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In the

Supreme Court of the United States

STENCEL AERO ENGINEERING CORPORATION,

Petitioners,

v. No. 76-321

UNITED STATES OF AMERICA,

Respondent.

Washington, D.C.
March 22, 1977

Pages 1 thru 50

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STENCEL AERO ENGINEERING CORPORATION, Petitioner,	:	
v.	:	No. 76-321
UNITED STATES OF AMERICA, Respondent.	:	

Washington, D.C.,

Tuesday, March 22, 1977

The above-entitled matter came on for argument at 10:38 o'clock, a.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice
JOHN PAUL STEVENS, Associate Justice

APPEARANCES:

THOMAS J. WHALEN, ESQ., 1251 Avenue of the Americas, New York, New York 10020; on behalf of the Petitioner.

THOMAS S. MARTIN, ESQ., Assistant to the Solicitor General, Department of Justice, Washington, D.C. 20530; on behalf of the Respondent.

C O N T E N T S

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in 76-321, Stencel Aero Engineering Corporation against United States of America.

Mr. Whelan, I think you may proceed.

ORAL ARGUMENT OF THOMAS J. WHALEN, ESQ.,

ON BEHALF OF THE PETITIONER

MR. WHALEN: Mr. Chief Justice, and may it please the Court:

This case involves the claim of Stencel Aero Engineering Corporation against the United States under the Federal Tort Claims Act.

The issue in this case is not whether a corporation can sue the United States for the government's negligence. The answer to that is clear. The United States may be sued.

The issue in this case is rather whether that government's claim must be barred simply because the damages to the corporation include injuries to servicemen.

Now the issue in this case arises in the following factual context: in 1968 Stencel Aero Engineering corporation entered into a contract with North American Rockwell Corporation to upgrade an ejection system in a F-100 D fighter aircraft being used by the Air Force.

In 1973 one Captain John Donham, while flying one of these F-100 fighter aircrafts, had his aircraft catch on

fire. Donham ejected, using the system of Stencel Aero Engineering Corporation; and successfully ejected and survived.

However, he was injured, and thereupon filed a claim against both the United States and Stencel in the Eastern District of Missouri.

The Stencel Corporation cross-claimed against the United States, claiming that the negligence that caused the injury was primarily due to the United States negligence in the provision of requirement specifications and components, which were used by Stencel in manufacturing the system which was installed in the Aircraft.

The United States moved to dismiss both the claim of Donham and the claim of Stencel. The District Court granted both motions on the ground that Feres versus the United States, a decision of this Court, controlled.

Donham did not appeal; Stencel did. They appealed to the United States Court of Appeals, Eighth Circuit. However, the Circuit Court affirmed the decision of the District Court.

QUESTION: Donham's case against Stencel is still pending, I take it?

MR. WHALEN: That is correct, your Honor.

In view of the briefs that have been filed in this case --

QUESTION: Donham's case against the United States is permanently terminated?

MR. WHALEN: Yes, your Honor, it is.

QUESTION: He received compensation for his injuries from the United States directly, did he not?

MR. WHALEN: Correct, your HOnor. He received compensation of about $1,500 a month under the Military Compensation Act, and he's still receiving those payments.

The review of the briefs in this case indicate that the United States does not really dispute that the claim of Stencel is within the provisions of the Federal Tort Claims Act.

The government complains about the ramifications of applying -- or rather the ramifications of permitting Stencel's claim in this case. The government does not dispute that the language of the Federal Tort Claims Act, in sweeping and broad terms, includes the claim of Stencel.

QUESTION: Is that because Missouri law, which is applicable here, clearly makes it an action in tort rather than one is quasi contract, which it is in at least some jurisdictions?

MR. WHALEN: Yes, your Honor, in part. But the language of the Act itself encompasses the claim --

QUESTION: It wouldn't encompass the claim, would it, if this were a contractual action?

MR. WHALEN: No, your Honor, that would be governed the Tucker ACt.

QUESTION: It has to be a tort.

MR. WHALEN: Yes, your Honor.

QUESTION: In order to be covered by the statute.

MR. WHALEN: The Federal Tort Claims Act said, that's --

QUESTION: And in some jurisdictions, the law's been changed without my knowledge, indemnification is thought of as a quasi contractual obligation.

MR. WHALEN: In some jurisdictions, it is.

QUESTION: And in a jurisdiction such as that, you wouldn't have a claim, would you, that was covered by the Act?

MR. WHALEN: If -- I would not if it was a claim in t ort.

QUESTION: If it is not a tort.

MR. WHALEN:If it's considered a contractual claim --

QUESTION: Or quasi contractual.

MR. WHALEN: -- I would not have a claim because the United States under the Federal Tort Claims Act, only waived its immunity as to torts; that's correct, jyour Honor.

QUESTION: Right, and is it -- if I may follow up, is it clear, and is it conceded in this case that under Missouri law this is a claim in tort?

MR. WHALEN: It has not been disputed. I cannot say it is conceded. But --

QUESTION: But you submit that the Missouri law is plain and clear?

MR. WHALEN: I submit that the Missourilaw is clear on indemnity, which is our claim.

QUESTION: Rather than contributions?

MR. WHALEN: Well, we have a problem on contribution under Missouri law. But we are claiming indemnity. And the Missouri law, we claim --

QUESTION: Thatyou're the minor and the government is the major tort-feasor; is that it?

MR. WHALEN: That's right, your Honor. That's correct.

QUESTION: And that you're therefore entitled under Missouri law to 100 percent indemnification of any liability that you may have incurred; is that --

MR. WHALEN: That's correct, your Honor.

QUESTION: -- that's your claim under Missouri law?

MR. WHALEN: That's correct, your Honor.

QUESTION: And that's a tort claim under Missouri law.

MR. WHALEN: That's correct, your Honor.

QUESTION: In any of the types of jurisdictions to which my brother Stewart has just referred, Stencel in

their dealings with the government could have bargained for a contractual indemnity, could it have not?

MR. WHALEN: Yes, your Honor. But I must point out that this case does not involved a contract between Stencel and the government. This is a contract between North American Rockwell and the government. Stencel's contract was with the North American Rockwell.

But to answer your question, yes, this could be a bargained for item between a government contractor and the United States.

Of course, if Stencel's claim were denied in this case, the contractor would make a provision to increase the contract price to cover the possibility that claims arising out of injuries to servicemen and government employees were claims which the government would claim it's been immune. So that the contractor would attempt to take care of that in its contract.

QUESTION: The subcontractor can always negotiate that kind of protectionwith the prime contractor who would then take it in to account in his bid -- in his contract with the government.

MR. WHELAN: Yes, your Honor, he could.

QUESTION: In other words, there are mechanisms readily available for total protection?

MR. WHELAN: Financial protection, yes, your Honor.

But I think --

QUESTION: Isn't that all you're concerned about here?

MR. WHELAN: Well, this case --

QUESTION: What other concern do you have?

MR. WHELAN: I'm sorry, I'm --

QUESTION: Do you have any other concern for your client except his financial protection?

MR. WHELAN: That's all my concern, financial protection. However, I believe that this Court has a broader concern, and that is, that the government, when it acts, should not be -- should be responsible for the consequences of its acts. So that the government can't walk away from its responsibilities to a government contractor, especially where the results of that negligence are going to -- the victims of that negligence are going to be government employees and, more particularly, servicemen.

QUESTION: Well, but can you really suggest that the government has walked away here when this man is receiving $18,000 a year without any showing of negligence, but merely the showing of the injury?

MR. WHELAN: Yes, your Honor, it has not walked away from Donham, but it has walked away from its responsibilities to Stencel. The government, in it's --

QUESTION: Yes, but you've conceded that that's

a responsibility which you could have contractually protected?

MR. WHELAN: I could have contractually protected it if I had a contract with the government; but I do not.

QUESTION: Well, you could have protected through the primary contractor.

MR. WHELAN: If, your Honor, I had that sufficient bargaining power with the general contractor, that could have been an item of our contract. We're not in any case dealing with contractual arrangements; we are dealing with a tort.

Now, the government has not --

QUESTION: As a matter of Missouri law, could the indemnity claim be asserted by Stencel after the plaintiff litigation had ended? And suppose the plaintiff prevailed in a separate suit against Stencel, would Stencel thereafter have a right to sue an indemnitor?

MR. WHELAN:: Under Missouri law, it depends upon who the indemnitor would be. If the indemnitor had no -- in either case under Missouri there was no requirement of underlying liability between a third party defendant and a plaintiff.

After the action were over, under Missouri law, yes, Stencel could sue the third party defendant or the indemnitor.

QUESTION: Is it possible that even if you lose this

case, you could reassert your claim at a later -- after judgment?

MR. WHELAN: If I could sue the United States, which is the issue in this case, yes, I could.

QUESTION: Well, is it conceivable, at least theoretically, that you might be able to sue them later even though you could not sue them in the same action, the concern being that if they're brought into the same action, the plaintiff's recovery might be enhanced by the fact that the United States would be in Court, and its alleged negligence, if proved in that case, might do something which would contribute to the plaintiff's ability to recover.

MR. WHELAN: Yes, your Honor, I could, if the basic issue which is before the Court here is decided in my favor; the answer is yes. I could bring a separate action against the United States?

QUESTION: But couldn't you -- at least -- how much ingenuity would it take, after -- after a judgment was entered against you for liability to this airman, for you to sue the government in the court of claims under a contractual theory, a quasi contractual theory?

MR. WHELAN: I have no -- if I had that right, that's the only place I could go, and that would be --

QUESTION: The Court of Claims.

MR. WHELAN: -- the Court of Claims.

But we don't have a contractual relationship, your Honor, in this case between and the United States. And it is only those actions which are permitted in the Court of Claims, as I read the Tucker Act. I could not sue, in this case, the United States in the Court of Claims. The Court of Claims is the only Court that has jurisdiction since what I would be claiming for is more than $10,000.

QUESTION: Right, and under a contract.

MR. WHELAN: And under a contract, yes, your Honor.

QUESTION: Well, ti seems to me that it perhaps wouldn't take a great deal of ingenuity to frame a complaint stating case of action under those circumstnaces?

MR. WHELAN: Well, I think it would take more ingenuity than I have, because we --

QUESTION: It may take more ingenuity than either one of us has to allow you to prevail. But --

[Laughter.]

MR. WHELAN: The government does not really dispute that the Stencel claim is within the provisions of the Federal Tort Claims Act, or that it falls within any of the exceptions.

And more critically, the government has not found one piece of legislative history indicating that Congress

inteded to exclude a claim such as Stencel's.

The government, rather, says in effect, what about the ramifications of allowing Stencel's claim? Eseentially, the ramifications fall into two categories: one, it would disrupt the military compensation system, which was set up by the Congress.

Now, let's look at that military compensation system. The military compensation system is essentially a quid proquo between the government and the servicemen. A servicemen gives up his right to the United States for damages due to United States negligence, and in return receives an ample and sure remedy. Of course Stencel is not part of that bargain; receives no benefit. And in this case, if you take the government's position, it is this: Stencel's claim is barred, or should be barred, simply because one party to that bargain, the serviceman, is suing Stencel for damages. And the other party to the bargain, the United States of America, says that that claim should be barred.

In other words, the government is saying that the bargain does not hold for Donham. He can sue Stencel. But please, our bargain, do not permit anyone to sue us. That is essentially the government's position.

And I say to this Court, that the moment that Donham steps out of his shoes and sues Stencel, he has

disrupted the military compensation system.

QUESTION: He hasn't recovered yet, has he?

MR.WHELAN: No, your Honor, this is a third party claim.

QUESTION: And we don't know whether he will recover?

MR. WHELAN: No, your Honor, we do not. But if he does, and we claim under the Federal Tort Claims ACt, that we have a right to indemnity, and in terms of judicial economy, having one court, one fact-finder -- rather, two fact-finders, in this case, but one litigation, to determine all the rights of the parties with an interest in litigation, that is, Stencel, Donham, and the United States of America, as well as the other defendants in this case, who we are not here concerned with.

QUESTION: Does the fact of privity between Stencel and the United States in the contractual area bar the United States from a suit against Stencel, assuming hypothetically that it could show that the injuries to Donham were caused by Stencel's negligence?

MR. WHELAN: No, your Honor, it does not. The United States could introduce its evidence, and say that our specifications, our components, are requirements, were perfect; and we exercised due care in making these decisions.

QUESTION: I'm afraid I didn't make my question clear.

QUESTION: Since the United States is now committed to paying $18,000 a year, probably for the rest of Donham's life, which will amount to a very substantial sum of money, is the United States barred from suing Stencel on a claim that Stencel's negligence has caused this huge damage to the United States government for which it must pay Donham?

MR. WHELAN: Well, your Honor, I think in part it is barred. I think that question, the question of equitable recoupment, was raised before this Court in the Standard Oil case many years ago, and I think that this Court found in that case, which I believe it is analogous, that the government could not sue.

But Congress has passed a statute which commits the government to recover for the expenses of the medical services which were provided to Donham in this case. In this case, they are considerable. So that in that event, if all things go badly for Stencel, Donham will collect his military compensation payment; Stencel will pay damages to Donham; Donham will recover twice; and the government, who we claim is the principal culprit in the accident that is involved in this case, will not only not be sued for damages by Stencel, but will be permitted to come into court and get back from Stencel the medical payments that it provided to Donham under the Congressional statute. And we think that is an outrageous situation.

QUESTION: Mr. Whelan, isn't the government's position that Donham can't sue the government; he can't recover; right?

MR. WHELAN: Donham cannot -- I'm sorry, your Honor.

QUESTION: If you sue on his behalf, you take over his impediment.

MR. WHELAN: Yes, your Honor, if we sue --

QUESTION: But what's wrong with that?

MR. WHELAN: We are not suing on his behalf. WE are suing on our own behalf. We --

QUESTION: Well, how can you sue if you don't sue on behalf of what Donham gets from you?

MR. WHELAN: That is our --

QUESTION: That's your only damages.

MR. WHELAN: Well, there may also be attorneys' fees. But essentially, that would be the principal damages. It's as if, your Honor, that we had separate damages. The character of the damages mean nothing. We have to pay money to someone. We have -- we, the corporation, have suffered damages. And we claim that the United States is responsible for that.

If Donham was a private citizen, and suffered an injury, and we sued Stencel --and he sued Stencel -- there's no question that under the Federal Tort Claims Act

we would be entitled to sue the United States.

QUESTION: Except where the Feres case says particularly that you can't.

MR. WHELAN: Your Honor, the Feres case --

QUESTION: Are you going to get to the Feres case?

MR. WHELAN: The Feres case -- I'm sorry your Honor?

QUESTION: Are you going to get to that case?

MR. WHELAN: Yes, your Honor; I will address it now.

The Feres case was basically a suit between a serviceman against the United States for injuries sustained incident to his service.

This Court found in the military compensation system a Congressional intent that Congress intended that kind of claim by a serviceman against the United States was not contemplated by Congress when it enacted the Federal Tort Claims Act. And that's all the case holds.

QUESTION: Well, would that apply if this man had sued the United States under the Federal Tort Claims Act? Does Feres apply?

MR. WHELAN: Yes, your Honor, and --

QUESTION: And what would that mean? He got nothing.

MR. WHELAN: He would get nothing from the government under the Federal Tort Claims Act.

QUESTION: That's right; but under this way, he will get something from the government?

MR. WHELAN: He will get -- he has gotten his military compensation assistance, and he will --

QUESTION: And he will also get what you give him?

MR. WHELAN: He will get what we are held responsible for.

QUESTION: And which the government will then have to give you?

MR. WHELAN: The government, will, if we can prove our case -- and of course the case of Stencel against the United States is a different case; different facts, different theories of liability. The fact of the matter is that we, the corporation, on our claim against the United States, is a different claim, differently in consequence --

QUESTION: Well, if there had not been this accident, could you have sued the United States?

MR. WHELAN: If there had not been this accident, we would have no reason to sue the United States?

QUESTION: Could you?

MR. WHELAN: Yes, your Honor, we could have.

QUESTION: How could you have sued? On what grounds?

MR. WHELAN: If a civilian -- if we had suffered

damage --

QUESTION: If nobody had been injured, could you sue the United States?

MR. WHELAN: No, your Honor.

QUESTION: So the only way you could sue is because a serviceman is injured. That's the only grounds.

MR. WHELAN: The only reason we can sue, your Honor, if your HOnor please, if is we have suffered damage. It's a different claim --

QUESTION: As a result of the United States tort?

MR. WHELAN: That's our claim, your Honor; as a result of the United States tort.

QUESTION: Mr. Whelan, in your cross claim, you allege that after the equipment was delivered, it was in the custody of the United States, and I take it you intend to prove in support of your cross claim that there war negligence in the government in the care and maintenance of the system? Is that correct?

MR. WHELAN: As a matter of strategy, I probably will not contend that, your Honor, because I think that would only lead me into a contribution situation in which I don't think I'm as sound as I am in indemnity; what I'm claiming is pre-delivery --

QUESTION: Well, that is in the cross claim that was dismissed.

MR. WHELAN: Yes, it is, your Honor.

QUESTION: You withdraw that allegation?

MR. WHELAN: Not yet, your Honor. I will consider --

QUESTION: Well, would it be an issue at the trial if you prevail? Will evidence be put in as to whether or not the government was negligent in the way in which it took care of the equipment after it was delivered?

MR. WHELAN: I may submit evidence if I can establish that that will support some claim of Stencel against the United States.

QUESTION: Wouldn't a jury interpret such evidence as supporting a claim by the pilot against the United STates?

MR. WHELAN: I'm sorry, I don't --

QUESTION: The theory would be that the man was injured because something was defective about the system, and the defect was created by the negligent maintenance of the United States.

MR. WHELAN: I would -- I would -- yes, that would be a defense of my claim to Donham. I would say that the cause of this accident was the negligence of the United States. That, I believe, would be a defense, it would be an absolute defense --

QUESTION: But the jury would be instructed that if that was the cause, there would be no recovery at all.

MR. WHELAN: Yes, your honor: Donham against

Stencel.

QUESTION: Or Donham against the United States, either one.

MR. WHELAN: Well, your Honor, Donham has already been dismissed as far as the United States --

QUESTION: Under Feres.

QUESTION: Right, I understand. But under your concept of the trial, though, all three parties would be in court arguing before the jury?

MR. WHELAN: That's correct, your Honor.

This Court has addressed the problem of workmen's compensation in two prior cases: the Ryan stevedore case and the Treadwell Construction case, in which the compensation system was not deemed to be a bar to a claim over.

It's exactly the same situation if you accept, as I believe you must, the military compensation system is a form of workmen's compensation.

QUESTION: That was on a warranty theory however, wasn't it? Which is quasi contractual; in any event, it's not tortious.

MR. WHELAN: Yes, your Honor.

QUESTION: With an implied warranty of workmanlike service, in the stevedoring contract, wasn't it?

MR. WHELAN: That's correct, your Honor. But I'm

trying to direct the Court's attention to the existence of the compensation system, not to the theory of the defense against a third party defendant. It is correct that the t heory of the defendant against the third party defendant was I believe a breach of workmanlike service, something --

QUESTION: Warranty.

MR. WHELAN: Warranty, yes your Honor.

QUESTION: Mr. Whelan, let me just go back for a second to this allegation in the cross claim about the negligent maintenance.

How does that support a cross claim, as opposed to being a defense to the main action?

MR. WHELAN: If I'm able to establish that the substantive law of Missouri permits contributions, then I will attempt to shift some of the liability for which we may be found in our suit involving Donham, we will attempt to shift some of that responsibility --

QUESTION: So that allegation is in on a contribution theory as opposed to an indemnity theory?

MR. WHELAN: Yes, your Honor, that is correct.

QUESTION: But you know in Missouri you're in trouble on that contribution theory, aren't you?

MR. WHELAN: Yes, your Honor, if the Missouri rule applies.

But of course we have not had a full development of

the case --

QUESTION: No, I see. But you have a more doubtful position with respect to it.

MR. WHELAN: Yes, your Honor; if Missouri law applies.

QUESTION: Right.

MR. WHELAN: The military discipline is the second rationale which the government relies upon as a serious ramification in this case.

First of all, I would like to point out to the Court that military discipline is not an issue in this case, and cannot be an issue in this case. This is a case arising out of a government procurement activity.

The government, however, fears that a decision in favor of Stencel in this case would involve the orders of a field commander, and place his judgment -- and impair his judgment in the exercise of his duties.

However, if a field commander's order is involved in a case -- it's not involved in this case, but if it's involved in another case, and I was defending a defendant, I would make sure that that field commander would be brought into court by subpoena deposition as another method, and I would confront in that suit the plaintiff Donham, and his military commander.

So if the government is afraid of the confrontation,

as I think this Court was concerned in one of its prior decisions, if you're afraid of a confrontation between a field commander and the plaintiff-serviceman, this suit won't -- a decision against Stencel will not stop that.

If the government order is relevant, I will bring in the field commander. I will put that order into issue. And so the situation as it exists today does not -- the denial of Stencel's claim in this case does not change that situation.

The orders of a military commander can be brought into question; and the Congress so intended it. When the Congress passed the Federal Tort Claims Act, it clearly defined employee to include military serviceman acting in the line of duty. It also provided a specific exception: that is, if the claim arises out of the combatant activities of the United States in time of war, the United States cannot be sued and does not waive its sovereign immunity.

We do not dispute that.

QUESTION: Well, are you familiar with the case of Brooks against the United States?

MR. WHELAN: Yes, your Honor, I am.

QUESTION: Well, what if in this case Donham had simply taken the plane without any instructions from a superior and gone off on a frolic of his own? Such that the Feres rationale would not have protected the government?

I take it your case then would be stronger, would it not?

MR. WHELAN: The Brooks case -- yes, your Honor, there would be no problem. The Brooks case would control the situation. Donham could sue the government, and he could sue us if he claims that our ejection system did not work properly. We, on the same facts, would bring in the government; and of course the question of underlying liability would not be an issue, because there would be no underlying--

QUESTION: And the government's arguments that they're available to make against you in this particular case because of Feres would not be available to them in the Brooks situation?

MR. WHELAN: That's correct, your Honor.

QUESTION: And your only obstacle in this case is the Feres doctrine, isn't it?

MR. WHELAN: We do not believe it is an obstacle, but thatis the obstacle which the government has placed in our --

QUESTION: Well, that's the issue. That's the only issue. I mean, we're not concerned here with the merits of your claim at all.

MR. WHELAN: Yes, your Honor.

QUESTION: But the issue of the government's suability here is an issue only because of the Feres case,

isn't that correct?

MR. WHELAN: Yes, your Honor.

QUESTION: There's no other reason?

MR. WHELAN: No other reason; that's right. And we think that the Feres case is simply a case of servicemen against the United States. And even if some commentators say that that is really an exception to the Federal Tort Claims Act, then we should be treated as an exception; and that is, as this Court has held many, many times, the broad sweeping language indicates a broad waiver of sovereign immunity, and the exceptions to that broad waiver of sovereign immunity should be narrowly construed.

It's the philosophy that's been expounded by this Court many, many times.

If, however, the issue of a field commander's orders does become an issue in the case, ifit's that kind of important decision, we believe that Congress has provided for that in the Federal Tort Claim's Act when it provided an exception for discretionary function.

That is, this is an important kind of decision-making; and the government is protected in its important government decisions. And if a decision, we maintain, is not important enough to be protected by the discretionary function, then it's not important enough to bar a claim like Stencel's against the government, when the government has

been negligible and responsible for the damages which may be sustained by Stencel in this case.

Finally, your Honor, I would like to conclude on the ramifications which would occur if Stencel's claim were denied -- Stencel's claim against the United States were denied.

First of all, there would be a double recovery by Donham. But the government would not worry about a double recover; it would not suffer the consequences of a double recovery. But, as I mentioned earlier, notwithstanding, the government's negligence, the government could still, under that congressional statute, come in and get from Stencel the expenses of the medical -- the medical expenses it incurred in treating Donham.

The government in this case is, in effect, saying that with respect to our negligence, we are not responsible; we want to be immune from the consequences of our act. On page 12 of its brief, in footnote 4, the government quite candidly states: we owe no duty of care to Stencel.

Your Honors, we maintain that the government owes a duty of care just as any private person. Every private person, every citizen, has an obligation to every other person to exercise due care.

QUESTION: Mr. Whelan, I just hate to interrupt, but your double recovery argument, I just don't understand that.

You're not going to be liable for medical expenses, if the medical expenses are all paid by the United States, are you?

MR. WHELAN: Well, your Honor -- yes, your Honor, I am saying that under the Congressional statute, as I read it --

QUESTION: They may recover those from you, but you're not going to have to pay them to the plaintiff.

MR. WHELAN: Your Honor --

QUESTION: There's an entire amount of injury, part of which is owed to the government, and part of which is owed to the plaintiff.

MR. WHELAN: Yes, your Honor.

QUESTION: Then you're not paying for the same injury twice, are you?

MR. WHELAN: No, your Honor, but the government -- the government, whom I'm claiming is responsible for this accident, is going to be entitled, under this Congressional statute, to sue Stencel, to pay for the medical costs of treating Donham --

QUESTION: But if you're right on the facts, they won'tprevail in that lawsuit, will they?

MR. WHELAN: That's correct, they won't.

Thank you, your Honor.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Whelan.

Mr. Martin.

ORAL ARGUMENT OF THOMAS S. MARTIN, ESQ.,

ON BEHALF OF THE RESPONDENT.

MR. MARTIN: Mr. Chief Justice, may it please the Court:

The issue in this case is whether Congress intended that the same kind of litigation that is barred in Feres would nevertheless be permitted if brought indirectly by a third party plaintiff.

In my argument I would hope to touch briefly on four principal topics. First, the similarity between the barred Feres claim and the claim which petitioner seeks to bring in this case by way of indemnity.

Second, the propriety of applying a Feres immunity against a third party manufacturer who had not received compensation.

Third, the limited scope of the immunity that is claimed here by the government.

And fourth, I'd like to briefly address our alternative ground for affirming the Court of Appeals' decision, namely, that indemnity will not be permitted in the absence of liability running from the United States to the injured party.

Now, turning to our first point --

QUESTION: That -- your fourth ground --

MR. MARTIN: Yes.

QUESTION: -- it's not a matter of Missouri law?

MR. MARTIN: It's not a matter of Missouri law, it's a matter of federal law.

QUESTION: Yes.

MR. MARTIN: OUr first point: petitioner's cause of action, we believe, is identical in a practical sense to the serviceman's claim that this court considered and rejected in Feres.

Now, in Feres the executrix of a serviceman who was killed in a barracks' fire sought to recover court damages from the United States. And the claim was thatthe military had negligently quartered troops in a barracks with an unsafe heating facility.

Now in Griggs and Jefferson, decided with Feres, the claim was that an army doctor had negligently performed a medical operation. Contrary to petitioner's apparent understanding, there was no field commander's order involved in any of these cases. In Feres, there was no plaintiff-serviceman going to point a finger at the -- at his commander.

Feres had died in the barracks fire that was the cause of action.

So Feres, like this case, really involved another party stepping into the place of the plaintiff and bringing a particular kind of litigation.

Now like petitioners here, the claimants in Feres based their cause of action on the general language of the Tort Claims Act and the absence of any specific exceptions applying to servicemen.

But in Feres, the Court demonstrated that in this context, a military context, a cause of action cannot be assumed from the general language of the Tort Claims Act. To find out Congress' real intent, the Court turned to the consequences of the proposed cause of action. The Court saw adverse effects on military discipline from the litigation of injuries arising out of injuries to servicemen under orders.

It found an additional tort remedy to be inconsistent with the compensation scheme which covers those injuries. And lastly, it thought it unlikely that Congress would impose the varying standards of state law upon the consequences of Federal military actions.

The Court denied the Feres claim against the United States, and it did so in very broad language. It said, and I quote, the government is not liable under the Federal Tort Claims Act for injuries to servicemen where those injuries arise out of activity incident to service, close quote.

That's exactly the liability that we're talking about here.

Now the Court in Feres appeared to realize it was making a difficult judgment with respect to Congress' intent. So the Court said to the Congress, if we're wrong on this, then Congress has a remedy; it can change the statute.

But in the 25 years since Feres was decided, Congress made no changes in the statute. And we think that suggests strongly that the decision to preclude litigation in this area was, in fact, correct.

Now, the nature of petitioner's claim is an indemnity claim for recovery of injuries to servicemen. And therefore the subject matter of its claim must be the injury to Captain Donham.

QUESTION: Well, I could understand your argument if Stencel, if that's its name, was an assignee, was suing as an assignee, or an assignee by operation of law by subrogation, then he would be asserting the serviceman's claim. But here, Stencel is asserting a different claim. The measure of damages is going to turn out to be the amount he had to pay to Donham. But it's a different claim, it's a different theory of recovery. He's not an assignee of Donham, nor is he an assignee by operation of law, by subrogation.

MR. MARTIN: I agree with you.

QUESTION: It's something else under Missouri law, as I understand it.

MR. MARTIN: I agree. It is not an assignee, it is not a subrogation case.

QUESTION: If it were, your argument would be, I would think --

MR. MARTIN: It would automatically follow. And it's a little bit more difficult than that.

But we suggest that Feres must have relied upon the nature of the litigation process that was brought. In other words, the Court seemed to be concerned, at least as interpreted in the Brown case and in Muniz, the Court seemed to be concerned with the effects of a tort suit challenging the action of military officers, and injuries to military personnel under orders.

And it's the litigation process which we think was what the Court was concerned about.

Now, that litigation process, we suggest, must be the same by the nature of an indemnity claim. Not because it's subrogation, but it's -- it'll have the same aspects. Let me speak to that --

QUESTION: But Stencel isn't under any order from the government, in the sense that it's a part of the Army.

MR. MARTIN: That's exactly right. But Stencel's claim, if we look at its cross-complaint, is that the United States was negligent in causing the injury to Captain Donham.

That's the only way it can succeed, at least under

the theory that it has, in fact, brought.

QUESTION: Its theory is passive versus active.

MR. MARTIN: Passive versus active negligence toward Captain Donham.

QUESTION: Not only that, but that the United States was the primary negligent party.

MR. MARTIN: Exactly. And we -- the United States negligently designed or negligently maintained this ejection system. And as a result, we caused Captain Donham's injury.

Now, Captain Donham's suit, if he had not been barred, would have been exactly the same. The United States either negligently designed or negligently maintained my ejection system, and therefore it caused me injury.

So that negligent action, in terms of its theory, is going to be the same, as Justice Stewart pointed out, the damages are going to be the same. There is no injury, as Justice Marshall said, there is no injury to Stencel independent of those damages to Captain Donham.

QUESTION: Is it correct that the proof of its case, Stencel would have to prove every element essentially that Donham would have had to prove if the Tort Claims Act had not been barred --

MR. MARTIN: I don't see how he could have avoided that burden, Mr. Chief Justice. Donham -- Stencel would have to show that there was a duty running from the

United States toward Captain Donham that somehow we negligently performed, and there was an injury to Captain Donham.

QUESTION: Well they --

MR. MARTIN: Causation has to be determined.

QUESTION: -- started with a suit by Donham, didn't it?

MR. MARTIN: The case started by a suit by Donham.

QUESTION: And they sued the United States.

MR. MARTIN: Sued the United States.

QUESTION: And the case was dismissed.

MR. MARTIN: On exactly these allegations. And the case was dismissed. And now we're going to have, if Stencel prepares -- prevails -- the exactly same litigation, except now the indemnitee as opposed to the serviceman himself.

QUESTION: But aren't you going to have some of the same issues in a litigation between Donham and Stencel, which can concededly be brought?

MR. MARTIN: I think it's possible that we could have some of those issues. I think it's also possible that Stencel may, in the absence of a third party recovery possibility, settle this kind of suit. It's true, as we recognized in our brief, that there can be some inroads on the policies which Feres meant to protect. In other words Feres attempted to protect the military from getting into the business of litigating its decisions.

There will be no determination by a Court, as there would be in a suit by Stencel, that Officer Jackson negligently failed to do something on a particular day. It'll just be a determination, if it comes about at all, that in fact Stencel did not cause the particular injury here. And we think that's significantly different.

If you have the kind of litigation process where you have an advocacy situation, a military officer accused of negligently performing a duty, I think the Court feared that after that litigation there's going to be questions about the impact on the relationship between the officers who testified, the impact on the confidence of the officer who was found negligent, impact upon the confidence of theother officers who might have to make similar judgmental decisions, an impact on those who have to respond, the subordinates to that officer.

The Court felt that Congress intended to exclude this kind of litigation. And again, Congress' failure to change the rules suggests to me, at least, that the Court was in fact right.

So while we recognize that unlike Feres, the former plaintiff here is a corporation, we think it does alter the more fundamental similarities, the subject matter of the litigation. In other words, an injury to an active duty serviceman bailing out of an F-looD fighter aircraft

while he was under military orders. That's the same question: who caused that accident? The theory of liability: Donham and Stencel both say that it's the United States that caused that accident. And so the litigation would be the same.

The litigation process would be an attempt to place that responsibility on the military officers who made the decision to get that particular ejection system, or maintain that particular ejection system.

QUESTION: Mr. Martin, if I could just interrupt. It seems to me, as Mr. Justice Rehnquist suggested, if their defense is, it was negligent maintenance, for example, aren't they going to put in precisely the same evidence to show it was the United States' responsibility, whether or not the United States is a party?

MR. MARTIN: Again I say, I think it's possible that they could. Of course we would not be a party to the suit, so they --

QUESTION: Well, what reason would they put any less evidence in?

MR. MARTIN: Well, first of all, they might settle the suit.

QUESTION: Well, that's not -- that can always happen in any lawsuit.

MR. MARTIN: Sure.

QUESTION: But I think we have to assume it's going to go to trial. And if it goes to trial, then it seems to me the evidence will be precisely the same whether you're a party or not.

MR. MARTIN: I think that it could be. Let me say this, Justice Stevens: I think Congress' determination, which this Court found in Feres, was a general determination to avoid this kind of action as much as possible. As the -- what we're saying, really, is that Stencel can now bring a suit that would undermine some of the Feres rationale in precluding Donham's suit. And it would undermine some of the rationale in precluding Stencel's suit against the United States.

But I think Congress, in establishing the rule which we think should be unitary as to servicemen and third parties, was looking to the broad scope of things and saying that in general we do not want to encourage people -- third parties, as to whom -- against whom suits are brought -- to join the United States in every case, and to engag e in an adversary litigation against the United States.

I think Congress was looking to that broad, policy and it applies here.

QUESTION: In the suit which Donham brings -- will try against Stencel, whose negligence will be the focus of the evidence?

MR. MARTIN: In the suit that Donham tries against Stencel, it'll be trying to prove that Stencel was, in fact, negligent.

QUESTION: Not negligence of the United STates.

MR. MARTIN: Not the negligence of the United States. But if it can prove that plainly.

QUESTION: So there's no common ground, necessarily --

MR. MARTIN: No necessary common ground.

QUESTION: -- between the proof that would be in the Donham against the United States if the Feres case didn't block it, and Donham against the United States. No one will be concerned in that case about the negligence of the United States on the plaintiff's side, will they?

MR. MARTIN: Not necessarily. It's only a possibility.

QUESTION: Well, would it be relevant at all?

MR. MARTIN: Not in terms of the plaintiff's side, not at all.

QUESTION: But you can have factual variations all over the lot, can't you, in this type of case, where you've got a clearly injured plaintiff and he's looking for as many solvent defendants as he can to sue to allege some claim of negligence against every conceivable person who he can keep in court. So that just because your particular

factual variant may be quite different from any case that might be brought against the United States doesn't mean that the next case will have that -- will be equally far distant from it.

MR. MARTIN: That's correct. But again I say, these are criticisms that really apply to Feres v. the United States. In Feres, the Court made a general determination that Congress intended generally to include these kinds of litigation.

Now Donham's suit against Stencel will in some way implicate those asme concerns. But I don't think that undermines Congress' intent, which this Court found in Feres, and which the Congress has sustained.

It would be somewhat bizarre, I would say, to allow one rule with respect to Captain Donham, that he can't bring the suit because it might involve a litigation process concerning the military, and then let Stencel do the exact same thing. As the Court of Appeals said, it would be simply anomalous to preclude th e serviceman from getting his recovery for his injury, and then allow a third party to have that exact same recovery.

QUESTION: And I suppose your answer would be, if someone were to make what all of us, I take it, would be an extreme argument, that Congress' fear of litigating military orders was so strong that it actually intended to

imply an exception to diversity jurisdiction, so that a federal court was to be prohibited from entertaining a suit by Donham against Stencel, your reply to that would be, you don't have to go that far. At least both of these exceptions come out of the Federal Tort Claims Act.

MR. MARTIN: That's exactly right. We're only talkin g about the Federal Tort Claims Act.

I'd like to speak for a moment about the proprietary, the fairness, of applying the Feres rule to a third-party government contractor.

Now in Feres, and subsequently in United States v. Demko, this Court found the presence of a compensation scheme to be an important indicator of Congress' intent to preclude tort remedies. Compensation statutes are almost always thought of as substitutes for common law tort remedy by the injured party.

But another function of a compensation scheme is to limit the liability arising out of a particular activity. The language of this Court in Cooper Stevedoring v. Kopke provides a kind of protective mantle for the employer.

Now, like workmen's compensation, veterans' compensation laws provide sure compensation to the injured party and a limited liability for the United States. And this protective function is especially important here, because this is an enormously dangerous business of

training and transporting military personnel. The compensation cheme we think really represents a Congressional balancing of the necessity to limit costs, but the duty and the responsibility to perform -- to provide some reparation, an adequate reparation, for these serviceman.

Now that protective function, that balancing of Congress, would be just as frustrated by an indirect recovery by way of indemnity as it would be by a direct recovery. We think it not likely that Congress intended that the liability of the United States would be measured by the compensation scheme plus whatever additional amount might be passed through some third-party manufacturer.

The fact that the scheme would be equally violated by direct or indirect recovery suggests to us that the fact that the petitioner is not a serviceman doesn't make any difference for the Feres result.

Now, petitioner argues that enforcing immunity against a party not governed by a compensationscheme is unfair. But this Court and other courts have enforced protection -- the protective mantle of a compensation scheme -- against third parties, to protect what again Cooper Stevedoring called a result inconsistent with the balance struck by Congress.

The commercial setting here, of course, we think especially eliminates any sort of unfairness claim. This

is a contract buyer. He sets the terms of his relationship by way of contract. And we think the obligation should be fairly limited to contract in this context.

This is not some stranger who suddenly is injured by an unforeseen action. The risk that, first of all, we think that Donham -- Stencel will not be held liable in the absence of its own negligence. But if it is, that's a commercial business risk. And it could have allocated some part of its price to the purchase of insurance, or to self insurance. It may in fact have done so.

So we think that to preclude tort indemnity here merely means that those kinds of risks that Stencel is talking about will continue to be resolved through the contract price or other contract terms, rather than through the kind of litigation that Congress intended to preclude.

STencel has talked about the reverse situation, the unfairness of recovery against -- that the United States could bring some action for recovery against Stencel. As Stencel realizes, the only action that the United States can bring is for recovery of medical costs under Section 2651 of 42 U.S.C.

It's important to note that this is de minimus matter. We're only talking in that statute about medical costs, only medical costs prior to discharge, VA medical costs cannot be recovered under that statute, under 2651(c)

It's not clear at all that that statute --

QUESTION: Prior to Donham's discharge?

MR. MARTIN: Prior to Donham's discharge only.

QUESTION: And has he been?

MR. MARTIN: He has been. In the appendix, as an attachment to petitioner complaint -- cross-complaint.

QUESTION: Let me ask something that relates to it, I think. In Stencel's action against the United States, where will that action -- how will that fact-finding be made? By --

MR. MARTIN: The fact-finding would be made by interrogatories to a party, depositions --

QUESTION: Well, court or jury?

MR. MARTIN: Excuse me?

QUESTION: Court or jury?

MR. MARTIN: Court or jury.

QUESTION: Well, which?

MR. MARTIN: Oh. Under the Tort Claims Act --

QUESTION: It's only a court.

MR. MARTIN: -- it's only a court, no jury, that's right.

The -- I would like to mention that -- as -- first of all, there's no -- it's not clear that this statute would permit -- this medical statute, as limited as it is, would permit recovery against a government

contractor who was not, in fact, negligent. And let me note that the Air Force's policy is not to -- not to recover even medical costs against a government contractor when the liability of that contractor is based upon a products liability or non-negligence theory.

So we think that the medical cost recovery is just simply too de minimus and hypothetical to upset the balance of fairness here.

I'd like to turn to the third point, the limited nature of theimmunity that we do claim here.

Stencel claims that our analysis will preclude every tort action touching the military. In fact, our claim of immunity is very narrow. It only governs situations that are covered by Feres itself. Only where the injury is to a serviceman are there implications for both the compensation scheme and for military discipline.

Now, because our understanding of Congress' intent would only bar suits where Feres applies, many of Stencel's criticisms are really addressed to Feres. Stencel argues that immunity is not merited here. Or there might be civilian personnel involved. Or there's a loss of deterrent value.

But Captain Donham's claim is barred in precisely this situation, because Congress set a broad rule that did not require an inquiry into each and every injury

action to determine whether, in fact, this action merits, in some way, a congressional immunity.

It's notable that all parties to this litigation seem to recognize that suits will have an important impact on federal interest. In other words, Stencel's claim really is, in its reply brief, that the advantages of deterrence will somehow outweigh the disadvantages of an impact upon the compensation scheme and military discipline. But that's really a policy kind of decision which we think should be reserved to Congress.

We think the situation is like United States v. Gilman. If you'll remember in that case, the United States brought to bring an indemnity action against one of its government employees. And the Court said, well, that kind of action will have results on the relationship between the government and its employees; it will have results with respect to fiscal policy. But it's very difficult for a court to determine exactly what those impacts will be.

And the Court denied a cause of action for indemnity in favor of the United States.

Here we think we have the reverse situation. Petitioner seeks to bring a cause of action. It's going to have an impact on fiscal policy, on the compensation scheme, on the military discipline. It's difficult to say precisely

what all the impact will be, what all the variations will be. But this is really a policy weighing judgment.

If Congress wants to change the rule of Feres and permit the United States to have liability for injuries to servicemen, Congress can do it. But we think this is not an appropriate kind of rule change for the Court to make, at least under the teaching of United States v. Gilman.

I'd like to turn briefly to the alternative ground for affirming the decision of the Court of Appeal, aground that does not rest on the military context at all.

A number of courts of appeals have held that neither indemnity or contribution will be permitted in the absence of liability running from the United States to the injured party.

This is the result which was reached by a majority of the state courts in workmen's compensation schemes.

But where the direct claim of the injured party is barred by federal law, we think and the courts have said that the implications of that bar for indemnity or contribution should also be decided as a matter of federal law.

Now this federal rule of indemnity would preclude indemnity here, because the United States is not liable to the injured party itself.

We believe that this rule is a proper one. It's

consistent with the purpose of indemnity, because it -- indemnity really shifts costs among liable parties. If the United States is not liable, no shifting should occur.

It also insures that theCourts will not permit a third-party recovery under an indemnity theory to override or undermine a Congressional decision to impose a sovereign immunity bar. And of course it makes fundamental good sense here, where recovery would impact on important federal interests.

QUESTION: The problem is that the Tort Claims Act incorporates by reference the state law.

MR. MARTIN: That's --

QUESTION: You had a very interesting argument, but you're met with that language of the statute, aren't you?

MR. MARTIN: I agree. But the language of the statute, and the legislative history, which is set out in Yellow Cab, talks in general about the Yellow Cab type situation where either the injured party or the --

QUESTION: That was contribution, wasn't it?

MR. MARTIN: Contribution, exactly.

QUESTION: Right.

MR. MARTIN: Either party could have sued the United States. And it says, that shall be decided as a matter of state law.

Now, there's nothing in the legislative history -- it's just silent, Justice Stewart -- there's nothing in the legislative history that would require, as far as we can see, that where a federal law has barred a direct claim of an injured party that the implications of that for indemnity should be decided by looking at state workmen's compensation decisions. That just hardly makes sense.

And I think the Courts in amttempt to place a realistic, sensible interpretation under the Tort Claims Act, have required that the matter be decided at the threshhold as a matter of federal laws.

QUESTION: Well, the only reason Stencel can sue you at all is by virtue of the waiver of immunity contained in the Federal Tort Claims Act, which clearly says -- which clearly makes the United States liable if a private person would be liable to the claimant in accordance with the law of the place where the act or omission occurred, which in this case was Missouri. That's the reason why I --

MR. MARTIN: I agree, the language is very difficult. But to bring the opposite result, Justice Stewart, you have to say that an indemnity action, the way the Court decides it is to look at what the meaning of the Missouri State workmen's compensation law was. Because that's the only reference point. And that just can't be true.

And so I think a reasonable interpretation is that

that language is the general rule, but where the direct bar arises out of federal law, implications must. It's the only way we can make sense out of the statute.

QUESTION: What did Mr. Whalen have to say about that in response to a question?

MR. MARTIN: He did not respond at all to that part of our brief.

QUESTION: Well, I thought he responded to a question here indicating that he had no claim under State law.

MR. MARTIN: That may be true. We have argued in our brief, as you know, that he has no claim under state law, under indemnity at all, or contribution.

QUESTION: Well, that would be for the merits if you lose here. That would be a matter for the trial court.

MR. MARTIN: Exactly right. And the reason why we're litigating here is not because of Missouri law --

QUESTION: Right.

MR. MARTIN: -- but these cases arise all over, and other law might be different.

QUESTION: Right.

MR. MARTIN: Thank you very much.

QUESTION: Mr. Martin, a very small question. The pleading refers to a defendant Mills Manufacturing Company; who's that?

MR. MARTIN: I know only that Mills Manufacturing is also -- was also named. I don't know their specific status, but I think my opposition will probably be more familiar with that.

Thank you.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen.

Your time has expired, Mr. Whelan.

Thank you, gentlemen. The case is submitted.

[Whereupon, at 11:36 o'clock, a.m., the case in the above-entitled matter was submitted.]

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