PennState Dickinson Law

DICKINSON LAW REVIEW
PUBLISHED SINCE 1897

Volume 125 | Issue 3

Spring 2021

Feres: The "Double-edged Sword"

Kaitlan Price

Follow this and additional works at: https://ideas.dickinsonlaw.psu.edu/dlr

 Part of the Common Law Commons, Legal Writing and Research Commons, Legislation Commons, Litigation Commons, Medical Jurisprudence Commons, Military, War, and Peace Commons, and the Torts Commons

Recommended Citation

Kaitlan Price, *Feres: The "Double-edged Sword"*, 125 DICK. L. REV. 745 (2021).
Available at: https://ideas.dickinsonlaw.psu.edu/dlr/vol125/iss3/5

This Comment is brought to you for free and open access by the Law Reviews at Dickinson Law IDEAS. It has been accepted for inclusion in Dickinson Law Review by an authorized editor of Dickinson Law IDEAS. For more information, please contact lja10@psu.edu.

Comments

Feres: The "Double-edged Sword"

Kaitlan Price*

ABSTRACT

In *Feres v. United States*, the Supreme Court barred service members from suing the Government under the Federal Tort Claims Act if the injuries occurred "incident to military service." In establishing this doctrine, the Court discussed the necessity of protecting the military from lawsuits to ensure effective decision-making by military leaders.

Scholars have harshly criticized *Feres* in the modern era, arguing *Feres* must be overturned to provide service members with a greater opportunity for recovery. Specifically, many scholars admonish *Feres* because the Supreme Court failed to provide a clear definition of "incident to military service." Lacking a clear definition of "incident to military service," *Feres* has transformed into a blanket waiver of all military tort claims against the Government. This broad interpretation has led to the denial of justice to numerous soldiers throughout the country.

In May 2019, the Supreme Court denied certiorari to consider *Daniel v. United States*, where plaintiff asked the Court to overturn *Feres*. After the Supreme Court declined to hear

* J.D. Candidate, Pennsylvania State University Dickinson Law, 2021. Thank you to Jack Kerwin for providing me with necessary encouragement throughout writing this Comment. Thank you to Tessa Shurr for the endless assistance with this Comment. Thank you to Private First Class Michael Diaz for sparking my interest in this topic.

Daniel, it became evident that the Court has no intention of ever completely overturning the doctrine. Congress passed the National Defense Authorization Act in December 2019, allowing service members to file claims with the Department of Defense for medical malpractice injuries caused by the Government. While this exception is considered a victory, *Feres* remains a blockade to service members attempting to recover for non-medical tort claims through a court of law. This Comment will recommend the Supreme Court establish a consistent approach to defining "incident to military service" for the lower courts to apply.

TABLE OF CONTENTS

I. INTRODUCTION

"*Feres* was wrongly decided and heartily deserves the 'widespread, almost universal criticism' it has received."[1] Since the doctrine's creation in 1950, *Feres*'s bar on recovery for service members who incur injuries "incident to military service" provides the Government with a broad protection from tort lawsuits.[2] In practice, *Feres* effectively shields the Government from lawsuits by service members wrongfully injured at the hands of the military.[3]

In the modern era, *Feres* receives harsh criticism by service members, families of military personnel, and numerous scholars—all asking the Supreme Court to reconsider and overturn the doctrine.[4] *Feres*'s opponents argue the doctrine produces unjust results by creating a blanket waiver denying service members recovery for injuries that did not directly occur "incident to military service."[5] Because *Feres* receives extensive criticism, the Supreme Court must correct the doctrine's inadequacies to address the years of injustice inflicted on injured service members.[6]

Part II of this Comment will examine the history of the *Feres* doctrine.[7] This section will discuss the demise of sovereign immunity, which has permitted private citizens to sue the Government

1. United States v. Johnson, 481 U.S. 681, 700 (1987) (Scalia, J., dissenting).
2. *See* Andrew D. Popper, Comment, *Rethinking* Feres*: Granting Access to Justice for Service Members*, 60 B.C. L. REV. 1491, 1505–06 (2019).
3. *See id.*
4. *See infra* Section II.C.1.
5. *See infra* Section II.C.2.
6. *See* Popper, *supra* note 2, at 1499.
7. *See infra* Part II.

for tort injuries.[8] Next, this Comment will discuss the Supreme Court's creation of *Feres*'s "incident to military service" test and the rationales behind the doctrine's existence.[9] Further, this section will introduce the shortcomings and condemnations of the *Feres* doctrine in the modern era.[10]

Part III of this Comment will begin by examining the most recent attempts to solve *Feres*'s inadequacies, in both the Supreme Court and Congress.[11] Next, this Comment will discuss why the Supreme Court cannot completely overturn the *Feres* doctrine in the modern era.[12] Because *Feres* remains necessary for military discipline and effectiveness, Part III will recommend the Supreme Court define *Feres*'s "incident to military service" test consistently for the lower courts to apply.[13] This Comment will propose that the Supreme Court adopt the Eleventh Circuit's three-factor balancing test to define "incident to military service."[14]

By examining the duty status of the injured service member, the location where the service member's injury occurred, and "whether the service member's injuries resulted from following military orders or compulsion," the Eleventh Circuit's test will provide lower courts with a clear, consistent approach to defining "incident to military service."[15] Further, the Eleventh Circuit's test will ensure lower courts examine each case on a factual basis instead of utilizing *Feres* as a blanket waiver for all military tort claims.[16]

II. BACKGROUND

A. Enactment of the Federal Tort Claims Act, Granting Citizens the Right to Sue the Federal Government

1. Sovereign Immunity

Prior to 1946, the doctrine of sovereign immunity reigned supreme throughout the United States under the theory "the king can do no wrong."[17] In practice, sovereign immunity provided the Government with an almost complete protection from private citizens'

8. *See infra* Section II.A.
9. *See infra* Section II.B.
10. *See infra* Section II.C.
11. *See infra* Section III.A.
12. *See infra* Section III.B.
13. *See infra* Section III.C.
14. *See infra* Section III.C.
15. *See infra* Section III.C.
16. *See infra* Section III.C.
17. Popper, *supra* note 2, at 1493.

civil tort lawsuits.[18] Throughout the United States's history, sovereign immunity became a point of contention for individuals studying the values of constitutionalism.[19]

Constitutionalism requires a Government's commitment to protecting the fundamental rights of citizens.[20] Scholars resisting sovereign immunity argue this commitment is in obvious tension with sovereign immunity's protection to the Government from private tort lawsuits.[21] " [I]f the 'essence of civil liberty' is that the law provide remedies for violations of rights, immunizing Government from ordinary remedies is in considerable tension with all but the most formalist understandings of law and rights."[22] On the other hand, those supporting sovereign immunity argue a democracy should hesitate to apply ordinary court remedies to hold the Government accountable to private citizens.[23]

2. The Federal Tort Claims Act

Congress passed the Federal Tort Claims Act ("FTCA")[24] in 1946.[25] The FTCA broke the protective shield of sovereign immunity by granting private citizens the right to sue the U.S. Government in federal court for tort injuries.[26] The FTCA defines an "employee of the Government" to include officers or employees of any federal agency, members of the U.S. military or naval forces, members of the National Guard, persons acting on behalf of a federal agency, and any officer or employee of a federal public defender organization.[27]

Because Congress did not intend for the FTCA to be a sweeping grant of all lawsuits against the Government, lawmakers created a separate statute listing exceptions to the Government's liability under the FTCA.[28] While the FTCA's exceptions reveal Congress's effort to limit certain claims, this statute nevertheless opened the door for private citizens—including members of the armed forces—

18. See *id.*

19. *See* Vicki C. Jackson, *Suing the Federal Government: Sovereignty, Immunity, and Judicial Independence*, 35 GEO. WASH. INT'L L. REV. 521, 521 (2003).

20. *See id.*

21. *See id.*

22. *Id.*

23. *See id.*

24. 28 U.S.C. § 1346 (2019).

25. *See id.*

26. *See id.*

27. *See id.* § 2671.

28. *See id.* § 2680.

to sue the federal Government.[29] Of particular importance is the legislature's decision to omit members of the military from the FTCA's list of individuals barred from suing the Government.[30]

B. The Feres *Doctrine*

1. Creation of the Feres *Doctrine's "Incident to Military Service" Test*

The *Feres* doctrine's evolution dates back to 1949 when the Supreme Court examined the circumstances in which a service member could sue the Government under the FTCA.[31] In *Brooks v. United States*,[32] an army vehicle struck a civilian vehicle while traveling at night.[33] Of the three men in the civilian vehicle, two were members of the armed forces who had been performing a non-military activity at the time of the accident.[34] One service member passed away, and the others survived with lasting injuries as a result of the accident.[35] The surviving service member, along with the estate of the deceased, brought a negligence lawsuit against the U.S. Government.[36] The Government moved to dismiss plaintiffs' suit, arguing that the plaintiffs could not recover under the FTCA because of their status as members of the armed forces at the time of the accident.[37]

Examining the legislative history, language, and framework of the FTCA, the Supreme Court ruled in favor of the plaintiffs—finding their legal claim to be well founded.[38] The Supreme Court allowed the plaintiffs' FTCA suit despite their status as members of the armed forces, stating, "[We] are dealing with an accident which had nothing to do with [plaintiffs'] army careers, injuries not caused by their service except in the sense that all human events depend upon what has already transpired."[39] The Supreme Court further supported its decision by noting that the FTCA contained numer-

29. See, *e.g.*, Brooks v. United States, 337 U.S. 49, 54 (1949) (allowing plaintiffs to recover damages for injuries caused by the federal Government's negligence).

30. Tara Willke, Comment, *Military Mothers and Claims Under the Federal Tort Claims Act for Injuries that Occur Pre-Birth,* 91 NOTRE DAME L. REV. 160, 161 (2016).

31. *See Brooks*, 337 U.S. at 50.

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

33. *See id.* at 50.

34. *See id.* at 52.

35. *See id.* at 50.

36. *See id.*

37. *See id.*

38. *See id.* at 54.

39. *Id.* at 52.

ous exceptions, none of which exclusively bar a plaintiff's claim by virtue of being in the military.[40]

In 1950, the Supreme Court revisited the circumstances under which members of the armed forces could file FTCA suit against the Government.[41] In *Feres v. United States*,[42] the Supreme Court considered three cases within one cohesive opinion.[43] The first case involved the death of an active duty service member resulting from a fire erupting in the army barracks.[44] The second and third cases involved two active duty service members who received inadequate medical treatment by military staff members.[45] Because each case involved plaintiffs sustaining injuries while on active duty in the armed forces, the Supreme Court considered the cases as one.[46]

Noting that the three factual scenarios within *Feres* were wholly different than the factual scenario in *Brooks*, the Supreme Court denied plaintiffs any relief under the FTCA.[47] The Supreme Court noted one key distinction between the plaintiffs in *Feres* and *Brooks*.[48] While the *Brooks* plaintiffs were on furlough from their military service and performing a personal task, the *Feres* plaintiffs were injured during the performance of military tasks on an active duty military status.[49] The Supreme Court concluded that the Government is not liable under the FTCA for injuries to service members when their "injuries arise out of or are in the course of activity incident to [military] service."[50]

The Supreme Court listed two main rationales supporting its decision to bar FTCA lawsuits for a service member's injuries occurring "incident to military service."[51] First, the Supreme Court expressed its desire not to intrude on the distinctively federal relationship between members of the armed forces and the Government.[52] Next, the Court discussed the already existing and vast statutory compensation schemes for injured service members.[53]

---

40. See *id.* at 51.
41. *See* Feres v. United States, 340 U.S. 135, 138 (1950) (establishing the Supreme Court's "incident to military service" test).
42. Feres v. United States, 340 U.S. 135 (1950).
43. *Id.* at 136.
44. *Id.* at 136–37.
45. *Id.* at 137.
46. *Id.* at 138.
47. *Id.* at 138, 146.
48. *Id.* at 146.
49. *See id.*
50. *Id.*
51. *See id.* at 139–46.
52. *See Feres*, 340 U.S. at 143.
53. *See id.* at 144–45. Unlike the FTCA, these statutory compensation schemes impose no litigation requirement on a service member to receive benefits.

2. Rationales Supporting the Creation of the Feres *Doctrine*

a. The Distinctively Federal Relationship Between the Government and the Armed Forces

In *Feres*, the Supreme Court noted its desire not to interfere with the unique, distinctively federal relationship between the members of the armed forces and the federal Government.[54] Further, the Supreme Court recognized that no federal remedy has ever existed to explicitly grant service members the right to recover from the Government.[55] The *Feres* Court viewed this unique relationship—combined with the lack of an already existing federal remedy to service members—as a blockade to members of the armed forces using the FTCA to recover for injuries against the Government.[56]

In *United States v. Johnson*,[57] the Supreme Court provided a critical examination of the rationales supporting the *Feres* doctrine, including the federal relationship between members of the armed forces and the Government.[58] The Supreme Court explained that the unique "federal relationship is implicated to the greatest degree when a service member is performing activities incident to his federal service."[59] By virtue of performing a military function in diverse parts of the country, those service members subject themselves to a "significant risk of accidents and injuries."[60] Allowing FTCA suits would undermine the unique relationship service members have with their country, categorized by "mandates of command and order, discipline and responsibility, a commitment to country, and a respect for rules [and] regulations."[61]

b. The Existence of Separate Statutory Compensation Schemes for Service Members

In *Feres*, the Supreme Court noted the legislature created the FTCA for the primary purpose of extending a judicial remedy to

---

See id. at 145. A soldier simply needs to successfully file with the Veterans' Administration to be compensated for injuries. *See id*. For a comprehensive discussion of these statutes, see generally Figley, *In Defense of* Feres*: An Unfairly Maligned Opinion*, 60 AM. U. L. REV. 393, 454–57 (2010).

54. *See Feres*, 340 U.S. at 143.

55. *See id.* at 144.

56. *See id.* at 143–44.

57. United States v. Johnson, 481 U.S. 681 (1987).

58. *See id.* at 689.

59. *Id.*

60. *Id.* (quoting Stencel Aero Engineering Corp. v. United States 430 U.S. 666, 672 (1977)).

61. Popper, *supra* note 2, at 1520.

those citizens who had been without one.[62] The Supreme Court took special notice of service members already having access to reimbursement for injuries, stating, "This Court, in deciding claims for wrongs incident to service under the Tort Claims Act, cannot escape attributing some bearing upon it to enactments by Congress which provide systems of simple, certain, and uniform compensation for injuries or death of those in armed services."[63] The Supreme Court did not accept that Congress would have provided service members with such a comprehensive system of statutory benefits while at the same time contemplating recovery for service-related injuries under the FTCA.[64] Allowing service members to recover under the FTCA and also receive statutory compensation would permit dual recovery, a legal concept in which the Court did not favor.[65]

Further, some scholars argue that service members can benefit more from recovering under these statutory compensation schemes than attempting to recover under the FTCA.[66] The Veteran's Benefit Act (VBA)[67] is the main statutory compensation scheme discussed in military FTCA lawsuits.[68] Unlike the FTCA, the VBA provides "no fault" compensation that requires no litigation or obligation upon the service member to prove fault of the Government.[69] Instead, a service member—or the family member of a deceased service member—must simply fit the statutory requirements to receive compensation.[70] In addition to the ease of receiving VBA benefits, the amount of compensation veterans receive is extremely favorable.[71] These compensation schemes completely cover any of the service member's necessary medical care and provide "generous insurance, retirement, and other general benefits" that extend beyond tort recovery from the Government.[72]

---

62. *See* Feres v. United States, 340 U.S. 135, 140 (1950).

63. *Id.* at 144.

64. *See Johnson*, 481 U.S. at 690.

65. *See Feres*, 340 U.S. at 144.

66. *See* Popper, *supra* note 2, at 1520.

67. 38 U.S.C. §§ 1101–1163 (1986).

68. *See Johnson*, 340 U.S. at 685 n.2.

69. *See id.*; Popper, *supra* note 2, at 1520.

70. *See Feres*, 340 U.S. at 145 (stating the statutory compensation system requires no litigation).

71. *See id.*

72. *See* Popper, *supra* note 2, at 1520.

c. The Court's Desire to Avoid Interference with Military Discipline and Effectiveness

In *United States v. Johnson*, the Supreme Court added a third rationale supporting *Feres*'s creation that relates to military effectiveness.[73] Compliance with the military's rules, demands, discipline, chain of command, and teachings is vitally important to building an effective and lasting armed forces.[74] Upon joining the armed forces, men and women shed their civilian statuses and take a vow to meet the demands of discipline and duty to their country.[75] The Supreme Court has relied heavily on this notion of "military discipline" to justify the bar of military FTCA suits under the *Feres* doctrine.[76]

In *Johnson*, the Supreme Court barred a service member's FTCA lawsuit because permitting military claims "would involve the judiciary in sensitive military affairs at the expense of military discipline and effectiveness."[77] The Court recognized that the military is a "specialized society" where obedience, community, and commitment are paramount to a unit's success.[78] In essence, the Court feared an FTCA suit would require military personnel to testify in a court of law to their decisions in the midst of combat, stating, " [A] suit based upon a service-related activity necessarily implicates the military judgements and decisions that are inextricably intertwined with the conduct of a military mission."[79] Such a requirement would potentially undermine the commitment essential to having an effective and lasting armed forces.[80]

C. Current Problems with the Feres *Doctrine*

1. The Feres *Doctrine Endures Widespread Criticism*

a. Early Criticism from the Supreme Court

Since 1987, the *Feres* doctrine has endured widespread criticism from Supreme Court Justices.[81] In *Johnson*, Justice Antonin Scalia discussed the problems with the *Feres* doctrine in a dissenting

73. *See Johnson*, 481 U.S. at 690.

74. Popper, *supra* note 2, at 1522.

75. *See* Jeffrey A. Critchlow, Note, *Propping Open the Courthouse Door: Why Service Members Should Be Able to Bring Sexual Harassment Suits Under the* Feres *Doctrine*, 104 IOWA L. REV. 856, 862 (2019).

76. *See id.*

77. *Johnson*, 481 U.S. at 690 (quoting United States v. Shearer, 473 U.S. 52, 59 (1985)).

78. *See id.* at 690–91.

79. *Id.* at 691.

80. *Id.*

81. *See id.* at 692–703 (Scalia, J., dissenting).

opinion joined by Justices William Brennan, John Marshall, and John Paul Stevens.[82] In his dissent, Justice Scalia stated, "*Feres* was wrongly decided and heartily deserves the 'widespread, almost universal criticism' it has received."[83] Justice Scalia further presented his view discussing why the Supreme Court majority's rationalizations of *Feres* are weak upon a critical examination.[84]

While statutory compensation schemes do provide relief to injured service members, that relief can be terminated if a service member does not fit the qualifications of the statute.[85] Further, Justice Scalia questioned the Supreme Court majority's inconsistent rationale of disallowing dual recovery.[86] Specifically, Justice Scalia pointed to the Supreme Court's allowance of dual recovery—under both the VBA and the FTCA—in the past.[87] For example, the *Brooks* Court allowed the plaintiffs to recover both under the FTCA and the VBA.[88]

Further, Justice Scalia examined why the Supreme Court majority's rationale of "protecting military discipline" is weak when critically examined.[89] Justice Scalia stated,

> To the extent that reading the FTCA as it is written will require civilian courts to examine military decisionmaking and thus influence military discipline, it is outlandish to consider that result "outlandish" . . . . If [plaintiff's] helicopter had crashed into a civilian's home, the homeowner could have brought an FTCA suit that would have invaded the sanctity of military decisionmaking no less than [plaintiff's].[90]

After examining the shortcomings related to the *Feres* doctrine's rationales, Justice Scalia discussed the moral wrongfulness behind the doctrine's bar to service members' recovery under the FTCA.[91] If Johnson's death had occurred while he flew a commercial, civilian plane, his family members could have recovered for the loss of their father and husband.[92] However, because Johnson devoted his life to serving his country in the armed forces, the Su-

82. *See id.*
83. *Id.* at 700.
84. *See id.* at 697–702.
85. *See id.* at 698.
86. *See id.* at 697.
87. *See Johnson*, 481 U.S. at 697.
88. *See id.*
89. *See id.* at 700.
90. *.Id.*
91. *See id.* at 703.
92. *Id.*

preme Court denied his family justice by barring suit under the FTCA.[93]

b. Modern Criticism from the Supreme Court

In *Daniel v. United States*,[94] the Supreme Court again had the opportunity to discuss the shortcomings of the *Feres* doctrine.[95] Without providing any rationale behind the decision, the Supreme Court declined to hear Daniel's argument in favor of overturning *Feres*.[96] Although the Supreme Court denied certiorari, JUSTICE CLARENCE THOMAS revealed his position on the *Feres* doctrine in his dissenting opinion.[97]

In his dissenting opinion of *Daniel*, JUSTICE THOMAS discussed another recent case—*Air & Liquid Systems Corp. v. DeVries*[98]— in which two veterans developed cancer from asbestos exposure caused by the navy's negligence.[99] Although the manufacturer delivered equipment to the navy without asbestos, the navy added the asbestos to the equipment after delivery.[100] Because the service members knew they would be denied recovery under the FTCA, the plaintiffs sued the manufacturers instead.[101] "[T]he Supreme Court then twisted traditional tort principals to afford [plaintiffs] the possibility of relief" by allowing them to sue a party not directly responsible for the injury.[102]

In the closing paragraph of his dissenting opinion, JUSTICE THOMAS stated his distaste for the *Feres* doctrine by asserting, "Such unfortunate repercussions—denial of relief to military personnel and distortions of other areas of law to compensate—will continue to ripple through our jurisprudence as long as the Court refuses to reconsider *Feres*."[103] The longstanding issues with the *Feres* doctrine have stemmed from the inconsistent methods in which the Circuit Courts and District Courts have defined *Feres*'s "incident to military service" test.[104]

93. *Id.*
94. Daniel v. United States, 139 S. Ct. 1713 (2019).
95. *See id.* at 1713.
96. See *id.*
97. *See id.* at 1713–14 (THOMAS, J., dissenting).
98. Air & Liquid Sys. Corp. v. DeVries, 139 S. Ct. 986 (2019).
99. *Daniel,* 139 S. Ct. at 1713 (THOMAS, J., dissenting).
100. *Id.*
101. *Id.* at 1714.
102. *Id.*
103. *Id.*
104. *See* Popper, *supra* note 2, at 1497.

2. *Circuit Courts Are Struggling to Define* Feres*'s "Incident to Military Service" Test*

Considering the current *Feres* environment, scholars reason the main problem with the doctrine is the Circuit Courts' "wistful and unenthusiastic" approach to examining military FTCA cases.[105] Rather than interpreting *Feres*'s "incident to military service" test on a case-by-case basis, the Circuit Courts interpret *Feres* as a broad bar of all FTCA suits brought by military personnel.[106] Although the Circuit Courts publicly denounce *Feres*, the courts still apply the doctrine as binding precedent providing for a blanket waiver of all military FTCA claims—not just those injuries occurring "incident to military service."[107] The most common cases of injustice under *Feres* are lawsuits against the Government pertaining to medical malpractice and sexual harassment within the military.[108] A closer examination of various Circuit Court and District Court case law will exemplify the current problem with the interpretation of *Feres*.

The first example of the D.C. Circuit's constrained application of *Feres*'s "incident to military service" test is *Doe v. Hagenbeck*.[109] While attending West Point Military Academy, a fellow West Point cadet sexually assaulted the plaintiff, Jane Doe.[110] The assault took place after hours and against the regulations of West Point Military Academy.[111] Doe filed suit against the two military officers in charge of administration, training cadets, and overseeing the "Sexual Assault Review Board."[112]

Although this assault occurred after hours, against military regulation, and not during any military training exercise, the D.C. Circuit concluded plaintiff's injury occurred "incident to military

105. *See id.* at 1537.

106. *See id.* at 1497.

107. *See id.* at 1537. In Costo v. United States, the court states,

> We apply the *Feres* doctrine here without relish. Nor are we the first to reluctantly reach such a conclusion under the doctrine. Rather, in determining the suit to be barred, we join the many panels of this Court that have criticized the inequitable extension of this doctrine to a range of situations that seem far removed from the doctrine's original purpose.

Costo v. United States, 248 F.3d 863, 869 (9th Cir. 2001).

108. *See* Popper, *supra* note 2, at 1505–6.

109. Doe v. Hagenbeck, 870 F.3d 36 (D.C. Cir. 2014)(denying a service member plaintiff recovery from those tasked to oversee cadets based on *Feres*'s "incident to military service" test).

110. *Id.* at 39.

111. *Id.*

112. *Id.* at 38.

service."[113] The D.C. Circuit based the decision to bar Doe from recovering against her supervisors on her active duty status.[114] Further, the D.C. Circuit explained that allowing Doe recovery would force the court to require military leaders to testify and "convince a civilian court of the wisdom of a wide range of military and disciplinary decisions."[115] *Doe* is just one example of many sexual assault victims denied FTCA recovery as a result of the court applying an overly broad definition of *Feres*'s "incident to military service" test.[116]

Another example of a Circuit Court broadly applying *Feres*'s "incident to military service test" is *Ortiz v. United States*,[117] decided by the Second Circuit.[118] Active duty Air Force Captain Heather Ortiz gave birth to her son at Evans Army Community Hospital.[119] The primary patients of Evans Army Community Hospital—owned and operated by the military—are service members and their families.[120] During Ortiz's cesarean section, the hospital staff negligently administered her drugs, deprived herself and her newborn baby of oxygen, and caused severe injuries to Ortiz's newborn child.[121] Ortiz's husband filed an FTCA suit against the Government in an attempt to receive compensation for the child's injuries and long-term medical care.[122]

Although the Second Circuit noted the "confusion and lack of uniform standards" surrounding the *Feres* doctrine, the court reluctantly denied Ortiz's husband FTCA relief for her newborn child's injuries and care.[123] The basis of this decision fell solely on the fact that the injuries occurred at a hospital primarily serving military members and their families.[124] Within the Second Circuit's opinion, the court gave an extensive background of the *Feres* doctrine's inconsistencies.[125] Nevertheless, the Second Circuit denied Ortiz

113. *See id.* at 49.
114. *See id.* at 47, 49.
115. *Id.* at 48 (quoting United States v. Shearer, 473 U.S. 52, 58 (1985)).
116. *See*, *e.g.*, Cioca v. Rumsfeld, 720 F.3d 505, 507 (4th Cir. 2013); Klay v. Penetta, 758 F.3d 369, 369 (D.C. Cir. 2014) (denying service member plaintiff FTCA recovery for injuries occurring from a sexual assault).
117. Ortiz v. United States, 786 F.3d 817 (2d Cir. 2017) (denying a service member plaintiff from receiving FTCA recovery to care for her newborn child after army medical staff negligently treated the child).
118. *See id.*
119. *Id.* at 819.
120. *Id.* n.1.
121. *See id.*
122. *Id.*
123. *See id.* at 822–23.
124. *See id.* at 823.
125. *See id.* at 822–23.

FTCA relief and accepted that the court is constrained by *Feres*'s "incident to military service test."[126]

Similar to *Ortiz*, *Glaude v. United States*[127] is another medical malpractice case exemplifying a court's denial of relief to a service member after a military hospital negligently treated her.[128] Captain Joann Glaude sustained injuries after a sting ray stung her foot while vacationing in Florida.[129] As a member of the armed forces, the nearby Tyndall Air Force Base permitted Glaude to receive treatment at the base's medical center.[130] After the Tyndall Air Force Base provided Glaude with negligent medical treatment, she sustained further injuries.[131] Glaude attempted to sue the Government under FTCA, but the District Court for the Northern District of Florida barred Glaude's lawsuit because her injury occurred "incident to military service."[132]

Although the court recognized that Glaude's injuries in no way arose out of any combat or military-conducted training activity, the court found great importance in the fact that Glaude's ability to receive treatment at the Tyndall Air Force Base took place "by virtue of her military status."[133] In making this decision, the court supported the notion that *Feres*'s "incident to military service" test includes injuries that did not directly arise out of a service member's duty to the military in a combative sense.[134] Rather, a service member could be denied recovery simply because that soldier received medical care at a military facility.[135]

126. *See id.*
127. Glaude v. United States, 381 F.Supp. 2d 1328 (N.D. Fla. 2005) (denying a service member plaintiff FTCA recovery after army medical staff negligently treated her).
128. *See id.* at 1331.
129. *Id.* at 1328.
130. *Id.*
131. *See id.*
132. *See id.* at 1331.
133. *See id.*
134. *See id.*
135. *See id.*

III. ANALYSIS

A. Recent Attempts to Solve Feres*'s Inadequacies and Grant Service Members More Opportunity for Recovery*

1. The Supreme Court's refusal to reconsider Feres *in* Daniel v. United States

Daniel v. United States is the most recent attempt to overturn the lasting impact of the *Feres* doctrine in the Supreme Court.[136] In *Daniel*, the spouse of Navy Lieutenant Rebekah Daniel attempted to sue the Government to recover for his wife's death.[137] Rebekah Daniel passed away during childbirth when a complication arose due to the negligence of the military hospital staff.[138] The District Court for the Western District of Washington determined that the *Feres* doctrine barred the suit because Daniel's injuries occurred "incident to her military service."[139] Upon petition to the Supreme Court, the plaintiff asked the Court to reconsider the *Feres* doctrine in the modern era.[140] Although JUSTICE CLARENCE THOMAS and Justice Ruth Bader Ginsburg both voiced their desire to grant certiorari and consider *Daniel*, the majority declined to hear the case on May 20, 2019.[141]

Because the Supreme Court denied consideration of *Daniel*, national court reporters inferred this decision signified the Court's handing off of *Feres*'s issues to Congress.[142] Ultimately, the Supreme Court's decision not to hear *Daniel* imposes on Congress the duty to solve the discrepancies associated with the *Feres* doctrine.[143] Natalie Khawam, an attorney arguing in support of the discontinuation of the *Feres* doctrine in the modern era, stated, "Congress now has the opportunity to fix this injustice. We need to stand up and ask Congress to support our troops."[144]

2. The National Defense Authorization Act of 2020

In 2019, Congress increased its efforts to solve the *Feres* doctrine's deficiencies, beginning with introducing the Sergeant First

136. *See* Daniel v. United States, 139 S. Ct. 1713, 1713 (2019).
137. *Id.*
138. *Id.*
139. *Id.*
140. *See id.*
141. See *id.*
142. *See* Leo Shane III, *Supreme Court Rejects Bid to Overturn Prohibition on Military Malpractice Cases*, MIL. TIMES (May 20, 2019), bit.ly/37slQ6U [https://perma.cc/6UCU-Y4GA].
143. *See id.*
144. *Id.*

Class (SFC) Richard Stayskal Military Medical Accountability Act of 2019 (MMAA).[145] SFC Richard Stayskal is an army special forces solider currently battling the final stages of lung cancer.[146] The progression and severity of Stayskal's cancer resulted from the failure of army medical staff to alert him of a tumor, despite the tumor appearing on medical scans.[147] By the time private practitioners alerted Stayskal of his cancer, the tumor had already reached a stage four, terminal prognosis.[148] Because of the *Feres* doctrine, a court of law will not allow Stayskal's family to recover under the FTCA for the military's negligent treatment of Stayskal.[149]

Congresswoman Jackie Speier, the sponsor of the MMAA, argued for the passage of this act to combat 70 years of injustice to service members.[150] The MMAA aimed to provide recovery to service members—or the family of service members—injured by the negligent actions of military medical staff in a noncombative setting.[151] While noting that the *Feres* doctrine is generally outdated, Congresswoman Speier focused on overriding *Feres* in the specific area of medical malpractice.[152]

In 2020, Congress took active steps toward increasing a service member's chances of recovery when the 2019 National Defense Authorization Act(NDAA)[153] adopted portions of the MMAA.[154] On December 20, 2019, President Donald J. Trump signed the NDAA, enacting the act as law to take effect in the upcoming year.[155] NDAA Section 729 contains an updated version of the MMAA, allowing service members and their families to file Department of Defense (DOD) claims to receive compensation for injuries arising out of a negligent act in the performance of medical care at a military medical treatment facility.[156]

---

145. Sergeant First Class Richard Stayskal Military Medical Accountability Act of 2019, H.R. 2422, 116th Cong. (2019).

146. 165 CONG. REC. H762 (daily ed. Sept. 10, 2019) (statement of Rep. Jackie Speier).

147. *Id.*

148. *Id.*

149. *Id.*

150. *See id.*

151. *See id.*

152. *See id.*

153. National Defense Authorization Act for Fiscal Year 2020, S. 1790, 116th Cong. (2020).

154. *See id.*

155. *See id.* § 729.

156. *See id.*

While reporters consider the passage of Section 729 within the NDAA a victory for service members, this Act falls short of being deemed a perfect solution.[157] First, skeptics acknowledge that the passage of this Act does not overturn *Feres*'s precedent.[158] *Feres*'s "incident to military service" test continues to govern whether a court can allow a service member to sue the Government for injuries occurring during military service.[159] Further, this exemption applies only to the military's medical malpractice in non-combative settings.[160] Finally, the specificity of the Act still fails to provide all service members—including sexual assault survivors—with a path to justice and relief.[161]

Another problem with the NDAA's medical malpractice exception is the Act's grant of power to the DOD, giving the Department the sole authority to establish the standards for judging the merits of each claim and the damages resulting from each claim.[162] If the DOD runs the claims process, the Department could act in its own self-interest by creating strict standards to deny justice to many victims.[163] Further, the DOD needs to provide compensation to victims only if their damages result in injuries under $100,000.[164] If a service member's injuries result in damages more than $100,000, the recovery process is further complicated because the DOD will outsource the service member's claim to the Department of Treasury for compensation.[165] While Section 729 is considered a victory for service members suffering from medical malpractice by military doctors, the NDAA is far from perfect to fix all of *Feres*'s discrepancies.[166]

3. The Eleventh Circuit's Approach to Defining Feres*'s "Incident to Military Service" Test*

Although many of the aforementioned Circuit Courts broadly interpret *Feres*'s "incident to military service test" as a blanket

157. *See* Richard A. Custin, *Congress Grants Military Members Partial Victory, but* Feres *Doctrine Survives,* THE HILL (Dec. 20, 2019, 1:00 PM), bit.ly/37tZH8b [https://perma.cc/7232-HZ7H].

158. *See id.*

159. *See id.*

160. *See id.*

161. *See id.*

162. *See* Patricia Kime, *A Dent to Feres: Troops to Be Able to File Claims—But Not Sue—for Medical Malpractice*, MIL. TIMES (Dec. 11, 2019), bit.ly/2Rr5bLm [https://perma.cc/5S3K-36RD].

163. *See id.*

164. *See id.*

165. *See id.*

166. *See id.*

waiver of all military FTCA claims, the Eleventh Circuit has crafted an effective test to analyze military FTCA suits.[167] In *Pierce v. United States*,[168] the Eleventh Circuit adopted a three-factor balancing test to examine whether a service member's injury occurred "incident to military service" for the purpose of *Feres*.[169] Under the three-factor balancing test, the court considers 1) the service member's duty status, 2) the location of the service member's injury, and 3) the service member's activity at the time of the injury.[170] After weighing the three factors, the court should determine whether the injury occurred "incident to military service based on the totality of the circumstances."[171] While no factor is dispositive, the Eleventh Circuit suggests the most important factor to consider in this analysis is the service member's activity at the time of injury.[172]

When examining the duty status of a service member, *Pierce* requires a court look to whether the military granted the service member a "furlough" or "pass" at the time of the injury.[173] If a service member receives permission to leave his or her post, exercises the right to be absent from his or her regular duties, and has "discretionary time off," this factor will weigh in favor of a court finding the service member's injuries did not occur "incident to military service."[174] If, however, the service member is active duty and must still attend to his or her daily military tasks, this factor will weigh in favor of a court concluding the injury occurred "incident to military service."[175]

Further, the site of an injury can inform whether the injury occurred "incident to military service."[176] If the service member's injury occurs on a military base or within military owned property, the likelihood that the service member's injury arose during a military activity is high.[177] If the injury occurred off the military base,

167. *See, e.g.*, Parker v. United States, 611 F.2d 1007, 1013 (5th Cir. 1980) (following a three-factor analysis to examine military FTCA claims under *Feres*'s "incident to service" test).

168. Pierce v. United States, 813 F.2d 349 (11th Cir. 1987) (allowing a service member plaintiff to recover for injuries that did not occur "incident to military service").

169. See *id.* at 352.

170. *Id.* at 353.

171. *Id.* (quoting *Parker,* 611 F.2d at 1013).

172. *See id.*

173. *See id.*

174. *See id.*

175. *See id.*

176. *Id.*

177. *Id.*

this factor weighs in favor of a court concluding the service member's injuries did not occur "incident to military service."[178]

Finally, the service member's activity at the time of the injury is the most dispositive factor in determining whether the soldier's injury occurred "incident to military service."[179] In *Pierce*, an army vehicle struck plaintiff while he engaged in the personal activities of eating lunch and visiting a pawn shop.[180] The Government argued plaintiff's activities were "proximately" related to military duties because those duties are part of everyday life as a soldier.[181]

Rejecting the Government's argument that the court must consider every activity in the life of a soldier a military activity under *Feres*, the Eleventh Circuit chose to adopt a new standard for defining a "military activity."[182] This standard examines whether the plaintiff's injury occurred while he was directly subject to the military's control, under the compulsion of military orders, or performing a military mission.[183] The court did not view pawning a camera, eating lunch, or operating a civilian vehicle as activities performed under the compulsion of military orders or during a military mission.[184] Overall, the court concluded that the plaintiff's injuries did not occur "incident to military service," allowing him to recover under the FTCA.[185] In recent years, the Eleventh Circuit has followed *Pierce*'s three-factor balancing test to determine whether a service member's injuries occur "incident to military service."[186]

B. The Supreme Court Should Not Overturn Feres

Feres is a "double-edged sword." While many scholars argue the Supreme Court should completely abandon the doctrine, this approach would prove extremely difficult.[187] Although *Feres* receives consistent criticism, the Court has accepted and ratified this doctrine for the past 60 years.[188] If the Supreme Court took such a severe approach as to completely overturn *Feres*, the Court would be abandoning over 60 years of legislative interpretation related to

178. *Pierce,* 813 F.2d at 353.
179. *Id.* at 354.
180. *Id.*
181. *Id.*
182. *See id.*
183. *Id.*
184. *Id.*
185. *Id.*
186. *See*, *e.g.*, Whitley v. United States, 170 F.3d 1061, 1061 (11th Cir. 1999) (allowing recovery for a service member killed while returning from a civilian soccer game).
187. *See* Figley, *supra* note 53, at 473.
188. *See id.*

the doctrine.[189] Although the Supreme Court has the authority to overturn *Feres*, this approach could cause additional harm by forcing the Court to start over in creating precedent dictating when a service member will have a successful FTCA suit.[190]

Further, the Supreme Court should not overturn *Feres* because the military remains a distinctively federal force in the modern era.[191] Finally, service members still receive vast benefits from the VBA for injuries occurring during their military service.[192] With the addition of the NDAA Section 729 allowing citizens to sue the military for medical malpractice, service members enjoy even more access to compensation schemes now than they did upon *Feres*'s creation.[193] It is unlikely the Supreme Court will ever elect to completely overturn the *Feres* doctrine.[194]

C. The Supreme Court Should Provide a Clear, Consistent Definition of "Incident to Military Service"

The Supreme Court should adopt the Eleventh Circuit's test to defining "incident to military service" for military FTCA lawsuits. While no one solution may solve all of *Feres* shortcomings, the Eleventh Circuit has crafted an effective test to define "incident to military service."[195] The test allows service members to sue the Government under the FTCA for injuries—caused by the military—that did not occur under military orders or compulsion.[196] The Eleventh Circuit's test supports the Supreme Court's original aspirations for the treatment of military FTCA claims established via *Brooks* in 1950.[197] The *Brooks* Court allowed the military plain-

189. *See id.*
190. *See id.*
191. *See id.* at 452.
192. *See id.* at 454.
193. *See* Kime, *supra* note 162.
194. *See* Joan M. Bernott, *Fairness and* Feres*: A Critique of the Presumption of Injustice*, 44 WASH. & LEE L. REV. 51, 62 (1987).
195. *See* Pierce v. United States, 813 F.2d 349, 353 (11th Cir. 1987).
196. *See supra* Section III.A.3 (describing the Eleventh Circuit's three-factor balancing test to define "incident to military service").
197. *See* Lester S. Jayson & Robert C. Longstreth, *Claims Involving Members of the Armed Forces: Brooks Doctrine Held Applicable*, *in* HANDLING FEDERAL TORT CLAIMS 1 (83rd ed. 2019).

> In cases in which the courts have held the *Brooks* doctrine controlling, rather than the *Feres* doctrine, the opinions generally have emphasized, *first,* that at the time of the accident the claimant-serviceman was on leave or furlough or pass; *second*, that the accident occurred away from the military base where he was stationed; and *third,* that at the time of the accident he was not under compulsion of military orders or performance any military mission or directly subject to military control.

Id.

tiffs to recover under the FTCA when an army vehicle struck their civilian vehicle.[198] Paramount to the Supreme Court's analysis, the army vehicle struck furloughed service members performing civilian tasks.[199] The Court granted recovery by finding the plaintiffs' injuries did not occur by virtue of their status in the military, stating, "[W]e are dealing with an accident which had nothing to do with [plaintiffs'] army careers, injuries not caused by their service except in the sense that all human events depend upon what has already transpired."[200]

IV. CONCLUSION

Although courts have applied the *Feres* doctrine for the past 60 years, *Feres*'s "incident to military service" test does not function as originally intended.[201] Rather than examining each case on a factual basis as the Court did in *Brooks*, many Circuit Courts apply *Feres* as a blanket waiver to bar all service members from suing the Government in FTCA actions.[202] Under this broad interpretation of *Feres*, the judicial system has denied justice to numerous injured service members.[203]

While the passage of the NDAA certainly is a victory for those service members injured due to the medical malpractice of military doctors, this exception does not provide any further recovery under *Feres* for victims of sexual assault.[204] To provide all service members with fair access to recovery, the Supreme Court should adopt the Eleventh Circuit's three-factor balancing test as binding precedent for all of the lower courts to apply.[205] Adopting the Eleventh Circuit's test will ensure that courts approach *Feres*'s "incident to military service" test by conducting a factual analysis of each case before the court.[206] Further, this test will make certain that courts can deny a service member recovery under *Feres* only if the service member's injuries occurred during a true military activity.[207]

198. *See* Brooks v. United States, 337 U.S. 49, 54 (1950).
199. *Id.* at 50.
200. *Id.* at 53.
201. *See supra* Section II.C.
202. *See supra* Section II.C.
203. *See supra* Section II.C.
204. *See supra* Section III.A.2.
205. *See supra* Section III.C.
206. *See supra* Section III.C.
207. *See supra* Section III.C.