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Solving The *Feres* Puzzle: A Proposed Analytical Framework For “Incident To Service”

A familiar common-law doctrine is that the sovereign cannot be sued without consent. The doctrine of sovereign immunity evolved from a concern that the governmental means required for the proper administration of public service would be endangered if the supreme authority could be subjected to suit by the citizens. The doctrine of sovereign immunity survived the Revolutionary War because of the financial instability of the newly created United States, rather than American acceptance of the theoretical foundation of the doctrine. The traditional immunity from suit enjoyed by the United States, however, was partially waived by Congress through the enactment of the Federal Tort Claims Act of 1946 (hereinafter referred to as FTCA).

The FTCA grants federal district courts jurisdiction over claims against the United States for injuries negligently caused by government employees acting within the scope of their employment, under circumstances in which the United States, if a private citizen, would be liable under the law of the place where the act or omission occurred. The FTCA specifically includes members of the military within the definition of “government employees.” The FTCA, however, exempts the United States from liability on any claim arising out of military combatant activities during time of war. A logical conclusion, therefore, is that the FTCA is sufficiently broad to allow

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1. See The Siren, 74 U.S. (7 Wall.) 152, 153-54 (1868).
2. Id. at 154.
6. Id. (definition of “acting within the scope of employment” in the case of military members).
7. Id. §1346.
8. Id. §2671.
9. Id. §2680(j).
a tort action by service members against the United States in some situations.

The United States Supreme Court addressed the question whether the FTCA extends a remedy to service members in Feres v. United States.10 The Court held that injuries sustained by service members are actionable under the FTCA unless sustained incident to service,11 reaffirming the holding of Brooks v. United States.12 In Feres, the Court was concerned with injuries sustained by three service members "incident to the service."13 The Court stated that although when read literally, the FTCA allows tort actions against the United States for injuries suffered by military members, Congress did not intend to subject the government to claims for injuries sustained incident to service.14 The Court based the denial of a remedy on the two critical policy considerations of the need to maintain the unique relationship between military members and to obviate any adverse effects upon military discipline.15 Moreover, the Court invited Congress to enact contrary legislation if the interpretation of the FTCA by the Court was incorrect.16 Congress has not accepted that invitation.

Although the Feres doctrine has been controversial since its inception over thirty years ago,17 the United States Supreme Court has reaffirmed the doctrine twice in the past seven years. In Stencel Aero Engineering Corp. v. United States,18 the Court held that the right of a third party to recover in an indemnity action against the United States19 is limited by the rationale of Feres when the injured party is a military member.20 The Supreme Court also recently reaffirmed the doctrine as applied to active duty service members for the first time since Feres in Chappell v. Wallace.21 In Chappell, the Court stated that "[c]ivilian courts must, at the very least, hesitate long before

11. Id. at 146.
14. Id. at 140-43.
15. Id. at 141-44.
16. Id. at 138.
entertaining a suit which asks the court to tamper with the established relationship between [military members]."  
At first glance, the *Feres* doctrine may seem a deterrent to FTCA claims by service members, but FTCA claims by service members have not decreased. The Court specifically noted that the plaintiffs in *Feres* and *Chappell* were on active duty and not on leave, thereby appearing to condone suits by service members who are injured while on leave or off duty. Plaintiffs have relied upon this interpretation and have continued to file FTCA claims, attempting to distinguish their cases from *Feres*, and now *Chappell*. Moreover, plaintiffs do not have consistent stare decisis from which they can predict the cognizability of their claims. The Court has not furnished specific guidelines to determine whether a plaintiff's injuries were sustained "incident to service" when the negligent act occurs during the plaintiff's leave or off-duty hours. Lower courts have been inconsistent in determining if the FTCA claims of active-duty military members are cognizable because of the absence of an analytical framework for "incident to service." Unless district courts are consistent in determining whether they have jurisdiction over FTCA claims of service members, plaintiffs will be uncertain in determining if they qualify to sue the government.

This comment will examine the right of active-duty military members to sue the government under the FTCA. Causes of action by service members who have been discharged or retired will not be addressed. Initial focus will be on the development of the *Feres* doctrine, with particular emphasis on the policy reasons underlying the Supreme Court interpretation of the FTCA. The three primary factors considered by courts in determining if the plaintiff's injuries were sustained incident to service then will be examined. This examination will reveal that inconsistent court decisions have resulted from the indifferent application of these factors by lower courts. Available remedies other than the FTCA then will be examined to determine why injured service members seek judicial relief. Courts have recognized that

22. Id. at 2365.
23. See Note, supra note 17, at 1099.
27. See infra notes 33-77 and accompanying text.
28. See infra notes 67-76 and accompanying text.
29. See infra notes 82-115 and accompanying text.
30. See infra notes 119-38 and accompanying text.
although veterans benefits are available, government liability in FTCA lawsuits may be greater than the veterans benefits that the injured military members will receive.\textsuperscript{31}

This comment will suggest that the courts apply a three factor analysis to determine if military members’ FTCA lawsuits should be barred based upon the plaintiffs’ injuries having been sustained “incident to service.”\textsuperscript{32} Each factor will be analyzed in the context of two hypothetical fact situations. This author will conclude that since the \textit{Feres} doctrine does not appear to be subject to judicial abandonment or legislative revision, the courts should adopt a uniform analytical framework to determine if a plaintiff’s injuries were sustained incident to service. Judicial application of a consistent analytical framework will allow plaintiffs to predict the viability of their claims, thereby eventually decreasing the number of FTCA lawsuits filed by military members. To provide a clear understanding of the right of military members to sue under the FTCA, an initial discussion of the \textit{Feres} doctrine is necessary.

\textbf{The \textit{Feres} Doctrine: Interpretation of the FTCA for Military Members}

While the British political theory that the King could do no wrong was repudiated in the United States, the legal doctrine that the Crown was immune from any suit to which it had not consented was applied by our courts as vigorously as the doctrine had been on behalf of the Crown.\textsuperscript{33} The Federal Tort Claims Act of 1946 terminated the controversial\textsuperscript{34} sovereign immunity of the United States government.\textsuperscript{35} As an integral part of the Legislative Reorganization Act of 1946, the FTCA had two primary purposes: (1) removing the previous barrier to tort suits against the government, and (2) relieving Congress of the burden of handling thousands of private bills for relief submitted each year because of the absence of any other remedy.\textsuperscript{36}

The FTCA holds the United States liable for tort claims “in the same manner and to the same extent as a private individual under

\begin{itemize}
\item \textsuperscript{31} See Rhodes, \textit{supra} note 25, at 41 n.170 (comparison of veterans benefits with probable verdicts for service members’ FTCA lawsuits).
\item \textsuperscript{32} See \textit{infra} notes 138-78 and accompanying text.
\item \textsuperscript{33} \textit{Feres}, 340 U.S. at 139.
\item \textsuperscript{34} See \textit{infra} note 71 and accompanying text.
\item \textsuperscript{35} See 28 U.S.C. §1346.
\item \textsuperscript{36} See H.R. REP. No. 1287, 79th Cong., 1st Sess. (1946); SEN. REP. No. 1400, 79th Cong., 2d Sess. (1946); \textit{see also} Parker v. United States, 611 F.2d 1007, 1009 (5th Cir. 1980).
\end{itemize}
The FTCA thus expressly ties the liability of the United States to the state laws governing the place where the alleged negligent act or omission occurred, subjecting the FTCA lawsuit to the statutory limitations of the state on awards and other related matters. The FTCA, however, exempts the United States from liability for interest prior to judgment and for punitive damages.38 Federal district courts have exclusive jurisdiction of FTCA lawsuits.39 Moreover, an FTCA lawsuit is tried by the court without a jury.40 Prerequisite to the ability to sue in district court, claimants must present their claims to the appropriate federal agency and (1) be denied relief by the agency, or (2) not receive final disposition of the claim within six months after filing.41 The FTCA also lists thirteen exclusions,42 including claims arising out of military combatant activities.43 The Supreme Court interpretation of the FTCA produced the Feres doctrine, which has been the focus of controversy and continuous challenge.44 To provide a clear understanding of the Feres doctrine, a discussion of the initial examination by the United States Supreme Court of the FTCA in Brooks v. United States is necessary.

A. Brooks v. United States: The Bridge to Feres

Brooks v. United States45 was the first case heard by the United States Supreme Court concerning the issue of service members’ right to sue the government under the FTCA. The Court framed the issue as “whether members of the United States armed forces can recover under [the FTCA] for injuries not incident to service.”46 (Emphasis added.) In Brooks, two brothers, on leave from active-duty military service, and their father were driving on a public highway when a United States Army truck negligently struck their car.47 One brother was killed; the other brother and the father were injured seriously.48

38. Id. Therefore, a plaintiff only receives compensatory damages. The estimated past and future veterans benefits are deducted from the award. Thus, if the award is less than the plaintiff's entitled veterans benefits, the award will be extinguished. See Brown v. United States, 348 U.S. 110, 111 (1954).
40. Id. §2402.
41. Id. §2675(a).
42. Id. §2680.
43. Id. §2680(j).
44. See generally Note, supra note 17, at 1099-1100.
45. 337 U.S. 49 (1949).
47. Id. at 50.
48. Id.
The Court refused to accept the contention that the FTCA excluded all claims by service members.\textsuperscript{49} Considering the FTCA exemptions encompassing military combatant claims and claims arising in a foreign country, the Court stated that to believe Congress did not have service members in mind when the FTCA was passed was "absurd."\textsuperscript{50} On this premise, the Court concluded that the Brooks' injuries had no relation to their army careers since their injuries were not caused by their service "except in the sense that all human events depend upon what has already transpired."\textsuperscript{51} The Court expressly stated, however, that had the accident been incident to service, a wholly different case would have been presented.\textsuperscript{52}

The Brooks Court reasoning was in line with the earlier Military Claims Act of 1943. That Act allowed administrative settlement by the War Department of claims not exceeding $1,000 for property losses, personal injury, or death caused by military personnel and civilian employees of the War Department, provided no contributory negligence was involved and the injury was not sustained incident to service.\textsuperscript{53} Claims of military personnel and civilian employees based on death or injury incident to service were expressly excluded from the Act.\textsuperscript{54} Thus, an "incident to service" bar to recovery was not a new idea. A year after Brooks, the Supreme Court had the opportunity to determine the right of service members to sue the government when injuries were sustained incident to their service.

\textbf{B. The Birth and Continuation of the Feres Doctrine}

In 1950, the Supreme Court heard \textit{Feres v. United States}\textsuperscript{55} and two companion cases\textsuperscript{56} that presented the common issue of whether service members could sue for injuries sustained incident to service, which, under other circumstances, would be an actionable wrong.\textsuperscript{57} The Court interpreted the FTCA to preclude claims arising from injuries sustained incident to service.\textsuperscript{58} The Court apparently believed that by

\begin{itemize}
  \item \textsuperscript{49} Id. at 51.
  \item \textsuperscript{50} Id.
  \item \textsuperscript{51} Id. at 52.
  \item \textsuperscript{52} Id.
  \item \textsuperscript{53} See Note, \textit{Military Personnel and the Federal Tort Claims Act}, 58 \textit{Yale L.J.} 615, 621 (1949).
  \item \textsuperscript{54} Id.
  \item \textsuperscript{55} 340 U.S. 135 (1950).
  \item \textsuperscript{56} The companion cases were \textit{Griggs v. United States} and \textit{Jefferson v. United States}.
  \item \textsuperscript{57} See id. at 137.
  \item \textsuperscript{58} See id. at 146.
\end{itemize}
being on leave, as the Brooks brothers were, military members removed themselves from being incident to service. The Feres court stated "[t]he common fact underlying the three cases is that each claimant, while on active duty and not on [leave], sustained injury due to negligence of others in the armed forces." (Emphasis added.)

Feres and its two companion cases were based upon injuries sustained by three military members, who were on active-duty and not on leave, due to alleged negligence of others in the armed forces. In Feres, a widow sued the United States for the wrongful death of her husband in a barracks fire. Similarly, in the companion case of Griggs v. United States, a widow sued for the wrongful death of her husband due to alleged medical malpractice. In the other companion case, Jefferson v. United States, the plaintiff sued for injuries resulting from medical malpractice.

The initial concern of the Court was the interpretation of the FTCA, which if misconstrued by the Court, still could be remedied through legislation by Congress, the "author of the confusion." Having few sources indicating congressional intent, the Court interpreted the FTCA in light of the entire statutory system of remedies against the government to make a workable, consistent, and equitable whole. The Court denied relief to the plaintiffs based on the following policy considerations: (1) Congress did not intend to create new causes of action by passage of the FTCA, (2) assimilation of the federal law into the rules of state substantive law would create inequity by subjecting service members to the laws of a location where they did not voluntarily choose to reside, (3) a distinctly federal relationship exists be-

59. See id.
60. Id. at 138.
61. Id.
62. Id. at 137.
63. Id.
64. Id.
65. See id. at 138-39.
66. See id.
67. Id. at 141. Moreover, the Court noted that the FTCA did not provide that all claims be allowed, but rather intended acceptance of liability under circumstances that would implicate private liability. The Court could find no American law that ever permitted a service member to recover for injuries sustained through government negligence. Id. Furthermore, the Court stated that since no private individual has power to mobilize an army, no analogous private liability could be found. Id. at 141-42.
68. See id. at 142-43. Subsequent decisions have substantially weakened the persuasiveness of this rationale. In Muniz v. United States, the Court noted that denial of any tort recovery was far more prejudicial to a plaintiff than mere application of nonuniform state laws. Muniz v. United States, 374 U.S. 150, 162 (1963).
between the government and members of the armed forces, and (4) veterans benefits for injury or death of the military member create an alternative compensation system. Thus, the *Feres* doctrine was created and has served as a bar to many service members' FTCA claims during the past three decades.

Recently, the Supreme Court reviewed the first case since *Feres* involving incident-to-service claims by active-duty military members. Notwithstanding the harsh criticism of the *Feres* doctrine by legal commentators and some members of the judiciary, the Court reaffirmed the *Feres* doctrine and restated the view that the doctrine seems best supported by the unique relationship of service members to their superiors, and the effects of suits on military discipline. The Court stated that the military makes demands on service members that are not encountered in civilian life. For this reason, "civilians courts must,

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69. *Feres*, 340 U.S. at 143-44; see also Warren, *The Bill of Rights and the Military*, 37 N.Y.U. L. Rev. 181, 187 (1962). "Courts are ill-equipped to determine the impact upon discipline that any particular intrusion upon military authority might have." *Id.* In *Stencel Aero Engineering Corp. v. United States*, the Court stated that the armed services perform a unique nationwide function in protecting the security of the United States. "By their responsibilities, the military authorities frequently move large numbers of people and large quantities of supplies from one end of the continent to the other, and beyond, thus creating a significant risk of accidents and injuries." *Stencel*, 431 U.S. 666, 672 (1977). *Cf.* *Standard Oil v. United States*, 332 U.S. 301, 305-10 (1947).


71. The *Feres* doctrine, in its simplest form, is a judge-made exception for service members who are injured. Jacoby, *The Feres Doctrine*, 24 *Hastings L.J.* 1281, 1281 (1973). The Court interpretation of the FTCA appears to have been mistaken. Representative Emmanuel Celler, who drafted the FTCA and sponsored it through three sessions of Committee and House debate to final passage, stated unequivocally when he learned of the *Feres* decision that he had never intended to preclude a suit by a service member. Note, *Military Personnel and the Federal Tort Claims Act*, 58 *Yale L.J.* 615, 620-21 (1949). Some other Court decisions have also criticized the manner in which the *Feres* doctrine was created. *See Reconstruction Finance Corp. v. J. G. Menihan Corp.*, 312 U.S. 81, 84 (1941). "Waivers by Congress of governmental immunity from suit should be liberally construed in the case of federal instrumentalities—that being in line with the current disfavor of the doctrine of government immunity." *Rayonier*, Inc. v. United States, 352 U.S. 315, 320 (1956). "There is no justification for this Court to read exceptions into the [FTCA] beyond those provided by Congress." *Id.*


73. *See supra* note 17 and accompanying text.

74. 103 S. Ct. at 2365; *see also* Brown v. United States, 348 U.S. 110, 112 (1954); *Muniz*, 374 U.S. at 162; *cf.* Hall v. United States, 451 F.2d 353, 355 (1st Cir. 1971) (rejecting plaintiff's contention that the *Feres* doctrine is inapplicable in any case where no military discipline was involved).

at the very least, hesitate long before entertaining a suit” that affects
the established relationship between military personnel. The Feres
document, therefore, appears stable and not near judicial or legislative
abandonment. The doctrine, however, is applied inconsistently by the
courts because of the lack of Supreme Court guidance in determining
whether plaintiffs’ injuries are incident to service. An examination
of lower court decisions reveals that cases are decided by various
methods, resulting in conflicting decisions. The situation is particularly
bad as the decisions differ not only between the federal circuits, but
also within the same circuit.

EXAMINATION OF THE PROBLEM

During the three decades since Feres was decided, courts have pro-
duced conflicting interpretations of Feres as applied to claims for tor-
tious injuries sustained by military members who are on active duty.
The problem has centered on defining “incident to service” in the
context of whether the alleged injuries can be the subject of a FTCA
lawsuit as in Brooks, or whether the plaintiff is barred from court
as in Feres. Although some courts have argued that a clear and cer-
tain definition must be established to determine if a claim is barred,
other courts have argued that the facts of each case must be examined
because an inflexible test could produce greater inequities. Although
decisions interpreting Feres have reached widely varying results, courts
employ some or all of the following three factors in varying degrees
to determine whether a plaintiff’s activities at the time of injury were
incident to service: (1) duty status of the plaintiff, (2) benefits
resulting from plaintiff’s status as a service member, and (3) place
where the negligent act occurred. An examination of each factor
follows.

76. 103 S. Ct. at 2365. Furthermore, the Court noted that the Framers of the Constitution
anticipated this type of issue and explicitly granted Congress plenary authority to control the
military. Id. at 2365-66. See also U.S. Const. art. I, cls. 12-14.
77. See infra notes 78-85 and accompanying text.
78. Compare Henninger v. United States, 473 F.2d 814 (9th Cir. 1973) with Johnson v.
United States, 704 F.2d 1431 (9th Cir. 1983).
79. See supra note 25 and accompanying text.
80. See Henninger, 473 F.2d at 815-16.
81. See Johnson v. United States, 704 F.2d 1431, 1436 (9th Cir. 1983).
82. See id.
83. See id. at 1437-38.
84. See id. at 1438-39.
85. See id. at 1436-37.
A. Duty Status of the Plaintiff

Typically, courts initially examine the duty status of the plaintiff at the time the negligent act occurred. If an individual were on active duty at the time of the negligent act, a cognizable claim cannot be made. At the other extreme, a person who had been discharged or retired from the military at the time of the incident in question may be able to make a cognizable claim. Between these two extremes are the duty statuses of leave and off duty. Whether valid FTCA claims can be made for injuries sustained when a person is on leave or off duty is uncertain. While some court decisions have held that the victim’s leave status is not dispositive of an incident to service determination, other courts have found leave status determinative based upon Brooks. Several courts have recognized that leave status does not alter an individual’s active-duty status since the service member remains subject to military control even on leave. Likewise, courts have handled a service member’s off-duty status in various ways. Several courts have recognized that off-duty military members are still on active duty and under military control. On the other hand, other courts have treated off-duty military members as civilians. The next factor a court considers is whether the plaintiff’s injury arose from a benefit the plaintiff would not have had but for military status.

B. Benefits Resulting from Plaintiff’s Status as a Service Member

As a benefit of military service, service members are entitled to

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86. See infra notes 157-59 and accompanying text.
87. See Feres, 340 U.S. at 143-46.
88. See Brown, 348 U.S. at 112-13; see also Parker v. United States, 611 F.2d 1007, 1013 (5th Cir. 1980).
89. A military member who is on leave is under less control of the military than one who is off duty. The member who is on leave is excused from all military duties, while the member who is off duty is simply enjoying nonduty hours and is more subject to recall. See Zoula v. United States, 217 F.2d 81, 82 n.1 (5th Cir. 1954).
90. See Camassar v. United States, 531 F.2d 1149, 1151 (2d Cir. 1976); Uptegrove v. United States, 600 F.2d 1248, 1250 (9th Cir. 1979).
91. See Henninger, 473 F.2d at 815-16; Hass v. United States, 518 F.2d 1138, 1140 (4th Cir. 1979).
92. See Mills v. Tucker, 499 F.2d 866, 868 (9th Cir. 1974); Camassar, 531 F.2d at 1151 n.2.
93. See, e.g., Mariano v. United States, 444 F. Supp. 316, 317 (E.D. Va. 1977) holding a service member’s off-duty position as an employee of a naval station’s noncommissioned officers’ club did not affect his duty status).
94. See, e.g., Johnson, 704 F.2d at 1439-40 (holding a service member’s off-duty position as an employee of a base noncommissioned officers’ club placed him in the equivalent position of a civilian).

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enjoy both recreational facilities and veterans benefits. Recreational facilities vary among military installations, but often include a bowling alley, gymnasium, swimming pool, riding stable, and flying club. These facilities are provided by the military to enhance the morale and social well-being of active-duty military personnel. Veterans benefits encompass a comprehensive disability and retirement system for service members and a related system of benefits for service members' dependents.

Some courts have applied a rationale that prohibits recovery for injuries that would not have been sustained "but for" the recreational privileges associated with military service. This "but for" test, for example, has been employed to bar recovery by a service member who was injured while riding a horse rented from a stable owned and operated by the Marine Corps. Apparently, courts developed the "but for" test in the belief that a suit based upon an injury resulting from an activity provided by the military would affect the military directly, and thus should not be allowed. The same analysis, however, is not employed to bar suits because of the availability of veterans benefits as an administrative remedy.

Some confusion exists regarding whether the presence of an administrative remedy precludes relief under the FTCA. An alternative remedy seems to preclude the FTCA relief except when the alternative source of compensation is veterans benefits. The availability of veterans benefits has been used as a basis for strictly interpreting the Feres doctrine, although normally the benefits are only subtracted from an FTCA court judgment. Thus, although the existence of

95. See Rhodes, supra note 25, at 37.
96. See infra notes 127-30 and accompanying text.
97. See Rhodes, supra note 25, at 37.
98. Id.
99. See infra notes 127-30 and accompanying text.
100. See Hass, 518 F.2d at 1141-42; Chambers v. United States, 357 F.2d 224, 228-29 (8th Cir. 1966).
102. See Johnson, 704 F.2d at 1438; Uptegrove, 600 F.2d at 1250.
103. Henninger, 473 F.2d at 816 n.2; see Johansen v. United States, 343 U.S. 427, 441 (1952). When "the Government has created a comprehensive system to award payments for injuries, it should not be held to have made exceptions to that system without specific legislation to the effect." Id. See also infra notes 127-36 and accompanying text.
104. Id. Compare Denko v. United States, 385 U.S. 149, 151-54 (1966) (compensation system provided in 18 U.S.C. § 4126 reasonably and fairly covers federal prisoners who are injured in prison employment and is the exclusive remedy for that group) with Brown v. United States, 348 U.S. 110, 111 (1954) ("[t]he fact that compensation was sought and paid under the [Veterans Benefits] Act [does not] bar recovery under the Tort Claims Act.")
105. See Henninger, 473 F. 2d at 816; Bailey v. Van Buskirk, 345 F.2d 298, 298 (9th Cir. 1965).
military recreational benefits may or may not serve as a bar to FTCA claims by service members, the availability of veterans benefits at the most will support a strict interpretation of Feres, and at the least, will reduce a court award. The final factor a court may consider to determine whether a plaintiff’s activities at the time of injury were incident to service is the place where the negligent act occurred.

C. Place Where the Negligent Act Occurred

The location of the negligent act is important in determining whether injuries were sustained incident to service. Some courts have taken the position that an injury to an active-duty military member sustained on a military installation is an injury incident to service per se.\(^\text{107}\) Other courts have held that the situs of the accident is not outcome determinative.\(^\text{108}\) Brooks, however, supports the proposition that if the service member is on leave and off base, the member can make a cognizable FTCA claim.\(^\text{109}\) On the other hand, if the negligent act occurs on base, the alleged injuries are more likely to be categorized as incident to service.\(^\text{110}\)

Despite the inconsistent application of the three factors, most courts agree the cases should be decided so that the principles underlying the military disciplinary system are not upset. The goal of the court is to determine if the claimant’s FTCA lawsuit could harm the military disciplinary system,\(^\text{111}\) which has recently been reaffirmed as the main premise of the Feres doctrine.\(^\text{112}\) Two distinct ways exist in which the military disciplinary system could be affected by civil suits concerning activities bearing a strong relationship to military affairs.\(^\text{113}\) First, military decision-makers subject to civil suit may be hesitant to act as quickly and forcefully as necessary.\(^\text{114}\) Second, military members may be encouraged to question orders from their superiors if they are allowed to maintain suits against them or the government.\(^\text{115}\) Prior

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107. See Camassar, 531 F.2d at 1151. The presence of service members on base is directly related to their military services. \textit{Id.}

108. See Downes, 249 F. Supp. at 628-29; Parker, 611 F.2d at 1014. As in Downes, the court believed that the critical factor was the nature of the function the service member was performing at the time of the injury. \textit{Id.}

109. See Brooks, 337 U.S. at 52.

110. See, e.g., Camassar, 531 F.2d at 1150-51.

111. See Downes, 249 F. Supp. at 628-29.

112. See Chappell, 103 S. Ct. at 2365.

113. \textit{Id.}

114. See Jaffee, 663 F.2d at 1232; Stencel, 431 U.S. at 673.

115. See 663 F.2d at 1232. "The idea is that an undisciplined army is a mob and he who is in it would weaken discipline if he can civilly litigate with others in the army over the performance of another man's army duty." Bailey v. DeQuevedo, 375 F.2d 72, 74 (3d Cir. 1967).
to an examination of possible solutions for curing the inconsistent opinions dealing with FTCA claims of active-duty military members, a discussion of other available remedies provides an understanding of the reasons why service members continue to file FTCA claims.

EXISTING REMEDIES FOR INJURED SERVICE MEMBERS

Three sources will be examined briefly as alternative remedies to the FTCA for injured service members. The three sources that will be discussed are the Uniform Code of Military Justice (hereinafter referred to as UCMJ), the Military Claims Act (hereinafter referred to as MCA), and the Veterans Benefits Act. This examination will reveal that service members rely upon the FTCA to equalize their compensatory damages with those of similarly situated injured civilians because the alternative sources provide only minimal compensation.

Article 30 of the UCMJ allows any person subject to the UCMJ to prefer charges against any other person subject to the UCMJ for conduct amounting to a criminal violation. Likewise, Article 138 of the UCMJ provides administrative review of service members’ complaints alleging that they have been wronged by their commanding officer. Articles 30 and 138, however, do not provide compensatory relief for tortious wrongs committed by a service member. Thus, the articles do not offer a remedy for service members to redress tortious injuries. Another possible remedial source is the Military Claims Act.

The MCA provides a purely administrative remedy for certain types of claims. No provision for an alternate lawsuit in federal district court exists if the claim is disapproved. The MCA gives the Secretaries of the Army, Navy and Air Force authority to settle claims of less than $25,000 against the United States. The MCA specifically excludes claims for personal injuries of military members that are in-

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116. See infra notes 119-21 and accompanying text.
117. See infra notes 122-26 and accompanying text.
118. See infra notes 127-38 and accompanying text.
119. 10 U.S.C. §830. For example, a service member can prefer criminal charges against another service member for an alleged assault by the latter.
120. Id. §938; see Mollnow v. Carlton, 716 F.2d 627, 629 (9th Cir. 1983).
121. See 10 U.S.C. §§830, 938.
122. See id. §§2733, 2734.
123. See id. §2735.
124. See id. If the Secretary considers that a claim in excess of $25,000 is meritorious, he may pay the claimant $25,000 and report the excess to Congress for its consideration. Id. §2733(d).
occurred "incident to service" or that could be the subject of an FTCA claim. Thus, the service member could not rely upon the MCA as an alternative remedy for any potential FTCA claim. Military members also can depend upon veterans benefits as a source of relief for their injuries.

The Veterans Benefits Act provides a comprehensive disability and retirement system for service members. The Act also establishes a related system of benefits for service members' dependents. Unlike a typical workers' compensation statute, the Act does not mandate exclusion of other remedies. Moreover, Congress did not provide for an election of remedies in the Veterans Benefits Act. Normally, courts deduct the entitled amount of veterans benefits associated with the plaintiff's injuries from the FTCA award by the court.

The Supreme Court used the availability of veterans benefits to support the decision in Feres. The Court indicated that, as in workers' compensation, the certain nature of the compensation under the Veterans Benefits Act and the waiver of affirmative defenses outweigh the bar to litigation. Furthermore, the Court concluded that the plaintiffs' entitled veterans benefits compared extremely favorably with the expected recoveries for their FTCA claims. Later, in Stencel Aero Engineering Corp. v. United States, the Supreme Court stated that the Veterans Benefits Act serves the dual purpose of providing a swift remedy for the injured service member while at the same time providing an upper limit of liability for the government as to service-connected injuries. Apparently, therefore, the Court in Stencel did not intend to imply that nonservice-connected injuries are precluded by the availability of veterans benefits.

An FTCA lawsuit would not be a viable remedy for service members who are not seriously injured, since the court award in the lawsuit will be reduced by the amount of past and expected future veterans

125. Id. §2733(b)(3).
126. Id. §2733(b)(2).
128. Id.
131. See Brown, 348 U.S. at 111.
132. See Feres, 340 U.S. at 144-45.
133. Id. at 145. The Court spoke of plaintiffs' expected veterans benefits to illustrate that the compensation system of veterans benefits were not negligible and compared favorably with most workers' compensation statutes. See id.
135. Id. at 673.
136. See id.; see also 340 U.S. at 144-45.
benefits associated with the alleged injury. Thus, even if a service member can hurdle the "incident to service" obstacle, a claim for a minor injury can be obliterated by the plaintiff's entitled veterans benefits. Seriously injured or disabled service members, who would not be compensated as well by veterans benefits as their civilian counterparts who are awarded recovery in civil suits thus turn to the FTCA as an equalizing remedy. The failure of the UCMJ, MCA, and Veterans Benefits Act to compensate tortiously injured military members, therefore, forces military members to seek redress under the FTCA. Military members then must confront the problem of judicial inconsistency in handling service member FTCA claims.

**STABILIZING FTCA INTERPRETATIONS: AN ANALYTICAL FRAMEWORK TO DEFINE "INCIDENT TO SERVICE"**

Many commentators have criticized the Feres doctrine, either urging abolition or modification. Regardless of the persuasive arguments for either termination or revision of the Feres doctrine, the Feres doctrine does not appear to be in danger of extinction. In *Chappell v. Wallace*, the Court affirmed the position that Congress has plenary authority in this area, and that if the Feres doctrine is to be modified, Congress must take the initiative. If the Feres doctrine is firmly established, courts should strive to apply the doctrine consistently to enable plaintiffs to predict the viability of their claims, and more importantly, to ensure equity. If a consistent analytical framework is not achieved, decisions will continue to lack uniformity. Courts can achieve consistent results in deciding service member FTCA claims only if a uniform test is developed to determine whether a plaintiff's injuries were sustained incident to service. An analytical definition for "incident to service" must be developed and adopted by the courts.

One logical solution is to analogize the definition of incident to service in FTCA claims to the definitional analysis used to determine that a military court-martial has jurisdiction over a military member charged with a crime. In both situations, civilian courts must deter-

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137. See Brown, 348 U.S. at 111.
138. See Rhodes, supra note 25, at 41.
139. See, e.g., Note, supra note 17, at 1126.
141. See Chappell, 103 S. Ct. at 2364-65.
142. Id.
mine whether they should exercise jurisdiction over a matter that affects the military. This determination is made in light of the United States Supreme Court philosophy that civilian courts, if possible, should avoid handling cases that affect the military disciplinary system.\textsuperscript{143} Courts employ a multifactor test to determine if a military member should be tried in a civilian court or by the military in a court-martial.\textsuperscript{144} Likewise, the civil courts could use a multifactor test to determine if a service member's FTCA claim should be barred because the alleged injuries have been sustained incident to service.\textsuperscript{145}

Although the test would be discretionary with the trial court, plaintiffs would know the factors that courts will consider in determining the viability of their FTCA lawsuits. Although the incident to service test requires a case-by-case analysis that will need several years to produce consistent decisions, this result would be preferable to the current inconsistent decisions found even within a circuit.\textsuperscript{146} A consistent analytical framework also will reduce the large number of FTCA lawsuits because plaintiffs will be in a position to predict the viability of their claims more accurately.

The factors would be examined in the overall context of the premise of the \textit{Feres} doctrine: the preservation of the unique requirements of the military disciplinary system.\textsuperscript{147} The factors would be considered in determining the nature of the plaintiff's activity at the time of the negligent act.\textsuperscript{148} In other words, the court would determine if the plaintiff's activities at the time of the negligent act were of the sort that would implicate the interest that the \textit{Feres} doctrine was designed to protect.\textsuperscript{149}

A court should consider three factors in determining whether a plaintiff's complaint implicates the interest that the \textit{Feres} doctrine was designed to protect. The three factors that indicate if the alleged in-

\begin{footnotesize}
\textsuperscript{143} See \textit{id.} at 2365.
\textsuperscript{145} \textit{See generally} Note, \textit{In Support of the Feres Doctrine and a Better Definition of "Incident to Service,"} 56 ST. JOHN's L. REV. 485, 512-14 (1982); Johnson, 704 F.2d at 1436-41.
\textsuperscript{146} \textit{Compare} Henninger, 473 F.2d at 816 ("[T]he drawing of a clear line is more important than being able to justify, in every conceivable case, the exact point at which it is drawn.") \textit{with} Johnson, 704 F.2d at 1436 ("While rigid rules . . . may sometimes be relevant, they cannot be blindly applied to determine whether an injury occurred "in the course of activity incident to service.""
\textsuperscript{147} See Brown, 348 U.S. at 112.
\textsuperscript{148} See Johnson, 704 F.2d at 1436.
\textsuperscript{149} \textit{See id.;} Woodside \textit{v.} United States, 606 F.2d 134, 141 (6th Cir. 1979). To prevent meaningless appeals, appellate courts should only reverse a district court determination if an abuse of discretion is found. \textit{See FED. R. CIV. P. 52(a).}
\end{footnotesize}
juries were sustained incident to service, in order of importance, are as follows: (1) whether the plaintiff's injuries were sustained from a benefit that was available solely from the plaintiff's military service,\textsuperscript{150} (2) whether the plaintiff was on leave at the time of the negligent act or omission,\textsuperscript{151} and (3) whether the negligent act occurred on or off base.\textsuperscript{152} After examining these factors, the court must determine if the circumstances indicate a need to bar the FTCA claim to protect the military disciplinary system.\textsuperscript{153}

Whether the plaintiff's injuries were sustained from a benefit that was available solely because of the plaintiff's military status is the most obvious factor to be used to determine if the alleged injuries were sustained incident to service. If the injuries resulted from a recreational or medical benefit to which the plaintiff would not have had access but for military status, allowing an FTCA claim would affect the military directly.\textsuperscript{154} Military benefits and recreational activities are provided for the morale and health of military personnel, and thus serve the overall military purpose.\textsuperscript{155} If an FTCA claim were allowed, the military may be tempted to eliminate recreational benefits, thus affecting military health and welfare, which would cause a weakening of the disciplinary system.

The second factor, the plaintiff's duty status, indicates the strength of the nexus between the military member and the military. The closer the nexus, the more willing a court should be to bar the plaintiff's lawsuit. An active-duty service member can be on duty, off duty, or on leave. If the service member were on duty, the injuries most likely would be sustained incident to service. Since on-duty service members are acting within the military disciplinary system, that is, acting under direct orders from superiors, most of their FTCA claims would implicate the policy underlying \textit{Feres}.\textsuperscript{156} The other duty statuses, off duty and on leave, unfortunately have been blurred or ignored by the courts.\textsuperscript{157} "Off duty" simply means that military members are not performing their duties during their established work hours.\textsuperscript{158}

\begin{itemize}
  \item 150. See 704 F.2d at 1438-39.
  \item 151. See id. at 1437-38.
  \item 152. See id. at 1436-37.
  \item 153. See Chappell, 103 S. Ct. at 2365.
  \item 154. See, e.g., Hass, 518 F.2d at 1138.
  \item 155. See id. 1141-42.
  \item 156. See supra notes 67-71 and accompanying text.
  \item 157. See, e.g., 704 F.2d at 1438. The Supreme Court ignored the fact that a military member who is on leave can still be injured such that the injuries would be classified as incident to service, thereby justifying a denial of an FTCA claim. See 340 U.S. at 138.
  \item 158. See Zoula, 217 F. 2d at 82 n.1.
\end{itemize}
On the other hand, service members on leave are on vacation and are excused from work, and are thereby further removed from military duty than off-duty service members.\footnote{159} Courts must recognize that an off-duty service member is not in the same status category as one who is on leave. Although both categories are still active duty, the service member who is on leave is less closely connected with military control than the service member who is off duty. The service member who was on leave at the time of the negligent act can make a stronger argument that the injuries were not connected with military duties or responsibilities, were not incident to service, and thus would not affect the military disciplinary system.

The third factor, the location of the negligent act, will not be as indicative of a service connection as the other two factors. Although the negligence may have occurred on base, the injured service member may have a legitimate FTCA claim if the member was performing purely personal activity while off duty.\footnote{160} The court should explore the nature of the service member’s activity thoroughly.\footnote{161} If the negligent act occurred on base, the court must scrutinize the circumstances closely to insure the FTCA claim will not affect the military disciplinary system that the \emph{Feres} doctrine was designed to protect.

To prevent a flood of FTCA claims, the court should continue to place the burden on the plaintiff to establish the right to sue under the FTCA. The plaintiff would have to make a prima facie showing that the circumstances, considered with three factors, indicate the injuries were not incident to service. All three factors must be considered together when determining if a service member’s FTCA claim should be allowed on the basis that the military disciplinary system will not be affected. Two hypothetical fact patterns can be used to illustrate the suggested analytical framework.

\textbf{Situation A}: Lieutenant (Lt.) Adams, while on leave, was struck by a military truck driven negligently by a civilian employed by the military. The accident occurred on base as Lt. Adams was bicycling on her own bicycle to her on-base quarters. Lt. Adams’ activity of riding her bicycle was not related to her military duties in any way. The government can argue that, but for the fact that Lt. Adams was entitled to military leave, which was approved by her supervisor, and but for the fact that by being in the military, Lt. Adams was able

\footnote{159} \textit{Id.}
\footnote{160} See \textit{Parker}, 611 F.2d at 1014.
\footnote{161} \textit{Id.}; see also 704 F.2d at 1437.
to live on base, the accident would not have happened. The activity of riding a bicycle for personal pleasure not connected with military duties, however, cannot be categorized as a benefit available solely from Adams' military status. A court cannot state that but for the individual's military service, the injury would not have occurred.

Lt. Adams was on leave, and thus was removed as much as possible from military control. Assuming Adams was not involved in any activity relating to her military duties, the injuries should not be described as incident to service. Although the on-base situs of the negligent act warrants a close examination of the facts to ensure that Adams was not engaging in activities incident to her military duties, the consideration of the other two factors has shown that Adams' activities were not connected with her military responsibilities. Thus, allowing Lt. Adams to bring her claim would not affect military discipline at all.

As in Brooks, Adams' accident had nothing to do with her military career; her injuries were not caused by her military service "except in the sense that all human events depend upon what has already transpired." Allowing Adams to file a lawsuit would not affect her relationship with her superiors. The policy considerations underlying Feres are avoided. Furthermore, any award by the court would be reduced by the amount of veterans benefits Adams received or is expected to receive in the future. In this manner, Lt. Adams would not realize a windfall, but would be compensated to the extent of a similarly situated civilian. By allowing Adams to file an FTCA lawsuit, therefore, the court would be placing her in the equivalent position of a civilian similarly injured.

Situation B: Sergeant (Sgt.) Baker worked at the base Noncommissioned Officers' (NCO) Club during his off-duty hours. Although state law required all bars serving alcohol to close at midnight, the NCO Club manager, also an off-duty military member, allowed a group of military members to have an after-hours squadron party until 2:00

162. See Downes, 249 F. Supp. at 626.
163. 611 F.2d at 1011.
164. See Zoula, 217 F.2d at 82 n.1.
165. See Camassar, 531 F.2d at 1151.
168. Id. at 52.
169. See Brown, 348 U.S. at 111.
170. But see Coffey v. United States, 324 F. Supp. 1087, 1088 (S.D. Cal. 1971) (no recovery for on-base accident even though plaintiff was on leave and driving towards exit gate); Gursley v. United States, 232 F. Supp. 614 (D. Colo. 1964) (no recovery for service member while on three day pass when explosion destroyed his on-base quarters).
a.m.}\textsuperscript{171} Sgt. Baker's NCO Club duties ended at midnight, but he attended the promotion party for his squadron co-workers. While Sgt. Baker was being driven home by a squadron member, the car left the road because the driver was intoxicated. Sgt. Baker was injured seriously in the accident, which occurred on base.

Sgt. Baker held a nonappropriated funds position at the NCO Club. Baker was not given hiring preference based on his military status, but was required to receive his military commander's permission to apply for the position.\textsuperscript{172} Baker's NCO Club position was controlled by military regulation,\textsuperscript{173} which denied him the NCO Club civilian employees' privilege of workers' compensation.\textsuperscript{174} Baker's position was not obtained but for his military status since he was not given preference over civilian applicants.

The activity of enjoying NCO Club privileges after working hours, however, did result from Baker's military status.\textsuperscript{175} The club was owned and operated by the military for the morale and social well-being of active-duty military personnel.\textsuperscript{176} Moreover, Baker's attendance at the party could be attributed to his assignment to the military squadron rather than his NCO Club position, especially since the duties associated with the NCO Club had ended. Although Baker could argue that his attendance was a result of his club responsibilities, the court would have to consider that Baker's salary as a club employee was derived from congressional military appropriations and nonappropriated funds generated by military recreational activities.\textsuperscript{177} On this basis, the court would be justified in considering the club position to be connected with the military directly, particularly for an off-duty service member.

Baker's off-duty status does not withdraw him from military control. Baker could have been recalled to his military duties at any time. Moreover, Baker's club position was controlled by military regulation. Furthermore, Baker was not acting in his capacity as an NCO

\textsuperscript{171} Military clubs located on military installations are not required to comply with state alcohol regulations and statutes. \textit{See} 10 U.S.C. §2682. \textit{See also id.} §2683.

\textsuperscript{172} \textit{See United States Air Force Regulation} 40-7 (1983).

\textsuperscript{173} \textit{Id.}

\textsuperscript{174} \textit{Id.} 40-7c; \textit{see} Employers Mutual Liability Insurance Company of Wisconsin \textit{v.} Arien, 244 F. Supp. 110, 114 (N.D. NY 1965). An active-duty service member who was injured as a result of the explosion of a beer bottle while working in civilian clothes at an Air Force base tavern was not a "civilian employee" within Nonappropriated Fund Instrumentality Act provision making Longshoremen's and Harbor Workers' Compensation Act applicable with respect to disability occurring to civilian employees of any nonappropriated fund instrumentality. \textit{Id.}

\textsuperscript{175} \textit{See Mariano,} 444 F. Supp. at 317.

\textsuperscript{176} \textit{See Rhodes, supra note} 25, at 37.

\textsuperscript{177} 444 F. Supp. at 318.
Club employee at the time of the injury. Although the on-base accident situs indicates a closer nexus to the military, careful scrutiny of the facts is required to determine if the plaintiff’s claim should be barred.

If the lawsuit were allowed, the military system of discipline would be affected adversely. Baker was under military control at his club position and was enjoying a benefit derived from his military status. Baker should not be allowed to maintain an FTCA lawsuit. Baker will receive veterans benefits, including medical treatment. Any court award would weaken the military disciplinary structure by affecting Baker’s relationship with his superiors.178

Although under the multifactor test applied in the preceding two hypotheticals, each case must be analyzed individually according to the facts and circumstances, a consistent application of three factors will produce more consistent court decisions regarding service members’ FTCA lawsuits. As previously stated, the number of FTCA claims may decrease as plaintiffs will be able to predict the viability of their claims more accurately. In this manner, the Feres doctrine will serve the purpose of barring only those lawsuits that will affect the military adversely.

CONCLUSION

The Feres doctrine has been a bar to the FTCA claims of service members for thirty years. Although many legal commentators and judges have criticized the doctrine throughout the past three decades, Feres has not been weakened. In Feres v. United States, the Supreme Court advised Congress to enact legislation overturning the doctrine if the Court had misconstrued the FTCA. Congress has not accepted that offer.

The Feres doctrine survived for good reason. The backbone of the military is the disciplinary system that produces a unique relationship among military members. The military disciplinary system would be undermined if active-duty service members could sue under the FTCA for injuries connected with their military service. Congress has realized this and has not taken action to alter the Feres doctrine. The judiciary should accept the fact that the Feres doctrine will not disappear.

A uniform framework for analyzing cases must be designed, however, so that courts can determine if the plaintiff’s injuries were

sustained incident to service, thereby implicating the policy considerations underlying \textit{Feres}. The policy considerations underlying \textit{Feres} include the following: (1) Congress did not intend to create new causes of action; (2) assimilation of the federal law into the rules of state substantive law, among which divergencies are notorious, would force service members to face inequity by being subject to the laws of a location where they did not choose to reside voluntarily; (3) a distinctly federal relationship exists between the government and members of its armed forces; and (4) the military member's veterans benefits for injury or death create an alternative compensation system. Modernly, the main premise upon which the \textit{Feres} doctrine is justified is the potentially destructive effect upon the military disciplinary system that would result by allowing military members to sue the government for injuries sustained incident to service.

The courts have not developed a consistent analytical framework to determine whether the plaintiff's alleged injuries were sustained incident to service. As a result, courts use various methods to resolve whether the military member should be allowed to maintain an FTCA lawsuit against the government. Moreover, the court decisions lack uniformity.

A uniform analytical framework should be employed to determine if the plaintiff's injuries were sustained incident to service. The courts should consider (1) the activity in which the plaintiff was engaged at the time of injury, (2) the plaintiff's duty status, and (3) the place where the plaintiff was injured. Each case will require an individual analysis to determine whether the facts implicate the policy considerations underlying \textit{Feres}. The framework, however, undoubtedly will provide more consistency than has existed since \textit{Feres} was decided. In this manner, plaintiffs can be assured equal access to the courts and the \textit{Feres} doctrine will be used for the purposes intended by Congress.

\textit{Michael Gilbert}