OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE

THE SUPREME COURT OF THE UNITED STATES

ORIGINAL

DKT/CASE NO. 84-194

TITLE UNITED STATES, Petitioner V. LOUISE SHEARER, INDIVIDUALLY AND AS ADMINISTRATRIX FOR THE ESTATE OF VERNON SHEARER, DECEASED

PLACE Washington, D. C.

DATE February 25, 1985

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IN THE SUPREME COURT OF THE UNITED STATES

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UNITED STATES,

Petitioner

v. : No. 84-194

LOUISE SHEARER, INDIVIDUALLY AND AS ADMINISTRATRIX OF THE ESTATE OF VERNON SHEARER, DECEASED

- -x

Washington, D.C.

Monday, February 25, 1985

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:56 a.m.

APPEARANCES:

KENNETH S. GELLER, ESQ., Deputy Solicitor General, Department of Justice, Washington, D.C.; on behalf of Petitioner.

WILLIAM T. CANNON, ESQ., Philadelphia, Pennsylvania; on behalf of the Respondent.

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P R O C E E D I N G S

CHIEF JUSTICE BURGER: Mr. Geller, I think you may proceed whenever you're ready.

ORAL ARGUMENT OF KENNETH S. GELLER, ESQ.,

ON BEHALF OF THE PETITIONER

MR. GELLER: Thank you, Mr. Chief Justice, and may it please the Court:

This case arises out of a rather unfortunate incident that occurred in New Mexico in 1979. Andrew Heard, who was a soldier in the United States Army stationed at Fort Bliss, Texas, murdered Vernon Shearer, who was also a soldier stationed at Fort Bliss, when both men were off base and off duty. And Heard was later sentenced to 15 to 55 years in prison in the state court for second degree murder.

Now, thereafter, Shearer's mother, who is the Respondent in this Court, sued the United States under the Federal Tort Claims Act seeking damages for her son's death. Respondent alleged that Heard had certain well-known dangerous propensities, and that the Army's negligent failure to control him, or to discharge him from the military, or to warn other soldiers about him was the cause of Shearer's death.

The Government moved for summary judgment on the basis of two exceptions to the Tort Claims Act. One

is the intentional tort exception in Section 2680(h) of Title VIII, and the other is the Feres doctrine.

The district court granted the Government's motion for summary judgment, but a divided court of appeals reversed. The Third Circuit held that Respondent's suit was not barred by the intentional tort exception because her complaint was framed in terms of negligence, and the court held that it was not barred by the Feres doctrine because Shearer's injuries had not occurred, in the court's view, incident to his military service.

Now, we sought certiorari because we believe that these rulings are plainly erroneous and conflict with numerous other decisions construing the Tort Claims Act.

Now, I'd like to begin by discussing the intentional tort exception first, because we believe that the plain language of that provision on its face unquestionably disposes of Respondent's claim.

The Tort Claims Act by its terms does not apply to any claim "arising out of certain intentional torts, including assault and battery." Now, there can't really be much doubt, we believe, that Respondent's claim here clearly arises out of Heard's assault and battery within the ordinary meaning of that phrase.

Heard's assault and battery directly gave rise to the injuries suffered by Respondent. Respondent unquestionably would have no cause of action if it wasn't for Heard's assault and battery. And the damages that she seeks here are precisely those damages that arose from the assault and battery, no more and no less. Her claim, therefore, we believe falls within the literal language of the intentional tort exception.

Now, the court of appeals attempted to avoid the straightforward language of Section 2680(h) by pointing out that Respondent's claim is drafted in terms of negligence rather than directly charging the Government with assault and battery.

It is undoubtedly true that Respondent, with an eye on Section 2680(h), has framed her complaint here to charge negligence rather than directly charge assault and battery; but we believe that a plaintiff's drafting decision plainly can't control the waiver of sovereign immunity that Congress has placed in the Tort Claims Act. It is a crucial --

QUESTION: May I ask one question on the Government's theory? Supposing we take it out of the military context for a moment and put it in a federal prison, and there was an allegation of negligence in administering the discipline and all the rest of the

prison, and that one inmate assaulted another inmate due to the negligence in supervision. Is that within the exemption or not?

MR. GELLER: Well, I think one could read Section 2680(h) even to cover that situation, but we have not suggested that. There's a line of cases that --

QUESTION: I understand there's a line of cases.

MR. GELLER: Yes.

QUESTION: But it seems to me if you read it as you say, you focus on the incident out of which the claim arises --

MR. GELLER: Well, but --

QUESTION: I have difficulty distinguishing the case. I mean maybe --

MR. GELLER: I think the distinction is not difficult, Justice Stevens, because Section 2680(h) bars claims against the United States arising out of assault and battery. And what we think Congress was obviously focusing on was arising out of assault and battery by a federal employee.

QUESTION: Well, what if it was done by a guard who was a poorly supervised guard?

MR. GELLER: If it was a federal employee, we think it would be covered by Section 2680(h). There's a

line of cases, however, where one inmate assaults another inmate, and we have not contended that that would be covered by Section 2680(h).

I think the distinction is one that Justice Harlan when he was a member of the Second Circuit drew, and we think quite reasonably so, in the Panella case; and that is something that has been followed by many of the subsequent courts.

QUESTION: You would read the arising out of language to mean arising out of an assault by a federal employee.

MR. GELLER: Yes. We think the whole Tort Claims Act is only talking about what should flow from torts by federal employees, what consequences should flow from torts by federal employees. And therefore, we think Section 2680(h) should be read at a minimum to bar suits against the United States arising out of assaults and batteries by federal employees, and therefore, the Court in this case needn't address what the situation would be if the assault was by a non-employee.

Now, as I was saying, the crucial language of the Tort Claims Act says not that the United States cannot be sued for assault and battery; it says the United States cannot be sued for any claim arising out of assault and battery. And Congress presumably chose

this broader language for a reason. We think the reason was that it wanted to avoid the federal Treasury's having to pay any claim that requires proof of an intentional tort by a federal employee. In fact, negligence supervision claims such as the one that Respondent has tried to bring here would seem to be precisely the sort of claim that arises out of an assault and battery but perhaps does not fall within wording such as for assault and battery.

So we think that unless Congress' choice of language -- and it was a deliberate choice of language -- is to be accorded no significance, then Section 2680(h) has to be read to cover claims like Respondent's that sound in torts other than assault and battery but plainly arise out of assault and battery.

And if there were any real doubt that this was the correct interpretation of the exemptions to the Tort Claims Act, I think it was dispelled by the Court's decision last term in the Kosak case.

Now, the Court will recall that Kosak involved a parallel exception to the Tort Claims Act, Section 2680(c). That section bars claims against the United States in respect of the detention of goods by Customs officers.

The plaintiff in Kosak, like the Respondent

here, argued for a very narrow construction of Section 2680(c). The plaintiff in Kosak argued that the Congress only meant to bar claims for damages that relate directly to the detention of goods and didn't mean to cover suits that challenge the loss or destruction of goods in the course of a Customs detention.

But this Court rejected that argument. It did so by looking at the plain language that Congress used. It said that Congress didn't simply bar claims for the detention of goods by Customs officials; it barred claims in respect of the detention of goods by Customs officials. And the Court said that in respect of has the same broad and all-encompassing meaning that words such as "arising out of," which appear in Section 2680(h), have. And therefore, the Court said that Congress intended to bar suits against the United States, in the Court's words, in any way associated with the detention of goods, including the plaintiff's claim in Kosak.

There's no reason why Section 2680(h) should be given a narrower reading than Section 2680(c). Section 2680(h) has the arising out of language that the Court in Kosak analogized Section 2680(c) to. Therefore, we think in light of the Court's decision in

Kosak, Section 2680(h) has to bar claims that are in any way associated with an assault and battery by a federal employee.

In fact, the way that the court of appeals construed Section 2680(h) is really quite perverse, because what the court of appeals essentially said is that the only species of claim that it bars is a claim trying to hold the United States liable on a respondiat superior basis for the intentional torts of its employees.

But there really was very little reason why Congress should have been concerned when it passed the Tort Claims Act in 1946 that the United States would be held liable on a respondiat superior basis for intentional torts, because it was very unusual in 1946, and it's still unusual today, for an employer to be held liable on a respondiat superior basis for the intentional torts of its employees. And Congress had already put into Section 1346(b) --

QUESTION: Do you think there might be a difference, Mr. Geller, if the federal employee is, as Justice Stevens' question suggested, a federal employee is in a position where he has been told of the injured person -- that is, as the prison guard vis-a-vis the prisoner, as compared with the prison guard, for

example, meeting somebody in a local bar and committing an assault or killing him, as was the case here?

MR. GELLER: We would think, Mr. Chief Justice, that both suits would be barred if the cause of action was dependent upon proving an intentional tort by a federal employee. And in both of your hypotheticals I think that would be the case. In other words, we don't think it matters whether the federal employee was acting within the scope of his employment of not. If it is essential to the plaintiff's case to prove an intentional tort by a federal employee, we think Congress meant to foreclose suits against the United States under 2680(h). However, we don't believe that it necessarily would extend to suits challenging intentional torts by non-employees such as I discussed with Justice Stevens.

So as I was saying, the only thing that would be covered by the Third Circuit's construction of Section 2680(h) are respondiat superior claims, but that was really not a problem that Congress could have been concerned about in 1946. If it had looked at the reported cases involving intentional torts by employees, it would have seen that most of those suits alleged a negligent supervision theory, and yet, there's nothing in the language or legislative history of the

intentional tort exception to suggest that Congress meant to foreclose suits based on the really less likely theory, which is respondiat superior, and allow the United States to be sued on the more likely theory, which is negligent supervision.

And I think that Congress' amendment of the Tort Claims Act, the intentional tort exception, in 1974 confirms this common understanding of the clause, because as the Court is aware, Congress amended the Tort Claims Act in 1974 to allow the United States to be sued for the intentional torts of law enforcement officers. And that amendment followed a series of well-publicized episodes in which law enforcement officers, primarily drug agents, had engaged in illegal searches and seizures, no-knock raids, and illegal arrests.

If there was any species of claim in which it would be plausible or would have been plausible to hold the United States liable on a negligence supervision theory, that was it, because the evidence showed that many of these illegal raids had been carried out by the same drug officials or the same drug offices. And yet, the legislative history of the 1974 amendments are quite clear that Congress amended the act based on the assumption, which was shared by everyone and disputed by no one, that prior to the amendment in 1974 the United

States could not have been sued by the victims of those raids because of the intentional tort exception.

And so I think for all of these reasons, the Third Circuit was quite wrong to deviate from the plain language of Section 2680(h) in holding that this suit was not barred by the intentional tort exception.

Now, I would like to turn briefly to our Feres argument. We think that for the reasons I have just stated it is inconceivable that Congress could have intended to allow a plaintiff to circumvent the all-encompassing language of the intentional tort exception by the simple expedient of framing a complaint that sounds negligence by plainly is seeking damages from the United States based on an intentional tort. Nonetheless, Respondent has done precisely that here, and we think that as a result, her complaint runs squarely up against the Feres doctrine.

Now, under this Court's decision in Feres, a serviceman can't sue the United States under the Tort Claims Act for injuries that arise out of or in the course of his military service. The Court has explained that the Feres doctrine is based principally on the special relationship between a solider and his superior officers, and it is designed to prevent the adverse effect on military discipline that would occur if

soldiers could challenge the decisions of their superior officers in court in the guise of tort claims litigation.

It's really hard to imagine a case that more directly implicates the Feres doctrine than this one, and I invite the Court to take a look at the allegations of Respondent's complaint to see precisely what I mean. The crucial allegations are at page 14 of the joint appendix, paragraphs 40 and 41 of the complaint. And the Court will see in paragraphs 40 and 41 that Respondent here alleges that Private Shearer's superior officers at Fort Bliss were negligent in failure to exert more control over Private Heard, a fellow solider at the base, in failing to remove Private Heard from active duty, in failing to prevent Private Heard from injuring his fellow soldiers on the base, and in failing to warn those soldiers of the special danger that Private Heard presented to them.

So what we have here is a tort claims act suit by a soldier that's unabashedly intended to hail his superior officers into court to defend against charges that they were negligent in the way that they controlled or refused to discipline or refused to dismiss from the military some fellow soldier who was at the same base.

Now, I ask the Court would it -- would a suit like this require a civilian court to referee disputes

involving military personnel? Would it require a court to intrude into the special relationship between a soldier and his superior officers? And would a suit -- would maintenance of a suit like this --

QUESTION: May I ask on that point, Mr. Geller, supposing that the suit were not by a soldier but by a civilian who had been killed by this --

MR. GELLER: Yes.

QUESTION: -- same military person, and you had precisely the same allegation. Would there be any difference in the intrusion into military affairs?

MR. GELLER: There would be only the difference that the Court has recognized in saying that the Feres doctrine doesn't apply to suits by civilians. But there -- but I think --

QUESTION: Why shouldn't it? Why does the reasoning distinguish depending on the character of the plaintiff? Because here, of course, it's the widow or the mother, I gather.

MR. GELLER: Well, but I think this Court has already said that someone like the Respondent stands in the shoes of her soldier. Feres had said --

QUESTION: Then why are these policy concerns that you describe about the relationship --

MR. GELLER: Well, I think --

QUESTION: -- between the commanding officer and the subordinate --

MR. GELLER: -- there's a special, a special problem which the Court mentioned in Feres in allowing soldiers or their representatives to challenge the actions of their superior officers.

It is clear that Congress intended military decisionmaking to be the subject of Tort Claims Act suits. The definition of employee in the Act covers the military. But this Court said in its unanimous decision in Feres that there are special problems which Congress could not have intended in allowing a soldier to challenge the actions of his superior officers in the guise of adjudicating --

QUESTION: For that purpose, the widow is the soldier.

MR. GELLER: Yes. And Feres was a case brought by the administratrix of the estate of the dead soldier.

But I should say that if this was a suit brought by a civilian, we think that the same sort of inquiry that the Respondent would have a court make here as to whether the employer, the United States, acted negligently in its control over its employee would be barred, I think, by the discretionary function exception

of 2680(a). But Feres, in a sense, is a much broader exemption in the context of suits by soldiers.

But I think even if this was a civilian case, Congress would never have intended --

QUESTION: What you're saying is that even if Feres might not apply, you might have a defense under the discretionary function exemption in any event. That would apply here, too.

MR. GELLER: Yes. I think if this was a suit by a civilian, that would be the case. But --

QUESTION: But you didn't plead that here because Feres is broader.

MR. GELLER: Well, this is a suit by a soldier, and Feres I think is a much broader exemption, and therefore, we have relied on Feres.

QUESTION: If the soldier had been dismissed from the Army a day before this, there would be no case.

MR. GELLER: I think even then, Justice Marshall, we'd be barred by Feres because the soldier would still be challenging military decisionmaking while he was a member of the Armed Forces. The failure of the superior officers at Fort Bliss while he and Heard were members of the Armed Forces not to warn fellow servicemen about the --

QUESTION: I hate to see it out that far,

because what would happen if it was a year later?

MR. GELLER: Well, I think there's a key -- you have cases like Brown and Brooks in which soldiers were not -- this is not a case like that at all.

Now, there's one other point that bears mentioning in this regard, and that's this: when the Third Circuit rejected the Government's intentional tort argument, what it said was that the basis of Respondent's claim wasn't the intentional tort by Heard; it was instead -- the basis of Respondent's claim instead was the actions of Private Shearer's superior officers at Fort Bliss.

And yet, when the Court of Appeals considered the Government's Feres claim, it quickly switched gears and totally reanalyzed Respondent's suit, and said in that context that what Respondent was challenging was not the actions of Private Shearer's superiors but what had happened off base when Heard assaulted Shearer.

Now, this is a bit of a shell game, we think; when we find the pea, the court moved it. It's obvious that Respondent can't have it both ways. She can't say that the basis of her suit is the negligence by private Shearer's military superiors when it suits her purposes under Section 2680(h), and then when the Government challenges her suit under the Feres doctrine say oh, no,

we're not really challenging the actions of military superiors; we're challenging what happened off base when Private Heard assaulted Private Shearer.

So we think for both of these reasons the court of appeals was quite wrong in reversing the district court's grant of summary judgment for the Government, and we would ask this Court to reverse the judgment of the court of appeals.

If there are no further questions, I'd like to reserve the balance of my time.

CHIEF JUSTICE BURGER: Mr. Cannon.

ORAL ARGUMENT OF WILLIAM T. CANNON, ESQ.,
ON BEHALF OF THE RESPONDENT

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

The Government characterizes Plaintiff's action as one growing out of assault and battery, an intentional tort for which the Government has not raised sovereign immunity. It also claims Plaintiff's action is barred by the Feres doctrine.

The court of appeals decided both that the Feres doctrine does not apply to this case, and that Plaintiff's cause of action was not barred by the intentional tort exception.

Section 2680(h) of the Federal Tort Claims

Act, the intentional tort exception, bars recovery where a claim arises out of assault and battery. The Government urges that this exception should engulf not only respondiat superior claims, but also claims founded in antecedent negligence, regardless of how dire or severe that negligence predicate is, whenever the intervening tort feasor is a government employee.

The court of appeals determined that where an intervening intentional tort arises proximately, predictably and foreseeably, antecedent negligence of the Government causing injury, then the intentional tort exception does not bar such a claim.

The board interpretation that the Government would give to the statutory language of the exception is that found incorrect by this Court in Kosak. Speaking about the exception found in 2680(c) respecting the detention of goods or merchandise by an officer of Customs, this Court noted that unduly generous interpretations of the exceptions run the risk of defeating the central purpose of the statute, citing United States v. Yellow Cab.

The claim before this Court is not a subterfuge for an intentional assault and battery claim admittedly barred under the FTCA. The FTCA was designed to compensate victims of negligence in the conduct of

governmental activity in circumstances like those in which a private person would be liable. By its statutory terms it provides for district court jurisdiction over any claim founded in negligence brought against the United States.

QUESTION: Where is the analog to maintaining an armed force in the private sector?

MR. CANNON: There is no analog, Mr. Chief Justice, in the private sector between maintaining a force and a traditional claim brought under the FTCA. But I think that whole area is really in the Feres area as opposed to the intentional tort exception; and I intend to address that in my discussion of the Feres doctrine, if it please the Court.

The Plaintiff's cause of action in this case is premised upon Section 448 of the restatement of torts which is entitled "Intentionally tortious or criminal acts done under opportunity afforded by an actor's negligence."

State and federal courts across this land have entertained successful negligence actions under Section 448, notwithstanding the presence of gross, violent and often homicidal conduct on the part of intervening tort feasors. Indeed, Apellee's brief references such cases.

Recovery against the Government has been had

in such cases, and several of them, including Jablonski, Gibson, White, Underwood, Fair, Hicks and Rodgers have also been cited for this Court.

The Government, however, seeks to distinguish such cases on the bases that the intervening tort feasor in those cases was not a government employee -- a distinction that the circuit court did not address in its opinion. The Government clearly advocates that the doctrine espoused in Panella v. United States by Judge, later Justice Harlan, and its progeny, including Naisbitt and Hughes, barring recovery under Section 2680(h) any time the intervening tort feasor is a government employee should be the interpretation adopted by this Court.

In attempting to explain away cases in which the Government has been held liable involving intervening tort feasors who were government employees, the Government has attempted to distinguish those cases on the bases of a special duty undertaken in hospital, parole and prison situations. Neither approach is correct.

The proper object of a court attempting to construe one of the subsections of 2680 is to identify the circumstances which are within the words and reason of the statute. Interpreting the intent of Congress in

adopting the intentional tort exception, it seems more likely to believe that the policy underlying the exception was to insulate the Government from liability for acts it was powerless to prevent, or which would make defense of a lawsuit unusually difficult, rather than it was intended to defeat actions steeped in negligence merely because the intervening tort feasor was a government employee.

There is no sound basis for disallowing a Section 448 case merely because the intervening tort feasor is a government employee. As was said by the circuit court, the intentional tort exception should bar a cause of action only if negligence is a remote cause of the injury, or plaintiff, through artful pleadings with conclusory allegations, attempts to create a negligence issue where none exists.

Where the Third Circuit decided the assault and battery of Private Heard upon Private Shearer was a natural result of the Government's failure to exercise due care, the assault and battery may be deemed to have its roots in negligence, and is therefore within the scope of the Federal Tort Claims Act.

This will require the Plaintiff in any case to allege sufficient facts to demonstrate that the Government knew or should have known that its employee

was dangerous prior to the injurious act. Unlike cases such as Naisbitt, Collins and Wine cited by the Government for the proposition that a negligence analysis is not necessary where the intervening tort feasor is a government employee, the factual negligence predicate in Shearer is startling, shocking, and of such magnitude that the Government should not be heard to complain that liaibility for their blatant negligence should not attach.

A negligent omission arises where the act necessary to avoid negligence should have occurred. The failure to eliminate Private Heard in this matter, convicted of homicide while serving at his last duty assignment, despite ringing recommendations from his superior officers that he be eliminated from the service, and exposing service members like Shearer to his violent propensities without warning amounts to negligence of a gross order.

QUESTION: I have a little trouble with one statement.

MR. CANNON: Justice Marshall.

QUESTION: That the Army exposed him to this. They were off the base, weren't they?

MR. CANNON: They were off the base, but --

QUESTION: Why did the Army expose him to it?

MR. CANNON: They exposed him to the jeopardy of contact with Shearer because they failed to eliminate, to supervise or to warn about. It is true that the tort took place off the base, but the complaint rests in negligence at the failure of the service to have eliminated Shearer so that he did not pose a threat on base or off base to Private Shearer, although admittedly --

QUESTION: How could they control him off base?

MR. CANNON: They can't control him off base, but they had the opportunity to control him within their numbers so that he at the time of this incident no longer --

QUESTION: How? How?

MR. CANNON: Just by eliminating him, by looking at the regulations --

QUESTION: By shooting him?

MR. CANNON: Beg your pardon?

QUESTION: By shooting him?

MR. CANNON: No, sir.

(Laughter.)

MR. CANNON: No, sir.

QUESTION: Well, you said eliminate.

MR. CANNON: When he was returned -- when he was returned from Germany after being released from

prison, the service had an obligation under its regulations to eliminate him.

QUESTION: Suppose they had discharged him and a week later he'd gone out and killed somebody.

MR. CANNON: Yes.

QUESTION: The theory of your case is that it was the bad conduct of the military in failing to train him or cure him --

QUESTION: Eliminate him.

QUESTION: Would the homicide after the discharge be subject to a recovery?

MR. CANNON: If the Chief Justice is asking if somebody killed after he was released could bring an action against the service, in my opinion no, they would have acted responsibly in discharging him from their membership.

QUESTION: But the cause that you assert in this case is the same in both situations, in the hypothetical and in the actual, is it not?

MR. CANNON: Well, I think that the difference is that the service had an opportunity and a mandatory duty to eliminate this person with demonstrated homidical tendencies, an obligation that they failed.

QUESTION: Well, are you suggesting that the difference would be that he wouldn't be killing a

serviceman; if he had those homicidal tendencies he might kill some civilian on the outside?

MR. CANNON: There would be no negligence on the part of the Government if they had properly eliminated him and then he had killed someone after that. The negligence of the Government --

QUESTION: Part of your case is that the Government didn't properly handle him while they had him in the service.

MR. CANNON: That is right, Chief Justice. That is correct. And if they had --

QUESTION: But then the impact -- the impact of that failure would be the same on a civilian as it was on this fellow soldier.

MR. CANNON: The impact would have been the same, but the Government would not be liable in that situation because they would have discharged their duty.

QUESTION: Well, Mr. Cannon, let me follow up on that a minute.

MR. CANNON: Yes, Justice Stevens.

QUESTION: Supposing you had at the time they made the wrong decision, whatever it was, before this --

MR. CANNON: Yes, sir.

QUESTION: -- you had some military officers sitting around saying this is a dangerous man,

psychiatrists have told us he's going to kill somebody in 90 days. What was their duty?

MR. CANNON: To eliminate him.

QUESTION: What do you mean by eliminate?

MR. CANNON: To eliminate him is not to kill him, as someone has suggested. It is merely to administratively eliminate him from the service. That was the recommendation.

QUESTION: Turn him loose on society, then, you're saying.

MR. CANNON: Well, they could hardly imprison him because --

QUESTION: Well, that's my point.

MR. CANNON: Yes. He had served his time --

QUESTION: And they're advised in advance he's going to kill somebody, and the question is they had a duty to protect other servicemen, and the heck with the civilian population.

MR. CANNON: Well, I think it will be too strong to say that they were advised that he would kill someone else, but certainly --

QUESTION: But you're saying they were on notice that it might happen.

MR. CANNON: He put the service on notice because of his past conduct that he had that potential.

QUESTION: So you're saying that military personnel with those facts had a duty to turn him loose?

MR. CANNON: They had a duty to follow the recommendations of those officers who had recommended that he be removed from the service, that's correct.

QUESTION: And you think there would be a net saving in human life by doing that?

MR. CANNON: Well, there's no difference, I don't think, between someone who's been committed for 20 years to a psychiatric institution, and he's served his time, and the doctors say there's nothing more we can do for him, and they release him, and then he turns around and kills someone. Well, there's hardly anything more that could be said in terms of what the hospital could have done.

But here the service failed in its obligation to remove from its membership someone who had killed before and who had been the subject of repeated recommendations for elimination.

QUESTION: Suppose they released him, to use your phrase, the day before he committed this murder, would the Army be liable?

MR. CANNON: I think not. I think it would be a close question. I think it's a stronger negligence predicate if he is still in the service, but I think the

Government would benefit from the fact situation that you present, Justice Marshall.

Panella and its progeny advocating a per se doctrine of immunity where the intervening tort feasor is a government employee are contradictory to the intended purpose of the FTCA and contradict, rather than espouse, the congressional attitude in passing the Tort Claims Act reflected in Judge Cardozo's remarks in Anderson v. John L. Hayes, that the exemption of a sovereign from suit involves hardship enough where consent has been held. We are not to add to its rigor by refinement of construction where consent has been announced.

Panella, upon which the Government has placed so much reliance, of course did permit a Section 448 type recovery by holding that the intentional tort exception does not apply to a non-government employee. To the extent that the circuit court decision in Panella affirmed the district court holding that a case founded in negligence will not lie where the intervening tort feasor is a government employee, Panella should not be followed by this Court.

The FTCA is a negligence statute. It permits recovery for the negligent acts of its employees committed in the course of their employment. But the

case before the Court is not one founded on a battery negligently performed. The negligence upon which suit is founded is related to the battery only to the extent that the battery is the proximate, predictable and foreseeable outgrowth of the Government's negligence in this case.

What was said by the Third Circuit in the Gibson case to the effect that the very risk which constituted the defendant's negligence was the probability of the action which occasioned the injury is applicable to the case at bar.

The Government's efforts to distinguish cases like Underwood and Fair where the intervening tort feasor was a government employee on the bases that those cases involve extension of a special duty of protection to the intervening tort feasors, in those cases because they have been hospitalized, is not convincing.

As the Jablonski Ninth Circuit court said, it is more significant in these cases that they are based on negligence, not assault and battery. Indeed, although the Government says that Section 319 of the restatement involving a theory of negligence where the Government does assume a special duty, that that should be some sort of demarcation. But the fact is that Section 319 just gives a plaintiff an alternate theory

of negligence in addition to 448, and there is nothing about Section 319 that involves indeed a waiver of the exception, in spite of which recovery has been permitted in those cases.

The better explanation for these cases is that the injuries were rooted in Government negligence to a depth that was not superseded by the intervening tort feasor. As occurred in the circuit court, employment of a government versus a non-government employee analysis should be rejected properly in favor of a proximate cause analysis. The federal judiciary is up to the task of weeding out claims of negligence which involve no more than artful pleadings from those legitimately steeped in negligence. They should be given that opportunity regardless of whether or not the intervening tort feasor is a government employee.

With regard to the Feres doctrine, the court of appeals determined that the Feres doctrine did not bar the instant case.

QUESTION: Before you get into the Feres doctrine, can I interrupt you with one question?

MR. CANNON: Of course, Justice.

QUESTION: Do I correctly understand that there's no claim that the murder was committed with a government weapon, or it's not failure to supervise a

soldier in the use of his weapon?

MR. CANNON: That's correct.

QUESTION: Yeah, I see. It's just that he got his own gun and --

MR. CANNON: Yes, sir.

QUESTION: I see.

MR. CANNON: In the analysis of the court of appeals, Shearer did not sustain his injury either in the course of or incident to military service. The circuit court's application of that Feres doctrine focused on the relationship between the serviceman and the military at the time and place the injury was sustained. Other circuit courts had conducted a Feres analysis upon the time, place and circumstance surrounding the negligent conduct.

The proper analysis is to consider the facts of this case within the framework of Feres ground as explicated by Stencel. Number one, the distinctively federal in character relationship between the government and members of its Armed Forces; number two, the statutory no-fault compensation scheme set forth in the Veterans' Benefit Act for injuries incurred incident to service; and thirdly, the peculiar and special relationship of the soldier to his superiors and the effects of the maintenance of such suits on discipline.

The Government concedes in its brief that only the third prong of Stencel is dispositive in any of these cases. That conclusion is no doubt wrong from the fact that the relationship between the government and its soldiers is no more sovereign than that which exists between other federal agencies subject to the Federal Tort Claims Act and its employees.

Also --

QUESTION: Are you familiar, Mr. Cannon, with a case in the Eighth Circuit, the name of which I don't recall, where suits were brought --

MR. CANNON: The Brown case.

QUESTION: -- on the basis of the erroneous weather reports and erroneous judgments of the United States engineers about the flood level of the Mississippi River?

MR. CANNON: No, sir. And that is not the Brown case.

QUESTION: No. That's not Brown.

MR. CANNON: Yes.

QUESTION: Now, there the Eighth Circuit held, and I believe this Court denied cert, that there just was no recovery.

Now, the theory of that case was much like yours. The government hadn't either -- they had made

misjudgments about the rainfall and about the river level and all that. How do you distinguish that from this case?

MR. CANNON: Well, there are also cases, Mr. Chief Justice, where the government has been found liable where they had FAA personnel within their membership who did not perform their duties properly, and that was found --

QUESTION: In this Court?

MR. CANNON: No, not before this Court, Mr. Chief Justice. In the circuit court.

With regard to the sovereign relationship of the soldier to the government, the immediacy of Shearer's peculiar and special relationship to his military superiors had been severed in this case by his authorized leave status. In addition, the Veterans' Benefit Act, which is the second prong of Stencel, of course does not contain an election of remedies clause in the manner of the Federal Employees' Workmen's Compensation Act, and Shearer's injuries, we contend, are also not incident to service, which is an appendix to the comments about the Veterans' Benefit Act in Stencel.

This Court's concern about the impact upon military discipline where suit is brought on behalf of a

serviceman is demonstrably set forth in Stencel and Chappell. Despite its importance, however, the military discipline factor, I suggest, is not an absolute. It is a shorthand means of anticipating the consequences of having civilian courts inquire extensively into military affairs. However, it is not the mere possible effect on the maintenance of military discipline, but the degree of that effect which should be controlling.

This case does not involve suit by enlisted members against their commanding officers, as in Chappell, or involve challenges to military activity, such as the radiation cases which involve issues unique to the claimant's military duty, training and combat. This case does not involve inquiry by the district court into the complex, subtle and professional decisions as to the composition, training, equipping and control of the military force as bespoken by this Court in Gilligan v. Morgan, nor does it involve the battle commander's poor judgment, the Army surgeon's slip of hand, or the defective jeep spoken of in the Brooks case.

QUESTION: Well, you say it doesn't imply or suggest review of Army policy. Certainly your paragraphs 40 and 41 on page 14 of the joint appendix require the district court to review some Army personnel decisions.

MR. CANNON: Justice Rehnquist, there is no question that if this case involves a review of policy or the formation of regulations that it would be barred. It is clear in the position of the Plaintiff, however, that this is a case where those regulations were ignored, not that they were not properly drafted. The regulations were on the books. They called for the elimination from the service of this person under these circumstances, I suggest, and those regulations were simply ignored. They do not require the intervention of military expertise or military judgment. It's a straightforward personnel decision such as that found by industry and business on any given day anywhere in these United States.

QUESTION: Yes, but I thought part of the Feres doctrine was that you do not subject the Armed Forces to the same sort of review of their policies and actions as you do subject private companies.

MR. CANNON: Well, I suggest that the distinction is if we're reviewing policy, then the claim is lost. If we're merely talking about negligence at the operational level by persons who simply ignore the regulations, then we have a claim that is viable under the Federal Tort Claims Act and which is not barred by Feres.

QUESTION: You may have answered this question before, and I missed it. What if this fellow had gone on the rampage in the bar somewhere near the base and shot six people, all civilians.

MR. CANNON: Yes.

QUESTION: What about that?

MR. CANNON: Oh, they clearly have a case without question. There's no Feres barrier at all.

QUESTION: What case would you say supports your conclusion that they'd clearly have a case?

MR. CANNON: As Justice Marshall pointed out in the Stencel case, if the jet aircraft had crashed into a civilian house, there is no question at all but that the occupants of that house would have had a viable FTCA action against the government for their negligence.

QUESTION: Well, I take it from that you say that this fellow was the same as the pilot of that plane who crashed into the house?

MR. CANNON: No. No, I -- of course, the business about crashing into a house is purely a hypothetical situation proposed by Justice Marshall, so I don't think that that --

QUESTION: Well, what about if he broke into the bar and robbed the bar and then shot the bartender?

MR. CANNON: Then clearly the bartender or his

heirs or his estate would have a viable claim.

QUESTION: Well, what in the history showed that he was likely to rob a bar?

MR. CANNON: There was nothing in his history that would suggest that he was in fact capable of robbing a bar, but certainly there is plenty in his history to suggest that he was a man of violence. And to the effect that I suggested that the government would be liable to the bartender, please let me correct my positon. That would not be position.

QUESTION: Don't open the gate too far.

MR. CANNON: No, sir.

QUESTION: You've got it about as wide open as you can get it.

MR. CANNON: Yes, sir.

The threat to military discipline in this case --

QUESTION: This has been too fast for me. Why wouldn't the government be liable to the bartender under your theory?

MR. CANNON: Well, I think -- I think it owes -- I think the service owes a duty to its members --

QUESTION: Oh, I see.

MR. CANNON: -- not to unusually jeopardize them.

QUESTION: The bartender is outside the protected class.

MR. CANNON: Yes, sir. Yes, sir.

The threat to military discipline in this case is minimal. The test which should be applied is not a but for test -- that is, not but for the fact that he was in the service he would not have been killed, but whether Shearer was indeed performing duties of such character as to undermine traditional concepts of military discipline if his administratrix was permitted to maintain a civil suit for injury resulting therefrom.

There is no second-guessing of military orders involved or any review of the adequacy of the Army's personnel regulations, just whether they were followed or ignored -- a decision that will not reguire military expertise of judgment.

It is difficult to contend, as the Government does, that this suit by Mrs. Shearer for the death of her son, negligently occasioned by the government, could threaten military relationships, which are the primary focus of Feres.

This case does not involve the negligent discharge of a red eye missile. There is no threat to the command hierarchy where the negligence involved does not involve military decisions, but rather decisions by

the military involving the retention of a member in the same manner that those problems are faced routinely in business and industry.

If permitted to proceed to trial in the district court, this case will not jeopardize the need for unhesitating and decisive action by officers and equally disciplined responses by enlisted personnel. Like one of the two plaintiffs in Brooks, the death of Vernon Shearer was not caused by his military service except in the sense that all human events depend upon what has already transpired. A soldier is ready to risk life and limb where national survival is at stake. There is no justification for requiring him, as the Government proposes, to bear the risk of operational negligence in domestic, noncombat circumstances where the loss is so monumental and the risk to military interests so minimal.

Thank you?

CHIEF JUSTICE BURGER: Do you have anything further, Mr. Geller?

MR. GELLER: Not unless the Court has questions, Mr. Chief Justice.

CHIEF JUSTICE BURGER: I think not.

Thank you, gentlemen. The case is submitted.

We'll hear arguments next in Kerr-McGee

against Navajo Tribe of Indians.

(Whereupon, at 11:42 a.m., the case in the above-entitled matter was submitted.)

CERTIFICATION

lderson Reporting Company, Inc., hereby certifies that the ttached pages represents an accurate transcription of lectronic sound recording of the oral argument before the preme Court of The United States in the Matter of:

#84-194 - UNITED STATES, Petitioner V. LOUISE SHEARER, INDIVIDUALLY AND AS ADMINISTRATRIX FOR THE ESTATE OF VERNON SHEARER, DECEASED

and that these attached pages constitutes the original transcript of the proceedings for the records of the court.

BY Paul A. Richardson

(REPORTER)