompanying text.

197. 28 U.S.C. § 2680(a) (1982).

the members in a military commander's chain of command:¹⁹⁸ all combat decisions are completely protected from liability by an express exception to the FTCA.¹⁹⁹ Yet, there are some injuries which are so far removed from the military command environment that only an inflexible *per se* rule could possibly preclude a proper remedy.²⁰⁰ Medical malpractice claims are the best examples of injuries that occur outside of the military command structure, that would be prejudiced by a *per se* rule banning tort recovery on the basis of active duty status.

A proper test for "incident to service" is one that evaluates the injury in light of the two concerns identified in *Shearer*: (1) whether a suit requires a civilian court to second-guess military decisions and (2) whether the suit might impair essential military discipline.²⁰¹ This "military discipline" test must necessarily consider the totality of the circumstances, including the activity and status of the injured party and the situs of the injury, in order to answer the ultimate questions.²⁰² Therefore, it is suggested that any injuries incurred during regular working hours, while "on duty," or while acting under orders or in accordance with regulations, would be considered "incident to service" and the servicemember would be barred from recovery.²⁰³ Additionally, however, an injury that is suffered by a servicemember far removed from the military sphere, outside of the military chain of command, and in no way connected with a servicemember's military duties, would not be incident to service, and thus the injured servicemember would be permitted to recover under the FTCA.²⁰⁴

198. It is suggested that the "discretionary functions" exception will serve as a suitable obstacle for military plaintiffs who seek to recover when injured in a truly "incident to service" status. For further discussion of the "discretionary functions" exception, see Note, *supra* note 7, at 1121-25.

199. See 28 U.S.C. § 2680(j) (1982) ("Any claim arising out of the combatant activities of the military or naval forces, or the Coast Guard, during time of war.").

200. It is suggested that the "military discipline" test proposed herein might reach a result opposite that of the Supreme Court's decision in *Stanley*. As Justice O'Connor stated in *Stanley*: "[C]onduct of the type alleged in this case is so far beyond the bounds of human decency that as a matter of law it simply cannot be considered a part of the military mission." *Stanley*, 107 S. Ct. at 3065 (O'Connor, J., concurring in part and dissenting in part).

Medical malpractice claims are far removed from the military discipline structure and deserve recovery. For a discussion of the status of military medical malpractice reform, see *supra* note 8 and accompanying text.

201. See *supra* note 92-100 and accompanying text.

202. The *Parker* factors are still relevant to the "military discipline" inquiry. For a full discussion of the *Parker* factors, see *supra* notes 124-35 and accompanying text.

203. It is submitted that the following decisions would reach identical results under such a "military discipline" test: *Chappell*, 462 U.S. 296 (1983); *Pierce*, 813 F.2d 349 (11th Cir. 1987); *Stubbs*, 744 F.2d 58 (8th Cir. 1984); *Parker*, 611 F.2d 1007 (5th Cir. 1980).

204. It is submitted that the following decisions would reach opposite results under such a "military discipline" analysis: *Atkinson*, 825 F.2d 202 (9th Cir.

Application of this "military discipline" test would not radically impair the military command structure. In fact, several cases would reach identical results, such as in *Chappell*, where five sailors who alleged racial discrimination would still be denied a *Bivens* remedy.²⁰⁵ In *Stubbs*, the suicide victim's family would still be denied recovery.²⁰⁶ Similarly, the national guardsman in *Brown* could not recover for being subjected to a "mock lynching."²⁰⁷ Despite the compelling circumstances in the cases aforementioned, the *Feres* doctrine serves a vital interest in protecting the military command structure.

Not all injuries are sustained, however, within this broad command structure. The "military discipline" test would permit recovery, therefore, in cases which are far removed from the military command environment. Lieutenant Hass would be allowed to recover for injuries sustained while horseback riding. The distressed mother in *Davis* would be allowed to recover for emotional distress, after her dead fetus was disposed of rather than preserved. Similarly, Specialist Four Joyce Atkinson would recover for her physical and emotional injuries since "[t]here is simply no connection between [her] medical treatment and the decisional or disciplinary interest protected by the *Feres* doctrine."²⁰⁸ Further, this test is broader than the restrictive "officer-subordinate relationship" analysis articulated by the United States Court of Appeals for the Eleventh Circuit.²⁰⁹ The chain of command implications are, however, an important element in the "military discipline" analysis.

Finally, such a definition of "incident to service" will likely result in fewer suits by servicemembers.²¹⁰ The present *Feres* tests have not re-

1987); *Hass v. United States*, 518 F.2d 1138 (4th Cir. 1975); *Davis*, 602 F. Supp. 355 (D. Md. 1985).

In addition, military medical malpractice claims should be considered outside the military sphere as well. For a discussion of the status of military medical malpractice reform, see *supra* note 8 and accompanying text.

205. The five sailors would be denied a remedy under this military discipline test because the alleged injuries were sustained within their direct chain of command and were directly related to their military mission. For further discussion of *Chappell*, see *supra* notes 63-66 and accompanying text.

206. Private *Stubbs*' family could not recover under the military discipline test, because her injuries were caused by her immediate superior incident to basic training. For a discussion of *Stubbs*, see *supra* notes 157-62 and accompanying text.

207. The guardsman could not recover under the military discipline test, because the incident took place while he was performing his military mission. For a discussion of *Brown*, see *supra* notes 149-56 and accompanying text.

208. 804 F.2d at 565. For a discussion of *Atkinson*, see *supra* notes 174-82 and accompanying text.

209. For a discussion of the "officer-subordinate relationship" interpretation of "special factors," see *supra* note 73 and accompanying text.

210. Under the *Feres* doctrine, servicemembers' suits have increased, as military plaintiffs have attempted to distinguish *Feres*. See *Bennett*, *supra* note 7, at 406-11. Another author stated that *Feres* has created more litigation than any of

duced suits, and one author suggests that there is no indication that such a barrage of suits has negatively effected military discipline.²¹¹ First, under such a standard, an injured servicemember could more accurately predict the potential for recovery. Secondly, the required (pre-suit) administrative claims decisions would have more finality, thereby dissuading potential litigants who would fail under the more refined and predictable analysis.²¹² This result would reduce the civilian courts' review of military decisions and, because of the greater degree of predictability, would likely *improve* morale among the uniformed services.²¹³

IV. CONCLUSION

The present inadequacies in the intramilitary compensation system for injuries to servicemembers has led some authors to call for reform or modification of the FTCA.²¹⁴ The servicemember is precluded from recovery for all injuries sustained "incident to service," but this ambiguous test has produced outlandish results.²¹⁵ In order to cure the ills of this doctrine and protect the rights of our nation's servicemembers, without disturbing the essential structure of military discipline, it is sug-

the express exceptions to the FTCA. See Note, *Torts—Rights of Servicemen Under Federal Tort Claims Act*, 45 N.C.L. REV. 1129, 1129 (1967).

211. "The large number of cases . . . demonstrate that the *Feres* ruling did not halt tort litigation by servicemembers. It simply assured that they would generally lose [T]here is no evidence that negligence actions by servicemembers over the past twenty-five years have degraded the military mission." Rhodes, *The Feres Doctrine After Twenty-Five Years*, 18 A.F. L. REV. 24, 42 (1976).

212. An injured servicemember cannot immediately bring suit. The claimant must first submit a proper claim to the appropriate federal agency with adjudicatory authority. If the claim is (1) denied or (2) does not receive final disposition within six months of filing, then the claimant has the statutory right to bring an action in federal district court. 28 U.S.C. § 2675(a) (1982).

213. "The policy argument for absolute immunity . . . rests on the dubious proposition that a serviceman is more likely to respect authority when he has no recourse for the intentional or malicious deprivation of his constitutional rights. The contrary idea—that safeguarding rights compatible with military needs will engender respect for authority and promote discipline—is more appealing." Note, *Intramilitary Immunity and Constitutional Torts*, 80 MICH. L. REV. 312, 328 (1981); cf. *Johnson*, 107 S. Ct. at 2074 (Scalia, J., dissenting) ("Or perhaps—most fascinating of all to contemplate—Congress thought that *barring* recovery by servicemen might adversely affect military discipline." (emphasis supplied by Court)).

214. For a discussion of the inadequacies of the intramilitary remedial system and the proposed reforms, see Donaldson, *Constitutional Torts and Military Effectiveness: A Proposed Alternative to the Feres Doctrine*, 23 A.F. L. REV. 171, 195-207 (1982-83); Schwartz, *supra* note 7, at 999-1003.

215. See *Atkinson*, 804 F.2d 561 (9th Cir. 1986), *withdrawn*, 825 F.2d 202, 205 (1987); Zillman, *Intramilitary Tort Law: Incidence to Service Meets Constitutional Tort*, 60 N.C. L. REV. 489, 512 (1982) (only 11 of 147 "incident to service" cases litigated between 1955 and 1981 involved "injuries incurred in the performance of the serviceperson's work duties.").

gested that a “military discipline” test be adopted to define “incident to service.”

The United States Supreme Court introduced this “military discipline” analysis in *Shearer*, and lower federal courts have applied it effectively to achieve more equitable results. A carefully defined test based on these principles will properly protect servicemembers’ rights and also serve the dual purpose of eliminating baseless claims for recovery and reducing the civilian courts’ intrusion into military affairs.

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