The Feres Exception to the Federal Tort Claims Act: New Insight Into an Old Problem

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So much has already been written1 on the Feres2 exception to the Federal Tort Claims Act3 (FTCA) that the reader has the right to ask, Why another article? The answer lies in a paradox: Since 1977, when the Supreme Court seemed to endorse strongly both the propriety of the Feres exception and the reasons underlying that doctrine,4 inferior federal courts seem to have had more, rather than less, difficulty in determining when the Feres exception applies and what significance attaches to each of its rationales.5 This article, through an examination of the reasons for the apparent confusion in those cases, provides new insight into when and why Feres should be applied.

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3. 28 U.S.C. §§ 1346(b), 2401(b), 2402, 2671-80 (1976)[hereinafter cited as FTCA]. The FTCA provides that "[t]he United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances. . . ." Id. at § 2674.


5. See infra text accompanying notes 92-194.
THE BACKGROUND

_Feres_ was a consolidation of three cases, the first of which was a wrongful death action arising out of the death of an active duty soldier in a barracks fire. The negligence alleged against the military personnel was the housing of the decedent in a barracks that was unsafe because of a defective heating plant, as well as the failure to maintain an adequate fire watch. In the second case, a personal injury action, the plaintiff sought damages for injuries he had sustained while on active duty and for those resulting from surgery performed by an army surgeon. The plaintiff alleged that the surgeon had “closed-up” with a towel remaining in the incision. The third case, a wrongful death action, involved the death of an active duty soldier who had undergone surgery; the plaintiff alleged negligent treatment by the army surgeons. All three cases were instituted under the FTCA. The Supreme Court concluded that, in enacting the FTCA, Congress did not intend to permit tort recoveries for injuries incident to military service.

Nevertheless, the Court candidly conceded the “iffiness” of its determination:

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

Indeed, the Court noted with candor those considerations implying a contrary result:

The Act does confer district court jurisdiction generally over claims for money damages against the United States founded on negligence. 28 U.S.C. § 1346(b). It does contemplate that the Government will sometimes respond for negligence of military personnel, for it defines “employee of the Government” to include “members of the military or naval forces of the United States,” and provides

7. Id. at 137.
8. Id. at 136-37 (facts of _Feres_).
9. Id. at 137 (facts of _Jefferson v. United States_).
10. Id. (facts of _United States v. Griggs_).
11. Id. at 138.
12. Id. at 146.
13. Id. at 138.
that "'acting within the scope of his office or employment', in the
case of a member of the military or naval forces of the United
might also imply inclusion of claims such as we have here. 28
U.S.C. § 2680(j) excepts "any claim arising out of the combatant
activities of the military or naval forces, or the Coast Guard, during
time of war," . . . from which it is said we should infer allow-
ance of claims arising from noncombat activities in peace. Section
2680(k) excludes "any claim arising in a foreign country."14

The Court declined, however, to convert the Act's broad jurisdic-
tional grant into a determination that Congress had intended recov-
ery for injuries incident to military service because,

[j]urisdiction is necessary to deny a claim on its merits as matter of
law as much as to adjudge that liability exists. . . . Jurisdiction of
the defendant now exists where the defendant was immune from
suit before; it remains for courts, in exercise of their jurisdiction, to
determine whether any claim is recognizable in law.15

Thus, the Court indicated that the Act's broad jurisdictional grant
was meant to permit judicial examination on a case-by-case basis for
the purpose of determining the applicability of the FTCA.
Moreover, the Court offered a series of affirmative (and some-
times interrelated) reasons for its ultimate conclusion that the Act
did not contemplate recovery for injuries incident to military service.

1. The Act subjects the United States to liability "in the same
manner and to the same extent as a private individual under like
circumstances."16 As no analog exists under present law to the rela-
tionship between a soldier and his superior officers or the Govern-
ment,17 Congress could not have contemplated liability for injuries
incident to military service.18

2. The Act provides that the liability of the United States shall
be determined pursuant to the law of the state where the alleged
wrongful act or omission of the federal employee occurred.19 As the
soldier has no choice as to where he is stationed, but rather, must

14. Id.
15. Id. at 141.
17. 340 U.S. at 141-42. The Court determined that, although a civilian doctor-patient
relationship can yield liability, this is not analogous to military personnel in the same relation-
ship because the military character alone negates finding the requisite parallel circumstances.
18. Id. at 142.
serve where he is assigned, such a provision is unfair because it subjects him to the law of any state. Therefore, it appears that Congress could not have intended that the Act apply to injuries incident to such service.20

3. Most states provide workmen's compensation for work-connected injuries.

Absent this, or where such statutes are inapplicable, states have differing provisions as to limitations of liability and different doctrines as to assumption of risk, fellow-servant rules and contributory or comparative negligence. It would hardly be a rational plan of providing for those disabled in service by others in service to leave them dependent upon geographic considerations over which they have no control and to laws which fluctuate in existence and value.21

Therefore, a military person should not be subject to state law.

4. "The relationship between the Government and members of its armed forces is 'distinctively federal in character.'"22 Consequently, Congress could not have intended to subject that relationship to the laws of the various states.23

5. Injuries incident to military service are compensable under the Veterans' Benefits Act.24 Neither the relevant provisions, nor the FTCA, contain a method for "adjust[ing] these two types of remedy to each other."25 The appropriate inference is that Congress did not intend the FTCA to apply to injuries incident to service.26

6. "A soldier is at peculiar disadvantage in litigation [because of his] [l]ack of time and money [and] the difficulty if not impossibility of procuring witnesses."27 On the other hand, the veterans' "compensation system . . . normally requires no litigation . . . [and provides] recoveries [that] compare extremely favorably with those provided by most workmen's compensation statutes."28 Under these circumstances Congress probably realized that the latter, rather than the former, would be the more appropriate method of providing redress for service-connected injuries.

20. 340 U.S. at 142-43.
21. Id. at 143.
22. Id. (relationship is governed by federal law and authority).
23. Id. at 143-44.
25. 340 U.S. at 144.
26. Id.
27. Id. at 145.
28. Id. (veterans compensation can exceed recovery from workmen's compensation).
Finally, the Court concluded that "[w]e do not think that Congress, in drafting this Act, created a new cause of action dependent on local law for service-connected injuries or death due to negligence."\textsuperscript{29}

\textit{Analysis of the Court's Rationales}

The first rationale—the absence of a soldier-government analog in existing liability law—is contingent upon how broadly or narrowly a court characterizes the facts in a given case. Indeed, even the Court conceded that "if we consider relevant only a part of the circumstances and ignore the status of both the wronged and the wrongdoer in these cases we find analogous private liability."\textsuperscript{30} The Court continued, however, that

\begin{quote}
[i]n the usual civilian doctor and patient relationship, there is of course a liability for malpractice. And a landlord would undoubtedly be held liable if an injury occurred to a tenant as the result of a negligently maintained heating plant. But the liability assumed by the Government here is that created by "all the circumstances," not that which a few of the circumstances might create.\textsuperscript{31}
\end{quote}

It seems to me that the Court's language is demonstrably overbroad. For instance, no one would contend that a motorist injured when his vehicle is struck by a negligently operated mail delivery truck could not recover under the FTCA. The Act's applicability is apparent and remains so even if the truck were carrying first-class mail, an activity prohibited to any private entity.\textsuperscript{32} Consequently, the applicability of the FTCA simply cannot be determined by "all the circumstances" as \textit{Feres} would require. To do so would be to render the Act inapplicable to virtually every set of circumstances imaginable simply by enlarging the facts to the point where no private entity would be engaging in precisely the same activity as the government employee.

The second reason emphasizes the unfairness to the soldier of resolving his claim against the government pursuant to the law of the state where the alleged wrong occurred, given the soldier's inability to select his duty station.\textsuperscript{33} There are several problems related to this rationale. First, the place of the wrong may or may not be the place where the soldier-victim is stationed. Negligence at a military post in

\begin{footnotes}
\textsuperscript{29} \textit{Id.} at 146.
\textsuperscript{30} \textit{Id.} at 142.
\textsuperscript{31} \textit{Id.}
\textsuperscript{33} 340 U.S. at 142-43.
\end{footnotes}
state $A$ could easily cause injury to a soldier stationed at a military post in state $B$. In those circumstances, the law of state $A$, not that of $B$, would be applicable.\footnote{See Richards v. United States, 369 U.S. 1, 15 (1962) (plaintiff sued for injury in one state resulting from negligence in another state).} Second, and perhaps more significant, is the awkwardness of inferring that Congress intended to "protect" the soldier by denying him an FTCA recovery.\footnote{This prophylactic attitude is evidenced by the Court's desire not to subject soldiers to the laws of the several states but rather to provide uniform redress through the Veteran's Benefits Act. See supra text accompanying note 22.} Rather clearly, the soldier-plaintiff's reaction to such presumed protection would be "Thanks, but no thanks." By initiating an FTCA action, the soldier could be deemed to have acquiesced in the Act's reference to the law of the state where the negligence attributable to the government occurred, and, as a matter of practicality, would far prefer that "unfairness" to the alternative created by Feres—no tort action at all. Finally, there is Richards v. United States,\footnote{369 U.S. 1 (1962).} where the Court held that the FTCA's reference to the law of the state where the government's negligence occurred was a reference to the total law of that state, conflicts law as well as local law.\footnote{Id. at 11.} Thus, a federal district court hearing an FTCA action and finding itself confronted with a choice-of-law problem is required to resolve that issue precisely as it would be resolved by the highest appellate court of the state in which the government's negligence occurred. Depending on the conflicts law of that state, \textit{lex loci delicti}\footnote{See Babcock v. Jackson, 12 N.Y.2d 473, 477-78, 240 N.Y.S.2d 743, 746, 191 N.E.2d 279, 280-81 (1963) (place of tort determines governing law).} or interest analysis,\footnote{Id. at 479-84, 240 N.Y.S.2d at 747-51, 191 N.E.2d at 282-85 (the law of the state with the greatest interest should govern).} for example, the ultimate local law applied could be that of the state where the plaintiff was injured, or where the negligence occurred, or of some other state where the greatest interest in the litigation lies.\footnote{See, e.g., Tyminski v. United States, 481 F.2d 257, 265-66 (3d Cir. 1973). The Third Circuit concluded that, under the conflicts law of New York (the state where the negligence attributable to the government occurred), the recovery for gratuitous nursing services would be governed by the local law of New Jersey because that state was the domicile of the victim and the place where the services had been rendered.} Consequently, the above choice-of-law methodologies may mitigate the alleged unfairness to the claimant, thereby rendering the Court's second reason for the Feres result less than entirely persuasive.

The Court's third reason, the irrationality of applying law based on fortuitous geographic location, seems to be a combination of two
elements. First, in most states, work-connected injuries are covered by a workmen’s compensation statute, and thus no tort liability is imposed. Consequently, treating injuries incident to military service as they would be treated by state law would lead to a similar conclusion—no tort liability. Second, where state law would permit a tort recovery, the available defenses and the amount of recovery would vary dramatically from state to state, thus subjecting soldier-claimants to “geographic considerations over which they have no control.” With respect to the second element, it is fair to infer that the soldier-plaintiff’s reaction to this “protection” would be “Thanks, but no thanks.” The possibility of a tort recovery under any state’s law, from the plaintiff’s perspective, would be preferable to the Court’s “protective” conclusion of no tort recovery at all. As to the first element, it is true that if a state workmen’s compensation statute applies, the injured claimant most likely will be denied a tort action against his employer. That conclusion, however, is mandated by the exclusivity clause in each workmen’s compensation statute, which explicitly precludes such a tort action. A similar exclusivity clause is not contained in the Veterans’ Benefits Act, even though Congress presumably was aware of the existence of such clauses in state workmen’s compensation statutes.

Of the Court’s fourth reason, the impropriety of imposing state law on the “distinctively federal” relationship between soldier and government, there is little doubt that the relationship between the government and any of its employees is distinctively federal. Almost all such relationships are governed by a plethora of federal constitutional provisions, laws or regulations. Immunizing the government

41. 340 U.S. at 143.
42. Id.
43. Id.
44. The Tennessee workmen’s compensation law, like similar compensation laws in other states, replaced all common law rights that an injured employee might have had against an employer for work-related injuries with statutory benefits. T.C.A. § 50-908 provides as follows:

Right to compensation exclusive.—The rights and remedies herein granted to an employee subject to the Workmen’s Compensation Law on account of personal injury or death by accident, including a minor whether lawfully or unlawfully employed, shall exclude all other rights and remedies of such employee, his personal representative, dependents, or next of kin, at common law or otherwise, on account of such injury or death.

Nearly every workmen’s compensation law contains an equivalent section. In interpreting the above section, the Tennessee Supreme Court has held that “[t]his Act constitutes a complete substitute for previous remedies in tort on the part of an employee. . . .” Liberty Mut. Ins. Co. v. Stevenson, 212 Tenn. 178, 182, 368 S.W.2d 760, 762 (1963).
from FTCA liability in those actions where the alleged tortfeasor is a federal employee would render the Act meaningless. The "distinctively federal" relationship may immunize the government from tort liability where the claimant is a civilian federal employee, but that is because a provision of the Federal Employees Compensation Act (FECA) provides that receipt of FECA benefits precludes an FTCA action. Even if we focus, however, on the particular relationship between the soldier-tortfeasor and the government, the potential application of state law to determine the liability consequences does not generally lead to the conclusion of governmental immunity. For instance, a civilian plaintiff injured by the negligence of a soldier "acting in line of duty" may maintain an FTCA action, even though in such an action state law will be applied in effect to the relationship between military tortfeasor and federal government.

It should be noted, too, that in Feres the Court did not precisely identify the "distinctively federal" relationship alluded to. Was it the relationship between soldier-claimant and government (the "first-level" relationship) or the relationship between soldier-tortfeasor and government (the "second-level" relationship)? In the three cases decided in Feres both the victims and the alleged tortfeasors were military personnel; consequently whichever relationship the Court contemplated was satisfied. Yet, the distinction between the two relationships may help determine if there is impropriety in imposing state law upon a federal relationship.

The fifth reason for the Feres result was the availability of veterans' benefits for service-connected injuries and the congressional failure to "adjust" those benefits with the FTCA. The flaw in this reasoning is demonstrated by the Court's recognition of alternative

47. Cf. United States v. Yellow Cab Co., 340 U.S. 543 (1951) (United States impleaded as a third party defendant in suit by civilian plaintiffs injured in a collision with a government vehicle).
48. There is language in Feres implying that both levels must exist as a precondition to the nonapplicability of the FTCA. As noted in the text, when discussing reason one, the Court referred to "the status of both the wronged and the wrongdoer," 340 U.S. at 142, and, when discussing reason three, the Court referred to "those disabled in service by others in service." Id. at 143. In my opinion, both levels should be found to exist before the Feres exception is imposed. If the first-level relationship, that between soldier-plaintiff and government, does not exist, Feres is inapplicable by its own terms. If the second-level relationship, that between military tortfeasor and government, does not exist, there would seem to be no impropriety in imposing state law. See infra text accompanying notes 91-92.
49. See 340 U.S. at 136-37.
50. See infra text accompanying notes 130-31.
conclusions:

We might say that the claimant may (a) enjoy both types of recovery, or (b) elect which to pursue, thereby waiving the other, or (c) pursue both, crediting the larger liability with the proceeds of the smaller, or (d) that the compensation and pension remedy excludes the tort remedy. There is as much statutory authority for one as for another of these conclusions.51

The Court's final reason rested on the soldier's peculiar disadvantage in litigation and the fact that the veterans' compensation system normally does not require litigation.52 Again, the soldier's response to such "solicitude" would be "Thanks, but no thanks." Presumably, the soldier who files an FTCA action would prefer to cope with the disadvantages posed by litigation rather than be denied a tort recovery—the Feres rule. And, of course, the peculiar disadvantage of the soldier—lack of time and money, difficulty in procuring witnesses—might have little or no bearing on a wrongful death action brought by a deceased soldier's personal representative, and, at most, a diminished bearing on a personal injury action initiated after the victim's separation from service.

My purpose in identifying each of the Court's reasons in Feres and some of the weaknesses inherent in those reasons is not to persuade the reader that the Feres result was wrong. It is too late for that. Rather, I believe identification and analysis of each of those reasons may be helpful in answering the essential question: When should Feres be deemed applicable? The appealing heuristic tone of the Feres opinion invites just that kind of analysis; the more recent cases demand it.

RECENT CASE ANALYSIS

Stencel's Bold Lettering

In 1977, the Supreme Court decided Stencel Aero Engineering Corp. v. United States.53 Captain John Donham, of the Missouri Air National Guard, was injured when the life-support system of his fighter aircraft malfunctioned.54 To recover for his injuries, Donham sued the United States under the FTCA and sued Stencel, the manufacturer of the ejection system. Accordingly, Stencel sued the
United States for indemnity as to any judgment Donham might secure against Stencel.\textsuperscript{56} The federal district court granted the government's motion for summary judgment against the plaintiff, finding that Donham's injuries were incident to military service.\textsuperscript{56} Accepting the district court's conclusion that the "plaintiff's status as a Missouri Air National Guard pilot is sufficiently related to federal military service to apply the Feres ruling,"\textsuperscript{57} there is little room to contest the court's conclusion that Donham's injuries were incident to military service. The district court also granted the government's motion for summary judgment against Stencel's cross-claim, noting that "to allow Stencel to recover against the United States on indemnity is to allow recovery indirectly of what could not be recovered by the injured plaintiff directly."\textsuperscript{58} That seems to be a wholly rational basis for rejecting Stencel's claimed right to indemnification. The Eighth Circuit affirmed,\textsuperscript{59} concluding more broadly that "the rights and duties of the United States arising pursuant to its contractual obligations primarily are governed by federal common law,"\textsuperscript{60} thus Congress could not have intended that the FTCA's mandate to apply state law be applicable to Stencel's indemnification claim. The Supreme Court affirmed.\textsuperscript{61}

The Supreme Court, like the district court, noted that to permit Stencel's claim "'would be to judicially admit at the back door that which has been legislatively turned away at the front door.'"\textsuperscript{62} In addition, however, the Court felt compelled to resolve the tension\textsuperscript{63} between Feres and United States v. Yellow Cab Co.\textsuperscript{64} According to the opinion in Stencel, the Court in Yellow Cab held that "the [FTCA] permits impleading the Government as a third-party defendant, under a theory of indemnity or contribution, if the original defendant claims that the United States was wholly or partially responsible for the plaintiff's injury."\textsuperscript{65} But the two cases decided in Yellow Cab were easily distinguishable from Stencel; none of the plaintiffs

\begin{itemize}
\item 55. Id. at 668.
\item 57. Id. at 53.
\item 58. Id.
\item 60. 536 F.2d at 769.
\item 61. 431 U.S. 666, reh'g denied, 434 U.S. 882 (1977).
\item 62. Id. at 673 (quoting Laird v. Nelms, 406 U.S. 797, 802 (1972)).
\item 63. Id. at 670.
\item 64. 340 U.S. 543 (1951).
\item 65. 431 U.S. 666, 669-70 (citation omitted).
\end{itemize}
in those cases were in military service,\textsuperscript{66} thus, the \textit{Feres} considerations were not controlling. Consequently, permitting the United States to be impleaded in those cases did not circumvent legislative intent. So much for the "tension" between \textit{Feres} and \textit{Yellow Cab}. Apparently, however, the Court did not adopt this position, for it deemed it appropriate, in support of its affirmance of the Eighth Circuit, to demonstrate that the reasons underlying the \textit{Feres} doctrine were equally applicable to the cross-claim asserted by Stencel against the United States, even though the plaintiff in \textit{Stencel} was in the military.\textsuperscript{67} Whether or not that demonstration was necessary, it affords the opportunity of examining the reasons underlying the \textit{Feres} doctrine as most recently stated by the Supreme Court. By the time \textit{Stencel} was decided, the Court had distilled those reasons to three: First, "the Veterans' Benefits Act establishes, as a substitute for tort liability, a statutory 'no fault' compensation scheme. . . ."\textsuperscript{68} Second, the "distinctively federal . . . relationship between the Government and its soldiers" makes the FTCA's application of state law senseless.\textsuperscript{69} Third, subjecting "military orders" to judicial "second-guessing" would have an adverse effect on military discipline.\textsuperscript{70}

It is apparent from the Court's opinion that the \textit{Feres} uncertainty about the propriety of the military-service exception to the FTCA and the reasons underlying that exception has been assuaged. The certainty as to the first point is entirely explicable: After all, in the twenty-seven years since \textit{Feres}, Congress had not utilized its "ready remedy"\textsuperscript{71} to correct any erroneous reading of legislative intent; congressional inaction implies acquiescence.

Determining that "the Veterans' Benefits Act establishes . . . a substitute for tort liability"\textsuperscript{72} seems inconsistent with the Court's opinions in \textit{Brooks v. United States}\textsuperscript{73} (a pre-\textit{Feres} decision) and

\begin{itemize}
\item \textsuperscript{66} In one case, the victims were civilian passengers in a cab that collided with a mail truck. The passengers sued the cab company which then impleaded the United States as a third-party defendant for the sake of securing contribution. \textit{Yellow Cab}, 340 U.S. at 544-45. In the other case, the victim was a passenger on a streetcar that collided with a jeep driven by a soldier. The passenger sued the transit company which then impleaded the United States as a third-party defendant, seeking contribution. \textit{Id.} at 545.
\item 431 U.S. at 672-73.
\item \textit{Id.} at 671.
\item \textit{Id.} at 672.
\item See \textit{Id.} at 673.
\item \textsuperscript{67} See \textit{supra} text accompanying note 13.
\item \textsuperscript{68} 431 U.S. at 671.
\item \textsuperscript{69} 431 U.S. at 671.
\item \textsuperscript{70} 337 U.S. 49 (1949).
\end{itemize}
United States v. Brown (a post-Feres decision). In Brooks, the Court concluded that the soldier-victim's injuries, sustained while the soldier was on leave and occasioned by the negligence of a civilian employee driving an army vehicle, were compensable under the FTCA, even assuming that the victim would receive compensation for those injuries under the Veterans' Benefits Act. Apparently, the Court in Brooks did not contemplate a duplicative recovery. It asserted that

this does not mean that the amount payable under servicemen's benefit laws should not be deducted, or taken into consideration, when the serviceman obtains judgment under the Tort Claims Act. Without the benefit of argument in this Court, or discussion of the matter in the Court of Appeals, we now see no indication that Congress meant the United States to pay twice for the same injury.

In Brown, the plaintiff had sustained an injury to his left knee while in the service, for which he received veterans' benefits. After his discharge, the plaintiff had the injured knee operated on in a veterans' hospital. Due to the use of an allegedly defective tourniquet during the surgery, the plaintiff sustained serious and permanent injury to the nerves in the leg. For that aggravation of the injury, he received an increase in the veterans' benefits received. In addition, the plaintiff brought an FTCA action to recover for the surgery-related injury. The government, relying on Feres, moved to dismiss. Although the district court granted the motion, the court of appeals reversed and the Supreme Court affirmed the court of appeals decision. After noting that the injury for which plaintiff sought tort damages had occurred after the plaintiff's discharge, and, therefore, was not incident to service, the Court declared that the receipt of veterans' benefits alone did not preclude an FTCA action.

75. See 337 U.S. at 53. "Unlike the usual workman's compensation statute, e.g., 33 U.S.C. § 905, there is nothing in the Tort Claims Act or the veterans' laws which provides for exclusiveness of remedy. . . . Nor did Congress provide for an election of remedies, as in the Federal Employees' Compensation Act, 5 U.S.C. § 757." Id.
76. Id.
77. 348 U.S. 110 (1954).
78. Id. at 110-11.
79. "The District Court agreed with the contention of petitioner that respondent's sole relief was under the Veterans Act and dismissed his complaint under the Tort Claims Act." 348 U.S. at 111. The district court's dismissal apparently is unreported.
82. See id. at 112.
since Congress had not made the Veterans' Benefits Act the exclusive remedy.\textsuperscript{83}

Congress could, of course, make the compensation system the exclusive remedy.\textellipsis We noted in the Brooks case\textellipsis that the usual workmen’s compensation statute was in this respect different from those governing veterans, that Congress had given no indication that it made the right to compensation the veteran’s exclusive remedy, that the receipt of disability payments under the Veterans Act was not an election of remedies and did not preclude recovery under the Tort Claims Act but only reduced the amount of any judgment under the latter act. We adhere to that result.\textsuperscript{84}

Both Brooks and Brown are distinguishable, however, from the usual Feres-type case. In Brooks, the serviceman’s injuries occurred while he was on leave and were not incident to his military service.\textsuperscript{85} In Brown, the specific injury for which tort damages were sought occurred while the plaintiff was a civilian.\textsuperscript{86} Yet, the opinions in the two cases make it clear that claimant’s eligibility for, or even actual receipt of, veterans’ benefits does not automatically bar an FTCA action. Consequently, the first reason offered by the Court in Stencel\textsuperscript{87} does not, of itself, preclude recovery under the Act.

The “distinctively federal relationship between the Government and its soldiers,” the second reason offered in Stencel, remains something of an enigma. Which relationship is referred to, that between plaintiff and government or that between tortfeasor and government? On the surface, the relationship would seem to be that between plaintiff and government, since it is only when the plaintiff’s injury was incident to service that Feres has potential applicability.\textsuperscript{88} If it is the relationship between plaintiff and government, why is it patently senseless to apply state law? Senselessness cannot be derived from the “unfairness” to the claimant arising from the application of state law, as noted in Feres,\textsuperscript{89} because this element seems to have been distilled out by the time Stencel was decided.

In Stencel, the emphasis seems to have shifted to the impropriety of judging the government’s military actions and decisions by va-

\textsuperscript{83} Id. at 113.
\textsuperscript{84} Id. (citations omitted).
\textsuperscript{85} 337 U.S. at 50.
\textsuperscript{86} 348 U.S. at 112.
\textsuperscript{87} See supra text accompanying note 68.
\textsuperscript{88} See 340 U.S. at 144.
\textsuperscript{89} Id. at 143.
rlying state laws. That conclusion seems far more sensible and compelling than the *Feres* concern about unfairness to the claimant. Moreover, that more firmly based concern implies that it is the relationship between the alleged military tortfeasor and the government that is not to be judged by varying state laws. That conclusion suggests that when the soldier-claimant's injury is the result of the negligence of civilian federal employees not engaged in military actions or decisions, *Feres* should be deemed inapplicable and the FTCA available.

The third reason offered by Stencel, that judicial "second-guessing" of "military orders" would have an adverse effect on military discipline, has a compelling legitimacy. After all, if every or even most military orders were vulnerable to judicial review, those in service and subject to those orders might be encouraged to reject or disregard those orders until judicial "approval" were obtained. Clearly that is no way to run an army. Perhaps equally as clear, it follows that this reason for the *Feres* exception should be deemed applicable only where judicial cognizance of an FTCA action seems likely to generate such an adverse effect on military discipline.

If *Feres* is combined with all of *Brooks*, *Brown* and *Stencel*, the following conclusions seem tenable: One, the FTCA gives federal district courts jurisdiction to determine when the *Feres* doctrine requires governmental immunity. Two, the mere fact that the victim of negligence receives veterans' benefits for his injuries does not preclude an FTCA action for damages. Three, an FTCA action arising out of an injury incident to service should be deemed to be precluded only when (a) such an action would improperly subject the relationship between military tortfeasor and federal government to state law, or (b) such an action and its concomitant judicial review of military decisions or actions would be likely to generate an adverse effect on military discipline. To put it another way, the *Feres* exception to the FTCA should be deemed applicable only to those cases in which its underlying rationales apply.

*Post-Stencel Decisions: Analysis Applied*

In *Uptegrove v. United States*, Navy Lieutenant Edwin

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90. See supra text accompanying notes 33-40 for a discussion of the awkwardness of the *Feres* Court's unfairness argument. The omission of this factor in *Stencel* indicates that the invalidity of that concern was realized.

91. 431 U.S. at 673.

92. 600 F.2d 1248 (9th Cir. 1979), cert. denied, 444 U.S. 1044 (1980).
Uptegrove left Japan on furlough on board an Air Force jet destined for Washington. He planned to visit his family in California. Space on the jet was available to Uptegrove due to his active duty status in the United States Navy. The jet approached the airport under poor visibility conditions, and although the pilots complied with the instructions from an air traffic controller, the transport collided with Mount Constance and all on board were killed.93

Lieutenant Uptegrove's widow brought a wrongful death action against the United States under the FTCA, seeking damages for herself and her two minor children.94 The plaintiff alleged that the FAA controllers had been negligent and that, under a respondeat superior theory, the United States should be held liable. The government's motion for summary judgment, based on Feres, was granted by the district court95 and the Ninth Circuit affirmed,96 emphasizing that

[w]hile on the C-141, Uptegrove was subject to the command of the military flight crew, and could be disciplined before a military court for violating provisions of the Uniform Code of Military Justice.

... Uptegrove was subject to military discipline while he was on the C-141, ... [and] the fact that he was on leave and voluntarily boarded the transport does not alter the fact that the activity was incident to his military service.97

The emphasis on the fact that decedent "was subject to the command . . . of the flight crew" and could have been court-martialed for any violation of the Uniform Code of Military Justice (UCMJ) while on board, is puzzling. After all, decedent violated neither a military command nor any provision of the UCMJ. His death, according to the allegations in the complaint, was due to no conduct on his part or to any negligence on the part of the flight crew. Rather, death resulted from the negligence of civilian employees of the United States.98

The court apparently was willing to concede the plaintiff's contention that, since the alleged tortfeasors were civilian employees of

93. 600 F.2d at 1249.
94. Id. at 1248.
95. The district court's granting of summary judgment apparently is not reported.
96. 600 F.2d 1248 (9th Cir. 1979).
97. Id. at 1249-50.
98. Id.
the government, an FTCA action would pose no threat to military discipline.\textsuperscript{99} The court, however, concluded that not all three of the reasons set forth in \textit{Stencel} had to be present in order to bar the action: “The Supreme Court has never indicated that \textit{Feres} should be limited only to situations in which interference with military discipline is threatened.”\textsuperscript{100} The receipt of veterans’ benefits alone will not preclude an FTCA action,\textsuperscript{101} and if any threat to military discipline is eliminated, as the \textit{Uptegrove} court apparently was willing to do, only one reason remains for barring the action: The distinctively federal character of the relationship between the government and members of its Armed Forces, and the impropriety of imposing state law on that relationship. The \textit{Uptegrove} court held that the relationship referred to was that between victim and government,\textsuperscript{102} the first-level relationship. Consequently, since the decedent had been in the Navy, the wrongful death action was barred. Earlier on, however, we concluded that the legal significance of that “distinctively federal relationship” is such that it should be immune from an inappropriate application of state law.\textsuperscript{103} While it is true that the ultimate liability of the government in \textit{Uptegrove} might have been determined by Washington state law, the relationship to which that state law would have been applied was that between the civilian air traffic controllers and the federal government—allegedly negligent employees and potentially liable employer. Lieutenant Uptegrove was simply a victim of that relationship, as were all those on board the plane. Since the impact of state law would have been felt on the relationship between the allegedly negligent civilian employees and their federal government employer, not on any military conduct by those employees,\textsuperscript{104} there would seem to have been no impropriety in the application of state law. The \textit{Uptegrove} action, if permitted, would not improperly have subjected the relationship between military tortfeasor and federal government to state law. Consequently,

\begin{itemize}
\item \textsuperscript{99} See \textit{id.} at 1250.
\item \textsuperscript{100} \textit{id.} (citation omitted).
\item \textsuperscript{101} See supra text accompanying notes 72-84.
\item \textsuperscript{102} 600 F.2d at 1250-51.
\item \textsuperscript{103} See supra text accompanying notes 88-91.
\item \textsuperscript{104} It could be asserted, of course, that assisting an Air Force transport in landing constitutes military conduct. The impropriety of imposing state law on a “distinctively federal relationship,” however, exists only where the military conduct is uniquely military in nature, not where the military conduct is closely analogous to similar civilian conduct. See infra text accompanying notes 185-90. Rather clearly, the conduct of the civilian controllers was closely analogous to their conduct in assisting civilian planes in landing.
\end{itemize}
the only remaining reason for the Feres exception would seem inapplicable to the facts of Uptegrove. Since (a) receipt of veterans' benefits alone will not bar an action, (b) the court itself concluded that permitting the action would have generated no threat to military discipline, and (c) permitting the action would not improperly have subjected the relationship between military tortfeasor and federal government to state law, I am inclined to think that the Ninth Circuit arrived at the wrong result.

In *Woodside v. United States*,105 Captain Henry W. Schroeder, an active duty officer in the Air Force, was killed in an airplane crash. He was on a five-day leave and "was receiving flight instruction toward a commercial pilot's license."106 The decedent's widow brought a wrongful death action under the FTCA. The government moved to dismiss on the basis of Feres.

"Captain Schroeder was not a military pilot, nor did his military duties require that he have a pilot's license or fly as a member of a flight crew."107 His interest in aviation was purely personal.108 Captain Schroeder received his flight instruction from a civilian instructor at the Hickman-Wheeler Air Force Base Aero Club. Active membership in the club was limited to individuals who were active duty military personnel of the United States Armed Forces. Associate membership was available to military-related personnel.109

The district court granted the government's motion to dismiss110 and the Sixth Circuit affirmed on the basis that

*Feres* requires that there be some proximate relationship between the service member's activity and the Armed Forces. Where the two are closely associated or naturally related, the activity will be deemed "incident to service" even though not an essential or integral part of the mission of the Armed Forces and even though not directly involving a command relationship between the soldier and the military.

... [W]e find the link between the Air Force and the Club sufficient to bring Captain Schroeder's flight instructions within the

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106. 606 F.2d at 136.
107. *Id.*
108. *Id.*
109. *Id.* Military-related personnel includes: "families of active duty service members, civilian Department of Defense employees and their families, and members of Congress." *Id.*
realm of activities incident to his military service.\textsuperscript{111}

Consider, however, \textit{Stencel}'s three reasons for the \textit{Feres} exception to the FTCA. Should not the court have made some effort to determine which, if any, of those reasons were applicable to the facts of \textit{Woodside} for the purpose of determining the applicability of \textit{Feres}?

Mrs. Schroeder received military compensation benefits as the result of her husband's death.\textsuperscript{112} Yet \textit{Brooks} and \textit{Brown} prove that that fact alone does not justify a \textit{Feres} dismissal. Would permitting the action to proceed have resulted in improperly subjecting the "distinctively federal relationship between the Government and its soldiers" to state law? If the relationship referred to is that between victim and government, the answer might be yes. After all, Captain Schroeder, although on leave, was an active duty officer in the Air Force. But if the real "evil" in the application of state law to a distinctively federal relationship is that military conduct or decisions would be judged by various and possibly conflicting state laws for the purpose of determining liability, the application of state law would not be improper. The alleged tortfeasor was the civilian flight instructor: At the time of the operative facts, the instructor was engaged in no military conduct or decision.\textsuperscript{113} Subiecting his conduct and decisions to state law would not mandate subjecting the relationship between a military tortfeasor and the federal government to state law for the purpose of determining the liability of the latter. Consequently, the second reason for the \textit{Feres} exception, as delineated in \textit{Stencel}, would seem to be inapplicable. Would permitting \textit{Woodside} to proceed have been likely to generate an adverse effect on military discipline by subjecting military conduct or decisions to judicial scrutiny? I think not, because, as already noted, the only negligence alleged was that of the civilian flight instructor.\textsuperscript{114} Consequently, permitting the action to proceed would have resulted in judicial scrutiny of nonmilitary conduct or decisions only. In addition, Captain Schroeder's flying lessons were neither a part of his military duty nor available only to military personnel.\textsuperscript{115} Therefore, even if the court were to find the flight instructor's conduct negligent, there would seem to be little or no risk that military personnel would be

\begin{itemize}
  \item \textsuperscript{111} 606 F.2d at 141-42.
  \item \textsuperscript{112} \textit{Id.} at 137.
  \item \textsuperscript{113} See \textit{Id.}
  \item \textsuperscript{114} \textit{Id.}
  \item \textsuperscript{115} See supra note 109 and accompanying text.
\end{itemize}
dissuaded from complying with any military orders. After all, Woodside involved no military orders. Consequently, only the first of Stencel's three reasons applied to Woodside, and, because the receipt of compensation is not alone sufficient to bar the action, it would seem that the government's motion to dismiss should have been denied.

In Parker v. United States, Specialist Five Jack Lowe Parker was granted a five-day leave from duty in order to move his family to a new residence. Parker, on his way home on leave, was struck head-on by a military vehicle that entered Parker's lane of traffic. Parker was driving a car borrowed from a civilian. The collision occurred on an Army-maintained road within Fort Hood. Parker died from injuries sustained in the accident and his family received veterans' benefits. The surviving widow brought a wrongful death action under the FTCA. The government's motion for summary judgment based on Feres was granted by the district court but the Fifth Circuit reversed.

The Fifth Circuit examined each of the three reasons for the Feres exception set forth in Stencel. With regard to veterans' benefits, the court said: "The existence and acceptance of the benefits is not an accurate barometer for the threshold question of whether the activity is 'incident to service.' The compensation system does not exclude FTCA remedies but it is rather the sole remedy once it is determined the injury is service connected." As to the "distinctively federal character of the soldier-Government relation," the Fifth Circuit concluded that "while the federal character of the relationship may be relevant to the wisdom of adopting an exception for service members, it does not help define when an injury is incurred 'incident to service.'" And, finally, with regard to "the effect FTCA suits may have on the maintenance of discipline," the court concluded that "again, this factor is more relevant to the decision whether to imply an exception than it is to the exception's application." There is, I think, a ringing condemnation implicit in

116. See supra text accompanying notes 75-84.
117. 611 F.2d 1007, reh'g denied, 615 F.2d 919 (5th Cir. 1980).
118. 611 F.2d at 1008.
120. 611 F.2d 1007 (5th Cir. 1980).
121. Id. at 1012.
122. Id.
123. Id. at 1013. There is an additional problem with the Stencel reasons for the Feres bar. We know that if a civilian is injured by military negligence, the civilian plaintiff will be
those conclusions arrived at by the Fifth Circuit. In effect, that court found that although Stencel’s three reasons might explain why the Feres exception was fashioned, none were helpful in determining when Feres is applicable. That means that the reasons for the rule offer no guidance as to when the rule should be applied. Normally, when the applicability of a rule of law is at issue, the most efficient (and perhaps most appropriate) method of resolving that issue is to determine the reasons underlying the rule and decide which if any is applicable to the case sub judice. When that cannot be done, the rule of law itself becomes suspect. After all, if its underlying reasons shed no light on its applicability, the rule in fact may lack an appropriate rationale. Perhaps that is the case with the Feres exception to the FTCA.

Feres itself is a Supreme Court determination of legislative intent in which Congress apparently has acquiesced. This indicates that Feres is an accurate reading of the congressional intent and, as such, the rule must be correct. In Stencel, we have a Supreme Court distillation of the reasons underlying Feres which is a product of twenty-seven years of judicial reflection. Surely, in those circumstances, the Court cannot so seriously have blundered that its stated reasons shed no light on when Feres is to be applied. Indeed, in Stencel, the Court itself purported to demonstrate the applicability of Feres to Stencel’s cross-claim against the United States by demonstrating the applicability of the three reasons for the exception to the federal contractor’s asserted claim. Was the Fifth Circuit simply and patently wrong, then, in concluding that none of Stencel’s reasons help determine when Feres is applicable?

That may be too strong a statement. After all, the court itself has concluded that one of those reasons—the receipt of veterans’ benefits—does not itself preclude an FTCA action. Moreover, the

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able to maintain an FTCA action even though such an action may result in judging military acts or decisions by state law or judicially “second-guessing” the military act or decision which occasioned the injury. Why should a different result obtain simply because the plaintiff is a soldier? The answer must be a Supreme Court determination (acquiesced in by Congress) that the evils of judging military acts or decisions by state law and judicially second-guessing military acts or decisions would be exacerbated in those cases in which plaintiff is an active-duty soldier. And where the victim is a soldier, his economic losses will be ameliorated by free military care and the possibility of veterans’ benefits.


125. See supra text accompanying notes 71-73.

126. 611 F.2d at 1012.
Court has not explicitly stated whether the "distinctively federal relationship" which should not be governed by state law is that between soldier-victim and government or that between military tortfeasor and government. Resolving which relationship is the critical federal relationship may even have some bearing on the concern for preserving military discipline. In those circumstances, it becomes at least explicable why the Fifth Circuit in *Parker* did not find any of *Stencel*’s three reasons to be readily and apparently useful in determining when the *Feres* exception applies. Perhaps a somewhat more penetrating analysis of those reasons can help a court determine the applicability of *Feres*.

According to this analysis, the Parker family received veterans’ benefits, which is alone insufficient to determine the applicability of *Feres*. In *Parker*, both the victim and the alleged tortfeasor were military personnel. That would imply that, whichever "distinctively federal relationship" is not to be governed by state law, the second *Stencel* reason would apply. In a footnote, however, the *Parker* court said, "[w]e doubt [that the tortfeasor] had orders to cross the road at the time of the collision." That language suggests that, although the alleged tortfeasor was a soldier and even though he was carrying out some military assignment at the time of the fatal collision, the specific act of negligence alleged had no intimate relationship with the military assignment involved. Thus, determining the liability of the government by the application of Texas law would not subject military conduct or decisions to state law. Rather, state law would determine only the liability-generating consequences of driving a vehicle across the center line of the roadway—conduct clearly not within the military mission of the alleged tortfeasor. Consequently, the second *Stencel* reason for the *Feres* exception would seem to be inapplicable.

Subjecting the tortfeasor’s alleged conduct—driving across the center line of a roadway—to judicial scrutiny seems unlikely to generate an adverse effect on military discipline, thus eliminating the need for the third major concern of *Stencel*. It is not likely that others in similar circumstances would be deterred from carrying out

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127. *Id.* at 1008.
128. On this point, the Fifth Circuit may have been entirely correct in its conclusion that “[t]he compensation system does not exclude FTCA remedies but it is rather the sole remedy once it is determined the injury is service connected.” *Id.* at 1012.
129. *Id.* at 1008.
130. *Id.* at 1012 n.7.
whatever military mission the tortfeasor was about to undertake when he inadvertently crossed the dividing line. Deterrence of others in Parker's circumstances—attempting to drive home on furlough time to move their families to new residences—is also improbable. Therefore, the third reason for the Feres exception would seem inapplicable to Parker. The only one of the three reasons having applicability to the case is the receipt of veterans' benefits, and the Court itself has decided that that alone does not justify imposing the Feres bar. It would seem, then, that the Fifth Circuit, in reversing the granting of the government's motion for summary judgment, arrived at precisely the correct conclusion. Moreover, the propriety of that conclusion, contrary to the Fifth Circuit's language, can be corroborated by recourse to the three reasons set forth in Stencel.

Miller v. United States, affords additional opportunity with which to evaluate the breadth of Feres. Douglas Miller was on active duty in the United States Army at Fort Wainwright, Alaska. On June 23, 1977, after completing his military duties and with the knowledge and permission of his superior officer, Miller reported to a part-time civilian job. He was there employed by George Rodman, a civilian subcontractor, to erect scaffolds on government-owned family quarters. While so employed, Miller was electrocuted by an aluminum ladder that came into contact with a main electrical power line. Miller's parents brought a wrongful death action against the United States, alleging negligence in the maintenance of and the failure to de-energize an uninsulated electric wire owned and controlled by the Department of the Army. The government, asserting the applicability of Feres, moved for summary judgment. The district court granted the motion, a three-judge panel of the Eighth Circuit, dividing 2-1, reversed, the Eighth Circuit en banc later affirmed the district court.

The two-judge majority opinion of the Eighth Circuit panel eschewed a "mechanical application of the Feres doctrine [to all cases where the victim was injured on base or while on active duty status, despite its] 'virtue of simplicity,' [and opted instead for a test that]
would involve difficult questions of fact.” 138 That specific factual inquiry would seem to be consistent with the spirit of the language in *Feres* which noted that the FTCA’s broad jurisdictional grant was as necessary to deny a claim on its merits as matter of law as [it was] to adjudge that liability exists. . . . Jurisdiction of the defendant now exists where the defendant was immune from suit before; it remains for courts, in exercise of their jurisdiction, to determine whether any claim is recognizable in law. 139

Applying that specific factual inquiry to *Miller*, the panel concluded that “[e]ven though he was on active duty and on a military base, [Miller] was exactly in the same position as any civilian employee of the private contractor might have been at that time and place.” 140 Consequently, the panel found that “PFC Miller’s death did not arise out of activities incident to service, and, therefore, the facts of the case do not fall within the rationale of *Feres*.”

The Eighth Circuit en banc, although arriving at a contrary ultimate conclusion, like the panel, also rejected “a *per se* rule” 142 which would apply *Feres* to every case in which the victim was on active duty and on base when injured, despite its “virtue of easy application.” 143 Instead, the court chose “the better jurisprudential course . . . [of] examin[ing] the facts of each case as they arise and determin[ing] whether they fall within the reasons given by the Supreme Court for its conclusion in *Feres*.”

Instead of applying the three distinct reasons given by the Supreme Court in *Stencel*, the court reverted in part to those reasons originally set forth in *Feres* and apparently distilled out by *Stencel*. The court en banc reiterated the anomaly of applying “the law of the place where the act or omission occurred” to a relationship that is “distinctively federal in character” since to do so, would be unfair to “soldiers on active duty, who have no choice and must serve any place where they are assigned.” 146 The court found that reason applicable to *Miller* because, “[l]ike all soldiers, he was at a particu-

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138. *Id.* at 485-86.
139. 340 U.S. at 141.
140. 643 F.2d at 487.
141. *Id.*
142. See *id.* at 493.
143. *Id.*
144. *Id.*
145. *Id.*
lar post not because he had chosen it, but because of his orders.”146 Next, the court noted that “Congress had provided by statute 'sys-

tems of simple, certain, and uniform compensation for injuries or
death of those in armed services.' ”147 Since Miller's survivors were
entitled to compensation under these acts, without proof of fault or
negligence, Feres barred the action.148 This determination seems in-
consistent with Brown and Brooks and their conclusions, never re-
versed by the Supreme Court, that receipt of veterans' benefits alone
did not require the application of Feres. The balance of the court's
rationale seems to be based substantially on the per se rule that the
court purportedly rejected.

Private Miller was on active duty; he was not on leave, pass, or
furlough; the injury occurred on a military base to which he was
assigned and the work he was doing, though not under the imme-
diate supervision of his military superiors, was related to the military
mission of the base, since it involved construction of residential
quarters to be owned by the Government and located on the base.
Although he had been given permission by his military superiors to
work at a part-time job during off-duty hours, he remained at all
times subject to immediate recall for military duty.149

Consequently, Feres was found to bar the action.

The three dissenters150 acquiesced in the majority's view that
there are several rationales supporting the Feres doctrine,151 yet they
concluded that “[s]ubsequent Supreme Court decisions have . . .
[shown that] the feared effect on military discipline remains the
most significant justification for barring servicepersons' tort
claims.”152 The dissenters, too, conceded the uncertainty of deter-
mining when Feres should apply:

Divining the limits of the Feres doctrine has been a difficult
task. The key term—"incident to service"—has never been defined
by the Supreme Court. Many lower courts have tended to automat-

146. Id. at 494.
147. Id. at 493.
148. Id. at 494.
149. Id.
150. Judge Heaney was joined by Judges Ross and McMillan.
151. Id. at 496 (Heaney, J., dissenting) (citations omitted). The rationales include: (1)
that the distinctively federal relationship should not be disturbed by state law, (2) the absence
of a private tort analog, (3) the existence of the veterans’ benefit compensation system, and (4)
the "peculiar and special relationship" between soldiers and their superiors and the ramifica-
tions thereof. Id.
152. Id. (Heaney, J., dissenting) (footnote omitted).
ically deny tort claims of servicepersons injured on a military base or while they were on active duty. In so doing, the courts have distorted the intent of Congress. 153

In light of the above considerations, the dissenters believed that giving effect to the intent of Congress entailed not barring the action against the government. In support of their conclusion that Miller's death was not incident to service—thereby dispelling concern for the effect of the action on military discipline—the dissenters asserted that

[a]t the time of his death, Private Miller was not engaged in an activity incident to his service. He was working in a civilian capacity for a private contractor. He was off duty and had been given permission by his military superiors to work the part-time job. He was not involved in any military mission or under compulsion of any military orders. He was not availing himself of a privilege acquired by virtue of his military status. He was subject to the direct control and authority of his civilian employer, not his military superiors. 154

What is the significance of the fact that Miller was working in a civilian capacity with regard to Stencel's reasons? It might be asserted that, given the civilian nature of Miller's activity at the time of the fatal injury, the distinctively federal character of the relationship between soldier and government did not exist at the first level, i.e., between victim and federal government. If Feres is never applicable when that first-level relationship is not distinctively federal in character, that alone could explain the dissenters' conclusion. Moreover, the civilian nature of Miller's activity at the time of injury is relevant with regard to the "discipline" reason of Feres. Since Miller's activity was neither compelled by military orders nor encouraged for morale or recreational purposes, subjecting the military conduct involved—maintaining an uninsulated power line and failing to de-energize the line—to judicial scrutiny hardly would be likely to generate an adverse effect on military discipline. Any soldier on the post would be entirely free to refrain from taking a part-time job with a civilian employer, whether or not Miller proceeded to trial. The civilian nature of Miller's activity, however, would not eliminate the distinctively federal character of the relationship between alleged tortfeasor and government. Presumably, the maintenance of the

153. Id. (Heaney, J., dissenting) (footnote omitted).
154. Id. at 497 (Heaney, J., dissenting).
power line and the decision not to de-energize the line were the ultimate responsibilities of military personnel. If Miller were to proceed to trial, the law of Alaska would be applied to determine the propriety of the manner in which those responsibilities had been fulfilled and the ultimate liability of the government. Arguably, that could be said to frustrate one of the Stencel reasons for the Feres exception—not applying state law to a military situation. Does the arguable frustration of that reason justify the application of Feres to bar the action?

The answer to that question, I think, depends upon whether it is appropriate to say that, because Miller was engaged in a civilian activity, the first-level distinctively federal relationship did not exist. If this relationship did not exist, then subjecting the military conduct to Alaska law would be irrelevant to the applicability of Feres. After all, if the very same military conduct had produced precisely the same tragic consequences to a full-time civilian employee of the contractor, Feres clearly would be inapplicable. A wrongful death action under the FTCA, arising from that civilian’s death, would be wholly appropriate and the application of Alaska law would not be considered an impropriety.155

The problem remains that, although Miller was engaged in a civilian activity, his general status remained that of an active duty soldier. Consequently, it could be asserted that the first-level distinctively federal relationship, a condition precedent to the potential application of Feres, did exist. Add to that the second-level federal relationship, that between allegedly negligent military personnel and government, and Feres might then appear to be applicable.

But the dissenters in Miller asserted that “the feared effect on military discipline remains the most significant justification for barring servicepersons’ tort claims.”156 That language could be read as implying that, even assuming a distinctively federal relationship at both levels—between victim and government and between tortfeasor and government—Feres should not be applied in those cases where an adverse effect on discipline is not likely to arise. That implication generates a second level of inquiry: Does Stencel contemplate a necessary relationship between the impropriety of subjecting military conduct to state law and an adverse effect on military discipline?

The three reasons set forth in Stencel appear in the following

155. See supra text accompanying notes 36-40.
156. 643 F.2d at 496 (Heaney, J., dissenting) (footnote omitted).
order: (1) the “distinctively federal character” of the “relationship between the Government and members of its Armed Forces,” (2) “the Veterans’ Benefits Act [which] establishes, as a substitute for tort liability, a statutory ‘no-fault’ compensation scheme,” and (3) “the effects of the maintenance of such suits on discipline.”

The very fact that the availability of veterans’ benefits was listed between the “distinctively federal character” reason and the military discipline reason would tend to negate any inference that the Court intended to require, as a condition precedent to the application of Feres, an intimate relationship between the first and third reasons. Moreover, the Court seems to have viewed reasons one and three as cures for disparate evils. With regard to the distinctively federal character of the relationship between soldier and government, the Court noted, “it would make little sense to have the Government’s liability to members of the Armed Services dependent on the fortuity of where the soldier happened to be stationed at the time of the injury.”

To demonstrate the applicability of that reason to Stencel, a federal supplier of ordnance, the Court noted:

The Armed Services perform a unique, nationwide function in protecting the security of the United States. To that end military authorities frequently move large numbers of men, and large quantities of equipment, from one end of the continent to the other, and beyond. Significant risk of accidents and injuries attend such a vast undertaking. If, as the Court held in Feres, it makes no sense to permit the fortuity of the situs of the alleged negligence to affect the liability of the Government to a serviceman who sustains service-connected injuries, . . . it makes equally little sense to permit that situs to affect the Government’s liability to a Government contractor for the identical injury.

With regard to the adverse effect on military discipline, however, the Court wrote that “[t]he trial 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.” All of this virtually compels the conclusion that the Court contemplated that, if either of the two reasons were applicable to a particular case, the Feres bar should be applied. And that con-

158. Id.
159. See id. at 667.
160. Id. at 672 (citation omitted).
161. Id. at 673.
clusion, in turn, suggests that if Miller’s status is viewed as that of an active duty soldier, thus satisfying the first-level distinctively federal relationship, and the negligence alleged is that of other military personnel, thus satisfying the second-level distinctively federal relationship, 

*Feres* should apply even absent any adverse effect on military discipline. That does not mean, however, that I would concur in the ultimate result achieved in *Miller*.

The propriety of the *Miller* result, I think, turns on a determination of which is the more appropriate characterization to be made of Miller’s status at the time of the fatal injury: civilian or active duty soldier. If Miller, while working for a private contractor after normal duty hours, had been struck and killed by an army vehicle operated by an active duty soldier carrying out a military assignment, but five miles away from any military base, would *Feres* bar an FTCA action? I think the answer must be no. In those circumstances, it would seem to be self-apparent that the decedent’s fatal injuries had not been incident to military service. To put it another way, the decedent’s status for *Feres* purposes would have been that of a civilian. Since the first-level distinctively federal relationship would be lacking, *Feres* would be inapplicable.

There are many similarities between *Miller* and the above hypothetical. For instance, the en banc majority opinion emphasized that “Private Miller was on active duty; he was not on leave, pass, or furlough.” The same characterization would apply to the hypothetical. The majority noted that, despite permission to work part-time during off-duty hours, Miller remained subject to immediate recall for military duty. The same could be said of our hypothetical. The majority said that although Miller’s work was not directly supervised by his military superiors, it “was related to the military mission of the base, since it involved construction of residential quarters to be owned by the Government and located on the base.” We can make that applicable to the hypothetical simply by adding the fact that Miller was loading a truck with ladders to be used in constructing residential quarters on a military base five miles away, and still retain the civilian characterization of Miller for *Feres* purposes. That leaves only this last reason offered by the majority: the occurrence of the injury on the military base. But, as already

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162. 643 F.2d at 494.
163. *Id.*
164. *Id.*
165. *Id.*
noted, even the majority rejected "a per se rule" that "every action for injuries sustained by an active duty serviceman while on base is barred by Feres." 166

It is true that the majority wrote: "Like all soldiers, [Miller] was at a particular post not because he had chosen it, but because of his orders. His survivors are entitled to compensation under the applicable acts of Congress, which require no showing of fault or negligence." 167

It has been determined, however, that the first sentence of that excerpt does not constitute a reason for the Feres bar under Stencel 168 and that the second sentence alone does not bar an FTCA action under Brown and Brooks. 169 Moreover, for Feres purposes, Miller should have been assigned the particularized characterization of civilian, eliminating the first-level distinctively federal relationship, thus making Feres inapplicable. Consequently, I find myself compelled to conclude that the minority conclusion is the better one and that the majority erred in applying the Feres exception to bar recovery.

The minority seems to have assigned Miller the particularized status of "civilian" at the time he suffered the fatal injury, since they asserted that "[p]art-time independent employment is not a normal part of military life." 170 Why, then, did the minority feel compelled to state that, of the several reasons assigned for the Feres bar, "the feared effect on military discipline remains the most significant justification for barring servicepersons' tort claims," 171 especially when the minority recognized that the language of Stencel did not "support this conclusion." 172 And, finally, why did the minority find that the "distinctly federal" character of the relationship between the government and the armed forces which should not be disturbed by state laws, 173 a reason specifically asserted in Stencel, 174 was only of limited importance. 175 Perhaps the answer can be distilled from the justification for the propriety of governing distinctively federal rela-

166. Id. at 493.
167. Id. at 494.
168. See supra text accompanying notes 89-90.
169. See supra text accompanying note 83.
170. 643 F.2d at 497 (Heaney, J., dissenting).
171. Id. at 496 (Heaney, J., dissenting) (footnote omitted).
172. Id. at 496 n.9.
173. Id. at 496 (Heaney, J., dissenting).
175. 643 F.2d at 496 (Heaney, J., dissenting).
tionships by federal law. Until now, we have accepted at face value the "distinctively federal" reason as a justification for the Feres bar. It would be fruitful to determine just what would be wrong with imposing state law on that "distinctively federal" relationship. Suppose that a military act or decision occurs in state A and, as a result of that allegedly negligent act or decision, service personnel in all fifty states are injured. Application of the FTCA would not result in judging the liability generating consequences of that decision by the laws of fifty different states. The Act provides for the application of the law of the state where the wrongful act or omission occurred. Hence, state A's law would be applied. That does not mean that state A's law would be applied even as to issues in which state A had absolutely no interest. Richards v. United States says that the Act's reference to the law of state A is to be read as a reference to the total law of that state, conflicts law as well as local law. Thus, the federal court hearing that FTCA action, and finding itself confronted with a choice-of-law problem, would be required to resolve that issue precisely as it would be resolved by the highest appellate court of state A. The due process clause (and perhaps the full faith and credit clause) would preclude the highest appellate court of state A from applying the local law of any state lacking a legitimate interest in the issue to be resolved. Consequently, every issue in the case would have to be resolved by the application of the local law of a state having a legitimate interest in that issue. In many cases this would impose no undue imposition on the distinctively federal relationship between federal government and service personnel.

If the negligence alleged is using "a defective heating plant" in an army barracks in New York, the application of New York law to resolve the negligence issue would seem to impose no undue burden on the military or the United States. If the negligence alleged is

177. See 369 U.S. 1, 11 (1962).
180. Id. art. IV, § 1.
181. Allstate Ins. Co. v. Hague, 449 U.S. 302, reh'g denied, 450 U.S. 971 (1981). In Hague, the Court concluded that Minnesota's application of its own local law permitting the "stacking" of uninsured motorist coverage, rather than Wisconsin's local law prohibiting such "stacking," violated neither the carrier's due process rights, U.S. Const. amend. XIV, § 1, nor the full faith and credit clause, U.S. Const. art. IV, § 1, given Minnesota's "contacts . . . with the parties and with the occurrence or transaction giving rise to the litigation." 449 U.S. at 308.
an army surgeon's "closing up" when "a towel 30 inches long by 18 inches wide, marked 'Medical Department U.S. Army,'"\textsuperscript{183} remains in the incision, judging the surgeon's conduct by the law of the state where the surgery was performed would seem to impose no undue burden on the military or the United States. If the culpability asserted is the "negligent and unskillful medical treatment by army surgeons,"\textsuperscript{184} judging the surgeons' conduct by the law of the state where the conduct occurred would seem to impose no undue burden on the military or the United States. After all, maintenance men and surgeons alike should have some standard of care in mind when they act. Why not utilize the standard imposed by the law of the state where the conduct occurs?

On the other hand, there may be cases in which the military action or decision is so distinctly military in nature that state law would provide an inadequate or wholly inappropriate standard. Which of several tanks would be most appropriate for a planned training maneuver, which of several rifles would be most appropriate for the basic training of infantry troops, or which of several sidearms would be most appropriate for use by fighter pilots, would seem to be such decisions. To judge the wisdom or reasonableness of those decisions by the law of the state in which the decisions were made might well unduly impose on the military and the United States.

Bearing in mind the language in \textit{Feres} that said jurisdiction is as necessary to decide which actions are legally insufficient as it is to decide which are legally sufficient,\textsuperscript{185} and considering the viewpoint shared by the majority and minority in \textit{Miller} that a case-by-case approach with careful analysis of the particular facts of each case is appropriate,\textsuperscript{186} one is impelled to conclude that the significance to be afforded the "distinctively federal" reason for the \textit{Feres} bar should be determined in each case by assessing the actual extent to which the military conduct or decision is distinctly or uniquely military in nature. Where the conduct or decision is closely analogous to conduct or decisions regularly occurring in civilian life, application of state law would not seem inappropriate. Where the conduct or decision is distinctly military in nature, application of state law might be grossly inappropriate. I think perhaps that message is the inherent concomitant of the \textit{Miller} minority's insistence on denigrating the

\textsuperscript{183.} Id.
\textsuperscript{184.} Id.
\textsuperscript{185.} Id. at 141.
\textsuperscript{186.} 643 F.2d at 493.
significance of the "distinctively federal" reason for *Feres*, when its "civilian" characterization of Miller’s status alone would have justified its conclusion that the *Feres* bar was inapplicable. Accordingly, the minority went too far. Instead of diminishing the significance of the "distinctively federal" reason across the board, the minority might better have associated the significance of that reason with the particular nature of the military act or decision in each case.

In *Miller*, the negligence alleged against military personnel was the maintenance of an uninsulated electric wire and the failure to de-energize it while construction work was carried on in the area.¹⁸⁷ Neither aspect was distinctly military in nature. On the contrary, similar conduct by private power companies produces similar tragic consequences in all too many cases.¹⁸⁸ Therefore, to judge the conduct of the alleged military tortfeasors by the law of Alaska would not seem to be an impropriety. Consequently, the *Miller* minority had available to it two bases to support its conclusion that *Feres* was not applicable. First, given the minority’s particularized characterization of the victim as a civilian—a characterization with which I would concur—the first-level distinctively federal relationship did not exist. That alone would compel the conclusion that the *Feres* bar was not applicable. Second, even though the alleged tortfeasors were military personnel, thus providing a second-level distinctively federal relationship, the alleged conduct of the military personnel was not distinctly military in nature; thus, there would have been no impropriety in judging that conduct by state law. Therefore, the distinctively federal relationship reason of *Stencel* was not applicable. Consequently, the minority could have supported its conclusion without gratuitously denigrating all but the military discipline reason for the *Feres* bar.

Consider also *Johnson v. United States*.²⁰⁰ In *Johnson*,

Sgt. Johnson was assigned to Fort Stewart, Georgia. In September . . . [, 1970,] Major Merideth, a psychiatrist at Fort Stewart, hospitalized him for a possible mental illness, and concluded he was suffering from a severe psychosis accompanied by homicidal and suicidal tendencies. Early in January, 1971 the sergeant was jailed on a warrant issued after he assaulted his wife. He was released on

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¹⁸⁷. *Id.* at 490.


¹⁸⁹. *See supra* text accompanying note 167.

condition that he reenter the post hospital, and he did so on January 11, 1971. Major Merideth discharged the sergeant on January 21, 1971, even though he knew of his violent tendencies.

On January 25, 1971, Johnson requested leave, which was denied by his captain for fear he would cause more trouble. Unfortunately, the battalion executive officer overruled the captain and granted the leave. On January 27, 1971, Sgt. Johnson went to the home of his wife’s brother in Waynesville, Georgia, approximately 80 miles from Fort Stewart. When he arrived he killed his brother-in-law, Carroll Johns, shot his wife and then killed himself. 191

Mrs. Johnson, who survived the shooting, brought a wrongful death action against the United States under the FTCA. 192 She al-

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191.   Id. at 35 (footnote omitted).

192.   Mrs. Johnson also sued the government, under the FTCA, for her own injuries. The issue of negligence was deemed res judicata on the negligence issue in the Johnson case (i.e., the government was negligent in releasing Sgt. Johnson). Both the negligence issue and that of proximate cause, therefore, were stipulated to by the parties in favor of Mrs. Johnson. 631 F.2d at 35.

Given the binding effect extended to the earlier conclusions of negligence and proximate cause, it became unnecessary in Johnson to judicially second-guess any military conduct or decision. It could be asserted, for that reason, that permitting an FTCA action in Johnson would have generated no adverse effect on military discipline. However, it seems likely that the res judicata effect given to the earlier conclusion of negligence would have become a matter of general knowledge in Johnson. And, as suggested, Stencel seems to represent a Supreme Court conclusion that the evil of judicially second-guessing military acts or decisions is exacerbated in cases in which the victim is a soldier. See supra note 85.

For a variation of the traditional judicial use of Feres, consider Kohn v. United States, 680 F.2d 922 (2d Cir. 1982). Plaintiffs, parents of a deceased soldier, asserted three causes of action under the FTCA. “The first two [sought] to hold the United States liable . . . in damages for their son’s conscious pain and suffering and for the parents’ loss of his society, support and services.” Id. at 924. In those causes of action, the plaintiffs alleged that their son’s death had resulted from the negligence of his commanding officers. “In their third cause of action, [the parents sought] recovery . . . for emotional distress allegedly inflicted on them by the Army’s treatment of them subsequent to their son’s death.” Id. The Second Circuit affirmed the dismissal of the first two claims on the basis of Feres but reversed the dismissal of the third claim. Id. at 926.

The court concluded that, because the third claim asserted culpable acts occurring after the soldier’s death, Feres was not applicable. The court reasoned that “the wrongful acts alleged” in the parents’ third claim were “completely independent of the purported negligent . . . misconduct that led to their son’s demise.” Id. However, in the third claim, the parents alleged, inter alia, that “the Army [had] suppressed information” from them concerning their son’s death. Id. at 924. It seems fair to infer that, if the third claim proceeds to trial, the parents, in an effort to show the motive for the suppression of information, will offer evidence of the cause of their son’s death. Rather clearly, that evidence will not be “completely independent of the purported negligence . . . that led to their son’s demise.” Id. at 926. On the contrary, it would subject to judicial scrutiny those military acts and decisions which allegedly contributed to the soldier’s death, in circumstances where there would be a significant risk of an adverse effect on military discipline.

The Second Circuit should not have affirmed the dismissal of the third claim because the
leged that Sergeant Johnson's suicide was the result of negligence in

parents are civilians, therefore, the first-level distinctively federal relationship is lacking. Absent that first-level relationship, Feres is inapplicable. Yet the Second Circuit wrote, "As Stencel itself illustrates, civilian status alone is not sufficient to lift the bar under Feres when a claim involves the same issues as if a serviceman himself sued, for then the relevant policy considerations apply with equal force." Id. at 926. I think that constitutes too broad a reading of Stencel, one which overlooks the fact that the civilian litigant was seeking indemnification from the United States with regard to injuries to a pilot incident to military service. Under the Second Circuit's view, Stencel would bar a civilian's claim for damages in any case in which distinctly military acts or decisions would be judged by state law or judicial scrutiny of those acts or decisions would be likely to generate an adverse effect on military discipline. That would seem to be contrary to the purposes of the FTCA itself and to the Feres exception's applicability to injuries incident to military service.

I can understand the "logical" appeal of the Second Circuit's conclusion that, if "the relevant policy considerations" of Stencel apply, even an injured civilian may not recover under the FTCA. But because I think that conclusion is inconsistent with the Act itself and the Feres bar as to injuries incident to service, I feel it is more appropriate to conclude that the Court has found (and Congress has acquiesced in the finding) that the evils to be avoided by the Feres bar achieve an unacceptable level only when the injury for which compensation is sought was sustained by a soldier. See supra note 85.

Several courts have concluded that Feres does not preclude a civilian's claim unless that claim derives from an injury that is incident to military service. Lombard v. United States, 690 F.2d 215 (D.C. Cir. 1982); In re Agent Orange, 506 F. Supp. 762 (E.D.N.Y. 1980); Hinkie v. United States, 524 F. Supp. 277 (E.D. Pa. 1981) certified for interlocutory appeal before the Third Circuit at Civ. Action No. 79-2340, Aug. 5, 1982. In all three cases, among the causes asserted were claims on behalf of ex-servicemen's children who allegedly sustained genetic injuries resulting from their parents' exposure to radiation or defoliant. In Lombard and Agent Orange, the children's claims were characterized as derivative and arising out of the parents' service-connected injuries, thus barred by Feres. In Hinkie, the children's claims were characterized as independent, thus not barred by Feres. As between the two conclusions, I am inclined to favor that achieved in Hinkie. Because the children allegedly sustained distinct physical injuries, I believe the "independent" characterization is the more appropriate. To me, "derivative" claims would include "e.g., loss of society, comfort, companionship, services, consortium, guidance and support." In re Agent Orange, 506 F. Supp. at 780.

In Lockheed Aircraft Corp. v. United States, 51 U.S.L.W. 4206 (U.S. Feb. 23, 1983), decedent, a civilian employee of the United States Air Force, died in an airplane crash. Pursuant to the Federal Employees' Compensation Act, the government paid death benefits to the decedent's survivors. Subsequently, the decedent's administrator brought a wrongful death action against Lockheed, alleging that the decedent's death had been occasioned by the defendant's defective product. Lockheed, seeking indemnification, impleaded the United States. After settling the wrongful death action, Lockheed sought summary judgment against the United States. The government argued that the exclusivity clause of the FECA, see supra note 46 and accompanying text, precluded such liability. Finding that Lockheed was "not within any of [the exclusivity clause's] specified categories," the Court permitted Lockheed the indemnification it sought. The majority opinion found Stencel to be inapposite because that opinion had dealt with the "military nature of the action." Id. at 4208 n.8. That language, I think, corroborates the conclusion above that Stencel has no applicability to a civilian claim. The majority opinion also found Stencel inapplicable because that case had been decided "without regard to any exclusive liability provision." Id. at 4208 n.8. The dissent found Stencel apposite because it did deal with an exclusive liability provision: "the compensation paid to servicemen without regard to the government's negligence." Id. at 4209 n.4. That disagreement as to whether Stencel dealt with an exclusive liability provision dramatizes the "iffiness" of the Vet-
releasing him from the hospital and in granting him leave. The United States moved to dismiss the action under Feres. The motion to dismiss was granted\(^{193}\) and the Fifth Circuit affirmed, rejecting plaintiff's argument that Sergeant Johnson's death "'had no significant link to the armed forces and was remote to his military service.' "\(^{194}\)

The court's conclusion can be tested by interpretation of Stencel's three reasons for the Feres bar. Since Brooks and Brown have never been rejected by the Court, the fact that Mrs. Johnson may or may not receive veterans' benefits is not dispositive. Clearly, the first-level of the distinctively federal relationship existed, since Sergeant Johnson was on active duty in the Army. It is true, of course, that, at the time of his suicide, Johnson was on leave and some eighty miles from his duty station. However, it is that very fact which plaintiff alleged was the result of negligence attributable to the defendant. In effect, plaintiff asserted that the negligent hospital discharge and the negligent granting of leave caused Johnson to be in Waynesville, Georgia. Plaintiff could hardly be permitted to assert simultaneously that Johnson was in Waynesville because of military decisions but that his presence there was unrelated to military service. Moreover, the second-level distinctively federal relationship also existed since the alleged tortfeasors were an Army psychiatrist and the decedent's battalion executive officer.

Would it be inappropriate to judge the decisions made by the alleged military tortfeasors by the law of Georgia? As we have noted, that impropriety would exist if the decisions made were distinctly or uniquely military in nature.\(^{195}\) The first decision—to dis-
charge Johnson from the post hospital—would seem to be virtually identical to decisions made regularly by psychiatrists at civilian hospitals. Therefore, to judge the reasonableness of that decision by state law would seem to generate no undue impropriety. The second decision—to grant Johnson leave—poses a more difficult question. Generally, in civilian life one is free to leave his place of employment and go where he wishes during nonworking hours. It is only in the military that permission must be granted for such conduct. Still, vacations are a normal part of civilian life, and military leave and vacation time are closely analogous. It could be said that the decision to grant Johnson leave was roughly equivalent to a civilian employer’s granting vacation time to an employee. The difference, however, is that no civilian employer would have the right to refuse to grant vacation time and, thereby, compel the employee to remain on the employment premises. That power seems to be unique to the military. To the extent that it is, there would be an impropriety in judging the reasonableness of the exercise of that unique military power by state law. Consequently, it would seem that the application of state law to the decision to grant Johnson leave would be an undue imposition on the distinctively federal relationship. For that reason alone, the Fifth Circuit’s decision would seem to be appropriate.

Consider also the applicability of Stencel’s third reason, an adverse effect on military discipline, to the facts of Johnson. Would judicial scrutiny of the allegedly negligent decisions leading to Johnson’s hospital release and leave be likely to generate an adverse effect on military discipline? I think the answer must be yes. Such judicial examination, with its potential for finding that each decision was culpable, would certainly tend to make military personnel less willing to comply with decisions relating to their own possible hospitalization or release and their own possible receipt or denial of leave. Moreover, and perhaps more importantly, such judicial scrutiny and its potential for finding culpability might very well tend to make military personnel less willing to comply with orders directing them to work with other military personnel recently discharged from psychiatric treatment. Consequently, Stencel’s third reason for the Feres bar would seem to be applicable to Johnson and would independently corroborate the propriety of the Fifth Circuit’s decision.

CONCLUSION

I believe that the Court’s opinion in Stencel, distilling the reasons underlying the Feres exception to the FTCA, can be used more
efficiently by federal courts than it has been heretofore. That more efficient use can be accomplished if the courts will (1) accept the existence of a relationship between the underlying reasons and the Feres bar, and (2) examine each reason in light of the particular facts of each case. It remains clear from Brooks and Brown that the first reason, the availability of veterans' benefits, is not dispositive of the issue; an FTCA action may lie whether or not such benefits are available. Obviously, then, judicial attention must be focused on the other two reasons. The distinctively federal relationship between government and soldier should be subjected to a dual analysis. First, the court should determine, in a particularized manner, whether such a relationship existed between both the victim and the United States and the alleged tortfeasor and the United States. If either level of the distinctively federal relationship does not exist, that reason for the Feres bar should be deemed inapplicable. Second, if both levels of the relationship exist, the court should determine whether the conduct or decision of the alleged tortfeasor was uniquely military in nature. If it were not, there would be no impropriety in judging the reasonableness of that conduct or decision by state law, and the "distinctively federal" reason should be deemed inapplicable. If, on the other hand, the conduct or decision of the alleged tortfeasor was uniquely military in nature, application of state law would be inappropriate, and the "distinctively federal" reason should be deemed applicable. Finally, the court should decide whether judicial scrutiny of the allegedly negligent conduct or decision is likely to generate an adverse effect on military discipline. Where such an adverse effect seems unlikely, that reason for the Feres bar should be deemed inapplicable; where such an adverse effect seems likely, that reason should be deemed applicable. In that manner, the federal courts may make the most efficient use possible of the Stencel decision, facilitate the difficult task of deciding when the Feres bar applies, and achieve an increased consistency in those decisions.