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## Feres Doctrine: "Don't Let This Be It. Fight!", 46 J. Marshall L. Rev. 607 (2013)

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# THE *FERES* DOCTRINE: “DON’T LET THIS BE IT. FIGHT!”<sup>1</sup>

JENNIFER L. ZYZNAR\*

## I. INTRODUCTION

I don’t want to die, I don’t know what else to do, I have a loaded gun in my lap right now, I’m so scared.<sup>2</sup>

### A. *The “Missing” Gun: The Story of Christopher Purcell*

Following in his father’s footsteps,<sup>3</sup> Christopher Lee Purcell (“Purcell”) enlisted in the United States Navy when he was eighteen years old.<sup>4</sup> Purcell served with distinction,<sup>5</sup> but struggled

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1. Sargeant Carmelo Rodriguez as stated to his family before he died. *See* Byron Pitts, *A Question Of Care: Military Malpractice?*, CBS NEWS (Feb. 11, 2009),

<http://www.cbsnews.com/stories/2008/01/31/eveningnews/main3776580.shtml> (reporting that during Sargeant Carmelo Rodriguez’s enlistment physical, the physician documented that he had melanoma, but did not recommend further treatment). Rodriguez’s uncle, Dean Ferraro, stated, “[Rodriguez’s death] wish [was] to have [the injustices created by the *Feres* Doctrine] known, because he doesn’t want any other soldier to fight for his country and go through what he had to go through.” *Id.* “To be neglected.” *Id.* Sargeant Carmelo Rodriguez died from melanoma shortly after he made this statement to his uncle. *Id.*

\* Jennifer L. Zyznar is a January 2013 graduate of The John Marshall Law School. Jennifer would like to thank Paul Coogan and Brian Roth for their diligent efforts and invaluable edits during the completion of this Comment. She dedicates this Comment to all members of the United States Armed Forces and their families. Their selfless service and commitment to this country will not be forgotten and may their rights one day be restored.

2. *See* Joe Celentino, *Navy Can’t Be Sued over Young Officer’s Suicide*, WOUNDED TIMES WEBLOG (Aug. 24, 2011, 9:02 AM), <http://woundedtimes.blogspot.com/2011/08/navy-cant-be-sued-over-young-officers.html> (quoting U.S. Navy Hospital Corpsman, Christopher Lee Purcell).

3. Mike Purcell, *Christopher Lee Purcell 1986-2008*, ALLIANCE OF HOPE, <http://www.allianceofhope.org/memorials/2011/08/christopher-lee-purcell-1986-2008.html> [hereinafter ALLIANCE OF HOPE] (last visited Jan. 21, 2013); *see also* Michael Purcell, *Christopher Lee Purcell’s Last Hour*, FACEBOOK (Aug. 28, 2011, 11:33 AM), [http://www.facebook.com/note.php?note\\_id=266498076711977](http://www.facebook.com/note.php?note_id=266498076711977) [hereinafter *Last Hour*] (explaining that Michael Purcell, Christopher’s father, honorably served the United States Navy for twenty-seven years before retiring in 2009). He is the founder of Putting a Face on Suicide, an organization dedicated to memorializing his son and others who have taken their own lives. *Id.*

4. Opening Brief of Plaintiff-Appellant at 6, *Purcell v. United States*, 656 F.3d 463 (7th Cir. 2011) (No. 10-3743), 2011 WL 2452321 [hereinafter Brief].

with emotional and substance abuse problems before taking his own life.<sup>6</sup> United States Navy personnel were aware of Purcell's deteriorating mental state,<sup>7</sup> and on November 13, 2007, two and half months before his suicide, Purcell underwent an initial evaluation with the Substance Abuse and Rehabilitation Program ("SARP") at Walter Reed National Military Medical Center.<sup>8</sup> The Department of Defense's postmortem report documented numerous warning signs of Purcell's untimely death.<sup>9</sup>

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5. ALLIANCE OF HOPE, *supra* note 3 (noting that Purcell served "as a first responder and . . . was handpicked to serve on the Emergency Medical Response team for President Bush at the Kennebunkport compound").

6. Brief, *supra* note 4, at 6; see UNITED STATES DEPARTMENT OF DEFENSE, REVIEW OF MATTERS RELATED TO THE DEATH OF HOSPITALMAN, CHRISTOPHER PURCELL, U.S. NAVY 9 (Oct. 27, 2010), available at <http://www.dodig.mil/Inspections/IPO/reports/IPO2010E002.pdf> [hereinafter DEFENSE REPORT] (revealing that the Navy was aware of Purcell's condition prior to his suicide). *Id.* A co-worker informed the Navy that Purcell "showed a lot of depressive signs" including: listening to music about suicide, suffering from insomnia and restlessness, giving away personal possessions (including his motorcycle, which he referred to as his "baby"), and "stat[ing] that he was looking forward to the day his eyes won't open." *Id.* Purcell's supervisor further expressed concern about Purcell selling off his possessions. *Id.* Purcell's friend also noticed that he was not himself. *Id.* His friend felt that he was more quiet than usual and noted that Purcell gave him a big hug when leaving even though they had never hugged before. *Id.* Moreover, Purcell suffered from panic attacks when he was on leave for Thanksgiving, and also began asking a co-worker if he had ever thought about suicide. *Id.*

The Navy took notice of these personality and emotional changes in October 2007, and it decided to transfer Purcell from the immunizations clinic to the family practice clinic. *Id.* The transfer only angered him. *Id.* When Purcell began visiting the Substance Abuse and Rehabilitation Program ("SARP"), he said that it made him "feel like a dirt bag." *Id.* Purcell admitted that his relationships with friends were strained and that he exhibited a lack of trust and sincerity in his relationships with others. *Id.* Purcell also reported that he has a family history of alcoholism and mental illness. *Id.* Purcell felt that there was always something wrong with him, had low self-esteem, drank excessively to rid himself of this pain, and always drank "until he passed out." *Id.*

Three months prior to his death, another one of Purcell's friends noted that his behavior was becoming more self-destructive. *Id.* For instance, his friend reported that Purcell was kicked out of a club after he punched a statue and drove drunk to the clinic just to see if he would get into trouble. *Id.* Purcell's supervisor noted that he was drinking the entire time he was on leave, and when he was not drinking, he was sleeping. *Id.* The supervisor told Purcell's friend, "I know what it looks like," but did not respond to Purcell's cries for help. *Id.*

7. DEFENSE REPORT, *supra* note 6, at 9.

8. See *id.* (stating that during the initial SARP, HN Purcell stated that he binge drank on five separate occasions during the past two weeks and that his work performance had suffered due to his extensive alcohol use).

9. See *id.* (detailing the investigation of Purcell's suicide while he was in the custody of United States Navy law enforcement). Mark Kirk, Republican Senator from Illinois, initiated the investigation on behalf of Purcell's parents. *Id.* at 1. The goal of the investigation was to determine whether the United

On what became his last afternoon, twenty-one-year-old Purcell was drinking alone in his apartment at Brunswick Naval Air Station.<sup>10</sup> He was chatting on MySpace when he wrote, “I don’t want to die, I don’t know what else to do, I have a loaded gun in my lap right now, I’m so scared.”<sup>11</sup> Purcell’s sister read his cry for help and immediately called their parents.<sup>12</sup> Purcell’s father contacted the base and informed them that his son was drunk, armed, and threatening to kill himself.<sup>13</sup> Department of Defense (“DoD”) law enforcement officials were sent to Purcell’s apartment.<sup>14</sup> DoD Officers Shawn Goding and Matthew Newcomb were the first to arrive and found Purcell alive,<sup>15</sup> but disturbed and agitated.<sup>16</sup> A short time later, Patrolman Francis Harrigan and Petty Officer (“PO”) First Class David Rodriguez also responded.<sup>17</sup>

The officers’ thorough search of his apartment recovered an empty gun case, a receipt for a Ruger .357 magnum revolver, and a box of ammunition with one round missing.<sup>18</sup> Despite evidence suggesting that Purcell was in possession of the .357 and knowledge that he was armed and threatening suicide, responding officers did not search his person for the “missing” gun.<sup>19</sup>

After the search of the premises, PO Rodriguez suggested that he and Purcell go outside to discuss what happened and Purcell agreed.<sup>20</sup> Once outside, Petty Officer First Class Mitchell Tafel intervened and stated that Purcell should be handcuffed for his safety and the safety of the DoD law enforcement.<sup>21</sup> When

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States Navy Law Enforcement Officers were adequately trained to respond to and help Purcell, whether any lack of training contributed to Purcell’s death, and whether the Department of Defense (“DoD”) took appropriate action to ensure that future incidents are prevented. *Id.*

10. Brief of the United States at 2, *Purcell v. United States*, 656 F.3d 463 (7th Cir. 2011) (No. 10-3743), 2011 WL 2452322.

11. Celentino, *supra* note 2.

12. Brief, *supra* note 4, at 6.

13. *Id.*

14. *Id.*

15. *Id.*; see Complaint of Plaintiff at ¶ 6, *Purcell v. United States*, 2010 WL 43039487 (N.D. Ill. Oct. 14, 2010) [hereinafter Complaint] (stating that Shawn Goding was and is a civilian employee of the Department of Defense, and was acting within the scope of his employment at all times during the incident).

16. Complaint, *supra* note 15, at ¶ 17(a); see DEFENSE REPORT, *supra* note 6, at 3 (describing what happened as the officers arrived on the scene). The police found Purcell’s front door open; they entered and found him seated at his computer desk. *Id.* There were several empty bottles of alcohol and one partially full bottle in his apartment. *Id.*

17. Brief, *supra* note 4, at 6.

18. *Id.*

19. *Id.*; see DEFENSE REPORT, *supra* note 6, at 3 (stating that Purcell told DoD Officers that he had given the “missing” gun to his friend).

20. Brief, *supra* note 4, at 7.

21. *Id.*

officers tried to restrain Purcell, he became belligerent and resisted arrest.<sup>22</sup> During the struggle, Purcell was thrown to the ground and held down by four officers until Harrigan was able to restrain him.<sup>23</sup> According to the Complaint, arresting officers further antagonized Purcell with disparaging comments and threats while he was in custody.<sup>24</sup> Purcell was eventually taken back upstairs to his apartment for medical attention.<sup>25</sup> Meanwhile, the .357 magnum revolver was still “missing,” and no one searched Purcell.<sup>26</sup>

Once back in his apartment, PO Tafel asked Purcell if he would like a glass of water or if he needed to use the restroom.<sup>27</sup> Purcell responded that he wanted to use the restroom but insisted that he go alone.<sup>28</sup> PO Tafel disagreed and required Purcell to be accompanied.<sup>29</sup> At this time, Nathan Mutschler, Purcell’s friend, was also present in the apartment.<sup>30</sup> When Purcell requested that Mutschler rather than an enforcement officer accompany him to the restroom, PO Tafel obliged and instructed another officer to remove one of Purcell’s handcuffs.<sup>31</sup> Purcell walked into the bathroom, turned his back to his friend Mutschler, pulled the “missing” .357 magnum revolver from his waistband, and shot himself in the chest.<sup>32</sup>

### B. The Legal Aftermath

On October 1, 2009, Purcell’s father brought a wrongful death action<sup>33</sup> under the Federal Tort Claims Act (“FTCA”).<sup>34</sup> According

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22. *Id.*

23. *Id.*

24. Complaint, *supra* note 15, at 17(g).

25. *See id.* at 17(e) (stating that Officers violated Standard Operating Procedures 0-019, 0-020, and 0-21 when they failed to immediately transport Purcell to Brunswick Naval Air Station’s Security Precinct after he was subdued and in handcuffs); *see also* Brief, *supra* note 4, at 7-8 (stating that “Tafel and Rodriguez faced courts martial for violating a general order, reckless endangerment, and dereliction of duty for failing to properly search and supervise Christopher Purcell”).

26. *Id.* at 7; *see also* DEFENSE REPORT, *supra* note 6, at 3 (stating that some DoD officers performed “sensory” searches—a term not defined in the report—but no officer found a weapon on his person).

27. Brief, *supra* note 4, at 7.

28. *Id.*

29. *Id.*

30. *Id.*

31. *Id.* at 7-8 (explaining that Tafel and Rodriguez faced a courts-martial for violating a general order, reckless endangerment, and dereliction of duty for failing to properly search and supervise Purcell).

32. *Id.* at 7; *see Last Hour*, *supra* note 3 (noting that DoD Officers had plenty of time to properly search Purcell for the missing firearm). At 9:07 PM, Officers arrived at Purcell’s apartment; at 9:47 PM, Purcell was pronounced dead. *Id.*

33. Purcell v. United States, No. 09 C 6137, 2010 WL 4039847, at \*1 (N.D.

to the Complaint, responding DoD law enforcement officers were negligent in failing to properly search and transport Purcell and failing to maintain proper custody.<sup>35</sup> The district court dismissed the action citing the *Feres* Doctrine,<sup>36</sup> which bars service members' claims for personal injuries arising from activities found to be "incident to service,"<sup>37</sup> and the Seventh Circuit affirmed.<sup>38</sup> Purcell's story and the subsequent "dismissed-affirmed" procedural history is common when service members bring suit under the FTCA.<sup>39</sup> Most service member claims die in judicial trenches only to be remembered by those personally affronted by the *Feres* Doctrine, a judicially created,<sup>40</sup> and almost universally

Ill. Oct. 14, 2010), *aff'd*, 656 F.3d 463 (7th Cir. 2011).

34. Federal Tort Claims Act, 28 U.S.C. §§ 1346(b), 2671-2680 (2010); *see also* Hervey A. Hotchkiss, *An Overview of the Federal Tort Claims Act*, 33 A.F. L. REV. 51, 51 (1990) (noting that the purpose of the FTCA is to provide "uniform remedy and fair compensation to tort victims"). Prior to the FTCA, an individual only had two options to recover for injuries negligently caused by governmental employees: (1) sue the tortfeasor in their individual capacity or (2) apply for private bill of relief directly to Congress. *Id.*; *see also* John Astley, Note, *United States v. Johnson: Feres Doctrine Gets New Life and Continues to Grow*, 38 AM. U. L. REV. 185, 192 (1988) (noting that the "congressional system of providing relief through private bills became cumbersome and unworkable").

35. Complaint, *supra* note 15, at ¶ 17; *see also* DEFENSE REPORT, *supra* note 6, at 19 (suggesting that officers were derelict in their duties and noting that "three officers were suspended without pay from 2 to 14 days . . . and the NASB Security Director and his deputy received suspensions without pay, 14 days and 10 days respectively").

36. *Purcell*, 2010 WL 4039847, at \*5.

37. *Feres v. United States*, 340 U.S. 135, 146 (1950) (finding that the United States is not liable for claims brought under the FTCA by service members for injuries arising out of an activity found "incident to service").

38. *Purcell*, 656 F.3d at 467 (holding that government is not liable for injuries arising out of activities found to be "incident to service").

39. The following cases involve dismissal of the complaint for lack of subject matter jurisdiction: *Diaz-Romero v. Mukasey*, 514 F.3d 115, 116 (1st Cir. 2008); *Lockett v. Bure*, 290 F.3d 493, 499 (2d Cir. 2002); *Ruggiero v. United States*, 162 F. App'x 140, 143 (3d Cir. 2006); *Mills v. United States*, No. 98-2410, 1999 WL 211943, at \*1 (4th Cir. Apr. 13, 1999); *Gros v. United States*, 232 F. App'x 417, 419 (5th Cir. 2007); *Lovely v. United States*, 570 F.3d 778, 785 (6th Cir. 2009), *cert. denied*, 130 S. Ct. 1054 (2010); *Sloan v. United States*, 208 F.3d 218 (8th Cir. 2000); *McConnell v. United States*, 478 F.3d 1092, 1098 (9th Cir. 2007), *cert. denied*, 552 U.S. 1038 (2007); *Pringle v. United States*, 208 F.3d 1220, 1227 (10th Cir. 2000); *Starke v. United States*, 249 F. App'x 774, 776 (11th Cir. 2007).

40. Section 2680 of the United States Code enumerates thirteen exceptions to the Federal Tort Claims Act and no exception retains immunity for injuries arising out of an activity found "incident to service." 28 U.S.C. § 2680 (2010); *see also* *United States v. Johnson*, 481 U.S. 681, 693 (1987) (Scalia, J., dissenting) (arguing that there was no "proper basis . . . to revise . . . [the combatant activities exception]" in *Feres*); Jonathan Turley, *Pax Militaris: The Feres Doctrine and the Retention of Sovereign Immunity in the Military System of Governance*, 71 GEO. WASH. L. REV. 1, 69 (2003) (criticizing the

criticized,<sup>41</sup> “exception” to the FTCA.

This Comment argues that the *Feres* Doctrine’s “incident to service” standard is not capable of an objective definition or application. Part II briefly reviews the three original rationales supporting the doctrine. Parts III-A and B analyze the current state of the doctrine, and specifically detail how the three original rationales are no longer controlling and how military discipline has emerged as its primary justification. Part III-C examines the main approach purportedly used by the district courts to define the “incident to service” standard. This examination will illustrate the courts’ dependency on the duty status of the service member to determine whether the claim should be barred, and how this dependency is correlated to the military discipline rationale. Finally, Part IV proposes a more objective and efficient analysis to determine whether a service member’s claim should be barred. This analysis not only restores the legislative intent of the FTCA but is also consistent with the principles of tort law.

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*Feres* Doctrine as “a total departure from judicial restraint and deference to political branches”).

41. *Johnson*, 481 U.S. at 700 (Scalia, J., dissenting) (arguing that *Feres* was “wrongly decided”); *Costo v. United States*, 248 F.3d 863, 869 (9th Cir. 2001) (Ferguson, J., dissenting) (arguing that the *Feres* Doctrine is unconstitutional as a violation of the Equal Protection Clause of the Fifth and Fourteenth Amendments and also a violation of the separation of powers); *Sanchez v. United States*, 813 F.2d 593, 595 (2d Cir. 1987), *modified*, 839 F.2d 40 (2d Cir. 1988) (noting that the *Feres* Doctrine lacks a theoretical basis for its decision); *Taber v. Maine*, 67 F.3d 1029, 1032, 1038 (2d Cir. 1995) (finding that “the *Feres* doctrine has gone off in so many different directions that it is difficult to know precisely what the doctrine means today,” and noting that it is “an extremely confused and confusing area of law”); *Bozeman v. United States*, 780 F.2d 198, 200 (2d Cir. 1985) (referring to the *Feres* Doctrine as a “blunt instrument”); *Hinkie v. United States*, 715 F.2d 96, 97 (3d Cir. 1983) (condemning the *Feres* Doctrine and the Supreme Court’s inaction in that the court felt it was “forced once again to decide a case where ‘we sense the injustice . . . of [the] result’ but where nevertheless we have no legal authority, as an intermediate appellate court, to decide the case differently”); *Scales v. United States*, 685 F.2d 970, 974 (5th Cir. 1982) (regretting its decision to bar the claim, the court “reluctantly” dismissed the claim and noted that it was not “blind to the tragedy . . . and . . . regrets the effects of our conclusion”); *Monaco v. United States*, 661 F.2d 129, 131-32 (9th Cir. 1981) (finding that the *Feres* Doctrine is the “subject of confusion” and stating that the court was not “fully convinced” of the doctrine’s legal viability); *see also Purcell*, 656 F.3d at 465 (stating that *Feres* is “viable,” but “not without controversy”); *McConnell*, 478 F.3d at 1098 (finding that the Ninth Circuit’s precedent relating to the *Feres* Doctrine creates an injustice and respectfully asking the Supreme Court of the United States to reconsider the rationales supporting the doctrine); *Kohn v. United States*, 680 F.2d 922, 925 (2d Cir. 1982) (recognizing that the *Feres* Doctrine is a controversial decision, but also that the court is obliged to follow precedent); *LaBash v. U.S. Dep’t of the Army*, 668 F.2d 1153, 1156 (10th Cir. 1982) (noting that “only the Supreme Court of the United States can overrule or modify *Feres*”).

## II. THE FEDERAL TORT CLAIMS ACT: A GOOD THING GONE BAD

In 1946, Congress passed the FTCA to waive sovereign immunity and render the United States liable for injuries or death caused by the negligent conduct of governmental employees.<sup>42</sup> Congress also enumerated thirteen exceptions to the FTCA. One of those exceptions, known as the combatant activities exception, provides that the United States shall remain immune from “any claim arising out of the combatant activities of the military or naval forces, or the Coast Guard, during time of war.”<sup>43</sup> It took only three years for the first service member’s claim under the FTCA to make its way to the United States Supreme Court in search of a determination of the proper scope of the combatant activities exception.

### A. *Canary in a Coal Mine*: Brooks v. United States

*Brooks v. United States*<sup>44</sup> involved claims against the United States brought on behalf of two brothers and service members, Arthur and Welker Brooks.<sup>45</sup> Arthur died and Welker sustained serious injuries as a result of a car accident with a civilian employee of the United States Army who was driving an Army truck.<sup>46</sup> Requesting a broad interpretation of the combatant activities exception, the government argued that, by virtue of their status as enlisted service members, the court should find the

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42. See 28 U.S.C. § 1346(b)(1) (stating that [T]he district courts . . . shall have exclusive jurisdiction . . . for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable . . .)

See also *United States v. Sherwood*, 312 U.S. 584, 586 (1941) (explaining that the United States is immune unless it consents to be sued); *Beers v. State*, 61 U.S. 527, 529 (1857) (stating that Congress determines when a suit against the United States can be initiated and how it shall be conducted).

43. 28 U.S.C. § 2680(j); see *Johnson*, 481 U.S. at 693 (Scalia, J., dissenting) (arguing that when “[r]ead as it is written, this language renders the United States liable to *all* persons, including servicemen, injured by the negligence of Government employees. [There is no exception that] precludes FTCA suits brought by servicemen” (emphasis in original)); see also Richard W. McKee, *Defending an Indifferent Constitution: The Plight of Soldiers Used as Guinea Pigs*, 31 ARIZ. L. REV. 633, 635 (1989) (noting that the statute, by its terms, does not exclude service members’ tort claims).

44. *Brooks v. United States*, 337 U.S. 49 (1949).

45. *Id.* *Brooks* was a consolidated two case action. *Id.* Welker and Arthur Brooks were brothers and were enlisted service members in the United States Army. *Id.* Welker Brooks brought a claim for personal injuries; Welker and his father, James Brooks, brought a wrongful death action on behalf of Arthur Brooks. *Id.*

46. *Id.* at 50. James Brooks, Arthur and Welker’s father, also sustained serious injuries in the car accident. *Id.*



injuries “incident to service,” and thus barred as their claims fall within the combatant activities exception.<sup>47</sup>

The Court rejected the government’s argument.<sup>48</sup> It stated that “the statute’s terms [were] clear;”<sup>49</sup> Arthur’s death and Welker’s injuries only arose from an activity “incident to service” “in the sense that all human events depend upon what has already transpired.”<sup>50</sup> Unwilling to allow the issue to turn on duty status alone, the Court suggested that a tighter fit must exist between the injury and the conduct before that injury can be found “incident to service.”<sup>51</sup>

The Court neither defined “incident to service” nor provided any guidance on how to determine whether an injury was “incident to service.”<sup>52</sup> This seemingly simple phrase marks the beginning of what has caused “considerable confusion among the circuits.”<sup>53</sup>

### B. *The Feres Doctrine: Why the Court Rewrote the FTCA*

One year after *Brooks*, the Supreme Court reexamined the “incident to service” standard in *Feres v. United States*,<sup>54</sup> a consolidated three-case action. Rudolph Feres, an Army soldier, died in a New York barracks fire allegedly caused by an unsafe and defective heating plant.<sup>55</sup> In the second case, an Army surgeon left behind a towel measuring thirty inches long by eighteen inches wide, marked “Medical Department U.S. Army” in soldier Arthur Jefferson’s stomach after an abdominal operation.<sup>56</sup> In the third case, Lt. Colonel Dudley Griggs died as a result of negligent medical treatment.<sup>57</sup> The Court again failed to define the “incident to service” standard and instead cited three rationales justifying dismissal of the claims: (1) a lack of parallel private liability, (2) a distinctly federal relationship, and (3) the availability of veterans’

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47. *Id.*

48. *Id.* at 51.

49. *Id.*

50. *Id.* at 52.

51. *Id.*

52. *Id.* at 52-53.

53. Anne R. Riley, *United States v. Johnson: Expansion of the Feres Doctrine to Include Service Members’ FTCA Suits Against Civilian Government Employees*, 42 VAND. L. REV. 233, 244 (1989) (noting that the Supreme Court’s failure to define what it meant by an injury being “incident to service” has created “considerable confusion among the lower courts”); *Taber*, 67 F.3d at 1032, 1038 (finding that “it is difficult to know precisely what the doctrine means today,” and noting that it is “an extremely confused and confusing area of law”).

54. *Feres*, 340 U.S. at 135.

55. *Id.* at 137.

56. *Jefferson v. United States*, 178 F.2d 518, 519 (4th Cir. 1949); *Feres*, 340 U.S. at 137.

57. *Griggs v. United States*, 178 F.2d 1, 2 (10th Cir. 1949).

benefits.<sup>58</sup>

First, the Court emphasized that the statutory text of the FTCA provided that the “United States shall be liable . . . in the same manner and to the same extent as a private individual under like circumstances.”<sup>59</sup> The Court reasoned that the United States cannot be liable to members of its Armed Forces because no private individual can be held liable in the same manner.<sup>60</sup> Since a private individual does not typically raise an army, a private individual cannot be sued by one of his or her service members. Thus, the United States remains immune in that manner as well.<sup>61</sup>

Second, the *Feres* Court found that the relationship between the federal government and its service members is one that is “distinctively federal in character,”<sup>62</sup> and applying substantive state law in these cases would be inappropriate.<sup>63</sup> Further, the Court paternalistically reasoned that a service member stands at a disadvantage when seeking redress in state tort law.<sup>64</sup> It stated that a service member has no choice but to serve within the jurisdiction stationed and that allowing the fortuity of the location of the injury and its respective tort laws to dictate recovery was unfair.<sup>65</sup> Instead, the Court favored certain and uniform compensation through the Veterans Administration.<sup>66</sup>

Third, the Court reasoned that Congress could not have

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58. *Feres*, 340 U.S. at 141-45.

59. *Id.* at 141.

60. *But compare id.* at 142 (finding that “the effect [of the FTCA] is to waive immunity from recognized causes of action and was not to visit the Government with novel and unprecedented liabilities”), *with* *Rayonier Inc. v. United States*, 352 U.S. 315, 319 (1957) (stating that the very purpose of the Tort Claims Act was “to waive the Government’s traditional all-encompassing immunity from tort actions and to establish novel and unprecedented governmental liability”).

61. *Feres*, 340 U.S. at 142.

62. *Id.* at 143; *United States v. Standard Oil Co. of Cal.*, 332 U.S. 301, 305-06 (1947) (“[N]o relation . . . is more distinctively federal in character than that between [the government] and members of its armed forces. . . . [T]he scope, nature, legal incidents and consequences of [this relation] are fundamentally derived from federal sources and governed by federal authority”).

63. *Feres*, 340 U.S. at 143-44; see David E. Seidelson, *The Feres Exception to the Federal Tort Claims Act: New Insight into an Old Problem*, 11 HOFSTRA L. REV. 629, 632 (1983) (explaining that the *Feres* Court found it difficult to conclude that state tort laws should govern a federal relationship).

64. *Feres*, 340 U.S. at 145 (noting that a “[j]ack of time and money, the difficulty if not impossibility of procuring witnesses, are only a few of the factors working to his disadvantage”).

65. *Id.* at 142-43.

66. *Id.* at 144; but see Barry Bennett, *The Feres Doctrine, Discipline, and the Weapons of War*, 29 ST. LOUIS U. L.J. 383, 400-01 (1985) (noting the “superficiality” of the Court’s reasoning and criticizing the decision to replace nonuniform recovery with Veterans’ Benefits).

intended to give a service member the right to recovery under the FTCA and the right to recover veterans' benefits.<sup>67</sup> The Court presumed that Congress's failure to include a provision that addressed the effect of VA compensation on FTCA recovery suggested that Congress never intended the Act to be interpreted to include those claims.<sup>68</sup> To reach this conclusion, the Court advanced alternative interpretations: "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."<sup>69</sup> Though the Court found that there was statutory authority supporting all interpretations, it chose the alternative that precluded recovery entirely.<sup>70</sup>

### III. ANALYSIS

#### A. *Original Feres' Rationales Repudiated*

The three rationales originally contemplated by the Court are no longer controlling. However, the doctrine persists, and its survival is dependent on the validity of the military discipline rationale—the prevailing justification for the *Feres* Doctrine. First, however, sound reasoning in subsequent Supreme Court cases illustrate the deficiencies of the three original rationales.

##### 1. *Parallel Private Liability Is Not Required*

The Supreme Court has refuted the notion that a parallel private liability was requisite for governmental liability. In *Indian Towing Co. v. United States*,<sup>71</sup> it held that the United States could be liable for negligently operating a lighthouse even though private individuals do not operate lighthouses.<sup>72</sup> Justice Scalia

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67. *Feres*, 340 U.S. at 144-45; see also Eric Juergens, *Feres and the Privacy Act: Are Military Personnel Records Protected?*, 85 ST. JOHN'S L. REV. 313, 320-21 (2011) (noting that the VA already has a system of compensation benefits, that double recovery should be prevented, and that for "simple, certain, and uniform compensation for injuries or death" is preferable).

68. *Feres*, 340 U.S. at 144 (finding that "[t]he 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").

69. *Id.*

70. *Id.*; see Christopher G. Froelich, *Closing the Equitable Loophole: Assessing the Supreme Court's Next Move Regarding the Availability of Equitable Relief for Military Plaintiffs*, 35 SETON HALL L. REV. 699, 712 (2005) (explaining that if Congress preferred a different alternative than the one the Court chose, it is exclusively responsible and has the legislative authority to clarify its intent).

71. *Indian Towing Co. v. United States*, 350 U.S. 61 (1955).

72. *Id.* at 69. It was conceivable that private persons could operate

also penned a determined dissent in *United States v. Johnson* and again revealed the flawed analysis of the first rationale.<sup>73</sup> He explained that “under this reasoning . . . many of the Act’s exceptions are superfluous, since private individuals typically do not . . . transmit postal matter, collect taxes or customs duties, impose quarantines, or regulate the monetary system.”<sup>74</sup> Applying this reasoning to *Feres*, it is irrelevant that individuals do not raise armies when considering governmental liability to the Armed Forces.<sup>75</sup> Thus, a mere five years after *Feres*, the first rationale was rejected, and a parallel private liability is not a necessary condition for governmental liability.

## 2. *Distinctly Federal Relationship Becomes Indistinct*

In 1963, the absurd conclusion that the Court was protecting service members by denying them a right to recover was corrected in *United States v. Muniz*.<sup>76</sup> In *Muniz*, prisoners brought suit against the United States for negligently caused injuries sustained during confinement.<sup>77</sup> The United States argued, citing *Feres*, that prisoners, like service members, were bound to the state laws in which their prisons were located and varying judgments would be detrimental.<sup>78</sup> The Court rejected this contention and held that nonuniform recoveries were “more of a matter of conjecture than of reality . . . [and] no recovery would prejudice them even more.”<sup>79</sup> Although *Muniz* did not explicitly overrule *Feres*, it seemingly renders the second rationale obsolete.<sup>80</sup> *Muniz* stresses the illogicality inherent in the conclusion that a service member is disadvantaged by nonuniform tort recovery.<sup>81</sup> However, failing to expressly overrule the second rationale has led to the most injudicious result—no FTCA recovery at all.<sup>82</sup>

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lighthouses. *Id.* at 66. Once the government chooses to operate lighthouses, it must use reasonable care. *Id.* at 69. Failure to do so could result in liability. *Id.*

73. *Johnson*, 481 U.S. at 694-95 (Scalia, J., dissenting).

74. *Id.* (Scalia, J., dissenting).

75. *Id.* 481 U.S. at 694-95 (Scalia, J., dissenting).

76. *United States v. Muniz*, 374 U.S. 150 (1963).

77. *Id.* at 150-51.

78. *Id.* at 161.

79. *Id.* at 161-62.

80. See Bennett, *supra* note 66, at 401 (noting that the Court “undercut this rationale” when it announced the *Muniz* opinion in that it, in effect, overruled the second rationale in *Feres*).

81. *Id.* at 400-01.

82. See Seidelson, *supra* note 63, at 634 (revealing the paradox of the Court’s reasoning and arguing that denying FTCA recovery protected the service member is patently unjust).

### 3. Availability of VA Benefits Should Not Result in the Unavailability of FTCA Recovery

In choosing the alternative that precluded FTCA recovery, the Court failed to sufficiently account for the text and legislative history of the FTCA.<sup>83</sup> If Congress intended to exclude service members from bringing claims for injuries arising from activities “incident to service” rather than for injuries arising from combatant activities, the language of the FTCA would have expressed it.<sup>84</sup> Such an exception is neither novel nor easily lost in diction.<sup>85</sup> The text and legislative history of the FTCA and the combatant activities exception indicate congressional intent to allow service members a right to FTCA recovery.<sup>86</sup> Specifically, in 1946, Congress declined to adopt a general service members’ exception to the FTCA, and instead provided for the combatant activities exception.<sup>87</sup> The once rejected general service members’ exception is now routinely applied through the *Feres* Doctrine.<sup>88</sup>

Indeed, the potential for dual recovery is a concern and was first addressed by the Court in *Brooks*.<sup>89</sup> It found that the availability of compensation benefits was not dispositive. To explain its reasoning, it distinguished the Veterans Administration’s compensation scheme with its most analogous counterpart, Workers’ Compensation.<sup>90</sup> The Court found that Congress included an expressed provision that Workers’ Compensation would be an exclusive remedy; no such provision exists in the FTCA or applicable veterans’ laws.<sup>91</sup>

There are more troubling differences, however, between workers’ compensation and VA benefits that support permitting service members to bring suit for noncombatant injuries. VA

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83. *Costo*, 248 F.3d at 869 (Ferguson, J., dissenting) (arguing that the *Feres* Doctrine violates of the Equal Protection Clause and the separation of powers).

84. *Johnson*, 481 U.S. at 693 (Scalia, J., dissenting) (noting that Congress “specifically considered” the unique circumstances between service members and the United States and addressed them in the combatant activities exception).

85. *Brooks*, 337 U.S. at 51 (noting that “the statute’s terms are clear”).

86. *Johnson*, 481 U.S. at 699 (Scalia, J., dissenting); Major Deirdre G. Brou, *Alternatives to the Judicially Promulgated Feres Doctrine*, 192 MIL. L. REV. 1, 37 (2007) (explaining that Congress considered eighteen tort claim bills, and all but two contained exceptions denying recovering to service members; the FTCA was one of the two).

87. Brou, *supra* note 86, at 37.

88. *Id.*

89. *Brooks*, 337 U.S. at 53.

90. *Id.*

91. *Id.* (finding that Congress provided for exclusiveness of the workers’ compensation remedy in three instances, and did not provide a similar remedy regarding the a service member’s VA compensation).

benefits are more difficult to obtain<sup>92</sup> and more easily terminated than workers' compensation.<sup>93</sup> VA denials for service members' requests for compensation tend to be the rule not the exception.<sup>94</sup> If the availability of VA benefits is cited to support precluding all injuries "incident to service," then VA benefits need to be *in fact* available without excessive "hoop jumping."<sup>95</sup> Indeed, the *Feres* Court was correct in one aspect: "[a] soldier is at a peculiar disadvantage."<sup>96</sup> The irony, however, is that the disadvantage lies with a service member's losing battle against VA bureaucracies, and not in state tort law litigation.

Moreover, there is a conflict of interest inherent in the VA compensation system in that the same branch of the government is both the cause of the injury and the only redress for that injury.<sup>97</sup> Though outside the scope of this Comment, the VA's incentive to set compensation and disability ratings low can be inferred.<sup>98</sup> This is particularly true with a growing federal deficit and budgetary constraints.

Compensation benefits can co-exist with FTCA recovery, and this conclusion has been supported in two FTCA actions, pre-<sup>99</sup>

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92. *Johnson*, 481 U.S. at 698 (Scalia, J. dissenting); Bennett, *supra* note 66, at 394. From 1945 to 1962, the United States military exposed soldiers to atomic radiation for the sole purpose of indoctrination; soldiers were told that exposure was not dangerous despite known evidence to the contrary. *Id.* The results were cancer, sterility, miscarriages, and mental and physical birth defects of later conceived children. *Id.* The VA denied compensation for 99.4 percent of claims. *Id.* During the Vietnam War, the VA denied claims at a rate of 99.6 percent. *Id.* at 397. Though the carcinogen was Agent Orange, the culprit was still the federal government. *Id.*

93. *Johnson*, 481 U.S. at 698 (Scalia, J. dissenting) (citing *From Feres to Stencil: Should Military Personnel Have Access to FTCA Recovery?*, 77 MICH. L. REV. 1099, 1106-08 (1979) [hereinafter *Access to Recovery*]). The note explains that veterans' benefits are "gratuitous rights" and only available so long as a "grateful government" wants to make them available. *Id.* at 1107. Conversely, workers' compensation is a "vested right" that is redressable in court if infringed. *Id.*

94. See Bennett, *supra* note 66 (stating that VA denial rates for benefits claims can be as high as ninety-nine percent).

95. *Access to Recovery*, *supra* note 93, at 1108 (noting that the Veterans' Benefit Act does not provide "certain recovery" for injuries sustained in the service).

96. *Feres*, 340 U.S. at 145.

97. Nicole Melvani, *The Fourteenth Exception: How the Feres Doctrine Improperly Bars Medical Malpractice Claims of Military Service Members*, 46 CAL. W. L. REV. 395, 420 (2010).

98. *Id.* at 436 n.174 (noting that a sergeant with eighteen years of active duty service was declared unfit for service after he underwent surgery for stomach cancer, but was assigned a disability rating of zero percent). "The Army only adjusted the rating to forty percent after the soldier's state senator intervened." *Id.*

99. *Brooks*, 337 U.S. at 53 (noting that Congress excluded an exclusivity provision in applicable veterans' laws).

and post-*Feres*.<sup>100</sup> In *United States v. Brown*, the post-*Feres* case, a service member was allowed to recover for injuries caused by a negligent knee surgery.<sup>101</sup> The Court held that “the receipt of disability payments . . . did not preclude recovery.”<sup>102</sup> The holding reaffirmed *Brooks*, the pre-*Feres* case, and nullifies the Court’s third rationale.

The history and legislative intent of the FTCA as well as a comparison between Worker’s Compensation and VA compensation suggest that a service member has a right to FTCA recovery, and the availability of VA benefits does not dictate precluding this right.<sup>103</sup> Notwithstanding *Feres*, Supreme Court precedent weighs in favor of this conclusion.<sup>104</sup>

### B. The Dawn of Discipline

Instead of sending the *Feres* Doctrine to the grave it deserved, the Supreme Court propelled the military discipline rationale, first introduced in *United States v. Brown*, to the frontlines of the issue.<sup>105</sup> In *United States v. Johnson*, the Court elaborated that “military discipline involves not only obedience to orders, but more generally duty and loyalty to one’s service and to one’s country. Suits . . . could undermine the commitment essential to effective service and thus have the potential to disrupt military discipline in the broadest sense of the word.”<sup>106</sup> Preservation of military discipline ensures the efficiency and order of military operations, and this interest outweighs the service member’s right to tort recovery even if the injury arises from circumstances unrelated to his or her military rank or operations.<sup>107</sup>

Initially, the discipline rationale appears to be a legitimate government interest. However, it has not escaped judicial review unscathed.<sup>108</sup> Dissenting in *Johnson*, Justice Scalia provided an

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100. *United States v. Brown*, 348 U.S. 110, 113 (1954) (noting that Congress did not indicate that the right to VA compensation was an exclusive remedy).

101. *Id.*

102. *Id.*

103. *Brooks*, 337 U.S. at 53; *Brown*, 348 U.S. at 113; *see also Feres*, 340 U.S. at 144 (noting that there was statutory authority for all four alternatives espoused by the Court including alternative “(a),” which would permit both FTCA recovery and VA compensation).

104. *Brooks*, 337 U.S. at 53; *Brown*, 348 U.S. at 113.

105. *Brown*, 348 U.S. at 112 (noting the Court’s concern for the “maintenance of . . . discipline”).

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

107. *Id.* (noting that no court wants to be the court that jeopardizes national defense by allowing service members to question orders received from their commanding officers).

108. *Costo*, 248 F.3d at 867 (citing *Johnson*, 481 at 699-700 (Scalia, J. dissenting)). “If the danger to discipline is inherent in soldiers suing their commanding officers, then *no* such suit should be permitted, regardless of whether the ‘injuries arise out of or are in the course of activity incident to

incisive perspective in his dissenting opinion in *Johnson*. He succinctly argued:

[P]erhaps Congress assumed that the FTCA's explicit exclusions would bar those suits most threatening to military discipline, such as claims based upon combat command decisions . . . . Or perhaps—most fascinating of all to contemplate—Congress thought that *barring* recovery by servicemen might adversely affect military discipline. After all, the morale of Lieutenant Commander Johnson's comrades-in-arms will not likely be boosted by news that his widow and children will receive only a fraction of the amount they might have recovered had he been piloting a commercial helicopter at the time of his death.<sup>109</sup>

A closer examination reveals that FTCA recovery, as the government suggests, does not undermine military order and efficiency.<sup>110</sup> Rather, military order and efficiency is undermined when the federal government shirks legal accountability for its negligent conduct.<sup>111</sup> The perception that those in command lack concern for the well-being of their service members is more likely to create distrust and low morale.<sup>112</sup> This lack of concern, or the perception thereof, is endorsed by the illegitimate immunity provided by the *Feres* Doctrine and detracts from the end it purports to achieve.<sup>113</sup> Courts are thus denying relief to “preserve

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service.’ But *Feres* itself imposes this limitation.” *Id.* at 866-67 (emphasis in original).

109. *Johnson*, 481 U.S. at 699-700 (Scalia, J. dissenting).

110. *Id.* (Scalia, J. dissenting).

111. See *Jaffe v. United States*, 663 F.2d 1226, 1248-50 (3d Cir. 1981) (Gibbons, J., dissenting) (admonishing military officials who “acting without legal authority and with no sufficient legitimate military or other purpose, conducted a human experiment upon soldiers . . . by exposing them to radiation which those officials knew to be dangerous”); McKee, *supra* note 43, at 633 (arguing that the United States Armed Forces, in violation of the U.S. Constitution, The Nuremburg Code, and state tort law, illegally employs its soldiers as guinea pigs to study biological and chemical weapons and to examine the effects of certain drugs like “LSD”).

112. Bennett, *supra* note 66, at 408-09. During the Korean and Vietnam Wars, studies were conducted to assess the effect of discipline on enlistees. *Id.* at 408. The studies asked enlistees what factors motivated them to keep fighting, and less than one percent cited discipline. *Id.* The desire to return home, camaraderie, and the degree of an officer's concern for the unit had the greatest effect on an enlistee's determination and efficiency. *Id.* Conversely, when officers were asked what motivated their unit to keep fighting, nineteen percent cited discipline. *Id.* Since discipline is one of the officers' major roles within the Army, it likely accounts for the divergence of views. *Id.* at 409. Ultimately, the studies concluded that the traditional concept of discipline was “seemingly irrelevant” and found instead that discipline “actually detracts from military morale and efficiency . . . .” *Id.* at 408-09.

113. *Johnson*, 481 U.S. at 699-700 (Scalia, J. dissenting); Bennett, *supra* note 66, at 407 (noting that “discipline depends on the relation of the soldiers to his superiors” and considering the significance of a service member's negative change in attitude after Agent Orange exposure); see *id.* at 408-09



a respect for authority that has been destroyed.”<sup>114</sup>

The Supreme Court once embraced a position similar to that of Justice Scalia’s dissent in *Johnson*.<sup>115</sup> In 1851, the Court reviewed a case involving an intra-military tort.<sup>116</sup> The Court aptly recognized the need to balance the interest of military discipline with service members’ individual rights.<sup>117</sup> The balance the Court struck then was more modest;<sup>118</sup> however, *Feres* swung the pendulum significantly in favor of “preserving military discipline” at the expense of its service members’ health and safety.<sup>119</sup> Recent decisions further expanded the doctrine’s immunity, not only extending it to civilian tortfeasors but also citing it to deny service members’ constitutional claims.<sup>120</sup>

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(describing other situations that erode a service member’s respect for his or her superiors).

114. Bennett, *supra* note 66, at 410 (arguing that service members will lose respect for a government that “is killing them”).

115. McKee, *supra* note 43, at 634-35.

116. *Wilkes v. Dinsman*, 48 U.S. 89 (1849); *Dinsman v. Wilkes*, 53 U.S. 390 (1851). A service member sued the commanding officer of his squadron alleging that he was illegally detained after his enlistment expired. *Wilkes*, 48 U.S. at 89.

117. *Dinsman*, 53 U.S. at 403-04.

118. McKee, *supra* note 43, at 634-35 nn.14-15 (citing *Dinsman*, 53 U.S. at 403-04). The *Dinsman* Court stated:

[I]t must be borne in mind that the nation would be equally dishonored, if it permitted the humblest individual in its service to be oppressed and injured by his commanding officer, from malice or ill-will, or the wantonness of power, without giving him redress in the courts of justice . . .

[A military official] is not liable to an action for a mere error in judgment . . . . But, on the other hand, he was equally bound to respect and protect the rights of those under his command, and to cause them to be respected by others; to watch over their health and comfort; and, above all, never to inflict any severer or harsher punishment than he, at the time, conscientiously believed to be necessary to maintain discipline and due subordination in his ships. And if, from malice to an individual, or vindictive feeling, or a disposition to oppress, he inflicted punishment beyond that which, in his sober judgment, he would have thought necessary, he is liable to this action.

*Dinsman*, 53 U.S. at 403-04.

119. See McKee, *supra* note 43, at 655-56 (arguing that *Feres*’ expansive grant of immunity to the United States “sanctions a ‘hands-off’ policy . . . regardless of how egregious its conduct,” which ultimately frustrates the purported goal of preserving discipline). The *Feres* Doctrine is a type of governmental insurance against (almost) all potential liability. *Id.* Thus, the federal government has no incentive, financial or otherwise, to provide for the health and safety of its service members. *Id.*

120. *Johnson*, 481 U.S. at 686 (extending *Feres*’ immunity to civilian tortfeasors); *Chappell v. Wallace*, 462 U.S. 296, 304-05 (1983) (denying service members *Bivens*-type remedy against superior officers for constitutional wrongs); *United States v. Stanley*, 483 U.S. 669, 683-84 (1987) (reaffirming *Chappell* and holding that there is no legal action for constitutional torts for injuries arising from activities “incident to service”).

Few deny that discretion during combat is paramount, and officers' operational decisions cannot be burdened with the threat of a FTCA action.<sup>121</sup> However, few cases dismissed under the *Feres* Doctrine involve such discretion.<sup>122</sup> Justice Scalia's dissenting opinion in *Johnson* thus begs the ultimate *Feres* question: What military orders would be questioned during a trial concerning a barracks fire allegedly caused by a negligently maintained heating plant?<sup>123</sup> Notwithstanding its deficiencies, the military discipline rationale remains the primary justification for the preservation of the *Feres* Doctrine.<sup>124</sup>

*C. The Current State of Feres: The Struggle to Define "Incident to Service" Continues*

Despite the fact that the original rationales supporting the *Feres* Doctrine are void of reason and fact, it persists.<sup>125</sup> Lower courts struggle to determine whether an injury is "incident to service."<sup>126</sup> Some circuits allow the claim to turn on duty status alone.<sup>127</sup> Most circuits, however, purport to employ a factor test.<sup>128</sup> The factors most often considered are: (1) the place where the negligent act occurred; (2) the duty status when the negligent act occurred; (3) the benefits accruing because of status; and (4) the

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121. *Johnson*, 481 U.S. at 699-700 (Scalia, J., dissenting).

122. *United States v. Shearer*, 473 U.S. 52, 105 (1985) (barring an FTCA claim of a soldier kidnapped and murdered when off-base and off-duty by another soldier); *Costo*, 248 F.3d at 867-68 (barring an FTCA claim of a soldier who drowned during Navy sponsored recreational rafting trip); *Pringle*, 208 F.3d at 1227 (barring an FTCA claim of a soldier beaten by a gang after being ejected from a bar on base); Turley, *supra* note 40, at 41-42 (discussing the application of the *Feres* Doctrine to claims involving entertainment and recreational activities).

123. *Feres*, 340 U.S. at 137 (noting that Feres died in a barracks fire allegedly caused by negligently maintained heating plant); *see also* Bennett, *supra* note 66, at 403 (arguing that many cases dismissed under the *Feres* Doctrine do not involve "peculiarly military situations").

124. *Johnson*, 481 U.S. at 684.

125. *Matreale v. N.J. Dep't of Military & Veterans Affairs*, 487 F.3d 150, 159 (3d Cir. 2007) (Smith, J., concurring) (noting that the doctrine "remains ripe for reconsideration by the Supreme Court in light of the questionable foundation upon which it stands").

126. *Id.* (Smith, J., concurring); Riley, *supra* note 53, at 244; *Taber*, 67 F.3d at 1038.

127. *Osik v. United States*, No. 99-6063, 1999 WL 1022481, at \*1 (2d Cir. Oct. 29, 1999) (holding that "'an injury to a [service member] on active duty, which occurs at a military base or installation . . . is an injury arising out of or is in the course of activity incident to military service' and thus is barred by *Feres*"); *Hass for Use & Benefit of U.S. v. United States*, 518 F.2d 1138, 1140 (4th Cir. 1975) (holding that an injury is "incident to service" when sustained "while on active duty and not on furlough").

128. *Diaz-Romero*, 514 F.3d at 115; *Gros*, 232 F. App'x. at 418; *McConnell*, 478 F.3d at 1095; *Pringle*, 208 F.3d at 1224; *Starke*, 249 F. App'x. at 775.

nature of the plaintiff's activities at the time the negligent act occurred.<sup>129</sup> Though one factor is not dispositive,<sup>130</sup> courts place the most weight on whether the service member was on active duty at the time the negligent act occurred.<sup>131</sup>

The relationship between duty status and military discipline must be emphasized. Courts have generally concluded that the threat to military discipline is highest when a service member is on active duty.<sup>132</sup> If a service member is on active duty, courts nearly presume that discipline will be undermined if it allowed the claim to proceed regardless of the nature of the activities.<sup>133</sup> Consequently, a status continuum has emerged.<sup>134</sup> Recovery is more likely for veterans or service members placed on the Temporary Disability Retired List because their claims are purportedly less threatening to military discipline as they are not

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129. See, e.g., *Pringle*, 208 F.3d at 1224 (noting the factors established by the Ninth Circuit and applying the same).

130. *McConnell*, 478 F.3d at 1095.

131. See, e.g., *Adams v. United States*, 728 F.2d 736, 739 (5th Cir. 1984) (observing that “the duty status of the service member is usually considered the most indicative of the nature of the nexus between him and the government at the time of injury”).

132. See, e.g., *Stephenson v. Stone*, 21 F.3d 159, 164 (7th Cir. 1994) (finding service member's death incident to military service because death occurred while he was an active duty and subject to military discipline, orders, and control); *Cortez*, 854 F.2d at 726 (explaining that the service member was on the Temporary Disability Retired List, his only military obligation was to report periodically, and therefore, the threat to military discipline was low). *But see*, *Mack v. United States*, 2001 WL 179888, at \*4 (D. Md. Feb. 21, 2001) (reasoning that the threat to discipline does not necessarily follow from active duty status and instead considered whether discipline would *in fact* be negatively impact military discipline if claim were litigated). The court found that a car accident would not require civilian inquiry into military matters and litigation would not affect military discipline. *Id.*

133. See, e.g., *Briggs v. United States*, 617 F. Supp. 1399, 1403 (D.R.I. 1985), *aff'd*, 787 F.2d 578 (1st Cir. 1986) (finding that Briggs, diagnosed with “Reiter's Syndrome,” would not have been treated at the military hospital but for his active duty military status). Military doctors were in charge of his case and Briggs' allegations of negligence would “question basic choices about the discipline, supervision, and control of a serviceman.” *Id.* at 1403-04; *see also* *Del Rio v. United States*, 833 F.2d 282, 286 (11th Cir. 1987) (barring prenatal tort claim because service member's active duty status permitted her to receive care at a military hospital and litigation would require court to second guess military discretion).

134. *Adams*, 728 F.2d at 739 (noting that at one end, “[veteran] activities are normally not ‘incident to service,’ . . . [and] [a]t the other extreme, one who is on active duty and on duty for the day is acting ‘incident to service’”); *see, e.g., Cortez*, 854 F.2d at 726-27 (holding that the suicide of a service member was not “incident to service” because it occurred when service member was on the Temporary Disability Retired List and noting that the threat to military discipline was minimal), and *Purcell*, 656 F.3d at 467 (rejecting argument that Purcell's death was unrelated to his active duty status even though Purcell's activities at the time of his death were entirely “civilian”).

considered to be acting under orders.<sup>135</sup> The critical failure of allowing duty status to control, however, is that it shifts the focus of the tort claim's analysis from the defendant's conduct to the plaintiff's status as an active duty service member. Tort law revolves around conduct, and it is misguided to allow the status of the individual service member to be dispositive.<sup>136</sup> This disposition affords different treatment under the law between service members,<sup>137</sup> and also between service members and civilians.<sup>138</sup>

#### IV. THE FUTURE OF THE *FERES* DOCTRINE

A more efficient and objective analysis is necessary to determine whether a service member's claim should be barred. It is best to depart from the use of the "incident to service" standard, as the Supreme Court's broad interpretation of the phrase has rendered it legally meaningless.<sup>139</sup> The standard has proven inadequate within the framework of tort law and inevitably leads to unwarranted claim dismissal.<sup>140</sup> This section suggests a

135. *Compare* *Stencel Aero Eng'g Corp. v. United States*, 431 U.S. 666, 673 (noting that "the effect of the action upon military discipline is identical whether the suit is brought by the soldier directly or by a third party"), *and Hinkie*, 715 F.2d at 98 (barring civilian claims brought by the wife and two sons of a veteran because birth defects were derivative of the veteran's active duty radiation exposure), *with Brown*, 348 U.S. at 112 (holding veteran's injury not "incident to service" because it occurred after discharge while veteran was not active duty or subject to military discipline).

136. PROSSER & KEETON ON THE LAW OF TORTS 173-74 (W. Page Keeton ed., 5th ed. 1984) [hereinafter PROSSER & KEETON].

The whole theory of negligence presupposes some uniform standard of behavior. . . . The standard of conduct . . . must be an external and objective one, . . . and it must be, so far as possible, the same for all persons, since the law can have no favorites.

*Id.*

137. *Brown*, 348 U.S. at 114 (Black, J., dissenting) (arguing that "permit[ting] a veteran to recover damages from the Government in circumstances under which a soldier on active duty cannot recover seems like an unjustifiable discrimination which the Act does not require").

138. *Costo*, 248 F.3d at 869-70 (Ferguson, J., dissenting) (arguing that the *Feres* Doctrine violates the Equal Protection Clause of the Fifth and Fourteenth Amendments and is also a violation of the separation of powers); Brou, *supra* note 86, at 38-39 (discussing how the Supreme Court usurped congressional authority when it announced the *Feres* Doctrine); Turley, *supra* note 40, at 68 (characterizing the *Feres* Doctrine as a "unilateral action not only conflict[ing] with the language of the FTCA but engag[ing] in a level of judicial legislation that may be unprecedented in its scope and impact").

139. *See* Bennett, *supra* note 66, at 388-93 (noting that the *Feres* Doctrine is not a standard, but rather an absolute bar for almost all service member claims); *see also* *United States v. Tohono O'Odham Nation*, 131 S. Ct. 1723, 1730 (2011) (noting that "[c]ourts should not render statutes nugatory through construction"); *see also supra* note 41 and accompanying text (listing cases criticizing the *Feres* Doctrine).

140. *See supra* note 39 and accompanying text (noting the "dismissed-

standard that is aligned not only with the original intentions of the FTCA, but also with general tort principles.

A. *The Proper Framework: Defining “Combatant”*

As the *Brooks* Court noted, “[i]t would be absurd to believe that Congress did not have the servicemen in mind in 1946.”<sup>141</sup> There exists a strong presumption that the plain language of a statute expresses congressional intent, and the court can only consider legislative history if a term appears ambiguous.<sup>142</sup> Even assuming that the Court had good cause to believe that “combatant” was ambiguous, delving into the legislative history should have made it clear that Congress never intended to bar all service members’ claims.<sup>143</sup> Congress intelligently considered the unique complexities of allowing service members to sue, and it found that the health and safety of the Armed Forces outweighed the potential governmental liability.<sup>144</sup> Presumably, the Supreme Court deemed the combatant activities exception unwise, substituted its own judgment for that of Congress, and then strained to justify its holding.<sup>145</sup> As a result, service members are left with no legal recourse, often under devastating circumstances.<sup>146</sup>

Congress recently drafted legislation to combat some of the

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affirmed” procedural history common to service members’ suits brought under the FTCA).

141. *Brooks*, 337 U.S. at 51.

142. *Conn. Nat’l Bank v. Germain*, 503 U.S. 249, 253-54 (1992) (reaffirming that “courts must presume that a legislature says in a statute what it means and means in a statute what it says there”); *Rubin v. United States*, 449 U.S. 424, 430 (1981); *Caminetti v. United States*, 242 U.S. 470, 485 (1917) (“Where the language is plain and admits of no more than one meaning, the duty of interpretation does not arise”).

143. *Johnson*, 481 U.S. at 699-700 (Scalia, J., dissenting); see *Brou*, *supra* note 86, at 37 (explaining that Congress considered eighteen tort claim bills and all but two contained exceptions denying recovering to service members; the FTCA was one of the two).

144. *Johnson*, 481 U.S. at 693 (Scalia, J., dissenting) (arguing that had Congress intended to exclude members of the military from bringing claims for injuries “incident to military service” rather than injuries arising from “combatant activities,” the language of § 2680(j) could have easily expressed that intention); *Brooks*, 337 U.S. at 51-52 (noting that Congress frequently includes general exclusionary provisions in legislation, but did not do so in the FTCA).

145. *Johnson*, 481 U.S. at 700 (Scalia, J., dissenting) (arguing that the three rationales promulgated in *Feres* are insufficient and refers to the “military discipline” rationale as a “post hoc rationalization” that still fails to substantiate the Court’s interpretation of the combatant activities exception); *Brou*, *supra* note 86, at 34.

146. See *infra* note 163 (detailing tragic injuries and deaths, allegedly caused by negligent conduct, the victims of which have been barred from tort recovery).

crippling effects of the *Feres* Doctrine. The Carmelo Rodriguez Military Medical Accountability Act of 2009 (“Act”) would have allowed service members injured or killed by medical malpractice to bring suit against the United States.<sup>147</sup> Three years have passed and Congress has yet to vote on it.<sup>148</sup> Though the Act would be a positive step in the right direction, Congress can and should do more to restore the original meaning of the combatant activities exception to the FTCA.<sup>149</sup> Congress should enact a bill to explicitly overrule the *Feres* Doctrine and the “incident to service” standard while providing a workable definition for the term “combatant activities.”

PROPOSED BILL: The rights of service members under the FTCA shall not be denied on the determination that injuries are “incident to service.” The United States shall be liable to service members for personal injuries unless those injuries arise from combatant activities during time of war. A “combatant activity” means an activity in which a service member is engaging in active fighting with enemy forces.<sup>150</sup>

Armed with this common sense definition, courts can determine whether an injury is reasonably caused by a combatant activity through a two-step analysis. First, the court must ask whether the injury was reasonably caused by a “combatant activity”—that is, an activity that involved actively fighting enemy forces. This is a question of law for the court and permits thoughtful discretion. If the court finds that the activity causing the injury is “combatant,” it should dismiss the claim, because the government has retained immunity. In the event that the activity is found to be combatant, the service member must resort to VA benefits for compensation.

If the court finds the activity causing the injury is noncombatant, the claim can proceed. The second question the court must ask is whether the service member’s injury was a foreseeable consequence of the risk created by the government’s

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147. Carmelo Rodriguez Military Medical Accountability Act of 2009, H.R. 1478, 111th Cong. § 2 (2009).

148. H.R. 1478: Carmelo Rodriguez Military Medical Accountability Act of 2009, GOVTRACK.US, <http://www.govtrack.us/congress/bill.xpd?bill=h111-1478> (last visited Jan. 21, 2013) (indicating that the Congress did not vote on the Carmelo Rodriguez Military Medical Accountability Act).

149. *Feres*, 340 U.S. at 138 (noting that “Congress possesses a ready remedy” and can re-legislate to correct the Court’s interpretation of the combatant activities exception); *Johnson*, 481 U.S. at 702-03 (Scalia, J., dissenting) (arguing that the Court cannot rely on Congress’s failure to employ its “ready remedy” as a rationale that the *Feres* Doctrine reflects what Congress intended). Such reliance would disregard the separation of powers and the system’s internal checks and balances. *Id.*

150. *Combatant Definition*, DICTIONARY.COM, <http://dictionary.reference.com/browse/combatant> (last visited Jan. 21, 2013).

conduct. This is a question of fact. The reasonableness of the government's conduct, like the reasonableness of a private individual's conduct, is objectively considered. A list of the possible injuries that could arise from combatant and noncombatant activities will materialize.

Suppose one applies this analysis to the facts presented in *Purcell*. The first question is whether drinking and chatting on the Internet while off-duty constitutes a "combatant activity." Suppose the court finds that this activity is noncombatant and allows the claim to proceed. The question then becomes whether Purcell's suicide was a foreseeable consequence of the DoD officers' failure to search his person for the .357 magnum revolver that the officers knew or had reason to believe he possessed. If this question is answered affirmatively, the government is liable and Purcell's estate can recover damages.

### B. *The Framework Addresses the Failures of the Feres Doctrine*

The critical failure of the "incident to service" standard is its subjectivity,<sup>151</sup> which has created confusion about its application and permitted an unacceptably broad interpretation of immunity.<sup>152</sup> By focusing on the language of the FTCA and using the word "combatant" to determine whether a service member's claim is viable, the proposed framework remedies this failure and addresses circuit confusion. "Combatant" is an adjective that is sufficiently definite to permit objective argumentation for the initial question of law required in this framework. It also refocuses the analysis from the duty status of the service member to the nature of the government's conduct. Thus, the emphasis is now properly on the conduct of the defendant.

Additionally, the proposed framework will allow more service members to recover for injuries.<sup>153</sup> FTCA recovery will more fairly and efficiently allocate losses, deter negligent conduct, and incentivize the federal government to better provide for the general safety of the Armed Forces.<sup>154</sup> Most importantly, this

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151. See PROSSER & KEETON, *supra* note 136, at 173-74 and accompanying text (arguing that tort law and the standard of care must be based on an objective analysis).

152. See *supra* notes 41, 52, 125 and accompanying text (arguing that the *Feres* Doctrine is confusing and should be reconsidered).

153. See PROSSER & KEETON, *supra* note 136, at 20, 25 (noting that tort law determines when loss should be allocated to the defendant to compensate the injured plaintiff and to provide an incentive to act reasonably to prevent harm to others).

154. See McKee, *supra* note 43, at 655-56 (arguing that the *Feres* Doctrine provides the United States with too much immunity and no incentive to provide for its service members); Jonathan Turley, *The Feres Doctrine: What Soldiers Really Need Are Lawyers*, JONATHAN TURLEY BLOG (Aug. 18, 2007, 11:47 AM), <http://jonathanturley.org/2007/08/18/the-feres-doctrine-what->

objective standard poses little threat to military discipline. The proposed bill still precludes claims arising from combatant activities, where the threat to military order is highest.<sup>155</sup> When balancing the interests of military discipline and service members' rights, it is prudent to protect individual rights.<sup>156</sup> This is especially true when evidence and reasonableness suggest that the *Feres* Doctrine breeds distrust of authority rather than preserving it.<sup>157</sup>

## V. CONCLUSION

The United States Army touts seven values: Loyalty, Duty, Respect, Selfless Service, Honor, Integrity, and Personal Courage.<sup>158</sup> Though all unite to illustrate the hypocrisy that is the *Feres* Doctrine, duty is perhaps the one that stands infused with the most irony. The United States Army explains that duty means “resist[ing] the temptation to take ‘shortcuts’ that might undermine the integrity of the final product.”<sup>159</sup> Congress and the Supreme Court have taken their fair share of shortcuts by avoiding their respective duties to enforce the rights of service members to bring claims for negligently caused injuries.<sup>160</sup> Cowering behind inane rationales, the federal government

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soldiers-really-need-are-lawyers/ (exposing Congress's failure to address the deteriorating conditions of military hospitals despite the commitment that “nothing is too good” for our troops). Conditions at the Walter Reed Army Medical included “mold, rats, cockroaches, rotting walls and callous treatment of patients”. *Id.* “[T]here is little deterrence for military negligence beyond self-regulation, bad publicity or a political scandal.” *Id.*

155. *Johnson*, 481 U.S. at 699-700 (Scalia, J., dissenting) (noting that the combatant activities exception, as written, bars claims Congress deemed most threatening to the success of military operations and discipline).

156. *Id.* (Scalia, J., dissenting) (espousing the premise that protecting service members' claims against the United States can boost morale and preserve a respect for military authority through accountability for negligent conduct).

157. *Id.* (Scalia, J., dissenting); *see supra* notes 112-14 and accompanying text (arguing that the United States undermines military discipline by failing to compensate service members for negligently caused injuries).

158. *The Army Values*, THE UNITED STATES ARMY, <http://www.army.mil/values/> (last visited Jan. 21, 2013).

159. *Id.*

160. *Witt ex rel. Estate of Witt v. United States*, 379 F. App'x 559, 559-60 (9th Cir. 2010), *cert. denied*, 131 S. Ct. 3058 (2011); Leo Shane III, *Supreme Court Deals Devastating Blow to Feres Doctrine Opponents*, STARS AND STRIPES (June 27, 2011), <http://www.stripes.com/news/supreme-court-deals-devastating-blow-to-feres-doctrine-opponents-1.147604> (noting that the Witt family believes that the Supreme Court “made a bad decision,” but they will not give up because this decision “could negatively impact the military for generations”); Brou, *supra* note 86, at 80 n.272 (noting that Congress has considered numerous bills attempting to ameliorate the harshness that has become the *Feres* Doctrine). All have failed to correct the *Feres* Court's injudicious activism. *Id.*



continues to undermine the integrity of its final product—the, health, safety, and efficiency of the United States Armed Forces.

Congress contemplated the unique considerations of allowing members of the military to bring suit against the United States, and its intent to retain immunity in the class of cases arising only from combatant activities is dispositive evidence that the *Feres* Doctrine was mere conjecture.<sup>161</sup> In the face of “widespread, almost universal criticism,”<sup>162</sup> the *Feres* Doctrine haunts our nation’s best intentions to provide for its men and women in uniform. If the *Feres* Doctrine remains viable, tragic and preventable deaths like that of Christopher Purcell will continue.<sup>163</sup> The time to overrule this self-defeating and importunate injustice is long overdue. Echoing Sergeant Carmelo Rodriguez’s dying words, we cannot let this be it.<sup>164</sup> We must continue to fight.<sup>165</sup>

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161. See *supra* notes 85, 87, 139, 143, 145 and accompanying text (arguing that the *Feres* Doctrine was judicially created and it had no basis in the text of the “combatant activities” exception).

162. *Johnson*, 481 U.S. at 700 (Scalia, J., dissenting) (citing *In re “Agent Orange”* Product Liability Litigation, 580 F. Supp. 1242, 1246 (E.D.N.Y. 1984), *appeal dismissed*, 745 F.2d 161 (2d Cir. 1984)). *In re “Agent Orange”* involved Vietnam veterans and their families who sued the chemical companies responsible for manufacturing Agent Orange to recover injuries sustained when exposed to the substance. *In re “Agent Orange”*, 580 F. Supp. at 1242.

163. The following sources detail the tragic deaths of other service members: Walter F. Roche, Jr., *Willing to Die, but Not this Way*, L.A. TIMES (Apr. 20, 2008), <http://articles.latimes.com/2008/apr/20/nation/na-feres20> (reporting that twenty-five-year-old Staff Sergeant Dean Witt died as a result of “avoidable error,” leaving behind his wife and two children); Pitts, *supra* note 1 (reporting that Sergeant Carmelo Rodriguez’s seven-year-old son held his hand as he whittled away to eighty pounds and died from stage four melanoma—entirely preventable had the army doctor actually told him that he had cancer when it was found a decade earlier); Turley, *supra* note 154 (detailing other tragic deaths resulting from negligent governmental conduct and barred by *Feres*); Beth Ford Roth, *U.S. Supreme Court Refuses to Hear Military Malpractice Case*, HOMEPOST (June 27, 2011, 11:14 AM), <http://homepost.kpbs.org/news/2011/jun/27/us-supreme-court-refuses-to-hear-military/> (expressing disapproval of the Supreme Court’s decision denying review of the *Feres* Doctrine most recently brought by Alexis Witt).

164. See *supra* note 1 and accompanying text (quoting Carmelo Rodriguez).

165. *Id.*