

In Support of the Feres Doctrine and a Better Definition of "Incident to Service"

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NOTE

IN SUPPORT OF THE *FERES* DOCTRINE AND A BETTER DEFINITION OF “INCIDENT TO SERVICE”

“[T]he Government is not liable under the Federal Tort Claims Act for injuries to servicemen where the injuries arise out of or are in the course of activity incident to service.”

—*Feres v. United States*¹

INTRODUCTION

Jack Parker, an active duty member of the United States Army, decided to move his family from their home near the Fort Hood military base to a new location in New Mexico.² He thereupon borrowed a car from a civilian and requested a few days off from the Army while he and his family moved.³ Permission was granted, and at the end of his normal duty hours, Parker left his post and drove toward the gate.⁴ Suddenly, an army vehicle proceeding in the opposite direction crossed the center line of the military road and collided head-on with his car.⁵ Parker died from his injuries, and his widow sued the United States for wrongful death.⁶

Carvel Gramlich, a petty officer in the United States Navy, spent an afternoon ashore “on authorized liberty.”⁷ A companion drove him back to his ship, docked at a naval pier in New Jersey, so that Gramlich could drop off some wood he obtained during the day to make a model sailboat.⁸ After Gramlich returned to his companion’s truck, they drove along the pier roadway toward

¹ 340 U.S. 135, 146 (1950).

² *Parker v. United States*, 611 F.2d 1007, 1008 (5th Cir. 1980).

³ *Id.*

⁴ *Id.*

⁵ *Id.*

⁶ *Id.*

⁷ *Camassar v. United States*, 400 F. Supp. 894, 895 (D. Conn. 1975), *aff’d per curiam*, 531 F.2d 1149 (2d Cir. 1976).

⁸ 400 F. Supp. at 895-96.

shore.⁹ It was alleged that the defective condition of the road caused the vehicle to veer off the pavement and plunge into the water below.¹⁰ Gramlich drowned in the accident and his administrator brought an action for damages against the government.¹¹

The circumstances surrounding both deaths are similar. Both decedents were members of the Armed Forces and were excused from duty to pursue personal endeavors. Both were killed driving from their military posts, and both resulting suits were brought under the Federal Tort Claims Act (FTCA) based upon the government's alleged negligence.¹² Despite such similarities, recovery was permitted in the former case, while in the latter it was held to be barred¹³ by the *Feres* doctrine, enunciated by the Supreme Court in *Feres v. United States*.¹⁴ In *Feres*, the Court established the principle that servicemen may not recover under the FTCA when their injuries are incurred "incident" to military service.¹⁵ Because the Court failed to define what it meant by a "service-incident" injury,¹⁶ however, inconsistent results often obtain in actions brought by military personnel seeking to recover under the Act.¹⁷ For example, the Second Circuit found that Gramlich's

⁹ *Id.* at 896.

¹⁰ *Id.*

¹¹ *Id.* at 895-96.

¹² The Federal Tort Claims Act of 1946, 28 U.S.C. §§ 1346(b)-(c), 1402(b), 1504, 2110, 2401(b), 2402, 2411(b), 2671-2680 (1976), gives the district courts exclusive jurisdiction of civil actions on claims against the United States . . . for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

28 U.S.C. § 1346(b) (1976).

¹³ *Camassar v. United States*, 531 F.2d 1149, 1151 (2d Cir. 1976) (per curiam).

¹⁴ 340 U.S. 135, 146 (1950).

¹⁵ *Id.*

¹⁶ *Miller v. United States*, 643 F.2d 481, 483 (8th Cir. 1980), *rev'd en banc*, 643 F.2d 490 (8th Cir. 1981); *Parker v. United States*, 611 F.2d 1007, 1009 (5th Cir. 1980); *Woodside v. United States*, 606 F.2d 134, 140 (6th Cir. 1979), *cert. denied*, 445 U.S. 904 (1980).

¹⁷ *Troglia v. United States*, 602 F.2d 1334, 1338 (9th Cir. 1979); *Mills v. Tucker*, 499 F.2d 866, 867 (9th Cir. 1974) (per curiam); *Stephan v. United States*, 490 F. Supp. 323, 326-27 (W.D. Mich. 1980); *Jacoby, The Feres Doctrine*, 24 HASTINGS L.J. 1281, 1284 (1973); Note, *The Federal Tort Claims Act: A Cause of Action for Servicemen*, 14 VAL. U.L. REV. 527, 557-58 (1980); see *Coffey v. United States*, 324 F. Supp. 1087, 1088 (S.D. Cal. 1971), *aff'd*, 455 F.2d 1380 (9th Cir. 1972). Compare *Preferred Ins. Co. v. United States*, 222 F.2d 942, 944-46 (9th Cir.), *cert. denied*, 350 U.S. 837 (1955) with *United States v. Guyer*, 218 F.2d 266, 267-70 (4th Cir. 1954) (per curiam), *rev'd on other grounds sub nom. Snyder v. United States*, 350 U.S. 906 (1955).

death occurred incident to his service because he was on active duty and died at a military installation.¹⁸ Consequently, the wrongful death action was within the rule announced in *Feres* and not cognizable under the FTCA.¹⁹ In contrast, the Fifth Circuit, in *Parker v. United States*, held that the decedent serviceman's widow was not barred from recovery by the *Feres* doctrine.²⁰ The court ruled that Parker's activity—"merely passing through the base on his way home"²¹—was not service incident despite the fact that he was on active duty and within the confines of a military base when death occurred.²²

The *Feres* doctrine has been the subject of intense criticism by courts and commentators alike.²³ Legal writers have argued that the doctrine should be abolished, asserting that the Supreme Court did not adequately support the result in the *Feres* case,²⁴ and that subsequent cases have departed from its underlying rationale.²⁵ Although frequently expressing distaste at the inequitable results which it fosters, courts nevertheless have continued to apply the *Feres* doctrine.²⁶ This Note will reexamine the *Feres* doctrine and some of the criticisms leveled at it. The Note will argue that, despite assertions to the contrary, the *Feres* Court reached an arguably correct conclusion. It will support this thesis by showing that *Feres*' currently disfavored "analogous private liability" rationale has been too readily discarded and is as valid today as it was in 1950.²⁷ Additionally, the Note will demonstrate that the often maligned "military discipline" rationale, standing alone, is suffi-

¹⁸ *Camassar v. United States*, 531 F.2d 1149, 1151 (2d Cir. 1976) (per curiam).

¹⁹ *Id.*

²⁰ *Parker v. United States*, 611 F.2d 1007, 1115 (5th Cir. 1980).

²¹ *Id.* at 1114.

²² *Id.* at 1113-14 & n.10.

²³ Note, *From Feres to Stencil: Should Military Personnel Have Access to FTCA Recovery?*, 77 MICH. L. REV. 1099, 1099-1100 (1979) [hereinafter cited as Note, *From Feres to Stencil*]; see *Veillette v. United States*, 615 F.2d 505, 507 (9th Cir. 1980); *Thomason v. Sanchez*, 539 F.2d 955, 957 (3d Cir. 1976), cert. denied, 429 U.S. 1072 (1977); *Hitch, The Federal Tort Claims Act and Military Personnel*, 8 RUTGERS L. REV. 316, 333-34 (1954); Note, *Military Rights Under the FTCA*, 43 ST. JOHN'S L. REV. 455, 472-75 (1969); Note, *supra* note 17, at 529-30.

²⁴ See, e.g., Note, *supra* note 17, at 535-53.

²⁵ See, e.g., Note, *The Supreme Court and the Tort Claims Act: End of an Enlightened Era?*, 27 CLEV. ST. L. REV. 267, 275-78 (1978).

²⁶ See, e.g., *Peluso v. United States*, 474 F.2d 605, 606 (3d Cir.), cert. denied, 414 U.S. 879 (1973).

²⁷ See notes 94-115 and accompanying text *infra*.

cient to support the *Feres* doctrine.²⁸ Having confirmed the validity of these *Feres* rationale, the Note will suggest that the appropriate target for reform of the inequities wrought by the *Feres* doctrine should be Congress, not the judiciary.²⁹ Finally, the Note will conclude that since the demise of *Feres* is not likely to occur in the foreseeable future, the incident to service test should be used by the courts to achieve more consistent results. Toward this end, an improved definition of that test will be suggested.³⁰

THE FTCA AND THE *Feres* DOCTRINE

For many years, the doctrine of sovereign immunity³¹ protected the United States from incurring any liability to its citizens.³² One of the first fissures in this shield of nonresponsibility

²⁸ See notes 116-136 and accompanying text *infra*.

²⁹ See notes 137-144 and accompanying text *infra*.

³⁰ See notes 145-170 and accompanying text *infra*.

³¹ There are two theories as to how the doctrine of sovereign immunity evolved in American jurisprudence. Borchard, *Governmental Responsibility in Tort*, 36 YALE L.J. 1, 17 (1926) [hereinafter cited as Borchard, *Responsibility*]; accord, *Keifer & Keifer v. Reconstruction Fin. Corp.*, 306 U.S. 381, 388 (1939). But see Note, *From Feres to Stencel*, *supra* note 23, at 1099 n.4. One theory is that the American concept of sovereign immunity had its roots in the English maxim "the King can do no wrong." Holtzoff, *The Handling of Tort Claims Against the Federal Government*, 9 LAW & CONTEMP. PROBS. 311, 311 (1942); cf. Gellhorn & Schenck, *Tort Actions Against the Federal Government*, 47 COLUM. L. REV. 722, 722 (1947) (doctrine has roots in "feudalism and theology"). That the King could do no wrong was understood in early English common law to mean that he did not have a right to do wrongs. Borchard, *Responsibility*, *supra*, at 22. In his commentaries, however, Blackstone asserted that this phrase meant that the sovereign, because of his unique status, was incapable of effecting a legal wrong. See 1 W. BLACKSTONE, COMMENTARIES 239, 241-43. While there is support for the proposition that this was a misconstruction of the maxim, see Armstrong & Cockrill, *The Federal Tort Claims Bill*, 9 LAW & CONTEMP. PROBS. 327, 331 (1942); Borchard, *Government Liability in Tort*, 34 YALE L.J. 1, 2 n.2 (1924) [hereinafter cited as Borchard, *Liability*], Blackstone's view nonetheless became entrenched in English common law. See Borchard, *Responsibility*, *supra*, at 31. The theory posits that this doctrine somehow was "carried over" into the American judicial system, despite the fact that it was "wholly inapplicable" to the fervently anti-monarchistic new society. Armstrong & Cockrill, *supra*, at 331.

The other theory which attempts to justify the existence of sovereign immunity in American law does not rely upon the English maxim, and found its most emphatic advocate in Justice Holmes. Borchard, *Responsibility*, *supra*, at 17. Holmes stated that the doctrine was not founded on "any formal conception or obsolete theory, but on the logical and practical ground that there can be no legal right as against the authority that makes the law on which the right depends." *Kawanakoa v. Polyblank*, 205 U.S. 349, 353 (1907); cf. *The Western Maid*, 257 U.S. 419, 433 (1922) (Holmes, J.) (when government has not consented to tort liability, it cannot be "guilty of a tort. For a tort is a tort in a legal sense only because the law has made it so.").

³² Regardless of how sovereign immunity originated, cf. *Keifer & Keifer v. Reconstruc-*

occurred when Congress established the Court of Claims to investigate the merits of certain types of claims asserted against the government.³³ This court was later given power to render judgment,³⁴ but such authority did not create a source of governmental liability in tort, for the Supreme Court found tort claims to be "exclude[d] by the strongest implication" under the statute.³⁵ Indeed, Congress later affirmed the Supreme Court's position by expressly excepting tort actions from Court of Claims jurisdiction.³⁶ Those who were injured in tort, therefore, were relegated to the process of petitioning Congress to pass a private bill for relief.³⁷ Eventually, the vol-

tion Fin. Corp., 306 U.S. 381, 388 (1939) (the question is "academic"), Chief Justice John Marshall stated in an early case that because the judiciary act did not authorize any suits against the United States, none could be maintained. *See Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 411-12 (1821) (dictum). Presently, it is well settled that the federal government cannot be sued without its permission. *See, e.g., United States v. Sherwood*, 312 U.S. 584, 586 (1941); *Kawananakoa v. Polyblank*, 205 U.S. 349, 353 (1907); *United States v. Lee*, 106 U.S. 196, 207 (1882). Such consent must be obtained from Congress, for sovereign immunity "has become too firmly entrenched" in American common law to be abolished by the courts. *Armstrong & Cockrill*, *supra* note 31, at 331; *accord, Honda v. Clark*, 386 U.S. 484, 500-01 (1967) (dictum); *McElrath v. United States*, 102 U.S. 426, 440 (1880); *Gardner v. United States*, 446 F.2d 1195, 1197 (2d Cir. 1971) (per curiam), *cert. denied*, 405 U.S. 1018 (1972). When Congress allows suit by waiving immunity under a statute, it may attach any conditions it wishes to that waiver. *Honda v. Clark*, 386 U.S. at 501; *International Eng'r Co. v. Richardson*, 512 F.2d 573, 577 (D.C. Cir. 1975), *cert. denied*, 423 U.S. 1048 (1976); *accord, McElrath v. United States*, 102 U.S. at 440; *see Kendall v. United States*, 107 U.S. 123, 125 (1883).

³³ *See* Court of Claims Act of 1855, ch. 122, 10 Stat. 612 (1855) (codified as amended at 28 U.S.C. § 1491 (Supp. III 1979)). This statute spoke of claims based, *inter alia*, "upon any contract, express or implied, with the government of the United States." *See id.*

³⁴ *See* Act of March 3, 1863, ch. 92, 12 Stat. 765 (1863) (codified as amended at 28 U.S.C. § 1491 (Supp. III 1979)).

³⁵ *Gibbons v. United States*, 75 U.S. (8 Wall.) 269, 275 (1869).

³⁶ *See* Tucker Act, ch. 359, 24 Stat. 505 (1887) (codified as amended at 28 U.S.C. § 1491 (Supp. III 1979)). The jurisdictional grant to the Court of Claims now provides in part:

The Court of Claims shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases *not sounding in tort*.

28 U.S.C. § 1491 (Supp. III 1979) (emphasis added). *See generally* Anderson, *Tort and Implied Contract Liability of the Federal Government*, 30 MINN. L. REV. 133 (1946); Borchard, *Liability*, *supra* note 31, at 28-29. Because Congress had not waived immunity from suits grounded in tort, liability for these claims could not attach against the federal government. *Armstrong & Cockrill*, *supra* note 31, at 331. Justice Holmes took this one step further and declared that the United States could not legally commit a tort. *See The Western Maid*, 257 U.S. 419, 433 (1922).

³⁷ Since tort remedies could not be obtained in the courts, claimants resorted to the practice of petitioning Congress for relief in the form of private bills. *Feres v. United States*, 340 U.S. 135, 140 (1950); *United States v. Brooks*, 169 F.2d 840, 842 (4th Cir. 1948), *rev'd*,

ume of requests for private statutes based upon tort claims became so large that Congress was compelled to act.³⁸ The result was the Legislative Reorganization Act of 1946³⁹ which contained the Federal Tort Claims Act,⁴⁰ a measure providing for a broad waiver of the government's immunity from tort liability.⁴¹ The Act provides that "[t]he United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances."⁴² This consent to tort liability, however, is not absolute, for there are numerous statutory exceptions contained within the Act.⁴³

Notwithstanding the fact that claims by military personnel were not expressly excluded from the FTCA's otherwise broad waiver of sovereign immunity,⁴⁴ the United States asserted that all claims of servicemen should be barred, citing "dire consequences"

337 U.S. 49 (1949); Note, *Stencel Aero Engineering Corporation v. United States: An Expansion of the Feres Doctrine to Include Military Contractors, Subcontractors, and Suppliers*, 29 HASTINGS L.J. 1217, 1218 (1978); see W. WRIGHT, *THE FEDERAL TORT CLAIMS ACT* 1-2 (1957). For a description of the procedure involved in enacting such bills, see Holtzoff, *supra* note 31, at 323-25.

³⁸ *E.g.*, *Feres v. United States*, 340 U.S. 135, 140 (1950); see S. REP. NO. 1400, 79th Cong., 2d Sess. 1, 7 (1946); S. REP. NO. 1011, 79th Cong., 2d Sess. 1, 24 (1946); H.R. REP. NO. 1287, 79th Cong., 1st Sess. 1, 1-2 (1945). By 1945, Congress recognized that the private bill procedure was an inadequate vehicle for handling tort claims against the government:

For many years the present system has been subjected to criticism, both as being unduly burdensome to the Congress and as being unjust to the claimants, in that it does not accord to injured parties a recovery as a matter of right but bases any award that may be made on considerations of grace. Moreover, it does not afford a well-defined continually operating machinery for the consideration of such claims.

Id. at 2.

³⁹ Legislative Reorganization Act of 1946, ch. 753, 60 Stat. 812 (1946).

⁴⁰ The Federal Tort Claims Act comprised Title IV of the Reorganization Act, see *id.* at 842, and was designed to complement a provision in Title I, *id.* at 812, which prohibited the introduction of private bills for claims cognizable under the tort claims procedure. S. REP. NO. 1400, 79th Cong., 2d Sess. 1, 29 (1946).

⁴¹ *United States v. Yellow Cab Co.*, 340 U.S. 543, 547 (1951).

⁴² 28 U.S.C. § 2674 (1976). Liability of the United States under this section does not extend to payment of interest accruing prior to judgment, nor does it include payment of punitive damages. *Id.*

⁴³ One section of the Act provides that the district courts do not have jurisdiction to hear, *inter alia*, claims based upon the execution of statutes or regulations, the performance of discretionary functions of government, or those arising out of postal, revenue, customs, treasury, or banking functions. See 28 U.S.C. § 2680 (1976). It further provides that claims arising out of combatant activities of the Armed Forces during time of war, as well as any claims occurring in foreign countries, are not permissible under the Act. See *id.*

⁴⁴ See *id.*

if liability were to attach.⁴⁵ The Supreme Court, however, in *Brooks v. United States*,⁴⁶ interpreted the FTCA to include at least some claims by military personnel.⁴⁷ In *Brooks*, two servicemen, on furlough, riding in a private car on a public highway, collided with an army vehicle being driven negligently by a civilian employee.⁴⁸ In permitting the resulting FTCA actions to proceed to trial, Justice Murphy, writing for the Court, found no indication of a congressional intent to mandate a blanket exclusion of military claims brought under the FTCA.⁴⁹ Justice Murphy first noted that the Act's jurisdictional grant did not clearly except military claims.⁵⁰ He reasoned that the express exceptions to federal liability, which include combat-related and overseas claims, mandated the conclusion that Congress intended military claims to fall within the scope of the Act.⁵¹ Also deemed persuasive by the Court

⁴⁵ *Brooks v. United States*, 337 U.S. 49, 52 (1949).

⁴⁶ 337 U.S. 49 (1949).

⁴⁷ *See id.* at 51-52.

⁴⁸ *Id.* at 50.

⁴⁹ *See id.* at 54. In *Brooks*, Justices Frankfurter and Douglas dissented, relying upon the rationale of the Fourth Circuit, *see id.*, which denied recovery, *see United States v. Brooks*, 169 F.2d 840, 841-42 (4th Cir. 1948), *rev'd*, 337 U.S. 49 (1949). The Fourth Circuit found the question of military rights under the FTCA a difficult one, primarily because of "inept draftsmanship on the part of Congress in failing to make clear and express provision as to soldiers in the United States Army." 169 F.2d at 842. The court noted that a literal reading of the Act did not exclude military claims, but reasoned that such a reading of a statute is inappropriate when it would result in a frustration of established policy and the "real" congressional intent. *See id.* *Brooks* presented such a situation, and therefore, the court "look[ed] to the reason of the enactment and inquire[d] into its antecedent history and [gave] it effect in accordance with its design and purpose, sacrificing . . . the literal meaning in order that the purpose [would] not fail." *Id.* (quoting *Jefferson v. United States*, 77 F. Supp. 706, 712 (D. Md. 1948), *aff'd*, 178 F.2d 518 (4th Cir. 1949), *aff'd sub nom. Feres v. United States*, 340 U.S. 135 (1950)). Viewing the statute from this perspective, the court held that the Act did not provide a cause of action for the *Brooks* claim. *See* 169 F.2d at 846. The Fourth Circuit examined the same factors which the Supreme Court would later find persuasive regarding service-incident claims in *Feres*. *Compare* 169 F.2d at 842-46 with *Feres v. United States*, 340 U.S. 135, 140-45 (1950). *See generally* notes 66-80 and accompanying text *infra*.

⁵⁰ 337 U.S. at 51. The *Brooks* Court noted that the statute gave the district courts jurisdiction of "any" negligence action brought against the government, and reasoned that there was nothing to indicate that this meant "any claim but that of servicemen." *Id.*; *see* 28 U.S.C. § 1346(b); note 12 *supra*.

⁵¹ *See* 337 U.S. at 51. *See generally* 28 U.S.C. § 2680(j), (k) (1976); note 43 *supra*. The conclusion of the *Brooks* Court that Congress did not intend to create an exception for military claims because no such exception was mentioned in the section of the Act which listed exceptions, is an application of the *expressio unius est exclusio alterius* principle of statutory construction. This rule states that an express exception precludes implication of other exceptions. *See, e.g., George Moore Ice Cream Co. v. Rose*, 289 U.S. 373, 377 (1933); *Cunard S.S. Co. v. Mellon*, 262 U.S. 100, 128-29 (1923); 2A J. SUTHERLAND, STATUTES AND

was the fact that an exception relating to such claims was proposed and later deleted before final passage of the statute.⁵² The existing availability of administrative benefits to military personnel injured by tortious acts posed no insuperable problem for the Court, for neither the FTCA nor the veterans' laws provided for an election or exclusivity of remedies.⁵³ The Court refused to consider the consequences of allowing tort claims grounded on poor military judgment and the like,⁵⁴ because the case did not raise such issues.⁵⁵ The Brooks' injuries were "not caused by their service except in the sense that all human events depend upon what has already transpired."⁵⁶ The Court, however, implied that its analysis of the Act would be different had the injury forming the basis of the serviceman's claim been incurred incident to military service,⁵⁷ and stated that the consequences of allowing such a claim could be so "outlandish" that even the considerations pointing to governmental liability in *Brooks* might not be sufficient to support recovery for service-incident claims.⁵⁸

The following year, in *Feres v. United States*,⁵⁹ the Court took the opportunity to settle the question whether recovery could obtain upon a service-incident claim under the FTCA. In *Feres*, the Court disposed of three cases in one opinion.⁶⁰ The first case involved a plaintiff whose decedent, an active duty member of the armed forces, was killed in a fire, allegedly due to the negligence of the United States in quartering him in barracks with a defective heating system.⁶¹ The plaintiff in the second case had undergone a

STATUTORY CONSTRUCTION § 47.23, at 123 (C. Sands 4th ed. 1973).

⁵² See 337 U.S. at 51-52.

⁵³ See *id.* at 53. The *Brooks* Court was not blind to the fact that a serviceman would receive statutory benefits for injuries incurred. It remanded the case for consideration of the possibility of deducting benefits already received from the tort judgment. *Id.* at 54. The Court noted that "[i]t would seem incongruous . . . if the United States should have to pay in tort for hospital expenses it had already paid," but did not pass on this question because it had not been argued. See *id.*

⁵⁴ See *id.* at 52.

⁵⁵ See *id.*

⁵⁶ *Id.*

⁵⁷ The Court stated that "[w]ere the accident incident to the Brooks' service, a wholly different case would be presented. We express no opinion as to it." *Id.*

⁵⁸ *Id.* at 52-53.

⁵⁹ 340 U.S. 135 (1950).

⁶⁰ See *id.* at 136.

⁶¹ *Id.* at 136-37. The Second Circuit had held that the plaintiff had no cause of action under the FTCA. See *Feres v. United States*, 177 F.2d 535, 537-38 (2d Cir. 1949), *aff'd*, 340 U.S. 135 (1950). The court distinguished *Brooks*, see notes 46-58 *supra*, because the instant

stomach operation while in the Army, and discovered after his discharge from the service that a towel was negligently left inside his body.⁶² The third plaintiff alleged that her decedent died while on active duty due to negligent treatment by army surgeons.⁶³ In distinguishing *Brooks*, the *Feres* Court stated that the common element in each of the situations presented in *Feres* was that the servicemen, "while on active duty and not on furlough, sustained injury due to negligence of others in the Armed Forces."⁶⁴

In an opinion by Justice Jackson, the Court held that the government was not liable under the FTCA for service-incident claims.⁶⁵ As in *Brooks*, the Court looked to the intent of Congress, but Justice Jackson did not merely search for possible "outlandish consequences" of liability.⁶⁶ Instead, he attempted to harmonize the Act with "the entire statutory system of remedies against the Government to make a workable, consistent and equitable whole."⁶⁷ Briefly restating the considerations leading to the *Brooks*

case involved an injury incurred incident to service. 177 F.2d at 536-37. The Second Circuit court noted the absence of an express exclusion of military claims under the Act, *see id.*; 28 U.S.C. § 2680 (1976); but reasoned that this could be explained by the fact that such an exception was unnecessary. *See* 177 F.2d at 537-38. The court also implied that the maxim *expressio unius est exclusio alterius*, *see* note 51 *supra*, did not apply since the statutory exceptions related to types of claims, not classes of claimants. *See* 177 F.2d at 537. Finally, the circuit court observed that if Congress intended any remedy beyond the military benefits scheme, it would have expressly provided for one. *Id.*

⁶² 340 U.S. at 137. Denying the plaintiff recovery under the Act, the district court in this case applied much of the reasoning that was later used by the Supreme Court in *Feres*. Compare *Feres v. United States*, 340 U.S. 135, 139-46 (1950) with *Jefferson v. United States*, 77 F. Supp. 706, 711-14 (D. Md. 1948), *aff'd*, 178 F.2d 518 (4th Cir. 1949), *aff'd sub nom. Feres v. United States*, 340 U.S. 135 (1950).

⁶³ 340 U.S. at 137. The Tenth Circuit in this case had held that service-incident claims were cognizable under the FTCA, *see* *Griggs v. United States*, 178 F.2d 1, 3 (10th Cir. 1949), *rev'd sub nom. Feres v. United States*, 340 U.S. 135 (1950), reasoning that such claims were not within any of the statutory exceptions, and noting that the absence of such a provision in light of previous proposed bills was persuasive, 178 F.2d at 3. The conflict between the Second, Fourth and Tenth Circuits led the Supreme Court to grant certiorari and decide the three cases together. 340 U.S. at 136.

⁶⁴ 340 U.S. at 138.

⁶⁵ *Id.* at 146. The decision in *Feres* was unanimous. Justice Douglas concurred in the result. *See id.*

⁶⁶ *See id.* at 139; note 143 *infra*.

⁶⁷ 340 U.S. at 139. It is submitted that a comparison of the *Brooks* and *Feres* opinions reveals two distinct methods of statutory interpretation. Justice Jackson, in *Feres*, remarked that the FTCA "was not an isolated and spontaneous flash of congressional generosity." *Id.* Hence, he felt it appropriate to fit the Act into the general scheme of remedies and benefits obtainable from the United States. *Id.* In *Brooks*, however, Justice Murphy simply noted the absence of express exclusivity or election provisions, and thus, allowed recovery. *Brooks v. United States*, 337 U.S. 49, 53 (1949). Justice Murphy also refused to examine other rem-

result,⁶⁸ the *Feres* Court nonetheless mentioned other factors which it found more persuasive of congressional intent to maintain sovereign immunity from service-incident tort claims.⁶⁹ A primary purpose of the FTCA, the Court observed, was to relieve Congress of the burden of examining tort claims and passing private acts when it found that relief was warranted.⁷⁰ Justice Jackson suggested that Congress had not been deluged with private bills for servicemen prior to the enactment of the FTCA because military personnel already had available to them a comprehensive scheme for relief through disability and veterans' benefits.⁷¹ Reasoning that the purpose of the Act was to extend a judicial remedy to those with no relief, he concluded that Congress did not intend to afford to servicemen the additional remedy of an FTCA claim.⁷² Justice Jackson further opined that if Congress had wished to enact another device for the satisfaction of military claims, it would have provided a method to harmonize the two schemes to prevent potential double recovery.⁷³ The Court looked to the statute's ju-

edies to decide if there should be a set-off for benefits already received, because the question was not fully argued below. *Id.* at 53-54.

⁶⁸ See 340 U.S. at 138-39; notes 49-53 *supra*.

⁶⁹ See notes 70-80 and accompanying text *infra*.

⁷⁰ 340 U.S. at 140; see notes 37-38 *supra*. The report of the joint committee on the organization of Congress described the difficulty that private bills had caused:

Congress is poorly equipped to serve as a judicial tribunal for the settlement of private claims against the Government of the United States. This method of handling individual claims does not work well either for the Government or for the individual claimant, while the cost of legislating the settlement in many cases far exceeds the total amounts involved.

Long delays in consideration of claims against the Government, time consumed by the Claims Committee of the House and Senate, and crowded private calendars combine to make this an inefficient method of procedure.

The United States courts are well able and equipped to hear these claims and to decide them with justice and equity both to the Government and to the claimants. We, therefore, recommend that all claims for damages against the Government be transferred by law to the United States Court of Claims and to the United States district courts for proper adjudication.

S. REP. No. 1010, 79th Cong., 2d Sess. 1, 25 (1946).

⁷¹ See 340 U.S. at 140.

⁷² See *id.*

⁷³ See *id.* at 144. The Court noted that the availability of other compensation could lead to four conclusions—that the claimant could obtain a double recovery, that he could elect to receive either the tort recovery or the statutory benefits, that he could look to both, deducting one recovery from the other, or that the claimant would be precluded from tort recovery because of the accessibility of the benefits. See *id.* There was authority for all four propositions, but the Court chose the last. See *id.* There was no attempt in the opinion to explain why the *Brooks* Court arrived at a different choice. See note 53 and accompanying text *supra*.

risisdictional grant, as did Justice Murphy in *Brooks*,⁷⁴ but reasoned that although this provision is unqualified in that it refers to "any claim,"⁷⁵ a grant of power to hear cases is not equivalent to a statement that all claims must be allowed to proceed.⁷⁶ According to the FTCA's language, Justice Jackson stated, the test of permissible claims is whether the liability sought to be imposed is analogous to that which would attach in a suit against a private individual.⁷⁷ In addition, the Justice observed that, pursuant to the FTCA, the tort liability of the United States must occur "under like circumstances" as would create private liability.⁷⁸ The Court declared that such similar circumstances did not exist in *Feres* because private parties cannot exercise the kind of control over persons that the Army wields over servicemen.⁷⁹ Another rationale advanced by the *Feres* Court in support of its holding was the fact that since the government's association with those in the Armed Forces is federal in nature, it would be anomalous to hold that Congress intended that state law should control the substantive rights of servicemen injured incident to that relationship.⁸⁰

After *Feres* was decided, there was some speculation that it

⁷⁴ See 340 U.S. at 140-41; 28 U.S.C. § 1346(b) (1976); note 12 *supra*.

⁷⁵ See *Brooks v. United States*, 337 U.S. 49, 51 (1949); note 50 *supra*.

⁷⁶ 340 U.S. at 141. The Court noted that a grant of jurisdiction "is necessary to deny a claim on its merits as a matter of law as much as to adjudge that liability exists." *Id.*

⁷⁷ *Id.*; see notes 94-110 and accompanying text *infra*.

⁷⁸ 340 U.S. at 141-42 (quoting 28 U.S.C. § 2674 (1976)); see notes 111-115 and accompanying text *infra*.

⁷⁹ See 340 U.S. at 141-42.

⁸⁰ See *id.* at 143-44. Notably, in *United States v. Standard Oil Co.*, 332 U.S. 301 (1947), the Supreme Court was faced with an indemnification claim by the government for amounts spent for, *inter alia*, medical treatment for a soldier who had been injured by the defendant tortfeasor. *Id.* at 302. The Court applied federal, rather than state law, reasoning that:

Perhaps no relation between the Government and a citizen is more distinctively federal in character than that between it and members of its armed forces. To whatever extent state law may apply to govern the relations between [members of] the armed forces and persons outside them . . . , the scope, nature, legal incidents and consequences of the relation between persons in service and the Government are fundamentally derived from federal sources and governed by federal authority.

Id. at 305-06 (citations omitted) (quoted in *Feres v. United States*, 340 U.S. at 143-44). The *Feres* Court recognized this federal relationship and concluded that no federal law provided for claims incident to military service. 340 U.S. at 144. The Court observed that servicemen on active duty must go anywhere they are told. See *id.* at 143. The Court reasoned, therefore, that it would be improper to permit the fortuity of the location of the tort govern the substantive rights and liabilities of the parties to this federal relationship. See *id.*; cf. 28 U.S.C. § 1346(b) (1976) (the law of the place governs under the FTCA).

had either overruled or severely limited the *Brooks* holding.⁸¹ The Supreme Court ended that uncertainty in *United States v. Brown*⁸² by making it clear that *Feres* merely distinguished *Brooks*.⁸³ In *Brown*, a discharged veteran was permanently injured when a defective tourniquet was applied to his leg during a knee operation in a VA hospital.⁸⁴ Justice Douglas, writing for the majority, noted that *Brown* was a civilian at the time he was injured, and thus, his case was closer to the facts presented in *Brooks* than those in *Feres*.⁸⁵ *Brooks* was said to control because *Brown's* injuries were not incurred incident to his military service.⁸⁶ Although Justice Jackson noted that the reasons advanced to bar claims arising incident to service were available to the *Brooks* Court,⁸⁷ these factors could be used to support liability in *Feres* "only by ignoring the vital distinction" that one case dealt with service-incident claims while the other did not.⁸⁸ Unfortunately, however, this "vital" criterion was left undefined by the Court.

Because there are no clear guidelines for defining the scope of the incident to service test which formed the crucial distinction between *Feres* and *Brooks*, it is unclear in many cases whether a serviceman will be barred from recovery under the FTCA.⁸⁹ Moreover, many commentators have questioned the validity of the rationale underlying the *Feres* doctrine.⁹⁰ Thus, before an analysis of the incident to service test can be attempted, the *Feres* doctrine itself must be reassessed. In this regard, some commentators have stated that the *Feres* decision clearly was incorrect in light of prin-

⁸¹ *Mason v. United States*, 568 F.2d 1135, 1136 (5th Cir. 1978); see, e.g., *Zoula v. United States*, 217 F.2d 81, 83 (5th Cir. 1954); cf. *Parker v. United States*, 611 F.2d 1007, 1010 (5th Cir. 1980) (Supreme Court later confirmed that *Feres* did not overrule *Brooks*).

⁸² 348 U.S. 110 (1954).

⁸³ See *id.* at 112.

⁸⁴ See *id.* at 110-11.

⁸⁵ *Id.* at 112. In distinguishing *Feres*, the *Brown* Court stated that *Brown's* injury "was not incurred while [he] was on active duty or subject to military discipline." *Id.*

⁸⁶ *Id.* The Court conceded that *Brown* was in the VA hospital because of his military service. See *id.* Justice Black, joined by Justices Reed and Minton, dissented, reasoning that *Brown's* injury was "inseparably related to military service." See *id.* at 114 (Black, J., dissenting). Thus, Justice Black asserted, the case fell directly within the *Feres* rule. "But for his army service [Brown] could not have been injured in the veterans hospital as he was eligible . . . for treatment there solely because of . . . veteran status." *Id.* (Black, J., dissenting).

⁸⁷ See 340 U.S. at 146.

⁸⁸ See *id.*

⁸⁹ See notes 1-22 and accompanying text *supra*; note 148 and accompanying text *infra*.

⁹⁰ See notes 24-25 and accompanying text *supra*.

principles of statutory construction.⁹¹ As Justice Jackson recognized, however, statutory interpretation is not an exact science, for the inquiry focuses upon the intent of a collective body of legislators whose thoughts on the subject at hand remain largely unexpressed.⁹² Working from "clues," the *Feres* Court attempted to ascertain that collective intention.⁹³ It is submitted that an arguably correct result was reached.

PRIVATE LIABILITY UNDER LIKE CIRCUMSTANCES

In defining the scope of the FTCA's waiver of immunity, the *Feres* Court looked to the language of the Act, which subjects the United States to the same measure of liability as would confront a private individual under like circumstances.⁹⁴ Addressing the requirement of "like circumstances," the Court found the *Feres* claims to be lacking, reasoning that private persons do not possess "such authorit[y] over persons as the Government vests in the echelons of command."⁹⁵ The Court further noted that analogous liability also was absent because "no American law . . . ever has permitted a soldier to recover for negligence, against either his superior officers or the Government."⁹⁶ Attempting to prove its point by way of example, the Court observed that, even if a state were considered a private person, the private liability under like circumstances mandated by the FTCA still would be lacking because states uniformly were immune from liability to militiamen.⁹⁷

Unfortunately, in *Dalehite v. United States*,⁹⁸ the Court applied its analogous private liability rationale in a nonmilitary context, thereby immunizing the federal government from liability for all torts arising out of uniquely governmental activities.⁹⁹ In *Dalehite*, the Coast Guard had failed to extinguish a fire caused by an explosion of fertilizer.¹⁰⁰ Upon noting the absence of an analo-

⁹¹ See, e.g., Note, *supra* note 17, at 535-53.

⁹² See E. CRAWFORD, *THE CONSTRUCTION OF STATUTES* § 163, at 251-56 (1940); 2A J. SUTHERLAND, *supra* note 51, § 45.06, at 19-20.

⁹³ See, e.g., *In re "Agent Orange" Product Liability Litigation*, 506 F. Supp. 762, 770 (E.D.N.Y. 1980).

⁹⁴ *Feres v. United States*, 340 U.S. 135, 141 (1950).

⁹⁵ *Id.* at 141-42.

⁹⁶ *Id.* at 141.

⁹⁷ *Id.* at 142.

⁹⁸ 346 U.S. 15 (1953).

⁹⁹ *Id.* at 44.

¹⁰⁰ *Id.* at 43. The primary issue in *Dalehite* was whether the government's allegedly

gous private duty to fight fires, the Court held that the government could not be held accountable for the Coast Guard's negligence.¹⁰¹

The *Dalehite* Court's narrow interpretation of the FTCA was overruled in *Indian Towing Co. v. United States*,¹⁰² wherein the Supreme Court observed that "all Government activity is inescapably 'uniquely governmental' in that it is performed by the Government."¹⁰³ To hold that the FTCA does not extend to any acts performed by the government, the Court reasoned, would create a "finespun and capricious" distinction which would frustrate the Act's objective of reducing private bills and relieving the injustices caused by sovereign immunity.¹⁰⁴

Interestingly, critics of the *Feres* doctrine seized upon the *Indian Towing* decision as support for their contention that one of the fundamental pedestals upon which the *Feres* decision rested, namely, the absence of analogous private liability in the military context, had been discredited.¹⁰⁵ It is submitted, however, that the

negligent storage of combustible materials was excluded from the purview of the FTCA by the "discretionary function" exception. *Id.* at 32-36; see 28 U.S.C. § 2680(a) (1976). Since the Coast Guard's alleged negligence also involved its failure to extinguish a fire, however, the Court was required to construe the private liability "under like circumstances" language of the Act. See 346 U.S. at 43-44. Notably, the Court felt that the instant case presented a "much stronger" case for finding a lack of analogous liability than did *Feres*. *Id.* This observation was based upon the fact that while public bodies *always* had been immune from liability for injuries caused in the course of fighting fires, the *Feres* Court had pointed to only *one* instance in which recovery expressly had been denied to state militiamen. *Id.*; see *Feres v. United States*, 340 U.S. 135, 142 (1950).

¹⁰¹ 346 U.S. 15, 44 (1953).

¹⁰² 350 U.S. 61 (1955); cf. *Rayonier, Inc. v. United States*, 352 U.S. 315, 319 (1957) (*Indian Towing* case "rejected" the uniquely governmental activity theory enunciated in *Dalehite*).

¹⁰³ 350 U.S. at 67. In *Indian Towing*, shipowners sued under the FTCA alleging that the Coast Guard's negligent operation of a lighthouse had caused their ship to run aground. See *id.* at 61-62. The government contended that the language of the FTCA demonstrated that Congress did not intend to waive immunity from tort claims arising out of governmental activities which private persons did not perform. *Id.* at 64. The Court found this assertion faulty because the statutory language mentioned federal liability "under like circumstances" and did not require private liability under the "same" circumstances. See *id.* at 64-65. See generally 28 U.S.C. § 2674 (1976). The Court did not criticize the apparently contradictory conclusion in *Feres*; it merely distinguished the case as involving military claims. See 350 U.S. at 69.

¹⁰⁴ 350 U.S. at 68.

¹⁰⁵ See, e.g., 1 L. JAYSON, *HANDLING FEDERAL TORT CLAIMS* § 155.05, at 5-89 (1979); Jacoby, *supra* note 17, at 1286-87; Note, *supra* note 25, at 276; Note, *From Feres to Stencel*, *supra* note 23, at 1103-04; Note, *supra* note 17, at 542. Commentators also have asserted that the Supreme Court's decision in *United States v. Muniz*, 374 U.S. 150 (1963), has cast doubt upon the validity of the *Feres* doctrine. See, e.g., Jacoby, *supra* note 17, at 1286-87. In *Muniz*, the Court refused to extend the *Feres* bar to the tort claims of federal prisoners.

Dalehite and *Indian Towing* decisions must be read together. Indeed, it appears that the Supreme Court's decision in *Dalehite* was an aberration which, shortly thereafter, its *Indian Towing* decision rectified. Surely, therefore, *Indian Towing* is of limited significance: it merely resolved a problem posed by *Dalehite*; it neither altered the fact that there is no private analogy to military service, nor undermined the propriety of the *Feres* Court's transformation of such fact into a rationale in support of its decision.

It is further suggested that neither the activities nor the uniquely governmental function of the military led the *Feres* Court to conclude that no analogous private liability existed in the case of service-incident injuries. Rather, it appears that the very *status* of the military was determinative in persuading the Court that service-incident claims were not intended by Congress to be cognizable under the FTCA.¹⁰⁶ Support for this interpretation of *Feres* is found in *Stencel Aero Engineering Corp. v. United States*,¹⁰⁷ a recent case in which the Supreme Court reaffirmed the validity of the *Feres* doctrine.¹⁰⁸ In *Stencel*, the *Feres* bar was extended to indemnity actions by third parties for money paid to military personnel who could not recover directly from the government.¹⁰⁹ Noting that the military relationship "is unlike any relationship between private individuals," the Court reasoned that "at least a surface anomaly" arises in attempting to fit a serviceman's service-incident injury within the language of the Act.¹¹⁰

Surprisingly, the *Feres* decision has been criticized for the very fact that it considered military status as a "circumstance" to be considered¹¹¹ when looking to the FTCA's "like circumstances"

374 U.S. at 159. As a ground for its decision, the Court stated that "the Government's liability is no longer restricted to circumstances in which government bodies have traditionally been responsible for misconduct of their employees." *Id.* Nevertheless, the Court noted that it had "no occasion to question *Feres*," but simply found that its rationale was "not compelling" in the context of federal prisoners. *Id.*

¹⁰⁶ After the *Indian Towing* Court rejected the proposition that uniquely governmental activities cannot form the basis for FTCA suits, it distinguished *Feres*. 350 U.S. at 69. The Court, in doing so, cited the military relationship as the distinguishing factor. *Id.*

¹⁰⁷ 431 U.S. 666 (1977).

¹⁰⁸ *Id.* at 670.

¹⁰⁹ *Id.* at 673.

¹¹⁰ *Id.* at 670-71. Significantly, although Justices Marshall and Brennan dissented in *Stencel*, they did not attack the validity of *Feres*. Instead, they disagreed with the Court's extension of the doctrine to indemnity actions. *Id.* at 674-77 (Marshall & Brennan, JJ., dissenting).

¹¹¹ *Feres v. United States*, 340 U.S. 135, 141-42 (1950).

language.¹¹² Given that the FTCA expressly provides for liability "under like circumstances,"¹¹³ however, it would be unreasonable *not* to consider this requirement, irrespective of commentators' assertions to the contrary. Indeed, if Congress had not intended these words to qualify the general statement that the government "shall be liable,"¹¹⁴ it is difficult to imagine why they were included in the Act.

Of course, should one consider "only a part of the circumstances [of military service] and ignore the status of the wronged and wrongdoer," it is arguable that service-incident torts are similar to those visited by a doctor upon his patient, or by a landlord upon his tenant.¹¹⁵ It is suggested, however, that when the military command relationship is injected into these situations, the similarities become tenuous. No doctor orders his patient to undergo examinations. Similarly, no landlord directs his tenant to remain in his quarters until told otherwise. Thus, it is submitted that the correlative elements of command and obedience, unique to the military relationship, remove service-incident claims from the purview of the FTCA. In addition, as the following section of this Note will demonstrate, the desirability of preserving this disciplinary relationship, standing alone, would have been sufficient to support the *Feres* Court's conclusion.

MILITARY DISCIPLINE—THE HEART OF *Feres*

In *Brown*, the Supreme Court commented upon what it perceived to be the primary rationale behind the *Feres* doctrine. Justice Douglas, writing for the majority, stressed the following factors as having led the Court to exclude service-incident tort claims from the ambit of the FTCA: the "special relationship" between

¹¹² See Note, *supra* note 17, at 540.

¹¹³ See 28 U.S.C. § 2674 (1976). Even the *Indian Towing* Court recognized that one purpose of the FTCA "was to compensate the victims of negligence in the conduct of governmental activities *in circumstances like unto those* in which a private person would be liable." *Indian Towing Co. v. United States*, 350 U.S. 61, 68-69 (1955) (emphasis added).

¹¹⁴ Some commentators assert that the FTCA can be interpreted as imposing liability on the federal government which is "co-extensive" with the liability of private persons. See, e.g., Note, *supra* note 17, at 536. It is submitted, however, that this should only be true to the extent that there are "like circumstances," for these words are contained within the express language of the statute. See 28 U.S.C. § 2674 (1976). It is a basic rule of statutory interpretation that the words of an enactment are to be given effect unless a contrary approach cannot be avoided. See E. CRAWFORD, *supra* note 92, § 200, at 347-48.

¹¹⁵ See *Feres v. United States*, 340 U.S. 135, 142 (1950).

the government and its soldiers, "the effects of the maintenance of such suits upon discipline," and the "extreme results" that might obtain from such claims.¹¹⁶

Some commentators have suggested that the "discipline rationale" represents an attempt by the *Brown* Court to bolster what it perceived to be the weak basis for the *Feres* doctrine.¹¹⁷ It appears, however, that this "new" rationale, while not expressly articulated in *Brooks* or *Feres*, clearly is implicit in the language of these cases. Justice Murphy, in *Brooks*, for example, stated that the "outlandish" consequences of tort claims based upon "[a] battle commander's poor judgment, an army surgeon's slip of hand, [or] a defective jeep which causes injury" could lead the Court in a subsequent case to bar service-incident claims.¹¹⁸ Moreover, the *Feres* opinion consistently referred to the unique nature of the military relationship in terms which clearly reflected the Court's acknowledgment of the importance of discipline. Among other things, Justice Jackson recognized the authority that the government wields over servicemen via the chain of command,¹¹⁹ noted that military personnel must serve wherever they are ordered to serve,¹²⁰ and distinguished *Brooks* on the ground that the relationship of the serviceman "was not analogous to that of a soldier while performing duties under orders."¹²¹

It is submitted that the discipline rationale provides a compelling reason for excluding service-incident claims from the ambit of the FTCA. The government's right to command and the soldier's duty to obey must be unquestioned if the military organization is to function effectively.¹²² The rights of military personnel some-

¹¹⁶ *United States v. Brown*, 348 U.S. 110, 112 (1954).

¹¹⁷ *See, e.g., Note, supra* note 17, at 555.

¹¹⁸ *Brooks v. United States*, 337 U.S. 49, 52-53 (1949).

¹¹⁹ *See Feres v. United States*, 340 U.S. 135, 141-42 (1950).

¹²⁰ *Id.* at 143.

¹²¹ *Id.* at 146.

¹²² *Parker v. Levy*, 417 U.S. 733, 744 (1974) (quoting *In re Grimley*, 137 U.S. 147, 153 (1890)); *accord, Schlesinger v. Councilman*, 420 U.S. 738, 757 (1975). In *Schlesinger*, the Court stated:

To provide for and perform its vital role, the military must insist upon a respect for duty and a discipline without counterpart in civilian life. The laws and traditions governing that discipline have a long history; but they are founded on unique military exigencies as powerful now as in the past. Their contemporary vitality repeatedly has been recognized by Congress.

Id. See also Blameuser v. Andrews, 630 F.2d 538, 542-43 (7th Cir. 1980). Notably, allowing FTCA suits for service-incident claims might deleteriously affect the maintenance of military discipline because those charged with enforcing discipline could be considered "causa-

times must be subordinated to the objective of an efficient command structure.¹²³ Therefore, when a statute can affect the command relationship, the courts must exercise caution to avoid a construction which would "circumscribe the authority of military commanders to an extent never intended by Congress."¹²⁴ Moreover, if a particular interpretation of an enactment would harm the command relationship, such a construction must be necessary to further the legislative purpose.¹²⁵ Hence, the *Feres* doctrine stands as good law: given that the purpose of the FTCA was to reduce the burden upon Congress of private bills,¹²⁶ and given that such

tive agents" of such claims. *Coffey v. United States*, 324 F. Supp. 1087, 1088 (S.D. Cal. 1971), *aff'd per curiam*, 455 F.2d 1380 (9th Cir. 1972); *accord*, *Brooks v. United States*, 337 U.S. 49, 52 (1949); *see Stencel Aero Eng'r Corp. v. United States*, 431 U.S. 666, 673 (1977); *Torres v. United States*, 621 F.2d 30, 32 (1st Cir. 1980); *Citizens Nat'l Bank v. United States*, 594 F.2d 1154, 1157 (7th Cir. 1979); *United States v. Lee*, 400 F.2d 558, 564 (9th Cir. 1968), *cert. denied*, 393 U.S. 1053 (1969); *Preferred Ins. Co. v. United States*, 222 F.2d 942, 944 (9th Cir.), *cert. denied*, 350 U.S. 837 (1955). Nevertheless, *Feres*' protection of military discipline may be too broad, thus necessitating legislative examination. For example, one judge reported the following exchange during oral argument:

The Court: [A]s I read the law, it doesn't matter if they stood up there and said "one, two, three, left, right, left," and marched them over a cliff . . . You'd be protected under *Feres* . . . ?

[The Gov't]: Yes, your Honor.

Jaffee v. United States, 468 F. Supp. 632, 635 (D.N.J.), *aff'd in part, rev'd in part*, 592 F.2d 712 (3d Cir.), *cert. denied*, 441 U.S. 961 (1979); *see James v. United States*, 358 F. Supp. 1381, 1385 (D.R.I. 1973), *aff'd mem.*, 530 F.2d 962 (1st Cir. 1976).

¹²³ *See, e.g., Parker v. Levy*, 417 U.S. 733, 744 (1974); *Burns v. Wilson*, 346 U.S. 137, 140 (1953). *See also Middendorf v. Henry*, 425 U.S. 25, 38-40 (1976).

¹²⁴ *Brown v. Glines*, 444 U.S. 348, 360 (1980) (quoting *Huff v. Secretary of the Navy*, 575 F.2d 907, 916 (D.C. Cir. 1978) (Tamm., J., dissenting in part), *rev'd, per curiam*, 444 U.S. 453 (1980)). Involved in *Glines* was a statute which prohibits anyone from "restrict[ing] any member of an armed force in communicating with a member of Congress" unless national security is implicated. *Id.* at 349; *see* 10 U.S.C. § 1034 (1976). *Glines*, a member of the Air Force Reserves, wished to circulate petitions with respect to grooming requirements, and then to send these signatures to various congressmen. 444 U.S. at 351. Air Force regulations required that he obtain authorization from an appropriate officer in order to distribute petitions on a base. *Id.* at 349-50. Although approval was not obtained, the petitions were circulated on base and *Glines* was disciplined. *Id.* at 351. He brought suit alleging violations of the first amendment and section 1034 of Title 10 of the United States Code. *Id.* The Supreme Court not only sustained the Air Force regulations against first amendment attack, but also construed section 1034 to permit such "restrictions" despite the clear statutory language. The Court noted that the legislative purpose was to allow individual service personnel to communicate with congressmen. *Id.* at 358-59. The Air Force regulations did not impair this right. The Court reasoned, however, that "[t]he unrestricted circulation of collective petitions could imperil discipline." *Id.* at 360.

¹²⁵ *Secretary of the Navy v. Huff*, 444 U.S. 453, 458 (1980); *accord, Brown v. Glines*, 444 U.S. 348, 360 (1980).

¹²⁶ *See* note 70 and accompanying text *supra*.

“private bills were never a problem in the military,”¹²⁷ it is clear that the *Feres* Court was justified in reading a service-incident exception into the Act’s waiver of sovereign immunity.

The propriety of such an interpretation of the FTCA also is evidenced by the fact that, at the time of the *Feres* decision, a strong governmental policy in favor of military autonomy existed.¹²⁸ Consequently, it appears, one commentator has questioned the continued viability of *Feres* in light of recent judicial *limitations* upon such military autonomy.¹²⁹ The commentator noted that the Supreme Court has limited the jurisdiction of the Uniform Code of Military Justice “to those subject to military discipline, and then only if a crime is service-connected” since no military necessity otherwise existed to justify military jurisdiction.¹³⁰ The policies evidenced by such Supreme Court decisions, the commentator suggested, are incompatible with the *Feres* rationale, because they make significant inroads into the concept of military autonomy.¹³¹ These decisions, however, involved constitutional rights, not legislative policy.¹³² Moreover, even if these cases could be read to indicate a congressional desire to limit military autonomy, *Feres* would remain viable because the doctrine applies only to service-

¹²⁷ See *United States v. Muniz*, 374 U.S. 150, 161 (1963); *Feres v. United States*, 340 U.S. 135, 140 (1950).

¹²⁸ See, e.g., *Burns v. Wilson*, 346 U.S. 137, 140 (1953), see *Hiatt v. Brown*, 339 U.S. 103, 111 (1950).

¹²⁹ See Note, *From Feres to Stencel*, *supra* note 23, at 1113.

¹³⁰ *Id.* at 1115; see *O’Callahan v. Parker*, 395 U.S. 258, 272-73 (1969); *Reid v. Covert*, 354 U.S. 1, 40-41 (1956); *United States ex rel. Toth v. Quarles*, 350 U.S. 11, 21-22 (1955).

¹³¹ Note, *From Feres to Stencel*, *supra* note 23, at 1113.

¹³² See *O’Callahan v. Parker*, 395 U.S. 258, 261-62 (1969); *Reid v. Covert*, 354 U.S. 1, 5-6 (1957); *United States ex rel. Toth v. Quarles*, 350 U.S. 11, 21-22 (1955). In these cases, the issue was whether Congress had the *power* to limit certain constitutional rights because of military autonomy. See, e.g., 350 U.S. at 13-14. *Feres*, however, deals with congressional *intent* and legislative *policy*. The difference is clear. Thus, these subsequent judicial pronouncements respecting military autonomy are not persuasive in the context of service-incident tort claims. On the contrary, the Supreme Court’s decision in *Toth v. Quarles*, for example, addressed a congressional policy which favored yielding to concerns of military discipline. The *Toth* case arose after Congress passed a law which subjected former military personnel to court-martial jurisdiction when the misconduct complained of occurred while the defendant was still a member of the Armed Forces. 350 U.S. at 13 & n.2. The Court ruled that this law was unconstitutional, *id.* at 23, reasoning that “considerations of discipline provide no excuse for new expansion of court-martial jurisdiction at the expense of the normal and constitutionally preferable system of trial by jury.” *Id.* at 22-23 (footnote omitted). Since the *Feres* doctrine is predicated solely upon congressional intent, it is suggested that limitations on the considerations of discipline that are premised on constitutional rights are inapposite.

connected torts.¹³³ Additionally, there is indeed a compelling military necessity for barring nonmilitary adjudication of these claims, namely, the potentially drastic effects upon military discipline.¹³⁴

The same commentator also placed weight upon the recent tendency to permit judicial review of certain military administrative decisions.¹³⁵ In such cases, a court is required to evaluate, *inter alia*, the strength of the complaint, the likelihood that judicial review will disturb the military function, and the degree of military expertise implicated.¹³⁶ No such safeguards exist, however, regarding a tort action brought under the FTCA. If military decisions are exposed to judicial scrutiny without the benefit of such safeguards, it is submitted that military discipline will be jeopardized. Thus, it seems that this limitation upon military autonomy also has little bearing upon the continued vitality of the *Feres* doctrine.

CONGRESSIONAL MODIFICATION OF THE *Feres* DOCTRINE

Notwithstanding criticisms that the *Feres* doctrine was inadequately supported, and that its continued application is questionable in light of more recent broad constructions of the FTCA,¹³⁷ the fact remains that Congress has not chosen to amend the Act to allow service-incident claims by servicemen.¹³⁸ Indeed, the *Feres* Court recognized that its interpretation of the Act was vulnerable to attack, but cited the lack of legislative materials pertinent to the question of military claims, and noted that if its construction were

¹³³ See, e.g., *United States v. Brown*, 348 U.S. 110, 113 (1954).

¹³⁴ It is suggested that it would be difficult to point out specific dangers regarding the effect of FTCA suits on the command relationship. As Chief Justice Warren noted in another context, "courts are ill-equipped to determine the impact on discipline that any particular intrusion upon military authority may have." Warren, *The Bill of Rights and the Military*, 37 N.Y.U. L. REV. 181, 187 (1962). It has been recognized, however, that "[v]igor and efficiency on the part of the officer and confidence among the soldiers are impaired if any question be left open as to their attitude to each other." *In re Grimley*, 137 U.S. 147, 153 (1890).

¹³⁵ See Note, *From Feres to Stencel*, *supra* note 23, at 1116.

¹³⁶ *Id.* at 1117; see *Mindes v. Seaman*, 453 F.2d 197, 201-02 (5th Cir. 1971). See generally Note, *Judicial Review and Military Discipline—Cortright v. Resor: The Case of the Boys in the Band*, 72 COLUM. L. REV. 1048, 1054-62 (1972).

¹³⁷ See note 105 *supra*.

¹³⁸ *Veillette v. United States*, 615 F.2d 505, 507 (9th Cir. 1980); *Trogia v. United States*, 602 F.2d 1334, 1338 (9th Cir. 1979). The most recent proposal to amend the FTCA was offered by Senator Kennedy. See S. 695, 96th Cong., 1st Sess., 125 CONG. REC. 2919 (1979). The bill would allow claims against the United States for constitutional torts committed by government employees, and would substitute disciplinary proceedings for individual tort liability. *Id.*

incorrect, Congress could remedy the situation.¹³⁹ Surely, the fact that Congress has not overruled the *Feres* doctrine evinces its tacit approval of the *Feres* bar to service-incident claims.¹⁴⁰

Therefore, it is submitted that any attack on the *Feres* doctrine should be directed to Congress, not to the federal court system. While the Supreme Court in the past has reinterpreted statutes by overruling prior cases,¹⁴¹ the principle of *stare decisis* indicates that this should be done with restraint—particularly when Congress can correct an erroneous construction through amendment of the statute in question.¹⁴² Additionally, it is not

¹³⁹ See *Feres v. United States*, 340 U.S. 135, 138 (1950).

¹⁴⁰ *United States v. Lee*, 400 F.2d 558, 561 (9th Cir. 1968), *cert. denied*, 393 U.S. 1053 (1969); *In re "Agent Orange" Product Liability Litigation*, 506 F. Supp. 762, 771 (E.D.N.Y. 1980); *accord*, Jacoby, *supra* note 17, at 1283, 1301; Note, *supra* note 37, at 1222.

¹⁴¹ See, e.g., *Girouard v. United States*, 328 U.S. 61, 69 (1946) (overruling *United States v. Bland*, 283 U.S. 636 (1931); *United States v. Macintosh*, 283 U.S. 605 (1931); *United States v. Schwimmer*, 279 U.S. 644 (1929)). Justice Douglas once commented that it was a "healthy practice" for the Court to examine its prior interpretations of statutes, and to discard them if necessary. W. O. DOUGLAS, *STARE DECISIS* 21 (1949). To support his view, the Justice cited the democratic tradition and the fact that it is not easy to pass legislation correcting judicial doctrine. *Id.*

¹⁴² *Stare decisis* is a rule of judicial policy which recognizes that a court is not bound by its prior decisions, but will adhere to them in order to further certainty and stability in the law. 1B J. MOORE, *FEDERAL PRACTICE* ¶ 0.402, at 154-55 (2d ed. 1980). Justice Brandeis found *stare decisis* to be the best course, "because in most matters it is more important that the applicable rule of law be settled than that it be settled right." *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 406 (1932) (Brandeis, J., dissenting). This principle is given even greater weight when the prior decision construed a statute because the legislature has, in effect, the power to overrule the court's interpretation. 1B J. MOORE, *supra*, ¶ 0.402, at 291; *accord*, *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. at 406 (Brandeis, J., dissenting). Indeed, some commentators assert that the judicial interpretation merges with the statute, effectively creating an amendment. R. DICKERSON, *THE INTERPRETATION AND APPLICATION OF STATUTES* 252-53 (1975); see, e.g., Horack, *Congressional Silence: A Tool of Judicial Supremacy*, 25 TEX. L. REV. 247, 250-51 (1947). This can be characterized as judicial legislation, but is justified as necessary to the judicial process. *Id.* If, however, a court reinterprets the statute, overruling its previous decision, it is usurping the legislative function. See *id.* at 251 n.15. This view is not universally accepted because it assumes that the legislature stands ready to examine all judicial decisions which construe statutes, and to amend acts which they deem to have been incorrectly interpreted. See Rogers, *Judicial Reinterpretation of Statutes: The Example of Baseball and the Antitrust Laws*, 14 HOUS. L. REV. 611, 611-12 (1977). The Supreme Court itself has noted that "it is at best treacherous to find in congressional silence alone the adoption of a controlling rule of law." *Girouard v. United States*, 328 U.S. 61, 69 (1946). More recent cases indicate, however, that the Court will generally yield to the principle of *stare decisis*, and thus avoid overruling prior construction of statutes, where Congress has not acted to amend. See, e.g., *Illinois Brick Co. v. Illinois*, 431 U.S. 720, 736 (1977); *Edwards v. Pacific Fruit Express Co.*, 390 U.S. 538, 543 (1968).

One can argue, citing *Girouard*, 328 U.S. at 69, that it is tenuous to state that Congress, by its silence, approves of the *Feres* doctrine. *But see* note 140 and accompanying text *supra*. It is submitted, however, that it can be shown that Congress has at least acquiesced

clear that the *Feres* decision was incorrect, for its rationale comports with the view that Congress did not intend service-incident military claims to be cognizable under the FTCA.¹⁴³ The effect of such suits upon military discipline, the availability of veterans' benefits, and the legislative purpose of reducing private bills, all support the *Feres* holding.¹⁴⁴ Moreover, the Supreme Court's later,

in the doctrine. The largest amount ever granted to an individual through a private enactment was received by James R. Thornwell. Mr. Thornwell was a private in the Army in 1961 when he unknowingly became the subject of "Operation Third Chance," a program designed to test the effectiveness of LSD as an aid to interrogation. *Thornwell v. United States*, 471 F. Supp. 344, 346 (D.D.C. 1979). Thornwell was "secretly drugged" and "subjected to . . . physical and mental degradation" pursuant to the program. *Id.* Four months later, he was discharged, but was not advised of his participation in the test until 1977. *Id.*; S. REP. NO. 96-589, 96th Cong. 2d Sess. 5-6 (1980). He brought an action under the FTCA, alleging various grounds for recovery, but those claims dealing with injuries occurring while he was on active duty were dismissed under *Feres*. 471 F. Supp. at 348. The Senate Report considering passage of a private act to compensate Thornwell for his injuries contained a letter from the Department of the Army, explaining that negotiations had reached an impasse because the *Feres* doctrine constituted an unquestioned bar to compensation under the FTCA. S. REP. NO. 96-589, 96th Cong., 2d Sess. 7 (1980).

¹⁴³ If one were to concede that some of the *Feres* rationale have been rendered inoperative by subsequent cases, the "outlandish consequences" rationale could still justify the *Feres* doctrine. The *Brooks* Court stated:

Interpretation of the same words may vary, of course, with the consequences, for those consequences may provide insight for determination of congressional purpose. The Government's fears may have point in reflecting congressional purpose to leave injuries incident to service where they were, despite literal language and other considerations to the contrary. The result may be so outlandish that even the factors we have mentioned would not permit recovery.

Brooks v. United States, 337 U.S. 49, 52-53 (1949) (citation omitted). It is a well-known canon of construction that courts cannot abandon the plain language of a statute to give it a more desirable interpretation. E. CRAWFORD, *supra* note 92, § 168, at 266; R. DICKERSON, *supra* note 142, at 231. Therefore, the *Feres* Court would have been "wrong" if it had implied an exception for servicemen and justified it by stating that this was a better approach, for there is no express exception in the language of the Act. See 28 U.S.C. §§ 1346(b), 2671, 2680 (1976). Of course, if consideration of only the express language of a statute would create an absurdity, it is well settled that a court may "conclude that the legislature did not mean what it expressly said." R. DICKERSON, *supra* note 142, at 232 (footnote omitted); accord, E. CRAWFORD, *supra* note 92, § 177, at 288-90. The *Brooks* Court saw no absurdity in allowing military claims unconnected with military service; therefore, it only needed to look at the express language of the FTCA. See 337 U.S. at 52. Claims incident to service, however, could lead to an absurdity which would justify looking beyond the words of the statute. See *id.* at 52-53. If such were the case in *Feres*, the fact that its interpretation of the private analogy language was subsequently questioned would be immaterial because the absurd consequences would allow the Court to discount the language and look more closely at legislative intent and purpose. See *id.*

¹⁴⁴ It already has been demonstrated that the *Feres* holding can be justified by looking to the absurd effect of FTCA suits upon military discipline. See note 143 *supra*. The availability of veterans' benefits also can lead to a finding that Congress did not intend service-incident claims to be cognizable under the Act. Although the Supreme Court appeared to

more liberal approach to the FTCA does not justify overruling *Feres* as if it were a common-law immunity doctrine. Presumably, it is a distillation of unswerving legislative intent. It is submitted, therefore, that modification or elimination of the *Feres* doctrine is a congressional, not a judicial, prerogative.

INCIDENT TO SERVICE: THE UNDEFINED DISTINCTION

Given that the *Feres* doctrine is in little danger of being overturned by the Supreme Court,¹⁴⁵ and given that Congress has shown no desire to legislate it out of existence, the appropriate definition of the "incident to service" phrase assumes crucial importance. While the Supreme Court has termed this the "vital distinc-

reach a contrary conclusion in *United States v. Muniz*, see 374 U.S. 150, 160 (1963); note 105 *supra*, this "was neither an issue in nor decided by" that case. *United States v. Demko*, 385 U.S. 149, 153-54 (1966). In *Demko*, the Court held that prisoners covered by the prison compensation law are barred from FTCA recovery. See *id.* *Muniz* was found not to control because it did not involve prisoners who were protected by any such law. *Id.* This appears to indicate that *Muniz* did not mark a retreat from *Feres*' veterans' benefits rationale. The *Feres* holding can also be supported through Justice Jackson's analysis of the legislative purpose of the Act. See *Feres v. United States*, 340 U.S. 135, 140 (1950); note 70-72 and accompanying text *supra*. The Tort Claims Act was only one part of the Legislative Reorganization Act of 1946, and was developed as a time and laborsaving device. S. REP. NO. 1400, 79th Cong., 2d Sess. 7 (1946). Since military personnel had not been submitting private bills, including them within the operation of the FTCA would not have an effect on congressional time, and thus, would not further the legislative purpose. See *Feres*, 340 U.S. at 140.

To ascertain legislative intent, courts may look to the meaning of the statute's language as well as to the purpose of the enactment. E. CRAWFORD, *supra* note 92, at § 160. The absurd effects of a literal construction of a statute can color a court's view of the meaning of a statute, see *Brooks v. United States*, 337 U.S. 49, 52-53 (1949); note 143 *supra*, thus permitting the conclusion that the express language of an act does not correctly reveal the intent of the legislature, see note 143 *supra*. In such a case, legislative purpose becomes a valuable guide to statutory interpretation. See R. DICKERSON, *supra* note 142, at 96; 2A J. SUTHERLAND, *supra* note 51, § 45.09, at 29. It is submitted that the factors involving veterans' benefits, private bills, and the military relationship combine to justify the *Feres* holding as a reasonable interpretation of congressional intent.

¹⁴⁵ See *Stencel Aero Eng'r Corp. v. United States*, 431 U.S. 666, 672-73 (1977). Notably, several recent court of appeals decisions have adhered strictly to the *Feres* doctrine. In *Jaffee v. United States*, 663 F.2d 1226 (3d Cir. 1981) (en banc), the Third Circuit rejected a constitutional tort cause of action by military personnel because it would have circumvented the *Feres* doctrine. *Id.* at 1236-37. In *Monaco v. United States*, 661 F.2d 129 (9th Cir. 1981), the Ninth Circuit held that the *Feres* doctrine barred a suit against the government by a serviceman whose cancer, which was caused in the course of military service, did not develop until after such service. *Id.* at 132-33. Conversely, however, in *Broudy v. United States*, 661 F.2d 125 (9th Cir. 1981), the Ninth Circuit also held that the *Feres* doctrine would not bar a suit against the government for recovery of postdischarge injuries caused by the negligent failure of the government to monitor and inform a discharged serviceman of his predischarge exposure to nuclear radiation. *Id.* at 128.

tion" between *Brooks* and *Feres*,¹⁴⁶ its failure to define the term¹⁴⁷ has resulted in inconsistent decisions by the lower courts.¹⁴⁸ Surely, neither the *Brooks*, *Feres*, nor *Brown* opinions adequately delineated the scope of the service-incident claim. *Brooks* taught that an off-base injury unrelated to the complainant's army career is clearly cognizable under the FTCA.¹⁴⁹ *Feres*, in denying the plaintiffs' FTCA claims as service incident, stressed the active duty status of the complainants¹⁵⁰ and distinguished *Brooks* as involving a claimant who was on furlough, off base, "under compulsion of no orders or duty, and on no military mission."¹⁵¹ The *Feres* Court, however, did not identify any one of these factors as being determinative. Finally, *Brown* distinguished the facts presented to the Court from those of *Feres* as involving an injury "not incurred while respondent was on active duty or subject to military discipline."¹⁵²

¹⁴⁶ See *Feres v. United States*, 340 U.S. 135, 146 (1950).

¹⁴⁷ See note 16 and accompanying text *supra*. One court criticized the "incident to service" standard by noting that "[i]t is so lacking in precision that the mere fact that the plaintiff was in military service at the time of the accident can provide a logical basis for the government's arguing for exclusion of the person concerned on a *post hoc, ergo propter hoc* basis." *Hale v. United States*, 416 F.2d 355, 358 (6th Cir. 1969).

¹⁴⁸ See notes 1-22 and accompanying text *supra*. Application of the *Feres* bar sometimes appears arbitrary. For example, if an Air Force plane crashes into a serviceman's privately owned home, he can recover damages under the FTCA, see *United States v. Guyer*, 218 F.2d 266, 267 (4th Cir. 1954) (per curiam), *rev'd on other grounds sub nom. Snyder v. United States*, 350 U.S. 906 (1955), unless he rents land inside a military base and puts his home thereon, see *Preferred Ins. Co. v. United States*, 222 F.2d 942, 948 (9th Cir.), *cert. denied*, 350 U.S. 837 (1955).

¹⁴⁹ *Brooks v. United States*, 337 U.S. 49, 52 (1949).

¹⁵⁰ *Feres v. United States*, 340 U.S. 135, 138 (1950).

¹⁵¹ *Id.* at 146.

¹⁵² *United States v. Brown*, 348 U.S. 110, 112 (1954). Since the Supreme Court, in *Brown*, emphasized that military discipline was a prime reason for the *Feres* doctrine, *id.* at 112, litigants have attempted to convince the lower courts that the service-incident concept should be limited to assessing whether a tort recovery would frustrate such discipline, see, e.g., *Woodside v. United States*, 606 F.2d 134, 139 (6th Cir. 1979), *cert. denied*, 445 U.S. 904 (1980); *Henninger v. United States*, 473 F.2d 814, 815 (8th Cir.), *cert. denied*, 414 U.S. 819 (1973). While at least one district court has accepted this proposition, stating that the incident to service inquiry should be limited to whether the particular suit would undermine discipline, see *Downes v. United States*, 249 F. Supp. 626, 628 (E.D.N.C. 1965), this approach has not gained general acceptance. Indeed, if disruption of military discipline were the only criterion, it is submitted that the *Feres* plaintiffs may very well have recovered. *Cf. Coffey v. United States*, 324 F. Supp. 1087, 1088 (S.D. Cal. 1971), *aff'd per curiam*, 455 F.2d 1380 (9th Cir. 1972) (*Feres* did not involve specific disciplinary problems). The Supreme Court never implied that the reach of *Feres* should be restricted by such a specialized reading of its "incident to service" language. *Uptegrove v. United States*, 600 F.2d 1248, 1250 (9th Cir. 1979); *United States v. Lee*, 400 F.2d 558, 564 (9th Cir. 1968), *cert. denied*, 393

The nebulous language and the varying factual situations presented in *Brooks*, *Feres*, and *Brown* have rendered it difficult for the lower courts to divine any guiding precepts for the interpretation of incident to service and to determine the degree of emphasis that should be accorded each factor. Moreover, courts have encountered novel factual situations which do not fit neatly into the fact patterns presented in either *Brooks*, *Feres*, or *Brown*.¹⁵³ Surveying this situation, one commentator has suggested that the best course for the practitioner would be to look at all the facts presented in the cases decided thus far and to compare them with

U.S. 1053 (1969). Also, this approach fails to account for those cases wherein the tortfeasor and the injured party are members of different branches of the military. Although discipline is not affected in such cases, the *Feres* doctrine nevertheless has been applied in this context. *Parker v. United States*, 611 F.2d 1007, 1012-13 (5th Cir. 1980); see *Uptegrove v. United States*, 600 F.2d 1248, 1250-51 (9th Cir. 1979). Finally, it is submitted that the effect of this approach would be to unjustifiably elevate one of several articulated rationales, albeit one of pivotal importance, to a position where it is the sole focus of the inquiry. *Cf. Parker v. United States*, 611 F.2d 1007, 1013 (5th Cir. 1980) (effect of particular suits on discipline "is more relevant to the decision whether to imply an exception than it is to the exception's application").

¹⁵³ See Note, *supra* note 17, at 557-58. A number of cases have involved injuries incurred incident to service which have continuing effect after the serviceman's separation from the military. See, e.g., *Monaco v. United States*, 661 F.2d 129, 133-34 (9th Cir. 1981); *Broudy v. United States*, 661 F.2d 125, 128-29 (9th Cir. 1981); *In re "Agent Orange" Product Liability Litigation*, 506 F. Supp. 762, 769 (E.D.N.Y. 1980); *Thornwell v. United States*, 471 F. Supp. 344, 347 (D.D.C. 1979); *Schwartz v. United States*, 230 F. Supp. 536, 539-40 (E.D. Pa. 1964), *aff'd on other grounds*, 381 F.2d 627 (3d Cir. 1967). The results in these cases depend upon how closely the facts parallel those presented in *Brown*. See notes 82-88 and accompanying text *supra*. If the claimant can show that the tort occurred after his discharge, he will not be barred by *Feres*. See, e.g., *Broudy v. United States*, 661 F.2d at 128; *Schwartz v. United States*, 230 F. Supp. at 539-40. If, however, there is no postdischarge tort, but merely one tort occurring before discharge which has continuing effects after discharge, the claim will be barred. *Thornwell v. United States*, 471 F. Supp. at 352; see, e.g., *In re "Agent Orange" Product Liability Litigation*, 506 F. Supp. at 779. Cases involving preinduction torts are similar to *Brown* and other postdischarge cases in that they involve injured plaintiffs who are not members of the military at the time the injury occurs. In *Healy v. United States*, 192 F. Supp. 325 (S.D.N.Y.), *aff'd per curiam*, 295 F.2d 958 (2d Cir. 1961), for example, the plaintiff was examined by an Air Force doctor, was found physically qualified, and was inducted into the Air Force. 192 F. Supp. at 326. He alleged that the doctor failed to diagnose a heart condition which became aggravated by the rigors of basic training. *Id.* Healy attempted to distinguish *Feres* on the ground that he was a civilian at the time of the negligent act. *Id.* The court held that Healy's claim was barred by *Feres* because although the negligence occurred while the plaintiff was a civilian, the injury occurred while the plaintiff was a serviceman. See *id.* at 328. The activity giving rise to that injury was inescapably connected with military service, and thus, the claim was barred by *Feres*. *Id.* Other cases dealing with preinduction torts have adopted the *Healy* analysis. See, e.g., *Joseph v. United States*, 505 F.2d 525, 526-27 (7th Cir. 1974); *Redmond v. United States*, 331 F. Supp. 1222, 1224 (N.D. Ill. 1971), *aff'd mem.*, 530 F.2d 979 (7th Cir. 1976).

the claim advanced to assess the probability that it will be adjudged service incident.¹⁵⁴ The Eighth Circuit, in *Miller v. United States*,¹⁵⁵ adopted a similar approach. The court found a general trend among the federal courts to characterize an injury as one incurred incident to service if it occurs "(1) on a military base, or (2) while the serviceman is on active duty status, or (3) under compulsion of military orders or on a military mission or directly subject to military control, or (4) the activity is a privilege related to or dependent upon military status."¹⁵⁶ The *Miller* court reasoned that the "on base" and "active duty" situations should not be considered irrebuttable presumptions that an injury was service incident, because this would needlessly expand the *Feres* doctrine.¹⁵⁷ Instead, the court declared, the facts in each case should be closely scrutinized to determine whether the activity engaged in was "truly" incident to service.¹⁵⁸ Although the panel decision in *Miller* was reversed en banc, its suggestion that the situs of the tort or the duty status of the serviceman should not be dispositive presents a welcome change. Nevertheless, it is submitted that the Eighth Circuit has perpetuated the confusion in this area by invoking the phrase "incident to service" without enunciating criteria for defin-

¹⁵⁴ L. JAYSON, *supra* note 105, § 155.02 at 5-66, 5-67.

¹⁵⁵ 643 F.2d 481 (8th Cir. 1980), *rev'd en banc*, 643 F.2d 490 (8th Cir. 1981).

¹⁵⁶ 643 F.2d at 483 (footnotes omitted) (emphasis in original). The *Miller* court further noted that if the injury does not occur on a military base, and the serviceman is on leave and not subject to any military control, and he is not taking advantage of some military privilege, the claim will not be barred by *Feres*. *See id.* at 494. All of these factors must be present, however, for the claim to be cognizable under the FTCA. *Id.* at 484.

¹⁵⁷ *See id.* at 485. The court admitted that raising an impenetrable shield of "on base" and "active duty" was attractive because of its simplicity. *See id.* at 485-86. Indeed, some courts have adopted mechanical tests for this very reason. *See, e.g.,* Hass v. United States, 518 F.2d 1138, 1140-41 (4th Cir. 1975); Henninger v. United States, 473 F.2d 814, 816 (9th Cir.), *cert. denied*, 414 U.S. 819 (1973). The Ninth Circuit attempted to justify this approach by stating, "[t]his is a classic situation where the drawing of a clear line is more important than being able to justify, in every conceivable case, the exact point at which it is drawn." *Id.* at 816. It is interesting to note that the Ninth Circuit still appears ready to find "on base" injuries incident to service, *see* Dexheimer v. United States, 608 F.2d 765, 766-67 (9th Cir. 1979); Troglia v. United States, 602 F.2d 1334, 1339 (9th Cir. 1979), but is willing to look further into the serviceman's activity if the injury occurs on government-owned "land" rather than on a "base" proper, *see* 602 F.2d at 1339. Indeed, this absolutist view is unfortunate given that the court has expressed its displeasure with the *Feres* doctrine. *See* Veillette v. United States, 615 F.2d 505, 507 (9th Cir. 1980). It is submitted that although the circuits are bound by *Feres*, they should not feel so constrained in deciding how to apply it, for the Supreme Court has never definitely established the meaning of the phrase "incident to service." *See* note 16 and accompanying text *supra*.

¹⁵⁸ *See* *Miller v. United States*, 643 F.2d 481, 486 (8th Cir. 1980), *rev'd en banc*, 643 F.2d 490 (8th Cir. 1981).

ing the scope of the term. It was, after all, the vagueness of this standard which resulted in the courts originally becoming embroiled in the on base/active duty dilemma.¹⁵⁹

While grouping military injuries into the four categories of "active duty," "on duty," "subject to military control," and "privileged activity"¹⁶⁰ is susceptible of simple application and, accordingly, fosters judicial economy, it seems that more persuasive reasoning must be employed before judicial redress of a grievance should be denied. It is submitted that the incident to service problem would be a less formidable obstacle if the inquiry focused primarily upon the activity of the serviceman at the time of the injury.¹⁶¹ Indeed, *Feres* states that military tort claims are not cognizable under the FTCA if they "arise out of" activity or are "in the course of" activity incident to service.¹⁶² The Sixth Circuit, in *Woodside v. United States*,¹⁶³ focused upon the activity of a serviceman at the time of his injury in determining whether his widow's FTCA claim should be barred.¹⁶⁴ The court stated that for

¹⁵⁹ The on base/active duty rules appear to have their genesis in some of the *Feres* language. The *Feres* Court noted that the servicemen in that case were "on active duty and not on furlough," *Feres v. United States*, 340 U.S. 135, 138 (1950), while the *Brooks* servicemen were on furlough and driving on a public highway at the time of the injury, *id.* at 146. The Ninth Circuit used this language to formulate its incident to service test. See *Henninger v. United States*, 473 F.2d 814, 816 (9th Cir.), *cert. denied*, 414 U.S. 819 (1973). The Ninth Circuit later retreated from this position, indicating that it would find duty status dispositive only in cases where the injury occurred "on base." See *Mills v. Tucker*, 499 F.2d 866, 868 (9th Cir. 1974) (*per curiam*). See generally note 157 *supra*. In an early case, the Fifth Circuit used the active duty/on base test to determine the applicability of *Feres*, see *Zoula v. United States*, 217 F.2d 81, 84 (5th Cir. 1954), and thereafter consistently applied it for 25 years, see, e.g., *Mason v. United States*, 568 F.2d 1135, 1136 (5th Cir. 1978) (*per curiam*). In a fairly recent case, however, the court expressed a desire to eliminate the dispositive effect of at least the "on base" test, see *Parker v. United States*, 611 F.2d 1007, 1014 (5th Cir. 1980), but still strictly applies the duty status test, see *Garrett v. United States*, 625 F.2d 712, 713-14 (5th Cir. 1980), *cert. denied*, 101 S. Ct. 1363 (1981). The Second and Third Circuits also consistently find injuries incurred by servicemen on base while on active duty barred by *Feres*. See, e.g., *Camassar v. United States*, 531 F.2d 1149, 1151 (2d Cir. 1976) (*per curiam*); *Thomason v. Sanchez*, 539 F.2d 955, 957, (3d Cir. 1976), *cert. denied*, 429 U.S. 1072 (1977); *Henning v. United States*, 446 F.2d 774, 777 (3d Cir. 1971), *cert. denied*, 404 U.S. 1016 (1972).

¹⁶⁰ See note 156 and accompanying text *supra*.

¹⁶¹ Notably, the Fifth Circuit has observed that "[c]ontrary to what one might expect, inquiry into what function the service member was performing appears to be one of the last questions considered." *Parker v. United States*, 611 F.2d 1007, 1013 (5th Cir. 1980).

¹⁶² *Feres v. United States*, 340 U.S. 135, 146 (1950) (emphasis added).

¹⁶³ 606 F.2d 134 (6th Cir. 1979), *cert. denied*, 445 U.S. 904 (1980).

¹⁶⁴ In *Woodside*, an Air Force captain was killed in an airplane crash. The decedent was taking flying lessons for his own personal satisfaction—his military duties did not require him to fly a plane. 606 F.2d at 136-37. Instruction was provided by an aviation club, main-

a claim to be considered barred by *Feres*, "there must be some proximate relationship between the service member's activity and the Armed Forces. Where the two are closely associated or naturally related, the activity will be deemed 'incident to service.'"¹⁶⁵ It is submitted that this states an excellent test for gauging the scope of *Feres*, for it avoids arbitrary "baseline" rules, and appears easy to apply. In enunciating this test, however, the court indicated that, generally, on base and active duty injuries would be deemed incident to service.¹⁶⁶ This is unfortunate because many of the cases cited for support used the on base/active duty presumptions found objectionable by the Eighth Circuit in *Miller*.¹⁶⁷ Moreover, the *Woodside* court failed to enunciate criteria for determining when a natural or closely proximate relationship between the serviceman's activity and the Armed Forces comes into existence. Without such criteria the "closely proximate relationship" test is as nebulous as the incident to service test.

When determining whether an injury is incurred incident to service, it is suggested that courts focus upon the *nature* of the activity engaged in by the serviceman at the time of his injury and examine whether the requisite proximate relationship exists between that activity and military service. In reaching that determination, rather than applying the attractively simplistic active duty and on base presumptions, the courts should consider a number of other factors.

First, the duty status, although not dispositive of the merits of a case, should weigh heavily in the courts' deliberations. It should not be determinative because it is easy to envisage situations where a serviceman is injured while technically on duty or subject to military discipline and engaged in an activity wholly unrelated to his military service. The situation of Carvel Gramlich, described at the beginning of this Note,¹⁶⁸ is a poignant example of this anomaly. To deny recovery in such an instance is to permit the fortuity of

tained at an Air Force base and supported by Air Force funds. *Id.* at 136. "Active" membership was limited to active duty members of the Air Force. *Id.*

¹⁶⁵ *Id.* at 141. The *Woodside* court noted that although the decedent was on leave and not subject to military control, his widow's claim was barred by *Feres*. *Id.* at 142. The court found the "link" between the activity of the decedent and the Air Force to be sufficient to call the activity "incident" to military service. *Id.*

¹⁶⁶ *Id.*

¹⁶⁷ Compare *Miller v. United States*, 643 F.2d 481, 483-84 & nn.9-11 (8th Cir. 1980), *rev'd en banc*, 643 F.2d 490 (8th Cir. 1981) with *Woodside v. United States*, 606 F.2d at 142.

¹⁶⁸ See notes 7-11 and accompanying text *supra*.

the circumstances to govern, despite the undeniable fact that Gramlich's activity—leaving his ship for an afternoon's shore leave—was in no way connected to his military status or service, except in the sense that "all human events depend upon what has already transpired."¹⁶⁹

Second, the location of the tort, while a factor to be weighed by the court, should not carry great weight in its deliberations because of the danger that the prospect of recovery will be dependent on the fortuity of the circumstances surrounding an accident. It is difficult to justify a principle that translates into the reality that if a serviceman is killed 10 feet inside a military base, there is a good chance that his claim will be barred by *Feres*, but if he is killed 10 feet away from the military premises, recovery prospects improve dramatically.

A third factor to be considered by the courts is whether the injury arose from the serviceman's availing himself of a privilege incident to military service. If the answer is affirmative, the court should give serious consideration to applying the *Feres* bar, since in this instance the activity is proximately related to military service. Even in this situation, however, the court should not invoke blindly the *Feres* bar. Rather, it is important that the court conduct a twofold inquiry: it must first determine whether the activity may be exercised solely by military personnel, or whether permission is granted to civilian personnel; second, the court must decide whether there is any military necessity that the victim have engaged in the activity at issue. A negative answer to either of these queries tends to divorce the activity from the military relationship and should lead the court to engage in a more thoughtful consideration of all of the circumstances impinging upon the injury.

Fourth, the court should consider the extent to which the serviceman was acting under orders in engaging in the activity that culminated in the accident. If he clearly was acting under orders, then the claim unequivocally is barred by *Feres*, since maintenance of the command/obedience nexus constitutes the core of the military relationship.¹⁷⁰

Of course, it is inevitable that many more factors that bear on the proximity of the serviceman's activity and the service relation-

¹⁶⁹ See *Brooks v. United States*, 337 U.S. 49, 52 (1949).

¹⁷⁰ See notes 122-128 and accompanying text *supra*.

ship will arise. For example, the role of a piece of military equipment in bringing about the serviceman's injury may be a relevant factor. Another such factor may be the question of whether the tortfeasor belonged to the same branch of the Armed Forces as the victim. The federal judiciary should not be hesitant in seeking out new elements which serve to clarify this most nebulous of tests.

CONCLUSION

Military decisions often must be made at a moment's notice. It may be inappropriate for military judgments and the situations which occasion them to be examined in a court of law—not necessarily because such decisions deal with sensitive topics—but because judicial scrutiny even of a simple negligence case may have lasting effects which transcend the equities in a given case. Service-incident claims may have a chilling effect on future military judgments. This, coupled with other considerations of statutory interpretation, was the essence of the *Brooks-Feres-Brown* trilogy.

Indeed, only Congress has the capacity to investigate the effects of service-incident claims upon the operation of the Armed Forces. Moreover, only Congress can waive sovereign immunity, and *Feres* demonstrates Congress' manifest failure to express an unequivocal waiver in the context of service-incident claims. Therefore, it is submitted that the time is ripe for Congress to examine the prospect of permitting military personnel to sue under the FTCA for injuries arising out of service-incident activities.

Finally, if Congress finds that to allow such claims would be unwise, or if it chooses not to act, the incident to service standard should operate fairly so as to avoid needless application of the *Feres* doctrine, while remaining true to its underlying principles. As this Note has demonstrated, the best way to accomplish this task is to focus upon the nature of the serviceman's activity with a view to determining the proximity of the relationship between that activity and military service.

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