Military Rights Under the FTCA

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Military Rights Under the FTCA

The Tort Claims Act was not an isolated and spontaneous flash of congressional generosity. It marks the culmination of a long effort to mitigate unjust consequences of sovereign immunity from suit.¹

The Federal Tort Claims Act² (hereinafter cited as FTCA) "is indeed a sign of the times."³ Its passage represents a fundamental departure from the medieval idea of sovereign immunity and as such is consonant with the modern concept of a limited and responsible sovereign. Judicial treatment of the Act, however, initially evinced a reluctance to give full effect to its broad purpose. Invocation of the ancient maxim "[S]tatutes in derogation of the Common Law must be strictly construed" served to rationalize the courts' refusal to accede to the full measure of congressional reforms.⁴ While recently, judicial interpretation and application have been generally progressive, a degree of circumvention still remains. Demonstrative of the courts current refusal to accept repudiation of immunity at face value are those cases involving the rights of military personnel under the Act. While a literal reading of the Act gives no indication of a congressional intent to exclude servicemen, courts, pragmatically reasoning that the literal meaning may be broader than that intended, have read

an additional exception into the Act through a questionable interpretation of its framer's intent. Although the common-law political theory that the King could do no wrong was repudiated in America, its legal corollary that the sovereign is immune from suit was invoked on behalf of the infant Republic and preserved inviolate until relatively recent times. Prior to the adoption of the FTCA, the general relinquishments of sovereign immunity were few in number and circumspect in scope. Permission to sue was granted only on contract, patent infringement, admiralty and marine tort, and torts by public vessels. Alternatively, no action could be maintained against the government with respect to any common-law tort. Relief was sought by the introduction of private bills in Congress, a system criticized as being both unduly burdensome and unjust as it "[did] not accord to injured parties a recovery as a matter of right but base[d] any award that may [have been] made on considerations of grace." Furthermore, the system providing for private relief afforded no "well-defined continually operating machinery for the consideration of such claims." These intrinsic inadequacies were intensified by the rapidly altering concept of sovereignty. As the government increasingly under-

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5 Jefferson v. United States, 77 F. Supp. 706, 711-12 (D. Md. 1948). This reasoning has been repeatedly invoked by courts confronted with the problem of servicemen's claims under the Act. For echoes of such reasoning see Feres v. United States, 340 U.S. 135, 146 (1950); United States v. Brooks, 169 F.2d 840, 842 (4th Cir. 1948), rev'd, 337 U.S. 49 (1949).

6 Earlier commentators saw little merit in the federal judiciary's exclusion of certain military claims arguing that the history and structure of the Act warranted recovery for all claims not expressly excluded. See, e.g., Hitch, The Federal Tort Claims Act and Military Personnel, 8 RUTGERS L. REV. 316 (1954); Comment, Federal Tort Claims Act As Applied To Military Personnel, 40 KY. L.J. 438, 444 (1952).

7 Gibbons v. United States, 75 U.S. (8 Wall.) 269 (1868); Cohens v. Virginia, 19 U.S. (6 Wheat.) 264 (1821); Chisholm v. Georgia, 2 U.S. (2 Dall.) 419 (1793). Dean Prosser questions "how this feudal and monarchistic doctrine ever got itself translated into the law of the new and belligerently democratic republic. . . ." W. Prosser, THE LAW OF TORTS § 125 (3d ed. 1964). Mr. Justice Holmes took a practical view, noting: A sovereign is exempt from suit, not because of 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. Kawananakoa v. Polyblank, 205 U.S. 349, 353 (1907).


13 Id.
took to conduct many of the services which had hitherto been maintained by private enterprise, its agents committed an ever-increasing number of remediless wrongs. And, as governmental activity increased, the pressure upon Congress to enact private bills multiplied to such an extent as to impede the ordinary and proper function of the legislature. Recognition of the inadequacy of congressional machinery to deal with this problem engendered demands that tort claims be submitted to adjudication.

After a generation of effort involving some twenty abortive bills, Congress ultimately adopted the FTCA which in rather sweeping language abolished the archaic and often cumbersome system of legislative determination. Jurisdiction is conferred upon district courts over civil actions or claims against the United States for injury or death caused by the negligent or wrongful act or omission of any employee of the government . . . 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.

Enacted as an integral part of the Legislative Reorganization Act of 1946, the legislative context of the Act reveals a dual purpose: to remove the previous barrier against suits sounding in tort against the federal government and also to relieve Congress of the burden of dealing with the voluminous amount of private bills for relief, which were, absent any other remedy, submitted annually. So enacted, the statute has become a prolific source of litigation—its not altogether ambiguous language presenting novel problems of construction and application.

The rights of the military under the Act typifies this difficulty of application. Concerning the exceptions to the FTCA, none have proved more litigious, nor more difficult to rationalize than the judicially imposed bar to suits by members of the armed forces for “injuries sustained incident to service.” Of the thirteen enumerated exceptions to the general waiver of liability,

14 Id. at 7. See also United States v. Brooks, 169 F.2d 840 (4th Cir. 1948).
16 Eighteen of these bills were considered in the decade 1925-1935. These bills are collected in Brooks v. United States, 337 U.S. 49, 51 n.2 (1949).
19 60 Stat. 842 (1946). The general purpose of the LEGISLATIV

REORGANIZATION ACT was “to reconvert our inherited and outmoded congressional machinery to the needs of today.” S. REP. No. 1400, 79th Cong., 2d Sess. 2 (1946).Significantly “[b]y revising our antiquated rules and improving our facilities, we can . . . revitalize our National Legislature . . . and renew popular faith in American democracy.” Id. at 9.
only two could be said to affect the rights of military personnel: that which prohibits recovery upon all claims "arising out of the combatant activities of the military, during the time of war"; and that which excludes liability upon "any claim arising in a foreign country," neither of which have been held apposite to the present problem. An examination of the record fails to produce any clear evidence of congressional intent or policy which could guide one toward a proper interpretation of the Act. Prior to its enactment, eighteen bills directed toward waiving governmental immunity from general tort liability were introduced into Congress. Of these, all but two contained exceptions denying recovery to the military. When the present Act was first introduced, the exceptions relating to servicemen had been dropped. Remaining from prior bills was an exclusion of those claims compensable under the World War Veterans Act of 1924. However, upon incorporation into the Legislative Reorganization Act, all remnants of the military exclusion disappeared. Unfortunately, there is no explanation to be found in the legislative history of the Act concerning this sudden disappearance. It has been suggested, however, that Congress had considered and rejected the exclusion of servicemen from the benefits of the Act. Such an inference is further supported by the fact that section 2680(j) of the Act as originally enacted excluded any claim arising out of the "activities" of the military. By way of amendment during debate in the House, the provision was further limited to exclude only those claims arising out of "combatant activities." Two considerations, however, militate against any such facile determination of the legislative intent. The Act must be read in view of the central purpose of the legislation—"to provide for

22 These exceptions have been held to relate to the circumstances under which the injury occurs, rather than the status of the injured party. The exception thus applies to claims of soldiers and civilians alike. See, e.g., United States v. Brooks, 169 F.2d 840, 844 (4th Cir. 1948) wherein the court states "the . . . exception is couched solely in terms of the source of the activity giving rise to the claim . . . regardless of the claimant".
23 Most of the pertinent legislative opinion and debate relating to the Act is recorded in H.R. Rep. No. 1287, 79th Cong., 1st Sess. (1946); S. Rep. No. 1400, 79th Cong., 2d Sess. (1946); and 86 Cong. Rec. 12015-32 (1940). None of these include any discussion of the present problem. See also Feres v. United States, 340 U.S. 135, 138, wherein the Court, in recognizing the paucity of guiding materials, observes that under such circumstances "no conclusion can be above challenge."
24 This argument was urged in the dissenting opinion of Brooks, 169 F.2d 840, 849 (4th Cir. 1948).
25 The "combatant" qualification was added, without recorded explanation, by House amendment during final passage. See 92 Cong. Rec. 10139, 10150 (1946). But see supra note 22.
increased efficiency in the legislative branch of the government"; secondly, the Act should be construed to fit as intelligently and as fairly as possible "into the entire statutory system of remedies against the Government to make a workable, consistent and equitable whole." Under such circumstances, one is hesitant in reaching any definite conclusion regarding congressional intent.

**The Incident to Service Rule: A Judicially Created Exception**

The Supreme Court has addressed itself to this problem at some length. In the first case to reach the Court under the Act, *Brooks v. United States*, the Court considered claims arising from the death and personal injuries sustained by two servicemen, while on furlough, resulting from the collision of their vehicle with an Army truck. The Court held that the benefits of the Act were available to servicemen injured or killed while in service, despite prior recovery pursuant to military compensation laws.

The statute's terms are clear. They provide for District Court jurisdiction over any claim founded on negligence brought against the United States. We are not persuaded that 'any claim' means 'any claim but that of servicemen.'

The Court observed that in addition to the very language and structure of the FTCA, its legislative history compelled this result. The Court noted that the Act, passed amid mass demobilization, expressly excluded injuries in a foreign country or those arising out of the combatant activities of the armed forces; that most of the tort claims bills previously before Congress had contained no provisions excluding all servicemen from recovery; and, that the exception disallowing claims by those entitled to recover pursuant to the World War Veteran's Act of 1924 was deleted from the bill on passage. Relating to the existence of compensation statutes providing for servicemen injured while in service, the Court found,

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26 S. Rep. No. 1400, 79th Cong., 2d Sess. 1 (1946). Insofar as the bills introduced into Congress for the relief of servicemen were "exceedingly rare," it has been argued that military claims were beyond the express purpose of the Act, thus remaining subject to their prior restrictions. *Feres v. United States*, 340 U.S. 135, 140 (1950); *United States v. Brooks*, 169 F.2d 840, 842 (4th Cir. 1948). *But see United States v. Muniz*, 374 U.S. 150, 154 (1963).


28 337 U.S. 49 (1949). It is to be noted that the *Brooks* Court considered only the limited question of whether members of the armed forces could recover under the FTCA for injuries not incident to their service. *Id.* at 50.

29 *Id.* at 51.
unlike the usual workmen’s compensation statute, no indication of an intent to forbid actions under the FTCA.

We will not call either remedy in the present case exclusive, nor pronounce a doctrine of election of remedies, when Congress has not done so.\(^3\)

But this did not imply that the amount recovered pursuant to servicemen’s benefit laws was non-deductible. Accordingly, the Court reduced judgment to the extent that the claimant had been compensated.

The rationale employed by the Brooks Court would seem to warrant a similar result in cases involving service-incident injuries. The Court, it should be noted, emphasized only those factors supportive of a congressional intent to include all servicemen, thereby precluding the existence of an implied exception to servicemen’s suits under the FTCA, regardless of the nature of the injury. However, the Court’s express reservation of opinion as to the “wholly different case” of injuries sustained incident to active service would seem to militate against such a conclusion. The practical results of allowing recovery in such cases might necessitate a different finding of congressional intent.\(^3\)

The “wholly different case” reserved from opinion in Brooks soon presented itself to the Supreme Court in Feres v. United States.\(^3\) Feres was the consolidation of three cases,\(^3\) the common

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\(^3\) Id. at 53.

\(^3\) Apparently the Court in Brooks recognized the futility of limiting itself to consideration of the Act’s legislative history. Indeed, the Court seems swayed by more practical considerations in imputing any intent to Congress. Thus it held:

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) (emphasis added). This reasoning may surely be characterized as “practical” and curiously anticipates subsequent Supreme Court decisions.

\(^3\) 340 U.S. 135 (1950).

\(^3\) Feres v. United States, 177 F.2d 535 (2d Cir. 1949), aff’d, 340 U.S. 135 (1950), wherein the Second Circuit denied recovery under the Act in a case concerning the death of an army lieutenant who perished in a barracks fire, when it was known or should have been known that the heating plant was defective. Jefferson v. United States, 178 F.2d 518 (4th Cir. 1949), aff’d sub nom., Feres v. United States, 340 U.S. 135 (1950), involved medical malpractice wherein the court of appeals had denied recovery stating that a soldier on active duty could not sue pursuant to FTCA for injuries caused by the negligence of army doctors in failing to remove a thirty-inch towel from his stomach. Griggs v. United States, 178 F.2d
element being that "each claimant, while on active duty and not on furlough, sustained injury due to negligence of others in the armed forces." 34 Adopting the pragmatic reasoning implicit in Brooks, i.e., that the practical results of allowing recovery in cases involving injuries sustained incident to service might require a different finding of congressional intent, the Feres Court denied recovery.

Recognizing that the primary purpose of the Act was to extend a remedy to those formerly without, the Court asserted that as Congress had been burdened with no deluge of private bills on behalf of the military, recovery for injuries incident to service would seem beyond the scope of the Act. Turning to an examination of existing remedies, it observed that Congress through a series of enactments had provided a system of "simple, certain, and uniform compensation for injuries or death of those in armed services." 35 Thus, absent any provision in the FTCA for adjustment, the Court refused to impute to Congress an intent to confer additional benefits on servicemen.

In considering the test of allowable claims under the Act, an important factor was the lack of analogous liability in the private sector. Emphasizing the severity of the break with tradition if these claims were allowed, the Court noted that the effect of the FTCA is "to waive immunity from recognized causes of action . . . not to visit the Government with novel and unprecedented liability." 36

Lacking the guidance of any explicit statement of congressional intent relevant to this problem, the Court observed the effect of the "distinctly federal" relationship existing between the government and members of its armed forces upon service-incident claims. Inasmuch as such a relationship has traditionally been governed exclusively by federal authority, the fact that no federal law had

1 (10th Cir. 1949), rev'd sub. nom., Feres v. United States, 340 U.S. 135 (1950) wherein the appellate court had held a complaint alleging the negligence of army doctors in the wrongful death of decedent to have stated a cause of action under the Act.

34 340 U.S. at 138.


36 340 U.S. at 142.
recognized recovery under such circumstances was held preclusive of liability. Similarly, the Court found it significant that the FTCA made applicable "the law of the place where the act or omission occurred." In its opinion, it would be irrational to predicate recovery upon geographic considerations over which servicemen had no control. In conclusion, the Court distinguished Brooks on the basis that the injury therein did not arise out of or in the course of military duty.

THE FERES RATIONALE

The Feres Court, groping to discern an implied congressional intent to exclude governmental liability for service-connected injuries, premised its decision upon those considerations which in its collective judgment seemed persuasive of such an intent. Recent Supreme Court developments, however, paralleled a growing doubt among the lower federal courts as to the continued viability of these factors, have resulted in minor tremors in the application of the "incident to service rule." The innovations and turmoil presently characteristic of the area assume broader significance as they are illustrative of a gradual liberalization of judicial attitudes which render consideration of this narrow but extremely important subject timely.

The Governmental—Private Liability Analogy

The reasoning of Feres which limited governmental liability to those situations where there existed analogous private liability has been subsequently abandoned by the Supreme Court. The initial step was taken in Indian Towing Co. v. United States, a suit under the FTCA for injury to a tug and cargo barge allegedly caused by the negligence of the Coast Guard in the maintenance of a lighthouse. The Government, relying upon Feres, contended that the Act should be held to exclude liability in the performance of activities which private persons do not perform. The Court, however, observed that it is well-settled in the law of torts that "one

38 See Caruso, An Analysis Of The Evolution Of The Supreme Court’s Concept Of The Federal Tort Claims Act, 26 Fed. B.J. 35-45 (1966). The author concludes that two forces account for the liberalization of the Supreme Court’s attitude toward the Act:
These two forces were changes in the Court’s membership and a shift from a narrow view to a broader view on the part of some members of the Court. Id. at 45.
39 See Comment, Federal Tort Claims Act As Applied To Military Personnel, 40 Ky. L.J. 438, 441 (1952) which considers the Court’s argument that individuals do not maintain an army as frivolous.
who undertakes to warn the public of danger and thereby induces reliance must perform his 'good Samaritan' task in a careful manner." The Court saw the government as reading:

the statute as imposing liability in the same manner as if it were a municipal corporation and not as if it were a private person, and it would thus push the courts into the 'non-governmental'—'governmental' quagmire that has long plagued the law of municipal corporations. . . . The fact of the matter is that the theory whereby municipalities are made amenable to liability is an endeavor . . . to escape from the basic historical doctrine of sovereign immunity. The Federal Tort Claims Act cuts the ground from under that doctrine; it is not self-defeating by covertly embedding the casuistries of municipal liability for tort.

*Indian Towing* was, therefore, a cautious first-step toward the imposition of broader liability upon the United States. In *Rayonier, Inc. v. United States*, the Supreme Court abandoned this moderate language and held the Government liable under the FTCA for the negligence of the Forest Service in fighting a forest fire.

The Court observed:

It may be that it is 'novel and unprecedented' to hold the United States accountable for the negligence of its firefighters, but the very purpose of the Tort Claims Act was to waive the Government's traditional all-encompassing immunity from tort actions and to establish 'novel and unprecedented' governmental liability.

*Indian Towing* and *Rayonier* thus establish that governmental liability is no longer restricted to those circumstances in which government bodies have been traditionally responsible for the misconduct of their employees. This transition from "similar activity" to "similar negligence," insofar as it has extended the Act to "novel and unprecedented" forms of liability, may be said to have undermined the persuasiveness of the analogous liability rationale of *Feres*.

**The Availability of Other Compensation**

In denying liability, *Feres* accorded considerable weight to the existence of various military compensation laws. However, the Court's decisions both prior and subsequent to *Feres* have been

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41 Id. at 64-65.
42 Id. at 65.
43 353 U.S. 352 (1957).
44 Id. at 319.
held lacking in any precise consistency as to the effect of such systems. 46 In United States v. Brooks 47 neither the availability nor prior recovery of statutory benefits was held preclusive of recovery by a serviceman. Instead, the compensation award was applied in mitigation of the damages recovered pursuant to judgment. Also, in United States v. Brown, 48 the Court, in allowing a veteran to recover for post-discharge injuries sustained in a Veteran's hospital, reaffirmed the position taken in Brooks.

Congress could, of course, make the compensation system the exclusive remedy. . . . We noted in the Brooks case that Congress had given no indication that it made the right to compensation the veteran's exclusive remedy . . . and did not preclude recovery . . . but only reduced the amount of any judgment. . . . We adhere to that result. 49

More recent holdings of the Supreme Court, involving prisoners' rights under the FTCA, have interjected greater confusion as to the effect of such compensation statutes. In United States v. Muniz, 50 the Court held suits by federal prisoners to be within the purview of the FTCA. Finding no congressional intent to exclude such claims it reasoned that "the presence of a compensation system persuasive in Feres, does not of necessity preclude a suit for negligence." 51 Citing Brown, the Court implicitly recognized that the mere presence of a compensation system is not preclusive of liability under the Act. Quite to the contrary, however, subsequent cases have distinguished between the mere presence and actual availability of such statutory benefits. While Muniz found no congressional intent to deny federal prisoners relief under the Act, it

47 337 U.S. 49 (1949).
49 Id. at 113.
50 374 U.S. 150 (1963). Muniz involved a federal prisoner's right to sue under the FTCA for personal injuries sustained during confinement in a federal prison, resulting from the negligence of a government employee. The Court in reasoning a cause of action might lie adopted an approach strikingly similar to that of Feres. Of controlling importance in allowing recovery was the unavailability of compensation benefits to claimant. The predecessor of 18 U.S.C. § 4126 (1964) extended benefits only to prisoners working for Federal Prison Industries, Inc. out of which only twenty percent of all prisoners were so employed. 374 U.S. at 160 n.17. This coverage has been subsequently expanded to include "any work activity in connection with the maintenance or operation of the institution where confined." 18 U.S.C. § 4126 (1964). For a comprehensive treatment of developments in this analogous area of federal prisoners' rights under the FTCA see Woody, Recovery by Federal Prisoners Under The Federal Tort Claims Act, 36 Wash. L. Rev. 338 (1961).
51 374 U.S. at 160.
has been subsequently noted that nothing in the legislative history of the FTCA is indicative of a purpose to provide additional recovery under the Act for those prisoners already benefited under a statutory compensation system. Indeed, in United States v. Demko,52 the Supreme Court has recently upheld its Feres rationale relating to the exclusivity of a comprehensive system of compensation. The Court, in denying a federal prisoner relief under the Act, reasoned that

where there is a compensation statute that reasonably and fairly covers a particular group of workers, it presumably is the exclusive remedy to protect that group.53

Relying upon Johansen v. United States,54 the Court contended that in view of the creation of a comprehensive system of compensation, Congress should not be held to have made exceptions thereto absent specific legislation to that effect.

While the foregoing results seem inconsistent, it should be noted that each case turns upon certain “distinguishing factors.” Thus, assuming a congressional policy precluding liability for injuries sustained incident to service, Brooks and Brown are consistent with Feres insofar as recovery in the former was sought for non-service incident injuries. In addition, these “factual distinctions” serve to reconcile the seemingly inconsistent results of Muniz and Demko as the latter was not afforded the statutory benefits while the former came within the purview of such protection. Significantly, the vigour of the Court’s recent affirmation of the exclusivity rationale would seem broader than its initial expression. Indeed, unlike Feres, Demko abstained from the pragmatic approach, adopting instead, as sole criterion, the availability of statutory benefits. Such would seem to be an abandonment of the Brooks position.55

52 385 U.S. 149 (1966).  53 Id. at 152.  54 343 U.S. 427 (1952).  55 The rationale underlying Demko strongly suggests such an influence. Preclusion from the benefits of the Act in the Brooks, Feres, Brown trilogy has been conditioned upon the co-existence of two factors: 1) an implied exception to recovery under the FTCA premised upon various practical considerations; and 2) the availability of statutory benefits pursuant to a comprehensive compensation act. Demko, however, has disregarded the first consideration and relied solely upon the availability factor. This observation, however, is subject to strong reservations. As yet, there has been no statutory provision declaring servicemen’s compensation laws exclusive, as under the Federal Employees Compensation Act. Similarly, while this is also true of federal prisoner compensation laws, the Court’s treatment in Demko seems to compel the inference that these laws are substantially workmen’s compensation laws. Unlike the statutory systems available for servicemen, such an analogy would seem well-founded.
While the effect of compensation is certain, the Court's reasoning gives rise to certain logical difficulties. Thus, the Court in Feres analogized to certain workmen's compensation statutes. That the analogy is hardly satisfactory is apparent in that: 1) the serviceman is without the power to terminate his status at will; and 2) military service is more often of a compulsory rather than an elective nature.

Furthermore, the Court has distinguished Feres from Brooks by applying the test of whether the injury was sustained "incident to service." This distinction seems inconsistent with Veterans Administration's interpretation of the laws as applied to injuries or death suffered by servicemen during military service. Statutory benefits are available to servicemen whether or not they are within the narrow ambit of Feres. Veterans Administration regulations provide, in effect, that any injury or disease incurred by a member of the armed forces while in active duty status will be deemed to have been incurred in the line of duty, provided it is not the result of his own willful misconduct. The situation thus arises whereby the serviceman injured in the performance of actual military duty has the limited recourse of compensation benefits while the serviceman injured on furlough is accorded both the statutory and judicial remedy. The result, therefore, is predicated upon the view that the FTCA precludes such recovery and not on the concept that statutory benefits afford the exclusive remedy. This incongruity is only partially mitigated by the set-off requirements of Brooks. If these statutory benefits were intended to provide exclusive relief for those injuries sustained incident to service, expansion and equalization seem to be in order. The claimant should be entitled to recover all damages allowable under a private suit.

See United States v. Demko, 385 U.S. 149, 151-52 (1966). See also Comment, supra note 52, at 1792 n.38 wherein the author recognizes that Demko relied upon the reasoning of Johansen v. United States, 343 U.S. 427 (1952) in holding the available compensation statute exclusive.

Traditionally, "time of duty" has been employed to define a status which ascertains possible compensation regardless of whether or not the individual was at the time of injury on furlough, leave or even under arrest. See 36 Geo. L.J. 276, 277 (1948).

E.g., AIR FORCE REGULATION (AFR) 35-67 sets forth how and when a "line of duty" determination is to be made. Thus, all findings are "in line of duty" unless the injury or disease resulted from the person's own misconduct, occurred during desertion or while absent without authority, or existed prior to service.

While in both instances the practical result is the same, the theoretical difference is the Achilles heel of the co-existence of remedies. See Hitch, The Federal Tort Claims Act and Military Personnel, 8 Rutgers L. Rev. 316 (1954); Note, Federal Liability to Personnel of the Armed Forces, 20 Geo. Wash. L. Rev. 90 (1951).
Also underlying the Court's decision in *Feres* is the notion that the "distinctly federal" character of the relation subsisting between the government and the military should bar "incident to service" claims under the Act. It is submitted that the general relationship provides no decisive answer. In *Brooks*, the Court had no difficulty in allowing recovery, despite the presence of the "distinctly federal" relationship. Such results seem incongruous. To be sure, a soldier is at all times subject to military law and discipline. On the other hand, he is still a citizen and, generally, his military status does not relieve him of the rights and duties incident thereto. Furthermore, as the military has in modern times assumed the aura of a citizen's army, maintained by a system of universal conscription, there seems less reason today for discriminating against the soldier, except in those peculiarly military aspects of his life.

*Feres* also based denial of recovery upon the illogic of subjecting the military claimant to the vicissitudes of state law. In this respect it is significant to note the Court's statement in *Muniz* that "[i]t nonetheless seems clear that no recovery would prejudice them even more." Recognizing that *Muniz* is distinguishable from those cases involving military rights under the Act, as recovery was the only alternative, the statement, nevertheless, detracts from the Court's reasoning in *Feres*. In treating the effect of variations of state laws, the Court in *Feres* conveniently disregarded the impact of military compensation laws. In view of the coexistence of the statutory and judicial remedies, as an alternative to denial of relief the injured soldier could be put to an election of remedies; or consonant with *Brooks*, those compensation benefits received could be set off in mitigation of damages received pursuant to the FTCA. This more generous approach would not prejudice the soldier—the basic argument of the Court in *Feres*—but would, instead, place him in a preferred position.

Secondly, in view of the recent innovations in conflicts of law, the validity of predicating relief upon the outdated notion of lex loci delictus would seem suspect. This traditional rule itself has

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*60* For the original exposition of this argument, see *Jefferson v. United States*, 77 F. Supp. 706, 713 (D. Md. 1948). Support for the proposition was a statement in *United States v. Standard Oil Co.*, 332 U.S. 301, 305 (1947). The case involved the problem of whether the government could be subrogated to a soldier's claim against the company for hospital treatment. The proposition would thus seem to be inapposite to the immediate problem.


been severely criticized for its characteristically harsh results. And, by its abandonment, there appears little reason for immunizing the claimant from state law.

In General.

In rejecting the plain language of the FTCA, the Supreme Court appears to have been influenced by what it considered sound policy. Given the logical inconsistencies which abound in Feres, one, however, wonders how convinced the Court is of its own reasoning. The Court in imputing to Congress an intent to exclude service-incident claims appears to be engaging in fictions for no apparent reason. Caught in the quagmire of judicial sophistry one gropes for firmer ground. In retrospect the Court has offered such an alternative. While the opinion in United States v. Muniz expressly stated that the Court found no reason to question Feres as it related to military claims, it, nevertheless, was expressive of an obvious paucity of ardour for each of the reasons upon which the case was founded. In the course of the opinion, Chief Justice Warren, citing Brown, offered this explanation of Feres:

In the last analysis, Feres seems best explained by the 'peculiar and special relationship of the soldier to his superiors, the effects of the maintenance of such suits on discipline, and the extreme results that might obtain if suits under the Tort Claims Act were allowed for negligent orders given or negligent acts committed in the course of military duty. . . .' Here is no search for an implied congressional intent founded upon tenuous policy considerations as attempted by Feres but rather, an explicit recognition of the policy basic to both Feres and Brown.

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64 Considering the legislative context of the FTCA, the Court asserted that prior to the Act's passage private bills were frequently sought by civilians, but only rarely by soldiers, and inferred from this state of affairs a congressional intent to withhold from servicemen the remedies of the Act. So reasoning, the Court seems to have overlooked the other facet of the Act—its sweeping waiver of immunity to actions in tort. The Court has more recently recognized that though cognate to the object of abolishing private bills, the waiver of immunity also has this independent value.
67 374 U.S. at 162.
AN EVALUATION OF THIS STATUTORY AND COURT-MADE EXEMPTION

While Congress sought to waive governmental immunity, it was not contemplated that the government should be subject to liability arising from all acts governmental in nature. There are, of course, those activities which by their very nature should be free from the hindrance of possible suit. There are valid reasons for the FTCA’s exclusion of civilian and military claims arising out of wartime combat. By the very nature of war and its incident activity, the military cannot be held to any ordinary standard of care; Moreover, the citizen’s obligation to bear arms would necessarily imply certain risks and hardships of a non-justiciable nature.

But accepting the proposition that this waiver was intended to be practical as well as theoretical, there exists the difficulty as to penumbral rights under the Act, i.e., when and where should the government be held liable for the tortious conduct of its agents.

Deeming the “time of war” limitation too narrow, the Supreme Court has expounded a theory of an implied exception to the FTCA which precludes recovery by the military for injuries sustained “incident to service.” As one commentator has poignantly observed, it is interesting . . . that the Court has adopted such a vague and meaningless standard . . . even though [it] . . . had previously condemned the same language as ‘deceptively simple and litigiously prolific’ in a Workmen’s Compensation case dealing with the problem of whether or not a claimant’s injury arose out of and in the course of his employment.


Note, Military Personnel and The Federal Tort Claims Act, 58 Yale L.J. 615, 626 (1949). This is not to imply that the tort doctrine of “assumption of risk” is applicable to claims of the military under the Act. The conscriptive nature of the armed forces, of course, would negate the presence of the requisite “voluntariness.” See also Note, Recovery for “Service-Incident” Injuries Under the Federal Tort Claims Act, 50 Colo. L. Rev. 827, 831 (1950).

19 Ga. B.J. 381 (1957). It is significant to note that the service-incident concept relied upon by the Feres Court was not “wholly novel” but rather, found “ready context within the framework of Workmen’s Compensation statutes.” United States v. Lee, No. 21,706 (9th Cir. Aug. 30, 1963) at 7. The analogy of military benefits and the Court’s recognition that “most states have abolished the common-law action for damages between employer and employee and have superseded it with workmen’s compensation statutes which provide, in most instances, the sole basis of liability” are clear evidence that the Court contemplated a definition of “incident to service” in terms of the workmen’s compensation statutes “course of employment.”
Fearful of the “dire consequences” resulting from allowable claims arising out of “[a] battle commander’s poor judgment, an army surgeon’s slip of hand, or a defective jeep which causes injury,” the Court has felt necessitated to reach this result. The “dire consequences” it has foreseen in allowing recovery for service-incident injuries are a myriad of claims and the attendant evil—“devastation of military discipline and morale.”

However, this spectre may be more imagined than real. The fear of extensive litigation and its detrimental effect upon discipline and morale might conceivably be justified if the serviceman’s action were against the individual officer or fellow soldier responsible for his injury. The imposition of liability being on the Government, however, seems too remote from the individual relationship to cause any extensive subversion of discipline and morale. Indeed, there may be no relationship at all existing between the claimant and the alleged tort feasor and yet, relief will be precluded under the “incident to service” rule.

Furthermore, the existence of a comprehensive system of statutory benefits would seem to minimize the danger of a multitude of suits. The volume of potential litigation would be limited by the probability that many injured soldiers would find little advantage in resorting to the courts, with their attendant costs and attorney’s fees, to supplement their already “generous” benefits, as construed by the Feres Court, under the various compensation laws. Regarding frivolous or tenuous claims, it is also improbable, assuming a judicially imposed election of remedies, that a claimant would risk a possible denial of recovery in a law suit, where an adequate system of compensation is available. The Act also provides that all claims for less than $2500 may be settled by the head of the agency affected. It is likely, therefore, that most claims would be in this latter category since an injured serviceman incurs no medical expenses nor suffers any loss of wages—two large elements of recovery in any tort action.

In addition to the nature of military “negligence,” the reduced amount recoverable in view of the compensation statutes, and the provisions within the Act providing for administrative

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72 Brooks v. United States, 169 F.2d 840, 845 (4th Cir. 1948).
73 See, e.g., Callaway v. Garber, 289 F.2d 171 (9th Cir.), cert. denied, 368 U.S. 874 (1961).
75 Negligence is a relative concept and whether an act can be so characterized is dependent upon a balancing of interests, i.e., whether the social desirability of the objective sought is greater than the seriousness of the risk created. Therefore, national defense or the prosecution of a war would justify conduct which, absent such circumstances, would be clearly negligent.
determination of claims, there are several express exceptions to the FTCA which prohibit suits by military personnel. These are directly intended to cover those situations which present a real danger to military discipline and morale. Thus, section 2680(j) prohibits any claim arising in a foreign country, and section 2680(k) precludes claims arising out of the combatant activities of the armed forces during time of war. Another express exception which may be applicable in limiting particularly undesirable claims is the statutory prohibition of suits arising out of abuse of discretion by a government official. As it is obvious that a degree of discretion is present in almost every echelon of command in the armed forces, this exception should allay the fear of an officer's tactical error being made the subject of a lawsuit against the Government.

The criterion adopted has generally produced more dust than light. While the exclusion of servicemen injured "incident to service" is designed to avoid interference with military discipline and morale, the Supreme Court has never expressly indicated that Feres should be limited to those situations which present a direct threat of interference with military discipline. The result has been the mechanical invocation and rigorous application of the exclusionary rule by the federal judiciary.

Relative to governmental liability for the activities of the military, courts have been reluctant to extend by interpretation instances wherein the Government would be liable to private parties for the negligence of the armed forces. Conversely, however, the

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77 The Court's continued reluctance to allow recovery for service-incident injuries is attributable, in part, to the fear of additional relief available pursuant to the military compensation laws. In view of the Brooks approach, supra note 31 and accompanying text, the problem seems readily resolvable. Servicemen should be accorded full recovery less benefits received. Thus, all benefits previously recovered could be applied in mitigation of damages. Alternately, some commentators have argued for a judicially imposed election of remedies. See, e.g., Comment, Federal Tort Claims Act as Applied to Military Personnel, 40 Ky. L.J. 438, 442-43 (1952). The Court's unequivocal refusal to adopt the latter alternative, however, renders such an approach unlikely. See United States v. Brown, 348 U.S. 110, 113 (1954); United States v. Brooks, 337 U.S. 49, 51 (1949).
78 Indeed, the lower federal courts have adopted a purely mechanical approach in dealing with military claims under the FTCA. The judicial test of "injuries sustained incident to service" has degenerated into a mere inquiry as to the location of the claimant when injury was sustained. Similarly, Preferred Ins. Co. v. United States, 222 F.2d 942 (9th Cir. 1955), involved an action to recover for property damage sustained when an Air Force plane crashed into the trailers for enlisted men and officers located on the base. In denying recovery, the court held that the Feres rule barred the suit since "the damage to the trailers of the servicemen arose out of and was in the course of activity incident to their military service."
courts have shown no such restraint in the amorphous area of
injuries sustained “incident to service.”

In considering the Feres “incident to service” rule, judicial
investigation has been limited to a case by case determination of
whether the claimant’s injury is encompassed within this exclu-
sion.\textsuperscript{78} This has not proven an easy task.\textsuperscript{79} Difficulty in application
has rendered the rule generally unworkable in uncontemplated
situations. Thus in Callaway v. Garber,\textsuperscript{80} the court recognizing the
facts to be of an isolated nature, beyond the contemplation of the
Court in Feres, nevertheless denied recovery. Through the retro-
spective interpretation of Brown, the court held that the Feres
rationale had no present application as the injured parties were
members of different branches of the service and were engaged in
entirely unrelated activity at the time of the accident. Recognizing,
however, that the case fell within the rule of Feres, as promulgated,
the court adhered to that rule as it had in no way been subsequently
abandoned or modified.

The Feres rule, therefore, has proved conducive to factually
inconsistent results thus generating general confusion among the

\textit{See}, e.g., Chambers v. United States, 357 F.2d 224 (8th Cir. 1966). Relief
under the Act was denied to an airman killed while swimming at a pool
on an Air Force base as the result of alleged negligence in the mainten-
W. Va. 1951). \textit{Zoula} v. United States, 217 F.2d 81 (5th Cir. 1954) held
that Feres barred a FTCA suit to recover for injuries by military stu-
dents who, while touring an Army base, were struck by an Army ambu-
 lance. The fact that they were not “injured as a result of, or while acting
under, immediate and direct military orders” was held irrelevant. \textit{See
also} Archer v. United States, 217 F.2d 548 (9th Cir. 1954), \textit{cert. denied},
349 U.S. 953 (1955), wherein parents of a West Point Cadet killed when a
military transport in which he was riding gratis crashed while returning from
leave, were denied recovery. The court of appeals held that a cadet riding
under military discipline on an army plane under the control of a superior
officer has no claim under the FTCA “for injury sustained through what-
ever cause.” \textit{Id.} at 551.

\textsuperscript{79} Unaware of the policy considerations underlying the Feres rule, the
lower federal courts have failed to perceive the complementary nature of
the Supreme Court decisions. Accordingly, courts have variously held:
(1) that Feres is controlling and thus Brooks should be limited to its
facts; (2) Feres and Brooks are factually distinguishable thus conceptually
consistent; (3) Brooks and Brown represent limited exceptions to the
general rule of Feres; or (4) Feres is best explained by the “retrospective
interpretation” of Brown.

The lower federal courts have failed to see Feres in its overall per-
spective. The result has been that the courts have alternately emphasized
various facets of Feres. For a more detailed discussion of these anomalies
see Comment, \textit{Sovereign Immunity—Federal Tort Claims Act—Injuries to

\textsuperscript{80} 289 F.2d 171 (9th Cir.), \textit{cert. denied}, 368 U.S. 874 (1961). Decedent,
an Air Force officer, en route to a training school by private automobile,
was killed as a result of a collision on a public highway with a vehicle
negligently driven by a Navy officer.
lower courts. A recent example is the federal district court holding in *Lee v. United States*.81 Allowing recovery for service-incident injuries, the *Lee* court reasoned that the Supreme Court, by a series of recent decisions apposite to the *Feres* rationale, had vitiated the grounds for that decision. Tracing Supreme Court developments from *Brown* through *Indian Towing*, *Rayonier* and *Muniz*, the district court declared its own rule of recovery.82 It concluded that servicemen would not be precluded from recovery under the FTCA when the official activities of the negligent party and those of the injured party are entirely unrelated. Accordingly, exclusion would depend upon whether the injuries stemmed from activities involving an official military relationship between the tortfeasor and the claimant. If so, claimant would be precluded; otherwise, he would not. Implicit in this conclusion is an agreement with the view expressed in *Brown* that the underlying considerations of the "incident to service" rule are the problems of discipline and morale.83 Pursuant to this rule of recovery, the exclusion of military personnel is not dependent upon the status of the individual, i.e., whether he was on active duty or leave at the time of injury. Instead, the controlling factor would be whether the injuries arose from activities which "involved an official military relationship" between the claimant and the negligent party. In view of its retrospective interpretation by *Brown*, this isolated proposition of law would seem to be the thrust of *Feres*.84 Failing to perceive this, however, the *Lee* court reached this result by mistakenly relying upon *Muniz* as an abandonment of the *Feres* rationale.85 Indeed, qualification and not abandonment is the purpose served by *Muniz* with the ultimate effect on discipline and morale as the prime consideration.

81 261 F. Supp. 252 (C.D. Colo. 1966). Two Marines while on active duty and in transit to Viet-Nam were killed when their plane, operated by the Military Air Transport Service (MATS), United States Air Force, crashed upon take-off. Their claimants made no charge against either the Marine Corps or the Air Force, but alleged negligence on the part of the Federal Aviation Agency (FAA) in operating, maintaining and controlling the departure of the aircraft from the ground and in giving inadequate terrain clearance information. Inasmuch as the FAA is in no way controlled by either the Department of Defense, or any military department therein, the complainant contended that the Agency's acts or omissions were completely disassociated from the status of the decedents.

82 Id. at 256.


84 See *Feres v. United States*, 340 U.S. at 142, wherein the Court implies such a relationship as a prerequisite to denial of relief:

> It is true that if we consider relevant only a part of the circumstances and ignore the status of both the wronged and wrongdoer we find . . . liability. Id.

85 *Demko v. United States*, 385 U.S. 149 (1966), illuminates the inapplicability of *Muniz*. 
The Lee court while denying the exclusivity of status as to the claimant found it of controlling importance as to the tortfeasor. In view of the judicial history of the FTCA such an approach seems unwarranted.\textsuperscript{86} Status, in such circumstances, would seem relevant only insofar as it relates to the nature of the injurious activities. Thus, where the injury is sustained "incident to service," only the relationship between claimant and tortfeasor would be of any significance. The fact that the tortfeasor is not a member of the armed forces is, under such circumstances, wholly extraneous.\textsuperscript{87} Further, it should be noted that the claimants' decedents were acting pursuant to military orders. Thus, assuming the validity of the court's criterion, the claims in issue did arise from activities involving an official military relationship between the negligent person and the claimant. As the appellate court recognized, the threat to military discipline was far less direct in Feres. The Brown rationale would necessitate an identical conclusion as "[t]he considerations of discipline which in part underlie the rule of Feres are strikingly present here." Therefore, while it is true that the tortfeasors were not in the armed forces, they were engaged in activities which by their very nature were indistinguishable therefrom. Strictly construing the concept of "official military relationship" the Lee court, in effect, limited exclusion from relief under the Act to those situations which were in form, rather than fact, of a military nature.

The difficulty of interpreting Feres is highlighted by the fact that, on appeal, Lee was reversed and the claims of the servicemen

\textsuperscript{86}In United Airlines Inc. v. Wiener, 335 F.2d 379 (9th Cir.), \textit{cert. denied}, 379 U.S. 951 (1964), the appellate court held the Government not liable under FTCA for injuries to servicemen which arose out of activities "incident to service," despite the fact that the Government's liability was predicated, in part, upon negligence of employees of a separate governmental agency. \textit{See also} Sheppard v. United States, 369 F.2d 272 (3rd Cir. 1966), \textit{cert. denied}, 386 U.S. 982 (1967); Layne v. United States, 295 F.2d 433 (7th Cir. 1961), \textit{cert. denied}, 368 U.S. 990 (1962).

\textsuperscript{87}In this context note the following statement by the court in Lawrence v. United States:

[I]t is running a good principle into the ground to declare in terms of a categorical imperative that a federal prisoner, \textit{by virtue of his status alone}, may not sue the United States under the provisions of the Federal Tort Claims Act where his claim is based upon the alleged negligence of a federal employee completely disassociated from his status. 193 F. Supp. 243, 245 (N.D. Ala. 1961).

Such a contention is wholly consistent with the above quoted Feres statement relating to the status of the wronged and wrongdoer. The consistency, in view of the Brown rationale, gives rise to a strong presumption that the status of the claimant at the time of injury is, of itself, not the controlling factor.
denied. Even in a particular fact pattern, therefore, courts are at odds on if and how the Feres rule should be applied.

CONCLUSION: “[T]is the Soldier's Life to Have His Balmy Slumbers Wake'd with Strife.” (Shakespeare: Othello II. i.i.i.)

Unfortunately, the traditional position of the soldier under law has intensified this plight. Because of its very nature and purpose, the military must place great emphasis upon discipline and efficiency—often at the expense of justice. There is no need, however, that this reliance upon disciplinary considerations be inordinate. Thus, while the "incident to service" rule has been criticized, inter alia, as vague and meaningless, conducive to factually inconsistent results, its greatest evil subsists in its pervasive scope and indiscriminate application. Lacking the guidance of any explicit statement of congressional intent, the Supreme Court, fearful of the adverse effect of certain claims upon military discipline and morale, formulated a rule of recovery predicated upon policy considerations of questionable validity. Unconvinced by its own reasoning, the Court has discreetly abandoned these grounds, expressly adopting the position that adverse effects on morale and discipline should control. Rather than an abandonment, this represents a refinement of the Feres rationale.

In view of the present confusion abounding among the lower federal courts, it is submitted that the "incident to service" rule has proven inadequately reflective of the Feres doctrine. It would seem that a rational extension of this rule to those situations more intimately related to the "peculiarly military aspects" of the soldier's life would accomplish the desired result. Pursuant to the benevolent purpose of the Act, restrictions should be imposed reluctantly only when clearly warranted by the most urgent policy-considerations. Considering the conscriptive nature of the modern military

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88 The district court's holding in Lee is also contrary to the Seventh Circuit's decision in Layne v. United States, 295 F.2d 433 (7th Cir. 1961), cert. denied, 368 U.S. 990 (1962). In Layne, the widow of an Air National Guardsman sought recovery under the FTCA for the deceased's death on a training flight, allegedly caused by the negligence of civilian employees of the government. The claimant specifically contended that the suit was not precluded by Feres because the alleged negligence was that of civilian employees rather than of military personnel. The court found this argument to be "lacking in merit," and dismissed the suit on the ground that death had occurred as "an incident to military service." Id. at 436.

89 See in this context Judge Cardozo's opinion in Anderson v. John L. Hayes Constr. Co., 243 N.Y. 140, 147, 153 N.E. 28, 29-30 (1926). The exemption of the sovereign from suit involves hardship enough, where consent has been withheld. We are not to add to its rigor by refinement of construction, where consent has been announced.
complex, servicemen should not be discriminatorily treated. Nor should the generally progressive movement away from the outmoded concept of sovereign immunity be impeded by imagined fears. As both *Feres* and *Lee* have demonstrated: "One struggles in vain for any verbal formula that will supply a ready touchstone... Life in all its fullness must supply the answer to the riddle." Thus, in formulating a rule of recovery, courts, motivated by justice in the particular case, should gaze intently upon the policy sought to be effected.

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