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THE FEDERAL TORT CLAIMS ACT: A CAUSE OF ACTION FOR SERVICEMEN

INTRODUCTION

Prior to 1946 the United States government was immune from liability for the tortious acts of its agents and employees.[1] In 1946 Congress passed the Federal Tort Claims Act[2] in order to mitigate the hardship of injuries which were previously remediless due to the sovereign immunity doctrine.[3] The Act waives the government's tort immunity, but excludes twelve types of claims from its scope.[4] Two

1. The first substantial move in recognition of citizens' claims was the congressional creation of the Court of Claims in 1855. Thereafter, Congress gradually adopted measures making the United States limitedly amenable to suit. The Tucker Act of 1887, 28 U.S.C. §§ 251, 258, 791-96 (1976), recognized suits against the United States for claims "not sounding in tort." In 1916, the Shipping Act, 46 U.S.C. § 801-42 (1976), imposed liability for United States vessels similar to that of privately-owned merchant vessels, while the Public Vessels Act, 46 U.S.C. §§ 781-90 (1976), and the Suits in Admiralty Act, 46 U.S.C. §§ 741-52 (1976), adopted in 1925 and 1920 respectively, permitted suits upon maritime and admiralty for torts involving United States vessels. The Tennessee Valley Authority was granted both the authority and the capacity to sue and be sued in the Act of March 18, 1833. 16 U.S.C. § 831 (1976). Although by 1916 federal civilian employees were permitted recovery for personal injuries under the Federal Employer Compensation Act, 5 U.S.C. §§ 8101-8151 (1976), military personnel were not permitted similar recoveries until the Military Personnel Claims Act, *as amended*, 31 U.S.C. § 223(b) (1946), was enacted in 1943. Aside from these statutory provisions, recovery for government-caused damages was available only through the introduction of private bills of relief in Congress.

2. Federal Tort Claims Act, 28 U.S.C. §§ 1291, 1346, 1402, 1504, 2110, 2401, 2402, 2411, 2412, 2671-80 (1976) [hereinafter cited as FTCA or the Act].

3. *See* notes 18-23 *infra* and accompanying text.

4. The Federal Tort Claims Act purports to recognize any claim for money damages. 28 U.S.C. § 1346(b) (1976). Exceptions to this broad waiver of immunity are delineated in 28 U.S.C. § 2680 (1976):

> (a) Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.
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> (b) Any claim arising out of the loss, miscarriage, or negligent transmission of letters or postal matter.
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> (c) Any claim arising in respect of the assessment or collection of any tax or customs duty, or the detention of any goods or merchandise by any officer of customs or excise or any other law-enforcement officer.
>
> (d) Any claim for which a remedy is provided by sections 741-52, 781-90 of Title 46, relating to claims or suits in admiralty against the United States.

of these exclusions relate to claims by servicemen. According to the Act, servicemen may not recover damages for claims which arise out of combatant activities or which occur in foreign countries.[5] Although these are the only express exceptions which relate to servicemen, there was a conflict in decisions regarding whether the Act allows servicemen to recover for claims which are not specifically excluded from the Act.[6] Considering the number of persons in the military service, the rights of a large class of persons would be affected by a determination of the extent of the Act's applicability to servicemen's claims.[7]

In *Brooks v. United States*,[8] the Supreme Court apparently resolved this question when it held that claims of servicemen for non-service related injuries were cognizable under the Act.[9]

(e) Any claim arising out of an act or omission of any employee of the Government in administering the provisions of sections 1-31 of Title 50, Appendix.

(f) Any claim for damages caused by the imposition or establishment of a quarantine by the United States.

(g) Any claim arising from injury to vessels, or to cargo, crew or passengers of vessels, while passing through the locks of the Panama Canal Zone or while in Canal Zone waters.

(h) Any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights.

(i) Any claim for damages caused by the fiscal operations of the Treasury or by the regulation of the monetary system.

(j) Any claim arising out of the combatant activities of the military or naval forces, or the Coast Guard, during time of war.

(k) Any claim arising in a foreign country.

(l) Any claim arising from the activities of the Tennessee Valley Authority.

In 1949 Congress added another exception to the Act which excluded "Any claim arising from the activities of the Panama Canal Company." 28 U.S.C. § 2680(m) (1976). Subsection (g) of § 2680 was deleted in 1950 while an additional exception excluding "Any claim arising from the activities of a Federal land bank, a Federal intermediate credit bank, or a bank for cooperatives," 28 U.S.C. § 2680(n) (1976), was included in the Act. Today there are thirteen exceptions from the coverage of the Federal Tort Claims Act.

5. 28 U.S.C. § 2680(j), (k) (1976).

6. *Compare* Perucki v. United States, 80 F. Supp. 959 (M.D. Pa. 1948) (denying recovery under the Act), *with* Samson v. United States, 79 F. Supp. 959 (S.D.N.Y. 1947) (allowing recovery under the Act).

7. In 1977 there were an estimated 2,069,000 persons in the military service. Roughly 10% of these persons will be injured before their term in service ends. U.S. Bureau of the Census, Statistical Abstract of the United States: 1978 (99th edition) Washington, D.C., 1978, at pp. 368-94.

8. 337 U.S. 49 (1949).

9. *Id.* at 54.

However, in the subsequent case of *Feres v. United States*,[10] the Court held that servicemen do not have a cause of action for injuries which "arise out of or are in the course of activities incident to service."[11] This holding is now commonly referred to as the Feres Doctrine. Four years after the *Feres* decision, the Supreme Court in *United States v. Brown*[12] re-examined the Feres Doctrine to determine whether it barred the cause of action of a veteran injured after discharge. The Court held that such recovery was not barred by the Feres Doctrine.[13] Since the *Brown* decision, the Supreme Court has not reconsidered the Feres Doctrine.[14]

Brooks, Feres and *Brown* have apparently settled the issue of a serviceman's rights under the Federal Tort Claims Act. However, this conclusion is deceptive. In fact, the real meaning and scope of the Feres Doctrine has been an enigma which has plagued courts since it was first enunciated in 1950.[15] The purpose of this note is to discuss the origin, scope and application of the Feres Doctrine.

This discussion begins with analysis of the *Brooks, Feres* and *Brown* decisions. Special emphasis is placed on the *Feres* decision because it established the Feres Doctrine. While this decision purports to interpret the Act, this note demonstrates that the decision utilizes neither logically or legally sound arguments nor generally accepted tools of statutory construction. Hence, the appropriateness of the Feres Doctrine is questioned.

In *Feres*, the Court also failed to explain its holding so that lower courts could properly apply the Doctrine. In this respect the *Brown* decision is significant in that it afforded the Supreme Court an opportunity to clarify the ambiguity of its holding in *Feres*. However, analysis of the *Brown* decision reveals that it does not

10. 340 U.S. 135 (1950).

11. *Id.* at 146. The Feres Doctrine has been applied to deny recovery for injuries to a civilian spouse or child of a serviceman. *See, e.g.*, DeFont v. United States, 453 F.2d 1239 (1st Cir.) *cert. denied*, 407 U.S. 910 (1972); Gugalauskas v. United States, 103 F. Supp. 543 (D. Mass), *aff'd*, 195 F.2d 494 (1st Cir. 1951); Wisniewski v. United States, 416 F. Supp. 599 (E.D. Wis. 1979).

12. 348 U.S. 110 (1954).

13. *Id.* at 112.

14. *See, e.g.*, Stencel Aero Eng'r Corp. v. United States, 431 U.S. 666 (1977). In *Stencel*, the Court held that government suppliers are immune from suits by servicemen because of the Feres Doctrine. This decision does not analyze or give support for the rationale in *Feres*, but merely restates the language in its *Feres* and *Brown* decisions.

15. "The Feres Doctrine has been the source of much confusion." Mills v. Tucker, 499 F.2d 866, 867 (9th Cir. 1974); *accord* Hale v. United States, 416 F.2d 355, 359 (6th Cir. 1969).

clarify *Feres*, but rather perpetuates the uncertainty as to the meaning and scope of the Feres Doctrine.

This ambiguity is illustrated by the various interpretations given to *Feres* by courts attempting to follow the Doctrine.[16] Such interpretations sometimes result in harsh and inconsistent decisions.[17] While the *Feres* decision may be criticized on various analytical grounds, it may also be attacked for resulting in varied treatment of servicemen seeking recovery under the Act. The final portion of this note, therefore, is devoted to the development of a test formulated as a synthesis of the *Brooks-Feres-Brown* triad and designed to yield consistent results.

THE FEDERAL TORT CLAIMS ACT

Under the common law, a sovereign state was generally immune from suit by its citizens.[18] This doctrine was recognized by the United State Supreme Court soon after the nation's founding.[19] Throughout the nation's development, government activity became increasingly prevalent in the private sector. This growth in government activity resulted in an ever-increasing number of remediless injuries which were attributable to the federal government through the acts of its officers and employees. Prior to the enactment of the FTCA, Congress recompensed these injuries with various piecemeal waivers of sovereign immunity.[20] This piecemeal abrogation of the doctrine of sovereign immunity established a trend away from the doctrine and culminated in congressional passage of the FTCA in 1946.[21]

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16. *Compare* Harten v. Coons, 502 F.2d 1363 (10th Cir.) *cert. denied*, 420 U.S. 963 (1974), *with* Hall v. United States, 451 F.2d 353 (1st Cir. 1971).

17. *Compare* Coffey v. United States, 324 F. Supp. 1087 (S.D. Cal.), *aff'd*, 455 F.2d 1380 (9th Cir. 1971) (denying recovery), *with* Downes v. United States, 249 F. Supp. 626 (E.D.N.C. 1965) (allowing recovery). The conflicting results in these cases arose out of substantially identical fact situations.

18. *See generally* W. PROSSER, HANDBOOK ON THE LAW OF TORTS § 131 at 971-75 (4th ed. 1971).

19. *See* Chisholm v. Georgia, 1 U.S. (2 Dall.) 204 (1792). Prior to the Federal Tort Claims Act, the concept that 'the King can do no wrong' provided governmental immunity from tort claims. *See, e.g.*, United States v. Sherwood, 312 U.S. 584 (1941); Lynch v. United States, 292 U.S. 571 (1934); Kawananakoa v. Polyblank, 215 U.S. 359 (1907).

20. *See* note 1 *supra* for a brief history of these waivers of immunity.

21. 28 U.S.C. §§ 1291, 1346, 1402, 1504, 2110, 2402, 2411, 2412, 2671-80 (1976). The Supreme Court recognized that the Act represents a general trend toward increasing the scope of the waiver by the government of its sovereign immunity. United States v. Yellow Cab Co., 340 U.S. 543, 552 (1951).

The Federal Tort Claims Act represents the resolution of a long congressional effort[22] to mitigate the hardships of sovereign immunity. It ostensibly sweeps away all forms of sovereign tort immunity by purporting to recognize "any claim" for money damages against the United States arising out of the wrongful acts or omissions of government employees acting within the scope of their office of employment.[23] Clearly, a primary purpose of the Act was to extend a cause of action to those who had been without a remedy.[24] An additional purpose was to remove the burden and expense of dealing with private bills of relief from Congress' shoulders by providing a judicial forum where injury might be compensated.[25]

According to the Act, liability for damages would be imposed on the federal government only in circumstances where a private citizen would be liable for such damage in accordance with the law of the place where the act or omission occurred.[26] Thus, if a private

22. Efforts to permit tort claims against the government began twenty-one years before the Federal Tort Claims Act was passed in 1946 with H.R. REP. No. 12178, 68th Cong., 2d Sess. (1925).

23. Section 410(a) of the Federal Tort Claims Act provides that District Courts:

> shall have exclusive jurisdiction to hear, determine, and render judgment on any claim against the United States, for money only . . . on account of damage to or loss of property or on account of 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 for such damage, loss, injury, or death in accordance with the law of the place where the act or omission occurred . . . the United States shall be liable in respect of such claims to the same claimants, in the same manner and to the same extent as a private individual under like circumstances.

28 U.S.C. § 931 (1947).

24. Feres v. United States, 340 U.S. 135, 140 (1951).

25. Considering the cost and effort to resolve private bills of relief, there is no question that the express intent of Congress was to substitute suits under the Act for private bills of relief. *See* S. REP. No. 1400, 79th Cong., 2d Sess. 29 (1946). This would allow Congress more time to devote to major public issues. United States v. Yellow Cab Co., 340 U.S. 543, 550 (1951). Indeed, the task of screening private bills of relief was substantial. *See* 74 CONG. REC. 6868 (1939). Between the 68th and 78th Congress, an average of 2,000 private bills of relief were considered in each Congressional session. Roughly 20% of these claims for relief were enacted. H.R. REP. No. 1287, 79th Cong., 1st Sess. 101 (1946). The cost of enacting a private claim bill into law during the 75th Congress was $139, and the average cost of considering a private bill (not enacted) was $34.56. These figures only cover the printing costs. *See Hearings Before a Subcommittee of the Senate Judiciary Committee on S.B. 2690,* 76th Cong., 3d Sess. 28 (1940). To ensure transfer of private claims to the courts, Congress prohibited introduction of private bills for claims cognizable under the Federal Tort Claims Act. *See* 2 U.S.C. § 190(g) (1976).

26. 28 U.S.C. § 1346(2)(b) (1976).

citizen would be liable under state law for his tortious act, then the federal government would be liable if it committed the same tortious act. However, Congress did not intend this liability to be all-encompassing; consequently, it qualified the Act's general waiver of immunity by excepting from the scope of the Act claims arising from certain government activity such as transmission of postal matters, assessment of taxes, and imposition of quarantine.[27] These and other activities are included in Section 421 of the Act, which enumerates twelve exceptions to this otherwise total waiver of sovereign immunity.[28]

Among the twelve exceptions expressed in the Act, only those claims arising out of the combatant activities during time of war[29] and claims arising in foreign countries[30] explicitly apply to claims by military personnel. Accordingly, it appears from the fact of the Act that the federal government is insulated from liability to its military personnel only when they are injured during combat or while in a foreign country. Aside from these situations, the Act does not purport to bar servicemen's claims which arise out of service-related activities.

SUPREME COURT INTERPRETATIONS OF THE ACT

Notwithstanding the apparent clarity of the Act regarding claims of military personnel, some courts had difficulty in accepting the notion that Congress would allow a cause of action for injuries received by military personnel.[31] Consequently, early decisions which interpreted the Act conflicted as to whether Congress actually intended to waive immunity from liability for injuries to military personnel.[32] This incongruity of lower court interpretations made the issue of a serviceman's rights under the Federal Tort Claims Act appropriate for review by the Supreme Court.

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27. 28 U.S.C. § 2680(b), (c), (f) (1976).

28. These twelve exceptions to the scope of the Act's waiver of immunity are found at 28 U.S.C. § 2680 (1976). *See* note 4 *supra*. Other limitations included in the Act prohibit the assessment of interest prior to judgment and punitive damages against the United States. 28 U.S.C. § 2674 (1976).

29. 28 U.S.C. § 2680(j) (1976).

30. 28 U.S.C. § 2680(k) (1976).

31. *See, e.g.*, Burkhardt v. United States, 165 F.2d 869 (4th Cir. 1947); Perucki v. United States, 80 F. Supp. 959 (M.D. Pa. 1948). These decisions denied servicemen recovery under the Act.

32. *Compare* Burkhardt v. United States, 165 F.2d 869 (4th Cir. 1947), and Perucki v. United States, 80 F. Supp. 959 (M.D. Pa. 1948) (denying a cause of action), *with* Alanski v. Northwest Airlines, Inc., 77 F. Supp. 556 (D. Mont. 1948), and Samson v. United States, 79 F. Supp. 406 (S.D.N.Y. 1947) (recognizing a cause of action).

Brooks v. United States.

The case of *Brooks v. United States*[33] afforded the Supreme Court its first opportunity to deal with the applicability of the FTCA to claims for injuries to military personnel. In *Brooks*, two soldiers on peacetime leave were driving along a state highway in a privately-owned automobile. Their auto was struck by a negligently-driven Army truck resulting in the death of one of the soldiers and serious injuries to the other. The District Court denied the sovereign immunity-based motion for dismissal and entered judgment for plaintiffs on a finding of negligence attributable to the government truck driver. The Fourth Circuit reversed, holding that the special relationship between a soldier and his government gave rise to an implied exception in the Act which excluded servicemen from the purview of the Act.[34] The court premised its decision on the ground that servicemen were precluded from bringing claims under the Federal Tort Claims Act because their existing benefits granted by Congress provided an exclusive and comprehensive remedy for service-related injuries.[35] Chief Justice Parker rendered a vigorous dissent, arguing that the clear language of the statute does not preclude claims of servicemen.[36] According to Justice Parker, neither accepted tools of statutory construction nor the legislative history of the Act supported the implied exception constructed by the Fourth Circuit majority.[37]

The Supreme Court adopted Justice Parker's dissent, reversing the decision of the Court of Appeals.[38] Noting that the *Brooks* decision was significant for "its importance as an interpretation of the Act,"[39] the Court held that members of the armed forces could bring suit under the FTCA for service-related injuries.[40] Writing for the majority, Mr. Justice Murphy stated:

> [W]e are not persuaded that "any claim" means any claim but that of servicemen. . . . It [is] clear to us that Congress knew what it was about when it used the term "any claim." It would be absurd to believe that Congress did

33. 337 U.S. 49 (1948) (Frankfurter, J., and Douglas, J., dissenting).
34. Brooks v. United States, 169 F.2d 840, 846 (4th Cir.) (Parker, C.J., dissenting), *rev'd*, 337 U.S. 49 (1948).
35. *Id.*
36. *Id.* at 847.
37. *Id.* at 846-51.
38. Brooks v. United States, 337 U.S. 49, 51.
39. *Id.*
40. *Id.* at 54.

> not have servicemen in mind in 1946, when this statute was passed. The overseas and combatant activities exceptions make this plain.[41]

In addition, the Court found that the system of benefits available to plaintiffs was not a bar to the cause of action. Since neither veteran's benefit laws nor the Federal Tort Claims Act included exclusive remedy or election of remedy clauses, the Court did not impose either remedy upon plaintiffs.[42] Instead, the Court remanded the case to the Court of Appeals with directions to consider reducing the damages awarded under the Act by the benefits received from the Veterans' Administration. Thus, the Supreme Court in *Brooks* held that non-service related injuries to military personnel are compensable under the Federal Tort Claims Act.[43]

The *Brooks* decision seemingly dealt fairly with the plaintiffs involved. However, despite the Court's explicit reference to the comprehensive nature of its decision,[44] the Court abstained from providing future litigants with a definitive statement of the serviceman's right to sue under the FTCA. A major factor underlying the decision was the fact that the plaintiffs' injuries were in no way related to their army careers or to their service "except in the sense that all human events depend upon what has already transpired."[45] Had these plaintiffs' injuries been related to their military service, the Court intimated that a different outcome might have resulted.[46] But the Court refrained from expressly stating the nature of that result. Thus the unresolved question of possible limitations on a serviceman's rights under the Federal Tort Claims Act,[47] was left for the future determination of the "wholly different case" of service-related injuries.[48]

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41. *Id.* at 55.

42. *Id.* at 52.

43. *Id.* at 54.

44. "We brought this case here on certiorari because of its importance as an interpretation of the (Federal Tort Claims) Act." *Id.* at 50.

45. *Id.* at 52.

46. *Id.*

47. In this regard, the Court cited Dobson v. United States, 27 F.2d 807 (2d Cir. 1928), Bradey v. United States, 151 F.2d 742 (2d Cir. 1946), Jefferson v. United States, 77 F. Supp. 706 (D.C. Md. 1948), and 31 U.S.C. § 223b (1943), as relevant to the distinction between injuries which do and do not occur incident to service. Brooks v. United States, 337 U.S. at 52. However, the situations in Brady and Dobson are expressly excluded from the Act while § 223b was repealed by the Act. *See* 28 U.S.C. § 2680(d) (1976); and Legislative Reform Act of 1946, 60 Stat. 831, 824 (1946).

48. Brooks v. United States, 337 U.S. 49, 52 (1948).

Feres v. United States

Only one year after the *Brooks* decision, the Supreme Court in *Feres v. United States*[49] was called upon to complete the statutory interpretation it had left open in *Brooks*. *Feres* was the consolidation of three cases.[50] In each of the cases servicemen suffered injuries for which they sought recovery under the FTCA.[51] The various circuits which had considered these cases were not in agreement as to the Act's applicability to the claims.

Second and Fourth Circuit decisions denied recovery under the Act but disagreed as to the underlying rationale. In the Second Circuit, the Court of Appeals reasoned that Congress did not intend to extend remedies of the FTCA to servicemen since the Act did not expressly provide for such remedies.[52] This court concluded that soldiers and their survivors were limited to statutory benefits already provided by Congress and were therefore precluded from recovery under FTCA.[53] Meanwhile, the Fourth Circuit decision denied recovery on the basis of an implied exception to the Act.[54] According to this court, the implied exception was supported by the fact that servicemen's claims would disrupt the special soldier/government relationship and because adequate remedies were already available through statutory benefits.[55]

Contrary to the Second and Fourth Circuit decisions, the Tenth Circuit held that plaintiff had stated a cause of action because the claim did not fall within one of the Act's twelve exceptions.[56] According to the Tenth Circuit, it was apparent that Congress intended to

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49. 340 U.S. 135 (1951).

50. Feres v. United States, 177 F.2d 535 (2d Cir. 1949), *aff'd*, 340 U.S. 135 (1951); Griggs v. United States, 178 F.2d 1 (10th Cir. 1949), *rev'd sub. nom.* Feres v. United States, 340 U.S. 135 (1950); Jefferson v. United States, 178 F.2d 518 (4th Cir. 1949), *aff'd sub nom.* Feres v. United States, 340 U.S. 135 (1950).

51. In *Feres* a serviceman on active duty died when the barracks in which he was sleeping caught fire. His executrix claimed that the United States knew or should have known the barracks were unsafe and therefore it was negligent to quarter men in them. The *Griggs* and *Jefferson* cases involved injuries and death resulting from the alleged negligence of Army surgeons. In both of these cases, the servicemen were on active duty during the operations.

52. Feres v. United States, 177 F. 2d 535, 537 (2d Cir. 1949), *aff'd*, 340 U.S. 135 (1950).

53. *Id.*

54. Jefferson v. United States, 77 F. Supp. 706, 714 (D. Md.), *aff'd*, 178 F.2d 518 (4th Cir. 1949), *aff'd sub. nom.* Feres v. United States, 340 U.S. 135 (1951).

55. *Id.*

56. Griggs v. United States, 178 F.2d 1 (10th Cir. 1949), *rev'd sub. nom.* Feres v. United States, 340 U.S. 135 (1951).

establish a cause of action for servicemen, because Congress had deliberately omitted earlier proposed provisions which expressly excluded claims of military personnel.[57] This conflict among the lower courts made Supreme Court review appropriate.

a) The Supreme Court Denies Recovery Due to Lack of Precedent

Common to each case is the fact that the peacetime servicemen, while on active duty and not on furlough, sustained injury in the United States due to the negligence of others in the armed forces who were acting in the scope of their employment. The only issue of law was whether the Federal Tort Claims Act extends its remedy to servicemen who sustain service-related injuries.[58] In an attempt to fit the Act into the entire system of remedies against the government,[59] the Court determined that claims of servicemen against the government which "arise out of or are in the course of activity incident to service" are not recognizable in law.[60]

Foundation for this holding rests primarily on the Court's interpretation of the test for compensable claims delineated in Section 410(a) of the Act. According to Section 410(a), "the United States shall be liable . . . in the same manner and to the same extent as a private individual under like circumstances." [61] This language can be given two possible interpretations. A literal interpretation would result in government liability co-extensive with that of any private individual, while a restrictive interpretation would equate government tort liability to that of state and local authorities.[62] The *Feres* Court recognized the latter, more restrictive interpretation of the statutory language. It thereby denied plaintiffs' cause of action because of the absence of analogous or parallel liability on the part of a state or local government.[63]

57. *Id.* at 3.

58. Feres v. United States, 340 U.S. 135, 138 (1951).

59. *Id.* at 139.

60. *Id.* at 148.

61. 28 U.S.C. § 931 (1947).

62. These governmental authorities are regarded as having a dual character. On the one hand they are political subdivisions endowed with governmental powers and charged with governmental functions and responsibilities. On the other they are corporate bodies, capable of much the same acts as private corporations, and having interests and relations not shared by the state at large. Simultaneously they can be both a corporate entity and a government. The law has attempted to distinguish between the two functions holding that insofar as they represent the state in their "governmental" capacity, they share its immunity from tort liability: but when functioning as a corporate or private entity, they may be held liable. *See generally*, W. PROSSER, HANDBOOK ON THE LAW OF TORTS, § 131 at 971-75 (4th ed. 1971).

63. Feres v. United States, 340 U.S. 135, 142 (1951).

This conclusion is a consequence of a two-pronged test which the *Feres* Court derived from the above-quoted statutory language. The first prong can be characterized as the "parallel liability" aspect of the test, while the second prong can be described as the "under like circumstances" aspect. Under the "two-pronged" test, plaintiff must first show liability of a private individual paralleling that asserted against the United States. Then he must show that his liability continues to parallel private liability under "like circumstances" as the claim asserted. Plaintiffs must fulfill both aspects of this test in order to establish government liability.

Since no American law has ever permitted recovery for negligence by a soldier against his superiors, the plaintiffs in *Feres* failed to show liability of a private individual paralleling their claim against the government. Additionally, plaintiffs did not satisfy the "under like circumstances" aspect of the test. According to the Court, this is because no private individual has the power to raise an army which exercises the high degree of control over persons as the government exercises over its servicemen. Consequently, there cannot be liability "under like circumstances" for there are no circumstances similar to the soldier/government relationship.[64] Since the Court believed that the Act was not meant to "visit the government with novel and unprecedented liabilities,"[65] plaintiff's failure to show analogous liability resulted in the denial of plaintiff's cause of action.[66]

In support of the finding that the plaintiffs failed to show analogous private liability, the Court cited *Goldstein v. State.*[67] In *Goldstein*, plaintiffs sought damages from the state growing out of the death of their son, a member of the state militia. His death resulted from the negligence of fellow militiamen. Recovery under

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64. The Court explains this conclusion in the following language:

> We know of no American law which ever has permitted a soldier to recover for negligence, against either his superior officers or the government he is serving. Nor is there any liability "under like circumstances," for no private individual has power to conscript or mobilize a private army with such authorities over persons as the Government vests in echelons of command.

Id. at 142-43.

65. *Id.* The Court did not give any support to this proposition. Considering, however, the existence of congressionally-enacted compensation schemes for servicemen and private bills of relief by servicemen, the novelty and want of precedent for recovery by servicemen can be questioned.

66. *Id.* at 142.

67. 281 N.Y. 396, 24 N.E.2d 97 (1939), *cited in* Feres v. United States, 340 U.S. 135, 142 (1951).

the state statute waiving sovereign immunity was denied because the tortfeasors were "not officers and employees" within the meaning of the statute.[68] Since the statute had not waived immunity from liability for torts committed by these tortfeasors, the state could not be held accountable for their tortious acts. In light of this holding, *Goldstein* seems inapplicable to the *Feres* case because Section 402(b) of the Federal Tort Claims Act specifically includes the *Feres* tortfeasors in the scope of the government's assumption of liability.[69]

Even if the Supreme Court's reading of *Goldstein* was correct, the Court wholly failed to inquire into the validity of the proposition that no right of recovery had ever been accorded a serviceman-plaintiff against his employing governmental unit. Instead, the Court's analysis rests on the syllogism that since no previous law had ever allowed recovery, there could be no present law allowing recovery. While such reasoning exhibits great respect for the doctrine of *stare decisis*, that doctrine has never been the sole guiding force which binds the law.[70] The fact that no previous law had recognized the recovery sought by plaintiffs does not persuasively lead to the conclusion that servicemen should be denied a cause of action under the FTCA.

From a logical standpoint, the two-pronged test imposed on plaintiffs was inappropriate for yet another reason. The requirement that plaintiffs must show previous laws permitting recovery demonstrates a possible confusion of the issues in *Feres*. The issue was not whether there was *a* law permitting plaintiff's recovery, but rather whether the Federal Tort Claims Act is *the* law permitting recovery. By adhering to questionable logic and acting under a mistake as to the issue in *Feres*, the Court denied recovery for want of analogous private liability.

If the status of the plaintiff and the defendant in *Feres* were ignored, there would be the analogous private liability of doctor/patient and landlord/tenant. However, the Court rejected this proposi-

68. Goldstein v. State, 281 N.Y. at 399, 24 N.E.2d at 100.

69. According to the FTCA, the United States assumes liability for the tortious acts of its employees who are acting in the scope of their employment. 28 U.S.C. § 1346(b) (1976). The Act defines employees as "officers or employees of any Federal Agency, *member of the military or naval forces* of the United States, and persons acting on behalf of a Federal Agency in an official capacity, temporarily or permanently in the service of the United States, whether with or without compensation." 28 U.S.C. § 2671 (1976) (emphasis added).

70. Taken to its logical conclusion, such reasoning would continue: since no present law allows recovery, therefore, no future law can allow recovery. This, of course, would mean that all legal development would be frozen *ad infinitum*.

tion, stating that the liability assumed by the government is created by "all the circumstances," not just a few of the circumstances.[71] Strictly speaking, the status of the parties is "a circumstance." But the question arises as to whether Congress intended the government's status to be strictly construed as "a circumstance."[72] Had Congress intended the government to retain sovereign status, it seems reasonable that Congress would not leave this to implication. Rather, the Act would have been drafted to state that "the United States shall be liable in the same manner and to the same extent as a 'sovereign' under like circumstances."[73]

If Congress had intended the Act to be interpreted in this manner, it would have little effect as a waiver of immunity because of the other provisions in Section 410(a). Section 410(a) provides that liability be determined by the law of the place where the act occurred.[74] When the Act was passed, only four states had waived sovereign immunity.[75] If Congress intended that the government's sovereign

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71. Feres v. United States, 340 U.S. at 142.

72. It is interesting to note that the Act prescribes that the United States shall be liable under like circumstances. The Act does *not* say "all the circumstances." 28 U.S.C. § 2674 (1976). Recognizing the Court's insertion of the word "all," *Feres* can be criticized for not dealing with the issues of Congressional intent or whether the Federal Tort Claims Act should be construed strictly or liberally. However, one year before *Feres*, the Court in United States v. Yellow Cab Co., 340 U.S. 543 (1950) recognized that:

> [T]he Federal Tort Claims Act waives the governments' immunity from suit in sweeping language. It unquestionably waives it in favor of an injured person.
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> . . . .
>
> . . . It suggests no reason for reading into it fine distinctions between various types of claims.
>
> . . . .
>
> . . . Since the Act represents a general trend toward increasing the scope of waiver by the United States of its sovereign immunity, it is uncontestable to whittle it down by refinements.
>
> . . . .
>
> . . . A sense of justice has brought a progressive relaxation by legislative enactments of the reign of the community role . . . . When authority is given, it is liberally construed.

Id. at 547-55.

73. This is a reasonable conclusion since after over 20 years of deliberations regarding the Act, it seems unlikely that Congress would risk a contrary judicial interpretation. *See* note 22 *supra*.

74. 28 U.S.C. § 1402(a)(B) (1976).

75. When the Federal Tort Claims Act was passed, only Arizona, California, Illinois, and New York had relaxed, to differing degrees, the rigors of sovereign immunity. 1912 Arizona Laws, c. 59; 1893 Cal. Stat. c. 45; 1917 Ill. Laws c. 325; 1929 N.Y. Laws, c. 467. Congress recognized that these few states were the only ones to relax sovereign immunity. *See* H.R. REP. No. 1287, 79th Cong., 1st Sess. 3 (1946).

status be considered "a circumstance," then the Act would bar suits by residents in 44 of the 48 states. This is because "parallel liability" and "like circumstances" would exist only in those four states which waived sovereign immunity.

Aside from the apparent absurdity of this conclusion, such a construction of the Act would be inconsistent with the Act's fundamental purpose of eliminating the burden of private bills of relief in Congress.[76] Residents of the forty-four states not covered by the Act would have to seek relief through private bills in Congress as if the Act were not passed. Recognizing that the Act would be substantially ineffective as a waiver of sovereign immunity if interpreted as equating federal government liability to that of state and local authorities and considering that such an interpretation would result in frustration of congressional purpose, it follows that Congress did not intend for sovereign status to be considered "a circumstance" when determining whether the government is liable under the FTCA.

Support for this conclusion is found in other language contained in the Act. Aside from prescribing the test of allowable claims, Section 410(a) of the Act confers exclusive jurisdiction upon the district courts to render judgment on any claim against the United States "under circumstances *where the United States, if a private person,* would be liable."[77] In other words, if a private person were liable for a tortious act, so too, the government would be held liable for the same tortious act. Essentially, the government steps into the shoes of a private individual for purposes of determining liability. This interpretation eliminates the absurd results and frustration of congressional purpose which would follow from the *Feres* interpretation equating federal government liability with that of a state or local government.

Other Supreme Court decisions have interpreted the Act directly contrary to the interpretation in *Feres*, which retained sovereign status as "a circumstance" to be considered. One year before the *Feres* decision, the Supreme Court in *United States v. Aetna Casualty Company*[78] recognized that the language of the Act indicates a congressional intent that the United States be treated as if it were a private person for torts committed by its employees.[79]

76. *See* note 25 *supra*.
77. 28 U.S.C. § 1346(b) (1976) (emphasis added).
78. 338 U.S. 366 (1949).
79. *Id.* at 370.

Five years after the *Feres* decision, the Court in *Indian Towing Co. v. United States*[80] reaffirmed the *Aetna Casualty* interpretation of the government's status under the Act. Emphasizing that chaos would develop if the statute were read as imposing liability similar to that of state and local governments, the Court explained that such an interpretation "would thus push the courts into the 'non-governmental'/'governmental' quagmire that has long plagued the law of municipal corporations. The Federal Tort Claims Act . . . is not self-defeating by covertly embedding the casuistries of municipal liability for torts."[81] It is clear that *Feres'* restrictive interpretation of the government's status under the Act cannot be supported by Supreme Court decisions which interpreted the Act.

Furthermore, it is clear that federal government liability is no longer restricted to circumstances in which government bodies have been traditionally responsible for misconduct of their employees.[82] Although the *Feres* Court asserted that the Act was not meant to extend to novel and unprecedented forms of liability, later Supreme Court decisions have stated this is the very purpose of the Act.[83] It appears, correspondingly, that the two-pronged test, which limits government liability to previously-recognized forms of action against governmental bodies and retains the government's sovereign status as "a circumstance," was inappropriately used to reach the result in

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80. 350 U.S. 61 (1955).

81. *Id.* at 65. *Accord,* Rayonier v. United States, 352 U.S. 315 (1957). Although neither *Aetna Casualty* nor *Indian Towing* deal with a serviceman's right under the Act, it seems appropriate that the sovereign status of the United States as a defendant would remain the same irrespective of a plaintiff's status as a serviceman or a civilian. Nothing in the Act or Supreme Court decisions interpreting the Act leads to the conclusion that the government's sovereign status should vanish in a suit by a civilian, but reappear in a suit by a non-civilian. *See* note 82 *infra.*

82. In Rayonier v. United States, 352 U.S. 315 (1957), the Supreme Court rejected the interpretation of the Act which would impose government liability only under circumstances where government bodies have been traditionally held responsible. The Court explained that the test for FTCA liability is whether a private person would be liable for similar negligence under the laws of the state where the negligent act occurred. *Id.* at 319. Accordingly, United States' liability is not restricted to that of a municipal corporation. "[T]he injured plaintiff cannot be deprived of his rights under the Act by resort to an alleged distinction imported from the law of municipal corporations." *Id. Accord,* United States v. Muniz, 374 U.S. 150, 159 (1963); Indian Towing Co. v. United States, 350 U.S. 561 (1955).

83. "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 government liability.*" Rayonier v. United States, 352 U.S. 315, 319 (1957) (emphasis added). *Accord,* United States v. Muniz, 374 U.S. 150 (1963); Indian Towing Co. v. United States, 350 U.S. 561 (1955).

Feres.[84] Thus, the decision in *Feres* can be criticized for placing reliance on this test in order to deny a cause of action for servicemen.

b) Other Arguments Used by the Feres Court to Deny Recovery.

An examination of several other factors articulated by the Court as support for the *Feres* decision will reveal whether the decision is justified despite the inappropriateness of its two-pronged test.[85] The first factor asserted by the Court is the significance of the Act's provision that "the law of the place where the act or omission occurred" governs the consequent FTCA liability.[86] According to *Feres*, this provision may be fair enough when the military claimant is not on duty and is thereby free to choose his jurisdiction; but such is not the case for a claimant on active duty because he has no control over where he serves.[87] Due to varying liability provisions in the several states, the Court concluded that it would not be rational to make a serviceman's recovery dependent on a geographic factor over which he has no control.[88] This conclusion fails to recognize that application of the state law in FTCA cases is no more difficult nor

84. The Supreme Court may recently have recognized the inappropriateness of the argument that the government retains its sovereign status in suits by servicemen. This is indicated by the Supreme Court opinion in Stencel Aero Eng'r Corp. v. United States, 431 U.S. 666 (1977), which lists the factors leading to the *Feres* decision, but omits the key argument in the *Feres* decision that the government retains sovereign status.

85. These factors which are used by the Court to support the *Feres* decision include: the disparity of a serviceman's rights due to divergent states' laws, the "distinctly federal character" of a relationship between the government and members of the armed forces, the failure of Congress in the Federal Tort Claims Act to provide for adjustment of the FTCA remedy and veteran benefits, and the existence of a simple, certain, and uniform compensation system for injured servicemen. Feres v. United States, 340 U.S. at 142-45. Since each of these matters was before the Court in *Brooks*, the *Feres* Court distinguished its holding from *Brooks* explaining that the injury in *Brooks* "did not arise out of or in the course of military duty." *Id.* at 146. It is questionable whether this factual distinction between *Feres* and *Brooks* persuasively justifies the different results. Furthermore, *Feres* does not explain why this distinction should make a difference.

86. Feres v. United States 340 U.S. at 142-43. This provision in the Act is found at 28 U.S.C. § 1346(b) (1976).

87. Feres v. United States, 340 U.S. at 142-43.

88. The *Feres* Court explains that "it would hardly be a rational plan for providing for those disabled in service by others in service to leave them dependent upon geographic considerations over which they have no control and to laws which fluctuate in existence and value." *Id.* But, the purpose of the Act is not to provide for disabled servicemen. Rather, the Act provides for an injured person to recover according to state law. Consequently, the Court's argument seems inappropriate to the decision to deny servicemen a cause of action. *See* note 89 *infra*.

irrational where there is a service-related injury than it is in cases where the claimant is a government employee or a serviceman seeking recovery for non-service related injuries.[89] Variations in state law do not of necessity justify the denial of a serviceman's cause of action.

Certainly, a serviceman's right to recovery may be affected by differences in state law over which he has no control. Denying recovery on this basis seems unjustified when contrasted with the rights under the Act which are accorded federal prisoners. Although these prisoners have no control over where they are confined and provide no societal benefits, the Supreme Court has recognized the right of federal prisoners to recover under the Act.[90]

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89. Justices Marshall and Brennan recognized that while the armed services perform a 'unique, nationwide function' the same can be said of the Bureau of the Census, the Bureau of Immigration and Naturalization, the Federal Bureau of Investigation, and other agencies of the federal government. Like the military, these agencies have personnel and equipment in all parts of the country. Nevertheless, Congress has recognized the rights of these private individuals to be governed by the law of the place where the act occurred. Stencil Aero Eng'r Corp. v. United States, 431 U.S. 666, 675 (1977) (Marshall, J., and Brennan, J., dissenting). It is unlikely that the government will act differently towards a civilian than a serviceman solely because only the former can sue under the Act. Further, it must be noted that reasonable care under the circumstances is the universal standard for determining negligence. While the circumstances may change from base to base, or state to state, the standard remains the same. Of course, the impact of contributory negligence, assumption of risk and other negligence defense may vary according to state law. However, it must be recognized that a serviceman is imputed knowledge of and is subject to these defenses whether the serviceman sues a civilian or the government. Since variations of the law do not bar suits or create extreme hardships when a serviceman sues a civilian, such variation should not bar a suit by a serviceman against his government.

90. It would seem somewhat contradictory that prisoners in federal confinement are accorded greater rights under the FTCA than the rights granted to free military personnel who are serving their country. Yet the Supreme Court in Muniz v. United States, 374 U.S. 150 (1963) unanimously determined that a federal prisoner has a right of recovery under the Act for injuries inflicted during federal confinement. This conclusion was the product of the 'plain meaning' rule and was supported by the Court's inquiry in the intent of Congress in passing the Federal Tort Claims Act. The *Muniz* decision significantly related to *Feres* because the Supreme Court in *Muniz* granted certiorari specifically for importance of the decision as an interpretation of the FTCA, *id.* at 151, and because the lower court decisions underlying *Muniz* reached conflicting results in reliance on *Feres*. Consequently, the *Muniz* analysis of Congressional intent is relevant to a determination of the validity of the *Feres* decision and its rationale *vis-à-vis* the intent of Congress. If the analysis in *Muniz* was applied for servicemen, it would support the recognition of servicemen's causes of action under the Act. This conclusion is contrary to that in *Feres*, and although the *Muniz* decision discusses *Feres*, the Court does not distinguish between the two cases. If the Supreme Court again addresses the issue of servicemen's rights under the Act, *Muniz* will be strong precedent for allowing a cause of action to military personnel.

Even if a claimant could control his location, it seems incomprehensible that he would choose his habitat in expectation of a federal tort in order thereby to limit the jurisdiction. Whether the Court's suggestion to this effect is correct,[91] in the final analysis it seems that a non-uniform right to FTCA recovery is better than no right at all.[92]

Aside from holding that a uniform denial of recovery is preferable, the Court also supported its decision by pointing to the "distinctively federal character" of the relationship between the government and members of its armed forces.[93] According to *Feres*, this relationship should be governed only by federal law, not by state law as provided by the Act. *United States v. Standard Oil Co.*[94] is cited in *Feres* as supporting the "distinctively federal character," of this government/soldier relationship.[95] The question raised in *Standard Oil* was whether the government has indemnity rights to recover losses incurred by virtue of injuries inflicted upon a serviceman by a third party. Denying the government's right to indemnification, the Court emphasized the uniqueness of the government/soldier relationship.[96] Despite the precedential value of *Standard Oil* in the indemification context, this decision seems inappropriate where, as in *Feres*, a serviceman seeks recovery against the government, not for indemnification, but rather for injuries caused directly by the government.[97]

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91. "[T]his perhaps is fair enough when the claimant is not on duty or is free to choose his own habitat and thereby limit the jurisdiction in which it will be possible for federal activities to cause him injury." Feres v. United States 340 U.S. at 142-43. Servicemen are not the only potential claimants who would find it difficult to choose a jurisdiction which provides favorable Federal Tort Claims Act recovery. The same is true of the poor, aged, unskilled and mentally incompetent who have the right to choose their jurisdiction, but, practically speaking, are unable to exercise that right. Thus, recognition of the varied results arising from different state laws is a strong argument for the application of Federal Common Law rather than support for the denial of a serviceman's cause of action.

92. United States v. Muniz, 374 U.S. 150, 162 (1963).

93. Feres v. United States, 340 U.S. at 143-44.

94. 332 U.S. 310 (1947).

95. *Id.* at 305.

96. "We know of no good reason why the Government right to be indemnified in these circumstances . . . should vary in accordance with the different ruling on the several states. . . . " Standard Oil Co. v. United States, 332 U.S. at 310.

97. The precedential value of *Standard Oil* is further weakened by Congressional passage of the Medical Care Recovery Act, 42 U.S.C. § 2651 (1976), which recognizes the right of the government to be indemnified for medical expenses incurred as a result of an injury inflicted upon a serviceman by a third-party tortfeasor. *Standard Oil* remains valid precedent for the denial of indemnification for the value of lost services of the injured serviceman, since the statute does not recognize this recovery. *Id.*

Standard Oil is also quoted in *Feres* for the proposition that the legal relations between servicemen and the government are "derived from federal sources and governed by federal authority."[98] But, the FTCA is federal authority. In Section 410(a) of the Act, Congress explicitly assimilated into federal law the substantive rules of law of the several states.[99] Thus, even if *Standard Oil* is accepted for the proposition that the government/soldier relationship is distinctively federal and governed only by federal law, allowing recovery by servicemen under the FTCA would not disturb this relationship. This is because the FTCA *is* the federal authority governing the legal relations of the parties.[100] Considering the questionable precedential value of *Standard Oil* and the FTCA's lack of impact on the federal character of the government/soldier relationship, it can concluded that neither of these factors convincingly supports the denial of recovery in *Feres*.

After citing *Standard Oil*, the *Feres* Court again asserted that no federal law recognizes a serviceman's recovery against the government.[101] While this may be true, proposing the syllogism that 'no law recognized recovery therefore no law can recognize recovery' is unacceptable logic. The issue in *Feres* is whether the FTCA recognizes recovery. Nonetheless, the Court attempted to support the syllogistic conclusion by noting that the Military Personnel Claims Act,[102] which permitted recovery for servicemen in some circumstances, specifically excluded claims "incident to service."[103] Although this statute did limit the scope of servicemen's compensable claims, it does not support the position that no federal law permits recovery against the government by a serviceman.

As noted by the Court in *Feres*, the Military Personnel Claims Act was repealed by the FTCA and has been superceded by Section 2672.[104] This statute provides for administrative settlement of "any claim" under one thousand dollars.[105] It does not limit its scope to

98. Feres v. United States, 340 U.S. at 144 (citing Standard Oil v. United States, 332 U.S. at 305, 306).

99. 28 U.S.C. § 1346(b) (1976).

100. It should be noted that if a special, distinctly federal character of the government/soldier relationship exists, such a relation existed at the time of *Brooks*, though it did not bar recovery by the servicemen in *Brooks*. Brooks v. United States, 374 U.S. at 54.

101. Feres v. United States, 340 U.S. at 144.

102. *Id.*

103. 28 U.S.C. § 223(b), *superseded by* 28 U.S.C. § 2672 (1976).

104. Feres v. United States, 340 U.S. at 144. *See* 28 U.S.C. § 223(b), superseded by 28 U.S.C. § 2672 (1976).

105. 28 U.S.C. § 2672 (1976).

the claims of military personnel, and furthermore, Section 2672 does not contain any language excluding claims "incident to service."[106] Therefore, rather than supporting the Court's position, this section undermines it because servicemen may avail themselves of its remedies. Additionally, if the Military Personnel Claims Act indicates a congressional policy of not recognizing certain claims of military personnel, its repeal and supersession by Section 2672 arguably indicates a reversal of the congressional policy which previously barred claims for service-related injuries.[107]

In deciding that claims for service-related injuries were beyond the scope of the FTCA, the Court also attributed some significance to enactments by Congress which provide systems of simple, certain, and uniform compensation of servicemen's injuries.[108] Since Congress provided a pre-existing system of compensation, the Court concluded that Congress did not intend servicemen to be covered by the FTCA.[109] Given this rationale, servicemen would be precluded from FTCA recovery in virtually all circumstances, because a serviceman is entitled to receive compensation benefits regardless of whether his injury was incident to service.[110] Since the system of

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106. *Id.*

107. Title 28 U.S.C. § 2672 was passed under the auspices of Section 403(a) of the FTCA. If Congress intended 28 U.S.C, § 2672 to apply to servicemen but did not intend section 410(a) of the Act equally to apply, one would expect Congress would have explicitly excluded servicemen from Section 410(a) of the Act.

108. Feres v. United States 340 U.S. at 145.

109. *Id.*

110. Servicemen are covered by Veterans Administration benefits at all times unless the injury

1) occurred under circumstances indicating the presence of the serviceman's misconduct or willful neglect and it is established by a preponderance of evidence that such misconduct or willful neglect was the proximate cause of the disease or injury, or,

2) occurred while the serviceman was absent from duty without special permission, or,

3) occurred as a result of the serviceman's outside activities, not authorized or encouraged by the War Department, or

4) existed prior to the serviceman's current active service and was not aggravated by the service.

In all cases, there is a presumption that the injury occurred in the line of duty. ARMY REGULATIONS 40-1025, par. 63 (December 31, 1966).

Clearly then, if the rationale of *Feres* were accepted, few servicemen could recover under the FTCA. This is true whether or not the serviceman was injured incident to his service. Carried to its extreme, some veterans would not be allowed to recover under the Act because veterans injured in a government hospital are entitled to precisely the same disability benefits as if the injury had been inflicted while he was in the service.

> Where any veteran suffers . . . an injury or an aggravation of any existing injury, as the result of hospitalization or medical or surgical treat-

benefits is just as simple, certain and uniform when the serviceman's injury is not "incident to service" and hence compensable under the Act, it is not persuasive that the presence of a compensation system of necessity precludes recovery under the FTCA when the injury occurs "incident to service."[111]

In spite of the clarity of this conclusion, the *Feres* Court justifies its contrary conclusion by implying that the denial of a cause of action is really a benefit to plaintiffs. Because of a lack of time and money and the difficulty in procuring witnesses, the Court concludes that a soldier is at a peculiar disadvantage in litigation.[112] Further, the Court implies that a serviceman should be content with the amount of Veterans' Administration benefits since these recoveries compare extremely favorably with those provided by most workmen's compensation statutes.[113] It is true that like the workmen's compensation statutes, the Veterans' Benefit Act[114] establishes a statutory "no fault" compensation scheme providing compensation irrespective of government negligence. But, unlike many workmen's compensation plans the Veterans' Benefit Act does not explicitly provide that it is the serviceman's exclusive remedy against the government. While Congress could make the Veteran's

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ment . . . benefits . . . shall be awarded in the same manner as if such disability, aggravation, or death were service connected. . . .

48 Stat. 526, 38 U.S.C. § 501(a) (1976).

111. Supreme Court decisions prior to *Feres* do not support the conclusion that a serviceman cannot recover under the Tort Claims Act because of the existence of a veterans' compensation system which does not adjust possible concurrent remedies. In Dahn v. United States, 250 U.S. 421 (1922), although neither the Federal Employees Compensation Act, 5 U.S.C. § 757 (1976), nor the Federal Control Act, 40 Stat. 451 (1918), provided for an adjustment of remedies, the Supreme Court held that this injured plaintiff, who was a postal employee, had two remedies. Having chosen one, he could not pursue the other. In *Brooks*, the Court remanded the case for a possible reduction of FTCA damages by the amount payable to the serviceman under veterans' benefits laws. Whether the election of remedies in *Dahn* or the reduction of the damages in *Brooks* is the correct solution, it would have been more appropriate for the *Feres* Court to allow FTCA recovery under either precedent, rather than concluding that servicemen cannot recover under the Act because it does not provide for adjustment of remedies.

112. Feres v. United States, 340 U.S. at 145.

113. *Id.*

114. 10 U.S.C. § 903 (1976). This statute is not unique in its provision for no-fault compensation to servicemen. Additional no-fault compensation for dependents of military personnel is provided under 38 U.S.C. § 315 (1976). Similarly, 38 U.S.C. §§ 321-22, 417(a) (1976), provides compensation to the survivors of a veteran when he dies in the line of duty. Other death benefits are provided in 38 U.S.C. §§ 410-15, 416(b)(2), (c), (d), (e)(4), 417(b) (1976), while 38 U.S.C. § 541-43 provides persons with pensions who are survivors of disabled servicemen.

Benefit Act the exclusive remedy of servicemen, it did not make the Veterans' Benefit Act exclusive as it had done with comparable compensation programs for civilians.[115] Despite the simple and certain recovery the Veterans' Administration provides, a serviceman is probably capable of weighing the disadvantages of suit against the advantages of established statutory benefits. In any event, he should be afforded the opportunity to decide this issue for himself.[116]

Yet the holding in *Feres* denies servicemen the chance to choose between statutory compensation and civil remedy under the FTCA. This holding was the product of a two-pronged test and was bolstered by the considerations discussed above.[117] While this test and the considerations which follow do not convincingly support the *Feres* result, these matters also do not indicate the method of statutory interpretation used in *Feres*. It may be deduced that the *Feres* holding was rendered without reference to the congressional intent behind the Act. Maxims of statutory construction and the legislative history of an enactment are recognized as suggestive of legislative intent.[181] Inquiry into these indices aids in determining whether the *Feres* decision can be fortified by a strictly statutory interpretation, despite the questionable persuasiveness of the *Feres* rationale.

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115. For example, the Federal Employees Compensation Act, 5 U.S.C. § 757 (1976), and Federal Workmans' Compensation Act, 33 U.S.C. § 905 (1976), explicitly provide for the exclusivity of these recoveries.

116. This assertion is supported by *Brooks*, which allowed FTCA recovery concurrent with Veterans Administration benefits. Brooks v. United States 337 U.S. at 53. The *Brooks* Court noted that provision in the statutes for disability and gratuity payments for the benefit of servicemen "indicated no purpose to forbid tort actions under the Tort Claims Act." *Id.* at 53. Thus, the Court did not call FTCA recovery or Veterans' Administration benefits exclusive nor did it require the serviceman to elect his remedy. *Id.* This approach is consistent with the decision of the Supreme Court in *Brown v. United States*, 348 U.S. 110 (1954). Stating that Congress could make either remedy exclusive, the *Brown* Court concluded that Congress had given no indication that it made the right to veterans' compensation exclusive. *Id.* at 113. Therefore, receipt of disability payments does not constitute an election of remedies and does not preclude recovery under the FTCA. *Id.*

117. These matters include the disparity of a serviceman's rights due to divergent state laws, the distinctively different federal character of the government/soldier relationship, the failure of Congress to provide for the adjustment of the FTCA remedy *vis-à-vis* Veterans' Administration benefits, and the existence of simple, certain and uniform compensation system for injured servicemen. Feres v. United States, 340 U.S. at 142-45. Discussion of these matters is found at text accompanying notes 82-111 *supra*.

118. *See generally*, A. SUTHERLAND, STATUTORY CONSTRUCTION (3rd ed. 1943).

d The Feres Decision Ignores Congressional Intent.

One rule of statutory construction which the Court in *Feres* did not use is the 'plain meaning' rule.[119] If this rule is applied to Section 410 of FTCA, the question becomes whether the language, that the district court "shall have exclusive jurisdiction . . . on *any claim* against the United States, for money only,"[120] suggests something other than its plain meaning of allowing "any claim" for money damages. The Supreme Court in *Brooks* was not persuaded that "any claim" signified anything other than "any claim."[121] However, the *Feres* holding impliedly demonstrates that the Court in *Feres* found this statutory language unclear. This change in viewpoints is not explained in the *Feres* decision. Accordingly, the Supreme Court in *Feres* can be criticized for rendering a statutory interpretation inconsistent with that in *Brooks*.

A second principle of statutory construction not employed in *Feres* is the *expressio unius est exclusio alterius* principle.[122] According to this principle, a presumption arises that other appropriate matters not expressly included within the enactment are not to be

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119. Courts often express the view that where the language of a statute is clear and admits no more than one meaning, courts must give effect to its clear meaning, regardless of the court's view as to the wisdom of the meaning. *See, e.g.*, Osaka v. United States, 300 U.S. 98, 101 (1937); Camineti v. United States, 242 U.S. 470, 485 (1917); Mackenzie v. Hare, 239 U.S. 299, 308 (1915); Adams Express v. Kentucky, 238 U.S. 190, 199 (1915).

When the statute is clear, the duty of interpretation does not arise. But courts do not always follow the plain meaning of a statute. This may be because the meaning of the statute is not apparently unambiguous or because the plain meaning application leads to absurd or unjust results. *See, e.g.*, Haggar Co. v. Commissioner of Internal Revenue, 308 U.S. 389, 394 (1940); United States v. Katz, 171 U.S. 354, 357 (1926).

Although servicemen are not expressly mentioned in the Act as proper claimants, this is of little consequence. No classes of persons are expressly mentioned in the Act and certainly military personnel represent only one of a multitude of potential claimants. It would be unreasonable to expect Congress specifically to mention all potential claimants. Such a demand would greatly increase the length and technicality of the Act, and increase the possibility of an inadvertent Congressional omission of a class of intended claimants. This could result in an unintended bar to recovery according to the *expressio unius est exclusius alterius* doctrine. "Expression of one thing is the exclusion of another." BLACK'S LAW DICTIONARY 692 (4th ed. 1958). *See* notes 122-26 and accompanying text *infra*.

120. 28 U.S.C. § 931 (1947) (emphasis added).

121. "We are not persuaded that 'any claim' means 'any claim but that of a servceman'. . . . Congress knew what it was about when it used the term 'any class.'" Brooks v. United States, 337 U.S. at 51.

122. Accordingly, Section 421 of the Act is significant not only in its express exclusion, but also for its omission of other appropriate matters which could have been excluded.

considered within its scope.[123] Section 421 of the Act specifies twelve exceptions which do not bar claims by servicemen;[124] therefore, Congress must have intended to omit from the Act an exception relating to servicemen's claims.[125]

This proposition is bolstered by an examination of the legislative history of the FTCA.[126] Between 1925 and 1935, eighteen tort claims bills were introduced in Congress.[127] All but two of these bills contained exceptions denying recovery to military personnel.[128] However, as noted in *Brooks*, when the FTCA was passed, "the last

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123. This proposition was recognized by the Supreme Court prior to *Feres*. *See, e.g.*, George Moore Ice Cream Co., Inc. v. Rose, 289 U.S. 373, 377 (1933); Lapina v. Williams, 232 U.S. 78, 92 (1914). *See also* 2 A. SUTHERLAND, STATUTORY CONSTRUCTION § 4915 (3d ed. 1943).

124. These exceptions are enumerated in 28 U.S.C. § 2680 (1976). *See* note 4 *supra*.

125. In *Brooks*, the Court felt that the content of the exceptions alone makes it clear that Congress intentionally did not exclude claims of servicemen. Brooks v. United States 337 U.S. at 57. Since the Act was passed in 1946, during one of the greatest military demobilizations in history, the Court stated that inclusion of the overseas and combatant activities exception makes this conclusion plain. *Id.*

126. Although the legislative history of a statute is a primary extrinsic aid to its interpretation, other legislative proposals from which the statute develops are valuable tools in fixing its meaning. United States v. Muniz, 374 U.S. 150, 155 (1963); Apex Hosiery Co. v. Leader, 310 U.S. 469, 487 (1940).

127. H.R. REP. No. 12178, 68th Cong., 2d Sess. (1925); H.R. REP. No. 12179, 68th Cong., 2d Sess. (1925); S. REP., 69th Cong., 1st Sess. (1926); H.R. REP. No. 6716, 69th Cong., 1st Sess. (1926); H.R. REP. No. 8914, 69th Cong., 1st Sess. (1926); H.R. REP. No. 9285, 70th Cong., 1st Sess. (1927); S. REP. 4377, 71st Cong., 2d Sess. (1928); H.R. REP. No. 15428, 71st Cong., 3rd Sess. (1930); H.R. REP. No. 16429, 71st Cong., 3d Sess. (1930); H.R. REP. No. 17168, 71st Cong., 3d Sess. (1930); H.R. REP. No. 5065, 72nd Cong., 1st Sess. (1931); S. REP. 211, 72d Cong., 1st Sess. (1931); S. REP. 4567, 73rd Cong., 1st Sess. (1933); 73rd Cong., 1st Sess. (1933); H.R. REP. No. 129, 73rd Cong., 1st Sess. (1933); H.R. REP. No. 8561, 73rd Cong., 2d Sess. (1934); H.R. REP. No. 2028, 74th Cong., 1st Sess. (1935); S. REP. 1043, 74th Cong., 1st Sess. (1935).

128. The two bills which do not contain the exclusion of claims by military personnel are: H.R. REP. No. 8561, 73d Cong., 2d Sess. (1934), and H.R. REP. No. 12178, 68th Cong., 2d Sess. (1925). All other bills, *see* note 127 *supra*, contained thirteen exceptions which comprised Section 421 of the Federal Tort Claims Act, 28 U.S.C. § 2690 (1976). But the following exception was omitted from the present Act:

> (8) Any claim for which compensation is provided by the Federal Employees Compensation Act, as amended, or by the World War Veterans Act of 1924, as amended. The World War Veterans' Act, 43 Stat. 607, c.320, 38 U.S.C. 412 (1976), provided compensation for injury or death occurring in the first World War and was the only provision for compensation to military personnel.

H.R. REP. No. 181, 79th Cong., 1st Sess. (1945). The senate prints of this bill in various stages of its enactment, the committee reports, and the hearing fail to mention this exception or give any reason for the deletion of this exception.

vestige of exclusion of members of the armed forces disappeared."[129] Consideration of the combined effects of the *expressio unius* maxim and prior versions of the Act lends strong support toward the conclusion that the FTCA should have been construed as not excluding claims of servicemen.

Another factor not considered by *Feres* is the legislation which the Act replaced.[130] The FTCA expressly repealed the Military Personnel Claims Act[131] which authorized the Secretary of War to adjust claims of servicemen.[132] If the Military Personnel Claims Act indicated a congressional policy of refusing claims of military personnel for injuries sustained incident to service, then the repeal of the Military Personnel Claims Act arguably indicates a reversal of that congressional policy. Moreover, since Congress did away with servicemen's limited remedies in repealing the Military Personnel Claims Act, it is reasonable to conclude that Congress did so with the intent that rights provided by the Military Personnel Claims Act be superseded by rights granted under the FTCA.

This is a logical conclusion since otherwise the repeal of the Military Personnel Claims Act would not serve the express purposes of the FTCA. The purposes of the Act were to waive immunity and to relieve the burden of private bills of relief; the Act was not intended to foreclose existing remedies.[133] The contrary presumption that Congress intended to foreclose a serviceman's remedy without

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129. 337 U.S. at 52.

130. The Supreme Court has recognized that the legislation which an enactment supplants is a factor for consideration in construing the enactment. *See, e.g.*, Thompson v. Thompson, 218 U.S. 611 (1910).

131. All provisions of laws authorizing any Federal agency to consider, ascertain, adjust, or determine claims on account of damage to or loss of property, or an account of personal injury or death . . . are hereby repealed . . . the provision granting such authorization now contained in the following laws; . . .

Legislative Reorganization Act of 1946, Pub. L. No. 79-601, § 424, 60 Stat. 812 (1946) (repealing 31 U.S.C. §§ 223b, 223c, and 223d).

132. The Secretary of War, and, . . . other officer or officers as he may designate . . . are hereby authorized to consider, ascertain, adjust, determine, settle and pay in an amount not in excess of $500, or in time of war not in excess of $1,000, . . . any claim against the United States . . . for damage to or loss or destruction of property, real or personal, or for personal injury or death, . . . provided, the provisions of this Act shall not be applicable to claims arising in foreign countries . . . or to claims for damage to or loss or destruction of property of military personnel . . . if such damage, loss, destruction, injury, or death, occurs incident to their service.

31 U.S.C. § 223(b) (1943).

133. *See* notes 24 and 25 and accompanying text *supra*.

providing a replacement remedy would be inconsistent with the congressional intent of reducing private bills of relief. Relief previously granted expeditiously by the Secretary of War would become obtainable only through the arduous and costly process of a private bill in Congress. Since such a result would be contrary to express congressional intent, it can be concluded that Congress repealed the Military Personnel Claims Act with the intent that it be superseded by rights provided by the FTCA.[134] Had the *Feres* Court considered the repeal of the Military Personnel Claims Act in this manner, its decisions may have been different.

In light of the repeal of the Military Personnel Claims Act, the principles of statutory construction, and the Act's legislative history, it is clear that Congress did not intend military personnel to be excluded from FTCA coverage. But this conclusion is contrary to that of the *Feres* Court. Accordingly, it can be inferred that the holding in *Feres* essentially imputed a congressional intent that would give all civilians an adequate remedy, but would restrict servicemen to pre-existing remedies even though these remedies may be inadequate.[135] The repugnancy of this proposition raises questions as to the appropriateness of the *Feres* decision.

Whether or not the *Feres* decision is incorrect as a result of failing to investigate legislative intent or due to nonsupportive ra-

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134. It may be argued that the repeal of the Military Personnel Claims Act is, of itself, evidence of Congressional awareness of servicemen's claims. This is a logical conclusion since any action with respect to the Military Personnel Claims Act necessitates an awareness that claims of servicemen covered therein will be affected.

135. Despite Veterans Administration findings that the claimants' injuries are not compensable, courts have denied recovery under the FTCA. This occurs most frequently when a serviceman is negligently inducted into the military, then later discharged due to a void induction. *See, e.g.*, Joseph v. United States, 505 F.2d 525 (7th Cir. 1974); Healy v. United States, 295 F.2d 958 (2nd Cir. 1961).

In addition, some seriously injured servicemen may not be fully compensated for injuries incurred in the service. For example, assume that a 35-year-old technical sergeant with more than fourteen years of service suffers an injury that results in the loss of sight in both eyes. This would be a 100 percent disability under applicable Veterans Administration regulations. 38 C.F.R. § 4.84a (1975). He would be entitled to an annuity in the amount of $6,635.60 for the rest of his life (¾ x monthly basic pay of $737.40 x 12 months). *See* 10 U.S.C. §§ 1201, 1401 (1976). The present value of this annuity at 6 percent is $92,088.13 ($6,36.60 x 13.8758). 1976 P-H FED. TAX GUIDE ¶ 31, 376 (1976). This is not an insubstantial amount especially when considered along with other retirement benefits. The government benefits do not, however, measure up to the potential recovery for tort liability. The Jury Verdict Research Group indicates that the probability range for verdicts in cases involving blindness in both eyes is $250,000.00-$459,000.00. 1 *J.V.R. Personal Injury Valuation Handbooks*, 440 (1972). Rhodes, *The Feres Doctrine After Twenty-Five Years*, 18 AIR FORCE L. REV. 24 (1976).

tionale, there is a more fundamental weakness of the *Feres* decision. In *Feres*, the Court held that the government is not liable under the FTCA for injuries to servicemen where the injuries "arise out of or are in the course of activity incident to service."[136] The Court did not explain the meaning or the applications of the test. Because *Feres* did not refer to the underlying facts of the case or explain how the decision related to these facts, the Supreme Court was called upon again to explain the *Feres* holding.

Brown v. United States

Four years after the *Feres* decision, the case of *Brown v. United States*[137] afforded the Supreme Court the opportunity to clarify its holding in *Feres*. The plaintiff in *Brown* was a veteran discharged from the armed services as a result of a knee injury which occurred while he was on active duty. For this injury, plaintiff Brown received a compensation award from the Veterans' Administration. After his discharge, Brown returned to a Veterans' Administration hospital for surgery on the knee. During this operation an allegedly defective tourniquet was used, resulting in serious and permanent injury to the plaintiff's leg nerves. Although Brown received an increased compensation award as a result of the alleged negligent operation, he also sought recovery under the FTCA. The district court dismissed the case on the grounds that compensation under the Veterans' Act was an exclusive remedy.[138] The Court of Appeals reversed,[139] and the Supreme Court granted certiorari "because of doubts as to whether *Brooks v. United States* or *Feres v. United States* controlled [the *Brown*] case."[140]

In its holding that the *Brown* case was governed by *Brooks* and not by *Feres*, the Supreme Court explained that "[t]he injury for which suit was brought was not incurred while respondent was on active duty or subject to military discipline."[141] Although *Brown* purported to clear up the distinction between *Brooks* and *Feres*, the *Brown* holding is only deceptively clear. *Brown* still leaves unanswered the question of whether plaintiff Brown recovered because *Brooks* applied or because *Feres* did not apply.

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136. Feres v. United States, 340 U.S. at 146.

137. 348 U.S. 110 (1954).

138. Brown v. United States, 121 F. Supp. 281 (S.D.N.Y. 1952), *rev'd*, 209 F.2d 463 (2d Cir.). *aff'd*, 348 U.S. 110 (1954).

139. Brown v. United States, 209 F.2d 463, 464 (2d Cir.), *aff'd*, 348 U.S. 110 (1954).

140. Brown v. United States, 348 U.S. at 111.

141. *Id.* at 112.

The importance of this distinction arises out of the different impacts which *Brooks* and *Feres* had on the scope of the FTCA. *Brooks* did not have an effect on the FTCA; it merely represents one situation not excluded by the Act.[142] On the other hand, *Feres* had a pervasive contrary effect on the Act. While it cannot be said that *Brooks* wrote a cause of action into the Act, it must be admitted that *Feres* wrote an exception into the Act by denying a cause of action for service-related injuries.

Clarification of whether the *Brown* holding refers to *Brooks* or *Feres* is not an easy task. The ambiguity of the holding is not resolved by deciphering the meaning of the smaller phrases which comprise the holdings' larger phrase "on active duty or subject to military discipline."[143] Pretermitting the possible meanings attached to the smaller phrases, further perplexity arises out of the connection of these phrases with the disjunctive 'or.' This confusion occurs because the recovery in *Brown* could have been based on a finding as to plaintiff's active duty status or his subjectivity to military discipline. Thus, *Brown* left uncertain whether a serviceman could recover under the Act if he were neither on active duty nor subject

142. *See* notes 33-49 and accompanying text *supra* for a discussion of *Brooks*.

143. Exactly what the Court meant by the term, "on active duty," is unclear. If the Court meant it in a military sense, then the plaintiffs in both *Brooks* and *Feres* were on "active duty," since all servicemen are on active duty until they are discharged. So the lack of distinguishability using these meanings does not clarify whether *Feres* or *Brown* are being explained by the Court. On the other hand, if the Court equated active duty to plaintiff's leave/non-leave status, then *Brooks* and *Feres* can be distinguished. Plaintiffs in *Brooks* were on leave while the *Feres* plaintiffs were not. This interpretation effectively distinguished *Brooks* from *Feres*, but it is an unlikely interpretation since the language in *Brooks* and *Feres* decisions do not rely upon the leave status. However, active duty is not generally equated with leave status in the common usage of the term. Even disregarding the inappropriateness of interpreting active duty in terms of leave status, if the Court analogized a permanent discharge to an indeterminate leave status, then uncertainty still exists as to whether Brown recovered due to his leave status per *Brooks* decision or because his was not precluded by his leave status under *Feres*.

A similar conclusion results if the above analysis is applied to the phrase "subject to military discipline." Whether the Court meant "subject to the Military Code of Justice" or "potentially subject to military orders," the *Brooks* and *Feres* cases would be indistinguishable since plaintiffs in each case were subject to military discipline under either of these meanings. If the Court meant to describe which plaintiff would be more easily brought under control of military discipline, then the cases are distinguishable. This is because while they were on base, the *Feres* plaintiffs were more easily subject to military control than the *Brooks* plaintiffs who were on a public highway. Whether defining "subject to military discipline" as "easily brought under control of military discipline" seems to stretch the meaning of the terms is of no importance in this circumstance. With any definition of terms that distinguishes *Brooks* and *Feres*, there is still uncertainty as to which case was being applied in *Brown*.

to military discipline or whether the presence of either factor would preclude recovery.

In its opinion, the *Brown* Court explains *Feres* in terms of the extreme effects on discipline that might result if suits under the FTCA were allowed for negligent acts committed in the course of duty.[144] Whether or not such extreme results would occur, the *Brown* Court expressly relies on *Feres* for this proposition[145] despite the absence of such language in the *Feres* opinion.[146] If military discipline was persuasive in leading to the result in *Feres*, it would seem appropriate that the *Feres* Court include it explicitly rather than leaving it questionably implicit throughout the opinion. Accordingly, it may be concluded that *Brown* was not restating the factors considered in *Feres*. Rather, the Court was attempting to support the weak rationale in *Feres*.[147]

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144. According to *Brown*, the factors which led the *Feres* Court to read the Act as excluding claims for service-related injuries are

> [t]he 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. . . .

Brown v. United States, 348 U.S. at 112. *Brown* does not articulate what detrimental effects will result from such a suit.

145. *Id.*

146. *Feres* refers to military duty only in regard to the factual distinction between *Brooks* and *Feres* in that the injury to Brooks did not arise out of or in the course of military duty. Feres v. United States, 340 U.S. at 146. This reference in *Feres* to 'military duty' has doubtful application to the factors which *Brown* explains as leading to the *Feres* decision. *See* note 144 *supra*.

147. The Supreme Court in Stencel Aero Eng'r v. United States, 431 U.S. 666 (1977), recognized that the pragmatic disciplinary considerations noted in *Brown* are unique to *Brown* and are additional factors weighing against FTCA recovery by servicemen. *Id.* at 671. On the other hand, it is interesting to note that *Brown* did not refer to the lack of precedent or the pre-existing system of compensation for servicemen although these factors were relied upon in *Feres*. Whether or not the "effect of the maintenance of discipline" can somehow be attributed to *Feres*, *Brown* does not explain what are the effects which will result. Furthermore, the Court does not articulate how suits by a serviceman for torts committed by a civilian government employee, by a military member of a different branch of the service, or by a serviceman of a lower rank, will affect discipline. This history of suits under the Act brought by servicemen shows that claims are not made for injuries resulting from negligent orders. Rather, the suits are brought for injuries arising out of malpractice, vehicular collisions, plane crashes, and negligent maintenance of government facilities. *See* notes 154-204, *infra*. It appears that recovery for these injuries would have a negligible effect on discipline.

Even if a suit were brought for injuries arising out of a negligent order, the government may already be protected from this type of suit by Section 421(a) of the Act which excludes claims arising out of the performance of a "discretionary function" by a government employee. 28 U.S.C. § 2680(a) (1976). If orders given by a military superior do not fall

Another matter which *Brown* varied from *Feres* is the effect the Act was meant to have on previously unrecognized causes of action. *Feres* declares that the Act was not meant to impose novel and unprecedented liabilities on the government.[148] According to *Feres*, liability is determined by "all the circumstances,"[149] hence, the relationship between a serviceman/plaintiff and the United States/defendant cannot be analogized to that of the civilian doctor/patient relationship.[150] However, in direct contradiction to *Feres*, the *Brown* Court recognized that government liability is neither novel nor without support, because if the defendant were a private party, local law would recognize a claim of negligence against a hospital.[151] Thus, the *Brown* Court did not consider the government's sovereign status as "a circumstance" to be considered when determining whether the claim may be asserted. This inconsistency in viewpoints as to the status of the defendant United States is not explained in *Brown*. If the Supreme Court ever hears another serviceman's FTCA case, this is an issue which the Court must resolve, since it was the cornerstone of the *Feres* decision denying recovery.[152]

These variations between *Brown* and *Feres* make it evident the Supreme Court in *Brown* did not clarify the future application of the *Brooks* and *Feres* decision. Since the *Brown* Court granted certiorari because of confusion as to whether *Brooks* or *Feres* applied, it seems elementary that a clear test should have been articulated in *Brown*. This is true unless the Supreme Court intended to intervene in future servicemen suits in which the *Brooks/Feres* distinction is unclear. However, since *Brown*, the Supreme Court has not reconsidered the Feres Doctrine.[153] In view of the logical pitfalls and unper-

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within the scope of the discretionary exception in Section 421(a), then it would seem appropriate for the Supreme Court to expand the scope of that Section. Thus, suits which would upset military discipline would not be allowed because of the discretionary function exception. This result avoids the disciplinary problems articulated by *Brown*. It also avoids the unnecessary denial of a serviceman's cause of action which would not affect military discipline.

148. The Court in *Feres* explained that the effect of the Act is "to waive immunity from recognized causes of action and [is] not to visit the Government with novel and unprecedented liabilities." Feres v. United States, 340 U.S. at 142.

149. *Id.*

150. *Id.*

151. Brown v. United States, 348 U.S. at 112-13.

152. Nothing in the Act or *Feres* implies that the status of the government as a sovereign depends on whether the claimant was injured incident to his service in the military.

153. However, since its decision in *Brown*, the Supreme Court has reconsidered the Feres Doctrine only once. The review consisted of a memorandum opinion affirming the appellate decision. *See* Snyder v. United States, 218 F.2d 266 (4th Cir. 1954), *aff'd*

suasive arguments employed in *Feres*, the failure of the *Brown* Court to clarify the Feres Doctrine made certain that future applications of the doctrine would lead to much confusion.

LOWER COURT APPLICATIONS OF *FERES*

The Supreme Court's decision in *Brown* did not shed light on the scope and application of its holding in *Feres*. Instead, the *Brown* decision perpetuated the vagueness of the Feres Doctrine. This uncertainty has manifested itself in several conflicting lower court interpretations of the dispositive factors of the *Feres* decision. The products of these interpretations are several differing tests which the courts have employed to resolve the question of governmental liability to servicemen. Since no one test is uniformly applied among the courts, it is natural to expect that some of the results of suits by servicemen are not compatible with outcomes found in other jurisdictions.

The basis for the conflicting results originates from the lack of a uniform view as to the dispositive factors in *Feres*. For example, a conflict of authority exists as to the importance of the serviceman's relationship to the tortfeasor. In this regard, the Tenth Circuit has recognized that an injury arises from an activity incident to service if it stems from an official military relationship between the tortfeasor and the serviceman.[154] Meanwhile, the First Circuit has held that the Feres Doctrine will bar recovery without such a relationship.[155]

Courts are similarly in conflict as to whether recovery under the Act is dependent upon the type of activity the serviceman was performing when he was injured.[156] Sixth Circuit decisions are based

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mem., 350 U.S. 906 (1955) (four justices voting to deny certiorari). In all other instances, the Supreme Court has denied certiorari in actions brought by servicemen. *See, e.g.*, Thomason v. Sanchez, 539 F.2d 755 (3rd Cir. 1976), *cert. denied*, 429 U.S. 1072 (1977); Harten v. Coons, 502 F.2d 1363 (10th Cir.), *cert. denied*, 420 U.S. 963 (1974); Henninger v. United States, 473 F.2d 814 (9th Cir.), *cert. denied*, 414 U.S. 819 (1973); DeFont v. United States, 453 F.2d 1239 (1st Cir.), *cert. denied*, 407 U.S. 910 (1972); Henning v. United States, 446 F.2d 774 (3rd Cir.), *cert. denied*, 404 U.S. 1016 (1971); United States v. Lee, 400 F.2d 558 (9th Cir.), *cert. denied*, 393 U.S. 1053 (1968); Baily v. DeQueredo, 375 F.2d (3d Cir.), *cert. denied*, 386 U.S. 923 (1967); Sheppard v. United States, 369 F.2d 272 (3rd Cir.), *cert. denied*, 386 U.S. 982 (1966); Callaway v. Garber, 289 F.2d 171 (9th Cir.), *cert. denied*, 368 U.S. 874 (1961); Brier v. United States, 241 F.2d 3 (7th Cir.), *cert. denied*, 353 U.S. 924 (1956). *But see* note 14 *supra*.

154. Harten v. Coons, 502 F.2d 1363 (10th Cir.), *cert. denied*, 420 U.S. 963 (1974).

155. Hall v. United States, 451 F.2d 353, 354 (1st Cir. 1971).

156. *See, e.g.*, McCord v. United States, 377 F. Supp. 953 (M.D. Tenn.), *aff'd without op.*, 472 F.2d 599 (6th Cir. 1972).

on whether the serviceman was injured in the performance of military duties.[157] These decisions bar a cause of action if the injury occurred while the serviceman was performing military duties.[158] On the other hand, the Fifth Circuit has decided that government liability does not depend on the activity performed; rather, it depends upon the effect that a suit for damages would have on the military system.[159] This viewpoint has had a great impact in decisions which have looked only to the status of the plaintiff as a serviceman and have held that servicemen who are injured on the military base[160] or in military hospitals do not have a cause of action under the FTCA.[161] From this overview of the varied interpretations of *Feres*, it is clear that no uniform test is being applied by the several courts. These varying interpretations of the Feres Doctrine can be distilled into three basic tests: the "but for" test,[162] the "line of duty" test[163] and the "military discipline" test.[164]

The "But For" Test

The "but for" test determines government liability based on an examination of the status of the plaintiff and the place of the

157. *Id. See also*, Hale v. United States, 452 F.2d 668 (6th Cir. 1971).

158. *Id.*

159. *See*, Bankston v. United States, 480 F.2d 495 (5th Cir. 1973) (denying a cause of action for the wrongful death of a serviceman which resulted from medical malpractice occurring on the date of the serviceman's discharge). *Cf.* United States v. Lee, 400 F.2d 558 (9th Cir.), *cert. denied*, 393 U.S. 1053 (1968), the Feres Doctrine is not "limited to situations which pose a threat or interferes with military discipline." *Id.* at 564.

160. In Mason v. United States, 568 F.2d 1135 (5th Cir. 1978), a serviceman was injured in an automobile collision while on the military base. The court held that while the serviceman was on the base he was engaged in activity incident to service. For similar results in cases involving on-base injuries, *see* Chambers v. United States, 357 F.2d 224 (8th Cir. 1966); Miller v. United States, 472 F. Supp. 116 (D.C. Mo. 1978); Coffey v. United States, 324 F. Supp. 1087, *aff'd*, 455 F.2d 1380 (9th Cir. 1971); Downes v. United States, 249 F. Supp. 626 (E.D.N.C. 1965).

161. The court in Coyne v. United States, 411 F.2d 987, 988 (5th Cir. 1969), held that no cause of action lies under the FTCA for medical malpractice caused by military personnel where the victim is a serviceman. *Accord*, Harten v. Coons, 502 F.2d 1363, *cert. denied*, 420 U.S. 963 (1975); Martin v. United States, 404 F. Supp. 1240 (E.D. Pa. 1975). These decisions cite *Feres* in barring recovery for malpractice. Yet the only language in the *Brooks-Feres-Brown* triad which would support such a mechanical denial of a cause of action is found in the dissent to *Brown*. Brown v. United States, 348 U.S. at 114 (Black, J., dissenting).

162. Harten v. Coons, 502 F.2d 1363 (10th Cir.), *cert. denied*, 420 U.S. 963 (1974) (serviceman injured due to medical malpractice).

163. McCord v. United States, 377 F. Supp. 953 (M.D. Tenn.), *aff'd without opinion*, 472 F.2d 599 (6th Cir. 1972) (accidental shooting death of serviceman).

164. Hoss v. United States, 518 F.2d 1138 (4th Cir. 1975) (serviceman injured while using base recreational facilities).

injury.[165] Generally, under the "but for" test, the government is not liable for any injuries which occur in a place that the plaintiff would not have been admitted but for his status as an active duty serviceman. This test is most often applied in cases which deny a serviceman's recovery in the medical malpractice context.[166]

For instance, where a sailor on leave is struck by a car on a public street and taken to a naval hospital, the fact that his liberty had not expired before the alleged malpractice of naval medical personnel is immaterial. Recovery is denied because the sailor would not have been admitted to the hospital but for his military status.[167] It is reasoned that since plaintiff was treated by naval personnel solely because of his status, it inescapably follows that whatever happened to him in that hospital and during the course of that treatment had to be in the course of activity incident to service.[168] This typical application of the "but for" test explains why recovery is denied under this test whether the malpractice arises out of elective or required surgery.[169]

Although the "but for" test is most often applied in malpractice cases, application of this test has not been limited to this context. Personal injuries arising out of on-base recreational activities have also been brought into the purview of the "but for" test.[170] In this

165. *See, e.g.*. United States v. United Serv. Auto. Ass'n, 238 F.2d 364 (8th Cir. 1956) (car of active duty serviceman damaged on base parking lot).

166. *See, e.g.*, Yolken v. United States, 590 F.2d 1303 (4th Cir. 1978); Vallance v. United States, 574 F.2d 1282 (5th Cir. 1978); Buer v. United States, 241 F.2d 3 (7th Cir.), *cert. denied*, 353 U.S. 974 (1956); Schwager v. United States, 326 F. Supp. 1081 (D.C. Pa. 1971). These cases apply the "but for" test to servicemen who were officially on duty at the time of the malpractice injuries. *See also* note 161 *supra*.

167. Shults v. United States, 421 F.2d 170 (5th Cir. 1969).

168. *Id.* at 171-72. *See also* Stanberry v. Middendorf, 567 F.2d 617 (4th Cir. 1978) (no recovery was allowed for a serviceman who became ill while on off-base leave and was injured when the military ambulance in which he was riding negligently collided with another vehicle on a public road).

169. In Lowe v. United States, 440 F.2d 452 (5th Cir.), *cert. denied*, 404 U.S. 833 (1971), the court held that the "but for" test barred the injured serviceman's cause of action for malpractice which arose out of elective surgery. According to this court, elective surgery is an "activity incident to service." *Id.* at 453. *See also* Martin v. United States, 404 F. Supp. 1240 (E.D. Pa. 1975).

170. Chambers v. United States, 357 F.2d 224 (8th Cir. 1966) (serviceman on furlough drowned in negligently-maintained swimming pool located on the military base). *See also* Watkins v. United States, 462 F. Supp. 980 (D.C. Ga), *aff'd*, 587 F.2d 779 (5th Cir. 1977). Recovery was denied even though the serviceman's presence at the facility is in a *civilian* capacity pursuant to government regulations in Moriano v. United States, 444 F. Supp. 316 (E.D. Va. 1977). The fact that civilians may also use the facility does not bar the application of the but for test when a serviceman is injured using it. *See* Woodside v. United States, 606 F.2d 134 (6th Cir. 1979); Eckles v. United States, 471 F. Supp. 108 (M.D. Pa. 1979).

context, courts have rationalized that the serviceman's use of a recreational facility is an activity incident to service because but for his status as a serviceman, plaintiff would not have been allowed to use the facility. Therefore, recovery is denied for any injuries arising from the use of recreational facilities, regardless of the serviceman's on-duty or furlough status.[171] Similarly, recovery is denied for damage to personal property brought onto a military base. Regardless of whether the property had any connection with the serviceman's duty on the base, it is sufficient under the "but for" test that his active service status was the sole reason the property was allowed on the base.[172] Thus, it is clear that the "but for" test will bar recovery for a variety of injuries inflicted upon a serviceman.

Fundamentally, the "but for" test was developed in order to determine the scope of injuries arising out of or in the course of activity incident to service. Yet courts which apply the "but for" test to personal injuries or property damage do not look to the injured serviceman's activity *per se*. Rather, these courts look solely to the plaintiff's status as a serviceman. Since the injury would not have occurred when or where it did "but for" the fact that the plaintiff is a serviceman, recovery is not allowed.[173] This result borders on denying recovery merely because the serviceman is a serviceman. Extending this to its logical conclusion, the "but for" test could virtually deny all recovery for servicemen under the FTCA.[174]

It is noteworthy that there is no language in *Feres* tending to support the "but for" test. Furthermore, *Brooks* clearly rejects the idea that a serviceman is barred from recovery because he is a serviceman.[175] According to *Feres*, a cause of action is denied when the serviceman is engaged in an activity incident to his service. Therefore, it seems inquiry should be made into how the serviceman's

171. Chambers v. United States, 357 F.2d 224, 226 (8th Cir. 1966).

172. *See, e.g.*, United States v. United Serv. Auto. Ass'n, 238 F.2d 364 (8th Cir. 1956).

173. *Id.* at 368.

174. "The *Feres* test is so lacking in precision that the mere fact that the plaintiff was in the 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). "It is the status of the claimant as a serviceman rather than the legal theory of his claim which governs such cases." Rotko v. Abrams, 338 F. Supp. 46, 47 (D. Conn. 1971), *aff'd*, 455 F.2d 992 (2d Cir. 1972).

175. "We are not persuaded that 'any claim' means 'any claim but that of servicemen.'" Brooks v. United States, 337 U.S. 49, 51 (1949).

activity relates to military duties.[176] Courts which have employed the "but for" test fail to make such an investigation.

The "Line of Duty" Test

Contrary to the "but for" test, the "line of duty" test makes an investigation into the serviceman's activity at the time of the injury. According to the "line of duty" test, the determinative question is whether the injury arose in the serviceman's line of duty. If the injury arose while the serviceman was acting in the line of duty, recovery under FTCA is barred.[177] The "line of duty" test attempts to prevent the unwarranted application of the Feres Doctrine in situations where the injury to the serviceman was so remote from his military activities as to be characterized as occurring outside the scope of any military relationship or duties.[178] Judging from its name, the "line of duty" test seems to determine the government's liability analogously to the work related/non-work related dichotomy characteristic of workmen's compensation schemes. However, courts have not been receptive to the application of such a test in suits brought by servicemen under the FTCA.[179] Rather than determining whether the serviceman was injured while performing military

176. "[T]he crucial question is: was he injured as a result of the *performance of conduct* incident to his military service." Downes v. United States, 249 F. Supp. 626, 628 (E.D. N.C. 1965) (emphasis added). *Accord*, Layne v. United States, 295 F.2d 433 (2d Cir.), *cert. denied*, 368 U.S. 990 (1961); Hand v. United States, 260 F. Supp. 38 (M.D. Ga. 1966); Rich v. United States, 144 F. Supp. 791 (E.D. Pa. 1956).

177. For cases where the injury occurred while the serviceman was acting in the line of duty, *see* Shaw v. United States, 448 F.2d 1240 (4th Cir. 1971); O'Brien v. United States, 192 F.2d 948 (8th Cir. 1951); Spain v. United States, 451 F. Supp. 585 (D.C. Mont. 1978); Morgan v. United States, 366 F. Supp. 938 (D.C. Fla. 1973); Colletta v. United States, 300 F. Supp. 19 (D.C.R.I. 1969).

178. Knight v. United States, 361 F. Supp. 708, 713 (M.D. Tenn.), *aff'd without opinion*, 480 F.2d 927 (6th Cir. 1972). This interpretation of the Feres Doctrine is derived from language in *Brown* which articulates possible detrimental effects which a FTCA suit by a serviceman might have if a cause of action were allowed for injuries occurring *in the course of military duty.* Brown v. United States, 348 U.S. at 112. Hence, it seems logical that a serviceman, who is not under any military duty, should recover under the Act. *See* Hand v. United States, 260 F. Supp. 38 (M.D. Ga. 1956); Downes v. United States, 249 F. Supp. 626 (E.D.N.C. 1965); Rich v. United States, 144 F. Supp. 791 (E.D. Pa. 1956). These decisions look to the type of activity performed by the serviceman at the time he was injured.

179. "It is clear that the [Feres] Court contemplated its definition of the phrase 'incident to service' in terms of workman's compensation concept of 'course of employment.'" United States v. Lee, 400 F.2d 558, 562 (9th Cir.) *cert. denied*, 393 U.S. 1053 (1968). Despite this court's application of this test, the serviceman in *Lee* did not recover because he was clearly engaged in performance of military duties when the injury occurred. The court in Bradshaw v. United States, 443 F.2d 759 (D.C. Cir. 1971), recognized this same test and allowed recovery in a suit brought under the Act by a policeman.

duties, many courts simply look at the presence of military discipline when the injury occurred.

The "Military Discipline" Test

Under the "military discipline" test, the only inquiry is whether the serviceman was subject to military discipline at the time of the injury.[180] If the injury occurs while the plaintiff is subject to military discipline, then the injury was incident to service.[181] Although in some cases compulsion of military discipline may indicate that the serviceman was injured incident to his service, courts applying this test have not required that the serviceman actually be acting under disciplinary control or lawful orders.[182] These courts find the potentiality of military discipline or control sufficient to deny recovery under the "military discipline" test.[183]

According to the "military discipline" test, any injury to a serviceman which occurs on the military base will not be recompensed under the Act because while the serviceman is on the base, he *can* be brought under disciplinary control.[184] In the malpractice context, courts have found that medical officers in a service hospital have a command function over all servicemen in the facility.[185] Therefore,

180. *See, e.g.*, Mason v. United States, 568 F.2d 1135 (5th Cir. 1978).

181. The court in Ritz v. Trent, 125 F. Supp. 664 (D.C.N.C. 1954), found it sufficient that the serviceman was "subject to call for military duty" in order to deny the serviceman's claim. *Id.* at 665.

182. *See, e.g.*, Archer v. United States, 217 F.2d 548 (9th Cir. 1954), *cert. denied*, 348 U.S. 953 (1955). Although the claimant was on leave and given permission to ride gratuitously on a military plane, since he was under the potential control of the pilot, the court held that the claimant was in the line of duty at the time of his death in the plane crash. *Id.* at 549. Similarly in Hale v. United States, 452 F.2d 668 (6th Cir. 1971), recovery was denied for injuries to the serviceman who, while on pass, was injured while entering a military vehicle which was driving back to the military base. The court held that whether he was entering the truck as a result of an invitation or a command, he re-entered a direct military relationship and consequently his injury occurred in the course of military duty. *Id.* at 669.

183. *See* note 182 *supra*.

184. In Knight v. United States, 361 F. Supp. 708 (M.D. Tenn.), *aff'd without op.*, 480 F. 2d 927 (6th Cir. 1972), the serviceman drowned in a swimming pool maintained on the base. Although the record did not show that lifeguards were present, the court held that since the serviceman was subject to any lawful orders given by a lifeguard that the action was barred, because the injury occurred on the base where the serviceman was subject to military discipline. *Id.* at 713. *See also* note 189 *infra*. *But see* Hand v. United States, 260 F. Supp. 38 (M.D. Ga. 1966). "[T]he question is not *where* the [serviceman] was at the time of the injury" but rather what was he doing when injured. *Id.* at 42 (original emphasis).

185. Schwage v. United States, 326 F. Supp. 1081 (E.D. Pa. 1971). *See also*, Nagy v. United States, 471 F. Supp. 3838 (D.D.C. 1979) (no recovery allowed for physical and psychological injuries arising out of his participation in military experiments with L.S.D.).

recovery has been denied because as a patient, the serviceman is subject to military commands of these medical officers.[186] Similarly, the serviceman on leave who takes advantage of gratuitous passage aboard a military plane has no cause of action for injuries caused by a negligent plane crash because the pilot exercises command control over all persons on the plane.[187]

Clearly, recovery is denied when the serviceman is acting under compulsion of orders.[188] However, some courts have stretched the military discipline concept by denying recovery even when the degree of actual control or discipline is negligible.[189] These decisions demonstrate that the degree of control exerted over the plaintiff-serviceman is immaterial. It seems that the existence of genuine

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Thornwall v. United States, 471 F. Supp. 344 (D.D.C. 1979) (no recovery allowed for the negligent failure to re-examine or provide treatment to a serviceman who had been discharged but had participated in L.S.D. experiments while in service. The alleged fifth amendment and due process infringements which arose out of the government cover-up of the experiements did not aid plaintiff's case).

186. *Id. See also* Dilworth v. United States, 387 F.2d 590 (3d Cir. 1967).

187. Uptegrove v. United States, 600 F.2d 1248 (9th Cir. 1979); Archer v. United States, 217 F.2d 548 (9th Cir. 1954) *cert. denied*, 348 U.S. 453 (1955); Homlitas v. United States, 202 F. Supp. 520 (D. Ore. 1962).

188. Using the compulsion of orders as a definitive consideration has not always led to pleasing results. In Shaw v. United States, 448 F.2d 1240 (4th Cir. 1971), an incarcerated serviceman was injured while cleaning a floor with gasoline according to the directions of a military superior. The court held that the serviceman was engaged in the performance of an assigned task and barred the claim for damages which resulted when the gasoline ignited causing severe burns to the serviceman. An unfortunate result also occurred in James v. United States, 358 F. Supp. 1381, *vacated without opinion*, 502 F.2d 1159 (1st Cir. 1973). In this case the serviceman was in custody, under orders of the military police and about to be taken to the base dispensary for a sobriety test. Before the test was administered, an argument erupted between the serviceman and a military policeman. This altercation resulted in the beating death of the serviceman. Although the court found that the military policeman had used unreasonable and excessive force, since the serviceman was acting while under military control, the claim for damages was denied. *Id.* at 1385.

189. In Hass v. United States, 518 F.2d 1138 (4th Cir. 1975), a serviceman, who was injured while riding a horse he had rented from a stable operated on the military base, could not recover under the Act for injuries received as a result of the negligent failure of the stable manager to warn him of the dangerous propensities of the horse. For purposes of finding that the serviceman was subject to military discipline, the Court found it sufficient that under the stable regulations, the serviceman could be reported to his commanding officer and could lose his stable privileges. *Id.* at 1141. *See also* Coffey v. United States, 324 F. Supp. 1087 (S.D. Cal.), *aff'd*, 455 F.2d 1380 (9th Cir. 1971). In *Coffey* the serviceman was injured while riding off the military post while on liberty. Recovery was denied because while within the confines of the military reservation, the serviceman was subject to cancellation of liberty, traffic and other military regulations. *Id.* at 1088. Since a serviceman on leave is always subject to cancellation of liberty and other military regulations, this reasoning of the court is unpersuasive.

military discipline is not necessary in order to deny recovery under the "military discipline" test. Thus, the "military discipline" test is not in accordance with *Feres* because it does not meaningfully relate the injury to the serviceman's activities. This results in unwarranted and inconsistent applications of the Feres Doctrine.

Inconsistent Applications of the Feres Doctrine

It is apparent that whether a court applies the "but for," "line of duty," or "military discipline" tests, a finding of a minimal relationship between the serviceman and his government will bar recovery. This is tantamount to denying recovery to a serviceman solely because of his status as a serviceman. Apart from any constitutional issues in this regard, it should be noted that these differing tests have resulted in non-uniform judicial treatment of servicemen.[190] This lack of uniformity is not due to varied state laws governing negligence as was feared by the *Feres* Court.[191] Rather, it results from the varied interpretations of *Feres* and from the differing tests employed to determine whether the government is liable to a serviceman.[192] Consequently, servicemen's claims which arise

190. Courts have held that *Feres* bars FTCA suits by servicemen even if the injury constituted an infringement of the serviceman's constitutional rights. "[I]t is the status of the claimant as a serviceman rather than the legal theory of his claim which governs such cases." Rotko v. Abrams, 338 F. Supp. 46, 47 (D. Conn. 1971), *aff'd*, 455 F.2d 992 (2d Cir. 1972). "An action sounding in constitutional as opposed to common law tort is not exempt from application of the Feres Doctrine." Nagy v. United States, 471 F. Supp. 383 (D.D.C. 1979). *Accord*, Citizens Nat'l Bank of Waukegan v. United States, 594 F.2d 1154 (7th Cir. 1979); Misko v. United States, 453 F. Supp. 513, *aff'd*, 593 F.2d 1371 (1979); Thornwell v. United States, 471 F. Supp. 34 (D.D.C. 1979); Jaffe v. United States, 468 F. Supp. 632 (D.N.J. 1979). In all of these cases, the servicemen raise various constitutional issues arising out of the first, fourth, fifth, and ninth amendments, but recovery was not allowed under the Act. *Cf.* Alvarez v. Wilson, 431 F. Supp. 136 (N.D. Ill. 1977) (recovery was allowed for injuries arising out of an unjustified confinement without adequate hearing or procedural due process and for injuries arising out of racial discrimination). Courts which deny servicemen recovery for constitutional infringements are impliedly asserting one of two propositions. Either the Constitution applies to all persons except servicemen or servicemen waive their constitutional rights upon enlistment. These propositions are highly questionable.

191. One consideration in *Feres* was the disparity of recoveries by servicemen which would result from varied state law. Feres v. United States, 340 U.S. at 141-42. It is ironic that a greater disparity has resulted from application of the Feres Doctrine than from divergent state laws.

192. Aside from the different tests applied in the various circuits, non-conformity of dispositive test can be found within a circuit. The Ninth Circuit is a prime example of such inconsistency. *Compare* Archer v. United States, 217 F. 2d 548 (9th Cir. 1954), *cert. denied*, 348 U.S. 953 (1955) (applying a "line of duty" test), *with* Knoch v. United States, 316 F.2d 532 (9th Cir. 1963) (applying "active duty and not furlough" as determinative). *See also* Coffey v. United States, 324 F. Supp. 1087 (S.D. Cal.), *aff'd*, 455 F.2d 1380 (9th Cir. 1971) (applying the "military discipline" test).

under substantially the same factual situations are treated in diverse and conflicting manners. One serviceman may recover while another may be barred from asserting a similar claim.

Such a discrepancy of results occurs in cases in which the place of the injury is significant. Under the "military discipline" test, a serviceman cannot recover for on-base injuries. However, some applications of the "line of duty" test would allow recovery. For instance, where a serviceman on liberty is negligently injured while driving towards an exit gate to off-post liberty, recovery is denied according to the "military discipline" test. This is because the serviceman is subject to military discipline while he is within the confines of the military reservation.[193] Yet, under similar facts, a court applying the "line of duty" test could grant recovery because the serviceman was not injured while performing military duties.[194] Thus, it is evident that results under the "line of duty" and "military discipline" tests can be conflicting.

A similar conflict can be found between jurisdictions applying the "line of duty" test rather than the "but for" test. If a serviceman brings private property onto the base, but does not use it in the performance of his duties, under the "line of duty" test he will

193. Parker v. United States, 437 F. Supp. 1039 (N.D. Tex. 1977); Coffey v. United States, 324 F. Supp. 1087 (S.D. Cal.), *aff'd*, 455 F.2d 1380 (9th Cir. 1971). *See also* Miller v. United States, 472 F. Supp. 116 (E.D. Mo. 1978). In this case the serviceman was shot to death by M.P.'s while he was leaving his base on leave. The shooting occurred because Miller ran a stop sign, was speeding, and refused to stop for the M.P.'s. Recovery was denied because the court reasoned that if the M.P.'s were shooting at him, then he must have been under their disciplinary control.

194. *See* Downes v. United States, 249 F. Supp. 626 (E.D.N.C. 1965). *Compare* Mills v. Tucker, 499 F. 2d 866 (9th Cir. 1974), *with* Camassar v. United States, 531 F.2d 1149 (2d Cir. 1976). In *Mills* the serviceman, who was on furlough on returning to his military base, was injured on a road adjacent to his base. While in *Camassar* a Navy serviceman, who was on liberty, was injured while driving away from his ship on the adjacent naval pier. Comparing the facts, since the serviceman in *Camassar* was leaving the vicinity of his "base," it would seem that recovery would be more likely than in *Mills* where the serviceman was injured returning the vicinity of his base. To the contrary, recovery was allowed in *Mills* and denied in *Camassar*. The court in *Camassar* explained that although the serviceman was leaving, his presence on the pier "was not fortuitous but was directly related to the fact that he was serving in the Navy on a vessel docked at that pier." *Id.* at 1151. *But see* Rich v. United States, 144 F. Supp. 791 (M.D. Pa. 1956); Barnes v. United States, 103 F. Supp. 51 (W.D. Ky. 1952). These decisions allowed a cause of action for injuries occurring while the serviceman was returning to his base. In Troglia v. United States, 602 F.2d 1334 (9th Cir. 1979), a serviceman was injured on a road adjacent to his base. While the road was owned by the federal government, it was maintained by the county. The United States contended that since it owned the road the injury occurred on a military base and hence, recovery should be denied. This case has been remanded for a determination of plaintiff's status at the time of the injury.

recover for government damage to his property.[195] On the other hand, since the property would not be on the base "but for" the serviceman's active service status, the "but for" test would deny recovery.[196] Hence, conflicting results can be found by comparing the "line of duty" and the "but for" tests.

Aside from the inconsistencies which have arisen from the several tests, incongruous results have occurred in cases where the time of the injury is significant. The time of the injury is primarily important in the malpractice context. For example, when an Army doctor failed to inform a serviceman of a tubercular condition revealed by a predischarge exam, which condition subsequently became aggravated after discharge, the Court stated that the focus of the inquiry is on when and how the negligent act occurred.[197] Because the negligence occurred during the predischarge exam, at which time the plaintiff was on active duty, recovery was denied.[198] According to this logic, recovery should be allowed for negligence which occurs during a pre-induction examination. But when a pre-induction exam fails to disclose an existing infirmity, recovery is denied. This result prevails despite the fact that plaintiffs are civilians at the time of the exam and are later released from the service without veterans' compensation.[199]

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195. Lund v. United States, 104 F. Supp. 756 (D. Mass. 1952).

196. Pratt v. United States, 207 F. Supp. 132 (D. Mass. 1962).

197. Henning v. United States, 446 F.2d 774, 777 (3d Cir.), *cert. denied*, 404 U.S. 1016 (1971). *See also* Thornwell v. United States, 471 F. Supp. 344 (D.D.C. 1979) (where no recovery was allowed for the negligent failure to re-examine or provide treatment to a veteran who participated in military L.S.D. experiments).

198. Henning v. United States, 446 F.2d 774 (3d Cir. 1971). Similarly in Kildruff v. United States, 248 F. Supp. 310 (D. Va. 1960), the court noted that "[e]ven if the examination or the defendant's nonfeasance did not occur until *after discharge*, when the plaintiff was actually out of the service, he was not so long removed from it as to give him the right to sue accorded an ex-serviceman in United States v. Brown." *Id.* at 312 (emphasis added). This court does not explain how far removed a veteran must be from the service before recovery is allowed. Nothing in *Brown* indicates that the length of time between active service and discharge is determinative of a veteran's cause of action.

199. *See*, Joseph v. United States, 505 F. 2d 525 (7th Cir. 1974); Glorioso v. United States, 331 F. Supp. 1 (N.D. Miss. 1971). In these cases the servicemen were allowed neither veterans' benefits nor FTCA recovery. Veterans' compensation is denied due to a void induction. "Individuals inducted in the Army, who at the time did not meet the medical fitness standards for induction, will be released from custody and control of the Army by virtue of a *void induction*." (Army Regulations 635-200 ¶ 5-9.1) (emphasis added).

In spite of a void induction, recovery is denied if the pre-existing infirmity is later aggravated before the serviceman is discharged. In Redmond v. United States, 331 F. Supp. 1222 (N.D. Ill. 1971), the claimant died as a result of the negligent pre-induction exam which failed to discover or diagnose a brain tumor. "[S]ince this conduct was performed by the Army in the course of the decedent's service or *in determining whether he*

Courts in the pre-induction malpractice cases have justified denial of recovery stating that the injury is "inseparably intertwined" with plaintiff's military service.[200] Even though the negligence occurred before plaintiff was in the service, since the aggravation of the injury occurred while the serviceman was acting in the service under orders, there is no recovery. It is questionable whether the "but for," "line of duty" or "military discipline" tests can support denial of recovery for injury which occurs in the pre-induction malpractice context. This logically follows because an injury cannot be "inseparably intertwined" with the service which is found void *ab initio* because the plaintiff did not meet medical fitness standards for induction.[201] Furthermore, denying recovery for pre-induction malpractice cannot be reconciled with the denial of recovery for post-service aggravation of injuries because unlike the pre-induction case, the aggravation from the pre-discharge malpractice does not result from the claimant's activity under orders. There is no justification for the logically inconsistent decisions in pre-induction or pre-discharge malpractice contexts.

In summary, the above discussion demonstrates that the "but for," "line of duty," and "military discipline" tests are inadequate in providing consonant uniform and justifiable results in suits by servicemen under the FTCA. In light of these incongruities and seemingly unjust results, opposition to the Feres Doctrine has grown.[202] Some courts have taken issue with the Feres Doctrine and challenged the Supreme Court to modify or clarify it.[203] Certainly there are con-

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was qualified to serve, the conduct is inseparably intertwined . . . with the decedent's active military service." Therefore, the claim is not cognizable under the FTCA. *Id.* at 1124 (emphasis added). *Accord*, Calhoun v. United States, 475 F. Supp. (N.D. Cal.), *aff'd*, 604 F.2d 647 (9th Cir. 1977); Southard v. United States, 397 F. Supp. 409 (E.D. Pa.), *aff'd without opinion*, 535 F.2d 1247 (3d Cir. 1975); Joseph v. United States, 505 F.2d 525 (7th Cir. 1974).

200. *See, e.g.*, Healy v. United States, 192 F. Supp. 325 (D.N.J.), *aff'd*, 295 F.2d 958 (2d Cir. 1961).

201. *See* note 199 *supra*.

202. *See, e.g.*, James v. United States, 358 F. Supp. 1381 (D.C.R.I.), *vacated without opinion*, 502 F.2d 1159 (1973). "This holding gives me little pleasure. An injustice has been done in this case and it ought to be remedied." *Id.* at 1386. "The facts here are of an isolated nature and could be said to not be within the contemplation of the Supreme Court in deciding the *Feres* case." Callaway v. Garber, 289 F.2d 171, *cert. denied*, 368 U.S. 874 (1961) (serviceman was denied FTCA recovery). "Where the rationale for the holding of [Feres] are not present, there is no reason to find the United States immune." Fischer v. United States, 451 F. Supp. 918 (S.D.N.Y. 1978).

203. "If the matter were open to us, we would be receptive to appellant's argument that *Feres* should be considered and perhaps restricted to injuries occurring in the course of service. . . . Certainly the facts pleaded here, . . . cry out for a remedy." Peluso v. United States, 474 F.2d 605, 606 (3d Cir.), *cert. denied*, 414 U:.S. 879 (1973). *Cf.* Henninger

flicts among lower courts, and these conflicts must be resolved. Unless the Supreme Court overrules *Feres*, clarification of the Feres Doctrine will probably be derived from a synthesis of the *Brooks*, *Feres* and *Brown* decisions.[204] Accordingly, a close examination of the law contained in these cases will reveal a plausible test to be used as the future Feres Doctrine.

AN ALTERNATIVE *FERES* TEST

According to the language of *Feres*, the government is not liable under the FTCA for injuries to servicemen which "arise out of or are in the course of activity incident to service."[205] To determine a workable test under this language, it is necessary to examine the opinion for language and concepts which are descriptive of this holding.

The *Feres* opinion contains the nebulous phrase, "arise out of or in the course of activity incident to *service*," and the key phrase, "arise out of or in the course of *military duty*," which seems to embody the meaning of the holding.[206] This key phrase is expressed when the Court distinguishes *Brooks* from *Feres*, noting that the injury to Brooks did not "arise out of or in the course of military duty."[207] A comparison of this key phrase to the nebulous phrase reveals that the only significant difference in the phrases is the use of the words "activity incident to service" in place of "military duty." It may be concluded from this difference that the *Feres* Court treated "activity incident to service" as an equivalent of "military duty" either as a formalistic restatement of the latter or due to a slip of the pen.

If the analysis of the Court's intent were to end here, a problem would still arise as to what the Court meant by the term "military duty." An indication of what "military duty" signifies is

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v. United States, 473 F.2d 814 (9th Cir.), *cert. denied*, 414 U.S. 819 (1973). In this case the serviceman was falsely told that he must submit to a medical operation four days prior to his discharge. He submitted to the operation which was negligently performed and resulted in the complete atrophy of his left testicle. The court denied FTCA recovery noting that "[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 the line is drawn." *Id.* at 816.

204. The Supreme Court has continually refused to grant certiorari. *See* note 153 *supra*.

205. Feres v. United States, 340 U.S. at 146.

206. The nebulous and the key phrases are found in the *Feres* opinion, *id.*

207. *Id.*

found in the sentence immediately following the Court's use of this terminology. This sentence states that Brooks was on furlough and "under compulsion of no orders or duty and on no military mission."[208] Assuming that *Feres* was explaining the distinction between *Brooks* and *Feres* as mutually exclusive,[209] then not being on military duty means, "under compulsion of no orders or duty and on no military mission."[210] Therefore, it can be concluded that *Feres* interpreted "military duty" as being under compulsion of orders or duty, or being on a military mission.

Other language in *Feres* supports the treatment of "military duty" as the equivalent of acting under compulsion of orders, duty or military mission. The *Feres* Court distinguished *Brooks* and *Feres* a second time by explaining that the situation of *Brooks* "while on leave is not analogous to that of a soldier injured while performing duties under orders."[211] The two logical inferences to be drawn from this statement are that recovery was allowable in *Brooks* because the injury did not occur while performing duties under orders, and/or that recovery is denied in *Feres* because the injuries occurred while performing duties under orders. If the phrase "while performing duties under orders"[212] were viewed as a shorthand statement for the negative of the phrase "under compulsion of no orders or duty and no military mission,"[213] the former phrase would be in accordance with the military duty language and give support to the "military duty/activity incident to service" equation.

The above several phrases comprise the only language in *Feres* which potentially describes activity incident to service. Since each phrase has an apparent meaning tending toward military duty and due to the parallel phrasing "arise out of or are in the course of *activity incident to service*"[214] and "arise out of or in the course of *military duty*,"[215] the *Feres* test should be defined in terms of the *Feres* interpretation of "military duty." As discussed earlier, the *Feres* Court described "military duty" in terms of compulsion of

208. *Id.*

209. Since the Court in *Feres* does not indicate a contrary intent, this is a proper assumption. Furthermore, failing to accept this assumption would contradict the underlying assumption that a clear test can be derived from a reconciliation of the *Brooks*, *Feres* and *Brown* decision.

210. Feres v. United States, 340 U.S. at 146.

211. *Id.*

212. *Id.*

213. *Id.*

214. *Id.* (emphasis added).

215. *Id.* (emphasis added).

orders, duty or military mission.[216] Therefore, in determining whether a serviceman is barred from FTCA recovery, courts should inquire into whether the injury occurred while the serviceman was acting under compulsion of orders, duty, or military mission. This is the "military duty" test which can be found in *Feres* as the Court distinguished *Feres* from *Brooks*.

It is necessary to examine the *Brown* opinion to insure that the equation of *military duty* to *activity incident to service* which reconciles *Brooks* and *Feres* can be reconciled with *Brown*.[217] The *Brown* Court explained pragmatic disciplinary considerations which led to the *Feres* decision and concluded that detrimental effects would result "if suits under the Tort Claims Act were allowed for negligent orders given or negligent act committed *in the course of military duty*."[218] This choice of words demonstrates that, as in *Feres*, the *Brown* Court assimilated "military duty" to "activity incident to service." Further, it is evident that the considerations relating to an impact on discipline which led to the *Feres* decision would be non-existent unless the claimant were injured in the course of military duty.[219] Combining the Court's explanation of the

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216. *Id.* (emphasis added).

217. Additionally, since certiorari was granted in *Brown* to determine whether *Feres* or *Brooks* applied to the *Brown* case, it seems logical that any test developed out of *Brooks* and *Feres* must be consistent with any distinction which *Brown* draws between the two cases.

218. United States v. Brown, 348 U.S. at 112 (emphasis added).

219. These considerations are described by the Court as "the effects of the maintenance of 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." Brown v. United States, 348 U.S. at 112 (emphasis added).

While the Court neither describes these results nor explains the circumstances under which such results will occur, it seems that the Court was aiming at situations where a commander gives an order and a serviceman is injured as a result of this order. Clearly, a serviceman's refusal to perform such an order accompanied by a threat of a Tort Claims Act suit would result in a detrimental effect on vital discipline and morale of the armed forces. This is best illustrated by the situation where a commander is forced, by the exigencies of the circumstances, to make a judgment call whether to give an order. He recognizes the importance of training maneuvers or war games, is aware of a potential danger, and is therefore faced with the dilemma of deciding whether or not to send the troops.

The commander's job requires that the decision be strictly a military one. But if the commander's judgment will be later questioned in court, his response to the situation will be cautious rather than military. If the threat of civil inquiry results in the commander withholding the order to "take the hill," he thereby concedes the "battle" and the valuable learning and training experience to be gained from the maneuver. This results in reduced military efficiency, morale, and discipline. Ultimately such effects could conclude in a

adverse disciplinary impact on servicemen's suits and the "military duty" language used in *Brown*, it is clear that the "military duty" test which was derived from *Feres* and *Brooks* can be supported by *Brown*.[220]

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reduction in national security or increased fatalities in time of emergency. These are of greater importance than the value of the losses to servicemen who are denied the right to sue under the FTCA.

220. In *Brown*, the veteran-plaintiff was allowed to recover under the FTCA. Similarly, the "military duty" test would allow recovery because the veteran was not injured while acting under compulsion of orders, duty or military mission. After his discharge, the veteran was not on active duty, so clearly his injury did not arise out of military duty. While the fact that he was not subject to military discipline supports this conclusion, it also demonstrates that the pragmatic disciplinary considerations do not apply since the plaintiff was no longer under any disciplinary control. Therefore, the decision in *Brown* is compatible with the result under the "military duty" test.

This same conclusion is not quite so clear in the *Feres* case. Only a loose interpretation of the "military duty" test would result in the same results for three plaintiffs as occurred in *Feres*. Two of the plaintiffs brought malpractice actions because of the injurious results of required surgery. Since each of the surgeries was required and the plaintiffs were technically under orders to be in the hospital, the *Feres* decision which denied their recovery would be consistent with the resolution under the "military duty" test. This test is not so easily applied to the third *Feres* plaintiff. This plaintiff died in his sleep when, due to negligent maintenance, his barracks caught fire. The characterization of sleep as a requirement to the fulfillment of the following day's duties would bring this plaintiff into the scope of the "military duty" test. In this context, sleeping would be considered a military duty or mission, hence recovery would be denied as in the *Feres* decision. Therefore, the results in *Feres* can be placed in harmony with those produced under the "military duty" test.

Although the "military duty" test can be reconciled with the individual fact situations in *Feres*, this may not be a desirable result. A better view would be to not stretch the "military duty" test and the fact situations in *Feres* to make the outcomes congruous. The rationale behind the test is to do away with the uncertainty and disparity of results which have prevailed when courts similarly stretch concepts into the presently unclear Feres Doctrine. Stretching military duty concepts to make the "military duty" test compatible with the *Feres* decision would not serve this underlying purpose of the test. Furthermore, avoidance of this stretching recognizes that the detrimental effects of the pragmatic considerations articulated by *Brown* do not apply to the *Feres* plaintiffs. Accordingly, the "military duty" test would allow recovery for the death caused by the barracks fire or for the malpractice injuries.

This conclusion is contrary to that in *Feres*. But, the contrary result is justifiable. Since it is doubtful that anyone was ordered to maintain the barracks in a dangerous condition or ordered to give negligent medical treatment, these suits would not cause a breakdown in the chain of command or reduction in the effective maintenance of discipline. Consequently, the pragmatic considerations enunciated by *Brown* are not applicable. Hence, the result under the "military duty" test, although contrary to that in *Feres*, can be justified thereby eliminating the need to stretch military duty concepts.

Since the language in *Feres* forms the basis for the "military duty" test, it may appear somewhat contradictory to accept the *Feres* language but not the results of the case. Yet this contradiction may be resolved by simply saying that the *Feres* language is correct

The "military duty" test applies to a serviceman who is injured while performing his assigned duties during the normal work day. In this situation, FTCA recovery would be barred, leaving the serviceman with Veterans' Administration benefits as the only recovery.[221] Since this solution makes Veterans' Administration benefits the exclusive remedy for duty-related injuries, it essentially parallels the solution of most civilian workmen's compensation statutes.[222] However, the analogy to civilian workmen's compensation statutes is not a perfect one.

Once his work day is over, a civilian may do as he likes. This is not always the case for a serviceman. At any time during a serviceman's off-duty hours he may be ordered to perform a task. When this occurs, whether the serviceman is on or off the military

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while the Feres decision based on the language is incorrect. Despite the apparent simplicity of this solution, it is not without support.

Feres preceded *Brown*. Due to this chronology, *Brown* may be viewed not only as an attempted clarification of *Feres*, but also as a justification or reflection of second thought about *Feres*. Stencel Aero Eng'r Corp. v. United States, 431 U.S. 666, 672 (1977). This proposition is supported by recognizing that *Brown*, not *Feres*, elucidated pragmatic considerations for denying recovery and that *Brown* directly contradicted the *Feres* analysis of the non-existence of comparable private liability. Since these factors were not articulated by the *Feres* Court, the application of the "military duty" test to the *Feres* facts cannot be criticized as inconsistent. The *Feres* rulings regarding its plaintiff are incorrect in view of the considerations in *Brown*. Furthermore, it is significant that the *Feres* opinion does not discuss the application of the Feres Doctrine to the underlying facts. Rather, it seems designed only to support the existence of the Doctrine. However, this does not necessarily negate the use of *Feres* to aid in the development of a workable and clear guide which would yield consistent determinations of governmental liability to its servicemen.

221. If the serviceman is not injured in the course of "military duty," recovery would be obtainable under either the FTCA or the Veterans Administration benefits. Therefore, it will be necessary for the Supreme Court or Congress to determine whether the serviceman may 1) enjoy both types of recovery, 2) elect one recovery, thereby waiving the other, 3) pursue both, crediting the larger liability with the recovery of the smaller, or 4) pursue only the tort remedy. Whatever determination is made is irrelevant to the operation of the "military duty" test.

222. Under most workmen's compensation statutes an employee cannot sue his employer for injuries arising in the scope of his employment. Rather, the employee's exclusive right to recovery is through the statute. Similarly, under the "military duty" test, a soldier cannot sue the government under the FTCA. Instead, statutory Veterans Administration benefits are his exclusive remedy if he is injured while performing military duties.

The courts in Bradshaw v. United States, 443 F.2d 759 (D.C. Cir. 1971), and United States v. Lee, 400 F.2d 558 (9th Cir.), *cert. denied*, 393 U.S. 1053 (1968), have particularly noted that the test contemplated by *Feres* is defined in terms of the workmen's compensation concept of "course of employment." Similarly, the court in Peluso v. United States, 474 F.2d 605 (3d Cir.), *cert. denied*, 414 U.S. 879 (1973), noted that *Feres* should be restricted to injuries occurring directly in the course of service.

base, he has re-entered a military relationship which requires him to perform a military duty or mission. Therefore, under the "military duty" test, the serviceman cannot recover for any injury which takes place while he is performing that task.[223] It should be apparent that the proper application of the "military duty" test looks beyond the serviceman's regular duty hours or regular tasks to determine whether tort recovery should be allowed. In other words, a court applying the test must discern whether the serviceman was acting under orders or military duty at the time of the injury.

But inquiry into whether a serviceman is under orders cannot be mechanically applied to all situations where a serviceman is technically under orders. A variety of situations exist where a serviceman is technically under orders but not performing any activity contemplated by the "military duty" test. For example, a soldier on leave is technically on orders to be "on leave" and a soldier confined to a military hospital is technically on "Temporary Duty Under Treatment." In these situations, the orders are best categorized as the military's method of accounting for the location and activity status of its personnel. The "military duty" test should not bar recovery of servicemen in these circumstances because the servicemen are not performing any military functions.[224] Although the existence of

223. The converse of this situation would allow an off-duty serviceman to recover for injuries which occurred on or off the military base provided that he was not acting under compulsion of military orders. The fact that a serviceman who is on the base can potentially be brought under military control should be insignificant. Until this potentiality becomes a reality the serviceman is not acting under any duty and the pragmatic considerations articulated by *Brown* are inoperative. *See* note 219 *supra*. This is true even if the plaintiff serviceman is injured by another serviceman who is acting under orders.

Consider the following hypothetical fact situation which illustrates this point. Sergeant X orders private Y to drive to command headquarters for a specified military purpose. En route, Y negligently drives into civilian A and off-duty serviceman B who happen to be standing together alongside the road on the base. In suits by A or B against the United States, whether Sergeant X's order to private Y negligent is insignificant. The only issue is whether private Y was acting negligently in the course of his military duty. Since there is no second guessing or challenging of Sergeant X's orders, the disciplinary considerations of *Brown* do not apply. This is true in the suit by civilian A who will clearly recover; this is also true in the suit by serviceman B who would recover under the "military duty" test.

224. If servicemen on leave or in military hospitals were viewed as performing a military task by an indirect military benefit analysis, the military duty test would lose its significance since virtually any activity of a serviceman can somehow be indirectly linked to his military service. This could potentially bar recovery by servicemen solely because of their status as servicemen. The "military duty" test was designed to avoid this result and bar Tort Claims Act recovery only when there is a nexus between the performance of a required military task and the injury resulting therefrom. Only in this situation do the pragmatic disciplinary factors of *Brown* become significant.

military orders may tend to show that an injured serviceman was acting under compulsion of military orders, proper application of the "military duty" test necessitates examination into the realities of the circumstances surrounding the orders.

Following this approach, most of the recurring circumstances which have given rise to suits by servicemen can be uniformly resolved.[225] This will be accomplished without barring recovery in situations where there is only a minimal connection between the injury and the serviceman's military duties. Proper application of the "military duty" test will overcome the weaknesses of the several

225. Most suits by servicemen have arisen from injuries incurred while performing assigned duties, from malpractice in government hospitals, from vehicular collisions on and off the military base. *See* notes 154-204 *supra* and accompanying text. In any of these cases, the "military duty" test would resolve government liability by asking whether the serviceman was ordered to perform a task at the time he was injured. Clearly FTCA recovery would be barred in the situation where the serviceman is injured while performing assigned duties. *See, e.g.*, Ulmer v. Hartford Accident & Indem. Co., 380 F.2d 589 (5th Cir. 1967) (injury occurred during serviceman's participation in training maneuvers); Morgan v. United States, 366 F. Supp. 938 (N.D. Fla. 1973) (injury occurred while serviceman was proceeding to his duty station). *See also* Layne v. United States, 295 F.2d 433 (7th Cir. 1960), *cert. denied*, 368 U.S. 990 (1961); Colletta v. United States, 300 F. Supp. 19 (D.R.I. 1969).

But in the malpractice context, the serviceman should be allowed recovery whether the medical procedure is elective or "required" since in either case the malpractice is not directly connected to the military activities of the serviceman. An argument can be made that recovery should not be allowed when malpractice arises out of an injury incurred during the course of military duty or out of "required" medical procedures. This is because without medical assistance the serviceman cannot perform his required duties. However, it should be recognized that if this argument is accepted, similar arguments can be made for any injuries occurring on leave or during off-duty hours. It can be argued that a serviceman is required to be off-duty in order to rest and build the morale necessary to perform effectively his military activities. These potentially extreme applications of the Feres Doctrine can be avoided by resorting to the pragmatic considerations in *Brown*. Thus, in the non-elective malpractice case and in all other situations which arguably result in an indirect benefit can be resolved by determining whether the serviceman was performing duties of such a character that maintenance of a FTCA suit would undermine the traditional concepts of military discipline.

With this consideration in mind, FTCA recovery will probably be allowed for malpractice arising out of either elective or non-elective medical procedures. But this policy must be ultimately determined by Congress or the Supreme Court. In any event, the "military duty" test will not bar FTCA recovery for injuries resulting from any recreational activities unless the serviceman is ordered to participate in such. *Compare* Keisel v. Buckeye Donkey Ball, Inc., 311 F. Supp. 370 (E.D. Va. 1970) (serviceman injured in recreational activity in which he was ordered to participate), *with* Degentesh v. United States, 230 F. Supp. 763 (N.D. Ill. 1964) (serviceman injured in non-required recreational activity designed to boost morale). Similarly, if an off-duty serviceman is injured in his barracks or other on-base facility, recovery would be allowed unless the serviceman was required to be in the facility or ordered to perform a task.

tests presently employed by providing predictable and uniform results to servicemen who seek recovery under the Federal Tort Claims Act.

CONCLUSION

This investigation into the Supreme Court cases interpreting the FTCA demonstrates that the Feres Doctrine is not supported by the rationale supplied by the *Feres* Court. Nor is the Doctrine supported under a strict statutory construction analysis. The Supreme Court did not interpret the law; rather, it wrote the law.[226] Without reference to congressional intent, the Supreme Court promulgated a policy which would bar civil recovery against the government for service-related injuries. This policy was established and revealed without reference to the facts of the individual cases. Instead, the Court relied on a sundry of items[227] to mold an argument perpetuating a policy of sovereign immunity. The conclusion to be drawn from these observations is that the Feres Doctrine should be overruled by Congress or the Supreme Court, thereby affording servicemen the right to hold the government responsible for the tortious acts of its officers and employees.

The latter portion of this note has attempted to demonstrate that if the Feres Doctrine is not erroneous, then it certainly is unclear. Various courts have applied differing tests which have resulted in the inconsistent treatment of injured servicemen who seek recovery under the FTCA.[228] The "military duty" test has been proffered as a workable solution to the unpredictable and non-uniform results which occur under the present Feres Doctrine.[229] But whether the present Feres Doctrine is totally rejected or supplanted by the "military discipline" test, something must be done to remedy the incongruous state which pervades current litgation involving injured servicemen. Either Congress must act to ratify or overrule the Feres Doctrine, or the Supreme Court must re-evaluate or re-

226. "There is no justification for this Court to read exemptions into the Act beyond those provided by Congress. If the Act is to be altered, that is a function for the same body that adopted it." Rayonier, Inc. v. United States, 352 U.S. 315, 320 (1957). *Accord*, United States v. Muniz, 374 U.S. 150 (1963). "This Act merely substitutes the district court for Congress as the agency to determine the validity and amount of claims. It suggest no reason for reading into it fine distinctions between various types of claims." United States v. Yellow Cab Co., 340 U.S. 543, 550 (1950).

227. These items include: weak logic, non-supportive case precedent, and an inconsistent statutory interpretation of the Act. *See* notes 59-136 and accompanying text *supra*.

228. *See* notes 154-204 and accompanying text *supra*.

229. *See* notes 205-225 and accompanying text *supra*.

affirm the Feres Doctrine. In any event, the rights of an injured serviceman must be clearly defined.[230]

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230. The appellate courts have not accepted the responsibility for clarifying the Feres Doctrine. This is demonstrated by the increasing number of progressively shorter appellate decisions which examine the facts and the law in less than one page of the reporter. *See, e.g.*, Yolken v. United States, 590 F.2d 1303 (2d Cir. 1979); Vallance v. United States, 574 F.2d 1282 (5th Cir. 1978); Calhoun v. United States, 604 F.2d 647 (9th Cir. 1977); Shaw v. United States, 448 F.2d 1280 (4th Cir. 1971); Sheppard v. United States, 369 F.2d 272 (3d Cir. 1966), *cert. denied*, 386 U.S. 982 (1962); James v. United States, 358 F. Supp. 1381 (D.R.I.) *vacated without opinion*, 502 F.2d 1159 (1st Cir. 1973); Knight v. United States, 361 F. Supp. 708 (D. Tenn.), *aff'd without opinion*, 480 F.2d 927 (6th Cir. 1972).