



10-1976

Stencel Aero Engineering Corp. v. United States

Lewis F. Powell Jr.

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Included to
Deny, see
76-220.

Preliminary Memorandum

November 12, 1976 Conference
List 1, Sheet 3

No. 76-321 CFX

Cert to CA 8 (Gibson,
Bright, Van Pelt--DJ)

STENCEL AERO ENGINEERING CORP.

v.

Federal/Civil

UNITED STATES

Timely

1. Summary. This case presents the same issue as
General Dynamics Corp. v. United States, No. 76-220, November
5 Conference, p. 3: whether a military contractor has a valid
action for indemnity against the United States under the Federal
Tort Claims Act, 28 U.S.C. § 2674, when a serviceman is injured
in an aircraft constructed by the contractor and negligence of

Await
disposition
of
gene

the United States in designs and specifications is alleged.

2. Facts. John C. Donham, an Air Force Reserve pilot assigned for training to the Missouri Air National Guard, was seriously injured when he was forced to eject from the F-100D aircraft that he was piloting. Petitioner was the manufacturer of the plane. Donham sued petitioner, the United States, and Mills Mfg. Corp., alleging that the "egress life support system" had malfunctioned due to the negligence of the defendants. Petitioner filed a cross-claim for indemnity against the United States, arguing that the malfunctioning was due to faulty design and specifications imposed by the Government and the Government's negligent maintenance after it took custody of the plane.

The district court dismissed both the claim and the cross-claim against the United States. Feres v. United States, 340 U.S. 135 (1950), held that an injured serviceman cannot proceed directly against the United States under the Federal Tort Claims Act (FTCA). Since Donham could not recover directly from the Government, the district court held that petitioner should not be able to recover on a claim derived from Donham's claim. It certified the disposition of the cross-claim as final under Rule 54(b), and petitioner appealed to CA 8.

CA 8 affirmed. It held that the scope of the federal government's waiver of sovereign immunity under the FTCA is a question of federal law. Petitioner's claim rested upon two distinct relationships: that of the serviceman to the Government, and that of the military contractor to the Government. Each of those relationships is governed by federal law. Feres, supra,

established that for the former, and cases such as Ivanhoe Irrigation Dist. v. McCracken, 357 U.S. 275 (1958), hold that federal contracts are governed by federal law. Id. at 289. Thus, the fact that Missouri law might permit an indemnity action in a situation where the indemnitor would not be liable to the injured party is not conclusive. Instead, federal policies must be consulted.

CA 8 found that the underlying policy of Feres dictated rejection of petitioner's claim. The FTCA was simply intended to permit the application of appropriate state law. Many of the special considerations arising from the Government's authority over a serviceman also apply to a military contractor. The Government has special privileges when it purchases military hardware, and the equipment is routinely moved across this country and overseas. The fortuity that an accident occurred in one state rather than another should not govern the liability of the United States.

CA 8 then went on to discuss the decisions from other circuits, including CA 9's General Dynamics case. In essence, it noted that the circuits were confused over the proper role of state law in this area, but that most results could be reconciled with its own. The court distinguished the cases that relied on the admiralty rule, e.g., Weyerhaeuser S.S. Co. v. United States, 372 U.S. 597 (1963).

3. Contentions. Petitioner argues that CA 8's decision conflicts with the admiralty cases, such as Weyerhaeuser, supra, and the remand in Treadwell Constr. Co. v. United States, 372 U.S. 772 (1963), a non-admiralty case. Feres should not preclude re-

covery, because there is no danger of a disruption of military discipline in a contractual suit for indemnification. Petitioner argues that the decision below conflicts with CA 9's General Dynamics opinion, because that court looked to state law to determine the government's liability. Most of the remainder of the petition is devoted to a discussion of the different results and approaches taken by the courts of appeals in the military area and the admiralty area.

4. Discussion. As indicated in the General Dynamics pool memo, this area seems quite confused. CA 8's opinion in this case went to some lengths to justify the result reached, so this might be a good case to take. On the other hand, if General Dynamics is granted this Friday, there would be no need for both of the cases to be heard, and this could be held for it.

There is ~~no~~ response.

and a reply.

11/2/76

Wood

Opn in petn

There is a response. The SG argues ① tort indemnity would involve the military in tort litigation disruptive of discipline and the orderly conduct of military affairs. and ② Under common law principles there cannot be indemnity under a tort theory because the U.S. is not directly liable for the injuries incurred by the servicemen. The SG also attempts to distinguish the other cases, such as Weyerhaeuser.

The General Dynamics memo discusses the cases.

gene.

To: MR. JUSTICE POWELL
From: Gene Comey
Re: No. 76-321, Aero Stencil Engineering Corp. v. United States

BOBTAIL BENCH MEMO

The issue in this case is extremely narrow: whether the United States is liable under the Federal Tort Claims Act to indemnify a third party for damages paid to servicemen injured in activity incident to military service. I don't think the issue is all that difficult, and I know for a fact that it is not all that interesting.

The ~~respondent~~ ^{petitioner} in this case makes out a fairly rational and logical argument for allowing a third party to seek indemnification from the United States in circumstances such as those presented here. But on the whole I think the SG really has the better position. The starting point is Feres v. United States, 340 U.S. 135. This Court there held that Congress did not intend in the Federal Tort Claims Act to subject the United States to suits brought by servicemen for injuries incurred incident to military service. Given Feres, there is no doubt that the serviceman in this case could not sue the United States directly. Unless the Court is interested in overruling Feres--which for me is an unacceptable option--the Court should go with the SG in this case. To hold otherwise would take ~~be~~ undermine the results which the Feres Court obviously considered necessary to the effective functioning of the military.

I find the following points of the SG to have considerable force:

(1) Petitioner's theory of the government's liability is essentially a tort theory; indeed, it is essentially the same theory that the serviceman would have to make if he were suing the United States directly. Of course, Stencel can point out that its suit is concerned with negligence as to it--the manufacturer--rather than as to the serviceman. But as Stencel really concedes, the "character of the negligence of the United States was such as to create [Stencel's] liability to [[the serviceman]." Brief at 17.

(2) The reasons for barring the serviceman's action apply with almost equal force to these third party suits. Significant, in my view, is the fact that these third party suits would frustrate the limited liability function of the federal compensation statute.

(3) As to equitable considerations, I think it is quite important to note that this issue of indemnification can be handled by contract. Even if this Court rules that third party parties cannot seek an "implied" indemnification under the Tort Claims Act, parties can insist that the government put an express indemnification clause in the contract. They would then have a contract claim in the Court of Claims on future injuries. Indeed, a ruling on this issue by this Court is only going to influence the relative bargaining strength of the parties with respect to negotiation of such a clause.

CONCLUSION: Although Feres had to strain a bit to find an exception for servicemen, I think the case was correctly decided. To hold for respondent in this case would undermine the benefits of the Feres ruling. Go with the SG on this one.

gene

Pilot ejected from an F-100, & was injured when system malfunctioned.

Pilot (Donham) sued Stencel (mfg'r of system) & U.S. for negligence - in design of system & in maintenance (by U.S. Air Force).

Stencel filed a cross-claim vs. U.S. claiming "indemnity" if Pilot recovered damages from it.

The Pilot cannot sue Gov't under Tort Claims Act, & its motion to dismiss was sustained. Gov't already is paying Gov't \$18,000 per year in disability benefits.

DC also dismissed Stencel's cross-claim, as it derived from a claim by a serviceman that cannot be asserted in tort vs Gov't.

This is purely a tort action, as Stencel has no contractual right of indemnity.

SG relies on Feres: serviceman can't sue Gov't.

Refr's argument is that it was not neg; that Gov't owed it not to if so, it ~~was~~ won't be liable to Donham.

Whalen (Petr.)

Case has not gone to trial - it was dismissed. Petr's claim is that if the Pilot recovers damages against it, Petr is entitled to indemnity from Gov't. ~~because of~~ Gov't negligence.

? Responding to J. Stevens, Whalen said if case goes to trial he probably won't try to prove negligence by Gov't - & a joint-trial fear situation would result in some "contribution". Whalen's theory is that an "implied ctt of indemnity arises as result of Gov't negligence with respect to Petr" - not the negligence of Gov'ts w/ respect to the Pilot.

Martin (for SG)

Relies on Feres. In 25 yrs since Feres, Congress has not changed its rule that servicemen can't sue Govt under Tort Claim Act.

If Pilot could have sued Govt, ~~to~~ his claim would be based on neg. of Govt in prescribing specifications & in maintaining the aircraft. Stencil's claim for "indemnity" is based on identical claim - that these acts of neg. by Govt resulted in injury.

In Dunham's suit vs ~~Petr~~ Petr, he will have to prove neg of Petr - not neg. of Govt. Thus, evidence will be different from that in suit by Petr vs U.S.

The Chief Justice

Appar

Mr. Justice Brennan

Reverie

Mr. Justice Stewart

Appar

Close case. Mo. creates tort action vs Govt(?)

Feres "amended" the Act, but Congress has acquiesced acquiesced in this.

We might as well overrule Feres if we accept Petri's position.

If Petri is not req. ~~at all~~ it won't be held liable.

Mr. Justice White

Affirm

Ferer is "strong medicine". It said there is no such thing as an action by a private man vs Gov't.

Also Ferer said this is matter of fed. law.

Mr. Justice Marshall

Reverse

No reason stated except that applying Ferer here is unfair (as it may well be)

Mr. Justice Blackmun

Affirm

Ferer establishes policy

Stay about from Mo. law — it is irrelevant.

Mr. Justice Powell

Affirm

Agree with Byron

Mr. Justice Rehnquist

Affirm

Feres carved out one exception. We should extend it further & carve out an additional or broader exception

Mr. Justice Stevens

Affirm

Stay away from state law.
Fed law should be uniform.

Join
Stevens
White
Requ
Reinquest

To: Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

From: The Chief Justice

Circulated: MAY 25 1977

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 76-321

Stencel Aero Engineering Corporation, Petitioner, v. United States.	} On Writ of Certiorari to the United States Court of Ap- peals for the Eighth Circuit.
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[May —, 1977]

MR. CHIEF JUSTICE BURGER delivered the opinion of the Court.

We granted certiorari in this case to decide whether the United States is liable under the Federal Tort Claims Act, 28 U. S. C. § 2674, to indemnify a third party for damages paid by it to a member of the Armed Forces injured in the course of military service.

(1)

On June 9, 1973, Captain John Donham was permanently injured when the egress life-support system of his F-100 fighter aircraft malfunctioned during a mid-air emergency.¹ Petitioner, Stencel Aero Engineering Corp., manufactured the ejection system pursuant to the specifications of, and by use of certain components provided by, the United States.² Pursuant to the Veterans' Benefits Act, 38 U. S. C. § 321 *et seq.*, made applicable to National Guardsmen by 32 U. S. C. § 318, Captain Donham was awarded a life-time pension of approximately \$1,500 per month. He nonetheless brought suit for

¹ Captain Donham was at the time assigned for training to the 131st Tactical Fighter Group, Missouri National Guard.

² There is no contractual relationship between the United States and Stencel. Stencel contracted with North American Rockwell, the prime government contractor, to provide the F-100's pilot eject system.

Reviewed
ZJP
Join
5/25

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the injury in the Eastern District of Missouri claiming damages of \$2,500,000. Named as defendants, *inter alia*, were the United States and Stencel. Donham alleged that the emergency eject system malfunctioned as a result of "the negligence and carelessness of the defendants individually and jointly."

Stencel then cross-claimed against the United States for indemnity, charging that any malfunction in the egress life-support system used by Donham was due to faulty specifications, requirements, and components provided by the United States or other persons under contract with the United States. The cross-claim further charged that the malfunctioning system had been in the exclusive custody and control of the United States since the time of its manufacture. Stencel therefore claimed that, insofar as it was negligent at all, its negligence was passive, while the negligence of the United States was active. Accordingly it prayed for indemnity as to any sums it would be required to pay to Captain Donham.³

The United States moved for summary judgment against Donham, contending that he could not recover under the Tort Claims Act against the Government for injuries sustained incident to military service. *Feres v. United States*, 340 U. S. 135 (1950). The United States further moved for dismissal of Stencel's cross-claim, asserting that *Feres* also bars an indemnity action by a third party for monies paid to military personnel who could not recover directly from the United States.

The District Court granted the Government's motions, holding that *Feres* protected the United States both from the

³ Stencel's indemnity claim is based upon the law of Missouri. See, e. g., *Feinstein v. Edmond Livingston & Sons, Inc.*, 457 S. W. 2d 789, 792-793 (Mo. 1970); *Kansas City Southern Ry. v. Payway Feed Mills, Inc.*, 338 S. W. 2d 1 (Mo. 1960). The FECA, of course, insofar as it is applicable, fixes the liability of the United States with reference to "the law of the place where the [wrongful] act or omission occurred." 28 U. S. C. § 1346 (b).

claims of the serviceman and that of the third party.⁴ Both claims were therefore dismissed for lack of subject matter jurisdiction. Stencel appealed this ruling to the Court of Appeals for the Eighth Circuit⁵ and that court affirmed. — F. 2d —. We granted certiorari.⁶ 429 U. S. 958.

(2)

In *Feres v. United States, supra*, the Court held that an on-duty serviceman who is injured due to the negligence of Government officials may not recover against the United States under the Federal Tort Claims Act. During the same Term, in a case involving injuries to private parties, the Court also held that the Act permits impleading the Government as a third-party defendant, under a theory of indemnity or contribution, if the original defendant claims that the United States was wholly or partially responsible for the plaintiff's injury. *United States v. Yellow Cab Co.*, 340 U. S. 543 (1951). In this case we must resolve the tension between *Feres* and *Yellow Cab* when a member of the armed services brings a tort action against a private defendant and the latter seeks indemnity from the United States under the Tort Claims

⁴ Still pending in the District Court is Donham's action against Stencel and against Mills Manufacturing Corporation, another alleged tortfeasor.

⁵ The District Court had properly certified its judgment as final pursuant to Fed. Rule Civ. Proc. 54 (b), thereby making immediate appeal by Stencel appropriate.

⁶ The circuits have been far from uniform in their treatment of this issue. The view taken by the Eighth Circuit in this case was first adopted by the Ninth Circuit in *United Air Lines, Inc. v. Wiener*, 335 F. 2d 379, 404, cert. dismissed, 379 U. S. 951 (1964), and has been recently reaffirmed in *Adams v. General Dynamics Corp.*, 525 F. 2d 489, 491 (1976), petn. for cert. filed, 45 U. S. L. W. 3184. Positions which appear inconsistent with this view have been adopted by the Tenth Circuit in *Barr v. United States*, 464 F. 2d 1141, 1143-1144 (1972), cert. denied, 409 U. S. 1125 (1973), and by the Fifth Circuit in *Certain Underwriters at Lloyd's v. United States*, 511 F. 2d 159, 163 (1975).

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4 STENCEL AERO ENG. CORP. v. UNITED STATES

Act, claiming that government officials were primarily responsible for the injuries.

Petitioner argues that "[t]he Federal Tort Claims Act waives the Government's immunity from suit in sweeping language." *United States v. Yellow Cab Co.*, *supra*, at 547. Petitioner therefore contends that, unless its claim falls within one of the express exceptions to the Act, the Court should give effect to the congressional policy underlying the Act, which is to hold the United States liable under state law principles to the same extent as a similarly situated private individual. However, the principles of *Yellow Cab* here come into conflict with the equally well-established doctrine of *Feres v. United States*. It is necessary, therefore, to examine the rationale of *Feres* to determine to what extent, if any, allowance of petitioner's claim would circumvent the purposes of the Act as there construed by the Court.

Feres was an action by the executrix of a serviceman who had been killed when the barracks in which he was sleeping caught fire. The plaintiff claimed that the United States had been negligent in quartering the decedent in barracks it knew to be unsafe due to a defective heating plant.⁷ While recognizing the broad congressional purpose in passing the Act, the Court noted that the relationship between a sovereign and the members of its armed forces is unlike any relationship between private individuals. 340 U. S., at 141-142. There is thus at least a surface anomaly in applying the mandate of the Act that "[t]he United States shall be liable . . . in the same manner and to the same extent as a private individual under like circumstances . . ." 28 U. S. C. § 2674. Noting that the effect of the Act was "to waive immunity from the recognized causes of action and . . . not to visit the Govern-

⁷ The Court considered two additional cases involving alleged negligence of army officials. *Jefferson v. United States*, No. 29, and *United States v. Griggs*, No. 31. It is unnecessary, for present purposes, to detail the fact situations involved in these two cases.

pension while he is disabled, the amount of general damages awarded him will be reduced *pro tanto*, and hence his claim against petitioner. While the contribution of the United States bears no direct relationship to the degree of its fault, it cannot be disputed that in *all* cases where a serviceman is injured by defective equipment, the potential exposure of the manufacturer of such equipment is substantially reduced by the military compensation scheme. Depending on the situation, this may well redound to the benefit or to the detriment of a particular manufacturer. In cases such as this, assuming the accuracy of petitioner's factual claims, the manufacturer may be required to pay monies for which it would not be liable if the contribution of the Government were based strictly upon degree of fault. However, it is not difficult to posit the converse situation, where the manufacturer is totally at fault, yet is spared from monetary liability because the Government has fully or partially compensated the serviceman by way of pension benefits. While some Government contractors no doubt suffer under this scheme, it cannot be said that contractors generally are harmed.

Our second reason for rejecting petitioner's argument is that a compensation scheme such as the Veterans' Benefits Act serves a dual purpose: it not only provides a swift, efficient remedy for the injured serviceman, but it also clothes the Government in the "protective mantle of the Act's limitation-of-liability provisions." See *Cooper Stevedoring Co. v. Kopke, Inc.*, 417 U. S. 106, 115 (1974). Given the broad exposure of the Government, and the great variability in the potentially applicable tort law, see *Feres*, 340 U. S., at 142-143, the military compensation scheme provides an upper limit of liability for the Government as to service-connected injuries. To permit petitioner's claim would circumvent this limitation, thereby frustrating one of the essential features of the Veterans' Benefits Act. As we stated in a somewhat different context concerning the Tort Claims Act: "To permit [petitioner] to proceed . . . here would be to judicially admit

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at the back door that which has been legislatively turned away at the front door. We do not believe that the [Federal Tort Claims] Act permits such a result." *Laird v. Nelms*, 406 U. S. 797, 802 (1972).

Turning to the third factor, it seems quite clear that where the case concerns an injury sustained by a soldier while on duty, the effect of the action upon military discipline is identical whether the suit is brought by the soldier directly or by a third party. The litigation would take virtually the identical form in either case, and at issue would be the degree of fault, if any, on the part of the Government's agents and the effect upon the serviceman's safety. The trial would, in either case, involve second-guessing military orders, and would often require members of the armed services to testify in court as to each other's decisions and actions. This factor, too, weighs against permitting any recovery by petitioner against the United States.

We conclude, therefore, that the third party indemnity action in this case is unavailable for essentially the same reasons that the direct action by Donham is barred by *Feres*. The factors considered by the *Feres* court are largely applicable in this type of case as well; hence, the right of a third party to recover in an indemnity action against the United States recognized in *Yellow Cab, supra*, must be held limited by the rationale of *Feres* where the injured party is a serviceman. Since the relationship between the United States and petitioner is based on a commercial contract, there is no basis for a claim of unfairness in this result.³

Accordingly, the judgment of the Court of Appeals is

Affirmed.

1. ³ Since the first Circuit case to hold such actions barred by *Feres* was decided in 1964, see n. 5, *supra*, petitioner no doubt had sufficient notice so as to take this risk into account in negotiating its contract for the emergency eject system at issue here.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST



May 25, 1977

Re: No. 76-321 - Stencel Aero Engineering Corp.
v. United States

Dear Chief:

Please join me.

Sincerely,

A handwritten signature, likely of William H. Rehnquist, is written below the word "Sincerely,".

The Chief Justice

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE BYRON R. WHITE

May 25, 1977

Re: No. 76-321 - Stencel Aero Engineering Corp.
v. United States

Dear Chief:

Please join me.

Sincerely,

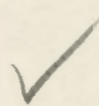
Byron

The Chief Justice

Copies to Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS



May 25, 1977

Re: 76-321 - Stencel Aero Engineering Corp. v.
United States

Dear Chief:

Please join me.

Respectfully,

A handwritten signature, likely of Justice John Paul Stevens, is written below the word "Respectfully,".

The Chief Justice

Copies to the Conference

May 25, 1977

No. 76-321 Stencel Aero v. United States

Dear Chief:

Please join me.

Sincerely,

The Chief Justice

lfp/ss

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE POTTER STEWART

May 25, 1977

No. 76-321, Stencel Aero Eng. Corp.
v. United States

Dear Chief,

good point!

I agree with the result you reach and expect ultimately to join your opinion. As presently written, however, the paragraph beginning at the bottom of page 6 and running through the first half of page 7 causes me some concern.

gene

Do we really know for certain that "to the extent that the serviceman receives a substantial government pension while he is disabled, the amount of general damages awarded him will be reduced pro tanto, ..."? While I am now more than a quarter of a century removed from day-to-day exposure to tort law, my recollection is that a good many jurisdictions do not permit a jury to know of a plaintiff's compensation from other sources, e.g., private insurance or workmen's compensation, and do not provide for a pro tanto reduction of the damages awarded.

Sincerely yours,

P.S.

The Chief Justice

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

May 26, 1977

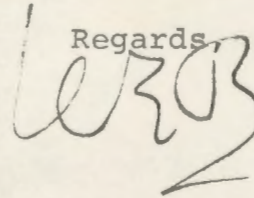
Re: 76-321 - Stencel Aero v. United States

Dear Potter:

The question you raise persuades me that, as often happens, the discussion goes beyond the needs of the case. The paragraph is not necessary and should either be explicated more fully or omitted, and I lean to the latter.

I will be back to you soon.

Regards



Mr. Justice Stewart

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

May 27, 1977

Re: No. 76-321 - Stencel Aero Engineering Corp.
v. United States

Dear Chief:

I, also, am troubled by the paragraph mentioned in Potter's letter to you of May 25. If this problem could be resolved, I could join your opinion.

Sincerely,

H.A.B.

The Chief Justice

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

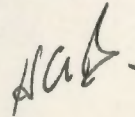
May 31, 1977

Re: No. 76-321 - Stencel Aero Engineering Corp.
v. United States

Dear Chief:

I join your opinion as revised in accordance with
your memorandum of today.

Sincerely,



The Chief Justice

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

June 1, 1977



RE: NO. 76-321 Stencel Aero Engineering Corporation
v. United States

Dear Thurgood:

Please join me in the dissenting opinion you
have prepared in the above.

Sincerely,

Mr. Justice Marshall

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE POTTER STEWART

June 1, 1977

No. 76-321, Stencel Aero Eng. Corp. v. U. S.

Dear Chief,

I am glad to join your opinion for the
Court, as recirculated yesterday.

Sincerely yours,

The Chief Justice

Copies to the Conference

[illegible]