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I. INTRODUCTION

The United States Government traditionally has enjoyed sovereign immunity from tort liability.[1] In 1946, however, Congress waived this immunity[2] by enacting the Federal Tort Claims Act (FTCA).[3] The FTCA gives federal district courts original jurisdiction over any claims for personal injury or death caused by the negligence of any governmental employee.[4] This broad waiver of immunity, however, is subject to certain exceptions.[5] Although Congress made no explicit exception for noncombat claims of servicemembers, the Supreme Court of the United States in *Feres v. United States*[6] construed the FTCA as creating an exception that bars all claims for injuries to servicemembers when the injuries are "incident to service."[7] This judicially created exception,[8] known as the *Feres* doctrine, has been criticized extensively by lower federal courts and commentators.[9] Even the Court itself has

1. For more information on the history of sovereign immunity in the United States, see generally W. KEETON, D. DOBBS, R. KEETON & D. OWEN, PROSSER AND KEETON ON THE LAW OF TORTS § 131, at 1033 (5th ed. 1984) [hereinafter PROSSER & KEETON], and Pound, *The Tort Claims Act: Reason or History?*, 30 NACCA L.J. 404, 406-09 (1964).

2. PROSSER & KEETON, *supra* note 1, at 1034; Pound, *supra* note 1, at 409.

3. Ch. 753, 60 Stat. 842 (1946) (codified as amended at 28 U.S.C. §§ 1346(b), 2671-2680 (1982)).

4. 28 U.S.C. § 1346(b) (1982).

5. *See id.* § 2680(a)-(n).

6. 340 U.S. 135 (1950).

7. The Supreme Court has failed to define clearly the term "incident to service" and thus has failed to create a clear-cut test. The *Feres* Court merely stated that the Government was not liable under the FTCA for "injuries to servicemen where the injuries arise out of or are in the course of activity incident to service." *Id.* at 146.

8. *See* Weisgall, Feres *Holding Lives: Split Court Upholds Limit on Liability*, Legal Times, Sept. 7, 1987, at 20, col. 2 [hereinafter Feres *Holding Lives*].

9. *In re* "Agent Orange" Prod. Liab. Litig., 580 F. Supp. 1242, 1246-47 (E.D.N.Y.), *appeal dismissed*, 745 F.2d 161 (2d Cir. 1984). For criticism of the *Feres* doctrine, see Sanchez v. United States, 813 F.2d 593, 595 (2d Cir. 1987), *modified*, 839 F.2d 40 (2d Cir. 1988); Mondelli v. United States, 711 F.2d 567, 569 (3d Cir. 1983), *cert. denied*, 465 U.S. 1021 (1984); Monaco v. United States, 661 F.2d 129, 132 (9th Cir. 1981), *cert. denied*, 456 U.S. 989 (1982); Hunt v. United States, 636 F.2d 580, 588-89 (D.C. Cir. 1980); and Parker v. United States, 611 F.2d 1007, 1011 (5th Cir. 1980). *See also* Bennett, *The* Feres *Doctrine, Discipline and the Weapons of War*, 29 ST. LOUIS U.L.J. 383 (1985); Hitch, *The Federal Tort Claims Act and Military Personnel*, 8 RUTGERS L. REV.

struggled with the original rationales supporting the doctrine.[10] Over the last four decades, the Court has rejected its original rationales and adopted a new "military discipline" rationale, which serves as the predominate justification for the doctrine.[11] The Supreme Court's inconsistent use of this rationale in relation to the definition of incident to service[12] currently is creating confusion in the lower federal courts.[13]

For example, in *Shearer v. United States (Shearer II)*[14] the Supreme Court used the military discipline rationale in order to bring activity that normally would not be considered incident to service under the *Feres* bar. On a case-by-case basis, *Shearer II's* military discipline analysis focuses on the claim's possible impact on the effectiveness of military discipline to determine whether the activity was incident to service. After *Shearer II*, the lower federal courts applied this same military discipline analysis to allow recovery. In a complete turnaround, the Court in *United States v. Johnson (Johnson III)*[15] condemned the lower courts' application of this analysis.

In *Johnson III* the Supreme Court also followed a result-oriented approach and denied recovery. The Court's decision, which included a scathing dissent, reaffirmed and expanded *Feres* to include suits against civilian government employees who play an integral role in military activities. By reaffirming *Feres*, commentators believe that *Johnson III*

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316 (1954); Note, *From* Feres *to* Stencel*: Should Military Personnel Have Access to FTCA Recovery?*, 77 MICH. L. REV. 1099 (1979). For further citation, see United States v. Johnson, 107 S. Ct. 2063, 2074 n. (1987) (Scalia, J., dissenting). For a contrary analysis of the *Feres* doctrine, see Bernott, *Fairness and* Feres*: A Critique of the Presumption of Injustice*, 44 WASH. & LEE L. REV. 51 (1987); and Note, *In Support of the* Feres *Doctrine and a Better Definition of "Incident to Service,"* 56 ST. JOHN'S L. REV. 485 (1982) [hereinafter Note, *In Support of the* Feres *Doctrine*]. The Supreme Court, however, consistently has reaffirmed *Feres*. *See* United States v. Johnson, 107 S. Ct. 2063, 2068-69 (1987); Stencel Aero Eng'g Corp. v. United States, 431 U.S. 666, 672 (1977).

10. United States v. Shearer, 473 U.S. 52, 58 n.4 (1985).

11. While the military discipline rationale was not one of the three original rationales in the *Feres* case, it was developed in United States v. Brown, 348 U.S. 110, 112 (1954). The *Brown* Court stated that one of the rationales for the *Feres* doctrine was "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.* For further discussion, see *infra* notes 73, 74 and accompanying text.

12. *See supra* note 7 and accompanying text; *see also Johnson III*, 107 S. Ct. at 2069; *Shearer II*, 473 U.S. at 57-59. For further discussion, see *infra* notes 89-234 and accompanying text. Recently, the Court has stated that whether a claim is incident to service is a fact-based question which must be determined on a case-by-case basis. *Shearer II*, 473 U.S. at 57. The lower federal courts have invented many different tests to determine whether the injury arose out of, or was in the course of, activity that was incident to service. *See* 1 L. JAYSON, HANDLING FEDERAL TORT CLAIMS: ADMINISTRATIVE AND JUDICIAL REMEDIES § 155.02 (1988); Annotation, Serviceman's Right to Recover Under Federal Tort Claims Act (28 U.S.C. § 2671 et seq.), 31 A.L.R. Fed. 146 (1977); *see also infra* note 99 and accompanying text.

13. *See infra* notes 80-88 and accompanying text.

14. 473 U.S. 52 (1985).

15. 107 S. Ct. 2063 (1987).

should clear up the confusion in the lower federal courts and, thereby, help to moderate the amount of litigation in this area.[16] Unfortunately, because the decision completely ignored the military discipline analysis used in *Shearer II* and failed to address the incident to service question, *Johnson III* only adds to the confusion in the lower courts. Moreover, *Johnson III* is a narrow decision which only should affect a small category of cases.[17] *Johnson III* will not affect the incident to service tests because the Court stated conclusively, without discussion, that the plaintiff was acting incident to service.[18] Furthermore, although *Johnson III* silently repudiates the military discipline analysis, it does not overrule *Shearer II*. The lower courts, therefore, still should use this military discipline analysis on a case-by-case basis in order to determine what is incident to service in all factual situations not already barred by *Feres*.[19]

Thus, until the Supreme Court clearly and consistently defines incident to service and confines its analysis to this definition, confusion in the lower federal courts will continue. The current analyses and rationales proffered for the *Feres* doctrine are so nebulous that they lead to result-oriented decisions.[20] Part II of this note traces the historical de-

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16. *See* Feres *Holding Lives*, *supra* note 8, at 20, col. 1.

17. Not only is *Johnson III* a 5-4 decision with a strong dissent but its application is narrow, affecting only servicemembers' suits against civilian government employees who play an integral role in military activities.

18. The Supreme Court opinion in *Johnson III* merely stated that Johnson's injury arose out of a military mission and, therefore, was incident to service. *Johnson III*, 107 S. Ct. at 2069. The Court stated that the military discipline rationale is "inextricably intertwined with the conduct of [a] military mission." *Id.* The Court noted that the status of the tortfeasor is unimportant, *id.* at 2066, and only mentioned the civilian tortfeasor's role in a footnote, *id.* at 2069 n.11.

19. As long as *Feres* is the law, certain categories of cases will be automatically denied recovery. *See infra* note 107 and accompanying text. These categories of cases, such as the medical malpractice cases, have already been deemed incident to service because if generally permitted, these claims supposedly would affect military discipline. *See infra* notes 185; and 208-09 and accompanying text. Yet, because *Shearer II* used the military discipline analysis in a factual situation which did not fit into one of these categories, the lower courts also should do so. In other words, because *Shearer II* stated that neither the duty status nor the location of the injury was determinative, *Shearer II*, 473 U.S. at 57, the lower courts should not deny recovery merely because the servicemember was injured while on base or on duty. If the case does not fall within a category of cases specifically barred by *Feres*, then the court should deny recovery only when the case is of the type that "if generally permitted, would involve the judiciary in sensitive military affairs at the expense of military discipline and effectiveness." *Id.* at 59. For example, in the lower court opinion of *Johnson (Johnson I)*, the Eleventh Circuit applied the military discipline analysis because there had never been a *Feres* case against civilian government employees in which recovery had been denied. *See infra* notes 123-27 and accompanying text. The Supreme Court in *Johnson III* denied recovery by extending the *Feres* doctrine to bar claims against civilian employees intimately involved in military affairs. Thus, *Johnson III* created another category of cases which will be denied recovery. Yet, because *Feres* cases are fact specific, the military discipline analysis should still be viable in many cases.

20. In fact, in recent years, the Court has only been consistent in expanding the *Feres* doc-

velopment of the rationales for the *Feres* doctrine. Part III discusses the Supreme Court's failure to define incident to service and the lower federal courts' attempts to deal with this failure. After analyzing *Shearer II* and *Johnson III* and some of their progeny, Part IV argues that the Supreme Court has manipulated the *Feres* rationales and the definitions of incident to service in order to maintain the government's immunity from servicemember's claims. Part V discusses the future impact of *Johnson III* by contemplating which types of claims still may warrant recovery. Finally, part VI concludes that *Johnson III* merely added another category of cases to be barred by *Feres* and thus limited the use of *Shearer II*'s military discipline analysis to factual situations not barred already by *Feres*. The lower federal courts, therefore, should not overreact to *Johnson III*'s reaffirmance of *Feres* by denying recovery summarily in all *Feres* cases.

II. The Historical Development of Rationales for the Feres Doctrine—The Supreme Court's Analysis

Numerous courts and commentators have traced thoroughly the historical development of the Supreme Court's rationales for the *Feres* doctrine.[21] The purpose of this section, therefore, is simply to give the background necessary to understand the current status of the doctrine.

A. Brooks v. United States

The Supreme Court first considered the question of whether servicemembers could recover under the FTCA in *Brooks v. United States*.[22] In *Brooks* two servicemembers were driving along a public highway when their car was hit by an army truck driven by a civilian employee.[23] In holding that the servicemembers could recover, the

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trine in order to deny recovery. The inconsistent rationales and analyses used to arrive at this result have made the *Feres* cases another example of what happens when the Supreme Court focuses on the result of the case rather than on defining and confining itself to a logical analysis. Until the Supreme Court more clearly defines incident to service and applies the rationales of *Feres* more consistently to this definition, the seemingly endless litigation will continue until *Feres* is overruled.

21. For a more thorough discussion of the development of the rationales for the *Feres* doctrine, see *Johnson III*, 107 S. Ct. at 2070-76 (Scalia, J., dissenting); Bennett, *supra* note 9, at 385-88, 400-406; Bernott, *supra* note 9, at 52-54. *See generally* Note, *Military Medical Malpractice and the* Feres *Doctrine*, 20 Geo. L. Rev. 497 (1986); Note, *Government Liability for Personal Injuries to Military Personnel*, 51 J. Air L. & Com. 1087 (1986); Note, *From* Feres *to* Stencel, *supra* note 9; Note, *In Support of the* Feres *Doctrine*, *supra* note 9; Feres *Holding Lives*, *supra* note 8, at 20-21, col. 1.

22. 337 U.S. 49 (1949). For a thorough annotation and analysis of *Feres* cases, see generally 1 L. Jayson, *supra* note 12, §§ 75-108.

23. 377 U.S. at 50.

Court stated that the statute's terms were clear.[24] The statute provided for federal district court jurisdiction over "*any* claim founded on negligence brought against the United States."[25]

The Court went on to explain that, although the FTCA contained twelve exceptions to its general waiver of immunity, none of the exceptions precluded the servicemembers' claim.[26] The only exception specifically involving servicemembers excluded claims arising out of wartime activities of the military or Coast Guard.[27] Because of these lengthy and specific exceptions, the *Brooks* Court concluded that Congress did not mean to except the noncombat claims of servicemembers, but rather intended to include servicemembers' claims in the term "any claim."[28] In fact the Court considered it absurd to believe that Congress did not have servicemembers in mind when the FTCA was passed in 1946.[29] Although the Government contemplated "dire consequences" if servicemembers were allowed recovery, the Court held that the Brooks' accident had nothing to do with their army careers, except in the sense that "all human events depend upon what has already transpired."[30] The Court, however, stated that if the Brooks' accident had been incident to service, a completely different case would have been presented.[31] That completely different case came to the Court one year later in *Feres v. United States*.[32]

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24. *Id.* at 51. The fact that the servicemembers were in the Armed Forces at the time of the accident did not prevent them from recovering. *Id.*

25. *Id.* The court stated that it was "not persuaded that 'any claim' mean[t] 'any claim but that of servicemen.' " *Id.*

26. *Id.*

27. *Id.*

28. *Id.*

29. *Id.* Additionally, the Court found the fact that the Brooks were receiving veteran's benefits to be irrelevant. *Id.* at 53. The Court explained that neither the FTCA nor the veteran's laws provided for exclusiveness of remedies. Moreover, the veteran's benefits simply could be deducted when the servicemember obtained judgment under the FTCA. *Id.*

30. *Id.* at 52. By "dire consequences" the Government probably meant the effect of civilian courts inquiry into military affairs, the effects of large claims against the government, and the endless litigation that would occur if servicemembers' suits were allowed.

31. *Id.* In regard to incident to service claims the Court states:

> The Government's fears may have point [sic] in reflecting congressional purpose to leave injuries incident to service where they were, despite literal language and other considerations to the contrary. The result may be so outlandish that even the factors we have mentioned would not permit recovery. But that is not the case before us.

Id. at 53.

32. 340 U.S. 135 (1950). Two companion cases, both involving malpractice claims, were decided with *Feres*. In *Jefferson v. United States*, the plaintiff had abdominal surgery while in the army. About eight months after the plaintiff was discharged, a towel 30 inches long and 18 inches wide and marked "U.S. Army" was discovered and removed from his stomach. In *United States v. Griggs*, the executrix alleged that the servicemember, while on active duty, died from negligent medical treatment by Army surgeons. In both of these cases the Court found that these malpractice claims were incident to service and, therefore, denied recovery. *Id.* at 137.

B. Feres v. United States

In *Feres* a servicemember burned to death when the barracks that he was sleeping in caught fire. His executrix claimed that the Government had been negligent in allowing servicemembers to live in barracks that the Government had known to be unsafe. The Court explained that the FTCA should be construed as being part of a framework of statutory remedies against the Government.[33] The Court stated that the primary purpose of the Act was to simply provide a remedy to those persons who had been without one.[34] The Court added that while the Act grants jurisdiction to the district courts over all claims, it does not provide that all claims are recognizable in law.[35] The *Feres* Court put forth three rationales for determining when claims incident to service are not recognizable in law: the "parallel private liability" rationale, the "distinctively federal" rationale, and the "uniform compensation" rationale.[36]

1. The Parallel Private Liability Rationale

The first rationale advanced by the *Feres* Court for refusing to allow servicemembers to recover under the FTCA for injuries that arise out of activity incident to service was that parallel private liability required by the FTCA was absent.[37] The Act states that the United States shall be liable in the same manner and to the same extent as a similarly situated private individual.[38] The Court, therefore, reasoned that the Act did not create new causes of action, it merely made available those afforded to private litigants.[39] The Court stated that there was no private counterpart to an incident to service claim against the

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33. *Id.* at 139. The Court stated that the common fact in *Feres* and its companion cases was that each claimant, while on active duty, sustained injury due to the negligence of other servicemembers. *Id.* at 138. Before the *Feres* Court began its statutory construction of the FTCA, it recognized that Congress "possesse[d] a ready remedy" if it misinterpreted the statute. *Id.* Despite the fact that the FTCA contemplated suits from military personnel and that the express exceptions did not exclude noncombat claims, *id.*, the *Feres* Court precluded recovery for its own reasons. Because the FTCA does not exclude either expressly or impliedly incident to service claims, the Court wrote its own exception to the Act and denied recovery because of the dire consequences that would befall the Government if recovery were allowed. *See Brooks*, 337 U.S. at 53.

34. *Feres*, 340 U.S. at 140. Before Congress waived immunity in the FTCA, relief often was sought through private hills in Congress. The volume of these private hills, and Congress' inability to deal with them, led to the transfer of the burden of examining tort claims to the courts. Few private bills were on behalf of military personnel because a comprehensive statutory system of relief already had been authorized for them and their dependents. *Id.*

35. *Id.* at 140-41.

36. *Id.* at 141-44.

37. *Id.* at 140-41.

38. *Id.*; *see also* 28 U.S.C. § 2674 (1982).

39. *Feres*, 340 U.S. at 141.

United States.[40] The Court, therefore, reasoned that incident to service claims do not present liability under "like circumstances" because no private individual can exercise such authority over individuals as the Government exercises over servicemembers.[41] No parallel liability existed for incident to service claims before the enactment of the FTCA; the Court, therefore, found that no liability existed after its enactment.[42]

The Supreme Court subsequently rejected this private liability rationale in *Indian Towing Co. v. United States*.[43] In *Indian Towing* the Court concluded that the Government could be found liable under the FTCA even though there was no parallel private liability for the Coast Guards' negligent operation of a lighthouse.[44] The Court held that the Act did not exclude liability for the negligent performance of "uniquely governmental" activity because all government activity was unique.[45] Two years after *Indian Towing* in *Rayonier, Inc. v. United States*,[46] the Court imposed liability on the Government for the negligence of its firefighters.[47] The *Rayonier* Court stated that although such liability may be "novel and unprecedented,"[48] the very purpose of the FTCA was to establish novel and unprecedented governmental liability.[49]

The *Indian Towing* Court also rejected the dire consequences[50] rationale alluded to in *Brooks* by stating that the FTCA can subject the Government to great liability, and the Court should refrain from giving back the very immunity the statute took away.[51] The Court in *Rayonier* reasoned that Congress had considered exposing the Government to liability and had decided it was appropriate.[52] Consequently, the Court

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40. *Id.*

41. *Id.* at 141-42. The Court recognized that if they ignored the status of both the wronged and the wrongdoer in these cases they would find analogous private liability. For example, in civilian doctor-patient relationships there is liability for malpractice. The liability assumed by the Government under the FTCA, however, is created by all of the circumstances. *Id.* at 142.

42. *Id.*

43. 350 U.S. 61 (1955); *see* sources cited *supra* note 21 (containing analysis of the rejection of the private liability rationale in *Indian Towing*).

44. *Indian Towing*, 350 U.S. at 69.

45. *Id.* at 67. The Court stated that all Government activity inherently is unique because it is performed by the Government. The language of the FTCA, therefore, does not support the "parallel private liability" rationale because the very purpose of the statute is to compensate victims injured by the negligent conduct of governmental affairs. *Id.* at 68.

46. 352 U.S. 315 (1957); *see* sources cited *supra* note 21.

47. *Rayonier*, 352 U.S. at 319.

48. *Id.*

49. *Id.* This holding is in direct conflict with the *Feres* Court which stated: "[The FTCA's] effect is to waive immunity from recognized causes of action and [is] not to visit the Government with novel and unprecedented liabilities." *Feres*, 340 U.S. at 142.

50. *See supra* note 30 and accompanying text.

51. *Indian Towing*, 350 U.S. at 69.

52. *Rayonier*, 352 U.S. at 320. The Court stated that:

was unjustified in creating exceptions to the Act.[53] Since the *Feres* decision the Supreme Court has abandoned the parallel private liability rationale.[54]

2. The Distinctively Federal Rationale

The FTCA provides that the local law of the place where the act or omission occurred will govern any consequent liability.[55] Because this local law provision assimilates the divergent laws of the states into federal law, the *Feres* Court believed that it would be unfair to apply it to the servicemember who was not free to choose the state into which military service placed him.[56] The Court added that it would make no sense for the geography of an injury to determine the law to be applied to a servicemember's tort claim because the relationship between the Government and servicemembers is distinctively federal in character.[57]

Thirteen years later, however, the Court abandoned this distinctively federal rationale in *United States v. Muniz*.[58] In *Muniz* the Court allowed federal prisoners to sue the Government for personal injuries sustained while in federal prison through the negligence of government employees.[59] The Court abandoned the distinctively federal rationale[60] by allowing prisoners, "who have no more control over their geographical location than do service[members], to recover under the FTCA."[61] The Court reasoned that, while a nonuniform right to recover would be prejudicial to prisoners, no recovery would be even more

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> Congress was aware that when losses caused by such negligence are charged against the puhlic treasury they are in effect spread among all those who contribute financially to the support of the Government and the resulting burden on each taxpayer is relatively slight. But when tbe entire burden falls on the injured party it may leave him destitute or grievously harmed. Congress could, and apparently did, decide that this would be unfair when the public as a whole benefits from the services performed by Government employees.

Id.

53. *Id.* Of course, the *Feres* Court created the *Feres* doctrine by reading exceptions into the Act. Feres *Holding Lives*, *supra* note 8, at 20, col. 2.

54. Recently, in Berkovitz v. United States, 108 S. Ct. 1954, 1960 n.5 (1988), the Court once again rejected the viability of the "parallel private liability" rationale. *Id.*

55. *Feres*, 340 U.S. at 142; *see also* 28 U.S.C. § 1346(b) (1982).

56. *Feres*, 340 U.S. at 142-43.

57. *Id.* at 143. The Court stated: "It would hardly be a rational plan of providing for those disabled in service by others in service to leave them dependent upon geographic considerations over which they have no control and to laws which fluctuate in existence and value." *Id.* The Court in *Feres* went on to quote the opinion in United States v. Standard Oil Co., 332 U.S. 301 (1947), which stated: "[T]he scope, nature, legal incidents and consequences of the relation between persons in service and the Government are fundamentally derived from federal sources and governed by federal authority." *Standard Oil*, 332 U.S. at 305-06, *quoted in Feres*, 340 U.S. at 143-44.

58. 374 U.S. 150 (1963); *see* sources cited *supra* note 21.

59. *Muniz*, 374 U.S. at 150.

60. *Id.* at 161.

61. United States v. Johnson, 107 S. Ct. 2071-72 (1987) (Scalia, J., dissenting).

prejudicial.[62]

3. The Uniform Compensation Rationale

The third rationale advanced by the *Feres* Court for denying servicemembers' recovery against the Government for incident to service claims was that the FTCA failed to adjust veteran's benefits for recovery under the Act.[63] The Court, therefore, stated that the statute must have intended veteran's benefits to be the exclusive remedy for servicemembers. The Court reasoned that the servicemember was better off with the assured benefits than with the possibility of no recovery through litigation under the FTCA, especially because the soldier was at a disadvantage in litigation.[64] Moreover, the Court believed that the Veteran's Benefits Act provided adequate compensation and compared very favorably with benefits provided by similar statutes.[65]

The uniform compensation rationale has never been a strong justification for the *Feres* doctrine, and it continues to be nondeterminative. The Court in *Brooks* stated that provisions in other statutes for disability payments to servicemembers cannot be construed to preclude actions under the FTCA;[66] and there was nothing in the Act or veteran's benefits law that provided for the exclusivity or election of remedies.[67] Moreover, the *Brooks* Court stated that any problem with adjustment could be solved by deducting veteran's benefits when the servicemember obtained a judgment under the FTCA.[68] In fact, in *United States v. Brown*[69] the Supreme Court allowed a servicemember to recover under the FTCA even though his veteran's benefits had been increased because of his injury.[70] In *Brown* a discharged veteran brought suit under the FTCA for negligent treatment received at a veteran's administration hospital for an injury that occurred while on active duty.[71] Notwithstanding the fact the injury occurred while on active duty, the Court found that the claim was not incident to service and that the veteran's benefits law did not bar recovery under the FTCA.[72]

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62. *Muniz*, 374 U.S. at 162.

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

64. *Id.* at 145. The Court believed the soldier to be at a disadvantage in litigation because of the "[l]ack of time and money, [and] the difficulty if not impossibility of procuring witnesses." *Id.*

65. *Id.* The Veteran's Benefits Act was similar to state workman compensation statutes. *Id.*

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

67. *Id.*

68. *Id.*

69. 348 U.S. 110 (1954); *see* sources cited *supra* note 21.

70. *Brown*, 348 U.S. at 113.

71. *Id.* at 110.

72. *Id.* at 113. For a more thorough discussion of the rejection of this rationale, see *Johnson III*, 107 S. Ct. at 2072-73 (Scalia, J., dissenting). *See also supra* note 29 and accompanying text.

C. The Military Discipline Rationale

In its decision in *Brown* the Court proffered a new rationale for the *Feres* doctrine. Specifically, the Court stated that the "peculiar and special relationship of the soldier to his superiors," the effects of servicemember suits on discipline, and the "extreme results that might obtain if suits under the [FTCA] were allowed for negligent orders given or negligent acts committed in the course of military duty" had led the *Feres* Court to construe the Act as excluding claims that were incident to service.[73] This military discipline rationale has become the primary justification for the *Feres* doctrine.[74]

The other rationales for the *Feres* doctrine, however, have not been abandoned completely. In *Stencel Aero Engineering Corp. v. United States*,[75] decided in 1977, the Supreme Court reiterated two of the original *Feres* rationales. First, the Court stated that the distinctively federal relationship between the Government and its armed forces made it irrational for the Government's liability to depend on the fortuity of the laws of the state where the injury occurred.[76] Additionally, the Court stated that the Veterans' Benefit Act established a "no fault" compensation scheme as a substitute for tort liability. However, the Court also restated the military discipline rationale that was enunciated in *Brown*.[77] Before *Stencel* many lower courts and commentators had questioned the continued viability of *Feres* when military discipline was not at stake.[78] Yet, after *Stencel* reaffirmed *Feres*, the lower courts began to give more weight to the original *Feres* rationales and, thereby, to deny recovery more summarily.[79]

In 1985, however, the Supreme Court, in *United States v. Shearer (Shearer II)*,[80] again stated that the effect of servicemember suits on military discipline was the most important rationale for *Feres*.[81] In fact, the *Shearer II* Court based its entire decision to deny recovery on the military discipline rationale,[82] which again led lower courts to question the viability of *Feres* in situations when the servicemember's suit did

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73. *Brown*, 348 U.S. at 112.

74. The *Muniz* Court claimed that the *Feres* doctrine rests on the military discipline rationale. 374 U.S. at 162. Moreover, the Court in United States v. Shearer, 473 U.S. 52, 58 n.4 (1985), admitted that the three rationales cited in *Feres* are "no longer controlling." *Id.*

75. 431 U.S. 666 (1977).

76. *Id.* at 671.

77. *Id.*

78. *See* 1 L. JAYSON, *supra* note 12, § 155.05, at 5-97 to 5-102.2.

79. *See id.* at 5-96, 5-97 & n.15.1.

80. 473 U.S. 52. For a discussion of the facts of *Shearer II*, see *infra* notes 134-36 and accompanying text.

81. *Shearer II*, 473 U.S. at 57.

82. *Id.* at 57-58.

not affect military discipline.[83]

In a complete turnaround two years later, the Court in *Johnson III*[84] denied recovery by reaffirming the "distinctively federal" and "uniform compensation" rationales for *Feres*.[85] The reaction of lower courts and commentators to *Johnson III* appears to be similar to their reaction to *Stencel*.[86] On the whole, the courts have read *Johnson III*'s reaffirmance of *Feres* to require that they also apply two of the original rationales for *Feres* and thus deny recovery more summarily.[87] This Note contends that the lower courts have overreacted to *Johnson III*. The lower federal courts should not deny recovery automatically because *Johnson III* reaffirmed *Feres*, but rather should continue to apply *Shearer II*'s military discipline analysis in all factual situations not barred already by *Feres*.[88]

III. INCIDENT TO SERVICE: THE SUPREME COURT'S LACK OF DEFINITION IS THE REAL DILEMMA

The Court's vacillation in determining which rationales are determinative for the explication of the *Feres* doctrine has engendered considerable confusion among lower courts. The lower courts have been called upon to apply *Feres* to a myriad of factual situations. With little guidance or commentary from the Court, the lower courts have established their own guidelines for applying *Feres*. While the *Feres* Court held that the Government is not liable under the FTCA for injuries to servicemembers when the injuries arise out of activity considered to be incident to service,[89] the Supreme Court has failed to define the term incident to service.[90] Consequently, the only way to determine what activities will be considered incident to service is to look at what activities the Court has deemed to be incident to service. In *Brooks*, for example, the Court found that the servicemembers' injury was not incurred incident to service. The *Brooks* Court stated that the servicemembers' accident had nothing to do with their army careers; the servicemembers

83. *See* Atkinson v. United States, 804 F.2d 561 (9th Cir. 1986) (*Atkinson I*); Johnson v. United States, 749 F.2d 1530 (11th Cir. 1985) (*Johnson I*).

84. 107 S. Ct. 2063 (1987). See text accompanying note 107 for a discussion of the facts to *Johnson III*.

85. *Johnson III*, 107 S. Ct. at 2068-69.

86. *See* 1 L. JAYSON, *supra* note 12, § 155.05, at 5-96, 5-97 & n.15.1; *see also* Atkinson v. United States, 825 F.2d 202, 205-06 (9th Cir. 1987) (*Atkinson II*); Feres *Doctrine Remains Stronger Than Ever*, Nat'l L.J., June 1, 1987, at 5, col. 1 [hereinafter *Doctrine Remains*]; Feres *Holding Lives*, *supra* note 8.

87. *See Atkinson I*, 804 F.2d at 561.

88. *See supra* note 19 and accompanying text.

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

90. *See supra* note 7.

were on furlough and driving off-base when they were hit by an army truck.[91] Their injuries were not caused by their army service "except in the sense that all human events depend upon what has already transpired."[92] The *Brooks* Court, therefore, held that an injury sustained to servicemembers while off-base and on furlough is not incident to service.

In *Feres* the Court found the servicemembers' medical malpractice and negligent maintenance claims to be incident to service. Yet, failing to explain why these claims were incident to service, the Court merely stated that each claimant, "while on active duty and not on furlough, sustained injury due to negligence of others in the armed forces."[93] Consequently, the *Feres* Court found that an injury sustained to servicemembers while on active duty and due to the negligence of others in the armed forces was incident to service.

Alternatively, the *Brown* Court found that a medical malpractice claim brought by a discharged servicemember was not incident to service.[94] In *Brown* a discharged veteran brought a damage claim for the negligent treatment of his knee in a veteran's administration hospital. The original injury occurred while the servicemember was on active duty in the armed forces. The negligent treatment of his knee, however, occurred after his discharge. The Veteran's Administration found his knee injury to be service-connected and allowed compensation. In allowing recovery, the Court claimed that the medical malpractice claim was not incident to service because the malpractice injury "was not incurred while [the servicemember] was on active duty or subject to military discipline." Instead, "[t]he injury occurred after his discharge, while he enjoyed civilian status."[95] *Brown*, therefore, added to the *Brooks*' Court definition of what is not incident to service all injuries sustained while the servicemember is not on active duty and not subject to military discipline.

In *Stencel* a servicemember was injured while flying a military aircraft when the ejection system of his aircraft malfunctioned during an emergency. He sued Stencel, the manufacturer of the ejection system, and the United States. Stencel also sued the United States for indemnity.[96] The Court found that the injury was incident to service and, therefore, denied recovery for the indemnity action.[97] The Court's only

91. *Brooks*, 337 U.S. at 50.
92. *Id.* at 52.
93. *Feres*, 340 U.S. at 138; *see also supra* note 32.
94. *Brown*, 348 U.S. at 113.
95. *Id.* at 112.
96. *Stencel*, 431 U.S. at 668.
97. *Id.* at 673-74.

statement concerning the term incident to service was that an "on-duty serviceman who is injured due to the negligence of Government officials may not recover against the United States."[98] The Court simply presumed—perhaps by inference from factors in *Brooks* and *Brown*—that servicemembers on active duty and not on furlough fell within the incident to service exception.

Thus, the Supreme Court has not given much guidance in determining what type of injury will be considered incident to service. Clearly, an injury sustained by a servicemember who is on duty, not on furlough, and subject to military discipline at the time of his injury is considered to be incident to service. Conversely, a servicemember who is injured while on furlough, off-base, and not subject to military discipline would not be considered incident to service. Consistent with these Supreme Court decisions, the lower federal courts have created bright-line tests based on factors including duty status, subjection to military discipline, and the location of the injury, in order to determine which injuries would be considered incident to service.[99]

Much of the developments in the lower courts became questioned, however, after the Supreme Court's opinion in *Shearer II*.[100] In *Shearer* the servicemember was off-duty and off-base when he was murdered by a fellow servicemember. Private Shearer's mother brought suit against

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98. *Id.* at 669.

99. Generally, the lower courts have looked at four factors to determine whether the claim arose incident to service. The factors are: (1) "the place where the negligent act occurred," (2) "the duty status of the plaintiff when the negligent act occurred," (3) "henefits accruing to plaintiff because of his status as a service member," and (4) "the nature of the plaintiff's activities at the time the negligent act occurred." 1 L. JAYSON, *supra* note 12, § 155.07[3][i], at 5-118.2. While all of these factors are important, none of them is dispositive. *Id.* For example, the location of the accident is only one factor to be considered. *Id.* If the injury occurs on-base it is more likely that the injured servicemember was engaged in an activity incident to service. *Id.* But the occurrence of an on-base injury does not trigger *Feres* automatically. *Id.* If the injury occurred on-base the court will inquire into the nature of the servicemember's activity at the time of injury in order to ascertain the "totality of the circumstances." *Id.* § 155.07[1][g], at 5-109. Probably the most important factor in the incident to service determination is the duty status of the servicemember plaintiff. *See id.* § 155.02, at 5-78.

Apart from these four factors, a common rationale for barring recovery in medical malpractice and recreational cases is the "privileged activity" test. According to this test, "if the accident occurs while the service[member] is [on-base] or on board a military aircraft, even though he may be in an off-duty status, the claim has generally heen regarded as incident to service." *Id.* § 155.02, at 5-82.3. One reason for finding these claims to be incident to service is that the servicemember is on military premises simply because of his military status. Consequently, there is a direct relationship between the injury and his military status. *Id.* § 155.02, at 5-82.6 to 5-82.7. Moreover, while on the military premises the servicemember is presumed to be under immediate military control and discipline. *Id.* at 5-82.7. Thus, if the soldier is injured while taking advantege of military privileges generally restricted to the military, he will be barred by *Feres*. *Id. See* Note, *The Federal Tort Claims Act: A Cause of Action for Servicemen*, 14 VAL. U. L. REV. 527, 558-61 (1980). *See generally* 1 L. JAYSON, *supra* note 12, §§ 155.08[2][a] to [2][b], 155.08[3][a] to [3][h].

100. 473 U.S. 52 (1985).

the United States claiming that while the Army knew that the servicemember who murdered Shearer was dangerous, it negligently failed to control him and failed to warn others of the danger.[101] The Third Circuit in *Shearer I*, relying on *Brooks*, held that the injury was not incident to service, and the Supreme Court reversed.[102] In *Shearer I* the Third Circuit allowed recovery because servicemembers who are off-duty, off-base, and engaged in nonmilitary activity at the time of injury generally have been allowed to recover.[103] After stating that *Feres* is based predominantly on the military discipline rationale, the Supreme Court reversed and denied recovery. The Court stated that *Feres* "cannot be reduced to a few bright-line rules," but rather "each case must be examined in light of the statute as it has been construed in *Feres* and subsequent cases."[104] *Shearer II* stated that the location of the murder was not as important as whether the claim would require the judiciary to question military decisions.[105] According to the Court, Shearer's complaint struck at the core of the concerns involving military discipline by "call[ing] into question the basic choices about the discipline, supervision, and control of a service[member]."[106]

Thus, in order to deny recovery, the Supreme Court in *Shearer II* abandoned the factors deemed relevant in *Brooks* and *Brown* and introduced an unprecedented case-by-case analysis of the suit's effect on military discipline. After *Shearer II*, neither the location of the injury nor the activity of the servicemember appeared to weigh too heavily in the determination of what was considered to be incident to service. Instead, the question of whether the claim endangered military discipline and effectiveness was determinative; if military discipline was involved, then the claim was considered incident to service.

IV. The Current Dilemma: Manipulation of the Rationales for *Feres* in order to Define Incident to Service

A. *The Lower Federal Courts' Attempts to Allow Recovery*

Because the Court has failed to articulate a clear definition of what is to be considered incident to service, the *Feres* doctrine has generated a great deal of case law. Ultimately, the lower courts have decided the cases on the particular facts raised. With every new factual situation, therefore, there is more litigation.[107] Moreover, the perceived harshness

101. *Id.* at 54.
102. *Id.* at 58-59.
103. *Id.* This analysis was consistent with the Court's opinion in *Brooks*.
104. *Id.* at 57.
105. *Id.*
106. *Id.* at 58.
107. There are however several categories of suits that are barred by the *Feres* doctrine re-

of the *Feres* doctrine by the lower courts,[108] as well as the erosion of the rationales for *Feres*, have led to newly evolving doctrines in order to ease the bar created by *Feres*.

1. The Eleventh Circuit Panel Opinion of *Johnson v. United States* (*Johnson I*)

One case that employed a new doctrine to ease the *Feres* bar is *Johnson v. United States* (*Johnson I*).[109] In *Johnson I* the Eleventh Circuit accepted an innovative argument in order to allow recovery. In this case the Federal Aviation Administration (FAA) gave negligent radar information to a coast guard helicopter pilot on a rescue mission, causing him to fly into the side of a mountain which resulted in his death.[110] The *Johnson I* court recognized that the "single most important, and defensible, rationale" for *Feres* was the military discipline rationale first mentioned in *Brown*.[111] The court refused to focus on whether Johnson's injury was incident to service because the "*Feres* factual paradigm"[112] was not present.[113] If the tortfeasor was not a member of the armed forces or a civilian employee engaged in activities usually associated with the armed forces, the court concluded that it should examine the *Feres* rationales restated in *Stencel* to determine whether allowing the claim would frustrate the purposes of the FTCA.[114] The *Johnson I* court stated that the Supreme Court, in those

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gardless of the particular facts in each individual case. Derivative tort cases, including the Agent Orange cases which involve the families of servicemembers who bring their own claims because they were injured through the Government's negligence towards their servicemember relative, have been barred by *Feres*. *See generally* Mondelli v. United States, 711 F.2d 567 (3d Cir. 1983), *cert. denied*, 465 U.S. 1021 (1984); Monaco v. United States, 661 F.2d 129 (9th Cir. 1981), *cert. denied*, 456 U.S. 989 (1982); Bennett, *supra* note 9, at 393-400. Suits against servicemembers as individuals also are barred by *Feres*. *See* United States v. Stanley, 107 S. Ct. 3054 (1987); Chappell v. Wallace, 462 U.S. 296 (1983). Most medical malpractice claims and recreational claims are barred by *Feres* under the privileged activity test. *See supra* note 99. Finally, after *Johnson III* it appears that claims brought by servicemembers injured while on a military mission will be categorically barred by *Feres*.

108. *See In re* "Agent Orange" Prod. Liab. Litig., 580 F. Supp. 1242, 1246-47 (E.D.N.Y. 1984), *appeal dismissed*, 745 F.2d 161 (2d Cir. 1984).

109. Johnson v. United States, 749 F.2d 1530 (11th Cir. 1985).

110. *Id.* at 1531.

111. *Id.* at 1533, 1537-38.

112. *Id.* at 1537. According to the Eleventh Circuit, the "*Feres* factual paradigm" consists of a suit for injuries or death allegedly caused by the negligence of a servicemember or an employee of the armed services. The court claimed that it had developed this analysis from studying *Feres* and its progeny, including Parker v. United States, 611 F.2d 1007 (5th Cir. 1980). *Johnson I*, 749 F.2d at 1537.

113. *Johnson I*, 749 F.2d at 1537. The court stated that the issue was whether the injury arose out of, or during the course of, an activity incident to service only when the "*Feres* factual paradigm" was present. *Id.*

114. *Id.* (quoting *Stencel*, 431 U.S. at 670).

situations not fitting into the *Feres* factual paradigm, had applied the doctrine's rationales to the facts in order to determine if immunizing the Government from liability was justified.[115] Employing this analysis, the court held that the *Feres* doctrine did not bar the plaintiff's claim.[116]

The court based its decision, however, on the military discipline rationale,[117] stating that this "much maligned doctrine" most accurately was explained by the desire to avoid civilian court inquiry into matters that the Supreme Court viewed beyond judicial scrutiny.[118] The court recognized that the "common thread" running through *Feres* cases is the reluctance to disturb the sensitive relationships that must exist if the military system is to function properly.[119] The *Johnson I* court believed that these delicate military relationships were not jeopardized under the facts presented. In fact, the court stated that there was no possibility that the conduct of any tortfeasor, "even remotely connected to the military, [would] be scrutinized if this case [went] to trial."[120] Thus, the court stated that because the plaintiff's claim could not endanger the military disciplinary structure, it would not intrude upon the military discipline rationale, which serves as the primary justification for the *Feres* doctrine.[121]

The *Johnson I* court noted that the Ninth Circuit had reached the opposite conclusion in a case involving a similar factual situation.[122]

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115. *Id.* at 1538. The court claimed that the Supreme Court used this analysis in *Chappell, Stencel,* and *Muniz. Id.* Additionally, the court stated that its decision to employ this approach was buttressed by the decision in Hunt v. United States, 636 F.2d 580 (D.C. Cir. 1980). The court stated that the "*Hunt* court resisted the temptation to automatically extend the *Feres* bar to a factual situation not akin to the *Feres* factual paradigm." *Johnson I,* 749 F.2d at 1538.

116. *Johnson I,* 749 F.2d at 1538.

117. The court claimed that it was following *Stencel* and applying all the rationales for *Feres* to this factual situation, but it really only applied the military discipline rationale. *See id.* at 1537-38.

118. *Id.* at 1538. The court cited *Stencel* and *Brown* for this proposition, stating that: "*Stencel* disallowed third-party indemnity claims against the United States arising out of service-connected injuries to soldiers, in part because '[t]he trial[s] would . . . involve second-guessing military orders, and would often require members of the Armed Services to testify in court as to each other's decisions and actions.' " *Id.* (quoting *Stencel,* 531 U.S. at 673). The court also stated that "the *Brown* Court expressed its concern over the effect intramilitary litigation might have on discipline, particularly when the suit involved 'negligent orders given or negligent acts committed in the course of military duty.' " *Id.* (quoting *Brown,* 348 U.S. at 112).

119. *Id.* at 1539.

120. *Id.*

121. *Id.*

122. Uptegrove v. United States, 600 F.2d 1248 (9th Cir. 1979), *cert. denied,* 444 U.S. 1044 (1980). The *Johnson I* court noted "that the Supreme Court ha[d] never limited the application of the *Feres* doctrine to situations involving a threat to military discipline." *Johnson I,* 749 F.2d at 1539 (quoting *Uptegrove*). Moreover, the court stated that "the focus in a *Feres* case should be solely on the servicemember's military status, not the status of the tortfeasor." *Id.* The *Johnson I* court simply stated that *Uptegrove* was decided incorrectly. *Id.*

The court, however, defended its analysis by stating that in all of the Supreme Court's *Feres* cases the tortfeasors were servicemembers or military employees, and not civilian employees of the government.[123] The court, therefore, argued that while disregarding this distinction and mindlessly applying the *Feres* bar to a fact situation not contemplated by the *Feres* Court has " 'the virtue of easy application, [but it is not] the better jurisprudential course.' "[124] The court further stated that the Ninth Circuit displayed a misunderstanding of the military discipline rationale when it claimed that a threat to military discipline need not be present in order for *Feres* to apply.[125] The *Johnson I* court stated that by definition incident to service claims within the *Feres* factual paradigm implicate the military discipline rationale.[126] Moreover, the post-*Brown* Supreme Court cases have relied predominantly on the military discipline rationale.[127]

The *Johnson I* court realized that, despite the great criticism of the *Feres* doctrine and its competing theoretical underpinnings, it is the law.[128] Yet, because the court disliked[129] the doctrine and wanted to allow recovery, it created a new avenue of recovery in its *Feres* factual paradigm distinction. The court stated that the Government should not be awarded "judicially-created immunity from suit" in fact situations not considered by the *Feres* Court.[130] The court believed that the fact that Johnson was killed while on a military mission was not controlling.[131] Thus, rather than follow what has typically been defined as incident to service—that is, an on-duty servicemember performing a military mission—the court used the military discipline rationale to de-

123. *Johnson I*, 749 F.2d at 1540.

124. *Id.* (citing *Brown*, 739 F.2d at 366 (quoting Miller v. United States, 643 F.2d 481, 493 (8th Cir. 1981) (en banc))).

125. *Id.*

126. *Id.* For support of its position the court stated that the Supreme Court "has found it unseemly to have military personnel injured 'incident to service,' asserting claims that question the propriety of decisions or conduct by fellow members of the military." *Id.* (quoting *Hunt*, 636 F.2d at 599).

127. *Id.* The court cited *Chappell*, *Stencel*, and *Muniz*. The court also stated that the status of the tortfeasor may not need to be examined when the "*Feres* factual paradigm" is present, but that the status of the tortfeasor must be examined when the "*Feres* factual paradigm" is not present and the facts permit the court to decide whether to imply an exception to the FTCA. *Id.* The court implied that the status of the tortfeasor always should be examined, stating that the *Feres* Court supported this implication when it discussed analogous private liability and cautioned against ignoring the status of the wrongdoer. *Id.*

128. *Id.*

129. The court showed its dislike for *Feres* by stating that "[t]here is no justification for this court to read exemptions into the [FTCA] beyond those provided by Congress. If the [FTCA] is to be altered that is a function for the same body that adopted it." *Id.* (quoting *Muniz*, 374 U.S. at 166).

130. *Id.*

131. *Id.*

fine what is incident to service. In so doing, the *Johnson I* court concluded that because the military discipline rationale would not be implicated by allowing Johnson's suit, the *Feres* doctrine did not apply.[132]

2. The Third Circuit Opinion of *Shearer v. United States (Shearer I)*

The Third Circuit in *Shearer v. United States (Shearer I)*[133] took a contrary approach to that of the Eleventh Circuit and applied a totality of circumstances test that relied on the status of the claimant in order to allow recovery. In *Shearer I* the servicemember was on-leave and off-base when he was murdered by another servicemember, Private Heard. Heard had been convicted of murder in Germany and had been released from prison only four months before he killed Private Shearer.[134] At the time of Shearer's kidnapping and murder, the Army was aware of Heard's violent record but had ignored the recommendations of Heard's superiors who had urged his discharge.[135] Shearer's mother sued the Army for its negligent failure to discharge Heard, its failure to warn other servicemembers of Heard's violent character, and its failure to restrain him.[136]

The Third Circuit, as the Eleventh Circuit had in *Johnson I*, stated that the main rationale for *Feres* was the military discipline rationale.[137] The court, however, did not use the military discipline rationale in order to define incident to service.[138] Rather, the court stated that because the question of whether an injury is sustained incident to service is fact-based, a court must look at the specific facts of each situa-

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132. *Id.* Although the basic approach of using the military discipline rationale to determine what is incident to service is the same approach the Supreme Court would use in *Shearer II*, the Eleventh Circuit, in an attempt to allow recovery, incorrectly found that military discipline would not be implicated. First, because Johnson was on a military mission at the time of his accident it is likely that some military orders would be called into question. Additionally, suits against civilians who play an integral role in military affairs, including the FAA, easily could affect military discipline. *See infra* note 196 and accompanying text.

133. 723 F.2d 1102 (3d Cir. 1983), *rev'd*, 473 U.S. 52 (1985); *see also Third Circuit Review*, Shearer v. United States, 29 VILL. L. REV. 1017 (1984); Strutin, Feres *is Narrowed: GI's Mother Sues Army*, PA. L.J. REP., Jan. 9, 1984, at 1, col. 1.

134. Heard had been prosecuted in Germany and sentenced to four years in prison for the grotesque murder of a German woman. He allegedly murdered the woman by inflicting bead injuries with a wrench and a lifting jack after engaging in forced sexual activity. *Shearer I*, 723 F.2d at 1104.

135. *Id.*

136. *Id.* at 1105.

137. *Id.* Thus, "*Feres* insulate[d] the military from FTCA suits arising out of 'negligent orders given or negligent acts committed in the course of' an injured service[member's] military duty." *Id.* (quoting *Stencel*, 431 U.S. at 671).

138. *Id.*

tion in order to determine if the injury or death was sustained "in the course of" military service.[139] Consequently, the court stated that the focal point of the *Feres* doctrine is the relationship between the servicemember and the military at the time and place of the injury.[140] The court claimed that the status and activity of the servicemember at the time of injury are the dominant factors.[141]

The court applied the traditional test for determining what is incident to service by taking into account: "(1) [t]he status of the injured soldier at the time of injury, (2) the place of the injury, (3) the nature of the activity engaged in, and (4) whether the injured party was acting under orders or compulsion."[142] The court generally stated that an injury sustained by a servicemember who is off-duty, off-base, and not involved in military activity at the time of injury is deemed not incident to service and, therefore, allowed to recover.[143]

At the time of his murder, Shearer was not involved in any military activity.[144] On the contrary, Shearer was off-duty and off-base in another state when he was kidnapped and murdered.[145] The court stated that the district court's error in denying recovery resulted from its focus on the status and activity of the tortfeasor rather than the status and activity of the claimant.[146] Thus, the *Shearer I* court, unlike the court in *Johnson I*, focused on the status of the claimant and defined incident to service as it had been defined traditionally. In other words, the *Shearer I* court applied the totality of circumstances test, rather than asking merely whether the military discipline rationale had been implicated. On appeal, however, the Supreme Court, in order to deny recovery, used the same approach employed by the Eleventh Circuit in *Johnson I*.

B. The Supreme Court's Denial of Recovery

1. The Supreme Court Opinion of *United States v. Shearer* (*Shearer II*)

The Supreme Court in *United States v. Shearer (Shearer II)*[147] stated that, although *Feres* was based on several grounds, it was ex-

139. *Id.*
140. *Id.*
141. *Id.*
142. *Id.* (citing *Brown*, 348 U.S. at 112; *Feres*, 340 U.S. at 146; and Jaffee v. United States, 663 F.2d 1226, 1232 (3d Cir. 1981)).
143. *Id.* at 1106.
144. *Id.*
145. *Id.*
146. *Id.*
147. 473 U.S. 52 (1985).

plained best by the military discipline rationale.[148] Denying recovery, the *Shearer II* Court introduced an unprecedented case-by-case methodology.[149] The Court stated that *Feres* could not be limited to a few bright-line rules.[150] Instead, the Court stated that every case must be analyzed in regard to the FTCA as it has been interpreted in *Feres* and subsequent cases.[151] The Third Circuit Court of Appeals considered the fact that Shearer was on-leave and off-base at the time of his murder to be controlling.[152] The Supreme Court noted, however, that the location of the murder was not as important as whether the suit would cause the judiciary to question military decisions.[153] Thus, the Supreme Court concluded that a court must not use the traditional off-duty, off-base factors to determine whether a claim is incident to service, but instead must use a case-by-case analysis focusing on whether the suit implicates the military discipline rationale in order to determine if the claim is incident to service.[154] If a court must second-guess military decisions, or if the suit might impair military discipline, then the injury is incident to service.[155] Moreover, the Court brought even more claims into the incident to service exception by stating that the particular claim before the court does not have to implicate the military discipline rationale.[156] Instead, the claim merely must be of the type that if generally allowed would require civilian courts to become involved in military affairs at the risk of harming military discipline and effectiveness.[157]

The *Shearer II* Court also focused on the status of the tortfeasors.[158] The Court stated that Shearer's allegation involved the "management" of the military by questioning basic decisions about the control and supervision of a servicemember.[159] The Court noted that it was immaterial that the claim was characterized as a personnel decision because it was the type of claim that, if generally allowed, would implicate the military discipline rationale.[160] Thus, the *Shearer II* Court

148. *Id.* at 57-58 n.4.
149. *Id.* at 57.
150. *Id.*
151. *Id.*
152. *Id.*
153. *Id.*
154. *Id.*
155. *Id.*
156. *Id.* at 59.
157. *Id.*
158. *Id.* at 59. The tortfeasors were the military commanders who negligently failed to discharge Heard. This focus on the tortfeasor also had been the approach of the Eleventh Circuit in *Johnson I*.
159. *Id.* at 58.
160. *Id.* at 59; *see also* Note, *Federal Tort Claims Act—Government Liability for Personal Injuries to Military Personnel*, 51 J. AIR L. & COM. 1087 (1986).

seemed to be saying that what mattered in determining what is incident to service is whether the claim is of the type that, if generally allowed, would implicate the military discipline rationale.

2. The Lower Courts' Interpretation of *Shearer II*

a. The Eleventh Circuit's Rehearing of Johnson v. United States (Johnson II)

In *Johnson II* the court stated that the Supreme Court opinion in *Shearer II* reaffirmed the analysis set forth in *Johnson v. United States (Johnson I)*.[161] The *Johnson II* court explained that the *Shearer II* Court based its decision on military discipline and on whether the claim being considered would cause the judiciary to question military decisions.[162] Following the command of the *Shearer II* Court to avoid reducing *Feres* to a few bright-line rules, the *Johnson II* court analyzed the case in regard to the FTCA as it has been interpreted by *Feres* and subsequent cases.[163] The court held that the *Johnson I* opinion gave an appropriate amount of attention to the *Feres* rationales, with an emphasis on the military discipline rationale.[164]

Again, the *Johnson II* court stated that the claims presented in *Johnson I* were based entirely upon the activities of the FAA which was not involved in military affairs.[165] Thus, the court found that it correctly followed the *Shearer II* example by focusing on the status of the tortfeasor and on whether the military discipline rationale would be implicated. Under the *Shearer II* military discipline analysis duty status was not dispositive.[166] Thus, the fact that Johnson was killed while on a military mission for the United States Coast Guard seemed immaterial. The only relevant consideration was whether military discipline or effectiveness would be harmed by the suit.

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161. 779 F.2d 1492, 1493 (11th Cir. 1986), *rev'd*, 107 S. Ct. 2063 (1987). After the Supreme Court's decision in *Shearer II*, the Eleveuth Circuit in *Johnson II* reconsidered its first opinion, *Johnson I*, and once again allowed Johnson's widow to recover.

162. *Id.* at 1493-94.

163. *Id.*

164. *Id.* at 1494.

165. *Id.* The *Johnson I* court, however, incorrectly found that military discipline would not be affected by these types of claims. *See supra* note 132.

166. *Johnson I*, 779 F.2d at 1494. Part V of this Note discusses some other factual situations in which the *Shearer II* military discipline analysis can be applied.

b. The Ninth Circuit Opinion of Atkinson v. United States (Atkinson I)

In *Atkinson v. United States (Atkinson I)*[167] the Ninth Circuit, also relying on *Shearer II*, allowed a servicemember to recover for the negligent medical care that she received at an army hospital. Joyce Atkinson, while serving as a specialist in the Army, received negligent prenatal care from military personnel causing her to deliver a stillborn child. The court began its analysis by recognizing that the Supreme Court's primary reason for maintaining the *Feres* doctrine was to protect military discipline.[168] The *Shearer II* Court specifically had stated that the original rationales mentioned in *Feres* and subsequent cases were no longer determinative.[169] The *Atkinson I* court interpreted this statement to mean that the *Feres* doctrine barred suit only when the judiciary would be required to examine military decisions, or when the plaintiff's conduct directly implicates the military discipline rationale.[170] Furthermore, the *Shearer II* Court confirmed that courts should take a case-by-case approach, rather than a per se approach, to the *Feres* doctrine.[171] The Ninth Circuit, therefore, claimed that it must determine each suit's actual effect on military discipline in order to determine if barring the claim would serve the intent of the *Feres* doctrine.[172] When the suit will not jeopardize any important military interests, the *Feres* doctrine should not bar recovery.[173] The *Atkinson I* court, following the *Shearer II* Court's command to examine each case individually, rejected the per se rule that prohibited medical malpractice claims against the military.[174]

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167. 804 F.2d 561 (9th Cir. 1986), *cert. denied*, 108 S. Ct. 1288 (1988); *see also* Rouse, Atkinson *and the Application of the* Feres *Doctrine in Wrongful Birth, Wrongful Life, and Wrongful Pregnancy Cases*, ARMY LAW., May 1987, at 58; Shemonsky & Flannery, *Good-bye* Feres *Doctrine? Servicemember Brings Malpractice Action*, 15 LEGAL ASPECTS MED. PRAC., June 1987, at 7.

168. *Atkinson I*, 804 F.2d at 563 (citing *Shearer II*, 473 U.S. at 52). The Ninth Circuit stated that the Supreme Court did not want military personnel who are injured incident to service to bring suits calling into question the decisions or performance of other servicemembers. *Id.* (citing Monaco v. United States, 661 F.2d 129, 132 (9th Cir. 1981) (quoting Hunt v. United States, 636 F.2d 580, 599 (D.C. Cir. 1980)), *cert. denied*, 456 U.S. 989 (1982)).

169. *Atkinson I*, 804 F.2d at 563 (citing *Shearer II*, 473 U.S. at 58 n.4).

170. *Id.*

171. *Id.*

172. *Id.*

173. *Id.*

174. *Id.* The Court rejected prior cases that said:

> *Feres* barred a military plaintiff's malpractice claim . . . because it would he too difficult to determine "the effect that a particular type of suit would have upon military discipline . . . ." We reasoned that "[t]his is a classic situation where the drawing of a clear line is more important than heing able to justify in every conceivable case, the exact point at which it is drawn." . . . [W]e refused to determine the effect of a particular malpractice suit on military discipline . . . . [because] "allegations of medical malpractice . . . have consistently been held to

The court also rejected the totality of circumstances test[175] as a "substitute" for determining whether the suit would endanger military discipline.[176] Thus, the fact that Atkinson was only able to receive this medical care because of her military status was insufficient to bar her suit.[177] Her active duty status also was not dispositive. The *Atkinson I* court stated that her status was important only if her injury occurred while she was involved in an activity that relevantly related to her military duties.[178] Rather than rely on the duty and status factors, the court stated that it must determine whether the particular facts in the case would cause the court to second-guess military decisions, thereby threatening military discipline and effectiveness.[179] Using this analysis, the court allowed Atkinson to recover.

First, the *Atkinson I* court reasoned that this malpractice claim involved a novel situation in that pregnant servicemembers did not serve on active duty when *Feres* was decided in 1950.[180] Thus, the *Feres* Court, in barring the two companion malpractice claims, could not have contemplated the unique facts presented in *Atkinson I*.[181] The court failed to see how Atkinson's suit for negligent prenatal care possibly could endanger military discipline.[182] This factual situation was not the type of case that would require a civilian court to second-guess military decisions and, thereby, become involved in military affairs at the expense of military discipline.[183] The *Atkinson I* court allowed recovery because it found that there was no connection between Atkinson's medical treatment and military discipline.[184]

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fall within the bounds of the [*Feres*] doctrine when the plaintiff was a service[member] on active duty at the time of the alleged malpractice."

Id. at 563-64 (quoting Henninger v. United States, 473 F.2d 814, 815 (9th Cir.), *cert. denied*, 414 U.S. 819 (1973), and Veillette v. United States, 615 F.2d 505, 507 (9th. Cir. 1980)).

175. *See supra* note 99 and accompanying text.

176. *Atkinson I*, 804 F.2d at 564.

177. *Id.*

178. *Id.*

179. *Id.*

180. *Id.*

181. *Id.*

182. *Id.* When Atkinson sought medical care she was not on a military mission or subject to military orders. Moreover, Atkinson was not in a command relationship with her physician. In addition, the court stated that "the circumstances of this case simply 'do not involve the sort of close military judgment calls that the *Feres* doctrine was designed to insulate from judicial review.'" *Id.* at 565 (quoting Johnson v. United States, 704 F.2d 1431, 1440 (9th Cir. 1983).

183. *Id.*

184. *Id.* Malpractice claims are covered by a privileged activity test used by the lower courts. The court stated that there was absolutely no connection between Atkinson's injuries and her army career "except in the sense that all human events depend upon what has already transpired." *Id.* (quoting *Brooks*, 337 U.S. at 52). This statement is not true, however, because Atkinson would not have been treated at the military hospital had she not been in the military. As the privileged activity text, which the court rejects, points out—she would not bave been treated by military

The result in *Atkinson I* was dictated by, and was a logical extension of, the *Shearer II* military discipline analysis—*Shearer II* mandated that all *Feres* cases be re-evaluated in light of the suit's effect on military discipline. The Supreme Court, however, was fearful of the lower courts' extension of the *Shearer II* military discipline analysis, so the Court ignored *Shearer II* in deciding *United States v. Johnson* (*Johnson III*)[185] and reaffirmed *Feres*. The *Johnson III* Court found that the injury was incident to service and denied recovery without focusing on the military discipline rationale.

3. The Supreme Court Decision in *Johnson III*

In order to deny recovery in *Johnson III*, the Supreme Court drastically changed the analysis it had used in *Shearer II*. The Court in *Johnson III* did not focus on the status of the tortfeasor, but rather focused on the status of the claimant.[186] In addition, the *Johnson III* Court did not use a case-by-case analysis in order to determine whether military discipline would be impaired if this suit was allowed. Instead, it denied recovery per se. The Court stated that Johnson's injury arose incident to service because he was performing a military mission and, therefore, recovery was denied.[187] *Johnson III* simply ignored *Shearer II*'s case-by-case analysis, and use of the military discipline rationale to define incident to service, without attempting to explain, justify, or distinguish it.

The Court reiterated *Feres*' holding that servicemembers could not bring suit against the Government for injuries that " 'arise out of or are in the course of activity incident to service.' "[188] The Court claimed that it had never departed from this depiction of the *Feres* doctrine.[189] The *Johnson III* Court stated that although all the *Feres* cases involved claims of negligent conduct by servicemembers, the Court stated that it

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personnel in an army hospital but for her military status. The *Atkinson I* court, like the Eleventh Circuit in *Johnson I*, seemed to stretch the *Shearer II* military discipline analysis too far. The basic analyses are the same but these courts did not weigh all of the factors correctly.

185. 107 S. Ct. 2063 (1987).

186. *See supra* notes 158-59 and accompanying text.

187. *Johnson III*, 107 S. Ct. at 2069. The Court dismissed the incident to service discussion by saying that there was no dispute that Johnson's injury arose incident to service. *Id.* The Eleventh Circuit dismissed the fact that military missions always have been deemed incident to service by claiming that only when the *Feres* factual paradigm is present does the issue of whether the injury arose out of, or during the course of, an activity incident to service arise. *Id.* at 2065; *see also supra* note 111 and accompanying text.

188. *Id.* at 2066 (quoting *Feres*, 340 U.S. at 146).

189. *Id.* The Court has never departed from this general statement because the Court has managed to achieve its desired result simply by manipulating what type of activities are considered incident to service.

had never implied that the tortfeasor's military status was important.[190] Furthermore, the Court specifically noted that the lower courts also had disregarded the status of the tortfeasor in their application of *Feres*.[191] The *Johnson III* Court refused to alter the doctrine.[192]

The *Johnson III* Court restated the rationales for *Feres* set forth in *Stencel*. First, the Court noted that the relationship between the Government and servicemembers is " 'distinctively federal in character.' "[193] Thus, the liability of the Government should not hinge on the fortuity of where the negligence occurred. Second, the Court stated that the existence of veteran's benefits dictated the rejection of servicemembers' suits for service-incident injuries.[194] Finally, incident to service claims were barred by *Feres* because they are the "*type*[s] of claims that, if generally permitted, would involve the judiciary in sensitive military affairs at the expense of military discipline and effectiveness."[195]

The *Johnson III* Court did not overrule the military discipline analysis used by the *Shearer II* Court, but it failed to give any guidance as to the type of factual situation the *Shearer II* analysis would apply. The Court did not explain why the *Shearer II* military discipline analysis could not be used in *Johnson III*. In order to be consistent, the Supreme Court should have applied the military discipline analysis to find that Johnson's case was of the type that would, if generally permitted, implicate military discipline.[196] Instead, the fact that the *Johnson III* Court ignored *Shearer II* leads one to believe that the Court was alarmed at the lower courts' interpretation of *Shearer II*. By failing to explain that there may be a difference between civilian tortfeasors who play an integral role in military affairs and those who do not, the Court left the impression that the lower federal courts simply should deny

190. *Id.* The *Johnson III* Court ignored its implication in *Shearer II* that the status of the tortfeasor was important.

191. *Id.* at 2067 & n.8.

192. *Id.* at 2067.

193. *Id.* at 2068 (quoting *Feres*, 340 U.S. at 143).

194. *Id.* at 2068-69 (citing *Stencel* and *Shearer II*).

195. *Id.* at 2069 (quoting *Shearer II*, 473 U.S. at 59 (emphasis in original)).

196. *Id.* The Court should have emphasized the fact that Johnson's injury was incident to service because: (1) Johnson went on the mission only because he was in the Coast Guard; (2) his wife was receiving veteran's benefits because of his death; (3) Johnson was acting pursuant to standard Coast Guard procedures; and (4) the FAA works very closely with the military. The potential, therefore, that this suit could implicate military discipline was substantial. Instead of applying the military discipline analysis, the Court merely stated conclusively that the suit must be denied, regardless of the status of the tortfeasor, because military judgments and decisions inextricably are intertwined with the conduct of the military mission. *Id.* Although the Court noted that civilian employees of the government (including the FAA) may play an integral role in military activities and thus cause an inquiry into the civilian activities to have the same effect on military discipline as a direct inquiry into military judgments, *id.* at 2069 n.11, the Court relegated this discussion to a footnote.

recovery in every factual situation in which the servicemember is engaged in a military mission regardless of whom the suit is against.[197] The *Johnson III* Court did not overrule *Shearer II*, however, because the Court wanted to be able to continue to use the military discipline rationale to bring even more traditionally non-incident to service claims under the *Feres* bar.

Commentators suggest that the *Johnson III* Court's reaffirmance of *Feres* will have a huge impact on the lower courts' attempts to permit servicemembers to recover. One commentator states that *Johnson III* will "slam shut" the door opened by lower courts that allowed servicemembers' suits against the Government if the suits would not affect military discipline.[198] While *Johnson III* is "emblematic" of the Supreme Court's traditional deference to the military,[199] the decision should not slam shut any doors. On the contrary, *Johnson III* should be read narrowly and have limited impact. It is a five to four decision with a strong dissent written by Justice Scalia. The dissenters seemed to want to overrule *Feres*, but because the respondents did not ask for a rejection of the doctrine they simply refused to extend *Feres*.[200] The dissent admitted that drawing a line between FTCA suits asserting military negligence and those asserting civilian negligence was arbitrary.[201] Yet Justice Scalia stated that limiting the "unfairness and irrationality" of *Feres* is a sufficient reason to draw an arbitrary line confining the decision.[202] By reaffirming *Feres* the Supreme Court did not eliminate the use of the *Shearer II* military discipline analysis, but rather limited its use to factual situations not barred already by *Feres*.[203]

The manipulation of the military discipline rationale to define incident to service in the Supreme Court's opinion of *Shearer II* and the lower courts' opinions of *Johnson I* and *Atkinson I* testifies to the

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197. Because the *Johnson III* Court said nothing about barring claims against civilians brought by servicemembers who were not engaged in a military mission at the time of injury or claims brought against civilian government employees who are not intimately involved with the military, the lower courts should be able to use the military discipline analysis in these situations. The Court also did not define "military mission." The Court can broaden *Johnson III*'s holding by manipulating what is considered to be a military mission.

198. Feres *Holding Lives*, *supra* note 8, at 21, col. 2.

199. *Doctrine Remains*, *supra* note 86, at 5, col. 3.

200. *Johnson III*, 107 S. Ct. at 2070, 2075 (Scalia, J., dissenting). Because "all of the cases decided by th[e] Court under *Feres* have involved allegations of negligence on the part of memhers of the military," the dissent would not extend *Feres* to include suits involving negligence on the part of civilian government employees. *Id.* at 2075.

201. *Id.* at 2075.

202. *Id.* Justice Scalia stated that the *Feres* decision was wrong. *Id.* He contended: "[t]here [was] no justification for [the] Court to read exemptions into the [FTCA] beyond those provided by Congress." *Id.*

203. *See supra* note 19.

weakness of the *Feres* doctrine. Although the lower courts and the Supreme Court are both guilty of selecting and bending their analyses to fit their result-oriented opinions,[204] the Supreme Court ultimately is responsible. The Court created the doctrine and then manipulated it to the point that it virtually can be molded to fit any result that the Court desires. The lower courts simply are following the Supreme Court's example.

4. The Lower Courts' Interpretation of *Johnson III*

a. The Ninth Circuit's Rehearing of Atkinson v. United States (Atkinson II)

In *Atkinson I* the Ninth Circuit held that the medical malpractice claim did not affect military discipline and therefore was not incident to service.[205] In *Atkinson v. United States (Atkinson II)*[206] the Ninth Circuit reversed its prior decision and made a per se denial of recovery to the servicemember because it believed that *Johnson III* "breathe[d]

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204. The Court only has used the *Shearer II* military discipline analysis in order to find an injury incident to service and thereby to deny recovery. It is unclear whether the Court would use this analysis in a situation that appeared to be incident to service in order to find that the activity is not incident to service. Based on the *Shearer II* opinion, the lower court's analysis in *Johnson I* was not so novel. In *Shearer II* the Court found activity to be incident to service that would not have been incident to service under the traditional criteria. By manipulating the military discipline rationale, the Court found a new factor to add to the incident to service analysis. The Eleventh Circuit used the same type of analysis to allow recovery in *Johnson I*. The Eleventh Circuit stated that Johnson's death traditionally would be found incident to service, but because the military rationale was not implicated, he should be able to recover. *Shearer II* rejected the old analysis. Both the Eleventh Circuit, in *Johnson I* and *Johnson II*, and the Third Circuit, in *Shearer I*, are examples of some lower courts' result-oriented approaches in order to allow recovery. As long as the Supreme Court is inconsistent in its analysis, the lower federal courts will take advantage of this inconsistency and use the analysis to obtain their desired results.

205. For a discussion of *Atkinson I*, see *supra* notes 167-84 and accompanying text.

206. 825 F.2d 202 (9th Cir. 1987), *cert. denied*, 108 S. Ct. 1288 (1988). The Eleventh Circuit heard a similar case in Del Rio v. United States, 833 F.2d 282 (11th Cir. 1987). Servicemember Del Rio brought an FTCA action against the United States on behalf of herself and her children for the negligent pre-natal care she received at a navy hospital. Although the court recognized *Shearer II*'s emphasis on the military discipline rationale, it stated that *Johnson III* "unequivocally expanded the *Feres* analysis to include all three rationales." *Id.* at 285-86. Consequently, the court applied all three rationales relied on in *Johnson III* to the facts and found that Ms. Del Rio could not recover. *Id.* at 286. Although the Eleventh Circuit stated that her medical treatment was incident to service because her military status permitted her to receive medical care at the military hospital, the court read *Johnson III* too broadly. *Id.* Rather than stating that a reaffirmance of *Feres* unavoidably meant that malpractice claims would be barred because malpractice claims brought by active servicemembers expressly were barred in the actual *Feres* case, the court based its decision on the application of the three rationales to the facts presented. *Id.* at 287. Ironically, this approach is not the per se denial of recovery that the commentators had predicted. Instead, it is a reapplication of the rationales for *Feres* to this fact situation in order to determine if *Feres* applies. While relying on *Johnson III*, the court really is engaging in a *Shearer II*-type, case-by-case analysis.

new life into the first two *Feres* rationales."[207] The Ninth Circuit, however, overreacted to *Johnson III* and made the right decision for the wrong reasons. Although *Johnson III* mentioned the first two rationales of *Feres*, they are not controlling.[208] These rationales always have been considered but they are not determinative.

Atkinson, therefore, should not have been denied recovery because *Johnson III* reasserted the first two rationales, but rather because her injury was incurred incident to service. The companion cases to *Feres* were malpractice claims brought by active-duty servicemembers. Thus, as long as *Feres* is good law, recovery on malpractice claims will be denied, regardless of whether the particular claim before the court implicates military discipline. *Feres* and its progeny have concluded that malpractice by army doctors to a servicemember on active duty is inherently incident to service.[209] Atkinson's suit did not involve a factual situation in which the military discipline analysis could be used because it fell into a category already barred by *Feres* cases. This fact does not suggest, however, that new categories of claims cannot be allowed recovery through the application of the military discipline analysis. Thus, the Ninth Circuit seems to have restrained its future application of the military discipline analysis by interpreting *Johnson III* so broadly.

b. Walls v. United States

The Seventh Circuit applied a hybrid version of the *Johnson III* and *Shearer II* approaches. In *Walls v. United States*[210] the Seventh Circuit restated the three rationales mentioned in *Johnson III*, but based its decision on whether military discipline would be affected adversely by this suit.[211] In *Walls* an active-duty servicemember caught a ride from Colorado to Utah with an army helicopter pilot on an aero club plane. Because of the pilot's alleged gross negligence and the aero club's insufficient supervision, the plane crashed, causing Walls to be injured.[212] Walls retired and began receiving veteran's benefits.[213] The court stated that the issue was whether Walls was acting incident to service when the aero club plane crashed.[214] The court stated that the

207. 825 F.2d at 205-06. These two rationales are the distinctively federal rationale and the uniform compensation rationale. *See supra* notes 55-72 and accompanying text.

208. *See Shearer II*, 473 U.S. at 58 n.4.

209. *Shearer I*, 723 F.2d at 1106. *See supra* note 184. There have been several attempts by Congress to allow servicemembers to bring medical malpractice suits, but all these attempts have failed. *See* H.R. 1161, 99th Cong., 1st Sess. (1985); H.R. 1942, 98th Cong., 1st Sess. (1983).

210. 832 F.2d 93 (7th Cir. 1987).

211. *Id.* at 95-96.

212. *Id.* at 94.

213. *Id.*

214. *Id.* at 95.

rationales supporting *Feres*, and the subsequent decisions interpreting *Feres*' application, necessitated a holding that Walls' suit was barred.[215]

The court stated that the Supreme Court had denied recovery in *Johnson III* because the servicemember was killed incident to service.[216] While restating the three rationales for *Feres* mentioned in *Johnson III*, the *Walls* court recognized that the military discipline rationale was the most important.[217] The court held that allowing servicemembers to bring suit for injuries sustained while involved in aero club activities could threaten military discipline.[218] The court stated that even if a servicemember is on-leave or off-duty when injured, he cannot recover under *Feres* if the injury occurred while the servicemember was taking advantage of privileges generally restricted to the military.[219] Precedent supported this holding.[220] In the instant case, Walls was on active duty at the time of the injury and subject to military jurisdiction. Moreover, he was only eligible to be a member of the aero club because of his service in the armed forces.[221] His injuries, therefore, were related directly to his military status. Thus, the *Walls* court found that "the circumstances of th[e] case fall within the heart of the *Feres* doctrine as it consistently has been articulated."[222]

The Seventh Circuit in *Walls* read *Johnson III* narrowly and denied recovery based on the court's determination that the plaintiff's injuries were incurred incident to service. Like *Atkinson II*, this case falls into a category of cases that consistently have denied recovery under *Feres*.[223] Yet, the court did not make a per se denial, but rather looked at the circumstances in order to determine if the injuries were incurred incident to service and to determine if military discipline might be affected.

The Seventh Circuit decision in *Walls* reflects confusion as to how

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215. *Id.*

216. *Id.*

217. *Id.* The Court stated that the fact that the servicemember had received veteran's benefits, in and of itself, would not preclude his recovery. The court noted that the *Shearer II* Court also adopted this position. *Id.* at 95 n.3.

218. *Id.* at 95.

219. *Id.*

220. *Id.* The court cited Woodside v. United States, 606 F.2d 134 (6th Cir. 1979), and Herreman v. United States, 476 F.2d 234 (7th Cir. 1973).

221. *Walls*, 832 F.2d at 95. The court stated that air force aero clubs are closely connected to the armed forces in that they are established and operated by the Air Force. The clubs were created to promote morale among members of the military by providing recreational activities. Moreover, only active-duty servicemembers are eligible for "active membership" in aero clubs. Aero clubs are strictly controlled by the Air Force. *Id.* at 94 n.2.

222. *Id.* at 96 (quoting *Johnson III*, 107 S. Ct. at 2069).

223. *See supra* note 107. *Walls* is a part of a category of cases known as the "recreational cases" that apply the privileged activity test.

to reconcile *Shearer II* and *Johnson III*. Once the court found that Walls was injured in a factual situation categorically deemed incident to service by *Feres* and its progeny, the court did not need to determine whether the suit would affect military discipline. If the case falls into a category of cases deemed incident to service then the Supreme Court supposedly has already determined that military discipline will be affected if these types of suits are generally permitted.

c. Major v. United States

In *Major v. United States*[224] two active-duty servicemembers were on base and were hit by a servicemember who was driving while intoxicated. The Sixth Circuit held that the injuries were sustained incident to service and, therefore, denied recovery.[225] The court began its analysis by looking at the decisions in *Shearer II* and *Johnson III*. The *Major* court stated that *Shearer II* held that the relevant inquiry is not where the incident occurred, but "whether the suit requires the civilian court to second-guess military decisions."[226] Similarly, the *Johnson III* court found that the status of the tortfeasor was irrelevant in determining whether *Feres* applied.[227] The court stated that if the injury occurred while the plaintiff was involved in a "service-related" mission, suit would be dismissed under *Johnson III* because its "maintenance would 'necessarily implicate[] the military judgments and decisions inextricably intertwined with the conduct of the military mission.' "[228]

The *Major* court stated that the Supreme Court in recent cases seemed dedicated to broadening the *Feres* doctrine to include all injuries sustained by servicemembers, regardless of how distantly related the injuries are to the individual's status as a member of the military.[229] The court recognized that the Supreme Court has denied recovery regardless of the location of the event, the status of the tortfeasor, or any connection between the incident and the military purpose of the activity from which it arose.[230] The court also stated that the rationale in *Brooks*, to allow recovery if the accident had nothing to do with the plaintiff's army career, had been greatly undermined by the *Johnson III* and *Shearer II* opinions.[231]

Yet, the Sixth Circuit, while recognizing the bleak outlook for

224. 835 F.2d 641 (6th Cir. 1987).
225. *Id.* at 642.
226. *Id.* at 644 (quoting *Shearer II*, 473 U.S. at 57).
227. *Id.*
228. *Id.* (quoting *Johnson III*, 107 S. Ct. at 2069).
229. *Id.*
230. *Id.*
231. *Id.* at 645 n.2.

Feres-type claims, did not bar this claim per se or give undue weight to the two original rationales reintroduced in *Johnson III*, instead the court looked at the claim's effects on military discipline. After the court found that this suit would affect military discipline and effectiveness, it barred recovery.[232] While the court paid lip service to *Johnson III*, it did not deny recovery because of *Johnson III*'s reaffirmance of *Feres*, but rather based its decision on the suit's effect on military discipline.[233]

C. *Summary of the Lower Courts' Interpretation of* Johnson III

Analyzing the lower courts' interpretation of *Johnson III* reveals two apparent trends. First, it appears that *Johnson III* has neither put a stop to litigation nor closed the door previously opened by the lower courts that allowed recovery to servicemembers in actions which are "unrelated to the military command structure."[234] Some of the courts, while paying lip service to *Johnson III*, really are applying the same analysis that they would have applied before *Johnson III*. Impairment of military discipline remains the primary reason for denying recovery despite *Johnson III*'s reliance on two of the original *Feres* rationales.

Second, the courts appear to be confused as to how to reconcile *Johnson III* and *Shearer II*. *Shearer II* relied primarily on the military discipline rationale to deny recovery. *Johnson III* would have denied recovery if the injury occurred incident to service regardless of the claim's effect on military discipline. The lower courts, however, appear to determine first whether the claim is incident to service and then go on to determine if military discipline will be affected. If the claim is incident to service, recovery should be denied. *Shearer II* added to the confusion by defining incident to service based on whether military discipline would be affected. For years the courts have been grounding their decisions on the suits' effects on military discipline; *Shearer II* simply took the analysis to the extreme.

Johnson III appears to be a reaction to *Shearer II*. The *Johnson III* Court was alarmed by the lower courts' use of *Shearer II* because the Supreme Court seems to want the military discipline rationale to be used to define incident to service only when it serves to deny recovery. Thus, *Johnson III* did not overrule *Shearer II*, but merely stated that if the accident is incurred incident to service then it does not matter if

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232. *Id.* at 645.

233. Because this fact situation did not fall into a fact situation categorically barred by *Feres*, and because *Shearer II* stated that duty status and situs of the event are noncontrolling, the Court was correct in applying the *Shearer II* military discipline analysis.

234. *See* Feres *Holding Lives, supra* note 8, at 21, col. 2.

military discipline is unaffected.

V. THE FUTURE IMPACT OF *Johnson III*

Johnson III[235] should not affect the categories of cases that already are barred by *Feres*, including medical malpractice claims, derivative tort claims, suits against officers in their individual capacities, and privileged activity suits.[236] *Johnson III* merely reaffirms that these claims are barred regardless of the instant claim's effect on military discipline. *Johnson III* should apply to any claims by servicemembers against civilian employees of the federal government. This generalization, however, does not mean that *Johnson III* will preclude recovery in all suits against civilian federal employees. In *Johnson III* the civilian agency sued was involved intimately with the military. Yet, the Court has not addressed the question of whether recovery will be allowed in suits against civilian employees of the government who are not involved closely with the military. Moreover, the plaintiff in *Johnson III* was engaged in a military mission at the time of his death. *Johnson III* says nothing about suits against civilian employees of the government which are brought by servicemembers who did not sustain injury on a military mission.[237] *Johnson III* should be recognized for what it is: an extension of the *Feres* doctrine to suits brought by military personnel injured incident to service against civilian government employees who are involved intimately in military activities.

Finally, it is likely that *Feres* will be overruled. The plaintiff in *Johnson III* did not ask the court to overrule *Feres*.[238] But if she had, four of the nine justices might have accommodated her and overruled *Feres*.[239] Furthermore, with the resignation of Justice Powell, who wrote

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235. *Johnson III* may have an interesting effect on Agent Orange suits. *See Doctrine Remains, supra* note 86, at 37, col. 1; Feres *Holding Lives, supra* note 8, at 21, col. 2. If the plaintiffs sue the officers individually then they will be barred by United States v. Stanley, 107 S. Ct. 3084 (1987). *Doctrine Remains, supra* note 86, at 37, col. 1; Feres *Holding Lives, supra* note 8, at 21, col. 2; *see supra* note 107. If the plaintiffs argue that the CIA is responsible then they will probably be barred by *Johnson III*. *See Doctrine Remains, supra* note 86, at 37, col. 1. The same questions may arise from the Challenger shuttle catastrophe. If the servicemembers' families sue NASA, then *Johnson III* should apply. *Id.* If the plaintiffs sue Morton Thiokol, Inc., the rocket maker, then Boyle v. United Technologies Corp., 108 S. Ct. 2510 (1988), would probably preclude recovery. *Id.*

236. *See supra* note 107.

237. For example, one commentator asks what would happen "if a West Point cadet is struck by a bullet negligently fired by an FBI agent at an Army-Navy game," or a servicemember is run over hy a post office truck on base? *See* Feres *Holding Lives, supra* note 8, at 21, col. 3. Recovery against the FBI will probably be precluded by *Johnson III*. *Id.* The suit against the post office, however, may be allowed because the post office is not intimately involved in military activities.

238. *Johnson III*, 107 S. Ct. at 2070 (Scalia, J., dissenting); *see also* Feres *Holding Lives, supra* note 8, at 21, col. 2.

239. Justices Brennan, Marshall, and Stevens joined in Justice Scalia's dissent.

the majority opinion in *Johnson III*, the continued viability of *Feres* will depend a great deal on Justice Kennedy.[240] Coming from the Ninth Circuit, which historically has been very hostile to the *Feres* doctrine, Justice Kennedy may be more prone to overrule *Feres*.[241]

VI. CONCLUSION

The *Feres* doctrine has been criticized extensively by courts and commentators.[242] Despite any stated rationales, the doctrine was created by the Supreme Court in order to save the Government from the dire consequences of large claims and potentially endless FTCA suits from servicemembers.[243] Ironically, because of the lower courts' dislike for *Feres* and the egregious way that the military often has treated its servicemembers, the Government has continued to experience the dire consequences of large amounts of litigation. *United States v. Johnson* has facilitated, rather than deterred, this multiplicity of suits.

The *Feres* doctrine has been criticized because of the inadequacy of its original rationales and their subsequent replacement by a rationalization of military discipline.[244] The doctrine also has been criticized because of the harsh results that it creates. Recently, the Court's blatant inconsistencies in applying the *Feres* rationales may be the basis for additional lower court criticisms. Consistent in denying recovery, the

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240. *See* Feres *Holding Lives, supra* note 8, at 21, col. 3.

241. Justice Kennedy authored some opinions in the Ninth Circuit that have been very critical of the *Feres* doctrine. *See* Veillette v. United States, 615 F.2d 505 (9th Cir. 1980); Troglia v. United States, 602 F.2d 1334 (9th Cir. 1979). These cases "reluctantly" upbold *Feres, Veillette*, 615 F.2d at 506, while pointing out the confusion and "tbe anomalies created by the court-made exception to tbe [FTCA]." *Id.* at 507. Justice Kennedy, therefore, may agree with Justice Scalia's argument to overrule *Feres* in favor of judicial restraint. *See supra* note 202 and accompanying text.

242. *See Johnson III*, 107 S. Ct. at 2074 (Scalia, J., dissenting) (quoting *In re* "Agent Orange" Prod. Liab. Litig., 580 F. Supp. 1242, 1246 (E.D.N.Y.), *appeal dismissed*, 745 F.2d 161 (2d Cir. 1984)); *see also supra* note 9.

243. *See Brooks*, 337 U.S. at 52; *see also supra* note 30 and accompanying text.

244. *See* Feres *Holding Lives, supra* note 8, at 21, col. 1 (quoting *Johnson III*, 107 S. Ct. at 2074 (Scalia, J., dissenting)); *see also* Danforth, *Should the Senate Consent to Bork?*, Kansas City Star, Sept. 13, 1987, at 1K, col. 1. In response to another issue Senator Danforth explained wby tbe Supreme Court should apply the law as it is written. He stated:

> Public policy should be made by those who are elected by the people, report to the people and can be removed by the people. It should not be made by men and women who have been elected by no one, who are isolated in courthouses and who serve for life. Tbe Supreme Court should be in the business of interpreting tbe law written by elected representatives. It should not be in the business of creating new law out of wbole clotb.

Id. at 6K, col. 5. Senator Danfortb was arguing for Senate approval of Judge Bork because Danforth believed conservative justices would strictly construe the Constitution and federal laws. Tbe *Feres* cases testify to the fact tbat conservative justices can be equally as guilty of "creating law out of wbole cloth." The *Feres* doctrine has been affirmed and expanded by conservatives and liberals alike. *See generally* Feres *Holding Lives, supra* note 8; *Doctrine Remains, supra* note 86.

Court is embarrassingly inconsistent in how it arrives at this result. As long as lower courts remain hostile to *Feres* and the Supreme Court gives little guidance as to the definition of incident to service and the role military discipline is supposed to play in the *Feres* analysis, the litigation will continue.

Shearer II used the military discipline rationale to bring activity that normally would not be considered incident to service under the *Feres* bar. When the lower courts in *Johnson II* and *Atkinson I* tried to follow *Shearer II* and allow recovery by using the military discipline rationale to define incident to service, the Supreme Court overruled their analyses. If the Court is going to adopt an analytical structure it must allow this structure to be used consistently to allow recovery. The reaction to the *Feres* doctrine over the last four decades is emblematic of the problems encountered when the Supreme Court focuses on the result of the case rather than on defining and confining itself to a logical analysis.

Johnson III, however, has not done as much damage as the commentators would lead one to believe. *Johnson III* simply expanded *Feres* to include cases against civilian federal employees intimately involved with the military and restricted the use of the *Shearer II* military discipline analysis to categories of cases not barred already by *Feres*. The *Shearer II* analysis cannot be used in every case because *Johnson III* showed that factual situations that traditionally have been found to be incident to service will continue to be found incident to service, regardless of their actual affect on military discipline. The lower federal courts, therefore, should continue, and in fact must continue, to use the *Shearer II* military discipline analysis in all factual situations not barred already by *Feres* if there is to be any chance of recovery at all.

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