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Paul J. Dion

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Stencel Aero Engineering Corporation v. United States: An Expansion of the Feres Doctrine to Include Military Contractors, Subcontractors, and Suppliers

In *Stencel Aero Engineering Corp. v. United States*, the United States Supreme Court denied a military subcontractor's claim for indemnity against the United States in a personal injury suit brought under the Federal Tort Claims Act by an active-duty serviceman. The Court held that such third party claims are barred by the rationale of *Feres v. United States*, which denied military personnel and their heirs the right to sue the United States under the Federal Tort Claims Act for injuries sustained incident to military service.

Notwithstanding signs that the Feres doctrine might eventually be abrogated, the Supreme Court in *Stencel* unequivocally reaffirmed Feres and expanded the scope of the doctrine to include third parties seeking indemnity from the United States on claims by active-duty service personnel. The purpose of this Note is to examine the Court's decision in *Stencel* in terms of judicial precedent and in light of the important public policy concerns on which the Court relied. The analysis will also consider the effect of *Stencel* on indemnity claims of private parties sued as joint tortfeasors with the government.

Prior to the adoption of the Federal Tort Claims Act (FTCA) in 1946, the doctrine of sovereign immunity insulated the United

2. Stencel Aero Engineering Corporation had no written contract with the government. It had contracted with North American Rockwell, the prime government contractor, to manufacture the ejection system for the F-100 aircraft being constructed by Rockwell. *Id.* at 667-68 n.2. Notwithstanding the fact contractors have no direct dealings with the government, the *Stencel* decision precludes their claims for indemnity.
3. Although the Court's consideration in *Stencel* was directed to a military subcontractor's claim for indemnity from the government, the decision should apply to contribution claims as well. See notes 96-102 & accompanying text infra.
5. See notes 18-20 & accompanying text infra.
7. See W. Prosser, LAW OF TORTS 970-87 (4th ed. 1971) [hereinafter cited as
States from liability in tort for the negligent acts or omissions of its employees or servants. Precluded by this doctrine from seeking judicial redress, parties injured by the negligence of government servants had to resort to the arduous process of private bills in Congress as the sole remedy for their losses. This procedure, however, proved unsatisfactory. As the volume of these private bills increased, Congress became progressively less able to adjudicate adequately each claim, and as a result, relief was sporadic and often insufficient.

With the adoption of the FTCA, Congress waived the government’s immunity from tort liability and granted the federal district courts jurisdiction over any subsequent tort claims against the government. With a few limited exceptions, the FTCA subjects the United States to liability for the negligent acts or omissions of any government employee “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.”

Four years after the adoption of the FTCA, the United States Supreme Court in *Feres v. United States* created a judicial exception to the Act’s general waiver of immunity. In *Feres*, the Supreme Court held that active-duty service personnel and their heirs could not recover from the government under the FTCA for injuries or death sustained “incident to service.” The courts have generally interpreted the phrase “incident to service” quite broadly and have held that all injuries suffered by active-duty service personnel, whether or not these injuries result from the performance of a service-related task, are incident to service. This interpretation includes, for example,

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10. Those claims expressly excluded by statute from coverage under the FTCA are found in 28 U.S.C. § 2680 (Supp. V 1975). These include claims based on acts of government employees “in the execution of a statute or regulation;” claims based on an employee’s performance or failure to perform a “discretionary function or duty;” claims based on “negligent transmission of letters or postal matter;” claims arising “in respect of the assessment or collection of any tax or customs duty;” claims based on enumerated torts of government employees; claims arising out of “combattant activities of the military;” claims arising in a foreign country.
13. Id. at 146. For discussion of *Feres* and the development of the *Feres* doctrine, see Jacoby, The Feres Doctrine, 24 Hastings L.J. 1281 (1973) [hereinafter cited as Jacoby]. See also Rhodes, The Feres Doctrine after Twenty-Five Years, 18 A.F. JAG L. Rev. 24 (1976) [hereinafter cited as Rhodes].
injuries sustained by an active-duty serviceman as a result of a negligently performed vasectomy operation, the drowning of an active-duty airman while swimming for recreation in the base pool, and injuries suffered by a serviceman while undergoing a hernia operation in a military hospital. Although the injuries in each of these cases did not arise while the serviceman was performing a military-related task, the courts have held that the injuries were nonetheless incident to service. The injured servicemen were thus precluded by Feres from suing the government under the FTCA.

Since Feres, this judicially created rule precluding active-duty service personnel from suing the government under the FTCA for injuries sustained incident to service has been subjected to severe criticism, and on several occasions the Supreme Court itself narrowed the scope of the doctrine. In United States v. Brown, the Court ruled that the Feres doctrine did not bar an FTCA suit for injuries sustained in a military hospital by a discharged veteran. In United States v. Múiniez, the Court refused to extend the doctrine to claims by federal prisoners against the government. What some viewed as growing judicial disfavor with the Feres doctrine has been dispelled, however, by Stencel.

The Stencel Decision

Stencel involved a personal injury claim brought under the FTCA by a national guard officer against, inter alia, the United States and Stencel Aero Engineering Corporation. The officer had been injured during an activity incident to service when the ejection system of his fighter aircraft malfunctioned during a mid-air emergency. The

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15. Chambers v. United States, 357 F.2d 224 (8th Cir. 1966).
17. A contrary view followed only in the Sixth Circuit is that the phrase “incident to service” involves only those injuries that are the product of military discipline or duty. Hale v. United States, 416 F.2d 355 (6th Cir. 1969). Under both the majority and minority views service personnel injured while on furlough and not on active-duty status are not precluded by Feres from suing the government for their injuries. Brooks v. United States, 337 U.S. 49 (1949); see notes 71-73 & accompanying text infra. The Stencel decision has no effect on these cases.
21. See note 86 infra.
faulty ejection system had been manufactured in accordance with government specifications by Stencel, a subcontractor to the prime government contractor, North American Rockwell. The government had provided Stencel with several of the components used in the system. The officer alleged that the ejection system malfunctioned as a result of the "negligence and carelessness of the defendants individually and jointly." 22

Stencel alleged that, if it had been negligent, its negligence was passive while the government's was active. On this theory, under Missouri law, 23 Stencel cross-claimed against the United States, seeking indemnity for any adverse judgment. The government moved for summary judgment on the negligence claim and for dismissal of Stencel's cross-claim, asserting that Fer es barred the serviceman's claim as well as any claim for indemnity or contribution by a joint tort-feasor when the injured party was an active-duty serviceperson. The district court granted both motions. 24 The Court of Appeals for the Eighth Circuit affirmed the dismissal of Stencel's cross-claim, 25 and the United States Supreme Court granted certiorari 26 to consider the indemnity question.

In evaluating Stencel's claim that its suit for indemnity against the United States under the FTCA should be permitted, a majority of the Court relied almost exclusively upon language in Fer es v. United States. The Court found that of the several factors it had considered in reaching its decision in Fer es, three were especially relevant to Stencel's claim for indemnity. First, the relationship between the government and its soldiers is "distinctively federal in character" 27 and therefore must be governed exclusively by federal law. 28 Second, the Veterans' Benefits Act provides "an upper limit of liability for the

22. 431 U.S. at 668.
23. See note 11 & accompanying text supra. Plaintiff Donham was injured in Missouri.
27. 431 U.S. at 671. The phrase "distinctively federal in character" was first adopted by the Supreme Court to describe the relationship between military and soldier in United States v. Standard Oil Co., 332 U.S. 301, 305-06 (1947). For a discussion of the Standard Oil decision, see notes 54-55 & accompanying text infra. In Fer es, the Court, by reference to Standard Oil, once again used the phrase to describe the military-soldier relationship. 340 U.S. at 143.
28. 431 U.S. at 673.
Government as to service-connected injuries." Third, the maintenance of such suits would have an adverse effect on military discipline. The Court's conclusion that these three factors applied with equal validity to the Stencel facts ignores substantial differences between suits brought directly by service personnel and those brought by third parties seeking indemnity.

A Relationship Distinctively Federal in Character

Feres v. United States involved three cases consolidated on certiorari, each involving an active duty serviceman who was injured or killed incident to service. The injured serviceman or his heirs in each instance sought recovery from the United States under the FTCA, claiming that the death or injuries were the result of the negligence of agents or employees of the United States. Notwithstanding the "sweeping language" of the Act in waiving immunity and its seemingly exclusive list of those unable to bring suit under the Act, which did not include active-duty service personnel, the Supreme Court denied the servicemen's claims against the government. The Feres Court determined that without express statutory language the FTCA could not be read as creating this new cause of action against the government. The Court relied upon several factors in reaching this interpretation of the statute. Foremost was the Court's recognition of a unique relationship between the government and members of the armed forces, a relationship which the Court defined as "distinctively federal in character." The Court then concluded that Congress never intended to include this distinctively federal relationship within the purview of the FTCA, which expressly conditions the federal

29. Id.
30. Id.
32. See notes 39-40 & accompanying text infra.
33. The Court considered other factors. Congress had enacted the Veterans' Benefits Act which provides for a system of uniform compensation "for injuries or death of those in armed forces." 340 U.S. at 145. For a discussion of this factor, see notes 59-78 & accompanying text infra. Service personnel, in the performance of their military duties, are stationed throughout the nation; and because the FTCA provides recovery according to local law, Congress could not have intended to provide for "those disabled in service" by making their recovery dependent upon "geographic considerations over which they have no control and . . . laws which fluctuate in existence and value." 340 U.S. at 143.
34. 340 U.S. at 143-44. In support of this "special relationship" theory, the Court cited cases which held that the affiliation between the government and its armed forces is governed exclusively by federal rather than state law. See notes 49-55 & accompanying text infra.
35. 340 U.S. at 146.
government's tort liability on federal law which adopts as its basis state law. The Court maintained that a contrary conclusion would have implied that Congress intended to subject the United States to disparate and inconsistent recoveries for the same type of injury to its service personnel, depending upon the laws of the particular state in which the serviceperson was injured.

The *Feres* Court's interpretation, which excluded military-government relationships from the scope of the FTCA, has been criticized by several scholars, who maintain that the stated purpose of the FTCA is to subject the federal government to tort liability in accordance with state law. One commentator proposes that, because Congress did not expressly exclude soldiers who sustained injuries in peacetime from coverage under the Act, the more likely interpretation is that Congress in fact intended that military personnel be included under the provisions of the FTCA. As later scholars observed, however, congressional silence and inaction in this matter for the last twenty-five years strongly suggest Congress's acquiescence in, or ratification of, the *Feres* decision.

In *Stencel*, the United States Supreme Court again invoked the "distinctively federal relationship" concept. The context, however, was significantly different. In *Stencel*, the Court was dealing not with a matter between the government and its military personnel, as in *Feres*, but rather with a situation involving the government and a supplier of ordnance. The Court dismissed this difference with its statement that "the relationship between the Government and its suppliers of ordnance is certainly no less 'distinctively federal in character' than the relationship between the Government and its soldiers." The only factor cited by the Court to support its finding of a unique federal relationship between the government and military suppliers

37. 340 U.S. at 143. The *Feres* Court recognized, of course, that Congress could at any time subject this "distinctively federal" relationship to local law. Id. at 138.
42. 431 U.S. at 671.
43. 431 U.S. at 672.
was the presence of military operations and installations on a nation-
wide basis. The Court reasoned, are dispersed nationally, and it "makes . . . little
sense to permit [the] situs [of the alleged negligence] to affect the
Government's liability to a Government contractor . . . ."45

Using this analysis to support its "distinctively federal" character-
ization of the government-supplier association, the Court reaches two
questionable conclusions: first, that this affiliation between govern-
ment and supplier must be governed exclusively by federal law; and
second, that the supplier must logically be precluded by the reasoning
in Feres from seeking indemnity or contribution from the government
when the injured party is an active-duty serviceperson.

The distinctively-federal-relationship theory, although valid when
applied to the military, has no clear application to military suppliers.
The mere fact that military facilities and equipment, like service per-
sonnel, are located nationwide, thereby subjecting the United States
to the danger of inconsistent state laws "which fluctuate in existence
and value"46 appears insufficient to create a uniquely federal matter.
Indeed, by specifying that state law would apply, Congress in enact-
ing the FTCA adopted a scheme that conditioned the federal govern-
ment's liability in tort upon the various and inconsistent state laws.
Many federal agencies, such as the Social Security Administration,
the Bureau of the Census, and the Immigration and Naturalization
Service, have equipment and employees dispersed throughout the
nation. Congress nonetheless adopted the various state laws as the
controlling federal law in determining government liability to persons
injured due to the negligence of employees of these agencies.

More importantly, in discerning a distinctively federal relation-
ship between government and soldier, the Feres Court relied on more
than the mere fact that members of the armed forces were stationed
in the various states. The Court recognized that this uniquely federal
status developed from the need to promote "good order, high morale,
and discipline" within the ranks of the national military forces, so
that the individual soldier will "instantly obey a lawful order, no
matter how unpleasant or dangerous the task may be."47 Accordingly,
a uniform system of rules and regulations completely divorced from
the general state laws governing the civilian population has developed,

44. Id.
45. Id. The FTCA adopts the tort law of the situs to determine recovery. See
note 10 & accompanying text supra.
46. 340 U.S. at 143.
47. E. Byrne, Military Law 1 (2d ed. 1976).
which closely defines and controls the duties and responsibilities of military personnel. One early commentator wrote:

If a national army be established, it is indispensably requisite that order and discipline should be maintained in that army. To effect this, it is necessary that the duties of the military be defined and their performance enforced . . . . According to the constitution, Congress has absolute power over the army. It can create, organize, increase or disband it at its mere will and pleasure. It has the exclusive power of making Rules and Articles of war, and of legislating for the public force.

The United States Supreme Court has repeatedly recognized the federal government's exclusive control over the military and has refused to permit local civilian authorities to exercise any jurisdiction over this uniquely federal matter. Three Supreme Court cases cited in Feres are illustrative.

The earliest of these decisions, Tarble's Case, involved a minor who enlisted in the United States Army without his father's consent. The father alleged that Tarble was "illegally imprisoned" by the army and obtained a writ of habeas corpus from a state court to free his son from the custody of the army. The Supreme Court reversed and declared that the state court was without authority to act in this federal matter. In Kurtz v. Moffitt, the second case cited in Feres, an army deserter was arrested by the local police for the purpose of returning him to military authorities. Kurtz asserted that the civilian police had no authority to arrest him for a military crime. In upholding Kurtz's claim, the Court considered the unique relationship between the soldier and his superior officers and concluded that such a relationship was governed solely by federal military law. The third case cited by the Court, United States v. Standard Oil Co., involved a suit brought by the United States against Standard Oil to recover expenses incurred by the government for the hospitalization of a soldier injured by the negligence of an employee of Standard Oil.

48. The armed forces of the United States are presently governed by the Uniform Code of Military Justice, 10 U.S.C. §§ 801-940 (1970). Congress's power to regulate the military is derived from U.S. Const., art. I, § 8: "The Congress shall have Power . . . to raise and support Armies . . . to provide and maintain a Navy . . . and to make rules for the Government of the land and naval Forces."

49. J. O'Brien, A TREATISE ON AMERICAN MILITARY LAWS 25 (1846). See also, E. Byrne, MILITARY LAW 1-10 (2d ed. 1976); G. Davis, A TREATISE ON THE MILITARY LAW OF THE UNITED STATES 1-12 (3d ed. 1915).

50. 340 U.S. at 143-44.
51. 80 U.S. (13 Wall.) 397 (1871).
52. 80 U.S. at 399.
53. 115 U.S. 487 (1885).
54. 332 U.S. 301 (1947).
The Court considered whether the respective duties and liabilities of each party were governed by federal or state law. In concluding that federal law must apply, the Court stated:

Perhaps no relation between the Government and a citizen is more distinctively federal in character than that between it and members of its armed forces. To whatever extent state law may apply to govern the relations between soldiers or others in the armed forces and persons outside them or nonfederal governmental agencies, the scope, nature, legal incidents and consequences of the relation between persons in service and the Government are fundamentally derived from federal sources and governed by federal authority.\(^{55}\)

In all three cases the Supreme Court recognized that military personnel are governed by a separate body of federal laws best meeting the needs of the nation as a whole.

The relationship between the government and a supplier, however, is not analogous to the relationship between the military and a soldier. The latter relationship is uniquely federal in nature; an affiliation between the government and supplier is normally governed by general contract considerations derived from local state law. One noted writer in the field has observed: "Except for statutory, regulatory and public policy requirements, government contracts contain reciprocal rights and duties between the government and the contractor and are interpreted in the same manner as private contracts to which the government is not a party."\(^{56}\) Although there are differences between government contracts and ordinary private contracts,\(^{57}\) courts have nonetheless consistently interpreted government contracts in light of general common law contract principles\(^{58}\) and have not developed a unique federal statutory or common law analogous to the military law system to regulate these contracts.

Even if, as assumed by the Court in Stencel, the affiliation between the military and the supplier is distinctively federal in character, the

\(^{55}\) Id. at 305-06.


\(^{57}\) These differences include the extent of bargaining over terms and conditions of the contract, the authority of an agent to bind the government, the necessity of an appropriation, the government's right to audit the contractor's records, and the government's right to recover excessive profits. A thorough examination of these factors is found in J. PAUL, UNITED STATES GOVERNMENT CONTRACTS AND SUBCONTRACTS 69-75 (1974).

Court treats this uniquely federal relationship quite differently from the soldier-military relationship. Whereas active-duty service personnel are precluded summarily by *Feres* from suing the government under the FTCA, the military supplier is not similarly barred by *Stencel* from seeking indemnity from the government; it is precluded from seeking indemnity only when the injured party is an active-duty serviceperson. If the injured party is a civilian or a serviceperson on furlough, *Stencel* does not bar the supplier from seeking indemnity from the government. This distinction may indicate that the Court's real concern in *Stencel* was to insure that *Feres*-disqualified plaintiffs did not circumvent the *Feres* decision by bringing suits indirectly against the government through third party indemnity claims.

The Veterans' Benefits Act as an Upper Limit of Liability

In *Stencel*, the Supreme Court stated that the Veterans' Benefits Act (VBA)\(^{59}\) was intended as an "upper limit of liability for the Government as to service-connected injuries,"\(^{60}\) requiring that Stencel's claim for indemnity be denied. The Court indicated that it was compelled to reach this conclusion on the basis of the *Feres* decision. In *Feres*, however, the Court's inquiry was limited to a consideration of claims by service personnel against the government. *Feres* examined the policy considerations underlying both the VBA and the FTCA and concluded only that military personnel injured while on active-duty status were limited in their recovery against the government to those benefits awarded under the VBA. The effect of the VBA upon private third party claims was not at issue.

Much of the language employed by the Court concerning the VBA's upper limit of liability is similar to that used elsewhere to describe worker's compensation schemes. For example, the Longshoremen's and Harbor Workers' Compensation Act provides an upper limit of liability for the employer.\(^{61}\) The employer's liability is limited to those benefits awarded under the compensation scheme, and direct claims by the employee and indemnity claims by third parties are expressly foreclosed. These worker's compensation schemes, however, differ from the VBA in two important respects. First, whereas worker's compensation benefits are awarded only when the employee's injuries arise in the course of employment, VBA benefits are awarded whether or not the injuries are service-connected. Thus, service per-


\(^{60}\) 431 U.S. at 673.

sonnel injured while on furlough or while undergoing elective surgery in a military hospital may recover benefits under the VBA after separation from military service. Second, under traditional workers' compensation acts, employees who receive benefits thereunder are barred from seeking further relief from their employers. In contrast, many service personnel who have received VBA benefits can seek further relief from the government.

In *Stencel*, the Court described the VBA as a “statutory ‘no fault’ compensation scheme which provides generous pensions to injured servicemen without regard to any negligence attributable to the government.” The Act was indeed intended to provide compensation for service personnel injured or killed in the line of duty; it does not require the serviceperson to prove fault in order to recover. The VBA does preclude members of the armed forces from receiving benefits if their disability is the result of willful misconduct, or if they are dishonorably discharged.

The *Stencel* Court further maintained that the VBA was intended as a “substitute for tort liability” in that it “clothes the Government in the ‘protective mantle of [its] limitation of liability provisions.” The Court's contentions here were twofold: first, that the VBA was intended as the exclusive remedy against the government for service

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64. 431 U.S. at 671.
66. 38 U.S.C. §§ 310, 331 (1970). Hitch, *supra* note 18, at 331, writes, for example: “The Veterans' Administration views are that there is no distinction in the laws applicable to veterans' benefits between ‘service-connected’ disability or death and disability or death 'caused by' service, nor is there any distinction between such matters on the ground of 'line of duty.' The Administrator of Veterans' Affairs pointed out that the only possible case of injury or death of a member of the armed forces, whether on furlough or at a post of duty, which would not be subject to the benefit of veterans' laws would be if the same had occurred by reason of the serviceman’s own misconduct . . . .” See also Note, *Federal Liability to Personnel of the Armed Forces*, 20 Geo. Wash. L. Rev. 90, 105 (1951). The Court’s contention that the benefits provided under the VBA are “generous” is open to question. *See* 38 U.S.C. §§ 314, 322, 334, 342 (Supp. V 1975) (setting payment rates).
67. 431 U.S. at 671.
68. Id. at 673.
personnel injured while on active-duty status, and second, that this exclusive remedy also barred third party indemnity claims against the government when the injured party was an active-duty military person. Neither of these conclusions, however, is supported by the language of the VBA. The Court's determination, rather, reflects a strong endorsement of its earlier interpretation in *Feres* of legislative intent, notwithstanding the harsh impact on the potential indemnitee.

The language of the VBA does not expressly provide for an upper limit of liability for the government for service personnel injured while on active-duty status or on furlough. The Act does not expressly provide that military persons are limited in their recovery against the government to those benefits received under its provisions. Indeed, the right of service personnel to seek further relief from the government under the FTCA in addition to benefits received under the VBA has been expressly recognized in other circumstances. In *Brooks v. United States*, the Supreme Court declared that the VBA was not intended as the upper limit on the government's liability for injuries sustained by military personnel while on furlough.

Provisions in other statutes for disability payments to service-men, and gratuity payments to their survivors . . . indicate no purpose to forbid tort actions under the Tort Claims Act . . . . [T]here is nothing in the Tort Claims Act or the veterans' laws which provides for exclusiveness of remedy . . . . Nor did Congress provide for an election of remedies . . . . We will not call either remedy in the present case exclusive, nor pronounce a doctrine of election of remedies, when Congress has not done so.

In *Stencel*, on the other hand, the Court declared that "one of the essential features" of the VBA is its limitation of liability provisions. This "essential feature" of the VBA, however, is limited by the Court to those situations when the serviceman or woman is injured while on active-duty status. Thus, in the *Brooks* situation,

71. 337 U.S. 49 (1949).
73. *Id.* at 53. The *Stencel* decision should have no effect on this kind of situation.
74. 431 U.S. at 673.
75. *Id.* See text accompanying note 13 supra.
service personnel who receive compensation under the VBA may nonetheless sue both the government and the military supplier for further damages. In these cases, moreover, the suppliers would not be precluded by Stencel from seeking indemnity from the government. The actual source of the asserted VBA limitation of liability provision must be found in the Court's Feres decision denying active-duty service personnel the right to sue the government under the FTCA and not within the language of the Act.

The second arm of the Court's position, that the VBA's limitation of liability provision bars third party indemnity claims against the government where the injured party is an active-duty military person, is based largely on the conceptualization that if such indemnity claims were permitted, service personnel precluded by Feres from seeking damages directly from the United States would recover damages from the government indirectly through these third party claims. The Court stated, for example: "To permit [petitioner] to proceed . . . here would be to judicially admit at the back door that which has been legislatively turned away at the front door." This statement is not precisely correct since it was the Feres Court and not Congress which precluded service personnel from suing the government directly under the FTCA for injuries incident to service. In order to prevent this circumvention of the Feres doctrine, the Court summarily barred Stencel's claim.

76. 431 U.S. at 673.

77. Several Federal Employee Compensation Act (FECA) cases have presented facts similar to Stencel: plaintiffs were precluded by the FECA's exclusive remedy provision, 5 U.S.C. § 757(b), from suing the government directly under the FTCA, and third parties were seeking indemnity from the government on claims by these excluded plaintiffs. The courts have split as to whether the third party claims may be maintained against the government. See Wallenius Bremen G. m. b. H. v. United States, 409 F.2d 994 (4th Cir. 1969), cert. denied, 398 U.S. 958 (1970) (third party claims not precluded by the exclusive remedy provisions of FECA); Newport Air Park, Inc. v. United States, 419 F.2d 342 (1st Cir. 1969), and United Air Lines, Inc. v. Wiener, 335 F.2d 379 (9th Cir.), cert. denied, 379 U.S. 1951 (1964) (FECA's exclusive remedy provision barred third party claims); see also Weyerhaeuser S.S. Co. v. United States, 372 U.S. 597 (1963). Stencel implications could preclude third parties from receiving indemnity from the government on claims by FECA-disqualified plaintiffs in the future.

78. 431 U.S. at 673 (quoting Laird v. Nelms, 406 U.S. 797, 802 (1972)). In denying the claim, the Court acknowledged Stencel's plea that a denial of its claim would leave it without a remedy, 431 U.S. at 672. Under traditional worker's compensation statutes a similar result may often be avoided by an express contract of indemnity between the employer and the third party; the third party is indemnified by the employer for any damage awards paid to the employee. The military supplier is barred by statute from negotiating for an indemnity clause in its government contract. See note 106 & accompanying text infra. A denial of its claim for indemnity does indeed leave it without a remedy.
Effect of a Third Party Indemnity Action on Military Discipline

The third factor considered by the Supreme Court in denying Stencel's claim for indemnity was the "effect of the action on military discipline." Although the Feres Court had not explicitly discussed military discipline, it was addressed implicitly when the Court stated, "We know of no American law which ever has permitted a soldier to recover for negligence, against either his superior officers or the Government he is serving." The Feres Court, by denying the servicemen's claims, foreclosed judicial action that might have had an adverse effect on military discipline.

In Stencel, however, the denial of the military supplier's indemnity claims against the government does not guarantee that military discipline will remain insulated from the adverse effects of tort litigation. Indeed, many of the issues that would have been litigated in the indemnity action if Stencel Corporation had prevailed on its cross-claim may nonetheless be litigated in the plaintiff's action against the private third party.

The military discipline factor was first considered by the Supreme Court in United States v. Brown. In Brown, a discharged veteran sued the government under the FTCA for the negligent treatment of his knee in a Veterans Administration hospital. Because Brown had first injured his knee while on active duty in the armed forces, the government contended that Feres barred the serviceman's claim. The Court ruled, however, that, because Brown was no longer on active-duty status, he was not precluded by Feres from suing the government under the FTCA. In reaching its decision, the Court emphasized that the military discipline argument was indeed one of the factors considered determinative by the Feres Court in its decision to limit the right of service personnel on active duty to sue the government for service related injuries:

The peculiar and special relationship of the soldier to his 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, led the Feres Court to read that Act as excluding claims of that character.

79. 431 U.S. at 673.
80. 340 U.S. at 141.
81. See notes 94-95 & accompanying text infra.
82. 348 U.S. 110 (1954).
83. Id. at 112.
The military discipline argument was once again examined by the Supreme Court in United States v. Muniz. In Muniz, two prisoners sued the United States under the FTCA to recover damages for personal injuries sustained while confined in a federal prison. Claiming that the relationship between prisoners and the federal government was sufficiently analogous to the government-soldier relationship, the United States argued that Feres barred the prisoners' claims. In rejecting the government's argument the Court reconsidered several of the factors examined in Feres and concluded that the military discipline argument was persuasive: "In the last analysis, Feres seems best explained by the . . . 'effects of the maintenance of such suits on discipline.'" Commentators generally agree, moreover, that the military discipline factor remains a viable support for the Feres doctrine.

In Stencel, the Supreme Court again warned that if service personnel were permitted to sue the government under the FTCA for service-related injuries, the result would be a breakdown in military discipline. The Court further stated that this military discipline rationale applies with equal validity to an indemnity action brought by a third party against the government when the injured party is in the armed forces: "[I]t seems quite clear that where the case concerns an injury sustained by a soldier while on duty, the effect of the action upon military discipline is identical whether the suit is brought by the soldier directly or by a third party." This assumption presents two important questions: first, whether the assumption is itself correct and second, if it is correct, whether the Court's denial of the indemnity claim effectively protects military discipline from judicial disruption.

In determining that the effect on military discipline would be identical whether the suit was brought by service personnel or by third parties, the Court found that in both instances it would be

85. Id. at 162.
86. See, e.g., Rhodes, supra note 13, at 42; Note, Servicemen's Tort Claims against the United States — United States v. Lee, 21 Hastings L.J. 1059, 1062-64 (1970). One noted commentator, Professor Sidney Jacoby, writes, "The Feres exception [to the FTCA] is clearly a 'judge-made' rule, and the only rationale of that doctrine still maintainable in light of the gradual development of that doctrine is the 'general military discipline' concept." Jacoby, supra note 13, at 1291. For an examination of whether in spite of this military discipline factor Congress intended to grant service personnel the right to sue the government under the FTCA, see notes 38-41 & accompanying text supra.
87. 431 U.S. at 673.
88. Id.
necessary to litigate the degree of fault on the part of the Government's agents.” A breakdown in military discipline would be caused by “second guessing military orders” and requiring “members of the Armed Services to testify in court as to each other’s decisions and actions.”

Under the FTCA, if service personnel were permitted to sue the government directly for injuries sustained incident to service, they would be required to establish that their injuries were the result of the “negligent or wrongful act or omission” of an employee of the government while “acting within the scope of his office or employment” and not in the exercise of a discretionary function or duty. In order to prove the government employee’s fault, plaintiffs would undoubtedly engage in “second-guessing” military orders by asking such questions as whether the action in question could have been performed by a safer method or whether the officer in charge was aware of the risks involved. In many cases, they would call other members of the armed forces to testify about the incident in question.

The Court’s concern that the same elements would be litigated when the suit was brought by the third party potential indemnitee, with the resulting disruption of military discipline, may be well founded. The supplier would need to prove the government’s negligence in order to recover on its claim for indemnity. This often would entail calling into question military orders and subpoenaing military personnel to testify on its behalf. The attempt to prove government fault would occur whether the supplier’s claim for indemnity was based on an express or implied contract provision that the government perform its obligations in a reasonable and workmanlike manner or, as in the case of Stencel, on the assertion that “its negligence was passive, while the negligence of the United States was active.”

89. Id.
90. Id. The Court’s fears concerning the “second guessing” of military orders may be somewhat exaggerated in light of the “discretionary function” exception to the FTCA. 28 U.S.C. § 2680(a) (1970). See note 10 supra.
93. 431 U.S. at 668. A right to indemnity may arise under four general circumstances: (1) by an express agreement between the parties providing for indemnity (express contract); (2) by implication, as when a court reads into a contract a provision that the work will be performed in a skillful and careful manner (implied contract); (3) by reason of the relationship between the parties, such as that of bailor-bailee, employer-employee; (4) by operation of law, where the negligence of one party was primary or active while the negligence of the other was secondary or passive. For a general analysis of these four forms of indemnity, see L. FRUMER, M. FRIEDMAN, L. PILGRIM, R. OLIVER & I. THAU, 4C PERSONAL INJURY, ACTIONS, DEFENSES, DAMAGES
Although the effect on military discipline would probably be identical "whether the suit is brought by the soldier directly or by a third party," the Court’s decision in *Stencel* to deny indemnity claims fails to accomplish its stated purpose. The Court’s decision simply insures the government’s immunity from suit. It does not preclude service personnel from independently suing private party defendants in state court for their injuries; they are free to pursue this course of action even if they have been fully compensated for their injuries under the VBA. In this independent action, the question of the government’s negligence may be litigated, resulting in the same undesirable disruption of military discipline. As a defense to the serviceperson’s claim, for example, the military supplier could assert that the government’s negligence was the sole cause of the resulting injuries, or that the injuries were the result of the serviceperson’s own actions in carrying out a military order. Once again, in proving these assertions, the supplier might well need to subpoena military personnel and to second guess military orders. Consequently, the Court’s denial of Stencel’s indemnity claim does not effectively protect military discipline from judicial scrutiny and disruption. The military discipline rationale, seemingly the most compelling of the factors relied upon by the Court to deny Stencel’s indemnity claim, does not justify the Court’s position because it fails to achieve its essential purpose.

**Application of the Stencel Ruling**

The United States Supreme Court’s ruling in *Stencel* is direct and unequivocal: government contractors and suppliers of military ordnance are barred from seeking indemnity or contribution from the government under the FTCA for amounts paid to service personnel injured while on active-duty status. The result is that these suppliers

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§ 1.01 (1971). *See also Prosser, supra* note 7, at 312. The Court’s decision in *Stencel* to preclude indemnity claims, however, would appear to apply to all four forms of indemnity.

94. 431 U.S. at 673.

95. The secondary result of the *Feres* and *Stencel* decisions limiting the right to sue under the FTCA is to divest the federal district courts of subject matter jurisdiction over claims by service personnel against the supplier. Except in cases of diversity of citizenship, these claims will be prosecuted in state court.

96. *Stencel* does not speak directly to contribution, but the same rationale should apply. Indemnity entails shifting “the entire loss from one tortfeasor who has been compelled to pay it to the shoulders of another who should bear it instead.” Contribution, on the other hand, “distributes the loss among the tortfeasors by requiring each to pay his proportionate share.” *Prosser, supra* note 7, at 310.
and contractors may be required, under the doctrine of joint and several liability, to bear not only the cost of their own negligence but also that of the government. 97

Under common law doctrine, each joint tortfeasor is liable for the full amount of damages suffered by the plaintiff. Such was the rule "even though his act concurred or combined with that of another wrongdoer to produce the result." 98 Beginning with the early English case of Merryweather v. Nixan, 99 these same common law courts developed the notion that willful or intentional wrongdoers were precluded from seeking contribution for their losses from the remaining joint tortfeasors. In the United States, the courts expanded this rule forbidding contribution to include negligent wrongdoers as well. 100 Recognizing the harshness of such a rule, several American jurisdictions began to permit, either by judicial decision or by legislative action, contribution among negligent joint tortfeasors. Presently thirty-eight American jurisdictions allow some degree of contribution. 101 Even in those jurisdictions that expressly forbid contribution the common law right to indemnity is often recognized. 102

In United States v. Yellow Cab. Co., 103 the United States Supreme Court held that the various state laws concerning indemnity and

97. Whether the Court's decision in Stencel will be limited to suppliers of military ordnance is not presently clear. Throughout the decision, however, the Court focuses upon Stencel's role as an ordnance supplier as one basis for extending the Feres doctrine to bar its claim. 431 U.S. at 672. The opinion, however, leaves sufficient leeway for a broader application of the decision and may be construed to bar indemnity claims by all military suppliers including those which provide such non-ordnance supplies as food, clothing, furniture, and housing. This latter conclusion seems persuasive in light of the Court's apparent underlying concern in Stencel to prevent Feres-disqualified plaintiffs from seeking recovery from the government indirectly through third party claims. In order to prevent such a circumvention of Feres, the Court may decide to include all military suppliers and contractors within the rationale of the Stencel decision.

98. PROSSER, supra note 7, at 297.
100. See PROSSER, supra note 7, at 305-08.
101. The jurisdictions are collected in Michael & Appel, Contribution and Indemnity among Joint Tortfeasors in Illinois: A Need for Reform, 7 Loy. Chi. L.J. 591, 617 n.110 (1976). The mere existence of a contribution statute does not mean that one tortfeasor can automatically seek contribution from a fellow tortfeasor. These statutes often expressly limit the right of contribution to certain tortfeasors (nonintentional tortfeasors) and then only if certain conditions precedent are satisfied (a joint judgment has been rendered against both tortfeasors and one of them has paid more than his pro rata share). See CAL. CIV. PROC. CODE § 875 (West 1976); N.Y. CIV. PRAC. LAW § 1401 (McKinney 1976).
102. See generally PROSSER, supra note 7, at 310-13.
contribution were applicable against the United States under the FTCA:

The question presented is whether the Federal Tort Claims Act empowers a United States District Court to require the United States to be impleaded as a third-party defendant and to answer the claim of a joint tort-feasor for contribution as if the United States were a private individual . . . . [W]e hold that it does.\(^{104}\)

Following the *Yellow Cab* decision, all private party defendants held jointly liable with the government were able to mitigate their losses by seeking contribution or indemnity\(^{105}\) from the government. *Stencel*, however, forecloses such actions to contractors and suppliers of military ordnance where the injured party was an active-duty serviceperson. *Stencel* effectively declares that, regardless of state law, the right to indemnity does not exist for *Stencel*-type defendants. Consequently, these same defendants, although jointly negligent with the government, must bear the entire burden of the loss.

With the denial of *Stencel's* claim for indemnity, the remedies available to military suppliers and contractors like *Stencel* take one of two forms. First, because government contractors are precluded by statute from negotiating with the government for indemnity clauses in their contracts,\(^{106}\) the only way these contractors can attempt to limit their losses from a *Stencel* situation is by means of liability insurance.\(^{107}\) Strictly speaking, liability insurance coverage is not, however, a "remedy." Because the insured, in order to meet the costs of such insurance, would undoubtedly increase the amount of its bid for the government contract, the government would pay indirectly for such insurance coverage through increased contract prices. Absorbing the cost of this liability insurance coverage may simply prove too costly to small suppliers such as *Stencel* who have no direct dealings with the government.

Second, military contractors denied indemnity or contribution under *Stencel* may petition Congress to compensate them for the losses they have suffered as a result of the government's negligence. The procedure of private bills for relief, however, places an undue burden on both the private parties and Congress. Indeed, the FTCA was

\(^{104}\) Id. at 544.

\(^{105}\) Defendants could, of course, seek such relief only if local law permitted. See note 36 & accompanying text *supra*.


\(^{107}\) See 431 U.S. at 674 n.8.
enacted by Congress largely in order to relieve it and the general public of this burden.\textsuperscript{108}

**Conclusion**

In *Stencel*, the United States Supreme Court reaffirmed its holding in *Feres* that "the Government is not liable under the Federal Tort Claims Act for injuries to servicemen where the injuries arise out of or are in the course of activity incident to service."\textsuperscript{109} Not since *Feres* itself had the Court expressed in such strong and unequivocal terms its support of the *Feres* doctrine.

The Court's decision is apparently based on the conclusion that such indemnity claims would permit active-duty service personnel, who are precluded by *Feres* from suing the government directly under the FTCA, to accomplish the same result indirectly through a third party claim. Such a circumvention of *Feres* would be contrary to the congressional intent, recognized by the *Feres* Court, to preclude active-duty service personnel from suing the government for injuries sustained incident to service.

In articulating its decision to deny these third party claims, the Court examined three of the same factors relied upon in *Feres* to divine a congressional intent to preclude active-duty service personnel from suing the government directly under the FTCA. As established above, these three factors—the distinctively federal relationship between the government and military supplier, the Veterans' Benefits Act as an upper limit on government's liability for injuries sustained by active-duty service personnel, and the military discipline argument—do not sufficiently support the decision to deny Stencel's claim for indemnity.

Although *Stencel* clearly prohibits ordnance suppliers from seeking indemnity from the Government on claims by active-duty service personnel, the effect of the decision on the indemnity claims of other suppliers and contractors who provide the military with such non-military goods as food and clothing is unclear. The three factors relied on by the Supreme Court to deny Stencel's claim become even less persuasive when applied to these suppliers. Unlike Stencel, they supply goods that are not distinctively military in nature. As such, their relationship with the Armed Forces is even less "distinctively federal in character." The Court should, therefore, narrowly limit the decision to military ordnance suppliers and contractors.

*Paul J. Dion*

\textsuperscript{109} 340 U.S. at 146.

\textsuperscript{*} A.B., 1972, University of California at Berkeley; M.A., 1974, University of California at Berkeley. Member, Second Year Class.