CASE NO. 10-3743

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

MICHAEL PURCELL, Individually and as Personal Representative of the Estate of Christopher Lee Purcell, deceased

PLAINTIFF-APPELLANT

v.

UNITED STATES

DEFENDANT-APPELLEE

Appeal from the United States District Court
For the Northern District of Illinois
Case No. 09 C 6137
Judge Joan Lefkow

APPELLANT'S PETITION FOR REHEARING *EN BANC*

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PURPOSE OF PETITION

The Panel's decision is contrary to the following United States Supreme Court and Seventh Circuit decisions which hold that claims by service members arising out of incidents completely analogous to civilian life such as those made by Appellant are allowed under the Federal Tort Claims Act 28 U.S.C. § 1346(b) (1993) ("FTCA"):

(i) *Brooks v. United States*, 337 U.S. 49, 69 S. Ct. 918 (1949) Claim allowed where claimant injured as a result of car accident completely analogous to civilian life.

(ii) *Feres v. United States*, 340 U.S. 135, 71 S. Ct. 153 (1950) Claims barred where claimants injured in the course of receiving free housing and free medical treatment that are both benefits provided to members of the military.

(iii) *United States v. Brown*, 348 U.S. 110, 75 S. Ct. 141 (1954) Claim barred where claimant injured in the course of receiving free medial care which is a benefit provided to members of the military.

(iv) *Stencel Aero Engineering Corp. v. United States*, 431 U.S. 666, 97 S. Ct. 2054 (1977) Claim barred where claimant injured in the course of a military operation which cannot occur in civilian life.

(v) *United States v. Shearer*, 473 U.S. 52, 105 S. Ct. 3039 (1985) Claim barred where claimant was injured as a result of negligent supervision by his superior officers because such claims of negligent supervision cannot occur in civilian life.

(vi) *United States v. Johnson*, 481 U.S. 681, 107 S. Ct. 2063 (1987) Claim barred where claimant injured in the course of a military operation which was distinguishable from any activity in civilian life.

(vii) *Mass v. United States*, 94 F.3d 291 (7th Cir. 1996) Claim barred where claimant

injured in the course of a military operation which was not analogous to any activity in civilian life.

(viii) *Selbe v. United States*, 130 F.3d 1265 (7th Cir. 1997) Claim barred where claimant injured in the course of receiving free medical care which is a benefit provided to members of the military.

(ix) *Smith v. United States*, 196 F.3d 774 (7th Cir. 1999) Claim barred where claimant was injured as a result of negligent supervision by her superior officers because such a relationship does not exist in civilian life.

This Court should seize this occasion to adopt a clear definition of "activity incident to service" that allows claims like Appellant's to proceed. The test should be: If the same claim could arise for a civilian under similar circumstances then it is not an activity incident to service. Refusing to rehear this case *en banc* is silently consenting to a distortion of Supreme Court precedent. The Seventh Circuit should not tacitly accept a distortion of precedent and allow yet another opportunity to clarify the ill-defined *Feres* doctrine pass.

BACKGROUND

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

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

son had a gun and was poised to commit suicide Christopher was alive when law enforcement officers arrived at his apartment.

Navy security dispatch informed local law enforcement of the situation. Among the first local law enforcement officers to arrive at Christopher's apartment were Department of Defense ("DoD") Police Officers and a Navy Officer. All were informed that Christopher had a gun and wanted to end his life. The investigating officers "searched" the premises and found no weapon. A severely depressed Christopher told the officers that he did not have a gun in the hope that he would later be able to use it on himself. Officers found an empty gun case, a receipt for a Ruger .357 magnum revolver, and a box of bullets with one shell missing. Despite all this evidence that Christopher had a .357 magnum, local law enforcement never searched his person.

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

Once upstairs, Christopher said he wanted to go the bathroom alone but the officer insisted he be accompanied into the bathroom. Christopher conceded but was adamant that his friend rather than anyone from local law enforcement go with him. After one handcuff

was removed Christopher went into the bathroom, turned his back to his friend, pulled his .357 magnum from his waistband, and shot himself in the chest.

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

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

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

This Court can constrict the "enormous breadth" of the *Feres* doctrine while following Supreme Court precedent by crafting a clear test for "activity incident to military service."

ARGUMENT

The Supreme Court did not define "activity incident to service" when it first established the standard nor has it in any opinion since. The Supreme Court has left it to the circuits to create a workable definition of "activity incident to service." In the fifty years since *Feres* and *Brooks* courts have offered many justifications for the incident to service test but it has never been clearly defined by the Supreme Court. Through its application of the *Feres* doctrine of the last 60 years Supreme Court precedent makes clear that the doctrine should not be applied to bar claims that are analogous to civilian life.

The Seventh Circuit now has an opportunity to define "activity incident to service" clearly and correctly so that it can be evenly applied by lower courts without generating a constant stream of appeals. It is possible to refine the *Feres* doctrine without overturning it. The best solution is to define what is not an activity incident to service. An activity that is analogous to civilian life is not incident to service. The test should be: If the same claim could arise for a civilian under similar circumstances then it is not an activity incident to service. There are circumstances that are completely unique to military life such as combatant activities, free medical care at a military hospital, or claims regarding negligent supervision. Supreme Court precedent makes clear that when a servicemember is receiving some special benefit, engaged in a military mission, or making claims against a superior officer his claims are barred. Claims that are analogous to civilian life such as those made by Appellant are allowed to proceed.

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

A. The Supreme Court's creation of the "activity incident to service" standard without any clear direction for the several circuits on how to define "incident to service" results in a constant stream of appeals.

The Supreme Court created a standard to bar claims by service members under the FTCA in *Brooks v. United States* and refined this test in *Feres v. United States.* The rule in *Feres* was that the government was not liable under the FTCA for injuries to servicemen arising out of or in the course of "activity incident to service." *Feres v. U.S.* 340 U.S. 135, 71 S.Ct. 153 (1950). The Supreme Court did not define "activity incident to service" in *Feres* nor has it since offered a definition in any case since.

Shortly after the FTCA was enacted, the Supreme Court decided *Brooks v. United States,* 337 U.S. 49 (1949). In *Brooks* the Court simply stated that the petitioner's claims were not incident to his service but did provide a clear definition of incident to service. *Id.* In *Brooks,* two soldiers and their father were driving on a public highway when they were hit by an Army truck. The government moved to dismiss for lack of jurisdiction, arguing that because the brothers were in the Army, claims arising from their injuries and death were excepted from the FTCA. *Id.* at 50. The Court rejected the argument. "The statute's terms are clear. They provide for District Court jurisdiction over *any* claim founded on negligence brought against the United States. We are not persuaded that 'any claim' means 'any claim but that of servicemen.'" *Id.* at 51 (emphasis in original). Just like Purcell's case, the accident, explained the Court, "had nothing to do with the [brothers'] Army careers. . . except in the sense that all human events depend on what has already transpired." *Id.* at 52.

Similarly here, Christopher's suicide had nothing to do with his Navy career, and dismissal of his claim is at odds with the reasoning articulated in *Brooks*.

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

In the fifty years since *Feres* many justifications have been offered for the incident to service standard but the Court has never set clear parameters for the circuits to utilize to determine what is an "activity incident to service." The Supreme Court has delineated the underlying rationales for the incident to service standard but the circuits are directed not to apply those rationales when attempting to define "activity incident to service." *Johnson*, 481 U.S. at 687-88; *see also Loughney v. United States,* 839 F.2d 186, 188 (3rd Cir. 1987) ("Johnson confirms the correctness of our previous view that *Feres* prohibits any case-by-case inquiry into whether judicial review of a service member's tort claim would unduly interfere with military operations."); *Verma v. United States*, 19 F.3d 646, 648 (D.C. Cir. 1994) ("[W]hether or not the circumstances of a case implicate the rationales for the *Feres* doctrine, the doctrine bars any damage suit against the United States for injuries incurred

incident to military service.") The lower courts of this circuit are left with no direction when defining an activity incident to service. The application of the *Feres* doctrine has devolved to a case by case analogy and distinction that ultimately relies entirely on the duty status of the claimant.

The Supreme Court has repeatedly refused to revisit the *Feres* doctrine. *See Richards v. United States*, 176 F.3d 652 (3d Cir.1999); *Witt v. United States*, 379 Fed. Appx. 559 (9th Cir. 2010). The Court has made clear with its recent denials of certiorari that it intends for the several circuits to create their own definition of "activity incident to service." If this Court is unable to fashion a definition of "activity incident to service" that can be applied fairly without generating a torrent of appeals it should call for the Supreme Court to grant certiorari in this case so it can revisit the *Feres* doctrine and possibly overrule *Feres* and its progeny.

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

To date, courts in the Seventh Circuit have no apparent direction in applying the incident to service test. The incident to service test has devolved into a case by case analogy and distinction that ultimately becomes just a question of duty status. The Seventh Circuit should adopt a test that can be consistently applied by lower courts that will not generate a constant stream of appeals as the current formulation does.

The Seventh Circuit is not alone in its apparent reliance on the duty status of the claimant. Two Circuits unabashedly bar claims based solely on the duty status of the claimant. The remainder of the circuits apply a multi-factor test that purports to not apply

duty status as the absolute determining factor but in fact duty status is dispositive in every recent opinion.

The Supreme Court has never provided a clear definition of incident to service but it is clear that the Court did not intend for duty status to be dispositive when applying the *Feres* doctrine. Furthermore, taking Supreme Court precedent as a whole, it is clear that the Court does not intend for the *Feres* doctrine to bar claims that arise out of incidents analogous to civilian life such as Appellant's claim.

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

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

The Eighth Circuit applies an equally draconian interpretation of incident to service. The Eighth Circuit has given up on a multi-factor analysis and simply holds the *Feres* doctrine unquestionably bars claims by service members generally. *See Wetherill v. Geren*,

616 F.3d 789 (8th Cir. 2010). Holding that claims are barred in such absolute terms clearly does not follow Supreme Court precedent. In *Johnson* and *Feres* the Supreme Court instructed the circuits to apply a more nuanced approach. However with no clear direction on exactly how to define "activity incident to service," the Sixth and Eighth Circuits created an inequitable bright line test based only on duty status. The Seventh Circuit must adopt a definition of "activity incident to service" that can be fairly and consistently applied rather than follow the simplistic tests of Sixth and Eighth Circuits.

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

The remainder of the circuits apply a multi-factor analysis to define incident to service.[1] The factors considered vary slightly from circuit to circuit but most profess to evaluate: (1) the place where the negligent act occurred, (2) the military duty status of the plaintiff when the negligent act occurred, (3) the benefits accruing to the plaintiff because of his status as a service member, and (4) the nature of the plaintiff's activities at the time the negligent act occurred.

The result of this test is also an absolute bar on claims by active duty service members injured in everyday civilian activities because "activity incident to service" has never been clearly defined. There have been numerous unjust results in circuits allegedly applying multi-factor while groping for a definition of activity incident to service. *See Ruggiero*, 162 F. App'x. at 142-43 (cadet fell out of defective dormitory window); *Gross,* 232

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

F. App'x. at 420 (servicemember exposed to toxic chemicals in his base apartment); *Costo* 248 F.3d at 867 (servicemember killed while off-duty on a rafting trip); *Pringle,* 44 F. Supp. 2d at 1173 (employees of military reservation's social club negligently ejected serviceman into club parking lot where he was beaten by local gang members); *Starke,* 249 F. App'x. at 775 (naval officer was struck by lightning while playing golf on naval base); *O'Neill v. United States,* 140 F.3d 564, 565 (3rd Cir. 1998) (naval officer murdered while she was sitting in her living room watching a movie with a friend) (Becker, C.J., statement sur denial of the petition for rehearing) ("[I]t is difficult for me to imagine anything less incident to service than being attacked by an ex-lover while sitting at home watching a movie with a friend. Surely, Smith would have killed O'Neill even if she was a civilian at the time."). These cases make clear that the circuits are making the incident to service determination based solely on duty status. The incident to service test is completely unworkable and after sixty years of precedent it has been constricted to simply a question of duty status.

This Circuit cannot fall into the duty status trap. The Seventh Circuit must define a clear test for incident to service that complies with Supreme Court precedent. The other circuits have made clear that multi-factor and totality of the circumstances tests do not work. This Court must follow Supreme Court precedent and clearly define incident to service.

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

The Seventh Circuit supposedly applies a totality of the circumstances test informed by precedent; however, in every application of the *Feres* Doctrine since *Johnson* duty status has been the determining factor in this Court's analysis. The current formulation of the

Feres doctrine as applied by this Panel results in holdings that are contrary to Supreme Court precedent. This Panel observed,

> "Claims are barred regardless of whether a service member's activities at the time of the injury are "non-military" in nature, or whether the service member is off duty or off base." *See also, e.g.*, *Smith*, 196 F.3d at 776 (applying *Feres* when an off-duty service member was sexually assaulted by her superior officer at an off-base hotel); *Rogers* v. *United States*, 902 F.2d 1268 (7th Cir. 1990) (*Feres* applied where the plaintiff had been living for years as a civilian – although due to an administrative mistake he had never been formally discharged – was injured while detained in a military brig for two months as a deserter); *Walls* v. *United States*, 832 F.2d 93, 95-96 (7th Cir. 1987) (applying *Feres* when a service member was injured while participating in a recreational flight club established by the Air Force)."

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

The Seventh Circuit needs to define incident to service so it does not continue to issue opinions contrary to Supreme Court precedent. Incident to service must be clearly defined so that the test does not further devolve into a duty status determinative test.

II. THE SEVENTH CIRCUIT MUST FINALLY ADOPT A CLEAR DEFINITION OF "ACTIVITY INCIDENT TO SERVICE" SO THAT THE *FERES* DOCTRINE CAN BE CONSISTENTLY APPLIED WITHOUT RISK OF FURTHER EXPANSION VIOLATING PRECEDENT.

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

It is possible to create a clear definition of "activity incident to service" that cannot be expanded or distorted while complying with Supreme Court precedent. The best solution is

to define what is not incident to service. An activity that is analogous to civilian life is not incident to service. Supreme Court precedent makes clear that servicemembers can bring claims that arise out of incidents analogous to civilian life. There are many situations that are unique to military life such as combatant activities as provided in the FTCA. Similarly, free medical care at a military hospital has no civilian analog. Claims regarding negligent supervision or infringing on the unique relationship of superiors and subordinates are also distinguishable from any aspect of civilian life. Supreme Court precedent makes clear that when a servicemember is receiving some benefit unique to military service, engaged in a military mission, or making claims against a superior officer his claims are barred. *See United States v. Shearer*, 473 U.S. 52, 105 S.Ct. 3039, 87 L.Ed.2d 38 (1985) (claims superior officers failed to properly supervise and screen servicemember). The Supreme Court has never held that claims arising out of activities analogous to civilian life should be barred by the *Feres* doctrine. This Court should now clearly define incident to service so that lower courts comply with Supreme Court precedent.

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

a serviceman engaged in a mission. *Johnson* 481 U.S. at 684. Claims barred in *Shearer* involved negligent supervision of a serviceman. *Shearer*, 473 U.S. at 54.

Supreme Court precedent demonstrates that when the same claim could arise for a civilian under similar circumstances then it is not an activity incident to military service. This Court should now set this test as the standard for applying the *Feres* doctrine.

B. A civilian under similar circumstances as Christopher Purcell would have a claim against the United States under the FTCA.

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

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

mission. He was technically on active duty but he was sitting in his apartment intoxicated and playing on the internet. This situation is undeniably analogous to civilian life.

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

Refusing to rehear this case en banc is tacitly approving a distortion of Supreme Court precedent. The Supreme Court has never barred a claim that is completely analogous to civilian life. The Seventh Circuit should not silently accept a distortion of precedent and allow yet another opportunity to clarify the ill-defined *Feres* doctrine pass.

CONCLUSION

For the foregoing reasons, Appellant respectfully requests that the Court grant this petition for rehearing en banc.

Respectfully Submitted,

Dated: October 6, 2011

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CERTIFICATE OF COMPLIANCE WITH PAGE LIMITATION

Undersigned counsel for Appellant hereby states that this Petition for Rehearing En Banc complies with the type-volume limitation of Fed. R. App. P. 32(b)(2) and Circuit Rule 32 because the brief is within the 15 page limit, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

This Petition for Rehearing En Banc complies with the typeface requirements of Fed. R. App. P. 32(a)(5), the type style requirements of Fed. R. App. P. 32(a)(6) and Circuit Rule 32. It was prepared in a proportionally spaced Century font using Microsoft Word 2003, with 12 point font used in the body and 11 point font used in the footnotes.

Respectfully Submitted,

Dated: October 6, 2011

/s/Alexander N. Hattimer
Alexander N. Hattimer

NOTICE OF FILING and PROOF OF SERVICE

Undersigned counsel for Appellant hereby certifies that, on the 6th day of October 2011, this Petition for Rehearing En Banc was electronically filed with the United States Court of Appeals, Seventh Judicial Circuit, and copies were served upon the below-listed counsel of record by e-mail and by first-class mail, proper postage prepaid, by depositing the same in the United States Mail at 415 N. LaSalle Street, Chicago, Illinois:

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