SUPREME COURT, U.S.
WASHINGTON, D.C. 20543

ORIGINAL

OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE

THE SUPREME COURT OF THE UNITED STATES

DKT/CASE NO. 85-2039

TITLE UNITED STATES, Petitioner V. FRIEDA JOYCE JOHNSON, PERSONAL REPRESENTATIVE OF THE ESTATE OF HORTON WINFIELD JOHNSON, ETC., ET AL.

PLACE Washington, D. C.

DATE February 24, 1987

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IN THE SUPREME COURT OF THE UNITED STATES

UNITED STATES,

Petitioner,

v. : No. 85-2039

FRIEDA JOYCE JOHNSON, PERSONAL REPRESENTATIVE OF THE ESTATE OF HORTON WINFIELD JOHNSON, ETC., ET AL.

Washington, D.C.

Tuesday, February 24, 1987

The above entitled matter came on for oral argument before the Supreme Court of the United States at 12:50 o'clock p.m.

APPEARANCES:

DONALD B. AYER, ESQ., Deputy Solicitor General, Department of Justice, Washington, D.C.; on behalf of the Petitioner.

JOEL D. EATON, ESQ., Miami, Florida; on behalf of the Respondent.

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C O N T E N T S

P R O C E E D I N G S

(12:50 p.m.)

CHIEF JUSTICE REHNQUIST: We will hear argument now in Number 85-2039, United States against Frieda Joyce Johnson.

Mr. Ayer.

ORAL ARGUMENT OF DONALD B. AYER, ESQ.

ON BEHALF OF THE PETITIONER

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

This case involves an action for wrongful death of a Coast Guard helicopter pilot brought by his wife, who alleged in that action that the death and the crash of the helicopter were caused by the negligence of the FAA.

Early in the morning of January 7th, 1982, Lieutenant Commander Johnson took off from his Coast Guard duty station at Barbers Point, Hawaii, to locate and assist a ship in distress. Due to the very same weather conditions which put the ship into distress, Lieutenant Commander Johnson, during the rescue mission, requested the assistance of the FAA in providing him with radar assistance to get him through the storm in a safe manner. A few minutes after radar assistance was commenced, the helicopter crashed into a mountain on the

north shore of the island of Molokai in Hawaii.

The district court, upon receiving this action, dismissed it under the court's decision in Feres versus United States, and on appeal to the Eleventh Circuit the panel reversed. The panel initially conceded that the Coast Guard is indeed a military service and that search and rescue is one of the principal functions of the Coast Guard.

But, it found that the Feres holding that there is no action under the Federal Tort Claims Act for injuries to a soldier incurred incident to service was only dispositive in a case which fits what it described as the typical Feres factual paradigm, a situation involving an injured serviceman injured as a result of conduct by another serviceperson or by a military person -- a civilian military person doing duties generally associated with the military.

The court found that where a civilian, non-military wrongdoer is involved, the action is only barred upon an examination of the effects of the litigation leading to the conclusion that it would disrupt military discipline and the effectiveness of the military operation. The case was reviewed en banc by the Eleventh Circuit and by a vote of eight to four it reinstated the opinion of the panel.

We submit that the holding of the Eleventh Circuit in this case is a departure, a substantial departure from the consistent holding of this Court construing the Federal Tort Claims Act as barring actions by soldiers where the injuries are incurred incident to military service. There is no basis for the reasoning of the court of appeals looking to whether or not -- first, whether or not there is a civilian alleged tort feasor, and then going on to an analysis of the effects of discipline.

We would submit that there is even less basis for the more extreme view being asserted by respondent here, which is that you need not even stop to ask whether there is a civilian tort feasor, the argument being that in every case you must make the inquiry as to the effects on military discipline before applying the Feres doctrine.

Our argument begins with the Feres decision itself, which I think, it is important to realize, is itself a decision of statutory construction. As the court there described its problem, it found few guiding materials for its task of statutory construction.

It looked at everything it could find in connection with the passing of the Federal Tort Claims Act, and it found some factors weighing on the side of

finding liability. But on balance, the Court found that Congress had not intended to extend liability to the situation where a soldier is injured incident to service.

The factors that it considered included, first, the fact that the Federal Tort Claims Act had been enacted in response to a problem of private relief bills that Congress had, on an increasingly frequent basis, had to entertain bills for special relief because immunity had not been waived for torts involving the federal government. It indicated that there was no such private relief bill problem pertaining to soldiers who had a Veterans Benefits Act and therefore had not been seeking that kind of relief or been extended it.

Secondly, the Court looked specifically at the language of the Tort Claims Act which says that the United States is liable "in the same manner and to the same extent as a private individual under like circumstances," and it found that there was no similar liabilty of private individuals that could be remotely described as analogous to the liability of a government to a person in its military service for acts incident to that military service.

The Court looked next to the, what it described as the distinctly federal relationship between the government and is soldiers, and it found it unlikely

that, given that peculiarly federal relationship, it was unlikely that Congress would have wanted to have an aspect, a very important aspect of that relationship, governed by state law, the state law of the situs of the injury that arose.

Finally, the Court noted the existence of a no-fault benefit scheme, the Veterans Benefits Act, and again found it unlikely that Congress would first create a parallel fault-based system of liability and further that it would do that without any effort at all to define the interaction between the no-fault based Veterans Benefits scheme and the fault-based Federal Tort Claims Act scheme.

Based upon all of that analysis, which I think it is fair to say was a thorough look at the data that the Court had to look at to interpret the Federal Tort Claims Act, the Court concluded that the FTC had created no remedy for service people concerning injuries which arise out of or are in the course of activity incident to their military service.

Then, without any further discussion, the Court applied that rule to the three cases before it, two of them medical malpractice cases, one of them a barracks fire. And the fact that it applied it in that way indicated, I think, something important for purposes

of this case, that at least in many cases it is a rule that can be applied based on the plain language of the incident to service rule.

The Court noted that Congress has a ready remedy if they were wrong in their interpretation of the Federal Tort Claims Act, and during the past 37 years Congress has not exercised that remedy.

We would submit that in the context of a statutory interpretation such as Feres, there is no other good reason to consider changing, revising, reversing a statutory construction like the one that was involved here, no other reason than the fact that Congress itself has found it wanting and chosen to change it.

Obviously, one of the main functions of this Court's statutory interpretation role, where it finds it necessary to hear cases on that basis, is to provide some measure of certainty, certainty for those people who are affected by the statute involved, and perhaps more importantly, certainty for Congress who, should they wish to change the law, need to know what the law is. We don't want to provide a moving target for Congress if it's unhappy with the state of the law.

Based upon the fact that Feres was a statutory construction case, and upon the fact that Congress in

the face of the well-reasoned Feres decision, has chosen not to change it, at least not thus far, I think it is not surprising that this Court has repeated many times Feres incident to service rule. It has always adhered to it and it has never cast doubt, I think, upon the basic rule that we are presented with in this case.

It is ironic, I think, that the plaintiffs here rely on the case of U.S. versus Shearer, which I would submit is the farthest extension yet of the military service bar to action under the Federal Tort Claims Act. They rely on the reasoning of the Shearer case in an effort to suggest that somehow that extension of Feres to, I think quite a far level in terms of the concept of incident to service, somehow undermines the basic rule itself.

In Shearer the Court was presented with an instance of a murder of a soldier, off base and off duty, by another soldier. And in order to define the outer limits of the basic incident to service concept set forth in Feres, the Court looked to the policy behind Feres, the policy which had been referred to in its previous opinions in Brown and Muniz, the policy of protecting military discipline and military management in order to define that outer limit.

Now, other courts have done the same thing,

and there are many Court of Appeals cases where in an instance, usually an off-duty instance and many times in an off-base instance where in order to define a concept of incident to service it is necessary to try to figure out what the rule is there for and whether or not it would be served in this case.

We do not believe that the fact that the Court has taken that approach and other courts have taken that approach in the marginal case, where they are extending beyond any strict or clear concept of incident to service, we don't believe that that approach suggests in any way that the basic incident to service rule has been dissolved. And indeed, Shearer itself is emphatic to repeat the basic rule of incident to service which is set forth in all of this Court's Feres decisions.

It is our position, and I think it is clear, that where an injury does arise incident to service, as is the fact here, when we have a Coast Guard person sent on a military rescue mission, in that situation it is easy to say that that is incident to service and there is no need to go beyond the basic rule in order to determine the outcome.

Now, in passing, I would like to note that this is a case which, if a case by case approach were proper, we think it clear that suit would in fact be

barred. We are dealing here with a civilian agency, the FAA, which is a close working partner of the military, a close working partner in many ways.

We lodged with the Court and provided to counsel for respondent at the time the petition was filed a book of regulations pertaining to the interactions between the FAA and the military and the functions they perform involve virtually every branch of the military service and some aspects of our most important national security activities.

We would submit that the FAA is itself an integral part of the military effort, and that litigation challenging the FAA's activities on connection with military action just as clearly as actions challenging military actions or orders themselves would impair the effectiveness of that overall military activity. It would impair it in the sense of impairing and calling into question the FAA's role in the overall military activity and it would impair it in the sense of raising issues concerning the military's own conduct in relation to it, questions as to whether the military perhaps is at fault instead of the FAA, questions as to whether the military bore part of the blame and the FAA bore another part of the blame.

It would be necessary, in other words, to get

into the overall military activity in order to define whether or not there was fault that would lead to liability.

QUESTION: So, you think the Feres rule is simply that if the defendant -- or if the injured person was engaged in activities within his duties, Feres applies?

MR. AYER: Well, at least that, Justice White. In fact, we think it goes well beyond that, particularly in light of Shearer. The way we would chatacterize the concept of incident to service would be in two parts: first, that the action would be barred where the person's military service is in some sense a necessary ingredient of the circumstances leading to the injury, for example where a military person is involved in an on-base military recreational --

QUESTION: That isn't this case, is it?

MR. AYER: No, it's not. But there is another part to it, and I want to make clear that we are certainly well aware of the Shearer decision. We believe that you must bar suit where you have the military status as a necessary ingredient, going beyond just being on duty, but military status somehow being inherent in the events leading to the injury, and further, that the Feres bar following Shearer,

certainly, also applies in an instance where you could say that the injury -- that it was wholly happenstancical that the injury occurred to this soldier.

I don't know if Shearer was that type of case but it may have been, where a person is murdered off-base by a soldier. Now, a person could have been murdered off-base by a soldier whether he is a soldier or not, and you could say then that it wasn't incident to service.

But the Court made clear in that case that the inquiry must go further and ask whether a calling into question of military decisions and military management is involved.

QUESTION: Well, in this case, how many facts do you have to have before you say Feres applies?

MR. AYER: In this case?

QUESTION: Yes.

MR. AYER: Well, in this case I don't think you need many facts at all, Justice White.

QUESTION: No, but he just was ordered out to -- he was on duty and he was in the helicopter on a mission well within his duties?

MR. AYER: Absolutely right. And we think that settles the case.

QUESTION: That's the end of it, isn't it?

MR. AYER: We think so, that's right. But we have briefs in this case and I don't want to leave the arguments raised there unanswered. We think that a case by case analysis of the sort pursued by the court of appeals, because of the alleged civilian tort feasor or in every case, as respondents argue, should be the rule, that that kind of an analysis is bad not only -- it's clearly wrong, as a matter of this Court's decisions. We think that's clear and we think that's enough.

Obviously that's enough, but as a further matter we think it's demonstrably unwise as a matter of policy. It's unwise for what I would describe as three reasons.

The first one is that that kind of a case by case approach, looking at whether military discipline will be affected by the lawsuit, is itself inherently disruptive of military management and military discipline, the idea being that if you let a suit go forward until it is apparent that there is a controversy questioning military authority and --

QUESTION: May I interrupt you on that. Supposing you had an officer at Fort Myer who wanted to deliver some papers to the Court in connection with some military case -- we have had a couple of military cases today -- and the messenger is on a military mission and

he gets hit by a postal vehicle and is badly injured.

Your rule would apply there, as I understand?

MR. AYER: Yes, it would.

QUESTION: Because he would be on a military mission. But how in the world would that implicate any command problem? I mean, he just was told to deliver these papers.

MR. AYER: Well, we think that the question of discipline -- it is the shorthand of military discipline, is what is typically referred to. We think there is really more involved there than that, an we think that what is involved there is really what this Court has referred to in a number of different ways many times, that one of the ways is that the separate nature of military society, the unique and extraordinary demands placed on military people, the kind of mental state and mental discipline that is necessary for a military person to be ready to do the basic job of the military, which is to go to war if that's ever necessary -- I am getting to the answer, Justice Stevens.

What is relevant is that it is quite reasonable for Congress to have adopted a rule, that is the incident to service rule, for the purpose of creating a separate scheme and not allowing a fault-based system of liability, creating a zone, if you

will, around the cases if indeed that is what they chose to do, where it won't be possible to raise questions about military authority.

The idea that a military person sent on a military mission can come into court to sue the government for the errors of his government, to whom he owes the duty and he owes the allegiance, that in itself I think is an impact on discipline. Now, by posing the extreme cases it is possible to come up with situations where that is most of what one has left. That is, it's the basic idea of there being a cause of action, a fault based cause of action, and that in itself is corrosive of the duty that the soldier owes.

QUESTION: You seem to be arguing that, really, the no-fault system is co-extensive with the Feres doctrine?

MR. AYER: Well, the no-fault system goes beyond the Feres doctrine in that it applies to veterans who clearly Feres does not apply to. I think that the no-fault --

QUESTION: Surely in the example we have been talking about, and even in this case, I must confess I am really not very much persuaded by your notion that any command decision sending a helicopter out on a search mission, there's no judgment call there. They

just went out and the air traffic controller apparently did a -- allegedly, at least, did a negligent job of guiding the airplane and he flew into a mountain.

I don't see how that implicates military decisions, any more than my example of sending a messenger across town to deliver something.

MR. AYER: With regard to this case.

QUESTION: Yes.

MR. AYER: With regard to this case, we are now, of course, at the stage of a dismissal having been entered and a court of appeals decision based on that. So, the facts have not been developed.

QUESTION: But they have been alleged, yes.

MR. AYER: But the facts as alleged include the facts that the weather on the morning when this occurred was extremely bad. There is a question as to whether it was wise --

QUESTION: It's always bad weather when you're flying in instrument conditions. I mean, there's nothing unusual about that.

MR. AYER: Well, but it seems to me it is at least possible that an issue could be raised of fault on the part of military in sending the plane up.

QUESTION: They haven't claimed fault of that kind.

MR. AYER: Well, the case has not --

QUESTION: The negligence, they allege, is by the air traffic controller in not watching the radar screen properly.

MR. AYER: That's correct, Justice Stevens, but it's quite possible in this type of case, and I cannot tell you what would develop in the litigation of this case, but it is quite possible, for example, that the government might want to come in and allege, in order to defend the case, allege military discipline -- excuseme, military errors which are protected under Feres, if indeed the facts would support that.

The military errors might not just include command decisions. I think that's one broadening of the concept of discipline that is quite appropriate, to recognize that we might want to challenge Lieutenant Commander Johnson's own actions. That is a possibility, contributory negligence.

The fighting back and forth --

QUESTION: That's true in my messenger case too, of course. You could say the guy was a bad driver.

MR. AYER: That's true, and our position is that in your messenger case, assuming he is a soldier and he is doing it in the line of duty, that the Feres doctrine does apply.

QUESTION: Right, I understand, but I just say I find it a little difficult to find -- and implicating command decisions as having much to do with it. I understand the value of the bright line rule. That I understand, and the duplication and the no-fault and the fault-based liability.

But you really escape me when you say this implicates any command decisions.

MR. AYER: Well, I don't -- let me correct myself if I said that. We do not mean to rest on the narrow ground of questioning command decisions.

QUESTION: It seems to me you must go beyond that?

MR. AYER: Correct, absolutely right, and we certainly do.

QUESTION: Well, you go back to the holding of Feres, don't you, that if it's incident to service it's barred?

MR. AYER: Yes, Your Honor. That's quite correct. Our basic position is that this is a statutory interpretation matter and that once the rule has been announced and not changed by Congress, unless there is some extraordinary circumstance, there is no reason to go any further, and that is our first point.

I am simply trying to now deal with policy

arguments, if anybody thinks that we need to get to that level.

QUESTION: Mr. Ayer, the Feres case came down 35 years ago, didn't it? It's never been very popular in the academic world, has it?

MR. AYER: Well, there has been criticism of it, Justice Blackmun.

QUESTION: Rather substantial criticism of it, I suppose.

Why do you think Congress has never faced up to the issue?

MR. AYER: Well, I wouldn't want to speculate, because I really don't know why they haven't acted. I guess I would take the view, maybe taking a step back from your question because I don't think I can answer your question, if I may, I would submit that the Feres decision as a matter of statutory interpretation rather than as a matter of policy, and I think when you read it it's very clear that it's a matter of statutory interpretation.

They're trying to read all the data they had about what Congress meant. They are not saying, this is a great idea, I don't think. I think they are saying, this is the best we can discern in terms of what Congress meant. And viewed that way, I think it makes a

lot of sense.

I think the arguments -- they are frank to say, here are some arguments for liability and here are what indicate to us that there shouldn't be liability for incident to service injuries, and we conclude on balance that there is not, under the statute, that liability. And I think when read that way, it makes a great deal of sense.

When viewed as a matter of policy one can argue about it, but a matter of policy is for the legislature rather than for the Court, I think, at least in this instance where it is a simple matter of a statutory rule.

QUESTION: Are they going to do something about the case in Congress? Have bills been introduced?

MR. AYER: Well, there was a bill -- excuse me, Justice White. There was a bill introduced, I believe last term, relating to medical malpractice and there have been a number of bills introduced previously.

I don't know the exact number.

QUESTION: None of them has ever gotten off the ground, I take it?

MR. AYER: Well, none of them has certainly passed. I believe there is one that did pass.

QUESTION: In a sense, Congress has thought

about it and done nothing so far?

MR. AYER: Well, we would -- that's certainly correct, Justice White. We would want to be careful about pressing too hard on the concept of subsequent legislative history and what you can conclude about what Congress did in 1946.

But we do think it clear that there is a statutory interpretation. It's a perfectly reasonable statutory interpretation. And until it's changed, it's the law.

I would like to close, if I may, just by observing that there is a matter of policy again. We think the case by case inquiry by civilian courts into injuries incurred incident to service, if that were to be made the rule, either in civilian tort feasor cases or in a broader class of cases, it would be a substantial departure from this Court's repeated recognition that military society really is something different, that properly is governed by separate rules and separate institutions.

The basic military mission has been found by this Court to require really a quite extraordinary subordination of desires and interests of the individual soldiers, and to justify separate treatment in quite a number of areas, one of which the Court heard argument

on this morning, the whole Uniform Code of Military Justice.

But the issues of whether a Bivens action is appropriate for a military person against his superior, all of the First Amendment issues of free speech and religious rights, et cetera, there are many different ways in which separate treatment of the military has been viewed as appropriate and as necessary, both by Congress and by this Court.

We think that if one were to -- for no good reason, but nonetheless simply cast aside the Feres decision, one certainly ought not to assume lightly that the same tort rules that apply with regard to civilian society were intended or should properly be applied in the military context, and we certainly think that such an approach is extremely questionable given the decision of this Court and given the inaction by Congress.

Thank you very much.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Ayer.

We will hear now from you, Mr. Eaton.

ORAL ARGUMENT OF JOEL D. EATON, ESQ.

ON BEHALF OF THE RESPONDENT

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

The government has taken approximately 40

years' worth of decisions and literally hundreds of decision involving this problem which have been rendered in that period of time, and reduced them all to three simple words: "incident to service." According to the goverment, the mechanical application of those three simple words dictates the result in this case.

In my judgment, the problem is considerably moe comples than those three simple words, and what I propose to do here is make three essential points to the Court, the first point being that the application of the Feres doctrine, the bar itself, should depend not upon the applicatiоn of some mechanical bright-line rule, but upon the reason for the doctrine. Where the reason is implicated, impose the bar. Where the reason is not implicated by the facts in the case, give that serviceman the same right that that statute gives to every civilian in this country.

The second point I would like to make is that, notwithstanding that there have been several reasons advanced by this Court for the Feres doctrine over the years, only one of them has survived te scrutiny of not only the lower courts and the academicians, but also this Court as well, culminating in Shearer, and that single reasons supporting the Feres doctrine is the notion that servicemen should not be allowed to come

into a civilian court and challenge the decisions and judgments of other servicemen; that those types of essentially intra-military disputes have to be resolved by the military, not by the civilian courts, or else the military disciplinary structure will be adversely affected.

QUESTION: Mr. Eaton, I don't think I read the Shearer case the same way you do, but as I recall the part of Shearer that's talking about Feres repeats the holding, and then as a quotation saying that the best reasons for it, or the best reason for it is this. I certainly didn't read that as a repudiation of the Feres opinion.

MR. EATON: Let me make on thing perfectly clear. I am not here asking this Court to overrule Feres. The distinction I am going to draw between Feres, Shearer, this court's incident to service tests on the one hand and the facts in this case on the other hand are that this is not an essentially intra-military dispute involving a serviceman versus a serviceman.

QUESTION: But Feres doesn't say an intra-military dispute involving a serviceman versus a serviceman. Feres says, incident to service, and this is a quintessential case of incident to service.

MR. EATON: Let me suggest this, Your Honor.

I think you need to look beyond just Feres, because the Feres doctrine really does not rest so much on Feres any more as it does on the conjunction of three of this Court's cases.

QUESTION: Why do you say that?

MR. EATON: Because Brooks, Feres and Brown taken together are the three decisions that the lower courts hve struggled with in an effort to come up with some kind of a definable hold as to what those three decisions mean.

QUESTION: Well, are you saying then that Brooks and Brown in effect partly repudiated Feres?

MR. EATON: No, Your Honor. The three cases are consistent. The thing that Brown did, however, was partly repudiate some of the rationales advanced for the Feres doctrine in the Feres case.

The Feres case came up with the notion that there's no parallel private liability, for example. That notion was repudiated later by this Court in the Indian Towing case and the Rayonnear, Inc. versus United States case, and it clearly no longer survives.

The VA benefits rationale, which was articulated in Feres, does not survive Brown because Brown says, even though this man gets VA benefits, it's not an exclusive remedy. That didn't survive Brown.

Neither did any of the other reasons articulated by this Court In feres survive Brown. What Brown did was announce, for the first time, incidentally, what has now come to be known as, as this Court has put it in the last analysis, Feres seems best explained by the military disciplinary rationale.

That is Brown's contribution to the Feres doctrine. Let me suggest that the incident to service test was developed in those three cases, not just Feres although it really doesn't make any difference, but each of those cases were essentially servicemen versus servicemen cases.

The incident to service line was meant to draw a principled line between two types of servicemen versus servicemen cases, and the facts in this particular case were not contemplated at the time, in my judgment. Those two groups of servicemen versus servicemen cases were those which were incident to service and those which were not, and this Court apparently felt that those servicemen versus servicemen cases which arose out of a military man's official duties which were incident to his service would, if allowed to be maintained, impact military discipline and therefore they couldn't be allowed.

On the other side of the line, those

servicemen versus serviceman cases in which there was no relevant relationship to an on-duty status or official duties like the Brooks case, did not threaten the military disciplinary structure if you allowed them. So, the line incident to service was drawn as kind of a bright line rule to divide servicemen versus servicemen cases into two groups, one which would threaten and one which would not, and the second therefore being allowed under the Federal Tort Claims Act.

The problem with the incident to service test is that it did not always serve its purpose.

QUESTION: But that isn't the way the Court put it, is it? In Feres, it says "incident to service," not "serviceman to serviceman."

MR. EATON: That is the catch phrase that was used. But the facts in Feres were serviceman versus serviceman, and the way this Court framed the question in Feres was, we must now decide -- and I have forgotten the language, but these people were injured by fellow servicemen or other members of the Armed Forces.

I can't discuss Feres in a vacuum without reference to the total history of that doctrine over a 45-year period, which comes up through Shearer, and there is some very important language in Shearer which, incidentally, the lower court found controlling in its

decision. So --

QUESTION: Well, that may be, but you are asserting that from the outset, that the Feres doctrine was intended to distinguish serviceman-serviceman cases, those that should and those that shouldn't come within the rule. But some of the factors mentioned in Feres don't relate at all to narrowly servicemen versus servicemen, such as the duplication of recovery.

MR. EATON: There is no duplication of recovery.

QUESTION: Well, two separate systems, no-fault versus tort claims. That would appply whether it's serviceman versus serviceman or not.

MR. EATON: That's correct.

QUESTION: Narrowly limited to that context.

MR. EATON: That's correct, Your Honor. But what the lower courts have done and what I believe the lower court announced unanimously in Shearer was that those other rationales that had been advanced with the doctrine over the years have simply not survived and that there is one principal reason for the Feres doctrine and only one reason for the Feres doctrine.

The incident to service test does not work in all cases. It works in 90 percent of them to sort the cases into the proper categories, but it doesn't work in

a case like my case where the injury is incident to service but there is no impact on the military disciplinary rationale.

QUESTION: When you say it doesn't work, you mean it doesn't work if you are correct in saying that the only basis for the Feres doctrine is the military command rationale. It might work quite well in the eyes of the judges who decided the Feres case.

MR. EATON: That's probably true, Your Honor, yes. My argument depends upon this Court saying once again what it said in Shearer, and that is that you must -- there can be no bright line rules. Each case must be examined on its facts to determine whether the principal rationale of Feres is implicated.

The reason Shearer came to this Court is because the incident to service test did not fulfill its purpose in that case. Private Shearer was off duty, off base, and by every standard articulated by this Court in prior cases in the lower courts, this man's injury was not incident to service, and that is what the Third Circuit held.

The problem in Shearer was that, although not incident to service as the tests have developed over the years, maintenance of the suit would necessarily implicate the military disciplinary structure because of

the nature of the allegation made by the plaintiff, and that is that there were some judgments of the military that resulted in letting loose this homicidal maniac who kidnapped the plaintiff, not incident to service.

So, the problem in Shearer was that if you followed the strict incident to service rule as it had developed over the years, Feres did not bar Private Shearer's action. But the primary rationale of Feres was implicated.

So, I think this Court looked at the problem in the lower courts, because you haven't had this case until this case. But the lower courts have struggled with this case since, like Shearer, the incident to service rule in this case does not serve its purpose because it bars a Feres action, notwithstanding that the primary rationale of Feres is not implicated.

Therefore, we have to look beyond the bright line rule incident to service, and the sub-tests that it developed, status and situs and the like, to the reason underlying the rule which is what this Court did in Shearer, and it found in Shearer that notwithstanding that this injury was really not incident to service under the old test, the rationale of the doctrine was implicated and therefore Feres barred the lawsuit.

It also dropped a rather pointed footnote

which said, although no longer controlling, other of Feres rationales, initially articulated rationales, exist here. Now, that, it seems to me, is expressed, what this Court had impliedly held in a number of other cases, that the old rationales that were initially given in Feres simply have not survived the scrutiny of time and that the only good reason for Feres is the military disciplinary rationale.

Of course, the Eleventh Circuit, the en banc court, found that language to be particularly instructive on the issue presented here.

QUESTION: Mr. Eaton, can I ask you if your rather bright line distinction between servicemen versus government when the tort feasor is a serviceman, and those where the tort feasor is not, where do you classify a case in which the tort feasor is an employee, a civilian employee of the Defense Department, for example doing maintenance work on an aircraft or something like that and that individual is negligent?

MR. EATON: You can make a very good argument in those cases that they ought to be treated the same way the Eleventh Circuit treated the FAA in this case. Wherever there are civilians, you don't have a military disciplinary rationale problem.

On the other hand, the lower court --

QUESTION: But they may have been hired by the general.

MR. EATON: Pardon?

QUESTION: They might have been hired by the general.

MR. EATON: On the other hand, the lower court lumped those particular cases in what it called the Feres factual paradigm, serviceman versus serviceman, or serviceman versus employee of the military. To the extent that an employee is integrated into the military structure, there is probably good reason for fear that the military disciplinary structure will be implicated if you allow those kind of suits.

But, by giving away that point, and it can be argued both ways, I don't necessarily mean to give away my case here because the FAA clearly hkas no employee relationship with the military. The FAA is totally independent, and the negligence that they committed was not in the nature of any kind of military negligence.

Let me try and explain --

QUESTION: Mr. Eaton, before you do that, let's talk about Shearer. You assert that Shearer -- it m;ay be dictum anyway, but you are saying Shearer just threw out all the other Feres rationales. I don't really read it that way.

It says, in the last analysis Feres seems best explained -- I mean, you know, one can take that to mean that's its most important rationale. And the footnote which says, "Although no longer controlling," it mean none of those other factors alone may be enough.

We have said what is the most significant one, but then it goes on to say, "Although no longer controlling, other factors mentioned in Feres are present here." I mean, the court goes on to think it relevant and worth mentioning that they are present.

So, why do you have to read Shearson as scrapping all of Feres except that one rationale?

MR. EATON: The Court mentioned the other rationales in the negative, expressly saying they are are no longer controlling, which is to say that by themselves --

QUESTION: It doesn't say "no longer relevant." I mean, that would be an absurd footnote.

Although it's totally irrelevant we note the fact, which is irrelevant, which is certainly not what the court was saying.

MR. EATON: What I believe that that page of this decision holds, the recognition that the doctrine is best explained by the military disciplinary rationale and the footnote that the other rationales are no longer

controlling of the question.

What I think that page means and the way the lower court read it, and the way lower courts have consistently read this Court's Feres cases up until that footnote was penned, means essentially this: that the other rationales, the VA benefits rationale, the distinctively federal relationship, the different state laws and those things are no longer controlling of the issue of whether Feres -- by themselves, are no longer controlling of the issue of whether Feres applies to bar a lawsuit which Congress has otherwise authorized, and the primary reason must exist, the primary reason being the military disciplinary rationale.

Let me explain what I think the military disciplinary rationale means, because this is probably the most critical question that the Court will have to face in this case, and I don't think the government has fairly represented really what the problem is.

The government has suggested that when the court, any civilian court passes judgment on a decision by a member of the military or some action on the part of the military, any judgment or any decision of that sort, that it has no business doing that and that Feres bars inquiry into those kinds of decisions and that that's what the military disciplinary rationale is all

about.

I must heartily disagree, because in the simplest way I know to illustrate the error of that position is to ask the Court to assume either one of two hypotheticals: either a civilian pilot and the helicopter that the FAA guided into the mountain, in my case, Justice Stevens for example, or that my helicopter piloted by a military pilot crashed into a civilian's house on this mountain on Molokai.

In both of those cases, the civilian on the ground and the civilian pilot or civilian passenger in my helicopter would be allowed to file suit under the Federal Tort Claims Act, come into a court of law, and challenge both the FAA's decision, the negligence of the military pilot, the negligence of the Coast Guard in launching this flight, and any other kind of negligent act that the government may have done which contributed to causing the death of this civilian.

QUESTION: And would not be allowed to recover against he government on a basis other than negligence as a serviceman can, right?

MR. EATON: That's correct.

QUESTION: So, that seems fair.

MR. EATON: But it only seems fair if VA benefits are an exclusive remedy, and they clearly are

not and this Court has already held that they are not, at least twice in Brooks and Brown. Congress has subsequently amended the Act to provide, in essence, that it is not an exclusive remedy because it provides for setoffs in Federal Tort Claims Act recoveries as the statute cited in my brief, and because the Court held in -- or noted in dictum, I suppose, in Shearer that the VA benefits rationale was no longer a controlling aspect of application of the Feres doctrine.

What -- it is not passing judgment on negligence of the military, which the Feres doctrine is designed to prevent, because civilians can sue the government for the negligence of the military. What Feres is designed to prevent, and this is as broad as Feres should be, is allowing a serviceman to hale another serviceman or the government in the serviceman's stead into court and challenge another serviceman's actions, judgments or decision. Because when you allow that, then you have in effect removed the military disciplinary function from the military and transferred it to a civilian court.

QUESTION: But, Mr. Eaton, doesn't the government contend here that the trial of these facts might well result in just that, that an attack would very likely be made on the chain of command decisions

which led to the dispatch of your client in a helicopter, or perhaps to his judgment?

MR. EATON: The government does make that contention, Your Honor, and I think I can demonstrate that the government is absolutely wrong; that the trial of this case will not implicate the military disciplinary structure or the reason for the Feres rule in any way, which was the unanimous opinion of the twelve judges who decided the case in the lower court.

The four dissenting judges didn't find to the contrary. They simply said, incident to service, forget it. And the reason that it won't implicate the military disciplinary structure is this: in the pilot's direct action, the action pled against the government for the negligence of the FAA, there is nothing military involved in that direct claim.

The simplest way to understand that is to put me or another civilian pilot in the helicopter and analyze what the suit would be. It would be no different, now.

QUESTION: Would contributory negligence be relevant?

MR. EATON: The government more or less concedes that in the direct action --

QUESTION: Could you answer my question. Woul

contributory negligence be relevant?

MR. EATON: Yes. Contributory negligence can be alleged and tried without impacting the military disciplinary rationale for the reason that I just stated, and that is once again that the Feres doctrine does not prohibit, is not designed to prohibiot judicial inquiry into the reasonableness of the conduct of particular military personnel.

It is designed to prevent servicemen from suing servicemen about conduct decisions and judgments of other servicemen. And the way to illustrate that, once again is to have Lieutenant Commander Johnson in this helicopter, fly it into the side of this mountain, and had a civilian standing on the ground who was killed.

Now, in that lawsuit, which this Court will allow, indisputably allow because of Lockheed Aircraft Corp. versus United States, a civilian can sue the government for the negligence of the military. In that suit the plaintiff would argue that the pilot in this Coast Guard helicopter was negligent, and the Court would entertain it and it would allow a federal district judge to decide whether the pilot flew his airplane properly, and this Court would have no problem with the military disciplinary rationale because it is not a serviceman challenging another serviceman.

QUESTION: Yes, but in this case if there are claims of contributory negligence, certainly there is a possible claim that Commander Johnson's superior officer, in dispatching him, may have made mistakes? I mean, let's suppose that Commander Johnson had lived and simply been wounded so that he's back, I mean he's on the scene.

MR. EATON: Your Honor, that's the third problem with the government's argument. They more or less give away that in the direct action, military discipline is not implicated.

They argue the contrib, and they also argue that the government's -- the Coast Guard's negligence --

QUESTION: Are you saying in the direct action contributory negligence is not implicated?

MR. EATON: Not in the direct action. That comes by way of affirmative defense. But it's semantic.

QUESTION: Yes, I think it is too.

MR. EATON: Direct action, defended by a claim of contributory negligence, that's the second thing. The third thing they have raised is that the Coast Guard was negligent and that that's going to get dragged into this lawsuit, and that is simply not true.

If you will allow me to explain why, the only person in this lawsuit who has a claim against the Coast

Guard for any of these hypothetical negligent acts that the Government has inserted here, is the plaintiff's decedent, the serviceman. He can't sue the Coast Guard for any of those negligent acts because of Feres.

That is a serviceman versus serviceman case which Feres proscribes, and I am not quarreling about that, and we did not sue the government for the negligence of the Coast Guard. We didn't bring it into lawsuit.

Now, the government has no business bringing it into lawsuit because it is is not a defense.

QUESTION: The government certainly has a business bringing contributory negligence in a lawsuit.

MR. EATON: That's true.

QUESTION: And there, it seems to me that your explanation does not satisfy the way it does on your third point.

MR. EATON: Briefly on the third point, the point I want to make, and then I'll ask you a question, Your Honor, is that that is no defense to my lawsuit that somebody else was a joint tort feasor and there was some concurring negligence on the part of the Coast Guard. That is a red herring in this case.

The Coast Guard's activities will never get involved in this lawsuit. The contributory negligence

of this pilot may be litigated. We don't know at this point because there has been no answer on this record at least, which makes that allegation.

But assuming that the pilot's contributory negligence is injected into this lawsuit, the Feres doctrine should still not bar maintenance of the lawsuit or the defense, because it does not involve a situation where a serviceman, a serviceman is challenging the actions or the judgments or the decisions of another serviceman which will impact the military disciplinary rationale.

The claim of contrib is a claim by the government that one serviceman, the plaintiff in this case, failed to use reasonable care.

QUESTION: Supposing he is challenged for failing to use reasonable care, and he says, I was told to do what I did by my superior.

MR. EATON: That can't be an issue in this suit.

QUESTION: Why not?

MR. EATON: Because of Feres. Neither side may challenge the actions of the Coast Guard becaukse of Feres.

QUESTION: Well, but the government is saying, he was contributorily negligent. He's saying, I was not

contributorily negligent. What I did was reasonable.

Or, he may say, what I did may seem unreasonable but I did it because I was ordered to by a superior commander. It seems to me you'd just have to have a great deal more foresight than I do to say that kind of an issue would never come up in this case.

MR. EATON: Well, it won't come up in this case because I know what the facts are. The Court doesn't know what the facts are because all it has is a complaint.

It doesn't seem to me to be a very good jurisprudential course to make a rule that says, nobody can maintain any case under the Federal Tort Claims Act, whether it implicates the military disciplinary rationale or not. Just because some of these cases, we might get involved in the military disciplinary rationale.

QUESTION: Well,I don't know. That's the way statutes are written. I mean, we have before us an issue of statutory construction and you are asking us to draw the line case by case, so that it will perfectly carve out all those situations in which the -- what you consider the sole rationale of the statute is, is achieved and leave only those in which it isn't achieved.

Well, that isn't really the way statutues

work. They always generalize, and in generalizing they don't achieve perfection. And why isn't it reasonable to say, as Feres did, generally speaking, maybe, you know, 98 percent of the time if you have a serviceman involved, it's likely to raise these issues and therefore we don't think when Congress passed the Federal Torts Claim Act it intended to let servicemen sue, period.

Now, there may be a case or two that will come in, but these people have other ways of getting reimbursed other than the Tort Claims Act, and it is close enough for government work. Isn't that the way statutes are normally written?

MR. EATON: Your Honor, I am not convinced, and notwithstanding that this Court said in Feres was that what it was doing was construing a statute, that we are really talking about construing a statute. Because the statute, in plain and unambiguous terms, gives servicemen a right to sue the government for the negligence of other servicemen, it contains an exception and that exception says, except any claim arising out of the combatant activities of the military and naval forces or the Coast Guard during time of war.

That is what the statute said. This Court legislatively enacted another exemption to this statute

in the process of construing, which wrote an exemption into this Act which clearly was never there, and its concern was the fear that the military disciplinary structure woule be impacted.

Because we are talking about a judicially crafted exception to an Act of Congress, not a construction of Congress's intent, you have to be practical about it, we are talking about a judicially enacted exception to an Act of Congress.

My position is, and the only principled position, must be that that exception must be as narrowly drawn as it can be to serve the purpose that supports it, which should not be so broadly drawn --

QUESTION: It would be a perfectly good argument to the court that decided Feres, but the exception was drawn of 35, 37 years ago.

MR. EATON: Your Honor, it remains within this Court's power to overrule Feres if it wants to, but I am not asking the Court to do that.

QUESTION: It remains within our power to reaffirm it too.

MR. EATON: Absolutely, Your Honor. But I want the Court to understand -- and I am not asking the Court to mess with Feres at all. Feres is a serviceman versus serviceman case. It was written in that

context. All of this Court's subsequent decisions have been written in that context and to the extent that Feres prohibits judidicial inquiry in suits by servicemen versus servicemen, I don't disagree with it.

I spent seven years in the Navy myself, and it would not have worked. If every time a commanding officer or a senior officer or even a peer made a decision or did a judgment, if we could run into court and challenge that decision, the military would not work.

But that is all that should be disallowed, because Feres has some adverse effects on military people as well, and I know because I was there. Feres is, in effect, and when applied, tells servicemen that they are second-class citizens, that they don't have the same rights as civilians in this country.

A civilian in this particular helicopter, given the same negligent act of this FAA controller, has a cause of action under the Federal Tort Claims Act. A military man doesn't unless the lower court is affirmed. And there are other contexts in which servicemen are treated differently than civilians.

It affects morale. It affects retention rates. I can't say that Feres is the reason I am practicing law instead of still flying for the Navy, but when I was in the Navy and in combat I knew that this

Court treated servicemen differently than it treated civilians, and that's what motivated me to take this question though the court system and try and get the law fixed, and I don't think Feres ought to be changed at all in serviceman versus serviceman cases.

But where you have a case like this, like Justice Stevens' postal worker case, where allowing the suit cannot conceivably impact the military disciplinary structure because servicemen are not complaining about the acts and judgments and decisions of other servicemen, there is no good reason in any of these courts -- or this Court's decisions for the last 40 years, except Feres, and those rationales which have been disowned over the years, and which appear to be no longer controlling according to this Court's unanimous opinion in Shearer, there is no good reason for treating that serviceman differently because the purpose of the doctrine is not served by barring the suit.

The statute ought to be enforced unless there is a very good reason for disallowing the rights and remedies that it gives to he citizens of this nation, and the only good reason which exists for disallowing servicemen to avail themselves of remedies given by Congress is military disciplinary rationale.

QUESTION: What about other courts of appeals

in cases brought by non-servicemen against servicemen? Is this the first case that it said, Feres doesn't apply?

MR. EATON: I don't --

QUESTION: This case is a suit against the United States for the negligence of another government employee, is that right?

MR. EATON: For the negligence of a civilian employee of a civilian agency, brought by a serviceman.

QUESTION: Have there been other cases like this?

MR. EATON: There are some older cases, principally in the Ninth Circuit.

QUESTION: Well, is your case the first case that the plaintiff has won?

MR. EATON: My case is the first case in which the negligence of the civilian has been alleged and which we have won, but there are numerous other cases in which servicemen challenged the judgment of another serviceman and in which the courts have utilized the same reasoning, the same analysis of the lower court, and held that -- but Feres did not bar the suit.

QUESTION: This may be the first case that has been won. Are there a lot that have been lost?

MR. EATON: Yes -- well, not a lot. There's three that are at least squarely against the -- Lee and

Layne, and all those cases --

QUESTION: What circuits are they?

MR. EATON: Lee and Uptegrove, I believe are the Ninth Circuit and Layne is the Fourth Circuit. Correct me if I am wrong -- Seventh Circuit. But there are older cases, and the curious thing about Uptegrove, the Ninth Circuit case, is they say, we can't even look at the status of the tort feasor. Whether he is a civilian or not is completely irrelevant, and whether this case will have any impact on military discipline or not is completely irrelevant, because the Supreme Court says, if it is incident to service, you lose.

Now, that is clearly changed in the Ninth Circuit. Most of the cases on which --

QUESTION: Well, that is still the government's position, though?

MR. EATON: They want the Veterans' Benefit Act to be a Workers' Comp Act with an exclusive remedy provision. That's what they want.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Eaton.

Mr. Ayer, you have five minutes remaining.

ORAL ARGUMENT OF DONALD B. AYER

ON BEHALF OF THE PETITIONER - REBUTTAL

MR. AYER: Thank you, Your Honor.

Justice White, in response to your question

there are at least two other cases that we are aware of, one in the Tenth Circuit, the Carter case, and a district court case in Pennsylvania.

QUESTION: You would think there would be a lot more.

MR. AYER: Well, there may be others. Those are all cases that --

QUESTION: Unless lawyers have read Feres like you read it.

MR. AYER: Those are all cases of FAA alleged negligence that we are talking about, and there -- I think there are other cases where you are talking about other civilian federal employees, but these are just the FAA cases.

Unless the Court has further questions, I have nothing further to add.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Ayer.

The case is submitted.

(Whereupon, at 1:54 o'clock p.m., the case in the above entitled matter was submitted.)

CERTIFICATION

Alderson Reporting Company, Inc., hereby certifies that the attached pages represents an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of The United States in the Matter of:

#85-2039 - UNITED STATES, Petitioner V. FRIEDA JOYCE JOHNSON, Personal Representative of the Estate of Horton Winfield Johnson, etc., et al.

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BY Paul A. Richardson

(REPORTER)