No. _____

IN THE

Supreme Court of the United States

MICHAEL PURCELL, individually and as special administrator of the Estate of CHRISTOPHER LEE PURCELL, deceased,

Petitioner,

v.

UNITED STATES,

Respondent.

On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In 1946, Congress enacted the Federal Tort Claims Act (FTCA), 28 U.S.C. §§ 1346(b), 2671-2680, which waives federal sovereign immunity for certain tort actions including claims of active duty servicemembers arising out of activities analogous to civilian life. In *Feres v. United States*, 340 U.S. 135 (1950), the Court created an extra-textual exception to the FTCA barring all claims that "arise out of or are in the course of activity incident to service." Since *Feres*, lower courts have groped for a definition of activity incident to service. The result of decades without any direction is an ever expanding definition of "activity incident to service" which directly conflicts with Supreme Court precedent and the FTCA.

The questions presented in this case are:

1. Whether, in view of the pervasive misinterpretation of *Feres*, "activity incident to service" must be defined in order for the *Feres* doctrine to remain viable.

2. Whether this Court should overrule *Feres* and follow the plain text and congressional intent of the Federal Tort Claims Act allowing claims of active duty servicemembers.

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PETITION FOR WRIT OF CERTIORARI

Michael Purcell, individually and as special administrator of the Estate of Christopher Lee Purcell, deceased, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

INTRODUCTION

This case presents the Court with an opportunity to either craft a clear definition of incident to service that can be evenly applied by the circuits or overturn the *Feres* doctrine entirely and follow the text of the FTCA.

In *Feres v. United States,* 340 U.S. 135 (1950), the Court crafted an extra-textual exception to the Federal Tort Claims Act ("FTCA"), to bar tort claims against the government by active duty servicemembers injured in activities incident to service. This rule is now ineffectual. The Court did not define incident to service in either *Feres* or *Brooks* nor has it since offered a definition for incident to service. In the 62 years since *Feres* courts have offered many justifications for the incident to service test but the Court has never set parameters for it. The Court proffered reasoning for the incident to service test but the circuits are directed not to apply it. The circuits are left with no direction on what is an activity incident to service. The current formulation of the *Feres* doctrine effectively declares that servicemembers are not equal citizens, as their rights against their government are less than the rights of their fellow Americans. This judicially-

created classification and muddled definition of incident to service run afoul of the Equal Protection clause of the 14th and 5th Amendments.

This Court should define incident to service so that *Feres* can be evenly applied by the circuits in compliance with precedent, the FTCA, and the Equal Protection clause of the 14th and 5th Amendments. The best solution is to define what is not an activity incident to service. An activity that is analogous to civilian life is not incident to service. There are many situations completely unique to military life such as combatant activities, the provision of free medical care at military hospitals, and claims regarding negligent supervision or infringing on the unique relationship of superiors and subordinates. Supreme Court precedent makes clear that when a servicemember is receiving some special benefit, engaged in a military mission, or making claims against a superior officer his claims are barred by *Feres*. Claims that arise out of activities that are analogous to civilian life such as those made by Petitioner should be allowed to proceed under *Feres*.

Rather than defining incident to service within the *Feres* doctrine framework this Court should overturn *Feres* and follow the FTCA as Congress intended. For the past 62 years, lower courts have struggled to apply the ill-defined doctrine while decrying its harsh results and calling for the Court to overrule *Feres*.

The FTCA was enacted as a broad waiver of sovereign immunity from tort liability for the negligent or wrongful acts of federal government employees. Although the FTCA contains a list of

specific exceptions to this expansive waiver of immunity none expressly precludes all claims by servicemembers. In fact, the only statutory exception that mentions military personnel creates a limited exception for "[a]ny claim arising out of the combatant activities of the military or naval forces, or the Coast Guard, during time of war." 28 U.S.C. § 2680(j). Nonetheless, *Feres* holds that servicemembers cannot bring claims against the government for injuries that "arise out of or are in the course of activity incident to service." 340 U.S. at 146. In 1987, by a 5-4 vote, the Court in *Johnson* reaffirmed the *Feres* doctrine without a single reference to the text of the FTCA. *United States v. Johnson*, 481 U.S. 681 (1987). This Court should apply fundamental cannons of statutory interpretation and overrule the *Feres* doctrine because it is a completely illogical, immoral, and an incorrect interpretation of the FTCA.

OPINIONS BELOW

The court of appeals' opinion (App. 1-10, 21) is not reported. The district court's order (App. 11-20) is not reported.

JURISDICTION

The court of appeals entered its judgment on August 24, 2011. A petition for rehearing was denied on October 25, 2011. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

This case involves a judicially created exception grafted onto the Federal Tort Claims Act ("FTCA"), 28 U.S.C. § 1346 *et seq.* The pertinent provisions of the FTCA are reproduced at App. 22-27.

STATEMENT

Christopher Purcell died as a result of the negligent acts and omissions of local law enforcement at Brunswick Naval Air Station. Purcell's father, Michael Purcell, brought this suit against the government on behalf of his son's estate.

On the night of January 27, 2008, after an afternoon of heavy drinking alone in his apartment, Christopher told strangers in an online chat room that he was going to kill himself. Fortunately, one person in the chat room notified Christopher's sister, Kristen, that he had a .357 magnum revolver and planned to kill himself. Kristen then told her parents. Around 8:00 p.m. Michael Purcell contacted the base to notify local law enforcement that his son had a gun and was poised to commit suicide. Christopher was alive when law enforcement officers arrived at his apartment.

Navy security dispatch informed local law enforcement of the situation. Among the first local law enforcement officers to arrive at Christopher's apartment were Department of Defense ("DoD") Police Officers and a Navy Officer. All were informed that Christopher had a gun and wanted to end his life. The investigating officers "searched" the

premises and found no weapon. Officers found an empty gun case, a receipt for a Ruger .357 magnum revolver, and a box of bullets with one shell missing. Despite all this evidence that Christopher had a .357 magnum, local law enforcement never searched his person.

After searching the premises, but not Christopher, one of the officers spoke to Christopher and suggested they go outside to talk. Once outside, one of the officers wisely insisted on handcuffing Christopher for his own safety. Christopher became belligerent when they attempted to handcuff him. A struggle ensued and the officers threw Christopher onto the frozen ground. Christopher was then escorted back upstairs to his apartment for medical attention as a result of being handcuffed. Local law enforcement failed to search Christopher even after he was in custody.

Once upstairs, Christopher asked to go the bathroom alone but the officer insisted he be accompanied. Christopher conceded but was adamant that his friend, rather than anyone from local law enforcement, go with him. After one handcuff was removed, Christopher went into the bathroom, turned his back to his friend, pulled his .357 magnum from his waistband, and shot himself in the chest.

Christopher had been carrying his .357 magnum the entire time investigating officers were in his apartment. No Navy or Department of Defense personnel present at any time, either before or after placing Christopher in restraints, conducted a search

of his person despite the fact that they knew that he had a .357 magnum.

After exhausting the administrative process, Petitioner filed a complaint in the Northern District of Illinois alleging that Navy and DoD personnel were negligent in their apprehension and detention of Christopher Purcell. Petitioner alleged the trial court had jurisdiction pursuant to the FTCA. The government moved to dismiss for lack of subject matter jurisdiction, claiming that the suit is barred under *Feres* and its progeny. The district court reluctantly dismissed Petitioner's case.

On appeal to the Seventh Circuit, Petitioner argued that Purcell's death was wholly unrelated to his military status and that the proper test for determining whether an activity was incident to service was whether the incident was parallel to civilian life. Despite stating "Feres was wrongly decided and heartily deserves the widespread, almost universal criticism it has received," *quoting United States v. Johnson*, 481 U.S. 681, 700 (1987) (Scalia, J., dissenting, joined by Brennan, Marshall, and Stevens, JJ.) the Seventh Circuit begrudgingly affirmed. The court stated that, "[l]ike many courts and commentators, we recognize the challenges presented by the *Feres* doctrine. In light of its enormous breadth, however, we affirm the judgment of the district court." App. 9.

Petitioner moved for rehearing on October 6, 2011 asking the Seventh Circuit to adopt a clear definition of "activity incident to service." The petition for rehearing was denied on October 25, 2011. App. 21.

REASONS FOR GRANTING THE PETITION

I. "ACTIVITY INCIDENT TO SERVICE" IS ILL DEFINED AND AS A RESULT SEVERAL CIRCUITS ARE APPLYING THE *FERES* DOCTRINE IN VIOLATION OF SUPREME COURT PRECEDENT AND THE 5TH AND 14TH AMENDMENTS.

A. The Supreme Court's creation of the "activity incident to service" standard without any clear direction for the several circuits on how to define "incident to service" yields unpredictable results contrary to precedent.

The Supreme Court created a standard to bar claims by service members under the FTCA in *Brooks v. United States* and refined this test in *Feres v. United States.* The Supreme Court did not define "activity incident to service" in *Feres* nor has it since.

Shortly after the FTCA was enacted, the Supreme Court decided *Brooks v. United States,* 337 U.S. 49 (1949). In *Brooks* the Court simply stated that the petitioner's claims were not incident to his service but did not provide a clear definition of incident to service. *Id.* In *Brooks,* two soldiers and their father were driving on a public highway when they were hit by an Army truck. The government moved to dismiss for lack of jurisdiction, arguing that because the brothers were in the Army, claims arising from their injuries and death were excepted from the FTCA. *Id.* at 50. The Court rejected the

argument. "The statute's terms are clear. They provide for District Court jurisdiction over *any* claim founded on negligence brought against the United States. We are not persuaded that 'any claim' means 'any claim but that of servicemen.'" *Id.* at 51 (emphasis in original). Just like Petitioner's case, the accident, explained the Court, "had nothing to do with the [brothers'] Army careers. . . except in the sense that all human events depend on what has already transpired." *Id.* at 52. Similarly here, Christopher's suicide had nothing to do with his Navy career, and dismissal of his claim is at odds with the reasoning articulated in *Brooks*.

A year after *Brooks,* the Court decided *Feres v. United States,* 340 U.S. 135 (1950). Two of the three consolidated cases involved claims of medical malpractice; the third was a wrongful death claim arising out of a soldier's death in a barracks fire. Deciding that none of the claims should have been permitted to go forward, the *Feres* Court held that in addition to the exceptions specified by Congress in the FTCA, Congress intended to exempt all tort claims "for injuries to servicemen where the injuries arise out of or are in the course of activity incident to service." *Id.* at 146. Thus the Court expanded the statute's language without providing any clear direction on how the circuits should apply this expansive and likely incorrect interpretation of the FTCA.

In the fifty years since *Feres* many justifications have been offered for the incident to service standard but the Court has never set clear parameters for the circuits to utilize to determine what is an "activity incident to service." The

Supreme Court has delineated the underlying rationales for the incident to service standard but the circuits are directed not to apply those rationales when attempting to define "activity incident to service." *Johnson*, 481 U.S. at 687-88. Lower courts are left with no direction when defining an activity incident to service. The application of the *Feres* doctrine has devolved into a case by case analogy and distinction that ultimately relies entirely on the duty status of the claimant. This Court now must supply a clear definition of incident to service that can be consistently applied by lower courts.

B. The several circuits' incoherent and failed attempts to define "activity incident to service" are out of line with Supreme Court precedent.

It is impossible for lower courts to implement the *Feres* doctrine consistently and fairly because of the lack of textual guidance. This Court should create a test that can be consistently applied by lower courts that will not generate a stream of petitions for writs of certiorari as the current formulation does. The *Johnson* Court's attempt to clarify the *Feres* doctrine failed to provide meaningful direction, and interpretive difficulties continue to plague the lower courts. *See Taber v. Maine,* 67 F.3d 1029, 1043 (2d Cir. 1995).

The current application of the *Feres* doctrine expressly ignores and is contrary to the rationales underlying the doctrine. *Johnson* made clear that courts should rely on the "incident to service" test in applying the *Feres* doctrine rather than attempting to ascertain whether the underlying rationales are

present in any given case. *Johnson*, 481 U.S. at 687-88; *see also Loughney v. United States,* 839 F.2d 186, 188 (3rd Cir. 1987) ("Johnson confirms the correctness of our previous view *that Feres* prohibits any case-by-case inquiry into whether judicial review of a service member's tort claim would unduly interfere with military operations."); *Verma v. United States*, 19 F.3d 646, 648 (D.C. Cir. 1994) ("[W]hether or not the circumstances of a case implicate the rationales for the *Feres* doctrine, the doctrine bars any damage suit against the United States for injuries incurred incident to military service.") To ignore the rationale when applying such an ill-defined test is completely irrational and violates the 5th and 14th Amendments.

The result of having no direction on this important test is a constantly changing array of criteria for defining incident to service that ends in reliance on duty status as the deciding factor in these cases. Two circuits unabashedly bar claims based solely on the duty status of the claimant, two apply a case-by-case analogy and distinction that ultimately hinges on duty status, and the remainder of the circuits apply a multi-factor test that purports to not apply duty status as the absolute determining factor but in fact duty status is dispositive in every recent opinion. The net effect is to deny all servicemembers any redress for any tort claims defeating the intended purpose of the FTCA.

i. **Sixth and Eighth Circuits do not follow Supreme Court precedent and bar claims whenever a servicemember is on duty at time of occurrence complained of.**

The Sixth Circuit has taken a radical approach in defining "activity incident to service." Its test is not at all what the Supreme Court intended for the *Feres* doctrine. In its last application of *Feres* the Sixth Circuit held: "all injuries suffered by military personnel that are even remotely related to the individual's status as a member of the military, without regard to the location of the event, the status of the tortfeasor, or any nexus between the injury-producing event and the essential defense/combat purpose of the military activity from which it arose" are incident to service. *Lovely v. United States,* 570 F.3d 778 (6th Cir. 2009). This sort of absolute bar is not what the Supreme Court intended for the *Feres* doctrine and certainly not what Congress intended when it enacted the FTCA.

The Eighth Circuit applies an equally draconian interpretation of incident to service. The Eighth Circuit has given up on a multi-factor analysis and simply holds the *Feres* doctrine unquestionably bars claims by service members generally. *See Wetherill v. Geren*, 616 F.3d 789 (8th Cir. 2010). Holding that claims are barred in such absolute terms clearly does not follow Supreme Court precedent. However with no clear direction on exactly how to define "activity incident to service," the Sixth and Eighth Circuits created an inequitable bright line test based only on duty status.

This Court should supply the circuits with a clear test for activity incident to service to prevent future application of these arbitrary and capricious tests.

ii. The Seventh Circuit's approach is increasingly dependant on duty status as the determining factor of "activity incident to military service."

The Seventh Circuit supposedly applies a totality of the circumstances test informed by precedent; however, in every application of the *Feres* doctrine since *Johnson*, duty status has been the determining factor in the court's analysis. The current formulation of the *Feres* doctrine as applied in this case results in holdings that are contrary to Supreme Court precedent. The court observed,

> "Claims are barred regardless of whether a servicemember's activities at the time of the injury are "non-military" in nature, or whether the service member is off duty or off base." *See also, e.g.*, *Smith v. United States*, 196 F.3d 774, 776 (7th Cir. 1999) (applying *Feres* when an off-duty service member was sexually assaulted by her superior officer at an off-base hotel); *Rogers* v. *United States*, 902 F.2d 1268 (7th Cir. 1990) (*Feres* applied where the plaintiff had been living for years as a civilian – although due to an administrative mistake he had never been formally discharged – was injured while detained in a military brig for two

> months as a deserter); *Walls* v. *United States*, 832 F.2d 93, 95-96 (7th Cir. 1987) (applying *Feres* when a service member was injured while participating in a recreational flight club established by the Air Force)."

The cases cited above make clear that while the Seventh Circuit claims to be evaluating a totality of the circumstances it is actually making its determinations based solely on duty status. The application of the *Feres* doctrine has devolved into a duty status determinative test because "activity incident to service" was never clearly defined by the Court.

iii. The multi-factor analysis applied by the majority of the circuits is devolving into a duty status determinative test that is contrary to Supreme Court precedent.

The remainder of the circuits apply a multi-factor analysis to define incident to service.[1] The factors considered vary slightly from circuit to circuit but most profess to evaluate: (1) the place where the negligent act occurred, (2) the military duty status of the plaintiff when the negligent act occurred, (3) the benefits accruing to the plaintiff because of his

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[1] *See Diaz-Romero v. Mukasey*, 514 F.3d 115 (1st Cir. 2008); *Overton v. New York State Div. Of Military*, 373 F.3d 83 (2nd Cir. 2004); *Ruggiero v. United States*, 162 F. App'x. 140, 142-43 (3d Cir. 2006); *Gros v. United States*, 232 F. App'x. 417 (5th Cir. 2007): *Costo v. United States.*, 248 F.3d 863 (9th Cir. 2001); *Pringle v. United States*, 44 F. Supp. 2d 1168, 1173 (D. Kan. 1999) aff'd, 208 F.3d 1220 (10th Cir. 2000); *Starke v. United States*, 249 F. App'x. 774, 775 (11th Cir. 2007).

status as a service member, and (4) the nature of the plaintiff's activities at the time the negligent act occurred.

The result of this test is an absolute bar on claims by active duty servicemembers injured in every day civilian activities because "activity incident to service" has never been clearly defined. There have been numerous unjust results in circuits allegedly applying a multi-factor test while groping for a definition of activity incident to service. *See Ruggiero*, 162 F. App'x. at 142-43 (cadet fell out of defective dormitory window); *Gros,* 232 F. App'x. at 420 (servicemember exposed to toxic chemicals in his base apartment); *Costo v. United States*, 248 F.3d 863, 867 (9th Cir. 2001) (servicemember killed while off-duty on a rafting trip); *Pringle,* 44 F. Supp. 2d at 1173 (employees of military reservation's social club negligently ejected serviceman into club parking lot where he was beaten by local gang members); *Starke,* 249 F. App'x. at 775 (naval officer was struck by lightning while playing golf on naval base); *O'Neill v. United States,* 140 F.3d 564, 565 (3rd Cir. 1998) (naval officer murdered while she was sitting in her living room watching a movie with a friend) (Becker, C.J., statement sur denial of the petition for rehearing) ("[I]t is difficult for me to imagine anything less incident to service than being attacked by an ex-lover while sitting at home watching a movie with a friend. Surely, Smith would have killed O'Neill even if she was a civilian at the time."). These cases make clear that the circuits are making the incident to service determination based solely on duty status. The incident to service test is completely unworkable and after 62 years of precedent it has been constricted to simply a question of duty status.

The Ninth Circuit claims to apply a multifactor analysis but is actually applying messy ad hoc factual analogies with prior precedents. *See, e.g., Schoenfeld* v. *Quamme*, 492 F.3d. 1016, 1019 (9th Cir. 2007). ("Despite this framework, our *Feres* jurisprudence is something of a muddle. . . Therefore, we now examine 'the Ninth Circuit cases that are most factually analogous to the case at bar to determine whether the *Feres* doctrine bars [plaintiff's] suit.' "); *see also McConnell* v. *United States*, 478 F.3d 1092, 1095 (9th Cir. 2007) n.3 (" '[W]e have reached the unhappy conclusion that the cases applying the *Feres* doctrine are irreconcilable, and thus, comparison of fact patterns to outcomes in cases that have applied the *Feres* doctrine is the most appropriate way to resolve *Feres* doctrine cases.' ") (quoting *Costo,* 248 F.3d at 867). The result of abandoning in the multi-factor analysis is an expansion of the *Feres* doctrine and greater reliance on duty-status as the deciding factor in determining an activity incident to service.

Since the Court last addressed the *Feres* doctrine there have been a token few cases holding that an active duty servicemember may bring a claim against the United States under the FTCA. That is not what was intended by the Court and absolutely not what Congress intended for the FTCA. The nearly absolute bar on claims by service members is an inapt application of the Court's precedent. If the Court intended for an absolute bar based on duty status it would have expressly held that. This Court should provide a clear definition of incident to service that can be applied by the circuits without generating a torrent of appeals and petitions for certiorari.

C. There is no rational basis for the classification created by the lower courts application of "activity incident to service."

The definition of incident to service as applied by the several circuits violates the equal protection rights of servicemembers. In passing the FTCA, Congress chose to place all Americans on an equal footing in litigating tort claims against the government. The several circuits deny individuals their right to sue based only on their duty status because the Court has never supplied a clear definition of incident to service. There is no rationale basis for the classification created by the misapplication of the *Feres* doctrine. The current formulation of the *Feres* doctrine effectively declares that servicemembers are not equal citizens, as their rights against their government are less than the rights of their fellow Americans.

This judicially-created classification and muddled definition of incident to service runs afoul of the Equal Protection clause of the 14th and 5th Amendments. There is no authority suggesting a standard of review for an act of judicial legislation. *Costo v. United States*, 248 F.3d at 869. (Ferguson, J., dissenting). Surely, however, a more stringent standard than "rational review" applies to classifications created by the judiciary rather than the legislature, as the constitutional implications are greater. *Id. Cf. Bearden v. Georgia,* 461 U.S. 660, 665 (1983) (noting that in cases considering the constitutionality of court fees the Court applies a hybrid of its "due process" and "equal protection" analyses).

The classification created by the definition of incident to service applied by the circuits does not pass a rational basis test. Several circuits expressly ignore any reasoning behind the classification created when defining a claim as "incident to service." *See Wetherill*, 616 F.3d 789; *Lovely,* 570 F.3d 778. The remaining circuits have abandoned any pretense that there is a rational basis for the classifications drawn in the original *Feres* opinion, and yet the circuits continue to apply the "incident to service" test with little thought to the constitutional principles at stake. *See Pringle,* 208 F.3d at 1224; *Schoemer v. U.S.,* 59 F.3d 26, 28-29 (5th Cir.1995); *Maas v. U.S.,* 94 F.3d 291, 295 (7th Cir. 1996). In practice, servicemembers are denied their right to sue under the FTCA based only on their duty status which is not substantially related to an important government interest.

The supposed rationales for the *Feres* doctrine enunciated by the Court do not pass a rational basis test or intermediate scrutiny. The first justification proffered by *Feres* was that there was no parallel private right of action whereby military members could sue their employer. *Feres,* 340 U.S. at 141-42. This ignores other provisions of the FTCA which opened to liability a number of areas where parallel private rights of action did not previously exist. *See* 28 U.S.C. § 2680(b), § 2680(c), § 2680(f), § 2680(i).

The second justification was the "distinctively federal" relationship between the Government and the military that risked being supplanted by local tort law. *Costo*, 248 F.3d at 870. In *Shearer* the Court stated that this rationale of the distinctively federal relationship was "no longer controlling"

United States v. Shearer, 473 U.S. 52, 58 n. 4. (1985). This justification also ignores the Court's precedent of adjudicating intra-military suits. *See Little v. Barreme*, *6* U.S. (2 Cranch) 170 (1804); *Dinsman v. Wilkes*. 48 U.S. (7 How.) 89 (1849); 53 U.S. (12 How.) 390 (1851).

The Court gave the third *Feres* rationale the same treatment. *See Shearer,* 473 U.S. at 58 n. 4; *Johnson,* 481 U.S. at 688-90. This rationale reasoned that, despite the plain language of the FTCA, Congress did not intend to allow military personnel to recover under the FTCA when they were guaranteed recovery under the Veterans Benefit Act ("VBA"), 38 U.S.C. § 301. *Feres,* 340 U.S. at 144. In fact, however, "both before and after *Feres* [the Court] permitted injured servicemen to bring FTCA suits, even though they had been compensated under the VBA." *Johnson,* 481 U.S. at 697.

The classification created by a confused definition of activity incident to service violates the Equal Protection clause of the 14th and 5th Amendments because servicemembers are denied recourse under the FTCA based only on their duty status. The circuits have abandoned any reason for applying the classification. The Court has abandoned all the rationale for the judicially created classification but one and directs the circuits not to consider the underlying rationale when applying the undefined standard of incident to service. *Johnson*, 481 U.S. at 687-88. Christopher Purcell's constitutional right of equal protection under the law is violated by this judicially created muddle.

D. This Court should craft a clear definition of "activity incident to service" so that the *Feres* doctrine can be consistently applied without risk of further expansion violating precedent or the Constitution.

i. If the same claim could arise for a civilian under similar circumstances then it is not an activity incident to military service.

In order for the *Feres* doctrine to remain viable this Court must adopt a clear definition of incident to service that can be consistently applied and not violate servicemember's equal protection rights. The best solution is to define what is not incident to service. An activity that is analogous to civilian life is not incident to service. Supreme Court precedent makes clear that servicemembers can bring claims that arise out of incidents analogous to civilian life. *Brooks*, 337 U.S. 49. There are many situations that are unique to military life such as combatant activities as provided in the FTCA. Similarly, free medical care at a military hospital has no civilian analog. Claims regarding negligent supervision or infringing on the unique relationship of superiors and subordinates are also distinguishable from any aspect of civilian life. Supreme Court precedent makes clear that when a servicemember is receiving some benefit unique to military service, engaged in a military mission, or making claims against a superior officer his claims are barred. *See Shearer*, 473 U.S. at 55 (claims superior officers failed to properly supervise and

screen servicemember). The Court has never held that claims arising out of activities analogous to civilian life should be barred by the *Feres* doctrine. Yet several circuits are consistently barring such claims. This Court should now clearly define incident to service so that lower courts comply with Supreme Court precedent.

The analogous to civilian life test proposed by Petitioner adheres to Supreme Court precedent and provides the lower courts a clear test to apply. The test should be: *If the same claim could arise for a civilian under similar circumstances then it is not an activity incident to service*. None of the cases where the Supreme Court has barred claims would violate this proposed test. The claims barred in *Feres* were all relating to servicemen receiving some benefit unique to military service such as free housing or medical care. *Feres*, 340 U.S. at 136. Claims barred in *Johnson* related to a serviceman engaged in a mission. *Johnson* 481 U.S. at 684. Claims barred in *Shearer* involved negligent supervision of a serviceman. *Shearer*, 473 U.S. at 54.

Supreme Court precedent demonstrates that when the same claim could arise for a civilian under similar circumstances then it is not an activity incident to military service. As explained above, the circuits are not following this precedent and have instead adopted a duty status determinative test. This Court should now adopt Petitioner's test as the standard for applying the *Feres* doctrine.

ii. A civilian under similar circumstances as Petitioner would have a claim against the United States under the FTCA.

The analogous to civilian life test is well illustrated by the case at bar. This claim does not implicate the relationship of superiors and subordinates. The relationship in this case is between law enforcement and a suicidal individual—not a soldier and his superiors. Thus it is distinguishable from *Shearer* where plaintiff alleged the Army was negligent for not properly controlling a dangerous soldier who murdered another off base. *Shearer*, 473 U.S. at 54.

Here, none of the allegations in Petitioner's complaint are dependent on anyone's rank. It is critical to consider that Petitioner's allegations are against local law enforcement that act outside the chain of command. The relationship in this case is between law enforcement and a suicidal individual. Petitioner's complaint raises no issues of the relationship of soldier and superior or of military policy. Thus, had local law enforcement officers responded to a civilian threatening to commit suicide on base, that civilian could state a claim against the United States under the FTCA. It is by virtue of Christopher Purcell's status as an active duty service member that his claim is barred. Obviously, as Christopher Purcell was sitting in his apartment drinking he was not engaged in a military mission. He was technically on active duty but he was sitting in his apartment intoxicated and playing on the internet. This situation is undeniably analogous to civilian life.

Finally, the negligence complained of does not arise out of anything unique to military service. Law enforcement is not a special advantage of being in the Navy. We all benefit from law enforcement whether employed by the City of Chicago or the United States Department of Defense. Had Christopher Purcell been in an apartment across the street the Brunswick Police Department would have responded and been held to the same standard of care as the military police. Civilians visiting Brunswick Naval Air Station rely on military police for law enforcement just as Purcell did. Harm as a result of the negligence of law enforcement personnel is analogous to civilian life and is actionable under the Federal Tort Claims Act.

The Supreme Court has never barred a claim that is completely analogous to civilian life such as Petitioner's. Yet since the Court last addressed the *Feres* doctrine the circuits are routinely disregarding Supreme Court precedent and barring claims that are analogous to civilian life.

II. *FERES* IS CONTRARY TO THE CONGRESSIONAL INTENT OF THE FEDERAL TORT CLAIMS ACT AND SHOULD BE OVERTURNED.

The FTCA plainly expresses that the claims of servicemembers are allowed so long as they do not arise from *combatant activities*. *See Brooks*, 337 U.S. at 51. *Feres* should be overturned because it is contrary to the original intent and plain text of the FTCA. The plain language of the FTCA makes clear that active duty servicemembers may bring claims

against the United States arising out of activities incident to service.

The congressional intent to allow servicemembers' claims is demonstrated by: Congress's express inclusion, in the definition of those "employee[s] of the Government" whose acts may give rise to liability, of "members of the military or naval forces of the United States" 28 U.S.C. § 2671; its further specification that "acting within the scope of employment" under the FTCA means, for members of the military, "acting in [the] line of duty" *id.*; and Congress's inclusion of several other exceptions that clearly contemplated tort claims by military personnel, including the discretionary function exception, the exception for claims arising in a foreign country, and, perhaps most importantly, the exception for all "claim[s] arising out of the combatant activities of the military or naval forces. . . during time of war" (§ 2680(a), (j), (k)). These provisions show the FTCA allows claims incident to military service.

The *Feres* doctrine should be overturned in favor of the plain meaning of the FTCA and the intent of its drafters.

A. The original intent of the FTCA was to bar claims arising out of combatant activities and to allow claims by active duty servicemembers.

i. The Court's pre-FTCA rulings on intramilitary torts do not support the holding of *Feres*.

Prior to Congress enacting the FTCA the Court addressed several issues related to claims by active duty servicemembers. Since the government had yet to waive sovereign immunity the suits were between or against military personnel. The central question in these cases was whether the military defendants were immune from suit. Courtney W. Howland, *The Hands-Off Policy and Intramilitary Torts*, 71 IOWA L. REV. 93 (1985).

In *Wilkes v. Dinsman* and *Dinsman v. Wilkes*. 48 U.S. (7 How.) 89 (1849); 53 U.S. (12 How.) 390 (1851), the Court held that officers were immune from judgment errors, but not immune from acts exceeding their authority, nor for malicious and cruel acts. *Id.* at 404. The Court never questioned, nor even mentioned, the authority of a civilian court to review a military officer's discretionary action. Recognizing that the maintenance of discipline was essential in military society, the Court nevertheless found that oppression and wantonness of power exercised by a military officer was contrary to the necessity of discipline rationale. *Id.* at 403.

Thus, prior to enactment of the FTCA, the Court allowed suits by active duty servicemembers against their superiors. The *Feres* Court ignored controlling precedent allowing civil courts to intervene in matters of military discipline. This Court should not follow *Feres* and instead follow the plain language of the FTCA and the earlier precedent of intramilitary tort cases.

ii. *Feres* directly contradicts the plain language of the FTCA.

"The meaning of the statute must, in the first instance, be sought in the language in which the act is framed, and if that is plain, . . . the sole function of the courts is to enforce it according to its terms." *Caminetti v. United States,* 242 U.S. 470, 484 (1917). The FTCA is plain and unambiguous and the Court must enforce it according to its terms. *See Brooks v. United States*, 169 F.2d 840, 850 (4th Cir. 1948) (Parker, C.J., dissenting) (noting that Act drafted with skill, much deliberation, and clearly articulating Congress' intentions). The cardinal rule of statutory construction is that a statute, clear and unambiguous on its face, is not subject to construction; it should be held to mean what it plainly expresses. 2A Sutherland Statutory Construction § 46:1 (7th ed. 2010); *See also Barnhart v. Walton*, 535 U.S. 212 (2002); *MacKenzie v. Hare*, 239 U.S. 299, 308 (1915) (stating that extrinsic sources of legislative intent must give way to clear meaning). The reviewing court should give full effect to and follow the plain meaning of the statute whenever possible. 2A Sutherland Statutory Construction § 46:1 (7th ed. 2010). The plain meaning of the FTCA is to allow claims by active duty servicemembers.

The FTCA specifically allows for claims by active duty servicemembers that are erroneously barred by *Feres*. The FTCA permits the imposition of liability for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or

employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred. *Id.* § 1346(b). An "employee of the Government" is defined as including "members of the military or naval forces of the United States." *Id.* § 2671. The FTCA also specifies that the phrase "acting within the scope of his office or employment" in Section 1346(b) "means acting in [the] line of duty" in "the case of a member of the military or naval forces of the United States." 28 U.S.C. § 2671. *Feres* contradicts the plain meaning of the FTCA that allows claims by active duty servicemembers.

There are 13 enumerated exceptions to the broad waiver of immunity created by the FTCA but none apply to this case. *See* 28 U.S.C. § 2680. Congress expressly exempted "[a]ny claim arising out of the combatant activities of the military or naval forces, or the Coast Guard, during time of war." *Id.* § 2680(j). It also broadly exempted "[a]ny claim arising in a foreign country." *Id.* § 2680(k). Except for certain intentional tort claims brought against federal investigative or law enforcement officers, Congress exempted intentional torts, including all claims "arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights." *Id.* § 2680(h). Congress exempted all claims "based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of. . . an employee of the Government." *Id.* § 2680(a).

An enumeration of exceptions from the operation of a statute indicates that the statute should apply to all cases not specifically enumerated. 2A Sutherland Statutory Construction § 47:11 (7th ed. 2010). Because the FTCA does not contain an exception excluding military suits, the *expressio unius est exclusio alterius* principle of statutory construction implies that Congress did not intend to create such an exception. *Id.* ("Exceptions strengthen the force of the general law and enumeration weakens it as to things not expressed.")

The FTCA specifically excludes "[a]ny claim arising out of the *combatant* activities of the military or naval forces, or the Coast Guard, *during time of war*." 28 U.S.C. § 2680(j) (emphasis added). The *Feres* doctrine completely ignores the words "combatant" and "during time of war." It is an elementary rule of construction that effect must be given to every word of a statute. *See Clark v. Arizona*, 548 U.S. 735 (2006). No clause, sentence or word shall be construed as superfluous, void or insignificant if a construction can be found which will give force to and preserve all the words of the statute. 2A Sutherland Statutory Construction § 46:6 (7th ed.) *citing Chickasaw Nation v. U.S.*, 534 U.S. 84 (2001). This Court should apply each word of the FTCA and hold it does not bar claims wholly unrelated to combatant activities during time of war.

Feres is a woefully incorrect construction of the FTCA and should be overturned. In devising an exception to the FTCA for all claims based on "injuries to servicemen [that] arise out of or are in the course of activity incident to service" (340 U.S. at 146), the *Feres* Court failed to give proper weight to

reams of evidence in the text, structure, and legislative history showing that Congress never intended to create such an exception to FTCA liability.

iii. Legislative history of FTCA shows that Congress intended to allow claims by servicemembers such as Petitioner against the United States.

When Congress explicitly enumerates exceptions to a statutory provision, the court cannot infer additional exceptions without evidence of contrary legislative intent. 2A Sutherland Statutory Construction § 47:23 (7th ed.) *citing Waldschmidt v. Amoco Oil Co.,* 924 F. Supp. 88 (C.D. Ill. 1996). There is ample evidence in the legislative history of the FTCA to show that Congress never intended to create an exception along the lines recognized in *Feres.*

The Federal Tort Claims Act was part of the Legislative Reorganization Act of 1946 whose primary purpose was to "provide for increased efficiency in the legislative branch of the Government." S. Rep. No. 79-2 at 1 (1946). Prior to the enactment of the FTCA, there was another avenue available to servicemembers injured by negligent federal government employees. An injured servicemember, like any other United States citizen, could petition Congress for a private bill to provide compensatory relief for the claimant. *See* Gellhorn and Lauer, *Congressional Settlement of Tort Claims Against the United States*, 55 COLUM. L. REV. 1, 1-4 (1955); S. Rep. No. 79-2 at 1 (1946). The Congressional intent was for the FTCA to replace

private bills that were not limited in amount or subject matter. *Id.* at 18, 29. (The FTCA "is complementary to the provision. . . banning private bills and resolutions in Congress, leaving claimants their remedy under this title."). Limitations on the amount that could be claimed under the FTCA were eliminated because there were no such limitations in private bills. *Id.* Accordingly, the FTCA should be interpreted broadly because it is a replacement for the broad and unlimited private bill system.

Congress considered and dismissed barring claims of servicemembers as they are barred under *Feres.* The bill that became the FTCA originally included an exception for all military suits, but that exception was dropped in part because it unfairly discriminated against federal employees. *See Hearing Before Senate Committee on the Judiciary on S. 2690*, 76th Cong., 3d Sess. 49 (1940); Irwin M. Gottlieb, *The FTCA—A Statutory Interpretation*, 35 GEO. L.J. 1, 2-4 (1946). The FTCA originally excluded claims arising out of "military activities." During debate on the bill, the House adopted an amendment adding the word "combatant" to the exception. *See* 92 CONG. REC. 10,143 (1946) (showing Congress adopted, without debate, recommendation to add word 'combatant' to 28 U.S.C. § 2680(j) exception). By emphasizing that only claims arising out of combat activities were excluded from FTCA coverage, Congress presumably intended military personnel claims arising from non-combat activities to be protected. *See* Lt. Col. Robert A. Hitch, *The Federal Tort Claims Act and Military Personnel*, 8 RUTGERS L. REV. 316 (1954). Thus the *Feres* doctrine is directly contrary to provisions considered, deliberated, and dismissed by Congress.

The *Feres* court supplanted its own intent over the express intent of Congress.

Feres has no real basis in the text, structure, or history of the FTCA. The Court no longer pretends *Feres* is at all rooted in the text of the FTCA. *See Johnson,* 481 U.S. at 694-95 (Scalia, J., dissenting). Instead of being grounded in the FTCA itself, the *Feres* doctrine purports to represent "three disembodied estimations of what Congress *must* (despite what it enacted) have intended" in the FTCA. *Id.* at 695 (emphasis in original). And "[t]hey are bad estimations at that." *Id.* This Court should now grant certiorari to correct the *Feres* Court's erroneous interpretation of the FTCA.

B. The *Feres* doctrine is widely criticized by the judges forced to apply it.

The judges who have criticized *Feres* over the years have sat on the appellate and trial benches in nearly every jurisdiction:

• First Circuit: Circuit Judges Boudin, Lynch, Lipez, Selya, and Thompson and District Judges Acosta and Carter. See *Donahue v. United States*, 09-1950, 2011 WL 4599817 (1st Cir. Oct. 6, 2011) (Thompson, J., dissenting from the denial of rehearing en banc). *Day v. Massachusetts Air Nat'l Guard,* 167 F.3d 678, 681-85 (1st Cir. 1999); *Briggs v. United States,* 617 F. Supp. 1399, 1402 (D.R.I. 1985), aff'd mem., 787 F.2d 578 (lst Cir. 1986); *Graham v. United States,* 753 F. Supp. 994, 995 & n.1 (D. Me. 1991); *Jones v. LaRiviera Club, Inc.,* 655 F. Supp. 1032, 1033 n.6 (D.P.R. 1987).

• Second Circuit: Circuit Judges Leval, Calabresi, Pierce, Mahoney, Feinberg, Van Graafeiland, Meskill, Kaufman, and Mansfield, and District Judges Raggi and Weinstein. See *Taber v. Maine,* 67 F.3d 1029, 1038-1049 (2d Cir. 1995); *id.* at 1038 (calling *Feres* "extremely confused and confusing" and noted the Supreme Court's "willingness to ignore language, history, and the process of incremental law making."); *Sanchez v. United States,* 813 F.2d 593, 595 (2d Cir. 1987); *Bozeman v. United States,* 780 F.2d 198, 200 (2d Cir. 1985); *Kohn v. United States,* 680 F.2d 922, 925 (2d Cir. 1982); *Veloz-Gertrudis v. United States,* 768 F. Supp. 38, 41 (E.D.N.Y.), aff'd mem., 953 F.2d 636 (2d Cir. 1991), cert. denied, 504 U.S. 911 (1992); *In re "Agent Orange" Prod. Liability Litig.,* 580 F. Supp. 1242, 1246 (E.D.N.Y.), appeal dismissed, 745 F.2d 161 (2d Cir. 1984).

• Third Circuit: Chief Judge Becker and Circuit Judges Nygaard, McKee, Rendell, Hunter, Higginbotham, Adams, Stapleton, and Sarokin, and District Judges Ditter and Gerry. See *Ruggiero v. United States*, 162 F. App'x 140, 141 (3d Cir. 2006) (". . . we have serious concerns about the analytical underpinnings of the Feres doctrine and the wisdom of applying it as broadly. . .") *Richards v. United States*, 176 F.3d 652, 657 (3d Cir. 1999) ("I urge the Supreme Court to grant certiorari and revisit what we have wrought during the nearly fifty years since the Court's pronouncement in Feres . . . .") (Rendell, J., dissenting from a denial of a petition for rehearing en banc); *Hinkie v. United States,* 715 F.2d 96, 97 (3d Cir. 1983), cert. denied, 465 U.S. 1023 (1984); *Mondelli v. United States,* 711 F.2d 567, 569 (3d Cir. 1983), cert. denied, 465 U.S. 1021

(1984); *Ocello v. United States,* 685 F. Supp. 100, 103 (D.N.J. 1988); *Punnett v. United States,* 602 F. Supp. 530, 531 (E.D. Pa. 1984); *Hall v. United States,* 528 F. Supp. 963, 967 (D.N.J. 1981), aff'd mem., 668 F.2d 821 (3d Cir. 1982).

• Fifth Circuit: Circuit Judges Thornberry, Johnson, Garwood, Goldberg, Fay, and Anderson. See *Scales v. United States,* 685 F.2d 970, 974 (5th Cir. 1982), cert. denied, 460 U.S. 1082 (1983); *Parker v. United States,* 611 F.2d 1007, 1011 (5th Cir. 1980).

• Seventh Circuit: Circuit Judges Flaum and Wood, See *Selbe v. United States*, 130 F.3d 1265, 1266 (7th Cir. 1997) (citing opinions and academic commentary criticizing the Feres Doctrine); *Purcell v. United States,* 10-3743, 2011 WL 3809444 (7th Cir. August 24, 2011).

• Eighth Circuit: Circuit Judges Magill, Bright, Murphy, Richard Arnold, Bowman, and Heany, and District Judge Doty. See *Cutshall v. United States,* 75 F.3d 426, 429 (8th Cir. 1995) ("We note. . . that the *Feres* doctrine has been roundly criticized as unjust and unwarranted."); *Bowers v. United States,* 904 F.2d 450, 452 (8th Cir. 1990); *C.R.S. v. United States,* 761 F. Supp. 665, 669 & n.1 (D. Minn. 1991).

• Ninth Circuit: Circuit Judges Canby, Ferguson, Fletcher, Goodwin, Gould, Nelson, Norris, O'Scannlain, Reinhardt, Thompson, Trott, and District Judges and Battin and Singleton. See *Costo v. United States*, 248 F.3d 863, 869-70 (9th Cir. 2001) (Ferguson, J., dissenting) ("This doctrine

represents judicial legislation, effectively negating the Congressional limitations that the excluded claims must arise from 'combatant activities . . . during time of war"). *McConnell v. United States*, 478 F.3d 1092, 1098 (9th Cir. 2007); *Lutz v. Secretary of the Air Force,* 944 F.2d 1477, 1487 (9th Cir. 1991); *Estate of McAllister v. United States,* 942 F.2d 1473, 1476-77 & n.2 (9th Cir. 1991), cert. denied, 502 U.S. 1092 (1992); *Persons v. United States,* 925 F.2d 292, 295, 299 (9th Cir. 1991) (calling the doctrine as "unsound and illogical") *Monaco v. United States,* 661 F.2d 129, 132 (9th Cir. 1981), cert. denied, 456 U.S. 989 (1982).

• Tenth Circuit: Circuit Judges Breitenstein, Doyle, and McKay. See *LaBash v. U.S. Department of the Army,* 668 F.2d 1153, 1156 (10th Cir.), cert. denied, 456 U.S. 1008 (1982).

• Eleventh Circuit: Circuit Judges Fay, Godbold, and Hatchett. See *Elliott v. United States,* 13 F.3d 1555, 1559-61 (11th Cir.), vacated, 28 F.3d 1076 (11th Cir.), judgment aff'd by equally divided court, 37 F.3d 617 (11th Cir. 1994).

• District of Columbia Circuit: Circuit Judges Tamm and Wald, and District Judge Joyce Green. See *Hunt v. United States,* 636 F.2d 580, 589 (D.C. Cir. 1980).

• Supreme Court: Justices Brennan, Ginsburg, Kennedy, Marshall, Scalia, and Stevens. See *United States v. Johnson,* 481 U.S. 681, 692-703 (1987); *Lombard v. United States,* 690 F.2d 215, 228-30, 233 (D.C. Cir. 1982), cert. denied, 462 U.S. 1118 (1983), noting that "the *Feres* Court's interpretation

of the FTCA continues to be questioned" and calling *Feres* "a problematic court precedent." *Id.* at 229 n.7, 233; *see also Veillette v. United States,* 615 F.2d 505, 506 (9th Cir. 1980) (per Fletcher, J., joined by Kennedy, J.) (stating that the court was applying a *Feres* bar "[r]eluctantly").

The judicial criticism of *Feres* is "widespread, almost universal." *Johnson,* 481 U.S. at 700. The torrent of criticism should not be ignored any longer. It is clear to dozens of federal judges that *Feres* is unfair, immoral, and illogical. The *Feres* doctrine should be overruled in favor of the plain language drafted by Congress.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully Submitted,

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January 23, 2012

APPENDIX

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UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 10-3743

MICHAEL PURCELL, individually and as the Personal Representative of the Estate of CHRISTOPHER LEE PURCELL, deceased,
Plaintiff-Appellant,
v.
UNITED STATES OF AMERICA,
Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 1:09-cv-06137—**Joan Humphrey Lefkow**, *Judge.*
ARGUED MAY 12, 2011
DECIDED AUGUST 23, 2011

Before BAUER, FLAUM, and EVANS*, *Circuit Judges*.

FLAUM, Circuit Judge. Christopher Lee Purcell ("Purcell") committed suicide in his barracks at the Brunswick Naval Air Station, where he was serving on active duty in the Navy. Navy and Department of Defense ("DOD") personnel were called to the scene after being informed that Purcell planned to kill himself. They arrived at his residence before he attempted suicide, but did not find the gun they were told he had. Later, they permitted Purcell to go to the bathroom accompanied by his friend.

* Circuit Judge Evans died on August 10, 2011, and did not participate in the decision of this case, which is being resolved by a quorum of the panel under 28 U.S.C. § 46(d).

Upon entering, he pulled a gun from his waistband and committed suicide by shooting himself in the chest.

After attempting unsuccessfully to recover for Purcell's death from the Navy through administrative procedures, his family sought relief in federal court on a wrongful death claim under the Federal Tort Claims Act ("FTCA"). The district court found the case barred by the Feres doctrine, which provides that "the Government is not liable under the [FTCA] for injuries to servicemen where the injuries arise out of or are in the course of activity incident to service." *Feres v. United States*, 340 U.S. 135, 146 (1950). We affirm.

I. Background

Purcell was twenty-one years old and working on active duty in the Navy as a hospital corpsman at the Brunswick Naval Air Station when he committed suicide. The brief submitted by Purcell's father, Michael Purcell, notes that shortly after enlisting, at the age of eighteen, Purcell began experiencing social and emotional problems. It also mentions that the Navy intervened on several occasions by providing substance abuse treatment and mental health care.

On January 27, 2008, someone contacted the base at around 8:30 PM to inform them that Purcell had a gun in his room and was threatening suicide. In response to the call, Junior Corpsman Stephen Lollis told base security that Purcell had a gun and was about to kill himself,

and provided Purcell's address. DOD Police Officers Shawn Goding and Matthew Newcomb were the among the first local law enforcement officers to arrive at Purcell's apartment, followed by DOD Patrolman Francis Harrigan and Petty Officer First Class David Rodriguez. Each was aware that Purcell had a gun and was suicidal.

Purcell was alive when the investigating officers arrived at his on-base residence. They searched his residence and found evidence indicating that he had a firearm, including an empty gun case and bullets on top of a television stand, but they did not find a weapon, and they never searched Purcell's person.

Rodriguez spoke to Purcell and suggested they go outside to talk. Purcell responded calmly. Outside, Petty Officer First Class Mitchell Tafel approached Rodriguez and stated that they needed to get Purcell into custody to protect him and local law enforcement. Purcell became irate and non-compliant when told he would have to be put in restraints. A struggle with Rodriguez, Tafel, Harrigan, Goding, and Thomas Robinson, also with DOD, ensued. The five eventually subdued Purcell, handcuffed him, and escorted him back to his room.

Once upstairs, Tafel permitted Purcell to use the bathroom and instructed Robinson to remove one of Purcell's handcuffs. Purcell went to the bathroom accompanied by his friend, Nathan Mutschler. After entering the bathroom, Purcell pulled his gun from

his waistband and committed suicide by shooting himself in the chest.

In his brief, Michael Purcell notes that Tafel and Rodriguez faced courts-martial for violating a general order, reckless endangerment, and dereliction of duty for failing to properly search and supervise Purcell. He claims that they were punished via an extrajudicial proceeding.

Purcell's estate filed an administrate tort claim with the Navy seeking $45 million in damages. The Navy denied the claim based on Feres. Michael Purcell's brief claims that the Purcell family has not received any benefits from the military for Purcell's suicide.

Michael Purcell, individually and as a personal representative of Purcell's estate, then brought a wrongful death action against the United States under the FTCA, 28 U.S.C. §§ 1346(b), 2671-2680, in federal district court based on the conduct of the officers sent to help Purcell. The complaint alleges that the United States failed to calm Purcell, to search him in accordance with Navy regulations, to maintain proper custody of him after removing his handcuffs, and to transport him to the Brunswick Naval Air Station security precinct in accordance with the Air Station's standard operating procedures. It also claims that the responding officers irritated Purcell with profane, derogatory, and threatening comments that were contrary to standard operating procedures. The district court

dismissed the case for lack of subject matter jurisdiction based on the Feres doctrine.

II. Discussion

Michael Purcell contends that the district court erred by dismissing his case based on Feres. We treat dismissal under Feres as a dismissal for lack of subject matter jurisdiction under Federal Rule of Civil Procedure 12(b)(1). *Smith v. United States*, 196 F.3d 774, 776 n.1 (7th Cir. 1999). Whether subject matter jurisdiction exists under the FTCA is a question of law that we review de novo. *Jones v. United States*, 112 F.3d 299, 301 (7th Cir. 1997).

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." 28 U.S.C. § 2674. Excepted from this waiver of sovereign immunity, however, are claims "arising out of the combatant activities of the military or naval forces, or the Coast Guard, during time of war." 28 U.S.C. § 2680(j). In *Feres v. United States*, 340 U.S. 135 (1950), the Supreme Court further held that "the Government is not liable under the [FTCA] for injuries to servicemen where the injuries arise out of or are in the course of activity incident to service." Id. at 146.

The Feres doctrine, while currently viable, is certainly not without controversy. It has been interpreted increasingly broadly over time, *see Persons v. United States*, 925 F.2d 292, 295 (9th Cir. 1991); *Major v. United States*, 835 F.2d 641,

644-45 (6th Cir. 1987), and has also been widely criticized, see, e.g., *Selbe v. United States*, 130 F.3d 1265, 1266 (7th Cir. 1997) (citing opinions and academic commentary criticizing the Feres doctrine); *Taber v. Maine*, 67 F.3d 1029, 1032, 1038 (2d Cir. 1995) (writing that "the Feres doctrine has gone off in so many different directions that it is difficult to know precisely what the doctrine means today," and characterizing it as "an extremely confused and confusing area of law"); *Estate of McAllister v. United States*, 942 F.2d 1473, 1475-77 (9th Cir. 1991) (discussing and citing to critiques of the Feres doctrine). In *United States v. Johnson*, 481 U.S. 681 (1987), in a dissent signed by three other Justices, Justice Scalia wrote that "Feres was wrongly decided and heartily deserves the widespread, almost universal criticism it has received." Id. at 700 (Scalia, J., dissenting, joined by Brennan, Marshall, and Stevens, JJ.). But the majority in Johnson reaffirmed Feres, id. at 692, and the Court has not squarely addressed the doctrine since then. Feres thus remains the law until Congress or the Supreme Court decides otherwise. *See Selbe*, 130 F.3d at 1266.

When the Court reaffirmed Feres, it discussed three rationales that support the doctrine: "(1) the need to protect the distinctively federal relationship between the government and the armed forces, which could be adversely affected by applying differing tort laws; (2) the existence of statutory compensatory schemes; and (3) the need to avoid interference with military discipline and effectiveness." *Jones*, 112 F.3d at 301 (construing

Johnson, 481 U.S. at 688-91). The Court has also explained that "[t]he Feres doctrine cannot be reduced to a few bright-line rules; each case must be examined in light of the statute as it has been construed in Feres and subsequent cases." *United States v. Shearer*, 473 U.S. 52, 57 (1985). "'The dispositive inquiry [is] whether the service-member stand[s] in the type of relationship to the military at the time of his or her injury that the occurrences causing the injury arose out of activity incident to military service.'" *Smith*, 196 F.3d at 777 (quoting *Stephenson v. Stone*, 21 F.3d 159, 162 (7th Cir. 1994)); *see also Jones*, 112 F.3d at 301 (same).

Applying that test, we conclude that the district court correctly dismissed Michael Purcell's suit based on Feres. At the time he committed suicide, which occurred in his on-base residential building, Purcell was on active duty; living in the barracks on a military base, experiencing, according to Michael Purcell, various social and emotional problems that developed shortly after he enlisted; and deliberately avoiding Navy and DOD personnel sent to Purcell's barracks to help him, whom Michael Purcell claims failed to follow their own military regulations, and some of whom, he explains, faced courts-martial and were punished via an extrajudicial proceeding for failing to adequately search and supervise Purcell. *See Skees v. United States*, 107 F.3d 421, 424 (6th Cir. 1997) (Feres barred claim that members of serviceman's chain of command negligently supervised him because they "knew of [his] alcohol problems, but failed to follow their own regulations

which required them to address and treat [the decedent's] problems" after he communicated his intent to kill himself); *Persons*, 925 F.2d at 294-96 (Feres barred medical malpractice claim involving a decedent who came to a military hospital with slash marks on his wrists and attested to his attempted suicide, was released after a few hours without being admitted for observation, and committed suicide three months later); *Stubbs v. United States*, 744 F.2d 58 (8th Cir. 1984) (Feres barred suit for wrongful death based on a servicewoman's suicide after she was accosted by a drill sergeant and refused his sexual advances); *see also Shearer*, 473 U.S. at 58-59 (holding that a suit alleging that the government inadequately supervised and disciplined a serviceman was barred by Feres because it went "directly to the management of the military; it call[ed] into question basic choices about the discipline, supervision, and control of a serviceman" (internal quotation marks and citations omitted)); *Feres*, 340 U.S. at 136-37 (tort suit barred where executrix of a serviceman sought to recover for serviceman's death allegedly caused by negligence where decedent died in a fire while on active duty and quartered in military barracks near a defective heating plant); *Selbe*, 130 F.3d at 1267 (considering as "a factor tending to show that her suit is barred" that the servicewoman's "original injury occurred while she was on active duty and she had not been discharged when the subsequent injury occurred"); *Stephenson*, 21 F.3d at 164 (considering as factors that "Stephenson's death occurred while he was an active duty member of the Army and subject to military discipline, orders, and control," and that

"his death occurred on military property and in the barracks to which he was assigned"). Together, these facts demonstrate that Purcell stood "in the type of relationship to the military at the time of his . . . injury that the occurrences causing the injury arose out of activity incident to military service," and thus that Feres bars his suit. *Stephenson*, 21 F.3d at 162. We limit our holding to the facts of this case.

Michael Purcell's counsel ably, although ultimately unpersuasively, opposes applying Feres. Primarily, he argues that Purcell's death had nothing to do with his military status, and that the military connections to the case are irrelevant because Purcell was effectively acting as and treated like a civilian during the relevant events. *See Brooks v. United States*, 337 U.S. 49, 52 (1949); *Jones*, 112 F.3d at 302 (noting that "where suits have been allowed to proceed, the military personnel involved were not taking advantage of any military program or status, but simply engaging in activities on the same grounds as civilians"). We disagree. As explained above, *Feres* is read broadly, and Michael Purcell cannot avoid its reach on the facts of this case. Michael Purcell also points out that neither Purcell nor his estate have received benefits related to his suicide. But that alone does not warrant reversal in this case. *See Maas v. United States*, 94 F.3d 291, 295 (7th Cir. 1996) ("[T]his and other courts have applied Feres to bar claims that are incident to service even if a serviceman is not entitled to military benefits relating to those claims.").

III. Conclusion

Like many courts and commentators, we recognize the challenges presented by the Feres doctrine. In light of its enormous breadth, however, we AFFIRM the judgment of the district court.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 09 C 6137

MICHAEL PURCELL, individually and as Personal Representative of the Estate of Christopher Lee Purcell, deceased	)
Plaintiff,	)
v.	)
UNITED STATES OF AMERICA,	)
Defendant.	)

OPINION AND ORDER

Michael Purcell ("Purcell"), the personal representative of the estate of Christopher Lee Purcell ("Christopher"), filed a complaint for wrongful death against the United States of America under the Federal Tort Claims Act ("FTCA"), 28 U.S.C. §§ 1346(b), 2671-2680. Before the court is the motion of the United States to dismiss for lack of jurisdiction pursuant to Federal Rule of Civil Procedure 12(b)(1), claiming that the action is barred under the doctrine established in *Feres* v. *United States*, 340 U.S. 135, 71 S. Ct. 153, 95 L. Ed. 152 (1950), that the government is not liable under the FTCA for injuries to servicemen arising out of or in the course of activity incident to military service. For the following reasons, the motion [#11] is granted.

BACKGROUND

At the time of his death, Christopher, a twenty-one year old Navy Hospital Corpsman, was on active duty at the Brunswick Naval Air Station. Exs. 2, 4 to Def.'s Mem.[1] On January 27, 2008, Department of Defense Police Officers Shawn Goding and Matthew Newcomb, followed by Department of Defense Patrolman Francis Harrigan and Petty Officer First Class David Rodriguez, responded to a call that Christopher had a gun and planned to kill himself. Compl. ¶¶ 7-8. Christopher was in his barracks on the base. Ex. 4 to Def.'s Mem. Rodriguez searched the premises and found an empty gun case and bullets on top of the television but no weapon. Compl. ¶ 9. None of the officers present at the scene searched Christopher to see if he had a gun on his person. *Id.* ¶ 15. Rodriguez suggested to Christopher that they talk outside, and he responded calmly. *Id.* ¶ 10. Once outside, Petty Officer First Class Mitchell Tafel approached Rodriguez and informed him that they needed to take Christopher into custody. *Id.* When the officers told Christopher that he would have to be put in restraints, he became irate and non-compliant. *Id.* ¶ 11. A struggle ensued, during which Rodriguez, Tafel, Harrigan, Goding, and Robinson subdued Christopher. *Id.* They handcuffed Christopher and escorted him back to his room. *Id.* Once upstairs, Tafel gave Christopher permission to use the

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[1] The court may rely on material outside of the complaint when ruling on a motion to dismiss for lack of subject matter jurisdiction. *Sapperstein* v. *Hager*, 188 F.3d 852, 855 (7th Cir. 1999).

bathroom and instructed Robinson to remove a handcuff. *Id.* ¶¶ 12-14. Christopher proceeded to the bathroom accompanied only by his friend Nathan Mutschler, pulled a gun from his waistband, and shot himself in the chest. *Id.* ¶ 16. The officers involved in the incident were later court-martialed. Pl.'s Resp. at 13.

On January 8, 2009, Purcell filed an administrative tort claim with the Department of Defense and Department of the Navy, seeking $45 million in damages. Compl. ¶ 18; Ex. 1 to Def.'s Mem. The claim was rejected on June 25, 2009 on the grounds that it was not cognizable under the FTCA. Ex. 4 to Def.'s Mem. Purcell filed this suit, alleging that the officers present were negligent in failing to search Christopher for a weapon and for a number of other acts and omissions that violated relevant Navy procedure. Compl. ¶ 17.

LEGAL STANDARD

The court treats dismissal under *Feres* as dismissal for lack of subject matter jurisdiction under Federal Rule of Civil Procedure 12(b)(1). *Smith* v. *United States*, 196 F.3d 774, 776 n.1 (7th Cir. 1999). The burden of proof is on the party asserting jurisdiction. *United Phosphorus, Ltd.* v. *Angus Chem. Co.*, 322 F.3d 942, 946 (7th Cir. 2003). In determining whether subject matter jurisdiction exists, the court must accept all well-pleaded facts alleged in the complaint and draw all reasonable inferences from those facts in the plaintiff's favor. *Sapperstein* v. *Hager*, 188 F.3d 852, 855 (7th Cir.

1999). "Where evidence pertinent to subject matter jurisdiction has been submitted, however, 'the district court may properly look beyond the jurisdictional allegations of the complaint . . . to determine whether in fact subject matter jurisdiction exists.'" *Id.* (quoting *United Transp. Union* v. *Gateway W. Ry. Co.,* 78 F.3d 1208, 1210 (7th Cir. 1996)).

ANALYSIS

I. The FTCA and the *Feres* Doctrine

The FTCA waives the sovereign immunity of the federal government under circumstances where the government would be liable under the law of the state where the injury occurred if it were a private individual. 28 U.S.C. § 1346(b). The statute contains a number of exceptions, including one for injuries resulting from combatant activities of the military during wartime. 28 U.S.C. § 2680. In three cases decided together known as *Feres*, the Court interpreted § 1346(b) as extending beyond combatant activities to injuries to service members "that arise out of or are in the course of activity incident to service," (in the *Feres* cases, a dangerous condition in barracks and medical malpractice). 340 U.S. at 146. The Supreme Court expressed three rationales for extending the exception in *Feres*: first, it is impossible for a court to hold the military liable as it would a private individual in similar circumstances because no private individual has powers and responsibilities remotely analogous to the military, *id.* at 141; second, the relationship between a soldier and the military is "distinctively

federal in character," such that it would not make sense to apply the laws of the state where the soldier happens to be stationed, *id.* at 143; and, third, statutory systems of compensation for injuries to service members make the FTCA redundant, *id.* at 144. The case before this court is indistinguishable from *Feres* and thus presumably controlled by it.

In *United States* v. *Shearer*, 473 U.S. 52, 57, 105 S. Ct. 3039, 87 L. Ed.2d 38 (1985), the Court extended *Feres* immunity to a tort committed by a service member against a service member while they were off duty and off the military base. Although first ruling on other grounds in favor of the government, the Court recited its holding as follows: "We hold that Congress has not undertaken to allow a serviceman or his representative to recover from the Government for negligently failing to prevent another serviceman's assault and battery." *Id.* at 59. Although acknowledging the *Feres* rationales, the Court rested it decision primarily on the relationship of the service member to the military: "In the last analysis, *Feres* seems best explained by the peculiar and special relationship of the soldier[2] to his

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[2] The Court did not specify whether "soldier" was the tortfeasor soldier or the deceased soldier for whose estate the law suit had been brought, but its policy analysis focused on the imprudence of second-guessing military decisions, such as whether it had exercised sufficient control over the wrongdoer soldier. *See* 473 U.S. at 58. (Continued on next page)

But see Johnson v. *United States*, 481 U.S. 681, 689, 107 S. Ct. 2063, 95 L. Ed. 2d 648 (1987) ("An examination of [the] reasons for the [*Feres*] doctrine demonstrates that the status of the alleged tortfeasor does not have the critical significance ascribed to it by the Court of Appeals in this case."); *Smith* v.

superiors, the effects of the maintenance of such suits on discipline, and the extreme results that might obtain if suits under the Tort Claims Act were allowed for negligent orders given or negligent acts committed in the course of military duty." *Id.* at 57 (quoting *United States* v. *Muniz*, 374 U.S. 150, 162, 83 S. Ct. 1850, 10 L. Ed. 2d 805 (1963)) (internal quotation marks omitted). Although the Court stated in *Shearer* that *Feres* immunity "cannot be reduced to a few bright-line rules[,]" 473 U.S. at 57, later cases suggest quite the contrary. They demonstrate the Court's intention to grant broad immunity to the United States from suits brought by military personnel. In *United States* v. *Johnson*, for example, the Court held (over a strongly worded dissent by four justices) that the government was immune where the service member's injury arose from conduct of a civilian employee of the government. The Supreme Court relied in its reasoning as in *Feres* on the "distinctly federal" relationship between the government and members of the armed forces and the existence of generous statutory disability and death benefits for service-related injuries, 481 U.S. 681, 689, 107 S. Ct. 2063, 2068 (1987), as well as *Shearer*'s statement that, if this type of claim were generally permitted, it "would involve the judiciary in sensitive military affairs at

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United States, 196 F.3d 774, 777 (7th Cir. 1999) ("The dispositive inquiry [is] whether the service-member stand[s] in the type of relationship to the military at the time of his or her injury that the occurrences causing the injury arose out of activity incident to military service." (second alteration in original) (quoting *Stephenson* v. *Stone*, 21 F.3d 159, 162 (7th Cir. 1994) (internal quotation marks omitted)).

the expense of military discipline and effectiveness." *Id.* at 689-91, 107 S. Ct. 2063, 95 L. Ed. 2d 648 (1987).

The Seventh Circuit has not distinguished any of the Supreme Court cases in a manner suggesting the rule is not virtually absolute. *See Smith* v. *United States*, 196 F.3d 774, 777 (7th Cir. 1999) ("We hold only that Congress has made it clear that an FTCA action, in which the service member seeks damages from the United States and necessarily calls into question the management decisions of those who exercise military leadership, is not the appropriate avenue for a wronged service member seeking redress for such a grave wrong."); *Maas* v. *United States*, 94 F.3d 291, 295 (7th Cir. 1996) ("Application of the *Feres* doctrine does not depend on the extent to which its rationales are present in a particular case."); *Selbe* v. *United States*, 130 F.3d 1265, 1268 (7th Cir. 1990) (applying *Feres* in an instance of medical malpractice at a military hospital, "notwithstanding the tenuous link between these rationales and malpractice cases").

II. *Feres* Applied to Christopher Purcell's Death

Even if the rationales of *Feres* are applied, the result is the same. Christopher's death occurred while he was an active duty service member in his barracks on a military base. As was the injured soldier in *Feres*, Christopher was under military discipline and jurisdiction. Military officers, not local law enforcement, responded when notified that he posed a threat to his own safety. Therefore, at the time of his death, Christopher stood in the type of

relationship to the military that indicates that his injuries were incident to military service. Furthermore, the allegedly negligent officers in this case were acting pursuant to military duties and according to military regulations. To inquire into the conduct of these officers under these circumstances would implicate the concerns about interference with military discipline underlying *Shearer.* As in that case, "[t]his allegation goes directly to the 'management' of the military; it calls into question basic choices about the discipline, supervision, and control of a serviceman." 473 U.S. at 58. The negligent officers involved here were court-martialed, underscoring the authority of the military judicial system over this case.

Purcell argues that *Feres* should not apply because Christopher was off duty, he was "performing a non-military activity in what was essentially a civilian context," and he was "not subject in any real way to the compulsion of military orders or performing any sort of military mission." Pl.'s Resp. at 8-9. These arguments do not comport with Supreme Court and Seventh Circuit precedent, which have applied the doctrine regardless of whether a service member's activities at the time of the injury are "non-military" in nature, or whether the service member is off duty or off base. *See also, e.g.*, *Smith*, 196 F.3d at 776 (applying *Feres* when an off-duty service member was sexually assaulted by her superior officer at an off-base hotel); *Rogers* v. *United States*, 902 F.2d 1268 (7th Cir. 1990) (*Feres* applied where the plaintiff had been living for years as a civilian – although due to an administrative

mistake he had never been formally discharged – was injured while detained in a military brig for two months as a deserter); *Walls* v. *United States*, 832 F.2d 93, 95-96 (7th Cir. 1987) (applying *Feres* when a service member was injured while participating in a recreational flight club established by the Air Force). Purcell further contends that the rationales expressed in *Johnson* do not support the application of *Feres* to this case, but his argument mischaracterizes the rationales. First, he argues that Christopher's federal relationship with the Navy was "only partially implicated when he died" because "he was being taken into police custody in the same way any other citizen would be." Pl.'s Resp. at 10-11. The distinctively federal nature of the relationship between a service member and the military weighs against the application of state law to military liability. *Feres*, 340 U.S. at 142-143. This concern remains valid even if the service member's specific activity at the time of his injury does not directly involve the federal relationship.

Next, Purcell points out that the family did not receive compensation through the Navy's administrative claim process. Pl.'s Resp. at 11. It is the existence of a compensation system, however, not the outcome of a particular administrative claim, that supports the application of *Feres* in civilian court. *See Johnson*, 481 U.S. at 690. Third, Purcell argues, "[i]n the present case, there is no question of management of the military or the relationship between soldiers and their superiors." Pl.'s Resp. at 12. As stated above, the negligence of military officers is a question of military management and

discipline, and therefore the province of military courts. *See Shearer*, 473 U.S. at 58.

The court does not minimize the personal tragedy plaintiff and others close to Christopher have suffered, but because the court concludes that the *Feres* doctrine applies to this case, it lacks subject matter jurisdiction to grant any relief.

CONCLUSION AND ORDER

For the foregoing reasons, the United States' motion to dismiss [#11] for lack of jurisdiction is granted. The case is terminated.

Dated: Oct. 14, 2010
/s/ Joan Humphrey Lefkow
United States District Judge

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 10-3743

MICHAEL PURCELL, individually and as
the Personal Representative of the Estate
of CHRISTOPHER LEE PURCELL, deceased,
Plaintiff-Appellant,
v.
UNITED STATES OF AMERICA,
Defendant-Appellee.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern
Division.
No. 1:09-cv-06137—Joan Humphrey Lefkow, *Judge.*
(October 25, 2011)
Before BAUER, FLAUM, and EVANS, *Circuit Judges.*

ORDER

On consideration of the petition for rehearing en banc filed by the appellant in the above case on October 6, 2011, no judge on active service has requested a vote thereon, and both of the judges* on the original panel have voted to deny the petition. The petition is therefore DENIED.

* Circuit Judge Evans died on August 10, 2011, and did not participate in the decision of this case, which is being resolved by a quorum of the panel under 28 U.S.C. § 46(d).

28 U.S.C. § 1346. United States as a Defendant

(a) The district courts shall have original jurisdiction, concurrent with the United States Court of Federal Claims, of:

(1) Any civil action against the United States for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, or any penalty claimed to have been collected without authority or any sum alleged to have been excessive or in any manner wrongfully collected under the internal-revenue laws;

(2) Any other civil action or claim against the United States, not exceeding $10,000 in amount, founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort, except that the district courts shall not have jurisdiction of any civil action or claim against the United States founded upon any express or implied contract with the United States or for liquidated or unliquidated damages in cases not sounding in tort which are subject to sections 8(g)(1) and 10(a)(1) of the Contract Disputes Act of 1978. For the purpose of this paragraph, an express or implied contract with the Army and Air Force Exchange Service, Navy Exchanges, Marine Corps Exchanges, Coast Guard Exchanges, or Exchange Councils of the National Aeronautics and Space Administration shall be considered an express or implied contract with the United States.

(b)

(1) Subject to the provisions of chapter 171 of this title, the district courts, together with the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

(2) No person convicted of a felony who is incarcerated while awaiting sentencing or while serving a sentence may bring a civil action against the United States or an agency, officer, or employee of the Government, for mental or emotional injury suffered while in custody without a prior showing of physical injury.

(c) The jurisdiction conferred by this section includes jurisdiction of any set-off, counterclaim, or other claim or demand whatever on the part of the United States against any plaintiff commencing an action under this section.

(d) The district courts shall not have jurisdiction under this section of any civil action or claim for a pension.

(e) The district courts shall have original jurisdiction of any civil action against the United States provided in section 6226, 6228 (a), 7426, or 7428 (in the case of the United States district court for the District of Columbia) or section 7429 of the Internal Revenue Code of 1986.

(f) The district courts shall have exclusive original jurisdiction of civil actions under section 2409a to quiet title to an estate or interest in real property in which an interest is claimed by the United States.

(g) Subject to the provisions of chapter 179, the district courts of the United States shall have exclusive jurisdiction over any civil action commenced under section 453 (2) of title3, by a covered employee under chapter 5 of such title.

28 U.S.C. § 2680 Exceptions

The provisions of this chapter and section 1346 (b) of this title shall not apply to—

(a) Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.

(b) Any claim arising out of the loss, miscarriage, or negligent transmission of letters or postal matter.

(c) Any claim arising in respect of the assessment or collection of any tax or customs duty, or the detention of any goods, merchandise, or other property by any officer of customs or excise or any other law enforcement officer, except that the provisions of this chapter and section 1346 (b) of this title apply to any claim based on injury or loss of goods, merchandise, or other property, while in the possession of any officer of customs or excise or any other law enforcement officer, if—

(1) the property was seized for the purpose of forfeiture under any provision of Federal law providing for the forfeiture of property other than as a sentence imposed upon conviction of a criminal offense;

(2) the interest of the claimant was not forfeited;

(3) the interest of the claimant was not remitted or mitigated (if the property was subject to forfeiture); and

(4) the claimant was not convicted of a crime for which the interest of the claimant in the property was subject to forfeiture under a Federal criminal forfeiture law.

(d) Any claim for which a remedy is provided by chapter 309 or 311 of title 46 relating to claims or suits in admiralty against the United States.

(e) Any claim arising out of an act or omission of any employee of the Government in administering the provisions of sections 1–31 of Title 50, Appendix.

(f) Any claim for damages caused by the imposition or establishment of a quarantine by the United States.

[(g) Repealed. Sept. 26, 1950, ch. 1049, § 13 (5), 64 Stat. 1043.]

(h) Any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights: Provided, That, with regard to acts or omissions of investigative or law enforcement officers of the United States Government, the provisions of this chapter and section 1346 (b) of this title shall apply to any claim arising, on or after the date of the enactment of this proviso, out of assault, battery, false imprisonment, false arrest, abuse of process, or malicious prosecution. For the purpose of this

subsection, "investigative or law enforcement officer" means any officer of the United States who is empowered by law to execute searches, to seize evidence, or to make arrests for violations of Federal law.

(i) Any claim for damages caused by the fiscal operations of the Treasury or by the regulation of the monetary system.

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

(k) Any claim arising in a foreign country.

(l) Any claim arising from the activities of the Tennessee Valley Authority.

(m) Any claim arising from the activities of the Panama Canal Company.

(n) Any claim arising from the activities of a Federal land bank, a Federal intermediate credit bank, or a bank for cooperatives.