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From *Feres v. United States* to *Boyle v. United Technologies Corp.*: An Examination of Supreme Court Jurisprudence and a Couple of Suggestions

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Sometimes an appellate court opinion so illuminates an area of law that its language seems to memorialize intellectual concepts already perceived, though not yet verbalized, by the reader. This kind of opinion tends to elicit a reader response of, "Yes, that's it! That's exactly right!" and provides lower courts with lucid precedent and persuasive rationales that facilitate decisions in future cases. At other times, appellate court opinions seem to do little more than offer a legal conclusion that seized the court, or a majority of its members, without any clear rationale for that conclusion. This kind of opinion tends to elicit a reader reaction of, "Huh? That can't be right!" and provides lower courts with more confusion than guidance in applying the decision to future cases with varying fact patterns. The Supreme Court opinions dealing with the applicability of the Federal Tort Claims Act ("FTCA" or "Act")[1] to injuries incident to military service, and with the creation and applicability of the government contractor defense[2] have, unfortunately, fallen within the second category of "That can't be right!"

Feres AND ITS PROGENY

In *Feres v. United States*,[3] the United States Supreme Court was required to determine whether Congress, in enacting the FTCA and its partial waiver of sovereign immunity, intended the

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1. 28 U.S.C. §§ 1291, 1346(b), (c), 1402(b), 2401(b), 2402, 2671-80 (1988).

2. *See* Boyle v. United Technologies Corp., 487 U.S. 500 (1988). See notes 237-264 and accompanying text.

3. 340 U.S. 135 (1950). The author has written before on the *Feres* issue. *See* David E. Seidelson, *The* Feres *Exception to the Federal Tort Claims Act: New Insight Into an Old Problem*, 11 HOFSTRA L. REV. 629 (1983). However, the intervening opinions of the Supreme Court require reexamination of *Feres*, and, in this author's opinion, different conclusions concerning the issue.

Act to apply to injuries incident to military service. Three cases were consolidated for decision by the *Feres* Court. In one, the decedent, an active duty soldier, died in a fire in an Army barracks.[4] The plaintiff alleged that the Army had negligently "quarter[ed] him in barracks known or which should have been known to be unsafe because of a defective heating plant, and in failing to maintain an adequate fire watch."[5] In the second case, the plaintiff, who was in the Army, underwent a stomach operation.[6] During the course of another operation approximately eight months later, and after the plaintiff's discharge, surgeons removed a towel "marked 'Medical Department U.S. Army,' "[7] from the plaintiff's stomach. The plaintiff alleged that the Army surgeon had negligently left the towel in his stomach during the first operation.[8] In the final case, the decedent's executrix alleged that the decedent's death was caused by "negligent and unskillful medical treatment by army surgeons."[9]

The Court candidly conceded the difficulty in determining if the FTCA was intended to apply to injuries incident to military service:

> There are few guiding materials for our task of statutory construction. No committee reports or floor debates disclose what effect the statute was designed to have on the problem before us, or that it even was in mind. Under these circumstances, no conclusion can be above challenge, but if we misinterpret the Act, at least Congress possesses a ready remedy.[10]

Moreover, the Court did "not overlook considerations persuasive of liability in [the] cases" before it.[11] The FTCA, in defining employees of the government for respondeat superior purposes, includes "members of the military or naval forces of the United States."[12] The FTCA explicitly excludes from coverage "any claim arising out of the *combatant* activities of the military or naval forces . . . *during time of war*"[13] and "any claim arising in a foreign country."[14] Reading these three provisions, one might infer that the FTCA was

4. *Feres*, 340 U.S. at 137.
5. *Id.*
6. *Id.*
7. *Id.*
8. *Id.*
9. *Feres*, 340 U.S. at 137.
10. *Id.* at 138.
11. *Id.*
12. *Id.* (quoting 28 U.S.C. § 2671).
13. *Feres*, 340 U.S. at 138 (quoting 28 U.S.C. § 2680(j)).
14. *Feres*, 340 U.S. at 138 (quoting 28 U.S.C. § 2680(k)).

intended to apply to injuries incident to military service where such injuries were the result of negligence on the part of military personnel, if the injuries were noncombatant and occurred within the United States. The Court, however, rejected this inference. Instead, it concluded that the FTCA was not applicable to injuries which "arise out of or are in the course of activity incident to service."[15]

The Court offered a half dozen reasons in support of its conclusion in *Feres*. First, it noted that the Act subjects the government to liability "in the same manner and to the same extent as a private individual under like circumstances."[16] In the Court's view, there existed no body of law applicable or analogous to the relationship between the military victims and the government in the cases before the Court. Did the Court not forget that two of the three cases before it were medical malpractice actions, and that the third was similar to a landlord-tenant action? It recognized the apparent similarities, stating, "[i]n the usual civilian doctor and patient relationship, there is of course a liability for malpractice. And a landlord would undoubtedly be held liable if an injury occurred to a tenant as the result of a negligently maintained heating plant."[17]

If these comparisons are true, then why was there no applicable or analogous body of law to apply for the plaintiffs in *Feres*? To the Court, "the liability assumed by the Government [under the FTCA was] that created by 'all the circumstances,' not that which a few of the circumstances might create."[18] Surely the Court's conclusion is overbroad. If a mail truck carrying first-class mail ran a red light and broadsided an automobile operated by a civilian, then the victim would have an FTCA action against the government pursuant to the law of the state where the truck driver's negligence occurred. The fact that carrying first-class mail is an activity prohibited to any private entity would have no effect on the injured party's ability to sue under the FTCA.

The second reason offered by the Court to support its conclusion is that the Act provides that the government's liability is to be determined pursuant to "the law of the place where the act or omission [of the government employee] occurred."[19] The Court found it

15. *Feres*, 340 U.S. at 146.
16. *Id.* at 141 (quoting 28 U.S.C. § 2674).
17. *Feres*, 340 U.S. at 142.
18. *Id.*
19. *Id.* (quoting 28 U.S.C. § 1346(b)).

illogical that the location in which an injury occurred should be determinative when the claimant has no choice but to go where the government wishes.[20] The Court apparently concluded that it would be unfair to the soldier to have the FTCA applied to his injuries incident to military service. The soldier's reaction to that solicitude would probably be, "Thanks, but no thanks." To the soldier, application of any state's law would be preferable to the conclusion achieved by the Court, that the soldier has no cause of action at all in tort.

Another problem with the Court's rationale is the assumption that if the FTCA were deemed applicable, it would invariably be the law of the state where the soldier was injured that would govern the decision in the case. This simply is not correct. The Act requires the application of the law of the state where the government negligence occurred, which may or may not be the state where the soldier is ultimately injured. A negligent act or decision in one state could result in injuries to soldiers in several states.[21]

The Court's third rationale is that "most states have abolished the common-law action for damages between employer and employee and superseded it with workmen's compensation statutes which provide, in most instances, the sole basis of liability."[22] The implication is that if state law were applied to injuries incident to military service, as would be mandated by the FTCA, no tort action would result. The problem with this implication is that the typical state bar to negligence actions arising out of work-connected injuries is the result of an exclusivity clause provided in the workers' compensation statute.[23] There is no similar exclusivity

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20. *Feres*, 340 U.S. at 142-43. The Court believed:

This perhaps is fair enough when the claimant is not on duty or is free to choose his own habitat and thereby limit the jurisdiction in which it will be possible for federal activities to cause him injury. That his tort claims should be governed by the law of the location where he has elected to be is just as fair when the defendant is the Government as when the defendant is a private individual. But a soldier on active duty has no such choice and must serve any place or, under modern conditions, any number of places in quick succession in the forty-eight states, the Canal Zone, or Alaska, or Hawaii, or any other territory of the United States. That the geography of an injury should select the law to be applied to his tort claims makes no sense.

Id.

21. *See* Richards v. United States, 369 U.S. 1 (1962) (holding that the FTCA's reference to the law of the state where the governmental negligence occurred was a reference to the total law of that state, conflicts law as well as local law, so that any choice-of-law problem was required to be resolved pursuant to the conflicts law of that state).

22. *Feres*, 340 U.S. at 143.

23. ARTHUR LARSON, 2A LAW OF WORKMEN'S COMPENSATION, § 65.00 at 12-1 (1992).

clause in the Veterans' Benefits Act ("VBA"),[24] which is the rough analogue for injuries incident to military service. In addition, the Court noted that:

> [w]here [state workers' compensation] statutes are inapplicable, states have differing provisions as to limitations of liability and different doctrines as to assumption of risk, fellow-servant rules and contributory or comparative negligence. It 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.[25]

The above language again suggests that the Court was motivated by a concern for fairness to the soldier in holding the FTCA inapplicable to injuries incident to military service. Once more, the soldier's reaction would probably be, "Thanks, but no thanks."

In its fourth line of reasoning in *Feres*, the Court characterized the "relationship between the Government and members of its armed forces [as] 'distinctively federal in character,' "[26] and then concluded that Congress could not have intended to subject that relationship to the laws of the various states, as provided in the FTCA.[27] The Court's fourth rationale has several problems. The relationship between any federal employee and the government is always distinctively federal, in the sense that it is likely to be governed by a host of federal laws, regulations, and rules. If the federal character of the relationship precluded the application of state law, the FTCA would be nearly nugatory since the Act can apply only to negligence on the part of a government employee acting within the scope of his employment. Of course, in the three cases before the Court, a distinctively federal relationship existed not only as between alleged tortfeasor and government, but also between victim and government. Assuming it was that dual-level, distinctively federal relationship that the Court contemplated, does it justify the Court's conclusion that the FTCA could not have been intended to apply? The Court's conclusion can be tested by posing a simple hypothetical case.

Suppose a soldier driving a jeep while on active military duty runs a red light and strikes a civilian government employee who is crossing the street on his way to lunch. Would the injured victim have an FTCA action against the government? It appears the an-

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24. 38 U.S.C. §§ 101-5228 (1988).
25. *Feres*, 340 U.S. at 143.
26. *Id.* (quoting United States v. Standard Oil Co., 332 U.S. 301, 305 (1947)).
27. *Feres*, 340 U.S. at 144.

swer is yes.[28] If the injured civilian has an FTCA action against the government, then the dual-level relationship between government and victim and government and tortfeasor would not alone seem to justify the Court's conclusion in the *Feres* case. The Court was, however, contemplating a dual-level federal relationship between victim/*soldier* and tortfeasor/*soldier*. Does that justify the conclusion it reaches, that Congress could not have intended the government's liability to be determined by *state* law? Unless the act or omission of the tortfeasor/*soldier* was uniquely military in nature, the application of state law as provided by the Act would be appropriate.[29] In the three cases before the Court, however, the alleged negligence, which consisted of medical malpractice in two and negligent maintenance of a furnace in one, hardly implicated any act or omission uniquely military in nature.

In the fifth rationale provided by the Court in *Feres*, it noted that the VBA provides "compensation for injuries or death of those in armed services" which has "some bearing" on whether the FTCA was intended to apply to such injuries.[30] As the Court noted:

> We might say that the claimant may (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. There is as much statutory authority for one as for another of these conclusions. If Congress had contemplated that this Tort Act would be held to apply in cases of this kind, it is difficult to see why it should have omitted any provision to adjust these two types of remedy to each other. The absence of any such adjustment is persuasive that there was no awareness that the Act might be interpreted to permit recovery for injuries incident to military service.[31]

The problem with this fifth rationale is two-fold. As the Court itself noted in alternative (c) above, the victim could pursue both remedies, crediting the larger liability with the smaller. The second problem is that the Court itself approved of this method of "adjustment" four years after *Feres* was decided, even absent explicit congressional authority.[32]

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28. It is assumed that because the civilian employee was on his way to lunch, his injury would be deemed not to be work-connected, thus making the Federal Employees' Compensation Act, 5 U.S.C. §§ 8101-93 (1988), inapplicable.

29. In these circumstances, one could argue that there is no applicable or analogous state law.

30. *Feres*, 340 U.S. at 144.

31. *Id.*

32. *See* United States v. Brown, 348 U.S. 110 (1954). See notes 120-31 and accompa-

Finally, in the last rationale offered by the *Feres* Court, it again evidenced solicitude for the poor soldier who "is at a peculiar disadvantage in litigation. Lack of time and money, the difficulty if not impossibility of procuring witnesses, are only a few of the factors working to his disadvantage."[33] To spare the soldier those disadvantages, the Court concluded that Congress had not intended the Act to apply to injuries incident to military service.[34] Once again, the soldier's reaction would probably be, "Thanks, but no thanks." An FTCA action, even with the enumerated difficulties, would seem preferable to no FTCA action at all. Moreover, the difficulties outlined by the Court may not be quite as formidable as the language implies. If the Act were deemed applicable, the victim/*soldier* (or, in the event of his death, the personal representative of his estate) would have no great difficulty in finding counsel willing to take the case on a contingent fee basis. It would then be counsel, not victim, who would assume the principal burden of procuring witnesses and preparing the case for trial.

In summary, it seems that the medley of rationales offered by the Court in *Feres* do not, either singly or in combination, persuasively support the ultimate conclusion that the FTCA is not applicable to injuries occurring incident to military service. The six rationales it offered seem to be barely more than a patchwork quilt hurriedly put together to cover some unseemly and unwelcome guest. Perhaps the most surprising aspect of the opinion is its author, Justice Jackson, who is generally and justifiably noted for his lucid and enlightening opinions. What went wrong in *Feres*? There is much room to speculate. Since *Feres* contained no dissenting opinion, its ultimate conclusion represented the view of a unanimous Court, tempered only by the fact that Justice Douglas concurred only in the result.[35] Perhaps the members of the Court, though united in result, were in disagreement as to the basic rationale for that result, and Justice Jackson was visited with the difficult task of writing an opinion that would reflect enough of each disparate view to satisfy nearly all, while not elaborating on any particular rationale sufficiently to compel any member to dissent. Whatever the explanation, the opinion is an embarrassment.

The *Feres* opinion must have also proved an embarrassment to the Court, because twenty-seven years later it strained for an op-

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nying text.

33. *Feres*, 340 U.S. at 145 (footnote omitted).

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

35. *Id.*

portunity to rethink and recast the rationales for the *Feres* result. In *Stencel Aero Engineering Corp. v. United States*,[36] Captain John Donham ("Donham") was seriously and permanently injured when the life-support system of his fighter aircraft malfunctioned during a mid-air emergency.[37] To recover for his injuries, Donham brought an FTCA action against the government and an action against Stencel, the manufacturer of the ejection system.[38] Stencel, in turn, cross-claimed against the government, seeking indemnification for any recovery Donham might receive from Stencel.[39] The district court granted the government's motion for summary judgment against the plaintiff, finding that his injuries were incident to military service, and thus *Feres* barred the action.[40] The district court also granted the government's motion for summary judgment against Stencel's cross-claim, because it held that otherwise Stencel would indirectly recover what Donham could not recover directly. [41]

The decision in *Stencel* is well in line with the *Feres* conclusion. If *Feres* precluded the plaintiff from recovering from the government, but the plaintiff recovered from Stencel and Stencel was permitted to receive government indemnification, the result would be that the government would be burdened with the liability for the plaintiff's injuries incident to military service. Stencel appealed and the Eighth Circuit affirmed.[42] The Supreme Court then granted certiorari to "resolve the tension between *Feres* and [*United States v.*] *Yellow Cab* [*Co.*] when a member of the Armed Services brings a tort action against a private defendant and the latter seeks indemnity from the United States under the . . . Act, claiming that Government officials were primarily responsible for the injuries."[43]

What tension, one might ask? In *United States v. Yellow Cab Co.*,[44] two cases were consolidated for decision by the Court. In

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36. 431 U.S. 666 (1977).

37. *Stencel*, 431 U.S. at 667.

38. *Id.* at 667-68.

39. *Id.* at 668. Stencel's claim for indemnification was based on Missouri law, under which a passively negligent actor may recover indemnification from an actively negligent actor. *Id.* at 668 n.3.

40. Donham v. United States, 395 F. Supp. 52, 53 (E.D. Mo. 1975), *aff'd*, 536 F.2d 765 (8th Cir. 1976), *aff'd sub nom.* Stencil Aero Engineering Corp. v. United States, 431 U.S. 666 (1977).

41. *Donham*, 395 F. Supp. at 53.

42. Donham v. United States, 536 F.2d 765 (8th Cir. 1976).

43. *Stencel*, 431 U.S. at 670.

44. 340 U.S. 543 (1951).

one, four cab passengers were injured in a collision between the cab and a U.S. mail truck.[45] To recover for their injuries, the passengers sued the cab company, who then impleaded the United States as a third-party defendant seeking contribution pursuant to the FTCA.[46] In the companion case, a passenger in a streetcar, injured in a collision between the streetcar and a jeep driven by a soldier acting within the scope of his employment, sued Capital Transit, who then impleaded the United States as a third-party defendant seeking contribution pursuant to the FTCA.[47] The Court held that the FTCA subjects the government to contribution liability through impleader when the plaintiff's injuries are occasioned in part by the negligence of a federal employee.[48] Unlike *Feres*, however, in neither of these two actions were the injured victims on active duty in the armed services. Rather, all were civilians. The "tension" perceived by the Court seems entirely illusory. The Court, however, used *Stencel* as the vehicle by which to recast the rationales for the result achieved in *Feres*.

In *Stencel*, the half-dozen reasons offered in *Feres* were refined to three. In so doing, the Court eliminated each *Feres* rationale purporting to rest on fairness to the soldier. Apparently the Court recognized the frivolity and perhaps even the cynicism underlying each of those reasons. With some modification, the Court retained two of the *Feres* rationales: (1) the distinctively federal relationship between soldier and government would make the application of state law mandated by the FTCA inappropriate;[49] and (2) the Veterans' Benefits Act.[50] As in *Feres*, however, the Court did not address the potential assertion that, with regard to the first reason, the application of state law would be inappropriate only if the alleged negligent act or omission were uniquely military in nature. It also failed to address the fact that the VBA contains no exclusivity

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45. *Yellow Cab*, 340 U.S. at 544.

46. *Id.*

47. *Id.* at 545.

48. *Id.* at 552, 556-57.

49. *Stencel*, 431 U.S. at 671. The Court noted that:

> the relationship between the Government and members of its Armed Forces is "distinctively federal in character," [therefore] it would make little sense to have the Government's liability to members of the Armed Services dependent on the fortuity of where the soldier happened to be stationed at the time of the injury.

Id. (citations omitted).

50. *Stencel*, 431 U.S. at 671. The Court stated that, "the Veterans' Benefits Act establishes, as a substitute for tort liability, a statutory 'no-fault' compensation scheme which provides generous pensions to injured servicemen, without regard to any negligence attributable to the Government." *Id.*

clause, and the fact that the Court itself had fashioned a manner of adjusting compensation under the VBA and recovery under the FTCA.

The Court offered as its third rationale one not found anywhere in *Feres*: judicial second-guessing of military acts or decisions would have an adverse effect on discipline.[51] This third reason does have a certain facial validity.[52] Military service demands discipline, and judicial second-guessing of military acts or decisions could impair that discipline. On reflection, however, it could just as easily be asserted that the *absence* of judicial second-guessing of military decisions could have an adverse effect on discipline. To the soldier, the possibility of judicial review and the award of money damages could make the requisite discipline more acceptable, or at least tolerable. Not only was the third reason an afterthought, it could also be labelled as less than self-evident. One could assert, however, that three dubious rationales are better than six. The Court then found all three of these reasons applicable to the relationship between Stencel and the government and affirmed the judgment for the government.[53]

Then the Court decided *United States v. Shearer*.[54] Private Shearer, while off-duty and off-post, was kidnapped and murdered by Private Heard, also off-duty and off-post.[55] Both had been stationed at Fort Bliss.[56] Plaintiff, decedent's mother and personal representative of his estate, brought a wrongful death action against the government under the FTCA.[57] Earlier, while stationed in Germany, Heard had been convicted of manslaughter by a German court and sentenced to four years imprisonment.[58] Private Shearer's murder at the hands of Heard occurred after the latter's release from prison.[59] Plaintiff alleged that the Army, aware of

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51. *Id.* at 673. In *Stencel*, the Court attributed that third reason to its decision in United States v. Brown, 348 U.S. 110, 112 (1954). *Stencel*, 431 U.S. at 671.

52. As this author has previously stated:

> The third reason offered by *Stencel* . . . has a compelling legitimacy. After all, if every or even most military orders were vulnerable to judicial review, those in service and subject to those orders might be encouraged to reject or disregard those orders until judicial "approval" were obtained. Clearly that is no way to run an army.

Seidelson, cited at note 3, at 642.

53. *Stencel*, 431 U.S. at 673-74.

54. 473 U.S. 52 (1985).

55. *Shearer*, 473 U.S. at 53.

56. *Id.* at 53-54.

57. *Id.*

58. *Id.* at 54.

59. *Id.*

Heard's dangerous nature, had been negligent in failing to exert reasonable control over him, in failing to warn others of his dangerousness, or in failing to remove him from active duty.[60] The government, asserting the *Feres* bar, moved for summary judgment.[61] The motion was granted by the district court, the Third Circuit reversed, and the United States Supreme Court in turn reversed the Third Circuit, holding the action was precluded by *Feres*.[62]

After noting that "the Court in *Feres* based its decision on several grounds," the Court in *Shearer* concluded that the basic reason for the *Feres* bar was the impropriety of a "civilian court . . . second-guess[ing] military decisions . . . [and thus] impair[ing] essential military discipline."[63] The Court found that:

> [Plaintiff's] complaint strikes at the core of these concerns. In particular, [plaintiff] alleges that Private Shearer's superiors in the Army "negligently and carelessly failed to exert a reasonably sufficient control over Andrew Heard, . . . failed to warn other persons that he was at large, [and] negligently and carelessly failed to . . . remove Andrew Heard from active military duty." . . . This allegation goes directly to the "management" of the military; it calls into question basic choices about the discipline, supervision, and control of a serviceman.[64]

Then, in a footnote, the Court wrote, "[a]*lthough no longer controlling*, other factors mentioned in *Feres* are present here. It would be anomalous for the Government's duty to supervise servicemen to depend on the local law of the various states . . . and the record shows that Private Shearer's dependents are entitled to

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60. *Shearer*, 473 U.S. at 54.

61. In addition, the government asserted that the action was barred by the intentional torts exception to the FTCA. 28 U.S.C. § 2680(h). The Third Circuit concluded that the intentional torts exception did not bar the action. Shearer v. United States, 723 F.2d 1102, 1106 (3d Cir. 1983). On that point, the Court divided 4-4, thereby leaving the Third Circuit's conclusion undisturbed. *Shearer*, 473 U.S. at 59. Subsequently, in Sheridan v. United States, 487 U.S. 392 (1988), the Court held that the intentional torts exception would not bar an FTCA action if the alleged negligence of the federal employee would subsist, even if the federal employment status of the intentional tortfeasor were irrelevant. *Sheridan*, 487 U.S. at 401. In his concurring opinion, Justice Kennedy emphasized that the plaintiff would not be permitted to circumvent the intentional tort exception simply by alleging negligent hiring or supervision of the intentional tortfeasor by the government. *Sheridan*, 487 U.S. at 408 (Kennedy, J., concurring). Applying *Sheridan* retroactively to *Shearer*, the intentional torts exception would seem to bar the action. Each of the negligent acts alleged against the government (see text at note 60) would not constitute negligence had Heard not been in the Army. The first and third negligent acts alleged would seem to be equivalent to negligent supervision and hiring (or retention), respectively.

62. *Shearer*, 473 U.S. at 54.

63. *Id.* at 57 (citation omitted).

64. *Shearer*, 473 U.S. at 58 (footnote omitted).

statutory veterans' benefits.[65]

Just like that, the three amended reasons for the *Feres* bar set forth in *Stencel* were reduced to one: Judicial second-guessing of military acts and decisions would have an adverse effect on military discipline. The other two reasons were relegated to the judicial dustbin as "no longer controlling." If the Court recognized that the one remaining reason, critical to decision in *Shearer*, was never alluded to in *Feres* itself, it never let on. How could it? Once all of the rationales set forth in *Feres* were repudiated by the Court, overruling *Feres* would seem to be the appropriate judicial reaction. Obviously, the Court was not ready to expressly overrule *Feres*. Instead, it perpetuated the *Feres* bar by an after-discovered rationale. One might argue that the Court's conclusion was judicially awkward, but one could not say that the decision was erroneous. The Supreme Court is incapable of legal error, and the inferior federal courts are bound by the Supreme Court's precedents. Given the Court's inconsistency in identifying reasons for the *Feres* bar, it was inevitable that one of the lower courts would be sandbagged.

In *Atkinson v. United States*,[66] the plaintiff, on active duty in the Army and in the second trimester of pregnancy, went to an Army hospital complaining of specific symptoms.[67] The hospital staff provided no treatment.[68] Three days later, plaintiff returned to the hospital and again the staff provided no treatment.[69] Two weeks later, plaintiff again went to the hospital and was admitted for treatment of pre-eclampsia, a life-threatening condition for the mother and the fetus.[70] As a result of the alleged negligence of the hospital staff, plaintiff delivered a stillborn child and suffered physical and emotional injuries.[71] To recover for those injuries, plaintiff sued the government under the FTCA.[72] Asserting that the action was barred by *Feres*, the government moved for summary judgment, which was granted by the district court.[73]

When the case reached the Ninth Circuit, the Supreme Court

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65. *Shearer*, U.S. at 58 n.4 (emphasis added) (citation omitted).

66. 804 F.2d 561 (9th Cir. 1986), *withdrawn and supplanted by* 825 F.2d 202 (9th Cir. 1987), *cert. denied*, 485 U.S. 987 (1988).

67. *Atkinson*, 804 F.2d at 561-62.

68. *Id.* at 562.

69. *Id.*

70. *Id.*

71. *Id.*

72. *Atkinson*, 804 F.2d at 562.

73. *Id.*

had already decided *Shearer*. Interpreting the *Shearer* decision, the Ninth Circuit concluded that the principal reason for the *Feres* bar was the concern that judicial second-guessing of military acts or decisions would have an adverse effect on discipline.[74] The court determined that this reason was inapplicable to medical care in a "non-field military hospital," not involving the kind of military act or decision which, if examined judicially, would be likely to generate an adverse effect on military discipline.[75] What about *Feres* itself? Two of the three consolidated cases in *Feres* involved alleged medical malpractice. The Ninth Circuit distinguished *Atkinson* from *Feres* by noting that the plaintiff in the instant case was a pregnant soldier, a situation not contemplated when *Feres* was decided.[76] Consequently, the Ninth Circuit reversed.[77]

The reasoning the Ninth Circuit applied in *Atkinson* raises serious concerns. The fact that the medical treatment afforded the plaintiff did not involve uniquely military acts or decisions would seem to make inapplicable the "distinctively federal relationship" reason for the *Feres* bar. Because the allegedly negligent medical care was not uniquely military in nature, it would not seem improper to determine the government's liability pursuant to the law of the state where the care occurred. As the Ninth Circuit found, *Shearer* had negated this reason. It is not readily apparent why judicial second-guessing of allegedly negligent medical care afforded a pregnant soldier would be less likely to have an adverse effect on military discipline than judicial second-guessing of allegedly negligent medical care afforded a non-pregnant soldier. Beyond the reasoning already noted, the Ninth Circuit did not persuasively demonstrate any other rationale.

Still, it is difficult to fault the Ninth Circuit's confusion in *Atkinson*, even assuming that such confusion existed. The court scrupulously reviewed the Supreme Court's decisions from *Feres* through *Stencel* to *Shearer*. It noted that *Stencel* had winnowed the six bases for the *Feres* doctrine to three,[78] but that the Supreme Court's last word was that the major foundation of the doctrine was to prevent second-guessing of military decisions and to preserve military discipline.[79]

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74. *Id.* at 563.
75. *Id.* at 564.
76. *Id.*
77. *Atkinson*, 804 F.2d at 565.
78. *Id.* at 563.
79. *Id.*

The Ninth Circuit also recognized that in *Shearer*:

> The Court specifically stated that the other factors enumerated in *Feres* no longer are controlling. . . . Thus, the *Feres* doctrine bars suit only where a civilian court would be called upon to second-guess military decisions or where the plaintiff's admitted activities are of the sort that would directly implicate the need to safeguard military discipline.[80]

Moreover, the Ninth Circuit repudiated its own precedents when it held that *Feres* barred malpractice actions, whether or not it seemed likely that judicial scrutiny would generate an adverse affect on military discipline.[81] These precedents were based on the desire to fashion "a clear line,"[82] and the repudiation rested on *Shearer*'s instruction that " '[t]he *Feres* doctrine cannot be reduced to a few bright-line rules; each case must be examined in light of the statute as it has been construed in *Feres* and subsequent cases'."[83]

Consequently, even if the distinction between medical treatment afforded a pregnant soldier versus a non-pregnant soldier is not inherently persuasive, the Ninth Circuit's decision was the result of an assiduous effort to identify and apply the Supreme Court's latest pronouncement on the reason underlying the *Feres* bar. To the extent that the court's effort to distinguish *Atkinson* from *Feres* was not entirely successful, the problem could be explained in the Supreme Court's repudiation of all the rationales asserted in *Feres*. If none of the reasons originally advanced for the *Feres* bar has continuing viability, then perhaps any distinction between *Atkinson* and *Feres* would be explicable. Indeed, in these circumstances, any distinction between any contemporary case and *Feres* becomes plausible and, beyond that, the viability of *Feres* itself becomes dubious. Apparently, the Supreme Court recognized the problem it had created in *Shearer*, just as in *Stencel* the Court recognized the weaknesses inherent in some of the rationales offered in *Feres*. Once again, the Court set about correcting the problem.

In *United States v. Johnson*,[84] Lieutenant Commander Johnson, a Coast Guard helicopter pilot stationed in Hawaii, was dispatched along with his crew, to search for a vessel in distress.[85] Because of

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80. *Id.* (citation omitted).
81. *Atkinson*, 804 F.2d at 563.
82. *Id.* at 564.
83. *Id.* at 563 (quoting *Shearer*, 473 U.S. at 57).
84. 481 U.S. 681 (1987).
85. *Johnson*, 481 U.S. at 682-83.

inclement weather and poor visibility, Johnson "requested radar assistance from the Federal Aviation Administration ("FAA"), . . . [t]he FAA controllers assumed positive radar control over the helicopter. Shortly thereafter, the helicopter crashed into the side of a mountain [and] . . . all the crew members, including Johnson, were killed in the crash."[86] Johnson's widow and personal representative of his estate brought a wrongful death action against the government pursuant to the FTCA.[87] Plaintiff alleged that Johnson's death was due to the negligence of the FAA flight controllers.[88] The government filed a motion to dismiss, claiming that the plaintiff was barred from recovering damages from the federal government, because Johnson died while performing his military duties.[89] The motion was granted by the district court. The court's dismissal was based solely on the Supreme Court's decision in *Feres*.[90] The Court of Appeals for the Eleventh Circuit reversed.[91] The Eleventh Circuit noted that the action did not involve military service.[92] The court determined that since the alleged tortfeasors were civilian employees of the government, rather than military employees, judicial second-guessing of the civilian's conduct would *not* adversely affect military discipline.

The Eleventh Circuit's original opinion antedated the Supreme Court's opinion in *Shearer*. The Eleventh Circuit therefore granted the government's petition for rehearing en banc, to reconsider the *Johnson* case in light of the Supreme Court's decision in *Shearer*.[93]

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86. *Id.* at 683.

87. *Id.*

88. *Id.*

89. *Johnson*, 481 U.S. at 683.

90. *Id.*

91. *Id.*

92. Johnson v. United States, 749 F.2d 1530, 1539 (11th Cir. 1985), *aff'd on reh'g*, 779 F.2d 1492 (11th Cir. 1986), *rev'd*, 481 U.S. 681 (1987). The court noted that:

> The complaint in this case alleges that plaintiff's decedent was killed because civilian FAA air traffic controllers negligently guided the helicopter he was piloting into a mountain. There is absolutely no hint in the scant record before this court that the conduct of any alleged tortfeasor even remotely connected to the military will be scrutinized if this case proceeds to trial. Nor is there a suggestion that examining the conduct of a civilian would in any way implicate the military services. Since the prosecution of plaintiff's claim cannot conceivably involve or compromise a military relationship or, for that matter, the military discipline structure, the prosecution of plaintiff's claim will not encroach upon the rationale which "serves largely if not exclusively as the predicate for the *Feres* doctrine."

Johnson, 749 F.2d at 1539 (footnote omitted) (quoting in part Hunt v. United States, 636 F.2d 580, 599 (D.C. Cir. 1980)).

93. Johnson v. United States, 760 F.2d 244 (11th Cir. 1985).

By the time the en banc consideration occurred, *Shearer* had been decided by the Court. In a per curiam opinion, a majority of the Eleventh Circuit concluded that *Shearer* "reinforce[d] the analysis set forth in the panel opinion."[94]

The Supreme Court, in a 5-4 decision, reversed, holding that the cause of action in *Johnson* was barred by *Feres*.[95] What led the Court to that conclusion? The opinion indicates that *Stencel* required the reversal.[96] The Court's opinion then restated the three rationales offered in *Stencel*: (1) the distinctively federal relationship between soldier and government would make the application of state law inappropriate; (2) the VBA was intended to be the exclusive remedy for injuries incident to military service; and (3) judicial second-guessing of military acts and decisions would have an adverse effect on military discipline.[97] What happened to *Shearer*, which stated that the first two reasons were "no longer controlling"? The Court cited *Shearer* in support of the third reason, and simply ignored that portion of *Shearer* that seemed to negate the first two reasons.[98]

The Court then found each of the three *Stencel* reasons for the *Feres* bar applicable to *Johnson*. Since decedent's death-producing injuries had been incident to his military service, the first reason applied.[99] Because his widow had applied for and received compensation for her husband's death pursuant to the Veterans' Benefits Act, the second reason applied.[100] What about the third reason? How would judicial second-guessing of the alleged negligent conduct of civilian employees of the government generate an adverse effect on military discipline? The Court wrote:

> Even if military negligence is not specifically alleged in a tort action, a suit based upon service-related activity necessarily implicates the military judgments and decisions that are inextricably intertwined with the conduct of the military mission. Moreover, military discipline involves not only obedience to orders, but more generally duty and loyalty to one's service and to one's country. Suits brought by service members against the Government for service-related injuries could undermine the commitment essential to ef-

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94. *Johnson*, 779 F.2d at 1493.

95. *Johnson*, 481 U.S. at 692.

96. *Id.* at 688-89. The Court stated that, "[t]his Court has emphasized three broad rationales underlying the *Feres* decision. See *Stencel Aero Engineering Corp. v. United States . . . .*" *Id.*

97. *Id.* at 689-90.

98. *Id.* at 690-91.

99. *Id.* at 691.

100. *Johnson*, 481 U.S. at 691.

> fective service and thus have the potential to disrupt military discipline in the broadest sense of the word.[101]

If the language appearing after "Moreover" in the above excerpt is correctly understood by this author, it would imply that a service person who brings an FTCA action to recover for negligently inflicted injuries manifests disloyalty to his service and to his country. This interpretation requires reading "military discipline in the broadest sense of the word." However, the *Johnson* Court limited such a broad and discomfiting reading by the language it included in a footnote immediately before the word "Moreover."

The *Johnson* Court stated that civilian employees of the Government may also:

> [P]lay an integral role in military activities. In this circumstance, an inquiry into the civilian activities would have the same effect on military discipline as a direct inquiry into military judgments. For example, the FAA and the United States Armed Services have an established working relationship that provides for FAA participation in numerous military activities. See FAA, United States Dept. of Transportation, Handbook 7610.4F: Special Military Operations (Jan. 21, 1981).[102]

This footnote language provides a rather clear basis for concluding that judicial second-guessing of the conduct of the allegedly negligent FAA controllers would generate an adverse effect on military discipline. After all, those controllers were actively engaged in assisting Lieutenant Commander Johnson in the performance of his military mission of searching for a vessel in distress. Still, it would have been a little more reassuring and a little less discomfiting if that language had appeared in the text of the Court's opinion, rather than, or at least in addition to, the language suggesting disloyalty to service and country arising from the filing of a lawsuit.[103]

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101. *Id.* (footnote omitted).

102. *Johnson*, 481 U.S. at 691 n.11.

103. Justice Powell, author of the Court's opinion in *Johnson*, subsequently used language considerably more sympathetic to the victim of military negligence. In Harduvel v. General Dynamics Corp., 878 F.2d 1311 (11th Cir. 1989), *cert. denied*, 494 U.S. 1030 (1990), Justice Powell, who was retired from the Supreme Court and was sitting by designation on the Eleventh Circuit, reversed a judgment for the plaintiff and remanded for entry of judgment for the defendant on the basis that the three conditions for the government contractor defense set forth in Boyle v. United Technologies Corp., 487 U.S. 500 (1988) (see notes 237-264 and accompanying text) were met. *Harduvel*, 878 F.2d at 1322. He wrote:

> Young servicemen such as Captain Harduvel represent the very best of our Nation's citizens. Americans take pride in their bravery and skill, and mourn when their lives are tragically lost. . . . Although the [government contractor] defense may sometimes seem harsh in its operation, it is a necessary consequence of the incompatibility

Justice Scalia, with three members joining, filed a dissenting opinion in *Johnson*.[104] The dissent concluded that *Feres* had been "wrongly decided."[105] The dissent noted, however, that since "[w]e have not been asked by the [plaintiff] to overrule *Feres*, [we] need not resolve whether considerations of *stare decisis* should induce us, despite the plain error of the case, to leave bad enough alone."[106]

Rather, the dissent would have declined to apply *Feres* to a case in which the allegedly negligent actors were civilian employees of the government. The dissent candidly conceded that the limitation it sought was more a product of pragmatism than logical symmetry: "[We] confess that the line between FTCA suits alleging military negligence and those alleging civilian negligence has nothing to recommend it except that it would limit our clearly wrong decision in *Feres* and confine the unfairness and irrationality that decision has bred. But that, [we] think, is justification enough."[107] These are harsh words to direct at a Supreme Court opinion that had stood for nearly forty years. Yet, as the dissent noted, the Court itself had disavowed the reasons originally offered in *Feres* and substituted as the only rationale (until *Johnson* resurrected the other two) the after-discovered military discipline concern.[108] Moreover, the dissent concluded that none of the reasons that the Court has asserted, from *Feres* through *Shearer*, persuasively supported the *Feres* bar.[109]

Does Congressional failure to amend the FTCA in the years since *Feres* bespeak congressional acquiescence in the Court's interpretation of the Act? To the majority it did.[110] To the dissent it did not. As the dissent noted:

> [We] cannot take comfort, as the Court does from Congress' failure to amend the FTCA to overturn *Feres*. The unlegislated desires of later Congresses with regard to one thread in the fabric of the FTCA could hardly have any bearing upon the proper interpretation of the entire fabric of compromises that their predecessors enacted into law in 1946. And even if they

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of modern products liability law and the exigencies of national defense. *Id.*

104. The other three dissenters were Justices Brennan, Marshall and Stevens. *Johnson*, 481 U.S. at 692 (Scalia, J., dissenting).

105. *Id.* at 700.

106. *Id.* at 703.

107. *Id.*

108. *Id.* at 698-99.

109. *Johnson*, 481 U.S. at 700 (Scalia, J., dissenting).

110. *Id.* at 689 n.9.

> could, intuiting those desires from congressional *failure* to act is an uncertain enterprise which takes as its starting point disregard of the checks and balances in the constitutional scheme of legislation designed to assure that not all desires of a majority of the Legislature find their way into law.[111]

The above-quoted passage was, of course, written by the dissent. The Court, as we have seen, reaffirmed *Feres* and resurrected all three reasons for that decision enunciated in *Stencel*.

Where does that leave the Ninth Circuit and its decision in *Atkinson*, which was predicated on *Shearer*'s emphasis on the military discipline rationale and characterization of the other two *Stencel* reasons as "no longer controlling?" It seems to be sandbagged. The Ninth Circuit granted the government's petition for rehearing and, "[i]n light of *United States v. Johnson*," withdrew its earlier opinion and issued a new opinion, this time affirming the district court's entry of summary judgment for the government.[112]

Congressional and Supreme Court Resolution of the *Feres* Issue

How would Congress resolve the issue, if it were to consider it? Obviously, that question defies any definitive answer. The best one can offer is speculation. One speculation, especially in light of the substantial national debt, is that Congress, concerned about protecting the public fisc, would not legislatively overrule *Feres*.

How should the Supreme Court react to its own inconstancy in fashioning reasons for the *Feres* bar, the apparent lack of persuasiveness of those reasons, singly or in combination, the scathing dissent in *Johnson*, and the lack of clear guidance to lower federal courts? Two basic options are available to the Court: Either con-

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111. *Id.* at 702-03 (Scalia, J., dissenting).

112. Atkinson v. United States, 825 F.2d 202, 203 (9th Cir. 1987). The court stated:

> Simply put, *Johnson* appears to breathe new life into the first two *Feres* rationales, which until that time had been largely discredited and abandoned. *See* [*Johnson*, 107 S. Ct.] at 2071-72 (Scalia, J., dissenting) (noting the *Shearer* statement that the first two rationales are "no longer controlling").
>
> In view of these circumstances, we are compelled to affirm the decision of the district court on the basis of *Feres* and *Johnson*. Although we believe that the military discipline rationale does not support application of the *Feres* doctrine in this case, the first two rationales support its application. . . .
>
> We are . . . reluctant to carve out an exception to the *Feres* doctrine after five members of the Court appear to have emphatically endorsed *Feres* and all three of its rationales. That task, if it is to be undertaken at all, is properly left to the Supreme Court or to Congress.

Atkinson, 825 F.2d at 205-06 (footnote omitted).

fess error and overrule *Feres*, or retain *Feres* and confess error in identifying its underlying rationales, supplanting those unpersuasive reasons with some unifying theory that may be more helpful in providing guidance to lower courts in subsequent cases.

Frankly, the willingness of four Justices in *Johnson* to label *Feres* as wrongly decided, and their apparent readiness to overrule it had they been so invited, was surprising. Given the views of four members of the Court, perhaps actual overruling of *Feres* is a feasible alternative in the foreseeable future. Yet it is doubtful for several reasons. First, two of the four dissenters in *Johnson* are no longer on the Court.[113] While it is true that the author and one of the Justices who joined the Court's opinion in *Johnson* have also retired from the Court,[114] all three of the other Justices who comprised the majority remain on the Court.[115] Thus, of the five remaining members, presumably three would favor retaining *Feres* and only two would overrule. Recognizing that such head-counting is a risky enterprise, and any Justice is free to change his or her mind, the numbers still do not augur well for overruling.

Second, the four dissenters in *Johnson*, although finding *Feres* wrongly decided, did not vote to overrule it. It is true they were not "asked to overrule," but it can be assumed that, even uninvited, they had the capacity to vote for overruling *Feres*. The fact that they did not suggests something less than fervor in their conclusion that *Feres* was wrong. That lack of fervor is corroborated by the somewhat awkward conclusion for which they did vote: restricted application having "nothing to recommend it except that it would limit our clearly wrong decision in *Feres*."[116]

Third, despite Justice Scalia's discounting of the significance of congressional inaction in the then thirty-seven years since *Feres*, a majority of the Court would probably continue to find it difficult to ignore the apparent congressional acquiescence. There is an inculcated and appropriate sensitivity on the part of the Court to the prerogatives of Congress.

Finally, a majority of the Court would surely find it difficult to jeopardize the integrity of the public fisc by the incursion that overruling *Feres* would almost certainly stimulate. While it is true that it would be the responsibility of Congress, not the Court, to

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113. Justices Brennan and Marshall.

114. Justices Powell and White.

115. Chief Justice Rehnquist and Justices Blackmun and O'Connor remain as active members of the Court.

116. *Johnson*, 481 U.S. at 703 (Scalia, J., dissenting).

generate the necessary revenue, the Court would be understandably reluctant to impose that onus on Congress. The Court would also recognize the likelihood that if it overruled *Feres*, Congress, rather than generate the necessary additional revenue, might very well amend the FTCA to restore a *Feres*-like exception. While in a legalistic sense, amending the FTCA might be a purer method of resolution, it is hardly likely to appeal to the Court's pragmatic inclinations. Since the Court is not likely to overrule *Feres* in the foreseeable future, it should confess error in articulating the rationales for that decision, something it has already done (albeit tacitly and inconsistently), and seek to identify a rationale that might have continuing persuasiveness and serve as a useful guide to lower courts.

A Suggested Rationale For *Feres*

What type of rationale would possess such persuasiveness and serve as a useful guide for lower courts? The previously stated ruminations about speculative action on the part of Congress and the Court may have suggested a beginning point for fashioning such a rationale: to protect the public fisc. The Court could conclude that Congress, in enacting the FTCA, had not intended to subject the fisc to the predictably large charges that would be generated by negligently inflicted injuries arising out of activities incident to military service, *given the inherently dangerous nature of such activities*. This rationale suggests that the Court could conclude that the *Feres* bar is applicable only to those injuries that are truly incident to military service. It would also have the advantage of maintaining the basic view of *Feres*, that Congress had not intended the Act to apply to injuries "aris[ing] out of . . . or [occurring] in the course of activity incident to service,"[117] without the disadvantage of any of the awkward, inconsistently applied reasons set forth in *Feres*, *Stencel*, *Shearer*, and *Johnson*.

How would this protection of the public fisc rationale have operated in *Johnson*? Since it is apparent that Lieutenant Commander Johnson sustained death-producing injuries while attempting to rescue a vessel in distress, an activity clearly within the function of the Coast Guard, the wrongful death action would be barred. The bar would subsist without the need to consider any of the six, three, one, or three reasons respectively and alternatively offered in *Feres*, *Stencel*, *Shearer*, and *Johnson*. How would this have af-

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

fected the three cases consolidated for decision in *Feres*? Two of those actions were predicated on medical malpractice. Assuming that the medical treatment afforded had no relationship to any injury or ailment resulting from an activity incident to military service, then the suggested rationale would be inapplicable and the actions would be cognizable under the FTCA. Similarly, in *Atkinson*, where the alleged medical malpractice occurred in the provision of pre-natal care, the victim's injury certainly did not arise out of any activity incident to her military service, and thus the action would be maintainable.

Suppose though, that the allegedly negligent medical treatment was provided for an injury that had occurred as the result of an activity incident to military service. Clearly, the suggested rationale would preclude an FTCA action for the initial injury, even if negligently inflicted. What would that rationale suggest with regard to an action to recover damages for the exacerbation of the original injury, where the exacerbation was due to military medical malpractice? Generally, where a defendant's negligence causes personal injuries to the plaintiff requiring medical attention, and that attention is negligently provided, the initial tortfeasor is liable for the totality of the consequences, both the initial injuries and the exacerbation thereof.[118] The usual rationale for that conclusion is that, where the initial injuries make subsequent medical care foreseeable, subsequent negligent medical care is also reasonably foreseeable.[119] At the same time, the plaintiff is free to sue the original tortfeasor for the totality of the consequences, and also the negligent medical care provider for the exacerbation occasioned by him. Indeed, this reasoning suggests a certain dichotomy. As far as the original tortfeasor is concerned, his negligence and the subsequent negligence of the medical care provider create one cause of action. However, as far as the medical care provider is concerned, his negligence creates an independent action against him. For *Feres* purposes, should the action against the government, the employer of both the initial tortfeasor and the negligent medical care provider, be deemed one action, and therefore barred, or should they be deemed two actions, with the second not barred? The suggested rationale does not require the issue to be resolved on the basis of a distinction so elusive or nebulous. That rationale asserts that Con-

118. W. PAGE KEETON ET AL.; PROSSER AND KEETON ON THE LAW OF TORTS § 44 at 309-10 nn.80-86 (5th ed. 1984).

119. *Id.*

gress, in enacting the FTCA, did not intend to subject the fisc to claims for injuries incurred in activities incident to military service, given the inherently dangerous nature of those activities and the predictably large numbers of such claims. Since negligent medical care is a reasonably foreseeable consequence of such injuries, claims arising out of such care would also be considered barred.

Suppose the negligent medical care is provided by a government employee after the victim has been discharged from the service, maybe at a VA hospital. Should a claim seeking damages for the exacerbation of injuries occasioned by that post-discharge treatment be deemed barred by our rationale? *United States v. Brown*[120] provides an apt analogy. Plaintiff, while in the service, sustained an injury to his left knee.[121] After his discharge, the plaintiff had surgery performed on the knee at a VA hospital.[122] Due to the use of an allegedly defective tourniquet during the operation, plaintiff suffered serious and permanent injury to the nerves in the leg.[123] To recover for that injury, plaintiff sued the government under the FTCA.[124] Plaintiff had received VBA benefits for the original service injury, and that award was increased after the surgery.[125] The government moved to dismiss under *Feres*.[126] The district court granted the motion, the court of appeals reversed, and the Supreme Court affirmed the reversal.[127]

To the Court, it was dispositive that the injury for which damages were sought was the result of surgery performed while the plaintiff was a civilian.[128] Moreover, as noted previously by the author,[129] the Court concluded that the VBA benefits and any judgment secured by the plaintiff in the FTCA action could be adjusted by deducting the former from the latter.[130]

It is not entirely clear from the Court's opinion whether the original injury was sustained as the result of an activity incident to military service.[131] If it was not, under this author's suggested ra-

120. 348 U.S. 110 (1954).
121. *Brown*, 348 U.S. at 110.
122. *Id.*
123. *Id.* at 110-11.
124. *Id.* at 110.
125. *Id.* at 111.
126. *Brown*, 348 U.S. at 111.
127. *Id.* at 111, 113.
128. *Id.* at 112.
129. See note 32 and accompanying text.
130. *Brown*, 348 U.S. at 113.
131. The Second Circuit opinion states that "the plaintiff, while in active service, had been injured in the left knee during military operations in New Guinea." Brown v. United

tionale, *Feres* would not bar an FTCA action for all injuries, initial and subsequent. If the original injury was sustained while performing military duties, what does the rationale suggest? It has already been determined that if the original injury arose out of an activity that was incident to military service, the rationale would preclude recovery for damages attributable to the initial injury, as well as for damages attributable to subsequent negligent military medical care. If Congress did not intend to expose the fisc to liability for injuries arising out of an activity incident to military service, given the inherently dangerous nature of such activities, Congress presumably did not intend to expose the fisc to liability arising out of reasonably foreseeable negligent medical care for those injuries. The same reasoning appears equally applicable whether the subsequent medical malpractice by government health providers occurs before or after the plaintiff's discharge from service. Consequently, the public fisc rationale would produce a result contrary to that achieved by the Court in *Brown*.

How would this hypothetical rationale affect the first case consolidated for decision in *Feres*? There, decedent died in a fire in military barracks.[132] The complaint alleged that the government was negligent for housing the plaintiff in barracks which the government knew or should have known were unsafe, due to a defective heating plant.[133] One might assert that because decedent's death-producing injuries occurred on-post, and because quartering soldiers is an essential part of military service, those injuries should be deemed incident to military service. This is not a persuasive assertion. Decedent might have been asleep at the time of the fatal fire, or writing a letter home, or reading a magazine. Absent evidence that decedent was exposed to the risk of fire as a result of his having been engaged in an activity incident to military service, the suggested rationale, protecting the fisc from damages arising out of the inherently dangerous nature of activities incident to military service, would point to permitting the action to proceed pursuant to the FTCA.

How would the suggested rationale apply to other, perhaps more difficult factual patterns? In *Del Rio v. United States*,[134] the plaintiff, on active duty in the Navy, allegedly received negligent prenatal care by Navy physicians resulting in personal injuries to her,

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States, 209 F.2d 463, 464 (2d Cir. 1954), *aff'd*, 348 U.S. 110 (1954).

132. *Feres*, 340 U.S. at 137.

133. *Id.*

134. 833 F.2d 282 (11th Cir. 1987).

personal injuries to Frederick, a twin who survived, and the death of Michael, the other twin, who lived only five days.[135] Plaintiff initiated three actions; one in her individual capacity to recover for her personal injuries, one as next friend of Frederick to recover for his personal injuries, and a wrongful death action arising out of the death of Michael, brought by the plaintiff as personal representative of decedent's estate.[136] The government moved to dismiss all three actions pursuant to *Feres*.[137] The district court granted the motions.[138] The Eleventh Circuit affirmed in part, reversed in part, and remanded.[139]

The Eleventh Circuit noted that the *Johnson* Court "unequivocally expanded the *Feres* analysis to include all three rationales [set forth in *Stencel*]."[140] Finding all three of those rationales applicable to the action for personal injuries to the plaintiff, the court affirmed the dismissal of that action.[141] However, the court concluded that none of the three rationales applied to the claim for injuries to Frederick, a dependent child of the service member.[142] Therefore, the court reversed dismissal of that action and remanded it for further proceedings.[143] With regard to the wrongful death action arising from the death of Michael, the court, noting that the mother would receive money damages if the action produced a judgment for the plaintiff, concluded that this action, like the plaintiff's individual action, was also *Feres* barred.[144]

In *Irvin v. United States*,[145] the plaintiff, on active duty in the Army, allegedly received negligent pre-natal care from Army physicians resulting in personal injuries to her and the death of her four-day old daughter, Quintessa.[146] Plaintiff and her husband initiated two actions; one to recover for the personal injuries to the plaintiff, and one to recover damages for the death of their daughter.[147] The district court granted the government's motion to dis-

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135. *Del Rio*, 833 F.2d at 284.
136. *Id.*
137. *Id.*
138. *Id.*
139. *Del Rio*, 833 F.2d at 288.
140. *Id.* at 285-86.
141. *Id.* at 286.
142. *Id.* at 287.
143. *Id.* at 288.
144. *Del Rio*, 833 F.2d at 288.
145. 845 F.2d 126 (6th Cir. 1988), *cert. denied*, 488 U.S. 975 (1989).
146. *Irvin*, 845 F.2d at 127.
147. *Id.*

miss both actions pursuant to *Feres*,[148] and the Sixth Circuit affirmed.[149]

The Sixth Circuit, noting that the Supreme Court in *Johnson* had reaffirmed *Stencel*'s three reasons for the *Feres* bar, found all three applicable to the action for personal injuries to the plaintiff.[150] As to the death of Quintessa, the court found that the treatment accorded the mother was inseparable from the treatment accorded Quintessa as a fetus.[151] Given the common genesis of the injuries to both, and the fact that the mother's action was *Feres* barred, the court concluded that the action arising out of the death of Quintessa was likewise barred.[152] Moreover, the court explicitly repudiated the conclusion achieved by the Eleventh Circuit in *Del Rio*, that the action for injuries to the surviving child was not barred.[153] The Sixth Circuit concluded that "the genesis test" applied by it was more consistent with the Supreme Court's opinions.[154]

There is an obvious unseemliness in having two circuits, both purporting to rely on Supreme Court opinions, achieve inconsistent results in analogous circumstances. Still, given the Court's inconstancy in identifying and applying the reasons underlying *Feres*, such unseemliness is hardly surprising. How would *Del Rio* and *Irvin* be resolved under the rationale recommended by this author? Clearly, in neither case was the injury to the service person one arising out of an activity incident to military service. Neither becoming pregnant nor pregnancy itself is such an activity. Therefore, the suggested rationale would lead to the conclusion that none of the actions in the two cases would be *Feres* barred.

Next, try the suggested rationale on *Shearer*. Private Shearer was kidnapped and murdered by Private Heard while both were off-duty and off-post.[155] To the Court, the plaintiff's claim that the Army had negligently failed to control Heard struck at the core of the concerns over a civilian court second-guessing military decisions and thus impairing essential military discipline.[156] It therefore barred the negligence action under *Feres*. Analyzing the opin-

148. *Id.* at 128.
149. *Id.* at 131.
150. *Id.* at 130.
151. *Irvin*, 845 F.2d at 131.
152. *Id.* at 131.
153. *Id.*
154. *Id.*
155. *Shearer*, 473 U.S. at 53.
156. *Id.* at 57-58.

ion under the suggested rationale, it would be argued that Congress did not intend to expose the fisc to damage awards for negligently caused injuries arising out of activities incident to military service, given the inherent danger of such activities. Therefore, the relevant inquiry in *Shearer* would be: Did the death-producing injuries sustained by the victim arise out of an activity incident to military service? Since at the time of the kidnapping and murder, Private Shearer was off-duty and off-post, the answer would be no, and *Feres* would not bar the action.

Another type of claim that should be examined includes those actions in which a soldier is injured while engaging in an activity incident to military service, and his injuries in turn generate injuries to civilian relatives. In some of the cases, the injuries to the service person were caused by handling radioactive materials while assisting in the Manhattan Project.[157] In others, the service person's injuries resulted from exposure to nuclear bomb testing.[158] In several cases, the soldiers' injuries resulted from exposure to Agent Orange.[159] In addition to the actions initiated by service personnel, actions were initiated on behalf of their children for genetic defects flowing from the original service-connected injuries and by their spouses for emotional distress occasioned by the injuries sustained by the service personnel and by their children.[160] Not surprisingly, given the Supreme Court's inconsistency in identifying and applying the reasons underlying *Feres*, the opinions produced in the cases involving radioactive materials, nuclear bomb testing, and Agent Orange are hardly consistent either in result or reasoning.

How would those cases be resolved through utilization of our suggested rationale? In all of the cases, the initial injuries to the service personnel were sustained while the personnel were engaged in an activity incident to military service. For that reason, the claims of those plaintiffs would be precluded by *Feres*. Suppose, however, that in addition to the original negligence that occasioned those injuries, there was subsequent governmental negligence in failing to provide a timely warning to the then discharged victims,

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157. *See, e.g.*, Lombard v. United States, 690 F.2d 215 (D.C. Cir. 1982), *cert. denied*, 462 U.S. 1118 (1983).

158. *See, e.g.*, Laswell v. Brown, 683 F.2d 261 (8th Cir. 1982), *cert. denied sub nom.* Laswell v. Weinberger, 459 U.S. 1210 (1983).

159. *See, e.g.*, In re Agent Orange Product Liability Litigation, 506 F. Supp. 762 (E.D.N.Y. 1980), *rev'd on other grounds*, 635 F.2d 987 (2d Cir. 1980), *cert. denied sub nom.* Chapman v. Dow Chemical Co., 454 U.S. 1128 (1981).

160. See notes 157-59 and accompanying text.

and that such subsequent negligence exacerbated the initial injuries. How should the rationale suggested by the author apply? It should lead to the conclusion that *Feres* precludes recovery for the exacerbated injuries. Exacerbation of injuries arising out of an activity incident to military service, even by post-discharge negligence, is hardly an extraordinary, unforeseeable event. To subject the fisc to vulnerability to such claims would be to subject the government to liability for injuries having been occasioned initially by negligence relating to activities incident to military service. Vulnerability to liability for such foreseeable, post-discharge aggravation would impact on the fisc in much the same manner as would such vulnerability for the initial injuries. Both would subject the fisc to liability for injuries having their origin in the inherently dangerous activities incident to military service.

How would the claims asserted by the civilian children and spouses of the military personnel be treated? These claims also would deplete the fisc as the result of inherently dangerous activities incident to military service. Whether one characterizes the claims of children and spouses as "derivative,"[161] or utilizes a "genesis"[162] test, or a "but for"[163] test (all of these phrases have been employed by courts attempting to apply the Supreme Court's reasons for the *Feres* bar), the critical fact under the proposed rationale is that all of these types of claims arise out of the initial injuries to service persons who were, at the time of injury, engaged in activities incident to military service. To subject the government to liability for such claims would be to expose the fisc to depletion as the ultimate consequence of the inherently dangerous activities undertaken incident to military service. Thus, the suggested rationale would preclude all such actions.

In another factual pattern, the plaintiff's husband, an Air Force officer, was seriously injured in a plane crash allegedly resulting from negligence on the part of the Air Force.[164] The plaintiff sued the government under the FTCA to recover damages for the loss of consortium she sustained by reason of her husband's personal injuries.[165] The government moved to dismiss on the basis of *Feres*.[166]

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161. *Lombard*, 690 F.2d at 223.

162. *Irvin*, 845 F.2d at 130.

163. *Lombard*, 690 F.2d at 223.

164. Harrison v. United States, 479 F. Supp. 529, 531 (D. Conn. 1979), *aff'd without opinion*, 622 F.2d 573 (2d Cir. 1979), *cert. denied*, 449 U.S. 828 (1980).

165. *Harrison*, 479 F. Supp. at 531.

166. *Id.* at 531-32.

The plaintiff resisted the motion by arguing that, even though her husband would be precluded from suing by *Feres*, her consortium claim should not be barred because, under the applicable state law, the consortium claim was characterized as independent not derivative.[167] The district court granted the motion to dismiss.[168] The Second Circuit affirmed without opinion and the Supreme Court denied certiorari.[169]

The district court's opinion, unelaborated by appellate consideration, is hardly a model of clarity. The court, characterizing the case as one of first impression,[170] employed the three reasons for the *Feres* bar set forth in *Stencel*[171] with the half-dozen reasons appearing in *Feres*,[172] shook well and concluded that the FTCA "does not support such a claim . . . in that it does not fit within the government's consent to liability expressed in the Act."[173]

What result would the suggested public fisc rationale produce? Since the plaintiff's claim clearly arose from the injuries sustained by her husband while he was engaged in an activity incident to military service, the consortium action would be precluded. Is that conclusion undercut by the asserted state-law characterization of such actions as independent rather than derivative? It probably is not. While it is true that the Act provides that the government's liability is to be determined by the law of the state where the governmental negligence occurred, the Act does not provide that the scope of the waiver of sovereign immunity is to be controlled by any state law.[174] Rather, this issue goes to the subject matter jurisdiction of federal district courts, and such issues are necessarily governed by federal law. Under the suggested rationale, it is hypothesized that Congress, in enacting the FTCA, did not intend to waive sovereign immunity with regard to injuries sustained in activities incident to military service, given the inherent danger of such activities and the consequential impact on the fisc. It is apparent that the plaintiff's consortium action, however characterized by state law, arose out of and represents an aspect of liability flowing from the injuries to her husband. Consequently, the au-

167. *Id.* at 532.
168. *Id.* at 531.
169. Harrison v. United States, 449 U.S. 828 (1980).
170. *Harrison*, 479 F. Supp. at 533.
171. *Id.* at 534.
172. *Id.* at 533-34.
173. *Id.* at 536.
174. *See* 28 U.S.C. § 1346(b) (1988).

thor's suggested rationale, like the court's opinion, would bar the action. Using the reasoning suggested here would spare the court the awkwardness and perhaps even embarrassment of wading through the numerous and varied reasons assigned by the Supreme Court at different times.

The suggested rationale can be tested on two additional cases. In *C.R.S. v. United States*,[175] the plaintiff-husband, while a member of the Minnesota National Guard and on active duty at Fort Benning, Georgia, underwent abdominal surgery.[176] The surgery was performed at an Army hospital, where the plaintiff-husband received blood transfusions.[177] He recovered from his surgery with no complications, and completed his military duty.[178] He married the plaintiff-wife and she bore three children, the youngest of whom, the plaintiff-child, tested positive for the HIV virus.[179] Subsequently, both husband and wife had positive results from an AIDS test.[180] Alleging that the blood transfusions given to the husband during the surgery constituted the source of the virus, the three plaintiffs brought FTCA actions against the United States.[181] The government, asserting the *Feres* bar, moved to dismiss, or in the alternative, for summary judgment.[182]

The court identified the three reasons for *Feres*, reaffirmed in *Johnson*.[183] Because the Veterans Administration had denied benefits to the husband, the court concluded that the exclusivity reason did not apply to the case.[184] The court stated that the "distinctly federal" nature of the relationship was not present due to the lack of veterans' benefits.[185] As for the third reason, the court decided that military discipline was not threatened because the plaintiff was no longer a member of the military and the injury was

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175. 761 F. Supp. 665 (D. Minn. 1991).
176. *C.R.S.*, 761 F. Supp. at 666.
177. *Id.*
178. *Id.*
179. *Id.*
180. *Id.*
181. *C.R.S.*, 761 F. Supp. at 666.
182. *Id.*
183. *Id.* at 667-68.
184. *Id.* at 668.
185. *Id.* The court wrote:

> The government's concern with the "distinctively federal" relationship cannot be given weight in the absence of veterans' benefits. The uniformity that the *Feres* Court sought to provide (by prohibiting the application through the FTCA of various state tort laws) was to be established through the "generous statutory disability and death benefits" . . . of the Veterans' Benefits Act.

Id. (quoting in part United States v. Johnson, 481 U.S. 681, 689 (1987)).

not related to military activity.[186]

The court held that *Feres* did not bar the claims because the claims did not implicate the three bases for the *Feres* doctrine.[187] The court then denied the government's alternative motions.[188] Almost as an afterthought, the court added, "[i]n the present case, it is highly questionable that elective surgery wholly unrelated to a serviceman's military duties is 'incident to service'. . . ."[189]

In light of the Supreme Court's precedents, it is not surprising that the court's analysis in the *C.R.S.* case is somewhat confusing. To hold that the second reason noted in *Stencel* and reaffirmed in *Johnson* (after being deleted by *Shearer*)—"[t]he Veterans' Benefits Act establishes, as a substitute for tort liability, a statutory 'no fault' compensation scheme which provides generous pensions to injured servicemen, without regard to any negligence attributable to the Government"[190]—is not applicable because the VA denied such benefits to husband-plaintiff, is to invite great mischief. First, it grants to the government the power to preclude or permit an FTCA action simply by granting or denying VBA benefits. Second, it grants to the claimant an even anterior power to preclude or permit his contemplated FTCA action by deciding whether or not to seek VBA benefits. It is difficult to imagine that the Supreme Court ever anticipated such a result or believed that Congress had so intended. Next, to hold, as the district court did, that because the Veterans Administration had denied VBA benefits, the "distinctively federal relationship" reason did not apply, appears to be a non sequitur. Even absent the award of such benefits, the assumed impropriety of applying the law of the state where the governmental negligence occurred to the relationship between soldier and government would subsist.

The district court's method of dealing with the third reason, military discipline, is somewhat more logical. Judicial second-guessing

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186. *C.R.S.*, 761 F. Supp. at 668. The court held that:

> Plaintiffs' claims, in contrast to those reviewed by the Supreme Court in *Johnson*, have very little "potential . . . [to] implicate military discipline." . . . Allowing a suit by a former member of the military for acts unrelated to the military mission does not, on these facts, threaten the integrity of military decision making. Furthermore, *some* inquiry into military activities and decision making is not a sufficient rationale for barring all suits. The same, or even greater, level of inquiry may result when a civilian sues the government for conduct related to military activities.

Id. (quoting *Johnson*, 481 U.S. at 692).

187. *Id.*

188. *Id.* at 670.

189. *Id.* at 669.

190. *Stencel*, 431 U.S. at 671.

of military acts or decisions relating to surgery does seem to possess less likelihood of generating an adverse effect on military discipline than the acts and decisions at issue in *Johnson*.[191] Still, the district court's opinion leaves unanswered two critical questions with regard to the military discipline reason. First, would a potential judicial determination that the Army had provided negligent and possibly fatal medical care to a soldier not generate a significant adverse effect on the morale and discipline of other soldiers? Second, what about *Feres* itself? In *Feres*, two of the three actions consolidated for decision involved military medical malpractice analogous to that in the case before the district court.

Each of the difficulties noted in the district court's opinion reflects the confusion generated by the Supreme Court's inconstancy in identifying the reasons underlying *Feres* and the lack of persuasiveness of each of those reasons. It is only as an afterthought that the district court's language takes on an inherent thrust of persuasiveness and logic. It states that of course "it is highly questionable that elective surgery wholly unrelated to a serviceman's military duties is 'incident to service.' "[192] The logical consequence of this language is the suggested rationale for the *Feres* bar. Congress, in enacting the FTCA, did not intend to expose the fisc to claims for injuries occasioned by activities incident to military service, given the inherently dangerous nature of such activities. Were the Supreme Court to embrace that single rationale for the *Feres* bar, the Court would eliminate the confusion pervasive in the lower courts' opinions, provide a persuasive reason for *Feres*, and enormously simplify the judicial task of determining when an FTCA action is and is not precluded. In *C.R.S.*, once it concluded that the surgery had not been occasioned by any injury sustained in an activity incident to military service, the court would have known that *Feres* did not bar the action.

In *M.M.H. v. United States*,[193] while the plaintiff was on active duty in the Army, a military doctor misdiagnosed the plaintiff as having been infected with the HIV virus.[194] The Army notified the plaintiff that she was so infected.[195] After the plaintiff's discharge,

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191. *C.R.S.*, 761 F. Supp. at 668. In *Johnson*, the FAA controllers' alleged negligence resulted in the deaths of all aboard a Coast Guard helicopter attempting to rescue a vessel in distress, a basic Coast Guard function. *Johnson*, 481 U.S. at 683.

192. *C.R.S.*, 761 F. Supp. at 669.

193. 966 F.2d 285 (7th Cir. 1992).

194. *M.M.H.*, 966 F.2d at 286.

195. *Id.*

the Army discovered its error, yet never notified the plaintiff of its error.[196] The plaintiff sued the government under the FTCA, seeking to recover for the exacerbated emotional distress she sustained as the result of the post-discharge negligent failure to inform her that she was not AIDS-infected.[197] The government moved for summary judgment on the basis of *Feres*.[198] The district court granted the motion but the Seventh Circuit reversed.[199]

The Seventh Circuit identified the three reasons for *Feres* that were identified by the Supreme Court in *Stencel* and reaffirmed by the Court in *Johnson*.[200] The court then concluded that none of those reasons applied to the alleged post-discharge negligence of the Army, characterizing post-discharge discovery and failure to notify as an "independent negligent act."[201] The court noted that, had the Army "simply failed to rectify [its] prior mistake, this failure might be one continuous tort," thus requiring the application of *Feres*.[202] In short, what saved the action from the *Feres* bar was that "the plaintiff presented evidence that the government learned of its mistake *after* the plaintiff's discharge."[203]

How would the suggested rationale apply to the *M.M.H.* case? Assuming that the mislabelled blood sample had not resulted from an injury sustained in an activity incident to military service, *Feres* would not bar the action, regardless of whether or not the Army had committed a new and "independent tort after discharge."[204] Thus, using the proposed rationale, the distinction between continuous negligence and an independent post-discharge negligent act, apparently critical under the Supreme Court's three rationales in *Feres*, would be irrelevant.

Assuming, contrary to the apparent facts in *M.M.H.*, that the mislabelled blood sample had resulted from medical treatment afforded the victim for an injury sustained in an activity that *was* incident to military service, then the suggested rationale would point to the conclusion that the pre-discharge negligence and its injurious consequences were not cognizable in an FTCA action.

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196. *Id.* at 287.
197. *Id.*
198. *Id.*
199. *M.M.H.*, 966 F.2d at 287.
200. *Id.*
201. *Id.* at 289.
202. *Id.*
203. *Id.*
204. *M.M.H.*, 966 F.2d at 288 (citing PROSSER AND KEETON ON THE LAW OF TORTS § 131 at 1036 n.44 (5th ed. 1984)).

The Seventh Circuit presumably would arrive at the same conclusion if it applied the Court's three rationales. The rationale proposed by this author would preclude the action because of the conclusion that, in enacting the FTCA, Congress had not intended to expose the fisc to claims for injuries sustained in an activity incident to military service, given the danger inherent in such activities. This conclusion would also preclude claims arising out of negligent medical treatment of such injuries, given the predictable frequency of such injuries and reasonably foreseeable intervening medical negligence. Suppose, however, there was post-discharge negligence associated with medical treatment, which was attributable to the government. What would the hypothetical rationale suggest? It would point toward precluding such an action for exactly the same reason: the predictable frequency of injuries sustained in activities incident to military service and the reasonable foreseeability of subsequent negligent medical care, whether occurring before or after the victim's discharge. Thus, distinguishing between a continuous tort and a separate post-discharge tort, unnecessary under the rationale with regard to the actual facts of *M.M.H.*, would be equally unnecessary if the negligent medical care occurred in the treatment of an injury sustained in an activity incident to military service. The suggested rationale, not requiring the rather elusive, even nebulous distinction between continuous and independent negligent acts, takes on an additional independent propriety.

A Direction For Federal Tort Immunity After *Feres*

Given the inconstancy of the Supreme Court in identifying the rationales for the *Feres* bar, and the lack of persuasiveness of the reasons asserted, either the half-dozen in *Feres*, the three in *Stencel* (one of which was not alluded to in *Feres*), the one in *Shearer* (the one not alluded to in *Feres*), or the three reaffirmed in *Johnson*, there would seem to be only three basic alternatives available to the Court. First, the Court could simply retain the *Feres* bar and the three reasons asserted in *Johnson*. Of course, there are two serious weaknesses in that alternative: the lack of persuasiveness of those reasons and the obvious lack of guidance they afford lower federal courts required to determine the applicability of *Feres*.

Second, the Court could concede error in interpreting congressional intent and overrule *Feres*. Were the Court to overrule *Feres*, the onus would be cast on Congress to determine whether and to

what extent it wanted the FTCA to apply to injuries incident to military service. While, at least theoretically, this might be the purest method of resolution available, there would be certain practical problems involved in the procedure. Moreover, for the reasons noted earlier, overruling *Feres* seems unlikely to occur in the foreseeable future. Even were it to occur, Congress, in attempting to resolve the issue, would almost certainly consult the Court's opinion in *Feres* and the Court's reasons for that opinion as stated in all of the cases from *Feres* through *Johnson*. Congress presumably would recognize the confusion generated among the lower courts by the various reasons offered by the Supreme Court. Thus, Congress would be confronted with limited alternatives: accepting the overruling of *Feres* and subjecting the fisc to predictably enormous liability; reinstating *Feres* and the various reasons asserted by the Court; or reinstating *Feres* with some of the reasons asserted by the Court, or none of those reasons. The Court itself has already tried limiting the reasons from half a dozen to three to one to three. The results of that approach have not been worthy of congressional emulation. Of course, Congress could reinstate *Feres*, repudiate the Court's reasons, and fashion a whole new set of reasons or only one reason. It is even possible that Congress might adopt the rationale suggested in this article.

Still, there is a certain intuitive sense that, since the Court has generated the problem with its interpretation of the FTCA in *Feres* and its subsequent inconstancy in offering rationales for that interpretation, perhaps the Court should attempt to ameliorate the problem. This suggests the third alternative available to the Court. It could reaffirm its basic conclusion in *Feres*: "We conclude that the Government is not liable under the Federal Tort Claims Act for injuries to servicemen where the injuries arise out of or are in the course of activity incident to service."[205] The Court could then offer one rationale for that conclusion: In enacting the FTCA, Congress did not intend to expose the fisc to the predictably enormous liability arising from injuries sustained in activities incident to military service, given the inherently dangerous nature of those activities. This single rationale has two basic advantages. It would complement the "holding" of *Feres* quoted above and it would afford lower federal courts a meaningful guide to follow in determining when *Feres* should and should not preclude an FTCA action. The proposed rationale seems almost to memorialize intellectual con-

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

cepts already perceived by the Court, though not yet verbalized, and to provide lower courts with a persuasive rationale that would facilitate decision in future cases. A rationale possessing these properties would not be half bad.

Feres and The Government Contractor Defense

Perhaps the most illuminating, carefully considered, and persuasively supported judicial opinion dealing with the government contractor defense was that in *Bynum v. FMC Corp.*[206] Plaintiff, a member of the Mississippi National Guard taking part in a seventeen-day training mission at Fort Stewart, Georgia, was injured when the M-548 cargo carrier in which he was riding fell off a bridge and crashed into the creek below.[207] The plaintiff's injuries included two broken legs.[208] To recover for his injuries, plaintiff brought a product liability action against the defendant-manufacturer, FMC.[209] Following discovery, the defendant moved for summary judgment based on the government contractor defense.[210]

The defendant relied heavily on the statements of Dr. Malcolm Newman and William H. Stites to support its motion for summary judgment.[211] Dr. Newman attributed the accident to design defects of the M-548.[212] Stites' affidavit indicated that "the specifications for the M-548 were the work product of the United States Army Tank-Automatic Command ("TACOM"), which was responsible for the designing and testing of wheeled and tracked vehicles procured by the government for military use."[213]

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206. 770 F.2d 556 (5th Cir. 1985). See notes 219 - 222 for explanation of the government contractor defense.

207. *Bynum*, 770 F.2d at 558.

208. *Id.*

209. *Id.*

210. *Id.*

211. *Bynum*, 770 F.2d at 558.

212. *Id.*

213. *Id.* at 559. The district court stated:

> According to Stites, TACOM supplied FMC with a technical data package containing over 2500 sheets of detailed drawings that were to be used in the manufacture of the M-548. Under the contract, . . . FMC was obligated to comply strictly with these design specifications in producing the M-548. If FMC desired to alter any particular portion of the design, the proposed modification had to be submitted to TACOM for review and testing. Any unapproved deviation from the government's specifications would result in rejection of the vehicles by the government's inspectors who, in accordance with the contract, worked full time at the FMC plant.
>
> Finally, Stites stated in his affidavit that the particular vehicle that was involved in the accident had been manufactured in strict compliance with the government's plans and specifications. The type of event that Newman described as being the most likely

The plaintiff did not file an evidentiary response to the motion for summary judgment.[214] The parties stipulated that, "[t]he vehicle in issue in the present case was manufactured in accordance with precise design specifications furnished by the United States Government, the vehicle conformed to the specifications, and the manufacturer FMC knew of no patent dangers in the vehicle that were not known to the United States Government."[215] The district court judge granted the defendant's motion for summary judgment, noting that his decision was based on an *Erie* guess that the courts in Mississippi courts would probably apply the government contractor's defense.[216]

The Fifth Circuit affirmed, but on a different basis.[217] The court began by reviewing *Feres* and *Stencel*.[218] It was obvious from the facts that Bynum would be precluded from maintaining a successful FTCA action by *Feres*. Indeed, under the rationale this author suggests for *Feres*, the claim would fail since the plaintiff's injuries resulted from an activity incident to military service. Moreover, if the plaintiff recovered from FMC, FMC would be barred from enjoying indemnification from the government under *Stencel*. To permit such indemnification would be to compensate the victim ultimately from the public fisc. Consequently, if the plaintiff were permitted to recover from FMC in circumstances where FMC could not secure indemnification from the government, even though the cause of the plaintiff's injuries existed in the design specifications created by the government, it would create a potential unfairness to the government contractor.

The Fifth Circuit considered two common law defenses that had been made available to government contractors. First, "a contractor would not be liable for damages resulting from specifications provided by another unless those specifications were so obviously defective and dangerous that a contractor of reasonable prudence would be put on notice that the work was dangerous and likely to cause injury."[219] The problem with the first defense, the court

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cause of the accident, Stites asserted, had never before occurred within the knowledge of FMC.

Id.

214. *Id.* at 558.

215. *Bynum*, 770 F.2d at 559 (citing Bynum v. General Motors Corp., 599 F. Supp. 155, 156 (N.D. Miss. 1984)).

216. *Bynum*, 770 F.2d at 560.

217. *Id.* at 560-62.

218. *Id.*

219. *Id.* at 563 (citing RESTATEMENT (SECOND) OF TORTS § 404 cmt. a (1965)).

found, was that it might be inappropriate when a product liability action has been brought utilizing strict liability principles,[220] as was the case in *Bynum*. The second traditional defense holds the contractor entitled to the government's sovereign immunity where the contractor acts as either an agent or an officer of the federal government.[221] The problem with the second defense is that it might not apply where the defendant is an independent contractor,[222] as was apparently the case in *Bynum*.

The problems with these dual common law defenses led the court to fashion a government contractor defense that would take into account the interests of all of the involved parties: the injured victim, the contractor, and the government. The court saw fit to limit the government contractor defense to those cases in which the injured victim would be precluded by *Feres* from maintaining an FTCA action against the government. A question remains as to whether the defense fashioned by the court is fair to the victim.

The Fifth Circuit weighed the government contractor defense it established against the competing state interests underlying the imposition of strict liability in a product liability action. One of the state interests enumerated by the court was to "vindicate the reasonable expectations of the consumer that a product [used by him] will not be unreasonably dangerous."[223] The court found this state interest to be inapplicable with regard to the government contractor for two reasons. First, service personnel " 'recognize when they join the armed forces that they may be exposed to grave risks of danger'."[224] That reason would take on an a fortiori persuasiveness under the rationale this author proposed for the *Feres* bar. The "grave risks of danger" would exist and be recognized most clearly when the soldier is engaged in an activity that is incident to military service. Second, the court found that, "even if servicemen have the same expectations of safety as those of ordinary consumers, these expectations would be directed toward the government, not the military contractor, when the government is responsible for the formulation of the design specifications in question and accepts

220. *Bynum*, 770 F.2d at 563.

221. *Id.* at 564 (quoting Yearsley v. W. A. Ross Construction Co., 309 U.S. 18, 21 (1940)).

222. *Bynum*, 770 F.2d at 564.

223. *Id.* at 572.

224. *Id.* (quoting McKay v. Rockwell International Corp., 704 F.2d 444, 453 (9th Cir. 1983), *cert. denied*, 464 U.S. 1843 (1984)).

the product once it is manufactured."[225]

According to the Fifth Circuit court, another state interest underlying product liability was to ensure that the prices of products reflected the risk of accidents, thereby discouraging the use of such products.[226] However, the court rejected the efficacy of this approach in the area of government contractors.[227] The court also noted that "[s]trict liability . . . functions to deter manufacturers from marketing unreasonably dangerous products."[228] However, once again the court recognized that this interest would not be protected in the government contractor context.[229]

The final rationale for the imposition of strict product liability identified by the court is compensation for the injured victim. The Fifth Circuit concluded:

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225. *Bynum*, 770 F.2d at 572.

226. *Id.* at 571-72. The court stated that products liability served:

> [t]o force [producers] to incorporate accident costs into the price of their products. The theory is that the increased prices will then discourage consumers from purchasing risky products and thereby lower total accident costs to society. Further, imposing the cost of accidents generally on manufacturers and consumers allows the costs of product-caused injuries to be spread over a class of users.

Id. at 571.

227. *Bynum*, 770 F.2d at 572. The court stated that:

> In the context of the government contractor defense, however, neither of those goals would be met. First, . . . the demand for military equipment, unlike consumer goods, is relatively inelastic. . . . "Meeting adequately the needs of national defense, not accident costs, is the ultimate standard by which purchases of military equipment must be measured." Increasing prices of military equipment, therefore, would not often result in the use of safer substitutes but might pose the risk of a diminished military capability. Second, the loss-spreading goal of strict liability is built on the presumption that the manufacturer sells a large volume of products to a large number of customers. This is simply not the case with respect to military equipment purchased by the government. The effect of strict liability here would be to shift the entire cost of the accident to the military contractor or, more likely, the government, thus subverting the *Feres-Stencel* doctrine.

Id. at 571-72 (quoting in part *McKay*, 704 F.2d at 452) (citation omitted).

228. *Bynum*, 770 F.2d at 572.

229. *Id.* The court stated:

> When military equipment is at issue, though, there is a strong government interest in encouraging the military contractor to agree to manufacture potentially dangerous products for the government and to comply strictly with government design specifications. Nor do these policies deprive the user of all protection from unintended design defects. As is illustrated by the record in this case, the government "has both the ability to recognize safety problems in military equipment and to negotiate with the suppliers to remedy those problems." There is thus strong reason to believe, especially in view of the relatively inelastic demand for military equipment, that requiring the contractor to test war materials would merely increase defense costs without resulting in significantly safer products.

Id. (quoting in part *McKay*, 704 F.2d at 452) (footnote omitted) (citation omitted).

> [This] justification . . . does not compel the imposition of strict liability for defective designs supplied by the government. As the Supreme Court noted in *Stencel*, "the Veterans' Benefits Act establishes, as a substitute for tort liability, a statutory no fault compensation scheme which provides generous pension to injured servicemen." While strict liability would obviously increase that compensation, to the extent the military contractor has to bear the cost of the increase, the burden would fall on an innocent defendant.[230]

Consequently, the court determined that the concerns of the federal government and the contractor justified overriding the state interests underlying the imposition of strict product liability. Moreover, the court determined that federal concerns justified fashioning the government contractor defense as a part of federal common law, making the defense applicable whether or not recognized by the state involved.[231]

The government contractor defense fashioned by the court required that the following three elements be present. First, "the government [must be] immune from liability under the *Feres-Stencel* doctrine."[232] This federal immunity requirement would assure that "the federal interests in avoiding judicial and state intrusion upon military authority are present and warrant the imposition of federal common law."[233] Second, the court concluded that:

> [T]he military contractor must prove that the government established reasonably precise specifications for the allegedly defective military equipment and that the equipment conformed to those specifications. This element makes clear that federal law provides no defense to the military contractor that mismanufactures military equipment or that is itself ultimately responsible for the design defect.[234]

The third requirement set forth by the court was that the plaintiff must show that the government was warned about specification errors that the contractor knew about, and that the contractor also warned the government about dangers involved in the equipment usage of which the government was not aware.[235] This third re-

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230. *Bynum*, 770 F.2d at 572 (quoting in part *Stencel*, 431 U.S. at 671) (citation omitted).

231. *Bynum*, 770 F.2d at 574.

232. *Id.*

233. *Id.*

234. *Id.*

235. *Id.* The court was unwilling to impose on the contractor a duty to warn the government of risks of which the contractor had only constructive knowledge, explaining:

> Such a duty would compel the military contractor to reevaluate the design specifications furnished by the government and to engage in testing not required under the government contract. Such reevaluations and additional testing would mean delay and an increase in defense costs not contemplated by the military authorities. Fur-

quirement would assure that the government is able to make design and use decisions based on all readily available information. Finding that each of the three noted requirements had been satisfied, the Fifth Circuit affirmed the summary judgment in favor of FMC.[236]

There is an appealing symmetry to the Fifth Circuit's application of the government contractor defense. If the plaintiff is precluded by *Feres* from recovering from the government, and the contractor is barred by *Stencel* from securing indemnification from the government, there would be an impropriety in imposing liability on the contractor for injuries resulting from defective design specifications created by the government. Moreover, the court's opinion offers acceptable reasons for sublimating the usual state interests in imposing strict liability into a higher federal common law negating such interests. If the previously suggested *Feres* rationale were to be added to the court's opinion in *Bynum*, there would be a near perfect application of the government contractor defense.

The Supreme Court considered the government contractor defense in *Boyle v. United Technologies Corp.*[237] *Boyle* involved a United States Marine who drowned after the helicopter he had been flying crashed into the Atlantic Ocean and he was trapped in the helicopter.[238] Decedent's father brought a wrongful death action against the manufacturer of the helicopter, alleging that the decedent's death had resulted from the defendant's defective design of the emergency escape system.[239] The jury returned a verdict for the plaintiff and the federal district court denied defendant's motion for judgment notwithstanding the verdict.[240] The Fourth Circuit reversed, concluding that, the defendant had established the "military contractor defense."[241] When the Supreme Court granted certiorari, it set the stage to determine whether to recog-

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> thermore, . . . the military has the ability to recognize safety problems or at least negotiate with the contractors for further testing, especially with respect to those design specifications that it generates itself. When to require additional testing of military equipment, and at what cost, are decisions that are better left to the military and the political branches of government.

Bynum, 770 F.2d at 576 (citation omitted).

236. *Bynum*, 770 F.2d at 578.

237. 487 U.S. 500 (1988).

238. *Boyle*, 487 U.S. at 502.

239. *Id.* at 502-03.

240. *Id.* at 503.

241. *Id.*

nize the government contractor defense and, if recognized, what the foundation and requirements for the defense should be.

Boyle was argued before an eight-member Court,[242] but the Court ordered reargument after a ninth Justice joined the Court.[243] Ordering reargument suggests that the Court may have been deadlocked and required a ninth and deciding vote. Indeed, the Court ultimately divided 5-4, and the majority opinion was written by Justice Scalia.[244] Since *Bynum* had found that the government contractor defense rested on *Feres* and *Stencel*, and since Justice Scalia had authored the dissenting opinion in *Johnson* concluding that *Feres* had been wrongly decided, one might have assumed that the majority opinion in the reargued case would repudiate the government contractor defense. One would have been wrong.

Justice Scalia, writing for the Court, approved the government contractor defense.[245] Following the lead of the Fifth Circuit in *Bynum*, the Court fashioned the defense as federal common law.[246] The elements the contractor is required to prove in order to assert the defense successfully were similar to those required by *Bynum*, and were identified by the Court as follows: "(1) the United States approved reasonably precise specifications; (2) the equipment conformed to those specifications; and, (3) the supplier warned the United States about the dangers in the use of the equipment that were known to the supplier but not to the United States."[247] However, *Feres* and *Stencel* were not the foundations upon which the Court-approved government contractor defense rested. Rather, the Court concluded that the foundation of the defense was the discretionary function exception to the FTCA.[248]

How does the discretionary function exception to the FTCA, intended to immunize the *government* from liability, apply to the *contractor*? The Court reasoned that any other decision was eco-

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242. Justice Powell had retired and his successor, Justice Kennedy, had not yet been confirmed.

243. Boyle v. United Technologies Corp., 484 U.S. 1054 (1988).

244. *Boyle*, 487 U.S. at 502.

245. *Id.* at 504.

246. *Id.*

247. *Id.* at 512.

248. *Id.* at 511 (citing to 28 U.S.C. § 2680(a)). Justice Scalia wrote:

> We think that the selection of the appropriate design for military equipment to be used by our Armed Forces is assuredly a discretionary function within the meaning of this provision. It often involves not merely engineering analysis but judgment as to the balancing of many technical, military, and even social considerations, including specifically the trade-off between greater safety and greater combat effectiveness.

Boyle, 487 U.S. at 511.

nomically illogical.[249]

Why did the Court feel compelled to supplant the *Feres-Stencel* foundation for the government contractor defense with the discretionary function exception to the FTCA, which is generally considered to immunize the government only? To a cynic, one possible answer may be that Justice Scalia, whose vote was necessary to form the five-Justice majority in *Boyle*, did not like *Feres* (remember his dissent in *Johnson*), but did like the government contractor defense. For him, the problem was to find some foundation for the defense other than *Feres*, and the discretionary function exception was it. Of course, Justice Scalia's opinion does not reflect this line of reasoning. Rather, he wrote:

> [T]he *Feres* doctrine, in its application to the present problem, logically produces results that are in some respects too broad and in some respects too narrow. Too broad, because if the Government contractor defense is to prohibit suit against the manufacturer whenever *Feres* would prevent suit against the Government, then even injuries caused to military personnel by a helicopter purchased from stock[,] . . . or by any standard equipment purchased by the Government, would be covered. Since *Feres* prohibits all service-related tort claims against the Government, a contractor defense that rests upon it should prohibit all service-related tort claims against the manufacturer—making inexplicable the three [additional] limiting criteria for contractor immunity.[250]

Again, one might comment, "That can't be right!" Even as fashioned in *Bynum*, the government contractor defense, although resting on the *Feres-Stencel* foundation, required the contractor to prove the three additional elements. These additional elements are not simply gratuitous; they demonstrate that the government, not the contractor, was primarily responsible for the injury-producing defect. It is in circumstances such as this that it would be inappropriate to permit the victim to recover from the nonculpable contractor, even though the victim cannot recover and the contractor cannot secure indemnification from the culpable government. If the injury-producing defect were attributable to the contractor and

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249. *Id.* at 511-12. The Court noted:

> The financial burden of judgments against the contractors would ultimately be passed through, substantially if not totally, to the United States itself, since defense contractors will predictably raise their prices to cover, or to insure against, contingent liability for the Government-ordered designs. To put the point differently: It makes little sense to insulate the Government against financial liability for the judgment that a particular feature of military equipment is necessary when the Government produces the equipment itself, but not when it contracts for the production.

Id.

250. *Id.* at 510.

not to the government, there would be no impropriety in permitting the victim to recover from the contractor, even though the victim could not recover and the contractor could not secure indemnification from the government. Had the Court recognized the significance of the three additional elements, similar to those required by *Boyle*, it would have been entirely free to adopt the *Bynum* formulation without imposing the defense into all cases covered by *Feres*. In this manner, the Court could have avoided the "too broad" results found by Justice Scalia.

Why would the *Feres* foundation produce results "too narrow"? Justice Scalia wrote:

> [R]eliance on *Feres* produces (or logically should produce) results that are in another respect too narrow. Since the doctrine covers only service-related injuries, and not injuries caused by the military to civilians, it could not be invoked to prevent, for example, a civilian's suit against the manufacturer of fighter planes, based on a state tort theory, claiming harm from what is alleged to be needlessly high levels of noise produced by the jet engines. Yet we think that the character of the jet engines the Government orders for its fighter planes cannot be regulated by state tort law, no more in suits by civilians than in suits by members of the Armed Services.[251]

Justice Scalia poses an artfully framed hypothetical, as it involves the noisome but not directly and immediately disabling effect of the sound of jet engines. Consider a hypothetical case suggested by the dissent.[252] Had the helicopter crashed on the beach rather than off the coast, causing the deaths of beachgoers, from whom could recovery be sought? Assuming that the defect that caused the crash was the product of design specifications approved by the government and that the three elements identified by the Court existed, the answer would seem to be no one. The government would be immune from liability because of the discretionary function exception to the FTCA. According to *Boyle*, "the selection of the appropriate design for military equipment to be used by our Armed Forces is assuredly a discretionary function within the meaning of this provision."[253]

The contractor would be immune from liability because of the government contractor defense fashioned by *Boyle*, which is equally applicable to claims arising out of injuries to service personnel or civilians. The ameliorating factor noted by the *Bynum* court, which predicated the government contractor defense on

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251. *Id.* at 510-11.
252. *Boyle*, 487 U.S. at 516 (Brennan, J., dissenting).
253. *Boyle*, 487 U.S. at 511.

Feres and *Stencel*, was that the injured soldier or his dependents would at least receive compensation under the VBA. Under the government contractor defense fashioned by *Boyle*, permitting such a defense in an action arising out of injuries or death of civilian victims from a product defect, the ameliorating factor would be absent. Not even the defendant in *Boyle* argued for such a sweeping result. It is ironic that in *Johnson*, Justice Scalia, author of the dissenting opinion finding that *Feres* had been wrongly decided, stopped short of voting to overrule *Feres* because the plaintiff had not requested such a result. Yet in *Boyle*, Justice Scalia, writing for the Court, fashioned a government contractor defense far broader than that sought by the defendant. As noted by the dissent, "respondent [contractor] has three times disavowed any reliance on the discretionary function exception, even after coaching by the Court, as has the Government."[254]

There are several problems inherent in the Court's decision in *Boyle* to supplant the *Feres-Stencel* foundation for the government contractor defense with the discretionary function exception to the FTCA. One of these problems has already been noted. *Boyle*'s conclusion would leave civilian victims of defective military products without remedy. This result seems sufficiently draconian in itself to suggest the impropriety of *Boyle*. Moreover, in fashioning the federal common law government contractor defense in *Boyle*, the Court, although purportedly performing a judicial function, created a defense more sweeping in application than that which government contractors had sought unsuccessfully from Congress.[255] While inaction on the part of Congress may not strip the Court of its power to decide, it should at least suggest circumspection on the part of the Court in determining how to decide. It is not difficult to imagine the outrage of the electorate had Congress enacted legislation effectively extending immunity from liability to the government *and* to government contractors for the injury or death of civilians caused by defective military equipment in all cases where:

(1) the United States approved reasonably precise specifications;

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254. *Boyle*, 487 U.S. at 526 (Brennan, J., dissenting) (footnote omitted).

255. *Id.* at 516. *See, e.g.*, H.R. 4765, 99th Cong., 2d Sess. (1986) (limitations on civil liability of Government contractors); S. 2441, 99th Cong., 2d Sess. (1986) (same). *See also* H.R. 2378, 100th Cong., 1st Sess. (1987) (indemnification of civil liability for Government contractors); H.R. 5883, 98th Cong., 2d Sess. (1984) (same); H.R. 1564, 97th Cong., 1st Sess. (1981) (same); H.R. 5351, 96th Cong., 1st Sess. (1979) (same). *Boyle*, 487 U.S. at 515 n.1 (Brennan, J., dissenting).

(2) the equipment conformed to those specifications; and,
(3) the supplier warned the United States about the dangers in the use of the equipment that were known to the supplier but not to the United States.[256]

The publicity attendant to congressional consideration of such a bill would trigger an outpouring of adverse reaction from the electorate. Were such a bill enacted into law, the outrage of the electorate the first time a defective military product produced catastrophic civilian consequences would almost certainly lead to a "vote the rascals out" movement and perhaps prompt repeal by Congress. Since its members enjoy life tenure, the Court is not vulnerable to such political reaction. In such circumstances, the immunity it enjoys from the electorate should counsel judicial restraint, which seems wholly lacking in *Boyle*.

Another problem with *Boyle*, one predicted by the dissent and corroborated by subsequent lower court opinions, is that it is not at all clear that the government contractor defense fashioned by the Court was intended to be applicable only to defective military equipment. This defense could also be deemed applicable to civilian products manufactured for the government, in instances where the three enumerated requirements are satisfied.[257] Any broader applicability would subject an even greater portion of the civilian population to the risk of injury or death from defective products without meaningful legal redress or compensation.

Finally, there is earlier Supreme Court precedent lurking in the background. In *Berkovitz v. United States*,[258] the Court held that the discretionary function exception to the FTCA would not shield the government from liability if the government's conduct was inconsistent with "a federal statute, regulation, or policy specifically prescrib[ing] a course of action for [a federal] employee to follow."[259] What will happen in a future case when the enumerated requirements of *Boyle* are satisfied, but the government's approval of the injury-producing defect is inconsistent with "a federal statute, regulation, or policy"? The possibility of such an occurrence is enhanced by lower federal court opinions holding that the government contractor defense fashioned by *Boyle* is applicable not only to design defects, but to warning defects as well, at least where the

256. *Boyle*, 487 U.S. at 512.
257. *See, e.g.*, Johnson v. Grumman Corp., 806 F. Supp. 212 (W.D. Wis. 1992).
258. 486 U.S. 531 (1988).
259. *Berkovitz*, 486 U.S. at 536.

government controls the warnings.[260] Under *Berkovitz*, the immunity of the government under the discretionary function exception to the FTCA would seem to fail. Under *Boyle*, which makes the discretionary function exception the foundation of the government contractor defense, does the latter fail as well? If so, would that impose unfairly on the contractor who is required to comply with government dictated design or warning defects, or should the contractor be deemed to have knowledge of all potentially applicable federal statutes, regulations, and policies, and therefore be said to have acted at its own peril? *Boyle* sheds little light on these lurking issues.

Can the problems enumerated above that are inherent in *Boyle* be eliminated? That question can be answered in the affirmative. The Court could eliminate them in either of two ways. First, the Court could recant *Boyle* and its adoption of the government contractor defense. However, retraction of the government contractor defense seems unlikely to occur in the foreseeable future. While the highly speculative nature of attempting to predict future votes by members of the Court has already been noted, it may be worth adding that two of the four dissenters in *Boyle* have retired from the Court, while four of the five Justices comprising the majority in *Boyle* remain on the Court. Moreover, the majority opinion in *Boyle* suggests a strong judicial feeling in favor of a government contractor defense; so strong that Justice Scalia, author of the opinion and a critic of *Feres*, found an alternative basis for the defense. All of these factors suggest the unlikelihood that the Court will completely repudiate the government contractor defense.

The second alternative available to the Court would be to retain the government contractor defense but recant the discretionary function foundation, and, following the lead of *Bynum*, utilize the *Feres-Stencel* foundation. This alternative would go a long way towards eliminating the problems inherent in *Boyle*. With the *Feres-Stencel* foundation, the government contractor defense would be applicable only to those claims arising out of injuries incident to military service. Given the rationale suggested by this author for *Feres*, the government contractor defense bottomed on *Feres* and *Stencel* could be asserted only in those cases in which the victim's

260. *See, e.g.*, Nicholson v. United Technologies Corp., 697 F. Supp. 598 (D. Conn. 1988); Garner v. Santoro, 865 F.2d 629 (5th Cir. 1989); In re Joint Eastern & Southern District New York Asbestos Litigation, 897 F.2d 626 (2d Cir. 1990).

injury had arisen out of an activity incident to military service and therefore inherently dangerous. Thus, in every such case the victims, or their survivors, would be eligible for compensation under the VBA, assuring that no plaintiff would be wholly without remedy. In addition, using the *Feres-Stencel* foundation for the government contractor defense would limit the application of the defense to cases involving injuries occurring in activities incident to military service. The *Feres-Stencel* rationale would also exclude the defense in cases involving injuries to civilians. In this manner, the Court would eliminate any public or congressional concern that it might have made a determination better left to other branches of government. Also, use of the *Feres-Stencel* foundation would seem to lead to the conclusion that the government contractor defense was not applicable to cases involving defective products intended for non-military purposes. Finally, the *Feres-Stencel* foundation would negate the potential problems generated by *Berkovitz* and its conclusion that the discretionary function exception to the FTCA is not applicable to government conduct in violation of federal statute, regulation or policy. Were the discretionary function exception supplanted by *Feres* and *Stencel* as the foundation for the government contractor defense, governmental conduct violative of federal statute, regulation or policy would have little potential for subjecting the contractor to liability.

In short, using the *Feres-Stencel* foundation for the government contractor defense would afford contractors a meaningful defense in a significant number of cases (although far fewer than *Boyle*), without leaving victims wholly without redress, without impinging on what might be characterized as a political issue, and without complicating or negating the defense, as a consequence of *Berkovitz*.

How likely is the Court to adopt that modified version of the government contractor defense? In *Boyle*, Justice Scalia found the *Bynum*-like application of the defense "too broad" because it would preclude successful action against the contractor for injuries incident to military service, even if the injury were caused by a product not designed according to government specifications.[261] As has been noted, however, this is not the case. The additional requirements in *Bynum*, similar to those in *Boyle*, would limit the defense to those actions in which the defect was attributable primarily to government fault, and preclude the defense where the

261. *Boyle*, 487 U.S. at 510.

defect was primarily attributable to contractor fault. This result is, after all, the ultimate consequence of the three enumerated requirements in *Boyle* and *Bynum*. Further reflection by the Court, making this conclusion apparent, should ameliorate any significant concern that the defense would be "too broad." Moreover, if the author's suggested rationale for *Feres* were adopted by the Court, the government contractor defense would be applicable only to those injuries arising out of an activity truly incident to military service, diminishing any concern of an overly broad application.

Justice Scalia found that a *Bynum*-like application of the government contractor defense would be "too narrow" because it would not extend to civilians injured by the military.[262] It is, however, the broader application that leaves victims without any recourse, judicial resolution of a political issue, and potential restriction of the defense as a result of *Berkovitz*. Perhaps further reflection by the Court would lead it to conclude that a broader application is simply inappropriate.

If the Court were to rethink and conclude that the *Bynum* method of fashioning and applying the government contractor defense was neither too broad nor too narrow, but rather a fairly well-balanced resolution of conflicting concerns, there would seem to remain only one obstacle to the Court's refashioning the defense: Justice Scalia's aversion to *Feres*. Yet, that aversion was not so strong that he felt compelled to vote for overruling *Feres*, uninvited, in *Johnson*. Given the proposed rationale for *Feres*, the inconstancy manifested by the Court when it identified the reasons underlying its decision, and the irrational results generated by that inconstancy, would largely be eliminated. In addition, it is interesting to note that of the three other members of the Court who joined in Justice Scalia's dissent in *Johnson*,[263] all of whom were still members when *Boyle* was decided, none joined in Justice Scalia's opinion for the Court in *Boyle*; all dissented.[264] To the extent that an aversion to *Feres* contributed to supplanting the *Feres-Stencel* foundation with the discretionary function foundation in *Boyle*, it apparently did so only with regard to Justice Scalia. Presumably, the other members of the Court comprising the majority in *Boyle* would not find it intolerable to consider utilizing the *Feres-Stencel* foundation for the government contrac-

262. *Id.*
263. Justices Brennan, Marshall and Stevens. *Johnson*, 481 U.S. at 692.
264. *Boyle*, 487 U.S. at 515, 531.

tor defense.

Resolving The Government Contractor Defense Under *Feres*

The Court has three basic paths to follow with regard to the government contractor defense. First, it may simply continue to apply *Boyle*. The weaknesses inherent in that course of action have already been enumerated. The "too broad" concern simply is not factually well-based. The "too narrow" concern subjects civilian victims to injuries without recourse, resolves an apparently political issue, and invites *Berkovitz* complications. Second, the Court could repudiate the government contractor defense entirely. As previously noted, this course of action seems highly unlikely in the foreseeable future. Finally, the Court could retain the government contractor defense, utilizing *Feres* and *Stencel* as its foundation, rather than the discretionary function exception to the FTCA. Pursuing this third course would preserve a significant defense for government contractors and, presumably, result in significant savings to the government. It would simultaneously assure that the injured victims would recover some compensation under the VBA. It would achieve the desirable symmetry accomplished by *Bynum* and, in the process, afford Supreme Court approval to intellectual concepts already memorialized in *Bynum*. It would also provide lower courts with a persuasive rationale unlikely to be complicated by concerns about non-military products and government conduct that might violate federal statute, regulation or policy. That would not be bad, either.