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THE EFFECT OF THE FERES DOCTRINE ON TORT ACTIONS AGAINST THE UNITED STATES BY FAMILY MEMBERS OF SERVICEMEN

INTRODUCTION

Under the doctrine of sovereign immunity, a private citizen may not sue the United States without its consent.1 This doctrine originated from the medieval notion that because he ruled by divine right,2 "the King could do no wrong."3 Adopted into American law by the Supreme Court in the early nineteenth century,4 sovereign immunity led to unfortunate consequences.5 As the activities of government

3. 86 Cong. Rec. 12,018 (1940) (statement of Rep. Michener); W. Prosser, supra note 2, § 131, at 970; see Restatement (Second) of Torts ch. 45A special note (1979); Pound, supra note 2, at 406. See generally 3 W. Holdsworth, A History of English Law 458-69 (3d ed. 1927) (discussion of origins of sovereign immunity). It was not until the seventeenth century, a period during which subjects regarded their king as the ruler of a modern national state, that this notion of the king's infallibility became fully established in the law. Id. The harsh consequences of this doctrine, however, were mitigated by the qualification that for every act of the king, some minister was always responsible. See 6 W. Holdsworth, supra, at 266-67. It has been suggested that the doctrine has its roots in Roman law. Parker, The King Does No Wrong—Liability for Misadministration, 5 Vand. L. Rev. 167, 167 (1952).
4. As early as 1821, in Cohens v. Virginia, 19 U.S. 120, 6 Wheat. 264 (1821), Chief Justice Marshall declared that no suit could be commenced or prosecuted against the United States without its consent. Id. at 184, 6 Wheat. at 411-12. Later, in Gibbons v. United States, 75 U.S. (8 Wall.) 269 (1868), the Court held that the government was immune from all liability in tort. Id. at 275-76. The theoretical underpinning of the doctrine of sovereign immunity, however, conflicts with the political theory of democracy upon which our nation is based, Parker, supra note 3, at 167; see Feres v. United States, 340 U.S. 135, 139 (1950); Jaffee, Suits Against Governments and Officers: Sovereign Immunity, 77 Harv. L. Rev. 1, 19-20 & n.59 (1963); Note, Military Rights Under the FTCA, 43 St. John's L. Rev. 455, 456 (1969) [hereinafter cited as Military Rights], and therefore its acceptance into American law is bewildering. Restatement (Second) of Torts § 895A comment a (1979); W. Prosser, supra note 2, § 131, at 971. For a discussion of several justifications that have been given for the acceptance of the doctrine, see 1 L. Jayson, Handling Federal Tort Claims: Administrative and Judicial Remedies § 51, at 2-5 n.12 (1982).
5. 1 L. Jayson, supra note 4, § 51, at 2-5 to -6.
spread, the volume of claims against it increased sharply. While contract actions could be brought against the government since 1855, relief in tort could only be obtained by petitioning Congress to permit a lawsuit or to allocate public funds to compensate innocent victims wronged by government action. Because these claims were absolutely barred absent such legislative consent and because Congress was an inadequate forum for the resolution of these claims, "a serious gap in the administration of justice" arose. Moreover, the duty to adjudicate these claims became a severe burden on the legislative body; by the 1930's Congress had to rule on over 2000 such bills each year. To relieve Congress of this intolerable burden and "to mitigate the unreasonable consequences of sovereign immunity from suit," Congress in 1946 enacted the Federal Tort Claims Act.

6. Unlike feudal society in which the king had but a limited function, see Pound, supra note 2, at 406, the modern state increasingly took over much of that which had been done by private enterprise. Id. at 409; Military Rights, supra note 4, at 456-57; see Feres v. United States, 340 U.S. 135, 139 (1950); Jaffee v. United States, 592 F.2d 712, 716 (3d Cir.), cert. denied, 441 U.S. 961 (1979); 1 L. Jayson, supra note 4, § 52, at 2-6.


8. Established by the Court of Claims Act, Act of Feb. 24, 1855, 10 Stat. 612, the Court of Claims was granted jurisdiction to hear and determine all claims founded "upon any contract, express or implied, with the government of the United States." Id. Although initially the court's determination could not be effective until Congress acted thereon, id., Congress amended the Act in 1863 to provide that the judgments of the Court of Claims shall be final. Act of Mar. 3, 1863, 12 Stat. 765. With the passage of the Tucker Act, ch. 359, 24 Stat. 505 (codified in scattered sections of 28 U.S.C.), federal district courts were granted concurrent jurisdiction with that of the Court of Claims. 28 U.S.C. § 1346 (1976).

9. Restatement (Second) of Torts § 895A comment a (1979); 1 L. Jayson, supra note 4, § 51, at 2-6; Pound, supra note 2, at 409.


11. Pound, supra note 2, at 409; accord 86 Cong. Rec. 12,016 (1940) ("Many unfortunate men have been deprived of the opportunity or the right to obtain redress from the Government. This is manifestly unfair and unjust . . . .") (statement of Rep. Sabath); id. at 12,026 ("[T]he present system is so inequitable and results in such unfair consequences.") (statement of Rep. McLaughlin); see 1 L. Jayson, supra note 4, § 51, at 2-5.

12. Restatement (Second) of Torts § 895A comment a (1979); 1 L. Jayson, supra note 4, § 52, at 2-6 to -9; Wright, The Growth of the Federal Tort Claims Act, 24 JAG 151, 151 (1970).


THE FERES DOCTRINE


16. Congress consented to liability "for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred." 28 U.S.C. § 1346(b) (1976); see id. § 2674. Between the years 1946 and 1974, the FTCA permitted only those actions sounding in negligence. In 1974, however, Congress amended the FTCA to cover certain intentional torts committed by federal investigative or law enforcement officers. Pub. L. 93-253, § 2, 88 Stat. 50 (1974) (codified at 28 U.S.C. § 2680(h) (1976)). Congress had earlier waived sovereign immunity with respect to actions in contract, see supra note 8, and certain limited torts. Public Vessels Act, ch. 428, 43 Stat. 1112 (1925) (codified as amended at 46 U.S.C. §§ 781-790 (1976)); Suits in Admiralty Act, ch. 95, 41 Stat. 525 (1920) (codified as amended at 46 U.S.C. §§ 741-752 (1976)). See generally 1 L. Jayson, supra note 4, §§ 53-55 (history of statutory waiver of sovereign immunity).

17. 28 U.S.C. § 2680 (1976). The FTCA excludes three general categories of claims: (1) those arising out of the performance of discretionary functions or duties, id. § 2680(a); (2) those arising out of particular areas of governmental activity, including "loss [or] miscarriage [of] postal matter," id. § 2680(b), "assessment or collection of any tax or customs duty," id. § 2680(c), "imposition or establishment of a quarantine," id. § 2680(f), "fiscal operations of the Treasury." id. § 2680(i), "combatant activities of the [armed forces]," id. § 2680(j), activities "in a foreign country," id. § 2680(k); and activities of the Tennessee Valley Authority, id. § 2680(l), the Panama Canal Company, id. § 2680(n), and a federal land or federal intermediate credit bank, id. § 2680(o); and (3) those arising out of certain types of torts, such as admiralty suits "for which a remedy is provided," id. § 2680(d), and "assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights." Id. § 2680(h). See generally 2 L. Jayson, supra note 4, §§ 235-266 (discussion of statutory exceptions to the FTCA).

18. Feres v. United States, 340 U.S. 135, 144-45 (1950) (construing the FTCA to exclude claims for personal injury or death of servicemen incurred as an incident to military service); Preferred Ins. Co. v. United States, 222 F.2d 942, 948 (9th Cir.) (construing the FTCA to exclude claims for property damage incurred incident to military service), cert. denied, 350 U.S. 837 (1955); see Johansen v. United States, 343 U.S. 427, 439-40 (1952) (claims covered by the Federal Employees' Compensation Act (FECA), ch. 458, 39 Stat. 742 (1916) (codified in part as amended in scattered sections of 5 U.S.C.), not recoverable under the FTCA). See generally 2 L. Jayson, supra note 4, § 237 (discussion of implied exceptions to the FTCA).

19. If a claim falls within any exception to the FTCA, sovereign immunity has not been waived and the court is without jurisdiction to hear the case. United States v. Orleans, 425 U.S. 807, 814-15 (1976); Dalehite v. United States, 346 U.S. 15, 30-31 (1953).

The Supreme Court held that the FTCA did not waive sovereign immunity with respect to injuries incurred by servicemen incident to their military service.21 The effect of the Feres decision on tort suits against the government brought by family members of servicemen has been the source of much litigation. Members of a serviceman's family have been permitted to bring suit against the United States for personal injuries or property damage caused directly to them or their property, independent of any injury to the serviceman,22 if such injuries arise from non-combatant activities.23 Conversely, they have been barred from recovery where the cause of action is derivative of the serviceman's action for his own injury.24 Most derivative injury cases involve a wrongful death action brought by the wife or child of the deceased serviceman,25 although courts also deny recovery for other

21. Id. at 146.

22. 1 L. Jayson, supra note 4, § 156; e.g., Bridgford v. United States, 550 F.2d 978, 979-80 (4th Cir. 1977) (retired military officer's dependent injured as a result of medical malpractice); Williams v. United States, 435 F.2d 804, 805 (1st Cir. 1970) (serviceman's child died after being refused admission to military hospital); Arrendale v. United States, 469 F. Supp. 883, 884 (N.D. Tex. 1979) (injuries to serviceman's son as a result of medical malpractice); Steele v. United States, 463 F. Supp. 321, 322, 330 (D. Alaska 1978) (same); Jones v. United States, 236 F. Supp. 756, 757-59 (E.D. N.C. 1964) (serviceman's wife injured in auto accident). Similarly, the serviceman has recovered for damages sustained by him as a result of injuries to his wife or child. 1 L. Jayson, supra note 4, § 156; e.g., Fournier v. United States, 220 F. Supp. 752, 755-55 (S.D. Miss. 1963); Grigalauskas v. United States, 103 F. Supp. 543, 549-50 (D. Miss. 1951), aff’d, 195 F.2d 494 (5th Cir. 1952); Messer v. United States, 95 F. Supp. 512, 513 (N.D. Fla. 1951).

23. 28 U.S.C. § 2680(j) (1976). The FTCA expressly excludes “[a]ny claim arising out of the combatant activities of the military or naval forces, or the Coast Guard, during time of war.” Id.


injuries suffered by family members, such as loss of consortium, mental anguish and marital disharmony.26

Recently, courts have been called to decide a new question: Whether family members of servicemen can seek recovery under the FTCA for physical injuries incurred as a result of the government’s negligent conduct with respect to the serviceman.27 Typically, these cases involve children of servicemen who have suffered genetic injury and birth defects resulting from negligent exposure of the father to radiation or toxic chemicals.28 Some courts confronted with such physical injury claims apply an incident-to-service test and find that because the origin of the family member’s injury is a service-related injury, the claim is barred by Feres.29 Other courts consider whether the factors underlying the Feres rule justify its application in this new context.30 Courts that have adopted this latter approach have reached conflicting results.31


Part I of this Note examines the application of the *Feres* doctrine to claims brought by dependents of servicemen and argues that an incident-to-service analysis should be replaced by a consideration of the factors that underlie the *Feres* doctrine. Part II contends that the *Feres* factor analysis adequately balances the government's interest in avoiding any impairment of its vital functions against the purpose of the FTCA, which is to provide a remedy to victims of the government's negligence. This Note concludes that under such an analysis family members of servicemen should be granted a cause of action for physical injuries incurred as a result of the government's negligence toward an active duty serviceman.

I. DEVELOPMENT OF THE *FERES* DOCTRINE AND ITS APPLICATION TO CLAIMS BY FAMILY MEMBERS

In *Brooks v. United States*, the Supreme Court first considered whether members of the armed forces had a right to sue the government under the FTCA. The Court held that two servicemen could recover under the Act for injuries sustained while on furlough. Both the language of the FTCA and its legislative history persuaded the Court to grant the tort actions. Recognizing the possible implications of its decision, however, the Court explicitly reserved the question whether an action would lie under the FTCA for injuries sustained incident to active military service.

32. 337 U.S. 49 (1949).
33. Id. at 50. This question was left open by Congress. Although the FTCA explicitly excludes "[a]ny claim arising out of the combatant activities of the military or naval forces, or the Coast Guard, during time of war," 28 U.S.C. § 2680(j) (1976), there is no exception for all actions by members of the military. See 337 U.S. at 51.
34. 337 U.S. at 50-51. Two brothers, Welker and Arthur Brooks, were riding in their automobile along a public highway when a negligently operated army truck crashed into their vehicle. Arthur was killed; Welker was seriously injured. Id. at 50.
35. Id. at 51. The FTCA waives sovereign immunity for any claim based on negligence brought against the United States. 28 U.S.C. § 1346(b) (1976). Noting that "[t]he statute's terms are clear," the Court was "not persuaded that 'any claim' means 'any claim but that of servicemen.' " 337 U.S. at 51. Moreover, because the FTCA includes an exception for combatant activities, 28 U.S.C. § 2680(j) (1976), the Court stated that "[i]t would be absurd to believe that Congress did not have the servicemen in mind" when it enacted the FTCA. 337 U.S. at 51.
36. 337 U.S. at 51-52. Noting that of the eighteen tort claims bills introduced in Congress between 1925 and 1935, "[a]ll but two contained exceptions denying recovery to members of the armed forces," id. at 51 & nn.2-3, and that the military exception had been dropped when the present FTCA was first introduced, id. at 51-52, the Court reasoned that Congress must have intended the FTCA to cover military claims that are not service-connected. Id.
37. Id. at 52 ("The Government envisages dire consequences should we reverse the judgment. A battle commander's poor judgment, an army surgeon's slip of hand, a defective jeep which causes injury, all would ground tort actions against the United States." (footnote omitted)).
38. Id.
A year after Brooks, this "wholly different case" presented itself to the Supreme Court in Feres v. United States. Before the Court were three separate claims; two involved claims of medical malpractice, the other claim charged that the serviceman was housed in unsafe barracks. The Court denied all three actions, stating that the FTCA does not cover "injuries to servicemen where the injuries arise out of or are in the course of activity incident to service." The Feres Court based its decision primarily on two factors. First, it considered the availability of veterans' benefits, and concluded that because of the absence of any statutory method of adjustment between these benefits and FTCA recoveries, Congress did not intend the FTCA to permit recovery for injuries incident to military service. Second, the Court noted that liability under the FTCA is determined under the law of the state in which the negligence occurred, but found that the relationship between the government and members of its armed forces is "distinctively federal in character." The Court concluded that the law governing that relationship should therefore be derived from federal sources and not from state law, as would be required under the FTCA.

Four years after its decision in Feres, the Court, in United States v. Brown, suggested a third rationale for the military exception to the FTCA. The Brown Court justified the Feres decision on the theory that suits brought against the United States for service-related injuries

39. Id.
41. Feres was the consolidation of three cases. See Feres v. United States, 340 U.S. 135, 136-37 (1950). In Feres v. United States, 177 F.2d 535 (2d Cir. 1949), aff'd, 340 U.S. 135 (1950), Feres' wife brought a wrongful death action against the United States for the death of her husband, who had perished by fire in army barracks while on active duty. Id. at 536. In Jefferson v. United States, 178 F.2d 518 (4th Cir. 1949), aff'd sub nom. Feres v. United States, 340 U.S. 135 (1950), a serviceman sued the United States for damages arising from a towel that was negligently left in his stomach during an abdominal operation by an army surgeon. Id. at 518-19. In Griggs v. United States, 178 F.2d 1 (10th Cir. 1949), aff'd sub nom. Feres v. United States, 340 U.S. 135 (1950), Griggs' wife brought a wrongful death action against the government for the death of her husband, who allegedly died while on active duty as a result of negligent medical treatment. Id. at 2.
42. 340 U.S. at 146; accord Carter v. City of Cheyenne, 649 F.2d 827, 829 (10th Cir. 1981); Parker v. United States, 611 F.2d 1007, 1009-10 (5th Cir. 1980); De Font v. United States, 453 F.2d 1239, 1240 (1st Cir.) (per curiam), cert. denied, 407 U.S. 910 (1972); Callaway v. Garber, 289 F.2d 171, 173-74 (9th Cir.), cert. denied, 368 U.S. 874 (1961).
43. 340 U.S. at 144-45.
44. Id. at 142-43. The Act provides that "the law of the place where the act or omission occurred" governs the issue of liability. 28 U.S.C. § 1346(b) (1976).
45. 340 U.S. at 143 (quoting United States v. Standard Oil Co., 332 U.S. 301, 305-06 (1947)).
46. Id. at 143-44.
47. 348 U.S. 110 (1954).
would adversely affect the maintenance of military discipline.\textsuperscript{48} In \textit{Brown}, however, a discharged veteran claimed that he had received negligent medical treatment at a Veterans' Administration hospital for an injury he had incurred several years earlier while on active military duty.\textsuperscript{49} Because the veteran enjoyed a civilian status and hence was not subject to military discipline, the Court permitted his action,\textsuperscript{50} thus refuting an inference that \textit{Feres} had overruled \textit{Brooks}.\textsuperscript{51}

The Supreme Court left to the lower federal courts the task of deciding whether a given claim falls within the \textit{Feres} ruling or within the ambit of \textit{Brooks} and \textit{Brown}.\textsuperscript{52} To accomplish this task, most courts have focused on whether a particular claim arises out of activity incident to military service; if the claim is found to be service-related, then it is held to be barred by \textit{Feres}.\textsuperscript{53} Such an approach emphasizes the \textit{Feres} holding, not its rationale.\textsuperscript{54} In cases brought by

\begin{itemize}
\item \textsuperscript{48} \textit{Id.} at 112.
\item \textsuperscript{49} \textit{Id.} at 110.
\item \textsuperscript{50} \textit{Id.} at 112-13.
\item \textsuperscript{51} \textit{Hunt} v. United States, 636 F.2d 580, 586 (D.C. Cir. 1980); \textit{Parker} v. United States, 611 F.2d 1007, 1010 (5th Cir. 1980); \textit{Crumpler} v. United States, 495 F. Supp. 266, 269 (S.D.N.Y. 1980).
\item \textsuperscript{52} \textit{Hunt} v. United States, 636 F.2d 580, 587 (D.C. Cir. 1980).
\item \textsuperscript{54} \textit{See, e.g.}, \textit{Parker} v. United States, 611 F.2d 1007, 1013-15 (5th Cir. 1980); \textit{Henning} v. United States, 446 F.2d 774, 776-78 (3d Cir. 1971), \textit{cert. denied}, 404 U.S. 1016 (1972); \textit{Kessler} v. United States, 514 F. Supp. 1320, 1321-22 (D.S.C. 1981); \textit{In re "Agent Orange" Prod. Liab. Litig.}, 506 F. Supp. 762, 774-76 (E.D.N.Y. 1980). Courts have considered various factors to determine whether an injury is service-related, including the military status of the claimant, \textit{compare} \textit{Stansberry} v. \textit{Middendorf}, 567 F.2d 617, 618 (4th Cir. 1978) (per curiam) (servicemen's action for injuries resulting from automobile accident while on active duty barred), \textit{with} \textit{Barnes} v. United States, 103 F. Supp. 51, 55 (W.D. Ky. 1952) (serviceman's action for injuries resulting from automobile accident while on a pass granted), the situs of the injury, \textit{compare} \textit{Watkins} v. United States, 462 F. Supp. 980, 986 (S.D. Ga. 1977) (wife's action for death of serviceman resulting from motorcycle accident that occurred on a military base barred), \textit{aff'd per curiam}, 567 F.2d 279 (5th Cir. 1979), \textit{with} \textit{Mills} v. \textit{Tucker}, 499 F.2d 866, 867-68 (9th Cir. 1974) (per curiam) (family's action for death of serviceman resulting from automobile accident that occurred on a publicly used road barred), and the claimant's activity at the time he was injured. \textit{Compare} \textit{Rotko} v. \textit{Abrams}, 338 F. Supp. 46, 47 (D. Conn. 1971) (parent's action for death of serviceman arising out of combatant activities in Vietnam barred), \textit{aff'd}, 455 F.2d 992 (2d Cir. 1972), \textit{with} \textit{Parker} v. United States, 611 F.2d 1007, 1014-15 (5th Cir. 1980) (wife's action for death of serviceman resulting from automobile...
servicemen, courts generally give the phrase "incident to service" a broad construction, resulting in the rather pro forma denial of such claims. The incident-to-service approach has also been used to bar claims brought against the United States by non-military personnel. For example, wrongful death actions brought by family members of servicemen have been barred by the Feres rule, even when those claims were independent of any claim of the servicemen's estates, because the "genesis [of these claims] must go back to the in-service injury." It is based on this "genesis-incident-to-service" test that courts have barred claims brought by dependents of servicemen for accident while driving toward his home granted). The incident-to-service test has been criticized as being "amorphous," accord Rhodes, The Feres Doctrine After Twenty-Five Years, 18 A.F. L. Rev. 24, 29 (1976), thus making it "difficult to determine whether or not a particular claim is barred." It is based on this "genesis-incident-to-service" test that courts have barred claims brought by dependents of servicemen for

55. Alexander v. United States, 500 F.2d 1, 5 (8th Cir. 1974), cert. denied, 419 U.S. 1107 (1975); In re "Agent Orange" Prod. Liab. Litig., 506 F. Supp. 762, 775 (E.D.N.Y. 1980); Rhodes, supra note 54, at 30, 41; see, e.g., Hass v. United States, 518 F.2d 1138, 1141-42 (4th Cir. 1975) (action for injuries resulting from riding a horse rented from a military riding stable barred); Henninger v. United States, 473 F.2d 814, 815 (9th Cir.) (action for malpractice during process of serviceman's discharge barred), cert. denied, 414 U.S. 819 (1973); Lowe v. United States, 440 F.2d 452, 452-53 (5th Cir.) (per curiam) (action for injuries arising from elective surgery two months before termination of enlistment barred), cert. denied, 404 U.S. 833 (1971); Mariano v. United States, 444 F. Supp. 316, 316-17, 320 (E.D. Va. 1977) (action brought by off-duty serviceman for injuries incurred while employed at servicemen's club barred), aff'd, 605 F.2d 721 (4th Cir. 1979); Degentesh v. United States, 230 F. Supp. 763, 764-65 (N.D. Ill. 1964) (action for injuries arising from a bus accident that occurred while riding to a military-sponsored beach party barred).


58. Van Sickel v. United States, 285 F.2d 87, 91 (9th Cir. 1960).

59. Hinkie v. United States, 524 F. Supp. 277, 282 (E.D. Pa. 1981). In essence, under the "genesis-incident-to-service" test, the family member stands in the shoes of the serviceman. Thus, if the serviceman would be barred from bringing suit because his injury was incident to his military service, so is his dependent. Because the phrase "incident to service" is broadly defined where servicemen are involved, see supra note 55 and accompanying text, claims by family members are usually denied under this test. See supra note 29 and accompanying text.
other derivative injuries, including loss of consortium, mental anguish and marital disharmony. Recently, two courts denied tort recovery to servicemen's children who suffered permanent birth defects as a result of their fathers' exposure to harmful substances while serving in the military. They reasoned that the injuries were "directly related to and arose out of the injuries sustained by [their fathers] at the time [they were] member[s] of the United States Army."

The rote application of the incident-to-service approach to claims brought by members of a serviceman's family, however, is improper in light of the Supreme Court's analysis of Feres in Stencel Aero Engineering Corp. v. United States. The Stencel Court held that a government contractor could not seek indemnity from the United States for damages it may have been required to pay to a serviceman


62. Monaco v. United States, No. C-79-0860-SW, slip op. at 4 (N.D. Cal. Nov. 2, 1979), aff'd, 661 F.2d 129 (9th Cir. 1981), cert. denied, 50 U.S.L.W. 3934 (U.S. May 24, 1982). For the same reason, the court in Agent Orange, relying on Monaco, denied a cause of action under the FTCA to children of servicemen who incurred genetic injury and birth defects allegedly as a result of their parents' negligent exposure to Agent Orange. In re "Agent Orange" Prod. Liab. Litig., 506 F. Supp. 762, 781 (E.D.N.Y. 1980). The court in Agent Orange further justified applying the genesis of injury test on the grounds that it would avoid subjecting the government to unlimited liability. Id. at 781. The court argued that to permit children to sue under the FTCA for genetic injuries caused by the serviceman's exposure to radiation "might open the door for governmental liability to countless generations of claimants." Id; accord Lombard v. United States, 530 F. Supp. 918, 921 (D.D.C. 1981). A similar argument was raised during the congressional debates concerning the merits of the FTCA. Some congressmen expressed concern that the waiver of governmental immunity from suits in tort would lead to an inordinate increase in the number of claims against the United States at great cost to the government. 86 Cong. Rec. 12,025 (1940) (statements of Rep. Taber and Rep. Cochran). But this argument was summarily rejected. "Objection has been made . . . on the score of predicted expense [to the government] . . . . Nobody should object on the score of expense even if it came. Fiat justitia, ruat coelum—let justice be done though the heavens fall. It is an ancient and honorable maxim. Remember the pledge of King John at Runnymede: 'To no man will we deny right or justice.' Least of all should Congress, the voice of the Nation, be silent when justice is at stake." Id. at 12,026 (statement of Rep. Luce).


64. 431 U.S. 666 (1977).
for injuries incurred by the serviceman while on active duty.\textsuperscript{65} Although the serviceman’s claim against the United States had been barred by the lower court as incident to service,\textsuperscript{66} the Supreme Court did not utilize an incident-to-service test in analyzing the corporation’s indemnity claim.\textsuperscript{67} Rather, the Court stated that “[i]t is necessary . . . to examine the rationale of Feres to determine to what extent, if any, allowance of [the] claim would circumvent the purposes of the Act as . . . construed by the [Feres] Court.”\textsuperscript{68} In determining that the third-party indemnity claim was barred by Feres, the Stencel Court considered the availability of veterans’ benefits,\textsuperscript{69} the distinctively federal relationship between the claimant and the military,\textsuperscript{70} and the anticipated effect of tort suits on military discipline.\textsuperscript{71}

\textsuperscript{65} Id. at 673-74. The serviceman suffered permanent injuries when the ejection system of his fighter aircraft malfunctioned during a midair emergency. \textit{Id.} at 667. He brought suit against the United States and Stencel Aero Engineering Corp., the manufacturer of the ejection system. \textit{Id.} at 668. Because Stencel manufactured the system pursuant to the government’s specifications and used components provided by the government, Stencel cross-claimed against the United States for indemnity. \textit{Id.} at 667-68. Both the serviceman’s claim and Stencel’s cross-claim against the United States were dismissed on summary judgment. Donham v. United States, 395 F. Supp. 52, 53 (E.D. Mo. 1975), \textit{aff’d}, 536 F.2d 765 (8th Cir. 1976), \textit{aff’d sub nom.} Stencel Aero Eng’g Corp. v. United States, 431 U.S. 666 (1977). The only issue before the Court was whether Stencel had the right to seek indemnity. 431 U.S. at 669.


\textsuperscript{69} 431 U.S. at 673. The Court noted that the Veterans’ Benefits Act “provides an upper limit of liability for the Government as to service-connected injuries.” \textit{Id.} Because the injured serviceman had already received veterans’ benefits for his injuries, the Court stated that “[t]o permit [the corporation’s] claim [for indemnity] would circumvent this limitation.” \textit{Id.}

\textsuperscript{70} \textit{Id.} at 672. Concluding that “[t]he relationship between the Government and its suppliers of ordnance is certainly no less ‘distinctively federal in character’ than the relationship between the Government and its soldiers,” the Court reasoned that because “it makes no sense to permit the fortuity of the situs of the alleged negligence
It is this analysis of the *Feres* factors, not the incident-to-service approach, that should determine whether a cause of action exists under the FTCA for injuries to non-military personnel. The mechanical application of the incident-to-service rule to suits by dependents of servicemen may well lead to a result different from that which would be reached by analyzing the *Feres* factors. Moreover, the genesis-incident-to-service test, by oversimplifying *Feres* and ig-

to affect the liability of the Government to a serviceman who sustains service-connected injuries, ... it makes equally little sense to permit that situs to affect the Government's liability to a Government contractor for the identical injury." *Id.* (citation omitted).

71. *Id.* at 673. The Court observed that "where the case concerns an injury sustained by a soldier while on duty," the trial would necessarily "involve second-guessing military orders, and would often require members of the Armed Services to testify in court as to each other's decisions and actions." *Id.* These adverse effects of judicial scrutiny on military discipline, the Court noted, "weigh[ed] against permitting any recovery." *Id.*

72. Hinkie v. United States, 524 F. Supp. 277, 282 (E.D. Pa. 1981); see Miller v. United States, 643 F.2d 481, 493-95 (8th Cir. 1980); Daberkow v. United States, 581 F.2d 785, 787-88 (9th Cir. 1978); Lombard v. United States, 530 F. Supp. 918, 921-22 (D.D.C. 1981); Crumpeler v. United States, 495 F. Supp. 266, 269-70 (S.D.N.Y. 1980); Jessup v. United States, No. Civ. 79-271-TUC-RMB, slip op. at 2 (D. Ariz. Apr. 2, 1980); Harrison v. United States, 479 F. Supp. 529, 534 (D. Conn. 1979), aff'd mem., 622 F.2d 573 (2d Cir.), cert. denied, 449 U.S. 828 (1980). The Agent Orange court, however, refused to weigh and consider the *Feres* factors. In re "Agent Orange" Prod. Liab. Litig., 506 F. Supp. 762, 774 (E.D.N.Y. 1980). Focusing on the servicemen's claims for their own service-connected injuries, the court deemed it unnecessary "to reargue the underlying rationale of *Feres*" because "neither the Court nor Congress itself has altered *Feres*' basic holding." *Id.* at 773. Although this reasoning is persuasive when the claim is brought by the serviceman himself or by the serviceman's dependents for wrongful death, it is wholly inapposite when the claim is brought by family members of servicemen for their own physical injuries because such an extension of the *Feres* doctrine to third parties involves no questioning of *Feres*' basic holding with respect to servicemen. In Parker v. United States, 611 F.2d 1007 (5th Cir. 1980), a wrongful death action brought by the serviceman's wife, the Fifth Circuit did examine the *Feres* factors, but ruled that although they justified the *Feres* doctrine, they were not helpful in ascertaining when an injury was incurred incident to service. *Id.* at 1011-13. Thus, *Parker* actually relied on the incident-to-service holding of *Feres*, not its underlying rationale, *id.* at 1013-15, in contrast with the analysis in *Stencel*. In this particular case, focusing on incident-to-service is not necessarily improper, however, because being a wrongful death action like *Feres*, *Parker* involved no extension of the *Feres* case. See supra note 41.

noring the factor analysis utilized in *Stencel*, loses sight of the policies underlying the *Feres* decision.\textsuperscript{74}

II. The *Feres* Factors

Conflicting public policies underlie the issue of whether, and under what circumstances, members of a serviceman's family have the right to bring an action in tort against the United States.\textsuperscript{75} Congress waived sovereign immunity in tort for negligence in order to promote justice by providing an adequate remedy to those injured by employees or agents of the government.\textsuperscript{76} Yet, certain tort actions against the United States may impair the ability of the military to maintain national security.\textsuperscript{77} Despite much confusion as to their meaning and relevance,\textsuperscript{78} the factors that underlie the *Feres* doctrine and that were reaffirmed in *Stencel* provide a framework for balancing these conflicting social policies.

A. The Veterans' Benefits Act

The Veterans' Benefits Act (VBA)\textsuperscript{79} provides compensation to any veteran injured in the line of duty\textsuperscript{80} and pays death benefits to the

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\textsuperscript{75} See Restatement (Second) of Torts ch. 45A special note (1979); Pound, *supra* note 2, at 416.
\textsuperscript{76} See Rayonier Inc. v. United States, 352 U.S. 315, 320 (1957); Feres v. United States, 340 U.S. 135, 139-40 (1950); Parker v. United States, 611 F.2d 1007, 1009 (5th Cir. 1980); Jaffee v. United States, 592 F.2d 712, 716 (3d Cir.), *cert. denied*, 441 U.S. 961 (1979); *In re "Agent Orange"* Prod. Liab. Litig., 506 F. Supp. 782, 769 (E.D.N.Y. 1980); H.R. Rep. No. 1287, 79th Cong., 1st Sess. 2 (1946). It is clear from the legislative history that a leading aim of the FTCA was to relieve persons injured by government negligence of an inequitable burden. 86 Cong. Rec. 12,015-32 (1940) (floor debate). "Many unfortunate men have been deprived of the opportunity or the right to obtain redress from the Government. This is manifestly unfair and unjust and under [the FTCA] such injustices will be done away with and justice will be forthcoming to men who, through no fault of their own, have suffered injury or have a justifiable claim against the Government." *Id.* at 12,016 (statement of Rep. Sabath). "The Attorney General . . . urged the passage of [the FTCA] because of the fact that the present system is so inequitable and results in such unfair consequences." *Id.* at 12,026 (statement of Rep. McLaughlin).
\textsuperscript{78} Monaco v. United States, 661 F.2d 129, 131-32 (9th Cir. 1981), *cert. denied*, 50 U.S.L.W. 3934 (U.S. May 24, 1982); Mills v. Tucker, 499 F.2d 866, 867 (9th Cir. 1974) (per curiam); Henninger v. United States, 473 F.2d 814, 815-16 & n.2 (9th Cir.), *cert. denied*, 414 U.S. 819 (1973); see *Hunt v. United States*, 636 F.2d 580, 584-88 (D.C. Cir. 1980); 1 L. Jayson, *supra* note 4, § 155.05.
\textsuperscript{80} Id. § 331.
surviving spouse or children of any veteran who dies as the result of injury incurred in the line of duty. The effect of veterans’ benefits on tort recovery under the FTCA is unclear. Congress was silent on the issue, and the Supreme Court has been woefully inconsistent in defining the nature of the relationship between the VBA and the FTCA. In Brooks v. United States, the Court refused to characterize the VBA as an exclusive remedy, but rather indicated that recovery under the FTCA should be reduced by the amounts that the United States paid under the VBA. One year later, however, the Feres Court retreated from the Brooks position, reasoning that because Congress did not provide a way to adjust veterans’ benefits with FTCA recoveries, the FTCA must not have been intended to cover service-related injuries. Despite the Feres decision, the Court, in United States v. Brown, was quick to reaffirm the position enunciated in Brooks. Although Brown led to a de-emphasis of the significance of the VBA factor as a justification of the Feres rule, the Supreme Court in Stencel revived and extended the reasoning of Feres. The Stencel Court noted that one of the essential features of the VBA was to provide “an upper limit of liability for the Government as to service-connected injuries.” To allow additional recovery under the FTCA would be to remove the “‘protective mantle of the VBA’s limitation-of-liability provisions.’”

Some courts, broadly interpreting Stencel, have held that the VBA is the exclusive remedy regardless of who brings the action and

81. Id. § 341.
83. 337 U.S. 49 (1949).
84. Id. at 53.
85. Id. at 53-54.
87. Id.
89. Id. at 113; accord Mosley v. United States, 405 F. Supp. 357, 360 (E.D.N.C. 1974). Reaffirming its decision in Brown, the Supreme Court, in United States v. Muniz, 374 U.S. 150 (1963), stated that “the presence of a compensation system, persuasive in Feres, does not of necessity preclude a suit for negligence.” Id. at 160.
90. Coffey v. United States, 324 F. Supp. 1087, 1088 (S.D. Cal. 1971), aff’d per curiam, 455 F.2d 1380 (9th Cir. 1972); 1 L. Jayson, supra note 4, § 155.05, at 5-89 to -90.
whether the injured person is eligible for veterans' benefits. Such an interpretation of *Stencel*, however, is unwarranted. In *Stencel*, the corporation's cross-claim was against the United States for indemnification; the only injury involved was that of the serviceman. Because the injured serviceman had already received substantial veterans' benefits for his injuries, to allow the corporation's indemnity action under the FTCA would have required the government to pay twice for the one injury. Unlike an injury to a serviceman, however, a physical injury to a serviceman's family member is not covered by the VBA. Thus, to permit such actions would not subject the United States to double liability, and therefore would not contravene the VBA's purpose of limiting the government's liability.

Moreover, the view that the VBA is the exclusive remedy imputes a characteristic to the VBA that Congress may never have intended. Because Congress did not speak to the issue, the VBA's exclusivity is at best questionable. Significantly, the *Feres* Court, admitting that


94. *See supra* note 65.

95. 431 U.S. at 672-74. As the Court noted, "the right of a third party to recover in an indemnity action against the United States . . . must be held limited by the rationale of *Feres* where the injured party is a serviceman." *Id.* at 674 (emphasis added). Stencel claimed that it was merely passively negligent and that because "the malfunctioning system had been in the exclusive custody and control of the United States since the time of its manufacture," it was the government's active negligence that caused the injury to the serviceman. *Id.* at 668. Therefore, Stencel sought indemnity for damages it might have to pay to the serviceman from the United States, the party more responsible for the serviceman's injuries. *Id.*

96. *Id.* at 667-68. The serviceman was awarded a lifetime pension of approximately $1,500 per month. *Id.*

97. *See Monaco v. United States*, 661 F.2d 129, 134 (9th Cir. 1981), *cert. denied*, 50 U.S.L.W. 3934 (U.S. May 24, 1982); *Hinkie v. United States*, 524 F. Supp. 277, 283 (E.D. Pa. 1981); *Jessup v. United States*, No. Civ. 79-271-TUC-RMB, slip op. at 2-3 (D. Ariz. Apr. 2, 1980). Dependents of servicemen are entitled only to death benefits under the VBA. *See supra* note 81 and accompanying text. They may, however, seek compensation for their personal injuries by petitioning Congress to enact private bills of relief. In *Monaco*, the court, although holding that "the doctrine of sovereign immunity prevents [the serviceman's daughter] from recovering for her injury in the federal courts," encouraged her "to pursue any legislative remedies available to her." 661 F.2d at 134 n.3. The court admitted, however, that her chance of obtaining reparations was "unclear, but not without hope." *Id.* In *Peluso v. United States*, 474 F.2d 605 (3d Cir.) (per curiam), *cert. denied*, 414 U.S. 879 (1973), the court, admitting that "the facts pleaded here, if true, cry out for a remedy," noted that "[p]ossibly the only route to relief is by an application to Congress." *Id.* at 606. For a complete discussion of the cumbersome procedure involved in obtaining a private bill of relief, see 1 L. Jayson, *supra* note 4, § 21.02.

98. *See supra* note 82 and accompanying text.
there was as much statutory authority for nonexclusivity as for exclusivity, implicitly limited its finding in favor of the latter to injuries "incident to service" that are compensable under the VBA.99 In addition, it has been argued that Congress could not have intended to make the VBA the exclusive remedy because at the time of the enactment of the FTCA, compensation under the VBA was neither sufficiently certain nor adequate in amount to justify denying servicemen the option of tort recovery.100 Furthermore, such a view contradicts valid Supreme Court precedent. Both Brooks and Brown expressly refused to make the VBA the exclusive remedy.101

Courts should heed the Supreme Court's restraint in Brooks and refuse to treat the VBA as exclusive "when Congress has not done so."102 The better view considers the fairness of denying a particular plaintiff's claim in light of the availability of veterans' benefits and other factors.103 In Stencel, the injured serviceman received substanc-

99. Feres v. United States, 340 U.S. 140, 144 (1950). Discussing the relationship between the FTCA and the VBA, the Feres Court noted four possibilities available to the claimant, each of which assumes the potential for VBA compensation. He could "(a) enjoy both types of recovery, or (b) elect which to pursue, thereby waiving the other, or (c) pursue both, crediting the larger liability with the proceeds of the smaller, or (d) that the compensation and pension remedy excludes the tort remedy." Id. Recognizing that "[t]here is as much statutory authority for one as for another of these conclusions," id., the Court reasoned that the failure of Congress to provide "any provision to adjust these two types of remedy to each other" implied that it had not "contemplated that this Tort Act would be held to apply in cases of this kind." Id. (emphasis added). In the cases before the Court in Feres, the claimants had received veterans' benefits for their service-related injuries. Id. at 144-45. In his Stencel dissent, Justice Marshall argued that congressional silence supports an inference of nonexclusivity at least as well as that of exclusivity. Stencel Aero Eng'g Corp. v. United States, 431 U.S. 666, 675-76 (1977) (Marshall, J., dissenting). Justice Marshall noted that the Federal Employees' Compensation Act (FECA), ch. 458, 39 Stat. 742 (1916) (codified in part as amended in scattered sections of 5 U.S.C.), the comparable compensation system for civilian employees of the federal government, was expressly made exclusive by Congress, 5 U.S.C. § 8116(c) (1976). 431 U.S. at 675. Despite this exclusivity provision, the Court has held that the FECA does not affect the rights of third parties. Weyerhaeuser S.S. Co. v. United States, 372 U.S. 597, 601 (1963). Justice Marshall criticized the majority's decision in Stencel for its failure to explain "why the absence of an exclusivity provision in the Veterans' Benefits Act forecloses suits by third parties in cases involving injuries to military personnel when the existence of such a clause does not bar similar actions when the injured employee works for one of the Government's civilian agencies." 431 U.S. at 676 (Marshall, J., dissenting).

100. From Feres to Stencel, supra note 68, at 1105-08.
101. See supra notes 83-85, 88-89 and accompanying text.
tial veterans' benefits for his injuries.\textsuperscript{104} Although the corporation was not entitled to benefits under the VBA,\textsuperscript{105} the Court noted that the relationship between the corporation and the United States was based on a commercial contract.\textsuperscript{106} Therefore, because Stencel was afforded the opportunity to negotiate an indemnity provision that would have adequately protected it against liability to military personnel,\textsuperscript{107} there was "no basis for a claim of unfairness."\textsuperscript{108}

That denying the tort actions would not result in harsh consequences to the claimants also weighed heavily in the Court's decision in \textit{Feres}.\textsuperscript{109} "The primary purpose of the [FTCA]," the \textit{Feres} Court explained, "was to extend a remedy to those who had been without."\textsuperscript{110} Mindful of this purpose, the Court reasoned that because the wives of the deceased servicemen were entitled to and had received veterans' benefits,\textsuperscript{111} it would not be unfair to bar their tort recovery.\textsuperscript{112}

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\item[104.] See supra note 96.
\item[105.] Stencel Aero Eng'g Corp. v. United States, 431 U.S. 666, 672 (1977).
\item[106.] Id. at 674. Because Stencel contracted with North American Rockwell, the prime government contractor, to provide the aircraft ejection system, there was no direct contractual relationship between the United States and Stencel. \textit{Id.} at 667 n.2.
\item[107.] \textit{Id.} at 674 n.8.
\item[108.] \textit{Id.} at 674 (footnote omitted). But see \textit{In re Ionian Glow Marine, Inc.}, 510 F. Supp. 196 (E.D. Va. 1981), in which the court noted that the existence of a contractual relationship, present in \textit{Stencel}, was not necessary to bar a third-party indemnity suit under the \textit{Feres} rule. \textit{Id.} at 200.
\item[110.] \textit{Id.} at 140.
\item[111.] \textit{Id.} at 145. The VBA provides that "[t]he surviving spouse, child or children . . . of any veteran who died . . . as the result of injury or disease incurred in or aggravated by active military, naval, or air service, in line of duty . . . shall be entitled to receive compensation." 38 U.S.C. § 341 (1976).
\item[112.] See 340 U.S. at 145. The Court noted that "[t]he compensation system . . . is not negligible or niggardly, as these cases demonstrate." \textit{Id.} It further opined that the claimants were in fact better off under the VBA because no litigation is required. \textit{Id.} Other courts that have denied wrongful death actions have recognized that because the VBA provides death benefits to wives and children of servicemen, denial of their claims under the FTCA would not leave them uncompensated. In \textit{Daberkow v. United States}, 581 F.2d 785 (9th Cir. 1978), the wife and son, both United States citizens, of a West German military officer who was killed in the United States during a joint military activity brought suit against the government for wrongful death. \textit{Id.} at 786. The court noted that the West German government had been compensating the claimants. \textit{Id.} at 788. Holding that the claim was barred by the \textit{Feres} rule, \textit{id.}, the court reasoned: "While the substitute compensation involved here does not come from the United States, that fact does not alter our conclusion, because the presence of this compensation satisfies the purpose of this factor, ensuring compensation for the injured person whatever its source." \textit{Id.} Similarly, the court in \textit{Shaw v. United States}, 448 F.2d 1240 (4th Cir. 1971) (per curiam), denied an action for the wrongful death of a serviceman who died in an accidental fire while confined to a stockade as a military prisoner because, in part, his confinement "did not affect his family's entitlement to death benefits." \textit{Id.} at 1241-42; \textit{accord} Miller v. United States, 643 F.2d 481, 494 (8th Cir. 1981) (rehearing en banc).
Conversely, to bar a claimant who is not entitled to administrative compensation from suing under the FTCA leaves the claimant remediless.\textsuperscript{113} This result would frustrate the very purpose of the FTCA—to ensure compensation to those injured by agents or employees of the United States.\textsuperscript{114} Accordingly, courts confronted with non-military claims are more willing to grant a cause of action to those claimants who are without other remedies.\textsuperscript{115} Under the terms of the VBA, family members of servicemen are not entitled to any reparation for their own personal injuries as a result of the government's negligent conduct with respect to the serviceman.\textsuperscript{116} As one court noted, even if the injured serviceman satisfies a particular requirement of the VBA that would permit him and his dependents to receive additional compensation for his injuries,\textsuperscript{117} they still “would be receiving nothing for their own [personal] injuries.”\textsuperscript{118} Thus, in determining whether an action under the FTCA exists for dependents of servicemen, courts should give great weight to the fact that the FTCA represents their only opportunity to obtain relief for the wrongs committed by the government.\textsuperscript{119}

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\textsuperscript{113} See supra note 97 and accompanying text.
\textsuperscript{115} Compare United States v. Demko, 385 U.S. 149, 153 (1966) (prisoner who had received an award for compensation under the prisoner's compensation act, 18 U.S.C. § 4126 (1976), denied action under the FTCA), with United States v. Muniz, 374 U.S. 150, 160 (1963) (prisoners who were not entitled to administrative relief permitted to seek relief under the FTCA). Reconciling the different results in these two cases, the Demko Court noted that the prisoners in Muniz “were not protected by the prison compensation law.” 385 U.S. at 153. In Milliken v. United States, 439 F. Supp. 290 (D. Kan. 1976), the court, in granting a serviceman's action to recover for alleged beatings while confined by the military, noted that there was no statute under which the serviceman could obtain compensation for his injuries. Id. at 295.
\textsuperscript{116} See supra note 97 and accompanying text.
\textsuperscript{117} The VBA provides for additional monthly compensation for dependents if the veteran is entitled to veterans' benefits and his disability is rated not less than 50%. 38 U.S.C. § 335 (1976).
\textsuperscript{119} See id.; Jessup v. United States, No. Civ. 79-271-TUC-RMB, slip op. at 3 (D. Ariz. Apr. 2, 1980). In Lombard v. United States, 530 F. Supp. 918 (D.D.C. 1981), the court recognized that the unavailability of veterans' benefits "supports the plaintiffs' position." Id. at 922. Yet the court was quick to point out that this factor "cuts both ways" because permitting such actions would also frustrate "the government's interest in limiting liability." Id. The VBA limits the government's liability, however, only to the extent that a claim is covered by both the VBA and the FTCA. See supra notes 93-101 and accompanying text. Moreover, it is clear from the legislative history that Congress was willing to incur great expense to remedy wrongs committed by the government. See supra note 62.
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B. Uniformity and the Distinctively Federal Relationship

Under the FTCA, liability depends upon "the law of the place where the act or omission occurred." The Feres Court expressed concern about the effects of applying nonuniform state laws to determine the government's tort liability. Considering the issue from the perspective of the serviceman, the Court reasoned that it would be unfair to make the success of a claim dependent upon the claimant's geographic location, a matter over which a serviceman may well have little control. In cases subsequent to Feres, however, the Court apparently abandoned this fairness rationale. In a similar context, the Court pointed out that denial of recovery on this basis would prejudice claimants even more than the application of varying state laws. Indeed, the Stencel Court, in its discussion of the need for uniformity, was silent on the issue of the unfairness of subjecting claimants to nonuniform state laws. In any event, local tort law already applies to military dependents in suits for damages for phys-

120. 28 U.S.C. § 1346(b) (1976). The FTCA approach to the choice-of-law question is a codification of the traditional doctrine of lex loci diletci, which looks to the law of the place of wrong. See Restatement of Conflict of Laws § 378 (1934); R. Weintraub, Commentary on the Conflict of Laws 266 (2d ed. 1980). This approach, which has been found to be inadequate and problematical, see id. at 266-67, has been rejected by the majority of courts in favor of the modern interest-analysis approach to choice of law. Id. at 308. Interest analysis considers the policies underlying potentially conflicting tort laws in order to determine the interest of each forum in applying its own law. Id. at 301.

121. Feres v. United States, 340 U.S. 135, 142-43 (1950). The Feres Court noted that, unlike a private citizen, "a soldier on active duty has no . . . choice [where he resides] and must serve any place or . . . any number of places in quick succession." Id. at 143. Consequently, the Court reasoned that "[i]t would hardly be a rational plan of providing for those disabled in service by others in service to leave them dependent upon geographic considerations over which they have no control and to laws which fluctuate in existence and value." Id. Adopting this rationale, one court denied a cause of action to the wife of a serviceman for loss of consortium arising from her husband's service-connected injuries. Harrison v. United States, 479 F. Supp. 529, 531 (D. Conn. 1979), aff'd mem., 622 F.2d 573 (2d Cir.), cert. denied, 449 U.S. 828 (1980). The court argued that because the serviceman's wife, like the serviceman himself, has no choice where her husband serves, it makes no sense to have her right to recovery depend upon his geographic military assignment. Id. at 534-35.

122. In Muniz v. United States, 374 U.S. 150 (1963), two prisoners brought suit against the United States under the FTCA seeking damages for personal injuries incurred while they were confined in federal prisons. Id. at 150-51. The Court noted that "the prisoners' opportunities to recover may be affected by differences in state law over which they have no control, a position shared by service personnel whose location is determined by government order rather than personal volition." Id. at 161.

123. Id. at 162.

124. Stencel Aero Eng'g Corp. v. United States, 431 U.S. 666, 672 (1977); see From Feres to Stencel, supra note 68, at 1119-20.
cal injuries, incurred independently of any injury to servicemen, even when these actions depend upon the fortuitous placement of the serviceman.125

The Feres Court considered the absence of nationwide uniformity to be undesirable not only for the serviceman, but for the military as well. Because the relationship between the government and members of its armed forces is "'distinctively federal in character,' "120 the Court indicated that the law that governs that relationship should be "'derived from federal sources.' "127 Similarly, the Stencel Court expressed the fear that the vital function of the military in protecting national security would be hindered by making state law, as opposed to federal law, govern the liability of the military.128 Because the "Armed Services perform a unique, nationwide function in protecting the security of the United States" and to that end "frequently move large numbers of men, and large quantities of equipment, from one end of the continent to the other," the Court indicated that it would be undesirable for the United States to "permit the fortuity of the situs of the alleged negligence to affect the liability of the Government."129

The crux of the Feres-Stencel analysis of the uniformity factor is whether the relationship between the plaintiff and the government is

125. Typically, these cases arise when dependents of servicemen are admitted to military hospitals because of their relation to military personnel and while there suffer physical injuries as a result of medical malpractice. E.g., Bridgford v. United States, 550 F.2d 978, 979-80 (4th Cir. 1977); Buck v. United States, 433 F. Supp. 896, 898 (M.D. Fla. 1977); Steeves v. United States, 294 F. Supp. 446, 448 (D.S.C. 1968); Larrabee v. United States, 254 F. Supp. 613, 614 (S.D. Cal. 1966).


129. Id. In his dissenting opinion, Justice Marshall criticized the majority's reasoning, noting that other government agencies that also perform "a unique, nationwide function" and have "personnel and equipment in all parts of the country" are nevertheless subject to liability under the FTCA. Id. at 675 (Marshall, J., dissenting). For further criticism of the majority's analysis, see Expansion of Feres, supra note 127, at 1225-26.

"distinctively federal" in nature. Should such a relationship exist, then subjecting the military to varying standards of care and liability would arguably impair its function. Where no such federal relationship exists, however, the government, including the military, has been routinely subject to diverse state laws. Unlike its relationship with a soldier or, as in Stencel, a military supplier, the government’s relationship with a serviceman’s family member is not distinctively federal, nor does it become so when the family member has a claim against the government, even if it is derived from the alleged negligence of the United States toward an active duty serviceman. Indeed, the family member is a civilian. Just as there is no compelling reason to apply uniform federal law to the civilian injured by military activities so, too, such a reason does not exist where the suit is brought by an injured family member.

C. Military Discipline

Justifying the Feres decision on the theory that tort suits brought by servicemen may adversely affect military order and discipline, the Supreme Court, in United States v. Brown, noted that:

The 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 such suits under the Tort

Claims Act were allowed for orders negligently given or negligent acts committed in the course of military duty, led the *Feres* Court to read that Act as excluding claims of that character.138

The extent to which the claimant is subject to military authority at the time of the negligent act is a key factor in determining the effect of a suit on the maintenance of military discipline.139 The more attenuated the connection, the less offensive are tort suits to military discipline. A severe threat to military discipline would be posed if an active duty serviceman had the right to bring suit in tort for injuries incurred while carrying out specific orders.140 Some courts have held that even if the serviceman is not performing duties when injured but is merely subject to military discipline, serious adverse consequences to military discipline would still result should he be granted the right to sue in

138. *Id.* Some courts have suggested that the military discipline rationale articulated in *Brown* best explains the *Feres* rule. United States v. Muniz, 374 U.S. 150, 162 (1963) (dictum); Jaffee v. United States, 663 F.2d 1226, 1232 (3d Cir. 1981) (en banc), *cert. denied*, 50 U.S.L.W. 3916 (U.S. May 17, 1982); Hunt v. United States, 636 F.2d 580, 599 (D.C. Cir. 1980); see Jacoby, *The Feres Doctrine*, 24 Hastings L.J. 1281, 1286-87 (1973). Other courts, however, have held that a finding of adverse effects on military discipline is not necessary for an injury to be incident to service. *See* Veillette v. United States, 615 F.2d 505, 507 (9th Cir. 1980); Watkins v. United States, 462 F. Supp. 980, 985 (S.D. Ga. 1977), *aff'd per curiam*, 587 F.2d 279 (5th Cir. 1979). That courts have taken an increasingly active role in reviewing military decisions has led some commentators to question the continued significance of the military discipline rationale. *From Feres to Stencel, supra* note 68, at 1100-18; *see* Rhodes, *supra* note 54, at 42.


140. Rhodes, *supra* note 54, at 42. A special hierarchical relationship exists between a soldier and his superiors that demands the soldier's strict obedience to the commands of his superiors. *See* Sherman, *Legal Inadequacies and Doctrinal Restraints in Controlling the Military*, 49 Ind. L.J. 539, 561 (1974); Westmoreland, *Military Justice—A Commander's Viewpoint*, 10 Am. Crim. L. Rev. 5, 5 (1971). As the Supreme Court noted in *In re Grimley*, 137 U.S. 147 (1890), "[a]n army is not a deliberative body. It is the executive arm. Its law is that of obedience. No question can be left open as to the right to command in the officer, or the duty of obedience in the soldier. Vigor and efficiency on the part of the officer and confidence among the soldiers in one another are impaired if any question be left open as to their attitude to each other." *Id.* at 153. To permit a cause of action for negligent orders given or negligent acts committed by a soldier's superiors would undermine this relationship. Jaffee v. United States, 663 F.2d 1226, 1232 (3d Cir. 1981) (en banc), *cert. denied*, 50 U.S.L.W. 3916 (U.S. May 17, 1982); *see* Jefferson v. United States, 178 F.2d 518, 520 (4th Cir. 1949), *aff'd sub nom.* Feres v. United States, 340 U.S. 135 (1950); Coffey v. United States, 324 F. Supp. 1087, 1088 (S.D. Cal. 1971), *aff'd per curiam*, 455 F.2d 1380 (9th Cir. 1972); Rhodes, *supra* note 54, at 42. It might lead soldiers to lose confidence in the judgment of their superiors or question the wisdom of their orders. *See id.*
tort.\textsuperscript{141} Other courts disagree, observing that such tort suits would interfere with military discipline only minimally, if at all, because in such cases there is no direct connection between discipline and the cause of the injury.\textsuperscript{142} If the lawsuit is brought by a serviceman or veteran not subject to military discipline, courts are even less concerned about the effect of the suit on the maintenance of military

\textsuperscript{141} In Coffey v. United States, 324 F. Supp. 1087 (S.D. Cal. 1971), \textit{aff'd per curiam}, 455 F.2d 1380 (9th Cir. 1972), the court denied a wrongful death action on behalf of a serviceman who, on his way to off-post liberty, was killed while riding in an automobile struck by a switch engine within the confines of the military base. \textit{Id.} at 1087-88. The court relied on the \textit{Feres} decision. Because "[t]he accidents which gave rise to [the] \textit{Feres} . . . cases were neither directly nor clearly related to discipline," the court reasoned that "\textit{Feres} cannot be explained on the ground of specific disciplinary problems . . . . \textit{Feres} can only be explained on the ground that the enforcement of army discipline in general is more difficult if persons involved in enforcing discipline may be treated as the causative agents of suits against the United States brought by persons who are the subjects of army discipline." \textit{Id.} at 1088 (emphasis added); \textit{accord} Miller v. United States, 643 F.2d 481, 493-94 (8th Cir. 1980) (rehearing en banc); Glorioso v. United States, 331 F. Supp. 1, 3 (N.D. Miss. 1971) (mem.) (citing Coffey with approval). Most courts, however, do not rationalize the \textit{Feres} decision in terms of military discipline, but simply hold that an action for injuries suffered by an active duty serviceman, even if it would have no disruptive effects on military discipline or morale, is incident to service and therefore barred by the \textit{Feres} rule. \textit{E.g.}, Torres v. United States, 621 F.2d 30, 32 (1st Cir. 1980); Veillette v. United States, 615 F.2d 505, 507 (9th Cir. 1980); Lowe v. United States, 440 F.2d 452, 452-53 (5th Cir.) (per curiam), \textit{cert. denied}, 404 U.S. 833 (1971); Gursley v. United States, 232 F. Supp. 614, 615-17 (D. Colo. 1964).

\textsuperscript{142} The first case to require a nexus between the injury and military discipline was Downes v. United States, 249 F. Supp. 626 (E.D.N.C. 1965). The court held that a soldier, who had obtained a pass authorizing him to leave the military base on personal business, could maintain suit against the United States under the FTCA for injuries sustained as a result of an automobile accident that occurred as he was leaving the base. \textit{Id.} at 628-29. Finding that the soldier was not "performing duties of such a character as to undermine traditional concepts of military discipline if he were permitted to maintain a civil suit for injuries resulting therefrom," the court reasoned that the injury was not service-related. \textit{Id.; accord} Miller v. United States, 643 F.2d 481, 498 (8th Cir. 1980) (rehearing en banc) (Heaney, J., dissenting); Parker v. United States, 611 F.2d 1007, 1013 (5th Cir. 1980); Rhodes, supra note 54, at 42. The Sixth Circuit, in Hale v. United States, 416 F.2d 355 (6th Cir. 1969), distinguished between injuries arising incident to service and those occurring in the line of duty, noting that the latter is a narrower standard. \textit{Id.} at 358. By holding that \textit{Feres} bars only injuries that arise out of or in the course of military duty, \textit{id.} at 358-60, the \textit{Hale} court has arguably adopted the \textit{Downes} test. Coffey v. United States, 324 F. Supp. 1087, 1088 n.1 (S.D. Cal. 1971), \textit{aff'd per curiam}, 455 F.2d 1380 (9th Cir. 1973). The \textit{Downes} test, however, has been subject to much criticism. Henniger v. United States, 473 F.2d 814, 815-16 & n.3 (9th Cir.) (exceedingly complex), \textit{cert. denied}, 414 U.S. 819 (1973); Hall v. United States, 451 F.2d 353, 354 (1st Cir. 1971) (per curiam) (leads to "invocation of Pandora's Box"); Coffey v. United States, 324 F. Supp. 1087, 1088 (S.D. Cal. 1971) (inconsistent with \textit{Feres}), \textit{aff'd per curiam}, 455 F.2d 1380 (9th Cir. 1972).
Finally, when civilians sue under the FTCA for direct injuries sustained as a result of the negligence of the military, courts routinely grant their claims without even discussing the effects of such suits on military discipline.

Courts should similarly recognize that when members of a service-man's family bring suit, the effect, if any, on military discipline is insignificant. The spouse and children of a soldier are civilians; they are neither parties to the special relationship that exists between the soldier and his superiors nor are they subject to military orders. For them to assert in a public forum that military officers were negligent is less offensive to the military's system of discipline than it would be for those subject to that system to make the same charge.

In Stencel, the Supreme Court suggested that the court proceeding itself, regardless of the claimant's military status, is another factor that may affect military discipline. The Court particularly feared the consequences of second-guessing military orders and taking the testimony of members of the military as to each other's decisions and actions, both of which would likely be involved in a trial. One court, relying on this reasoning, rejected the plaintiff's argument that because she, being only a daughter of a soldier, was never a member of the armed forces, her claim for direct injuries incurred as a result of

143. United States v. Brown, 348 U.S. 110, 112 (1954) (veteran); see Brooks v. United States, 337 U.S. 49, 52 (1949) (servicemen on furlough); Mills v. Tucker, 499 F.2d 866, 867 (9th Cir. 1974) (per curiam) (same); Hand v. United States, 260 F. Supp. 38, 40-41 (M.D. Ga. 1966) (serviceman on pass). The Monaco court noted that "any claimant whose injury was not the result of negligence occurring while on active duty should be allowed to recover .... [because] [c]harges of negligent acts taken when the claimant was not in the service cannot implicate any command decision involving the claimant." Monaco v. United States, 661 F.2d 129, 132 (9th Cir. 1981) (dictum), cert. denied, 50 U.S.L.W. 3934 (U.S. May 24, 1982).

144. See supra note 22 and accompanying text.

145. See supra note 135 and accompanying text.

146. Grigalauskas v. United States, 103 F. Supp. 543, 549 (D. Mass. 1951), aff'd, 195 F.2d 494 (1st Cir. 1952). "The relationship between the Government and a serviceman's dependents is not 'distinctively federal in character' .... They are not subject to the orders of superior officers .... they are not 'serving the Government,' they are not 'on duty' .... It does not follow that, because these dependents enjoy privileges by reason of their relation to the serviceman, their rights to sue are derived from the serviceman's status." Id.; see Hinkie v. United States, 524 F. Supp. 277, 282-83 (E.D. Pa. 1981); Jessup v. United States, No. Civ. 79-271-TUC-RMB, slip op. at 2 (D. Ariz. Apr. 2, 1980).


148. 431 U.S. at 673.
negligently inflicted injuries to her father would not have any adverse effect on military discipline.\textsuperscript{149}

Such an extension of \textit{Stencel} is unwarranted.\textsuperscript{150} There will always be some interference with the military function when judicial review is granted.\textsuperscript{151} Interference alone, however, is not sufficient to bar the claim.\textsuperscript{152} Actions brought by civilians or off-duty servicemen for injuries arising from the alleged negligence of military personnel, but independent of any injury to a serviceman, may involve second-guessing military orders\textsuperscript{153} or require testimony of military officers.\textsuperscript{154} Yet, these actions have never been thought to sufficiently threaten military discipline so as to warrant their dismissal.\textsuperscript{155} Because the threat to military discipline is similarly tenuous and remote in suits by family members of servicemen,\textsuperscript{156} this factor alone is insufficient to warrant their bar.\textsuperscript{157}

\textsuperscript{149} Monaco v. United States, 661 F.2d 129, 133-34 (9th Cir. 1981), \textit{cert. denied}, 50 U.S.L.W. 3934 (U.S. May 24, 1982).


\textsuperscript{151} Mindes v. Seaman, 453 F.2d 197, 201 (5th Cir. 1971).


\textsuperscript{153} See Rhodes, \textit{supra} note 54, at 42.

\textsuperscript{154} Parker v. United States, 611 F.2d 1007, 1012 (5th Cir. 1980).

\textsuperscript{155} See United States v. Brown, 348 U.S. 110, 112-13 (1954); Rhodes, \textit{supra} note 54, at 42; \textit{supra} note 22 and accompanying text.

\textsuperscript{156} Hinkie v. United States, 524 F. Supp. 277, 284 (E.D. Pa. 1981); Jessup v. United States, No. Civ. 79-271-TUC-RMB, slip op. at 3 (D. Ariz. Apr. 2, 1980). The effect on military discipline was particularly remote in \textit{Hinkie}. There the court noted that because the injuries to the serviceman's children manifested themselves decades after the government's negligent act, "[t]he undermining of discipline or refusal to follow orders present less of a problem because of the time lapse here involved." 524 F. Supp. at 284. On the other hand, one court stated, without explanation, that a suit for indirect consequences of military orders would have a similar adverse effect on military discipline as a suit for direct consequences. Lombard v. United States, 530 F. Supp. 918, 922 (D.D.C. 1981). The effect of these two actions on military discipline, however, is not similar. Suits for indirect consequences of military orders, contrary to those for direct consequences, are brought by non-military personnel who are not subject to military authority, and therefore pose less of a threat to the maintenance of military discipline. See \textit{supra} notes 139-46 and accompanying text. Moreover, because the negligent orders were given over three decades before the manifestation of the injuries, Lombard v. United States, 530 F. Supp. 918, 919 n.1 (D.D.C. 1981), any effect on military discipline would be slight. See Hinkie v. United States, 524 F. Supp. 277, 284 (E.D. Pa. 1981).

\textsuperscript{157} In \textit{Stencel}, the effect of the court proceeding on the maintenance of military discipline "weigh[ed] against permitting any recovery," 431 U.S. at 673, but was not dispositive. Rather, it was the combined weight of all three factors that ultimately led the Court to bar Stencel's cross-claim. \textit{Id.} at 672-73. When the suit is brought by...
D. Balancing the Feres Factors

To determine whether dependents of servicemen have a right to sue under the FTCA for their own injuries, courts should use the Feres factors to balance the potential hardship to the claimant if the action is barred against the anticipated burden on the government if suit is permitted. Although the adverse effect of actions for wrongful death on the military function is questionable, the damages to dependents of servicemen are mitigated by their entitlement to death benefits under the VBA. Hence, to deny suit for wrongful death under the FTCA is not unfair. Family members are not entitled, however, to veterans' benefits for their own physical injuries, and therefore it would be particularly harsh to bar these claims. Moreover, any adverse consequences on the military function that would result from family members' actions for their own physical injuries would be negligible. Subjecting the military to diverse standards of care and liability would not interfere with the performance of its vital function because the relationship between the claimant and the United States is not "distinctively federal in character." Furthermore, because the claimant is a civilian and therefore not subject to the military's system

family members of servicemen for physical injuries, however, the only factor that arguably weighs against recovery is the effect of the court proceeding on the maintenance of military discipline. Both the non-availability of veterans' benefits and the non-existence of a distinctively federal relationship, on the other hand, weigh for permitting the action. See supra notes 113-19, 133-36 and accompanying text. It is therefore improper to rely on Stencel's analysis of the effects of the court proceeding alone to bar claims brought against the United States by family members of servicemen for their own personal injuries.


159. See supra notes 81, 109-12 and accompanying text.

160. See supra notes 97, 113-18 and accompanying text.

161. See supra notes 131-36 and accompanying text.
of order and discipline, any threat to the integrity of that system would be remote. To grant family members’ actions for their own physical injuries would promote justice by providing a remedy to those who would otherwise be without.

**Conclusion**

Sovereign immunity, whose origin dates from the Middle Ages, is a present-day anachronism. For years the doctrine caused widespread injustice by denying private persons a remedy for wrongs committed by agents or employees of the government. In enacting the FTCA, Congress waived the government’s immunity from suits sounding in tort. Cognizance of both the past and potential injustices of the doctrine of sovereign immunity demands that the FTCA be read broadly. Permitting family members of servicemen to bring suit against the United States under the FTCA for personal injuries arising from the negligence of military personnel toward active duty servicemen would effectuate the purpose of the Act without jeopardizing the ability of the military to ensure our national security. Admittedly these claimants may face serious difficulties of proof at trial. Nevertheless, granting them the opportunity to seek redress provides an avenue for justice where before there had been no path.

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162. *See supra* notes 144-46, 151-57 and accompanying text.