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Susan Beaupre Lindholm

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The common law doctrine of sovereign immunity dictates that a citizen may not sue the United States Government without its consent. In 1946, the United States Congress partially waived this immunity by enacting the Federal Tort Claims Act ("FTCA"), which expressly renders the United States liable to all persons injured by the negligence of government employees. Only four years after Con...

1. The doctrine of sovereign immunity emerged from the medieval assumption that the king was infallible. The United States Supreme Court adopted this idea in 1821, holding that no one could pursue an action against the United States Government without its consent. Cohens v. Virginia, 19 U.S. 120, (1821). See Note, The Effect of the Feres Doctrine on Tort Actions Against the United States by Family Members of Servicemen, 50 FORDHAM L. REV. 1241-45 (1982) [hereinafter Note, The Effect of the Feres Doctrine]. The English common law notion of sovereign immunity quickly took root in America because of the fear that the newly created federal government was financially unstable and would be unable to shoulder the costs of litigation. Note, Solving the Feres Puzzle: A Proposed Analytical Framework for "Incident to Service," 15 PAC. L.J. 1181 (1984) [hereinafter Note, The Feres Puzzle]. See Feres v. United States, 340 U.S. 135, 139-40 (1950) (American courts have consistently clothed the federal government and its agents with immunity); RESTATEMENT (SECOND) OF TORTS § 895A comment a (1979) (English common law doctrine of sovereign immunity eagerly accepted by American judges in early days of the republic).
2. 28 U.S.C. §§ 1346, 2671-2680 (1976). In enacting the Federal Tort Claims Act ("FTCA"), the United States Congress abolished the government's sovereign immunity:

for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.
28 U.S.C. § 1346(b) (1976). The FTCA qualifies the Congressional waiver of sovereign immunity with ten express exceptions, including:

(a) Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government,
gress enacted the FTCA, however, the Supreme Court, in Feres v. United States, created a major exception to the FTCA when it prohibited military personnel from suing the United States for injuries that "arise out of, or are in the course of activity incident to [military] service." In United States v. Johnson, the Supreme Court addressed the issue of whether the "Feres doctrine" should be extended to bar FTCA actions when military personnel are injured by non-military, civilian employees of the federal government. The

whether or not the discretion involved be abused.

... 

(d) Any claim for which a remedy is provided by sections 741-752, 781-790 of title 46, relating to claims or suits in admiralty against the United States.
(e) Any claim arising out of an act or omission of any employee of the Government in administering the provisions of sections 1-31 of title 50, Appendix.

... 

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

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


3. 340 U.S. 135 (1950). In Feres, the Court consolidated three cases that addressed the issue of whether members of the military could recover under the FTCA for injuries sustained while on active duty but not during time of war. In the first case, the serviceman perished when the barracks in which he slept caught fire. Feres v. United States, 177 F.2d 535 (2d Cir. 1949), aff'd, 340 U.S. 135 (1950). The plaintiff alleged that the government was negligent for housing the serviceman in unsafe quarters. Id. See also Jefferson v. United States, 178 F.2d 518 (4th Cir. 1949), aff'd, 340 U.S. 135 (1950) (alleged medical malpractice by army surgeon); United States v. Griggs, 178 F.2d 1 (10th Cir. 1949), rev'd, 340 U.S. 135 (1950) (serviceman’s death alleged to be result of army surgeon’s negligent treatment).

4. Feres, 340 U.S. at 146. The Court conceded that although a literal interpretation of the FTCA allows servicemen to bring tort actions against the United States, the Congressional drafters did not intend the military to seek remedies for injuries sustained incident to service. Id. at 140-43. See also Note, The Feres Puzzle, supra note 1, at 1182. Contra Note, Military Personnel at the Federal Tort Claims Act, 58 YALE L.J. 615, 620-21 (1949) [hereinafter Note, Military Personnel] (primary drafter of FTCA says Congress never intended to exclude military servicemen from the Act’s coverage); Note, The Feres Puzzle, supra note 1, at 1188 n. 71 (Feres creates a judge-made exception for servicemen that the drafters did not intend to include in the FTCA).


6. The Supreme Court has never deviated from the Feres doctrine’s holding that a serviceman cannot bring a tort action against the United States if he is injured "incident to service." Johnson 107 S. Ct. at 2066. See United States v. Shearer, 473 U.S. 52, 57 (1985) (serviceman who Army knew to be violent kidnapped and murdered fellow serviceman); Chappell v. Wallace, 462 U.S. 296, 299 (1983) (military personnel may not bring suit against superior officers for alleged constitutional violation); Stencel Aero Engineering Corp. v. United States, 431 U.S. 666 (recovery in indemnity action barred because injured person was military officer), reh’g denied, 434 U.S. 882 (1977); United States v. Brown, 348 U.S. 110, 112 (1954) (recovery allowed where injury caused by negligent treatment in VA hospital occurred after discharge, distinguishing Feres from Brooks v. United States, 337 U.S. 49 (1949)).
Supreme Court held that the military status of the alleged tortfeasor was not crucial to the application of the *Feres* doctrine. In so ruling, the Court unjustifiably extended the *Feres* doctrine to deny legitimate claims that do not fairly implicate the legitimate concerns of the *Feres* doctrine rationale.  

In 1982, Johnson, a helicopter pilot for the United States Coast Guard, assisted in an aerial search for a lost civilian boat off the the coast of Hawaii. Inclement weather caused Johnson to request radar assistance from the Federal Aviation Administration ("FAA"). Although the FAA air traffic controller assumed positive radar control over Johnson's helicopter, it subsequently crashed into the side of a mountain, killing Johnson and his fellow crew members.  

Pursuant to the Veterans' Benefits Act ("VBA"), Johnson's widow applied for and received compensation for her husband's death. In addition, she brought a wrongful death action against the United States pursuant to the *FTCA*, alleging that the FAA air traffic controller negligently caused her husband's death.

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7. The Court justified this decision by stating that "(w)e know of no American law which has ever permitted a soldier to recover for negligence, against either his superior officers or the government he is serving." *Johnson*, 107 S. Ct. at 2066 n.7 (quoting *Feres* v. United States, 340 U.S. at 141) (emphasis in original).

8. *Johnson*, 107 S. Ct. at 2064. The United States Coast Guard must operate as "a military service and a branch of the armed forces of the United States at all times," and fulfill their primary duties as rescuers and promoters "of safety on, under, and over the high seas." 14 U.S.C. §§ 1-2 (1982).

9. *Johnson*, 107 S. Ct. at 2064. The court of appeals further emphasized the civilian nature of the FAA: Although we have no cause to doubt that the FAA could have been placed under the direct control of the Armed Forces, the fact remains that Congress chose to make the FAA a civilian administration within the Department of Transportation. See Act of Jan. 12, 1983, Pub. L. No. 97-449, 1982 U.S. Code Cong. & Ad. News (96 Stat. 2413) (2416). It bears mentioning that the Administrator of the FAA must be a civilian, and if the Administrator is a former regular officer of an armed service, the Deputy Administrator may not be an officer on active duty in the armed services, a retired regular officer in an armed service, or a former regular officer in an armed service .... *Johnson* v. United States, 749 F.2d 1530, 1539 n.10 (1985). *See Note*, Federal Tort Claims Act, J. AIR L. & COM 1087, at n.4 (1986) [hereinafter Note, *FTCA*] (FAA acts as civilian agency under the U.S. Department of Transportation).


11. *Id.*, at 2005. Mrs. Johnson received compensation totaling $35,690.66 in life insurance, a $3,000 death gratuity, and continues to receive approximately $868 per month in compensatory and dependency benefits. Brief for United States at 3 n.1, United States v. *Johnson*, 107 S. Ct. 1063 (No. 85-2039). The $868 monthly compensatory and dependency benefits Mrs. Johnson receives from the government are benefits typically payable to the surviving spouse, and it also includes a monthly sum for any surviving children below age 18. *Johnson*, 107 S. Ct. at 2065 n.1.


13. For the relevant sections of the statute, see *supra* note 2.

The court, however, granted the federal government's motion to dismiss. The court, relying on *Feres*, held that even if the tortfeasor in an FTCA action is a civilian, family members of a deceased serviceman cannot recover from the government if the serviceman was killed during the course of military duty.

The Court of Appeals for the Eleventh Circuit reversed the district court and held that *Johnson* was not governed by the rule in *Feres* because the alleged tortfeasor was a civilian governmental employee rather than a serviceman or armed forces employee. The court found that it was necessary to analyze the underlying rationale of the *Feres* doctrine in order to determine whether a particular plaintiff could sue under the FTCA. The court stated that the *Feres* doctrine was best explained as an attempt by the Supreme Court to avoid upsetting the "delicate" relationship which must exist between servicemen and their superiors if the military is to function effectively. The appellate court noted that the plaintiff's contemplated action would not disturb this relationship between servicemen and their superiors. Because FAA controllers are civilian government employees, a suit against the government would not re-

16. See *supra* notes 3, 6 and 7 for a discussion of the *Feres* doctrine.
18. *Id.* at 2065. The Court listed the three rationales it used to support the *Feres* doctrine's bar to recovery by a serviceman under the FTCA:

First, the relationship between the Government and members of its Armed Forces is "'distinctively federal in character';" 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. Second, the Veteran's 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. A third factor . . . (is) "'(t)he peculiar and special relationship of a soldier to his superiors, the effects of the maintenance of such suits on discipline, and the extreme results that might obtain if suits under the Tort Claims Act were allowed for negligent orders given or negligent acts committed in the course of military duty . . . .'"

*Id.* See Stencel Aero Eng'g Corp. v. United States, 431 U.S. 666, 671-72 (Court applied the three rationales of *Feres*) *reh'g denied*, 434 U.S. 882 (1977). United States v. Brown, 348 U.S. 110, 112 (1954) (Court expanded on the *Feres* rationales but held that the doctrine did not apply here); *Feres* v. United States, 340 U.S. 135 (1950); United States v. Standard Oil Co., 332 U.S. 301 (1947) (federal law governs relationship between government and members of the armed forces, which is "distinctly federal in character").

quire courts to scrutinize the conduct of any military personnel. Consequently, the lower court concluded that the *Feres* doctrine did not bar Mrs. Johnson's FTCA action.

The United States Supreme Court granted certiorari to address the issue of whether the *Feres* doctrine bars an FTCA action on behalf of a serviceman killed during the course of an activity incident to service, but where the alleged tortfeasor is a civilian employee of the federal government rather than a member of the military. The Court held that the military status of the alleged tortfeasor is irrelevant in applying the *Feres* doctrine. Thus, the Court retained its

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21. Johnson, 107 S. Ct. at 2066. The court of appeals granted the Government's request for rehearing *en banc*, id., and ruled that the panel had properly considered the *Feres* rationale in determining that the suit in question would not erode the purposes of the FTCA. Id. Hence, because the tortfeasors were not involved in military activities, the court concluded that the Feres doctrine did not preclude Mrs. Johnson's FTCA action. *Id.*


23. *Id.* "We know of no American law which has ever permitted a soldier to recover for negligence, against either his superior officers, or the government he is serving." *Feres* v. United States, 340 U.S. at 135, 141 (1950) (emphasis in original). In order to demonstrate the general unfairness of the *Feres* doctrine, the dissent listed a host of lower court rulings which barred suits brought by servicemen to recover for injuries caused by civilian tortfeasors. These cases are as follows:

- *Potts* v. United States, 723 F.2d 20 (6th Cir. 1983) (Navy corpsman injured when struck by a broken cable from a hoist operated by civilians), *cert. denied*, 466 U.S. 959 (1984);
- *Warner* v. United States, 720 F.2d 837 (5th Cir. 1983) (off-duty Army enlisted man injured on base when motorcycle collided with shuttle bus driven by civilian government employee);
- *Lewis* v. United States, 663 F.2d 889 (9th Cir. 1981) (Marine Corps pilot killed in crash allegedly due to negligence of government maintenance employees), *cert. denied*, 457 U.S. 1133 (1982);
- *Carter* v. Cheyenne, 649 F.2d 827 (10th Cir. 1981) (Air Force captain killed in crash at city airport for which city brought third-party claim against FAA air traffic controller);
- *Woodside* v. United States, 606 F.2d 134 (6th Cir. 1979) (Air Force officer killed in plane crash allegedly due to negligence of civilian flight instructor employed by military flight club), *cert. denied*, 445 U.S. 904 (1980);
- *Uptegrove* v. United States, 600 F.2d 1248 (9th Cir. 1979) (Navy lieutenant killed while flying home on Air Force transport due to negligence of FAA air traffic controller), *cert. denied*, 444 U.S. 1044 (1980);
- *Watkins* v. United States, 462 F. Supp. 990 (S.D. Ga. 1978) (serviceman killed on base when motorcycle collided with shuttle bus driven by civilian government employee), *aff'd*, 587 F.2d 279 (5th Cir. 1979);
- *Hass* v. United States, 518 F.2d 1138 (4th Cir. 1975) (suit by serviceman against civilian manager of military-owned horse stable);
- *United States* v. *Lee*, 400 F.2d 558 (9th Cir. 1968) (serviceman killed in crash of military aircraft allegedly due to FAA air traffic controller negligence), *cert. denied*, 398 U.S. 1053 (1969);
- *Sheppard* v. United States, 369 F.2d 272 (3rd Cir. 1966) (same), *cert. denied*, 386 U.S. 982 (1967);
- *Layne* v. United States, 295 F.2d 433 (7th Cir. 1961) (National Guardsman killed on training flight allegedly due to negligence of civilian air traffic controllers), *cert. denied*, 368 U.S.
rigid formulation of the Feres doctrine, prohibiting any military serviceman from recovering for any injuries that arise out of, or are sustained in, the course of any activity incident to his service, notwithstanding the civilian status of the tortfeasor.24

The Supreme Court began its analysis by noting that it had never deviated from its original interpretation of the FTCA.25 The Court justified this rigid position by stating that although Congress possesses the power to alter any erroneous judicial interpretation of its enactments, it has not chosen to change the standards set forth in Feres in the forty years since it was first articulated.26

Next, the Court examined the three rationales underlying the Feres Court's decision to not permit suits against the government by servicemen where the injury arises out of activities incident to military service.27 First, a uniform federal remedy like that provided in the VBA is appropriate as the exclusive remedy for injured servicemen because the relationship between the government and members of its armed forces is "distinctively federal in character."28 Second, generous statutory disability and death benefits already exist which provide substantial compensation to the servicemen or their surviving family members.29 Third, if such suits were permitted, the judi-
ciary would necessarily become enmeshed in “sensitive military affairs at the expense of military discipline and effectiveness.”30 The Court concluded that an examination of these Feres doctrine rationales demonstrates that the status of the alleged tortfeasor “does not have the crucial significance ascribed to it by the court of appeals.”31

After examining the first rationale underlying Feres, the Johnson Court concluded that there should be a uniform federal remedy for servicemen who are injured or killed while fulfilling their duty to the government.32 The Court explained that where a serviceman performs activities required and governed by federal authority, he is clearly acting on behalf of the federal government.33 If a serviceman could bring an FTCA action against the government, however, the law of the state in which the accident occurred would govern the proceedings.34 The Court noted that compensation to federal mili-

and superseded it with workmen's compensation statutes which provide, in most instances, the sole basis of liability.” Feres, 340 U.S. at 143. Additionally, a soldier is at a distinct disadvantage if he must litigate to recover for his injury, because he will normally lack the time and money necessary to effectively prosecute a personal injury action. Id. at 145. Similarly, on the federal level, the VBA provides benefits comparable to those provided by most workmen's compensation statutes. Id. at 144-45. See Hatzlach Supply Co. v. United States, 44 U.S. 460, 464 (1980) (Congress intended VBA to be serviceman’s sole remedy for service-connected injuries); Stencel Aero Eng’g Corp. v. United States, 431 U.S. 666, 673 (VBA compensation is a swift and efficient remedy for servicemen).

30. United States v. Johnson, 107 S. Ct. at 2063, 2069 (1987). See also United States v. Shearer, 473 U.S. 52, 59 (1985) (claims which failed to fall within the Tort Claims Act were the type of claims that if generally permitted, would involve the judiciary in sensitive military affairs, to the detriment of military discipline and effectiveness); Chappell v. Wallace, 462 U.S. 296, 300 (1983) (“The need for special regulations in relation to military discipline, and the consequent need and justification for a special and exclusive system of military justice, is too obvious to require extensive discussion; no military organization can function without strict discipline and regulations”); Stencel Aero Eng’g Corp. v. United States 431 U.S. 666, 673 (1977) (when an action involves an injured serviceman, the trial will “involve second-guessing military orders,” and should not be allowed to proceed), reh’g denied, 434 U.S. 882 (1977); United States v. Muniz, 374 U.S. 150, 162 (1963) (Feres best explained by examining the peculiar and special relationship of the soldiers and superior officers, effect of such suits on discipline, and the extreme results that might occur if suits were allowed under FTCA for orders negligently given or acts negligently committed in the course of military duty service); Brief for the United States at 13, United States v. Johnson, 107 S. Ct. 2063 (1987) (No. 85-2539). In Johnson, the United States might have to prove, as a matter of litigation strategy, that military officials rather than civilian governmental employees were negligent. For example, the United States might attempt to prove that the co-pilot was negligent, or that the helicopter should not have been sent into such poor weather conditions.


32. Id. at 2068; Feres, 340 U.S. at 143. See supra note 28 for an explanation of the “distinctively federal in character” argument.


34. Johnson, 107 S. Ct. at 2068; Feres, 340 U.S. at 142-43 (service-connected injuries generally compensated under the substantive tort law of the situs of the
tary personnel would then be determined under varying state law, inevitably producing inconsistent results. The Court reasoned that "it makes no sense to permit the fortuity of the situs of the alleged negligence to affect the liability of the government to the service-
man." Consequently, the Court concluded that a uniform federal remedy, such as that provided under the VBA, should determine the amount of compensation that Johnson's widow receives. 

In examining the second rationale underlying the Feres decision (that generous disability and death benefits already were available), the Johnson Court noted that the primary purpose of Congress in passing the FTCA was to extend a remedy to those who had previously been without one. The Court believed that Congress did not intend the FTCA to include members of the military as possible plaintiffs because Congress had already provided generous remedies in statutory disability and death benefits. The court noted that this recovery is swift, usually requires no litigation, and is comparable to benefits available under most workmen's compensation statutes. Moreover, the Court found no reason to modify precedent which had established that statutory veterans' benefits provide an upper limit on governmental liability for service-connected injuries. Therefore, the Court concluded that Mrs. Johnson had no wrongful action, but Court rejects a similar rule for servicemen who are the victims). See supra note 2 for the text of 28 U.S.C. § 1346(b) (1976) ("the law of the place where the act or omission occurred governs any resulting liability").

35. Johnson, 107 S. Ct. at 2068; Feres, 340 U.S. at 144. The Feres Court argued that the laws governing the federal military should be derived from federal sources. Id. at 144 (quoting United States v. Standard Oil Co., 332 U.S. 301, 306 (1947)). For a discussion of the "distinctively federal in character relationships," see Note, The Effect of the Feres Doctrine, supra note 1, at 1259-61.


37. Johnson, 107 S. Ct. at 2069. See supra notes 11 & 29 for discussions of Mrs. Johnson's statutory benefits under the VBA.

38. Id. at 2068. Congress did not intentionally try to help the military under the FTCA because federal law already provided military personnel a remedy for injuries or death which occurred during service. Feres, 340 U.S. at 140. For a general discussion of sovereign immunity see supra note 1.


40. Stencel Aero Eng'g Corp. v. United States, 431 U.S. 666, 673 (1976) (VBA compensation scheme is an "efficient remedy for the injured serviceman, but it also clothes the government in the 'protective mantel of the Act's limitation-of-liability provision'"), reh'g denied, 434 U.S. 882 (1977).

41. Feres, 340 U.S. at 145.

42. Id. The Feres Court noted that the widow of a serviceman might recover more money under the VBA than she could have recovered under the Illinois workers' compensation law. Id. In one example, the widow received $2,100 since her husband's death, plus $2,635 representing the six months' death gratuity. Id. The Court estimated that the widow could receive future pension payments of $18,000, bringing her total compensation from the government to more than of $22,000. Id. Under the Illinois statute, the maximum amount of money that the widow could recover is $15,000. Id.

43. Johnson, 107 S. Ct. at 2068-69. Accord Stencel Aero Eng'g Corp. v. United
cause of action against the government because she was already receiving statutory benefits.

Finally, the Johnson Court examined the third rationale underlying the Feres decision: that allowing suits by military members against the government would involve the judiciary in sensitive military affairs. The Court noted that the military must encourage "instinctive obedience, unity, and commitment." The Court determined that a suit by a serviceman against the government would disrupt the serviceman's commitment to his country and possibly undermine military discipline among other servicemen. The Court noted that because Johnson "was acting pursuant to the standard operating procedures of the Coast Guard," the likelihood that his widow's suit would implicate military discipline was substantial. The Court therefore concluded that Mrs. Johnson's suit against the government must be dismissed because the circumstances of this case fell within the heart of the Feres doctrine.

In Johnson, the Supreme Court incorrectly extended the Feres doctrine to bar recovery for service-related injuries where the tortfeasor is a civilian governmental employee. The Johnson Court's justifications for a further extension of the doctrine are flawed for three reasons. First, the language of the statute neither expressly nor implicitly suggests the military exception expounded by the Court in Feres. Second, the various rationales underlying Feres do not justify a complete prohibition of suits such as Mrs. Johnson's, where the tortfeasor is a civilian. Finally, the Court failed to recognize the inherent unfairness of the Feres doctrine which, solely on the basis of military standing, deprives military members of remedies which are available to all civilian citizens of this country.

When Congress enacted the FTCA, it intentionally waived the

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44. Johnson, 107 S. Ct. at 2069.
45. See supra note 30 for an argument that Feres doctrine justified by need to keep sensitive military affairs out of the courtroom.
47. Id. In many cases in which military members are injured, it is likely that contributory negligence would be an issue, and thus requiring servicemen to testify against one another. Brief for the United States at 19, United States v. Johnson, 107 S. Ct. 2063 (1987) (No. 85-2539).
49. Id.
50. See supra note 2 for the text of the pertinent statutory provisions of the FTCA. In Note, The Effect of the Feres Doctrine, supra, note 1 at 1243 n.17, the author explains that under 28 U.S.C. § 2680 (1976):
The FTCA excludes three general categories of claims: (1) those arising out of the performance of discretionary functions or duties, § 2680(a); (2) those arising out of particular areas of governmental activity, including "loss (or) miscar--
government's sovereign immunity, thereby allowing citizens to sue the United States for the negligence of its employees. The FTCA expressly states that military servicemen's suits are barred only for "claims arising out of combatant activities of the military, or naval forces, or the Coast Guard, during time of war." The Feres Court, however, ignored the literal language of the Act and instead held that Congress could not have intended to subject the government to such claims by members of the armed forces. However, contrary to the holdings in both Feres and Johnson, Congress never intended to bar servicemen from recovering under the FTCA for injuries sustained while engaged in activities incident to their military service. First, when courts examine plain and unambiguous language, such as that of the FTCA, they are not entitled to change the meaning of that language. Second, the FTCA was en-

51. See supra note 1 for a general discussion of sovereign immunity.

52. In Note, Military Personnel, supra note 4, at 617-18, the author states that the FTCA "has a double-barreled purpose: to remove the previous barrier to suits against the Government in tort and, by so doing, to relieve Congress of the burden of handling the thousands of private bills for relief that were, in the absence of any other remedy, submitted to it each year." The Court claimed that prior to the passage of the FTCA, private remedies were sought by civilians, but almost never by servicemen. Id. The Court inferred from these circumstances that Congress intended to withhold the servicemen's remedies under the FTCA. Id. But see infra note 56 (no Congressional intent to exclude servicemen from coverage of the Act).

53. No legislative history exists to explain the term "combatant activities." In Re "Agent Orange" Product Liability Litigation, 580 F. Supp. 1242, 1255 (E.D.N.Y. 1984) (defines "combatant activities" as "actual hostilities and physical violence" and "operation directly connected with engaging the enemy").


55. Johnson, 107 S. Ct. at 2070 (Scalia, J., dissenting) (language of FTCA renders United States liable to all persons, and statutory exceptions fail to preclude actions by servicemen generally).

56. The Supreme Court's interpretation of Congressional intent appears mistaken. Note, Military Personnel, supra note 4, at 620-21. Representative Emmanuel Celler, a drafter of the FTCA who pushed the legislation through three sessions of Committee and House debates before its final passage, stated unequivocally that Congress never intended to exclude servicemen from coverage of the Act. Id. In an address delivered to the Yale Law School on November 26, 1948, Representative Celler stated:

The opinion of the Fourth Circuit is utterly erroneous when it says that it was the intent of Congress to exclude a member of the Armed Forces from the benefits of the Tort Claims Act. I am the author of the bill, and I piloted it
acted shortly after the end of World War II, at a time when Congressional sentiment towards servicemen undoubtedly ran high. Therefore, without including express language, it is unlikely that Congress would have denied our returning military heroes a remedy made available to all other citizens. Thus, it seems that the Court simply read exceptions into the statute that Congress failed to include, ignoring the strong possibility that Congress simply intended to include servicemen within the coverage of the statute.

In the instant case, Johnson was performing a routine rescue mission that was in no way a part of combatant activities. Further, the United States was clearly not engaged in any wartime activities at the time of Johnson's death. These circumstances simply do not fall within the only military exception expressly provided for in the FTCA.

Furthermore, the three rationales the Court set forth in Feres do not justify a prohibition on suits like Mrs. Johnson's. The first Feres rationale assumes that Congress could not have intended local tort law to govern the "distinctively federal relationship between the

through the Subcommittee of the House Judiciary Committee, the House Judiciary Committee, and the House. Prior to its passage I worked on this bill for many years, and I repeatedly offered it to successive Congresses before its final passage. I had more to do with it any other member. I never intended to preclude a suit by a soldier. Despite the fact that the latter might have various and sundry remedies for compensations, pensions, hospitalization, preferences, etc., these benefits had nothing whatsoever to do with, and are utterly unrelated to the right to sue under the Federal Tort Claims Act. The only place where soldiers were even mentioned was in a section that was cut out of the Act. We start off with the proposition in general that the Government deliberately removes the defense of sovereignty, except in the cases where the Act specifically makes an exception. The exception cannot be implied; it must be expressed. The court cannot read the exceptions into the law.

Id. at 621 n.26.

57. Note, Military Personnel, supra note 4, at 621 n.26. Congress passed the FTCA on August 2, 1946, just prior to a Congressional election and shortly after the end of WWII. Given the political realities of that immediate post-war period, it would be unreasonable to conclude that Congress intended to exclude all servicemen from the benefits of the FTCA. Id.

58. Crawford, Statutory Construction: Interpretation of Laws § 177 (1984) (where language of statute is plain and unambiguous, that construction should be accepted by the court without regard to the effect of such a construction).

59. Id. In one pre-Feres decision, the Court did in fact adhere to the plain language of the statute by permitting an FTCA action by servicemen who were off duty when a U.S. Army truck struck their car and injured them. Brooks v. United States, 337 U.S. 49 (1949).

60. 28 U.S.C. § 2680(j) (1982). See supra note 2 for the text of pertinent provisions of the FTCA statute. For an argument that such a conclusion was clearly contrary to Congressional intent, see Note, The Feres Puzzle, supra note 1, at 1186 ("to believe that Congress failed to consider servicemen when it passed the FTCA is absurd").

Government and the military."

Feres was concerned primarily with the unfairness of making a soldier's recovery turn upon the status of the injury because this is a matter outside his control. If the Court denies recovery on the basis of this rationale, however, the serviceman is actually subjected to greater discrimination than if he had to rely on the Court's application of varying state tort law. The Court simply fails to recognize that for an injured serviceman, non-uniform recovery cannot possibly be worse than no recovery at all.

In addition, the Johnson Court ignores the fact that if this same serviceman were injured by a civilian, or injured while off duty, he would be forced to rely on varying state laws for compensation. By requiring the serviceman to rely on state laws in some instances, but not others, the Feres doctrine subjects servicemen to exactly the non-uniform recovery that the Johnson Court claims Feres was designed to avoid.

It is perhaps helpful to compare the situation of federal prisoners with that of servicemen because neither has any control over the place he is located. Unlike the serviceman, however, the federal prisoner is permitted to recover from the government for negligence that is based on varying state tort law. Incredibly, the Court thus affords convicted federal criminals a right to tort recovery that it denies to men who devote their lives to the defense of this country.

The second Feres rationale suggests that a recovery under the

63. Johnson, 107 S. Ct. at 2071 (Scalia, J., dissenting).
64. This "rationale is not even a good excuse in policy, much less in principle, for ignoring the plain terms of the FTCA." United States v. Johnson, 107 S. Ct. at 2063, 2071 (Scalia, J., dissenting).
65. "There seems to me nothing 'unfair' about a rule which says that, just as a serviceman injured by a negligent civilian must resort to state tort law, so must a serviceman injured by a negligent government employee." Johnson, 107 S. Ct. at 2072 (Scalia, J., dissenting).
66. Id. at 2071-72.
67. In Muniz v. United States, 374 U.S. 150 (1963), two prisoners brought suit under the FTCA against the United States Government. The prisoners sought damages for personal injuries incurred while they were under sentence in federal prisons. Id. at 150-51. The Court noted that the prisoners' opportunities to recover would be affected by differences in state law, depending upon the state in which they were sentenced to serve time. Id. at 161. The prisoners, therefore, had no choice as to their location within a state. Id. This is a position that both the serviceman and the federal prisoner share. Id. "The Court pointed out that denial of recovery on this basis would prejudice claimants even more than the application of varying state laws." Note, The Effect of the Feres Doctrine, supra note 1, at 1259.
68. Stencel Aero Eng'g Corp. v. United States, 431 U.S. 666, 675 (1977) (Marshall, J., dissenting) (questions why a uniform federal remedy was indispensable for the military, but not for other federal agencies such as the Bureau of the Census, the Immigration and Naturalization Service and many other agencies of the Federal Government), reh'g denied, 434 U.S. 882 (1977).
VBA\textsuperscript{69} was intended to be the sole remedy for service-related injuries.\textsuperscript{70} Congress, however, never specifically stated that the VBA should be the exclusive tort remedy for servicemen\textsuperscript{71} and the Supreme Court itself has previously permitted recovery under both the FTCA and the VBA.\textsuperscript{72} The Johnson Court's reliance on the alleged exclusivity of the VBA remedy is therefore misplaced.

The last Feres rationale states that allowing a serviceman to bring an FTCA action against the government for injuries incident to service would have a detrimental effect on military discipline.\textsuperscript{73} The Court, however, erred in its determination that an FTCA action necessarily has a detrimental effect on military discipline.\textsuperscript{74} Instead of applying a \textit{per se} rule, the Court should have examined each serviceman's FTCA action individually to determine whether or not that particular action would have an adverse effect on military discipline.\textsuperscript{75} The mere fact that the judgment of military officers could possibly be questioned in a court of law is not sufficient grounds for

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\item \textsuperscript{70} Feres v. United States, 340 U.S. 135, 144-45 (1950). See Note, The Feres Puzzle, supra note 1, at 1194 (The VBA provides a comprehensive disability and retirement system for service members).
\item \textsuperscript{71} The VBA lacks an exclusivity clause, unlike most workmen's compensation statutes. \textit{In Re "Agent Orange" Product Liability Litigation}, 580 F. Supp. 1242, 1245 (E.D.N.Y. 1984). The VBA is not the exclusive remedy, or upper limit to governmental liability in some military related injuries. United States v. Brown, 348 U.S. 110, 113 (1954) (emphasis added). In \textit{Brown}, a discharged veteran claimed he received negligent medical treatment at a military hospital for an injury he received several years earlier while on active military duty. \textit{Id.} at 110. Due to the veteran's current civilian status, the Court concluded that the action could proceed and that it would not interfere with military discipline. \textit{Id.} at 113.
\item \textsuperscript{72} In Brooks v. United States, 332 U.S. 49 (1949), two brothers on military leave were driving with their father when a U.S. Army truck negligently hit their car. \textit{Id.} at 50. Although the serviceman's injuries were not "incident to service," the Court allowed the servicemen to recover under both the FTCA and the VBA. \textit{Id.} at 59. The Court thereby conceded that the VBA was not an exclusive remedy for servicemen. See supra note 71 for another example of a serviceman recovering under both the FTCA and the VBA.
\item \textsuperscript{74} The Court's concern over possible military discipline problems may be justified when the military personnel incur injury incident to their service and bring an FTCA suit which would attack this direct superior's actions made in furtherance of a military mission. Rhodes, \textit{The Feres Doctrine After Twenty-Five Years}, 18 A.F. L. Rev. 24, 42 (1976). It is difficult, nevertheless, to understand how negligence claims that fail to question any military actions would substantially affect military discipline. \textit{Id.}
\item \textsuperscript{75} The actions brought by injured servicemen are not generally so certain to effect military discipline, or so certainly substantial, that the Court is justified in automatically barring the servicemen's claims. \textit{Johnson}, 107 S. Ct. at 2073 (Scalia, J., dissenting). The Court should instead examine the Feres rationale to determine to what extent the claim would circumvent the purposes of the FTCA. \textit{Stencel Aero Eng'g Corp.}, 431 U.S. at 670.
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the automatic application of the *Feres* doctrine.\textsuperscript{76}

In the instant case, for example, Johnson's widow did not contest the wisdom of any military policy.\textsuperscript{77} Instead, she attacked the action of the FAA, a non-military agency of the federal government.\textsuperscript{78} The Court, however, apparently chose to ignore this fact and therefore blindly applied the *Feres* doctrine. Thus, the Court merely speculated that Mrs. Johnson's suit would adversely affect vital military discipline without any real evidence that this would in fact be true.\textsuperscript{79}

Moreover, the Supreme Court permits civilians to bring FTCA claims against the military, without closely examining the possible disciplinary effects such actions may have on the military.\textsuperscript{80} In applying a strict *Feres* test, the Court stresses the importance of avoiding judicial interference with military decision-making. In cases involving civilians, however, the Court plunges into this sensitive area without reluctance.

Finally, the *Johnson* Court failed to recognize the inherent unfairness the *Feres* doctrine creates by depriving devoted servicemen of remedies which are available to all other United States citizens.\textsuperscript{81} For example, had Johnson been piloting a commercial helicopter when he crashed into the mountain, his widow could have sued and recovered from the government for her loss.\textsuperscript{82} Because Johnson devoted his life to serving in his country's armed forces, however, the Court limited his widow's recovery to only a fraction of the damages that she might have otherwise received.\textsuperscript{83} The inequity of such a re-

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\item \textsuperscript{76} *In Re "Agent Orange"* Product Liability Litigation, 580 F. Supp. 1242, 1250 (E.D.N.Y. 1984).
\item \textsuperscript{77} The Government admitted that the FAA air traffic controller acted negligently in the present case and, therefore, the only issues the Court would examine concerned damages. Brief for Respondent at 21-22, United States v. Johnson, 107 S. Ct. 2063 (1987). The Court, therefore, was not asked to adjudicate or scrutinize any military decisions. \textit{Id.}
\item \textsuperscript{78} \textit{Id.}
\item \textsuperscript{79} When the Government concedes liability in certain cases, there is no longer any threat that the judiciary will inquire into any sensitive military affairs, and thus upset necessary military discipline. *In Re "Agent Orange,"* 580 F. Supp. at 1247. See Rhodes, \textit{supra} note 74 at 42-43 (rigid application of *Feres* does not permit testing of theory that servicemens' actions would adversely affect military discipline).
\item \textsuperscript{80} *In Re "Agent Orange,"* 580 F. Supp. at 1250. The same negligent act that injures a serviceman could also cause injury to a civilian and the civilian could unquestionably proceed with an FTCA action, although it would involve the same intrusion into military affairs. \textit{Id.}
\item \textsuperscript{81} In Stencel Aero Eng'g Corp. v. United States, 431 U.S. 666, 676 (Marshall, J., dissenting), reh'g denied, 434 U.S. 882 (1977). The dissent points out that if a plane's malfunctioning ejection system injured a civilian, that civilian could bring an FTCA claim against the government. If the victim, however, was a serviceman, his FTCA claim would be barred. \textit{Id.} at 677.
\item \textsuperscript{82} United States v. Johnson, 107 S. Ct. 2063, 2075 (1987).
\item \textsuperscript{83} \textit{Id.} at 2076-76. One author calculated the difference between recovery under the VBA and probable recovery under the FTCA as follows:
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suit is not only self-evident, but also an insult to every member of this nation's armed forces.

The Supreme Court, in Johnson, imprudently extended the Feres doctrine to bar FTCA actions brought on behalf of servicemen for the negligence of civilian governmental employees. The language of the statute neither expressly, nor impliedly suggests the general military exception expounded by the Court; the rationales underlying Feres do not justify a complete bar to such suits; and the decision unfairly deprives military members of remedies which are available to all other citizens of the United States. Although the decision is not in irreconcilable conflict with any relevant precedent, the Supreme Court has extinguished any hope that a serviceman negligently killed or injured during service can pursue a recovery under a Congressionally favored remedy — the FTCA. Unfortunately, when it comes to obtaining recovery for their wrongfully-caused service-related injuries, those who are in this nation's first line of defense are still treated as second class citizens.

Susan Beaupre Lindholm

Assume that a 35 year old technical sergeant, with more than fourteen years of service, suffers an injury that results in the loss of sight in both eyes. This would be a 100 percent disability under applicable Veterans Administration regulations. 38 C.F.R. § 4.84a (1975). He would be entitled to an annuity in the amount of $6,636.60 for the rest of his life. See 10 U.S.C. §§ 1201, 1401 (1970 ed). The present value of this annuity at 6 percent is $92,088.13. This is not an insubstantial amount especially when considered along with other retirement benefits. The Government benefits do not, however, measure up to the potential recovery in tort liability. The Jury Verdict Research Group indicates that the probability range for verdicts in cases involving blindness in both eyes is $250,000 - $459,000.
