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INTRAMILITARY TORT LAW: INCIDENCE TO SERVICE MEETS CONSTITUTIONAL TORT

DONALD ZILLMAN†

In this Article Professor Zillman critically examines the current state of intramilitary tort law. Professor Zillman traces the historical development of the prevailing doctrines that govern the ability of the injured serviceperson to maintain a tort action against the government, both in this country and in England. Through this analysis the Article explores the emergence of the incident-to-service rule, which bars suits by military plaintiffs when the injury arose out of activity related to military service. After examining the competing justifications that counsel for and against allowing intramilitary tort suits, and considering the existing statutory compensation system available to the injured service person, Professor Zillman argues that the incident-to-service rule should be reconsidered. Professor Zillman proposes that the rule be modified to remove most intramilitary disputes from the courts. Where compensation to the injured serviceperson is not available presently, Congress should authorize a form of administrative relief.

I. INTRODUCTION

One of the significant developments in tort law since World War II has been the expanded liability of governments and government officials for wrongful acts. The law has developed on several fronts. The Federal Tort Claims Act[1] and state tort claims statutes have waived federal and state immunity for most negligent and some intentional torts. Federal civil rights statutes, primarily 42 U.S.C. § 1983, have held state and local officials and local governments liable for damages for deprivations of constitutional rights. Federal officials have been subjected to similar liability stemming from the Supreme Court decision in *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*.[2]

Any government tort case raises policy issues not present in a private party tort suit. Redress for the injured plaintiff may not accord with the public good. This conflict is sharply illustrated when one party in a case alleging government wrong is a member of the military. Numerically the uniformed military constitutes a considerable portion of the federal work force.[3] The

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† Professor of Law, University of Utah. Major, Judge Advocate General's Corps, United States Army Reserve. The opinions expressed are those of the author and do not necessarily represent the opinions of any agency of government. Ms. Eva Novak, University of Utah, class of 1981, assisted with the preparation of this Article.

1. 28 U.S.C. §§ 2671-2680 (1976).
2. 403 U.S. 388 (1971).
3. In 1979 there were approximately two million active duty military members. The World Almanac and Book of Facts, 1982, at 328-31 (1981).

broad variety of military duties exposes service personnel to almost every form of tortious or constitutional injury—from injury in automobiles to medical negligence, from physical abuse to wrongful damage to reputation. Recognition of the military as a "separate society"[4] highlights the different values that may be involved in litigation over intramilitary misconduct. Not surprisingly, the claim by a military plaintiff against the government or fellow military member has proven difficult for courts and legislatures. The tension has become particularly acute in recent years. Revelations of government misconduct in a wide variety of spheres and the growth of new causes of action against government wrongdoing have encouraged novel suits involving intramilitary claims. At the same time, fears of damage to essential military functions through the treatment of the military as identical to the civilian community have led some to urge caution in carrying civilian tort standards over into the military community.

A focal point for consideration of these issues is *Jaffee v. United States*.[5] Jaffee, a former Army enlisted man, brought suit on his own behalf and on behalf of his fellow soldiers against the United States and individual military and civilian officers. Jaffee alleged that defendants intentionally exposed him to nuclear radiation during atomic weapons testing in the 1950s. Jaffee, suffering from inoperable cancer, sought money damages and other relief from the United States for being compelled to serve as a "nuclear guinea pig."[6] The Court of Appeals for the Third Circuit dismissed a portion of Jaffee's claim against the United States[7] but allowed the action to continue against the individual defendants.[8] The case has been reheard en banc.[9] The *Jaffee* litigation and other lawsuits alleging major military wrongdoing directed against military members[10] reflect the need to rethink intramilitary liability. This Article will attempt that rethinking.

4. See note 166 infra.

5. 592 F.2d 712 (3d Cir.), cert. denied, 441 U.S. 961 (1979) (*Jaffee I*); Jaffee v. United States (*Jaffee II*), No. 79-1543 (3d Cir., filed Feb. 20, 1980), vacated, 633 F.2d 1226 (3d Cir. 1981).

6. 592 F.2d at 714. Counts I, II and III of Jaffee's complaint joined the United States and individual government officers as defendants. Money damages were requested. Count IV was a class action on behalf of all soldiers ordered to be present at the explosion. Only the United States was named as defendant. The complaint sought to require the United States to warn all members of the class of the hazards of their prior radiation exposure and to provide medical care for all class members. Id.

7. The Third Circuit held that the Government had not waived sovereign immunity over Jaffee's claims for money damages but had waived immunity over the equitable request for a warning to class members. 592 F.2d at 719.

8. Jaffee v. United States (*Jaffee II*), No. 79-1543 (3d Cir., filed Feb. 20, 1980), vacated, 633 F.2d 1226 (3d Cir. 1981). See Postscript infra.

9. See Postscript infra.

10. E.g., Stanley v. C.I.A., 639 F.2d 1146 (5th Cir. 1981) (LSD experiment); Everett v. United States, 492 F. Supp. 318 (S.D. Ohio 1980) (exposure to atomic radiation); Schnurman v. United States, 490 F. Supp. 429 (E.D. Va. 1980) (exposure to mustard gas experiment); Sigler v. LeVan, 485 F. Supp. 185 (D. Md. 1980) (harassment by military security officer); Schmid v. Rumsfeld, 481 F. Supp. 19 (N.D. Cal. 1979) (failure to provide protection to Marine informant); Nagy v. United States, 471 F. Supp. 383 (D.D.C. 1979) (participation in LSD experiments); Thornwell v. United States, 471 F. Supp. 344 (D.D.C. 1979) (harassment and participation in LSD experiments). See also the litigation against manufacturers of the defoliant Agent Orange for damage to troops in Vietnam. In re Agent Orange Litigation, 506 F. Supp. 762 (E.D.N.Y. 1980).

This Article first will examine the historical development of the suit for tort damages against the government or a government employee for injuries suffered by a member of the military. The original cases in the English and American courts arose out of suits against individual military defendants for intentional torts. These precedents recognized that military needs could be threatened by such suits but stopped short of providing an absolute prohibition of them. The passage of the Federal Tort Claims Act (FTCA) in 1946 subjected the United States government to a general liability for the negligent or wrongful acts of its employees. Unfortunately, Congress did not address the question of whether military plaintiffs were eligible claimants against the United States. That decision was left to the Supreme Court and lower federal courts, who imposed a prohibition on most intramilitary suits under the FTCA. The judicial imprecision of the various decisions created a rule that was both analytically questionable and difficult to apply in individual cases. The result has created a wealth of litigation over the last thirty years that almost invariably has frustrated plaintiffs, burdened government lawyers and added little insight into the reasons justifying intramilitary immunities. The rejection of actions brought against the government has encouraged a return to actions brought against individual military defendants or actions not relying on the Federal Tort Claims Act. This tendency has been spurred by the development of the constitutional tort action against the federal official. As the *Jaffee* litigation indicates, these cases raise some of the most difficult issues in the intramilitary immunity area.

After investigating the historical background, this Article will examine various tort claims and their development in the intramilitary context. The Article will highlight the real policy choices faced in the legislative and judicial resolution of intramilitary tort claims.[11] In these claims three broad interests are involved. The first is the individual redress interest. The military plaintiff alleges loss of life or harm to person, chattels, reputation or career. Longstanding precepts of Anglo-American tort law hold that these values are compensable upon a showing that defendant is responsible. The government, however, may urge that it is entitled to define redress for its military personnel in its own way. The government may offer some compensatory redress by statute. The plaintiff may feel that he is entitled to more by judicial remedy. Beyond monetary compensation the military plaintiff may seek psychological satisfaction against the wrongdoer. A legal determination may do this by verifying the rightness of plaintiff's position or the wrongfulness of the government's conduct. The military plaintiff may feel that redress must be secured outside the military hierarchy, either from a desire to expose military wrongdoing or from a fear that the military will not correct its errors. Given the unique nature of the military society with its vital functions, access to weap-

11. The term "intramilitary suit" is used to include any lawsuit in tort in which (1) plaintiff alleges harm has occurred during his membership in the armed forces, and (2) the suit is brought against the government or individual members of the military or both. The terms "serviceman," "soldier" and "military member" include members of both sexes of all branches of the armed services.

ons, mandatory periods of service, forced duty assignments and emphasis on control of personnel, the need for avenues of redress can be particularly acute.

The second interest in the intramilitary tort cases is the military efficiency interest. In the private sector we may allow the individual redress objective to override a beneficial activity of the defendant. A products liability judgment may bankrupt a manufacturer. A defamation judgment may close a publisher. A different rule applies in dealing with a government defendant. At the extreme, tort liability should not prevent an operation of government. More narrowly, tort liability should not impair substantially the necessary workings of government and government officials. These concerns are particularly strong when dealing with the military. The military already reflects the choice of societal values over individual desires. An impairment of military capability is of the most serious national consequence. Further, the impairment may be difficult to detect and may not be capable of prompt correction. These factors urge a careful assessment of assertions that intramilitary torts threaten military efficiency.

The third interest in the intramilitary tort cases is the interest in citizen control and review of the military. Intramilitary tort cases can raise crucial questions about the nature of military activities. The uniformed and civilian leaders in the Pentagon may not always serve the national interest when they claim that military efficiency interests preclude individual tort suits. The citizen is entitled to know the values that the military supports. This is so, whether the citizen is a potential member of the military or merely fearful that military wrongdoing against foreign lands or its own membership can be turned on the homefront. The tort claim provides one means for addressing these concerns.

Ideally, the wise solution of an intramilitary claim would satisfy all three interests, but more often, interests will conflict to some degree. An intelligent assessment of these interests will allow a more satisfactory solution to the problems posed by the intramilitary immunity cases.

II. THE DEVELOPMENT OF COMMON-LAW INTRAMILITARY IMMUNITIES

A. *The English Precedents*

English precedents involving suits by military plaintiffs for wrongs done by other members of the military were typically suits by subordinate officers against superiors, brought for intentional conduct. The action was against an individual defendant, not the government. In theory, English common law gave the Crown immunity from tort liability for any attempt by a military member to sue the national government for tortious injury.[12] No similar immunity governed the action against the individual wrongdoer.[13] In practice,

12. P. Hogg, Liability of the Crown in Australia, New Zealand, and the United Kingdom 62 (1971); J. Jolowicz, T. Lewis & D. Harris, Winfield and Jolowicz on Tort (9th ed. 1971) [hereinafter cited as Winfield & Jolowicz]; 11 Halsbury's Laws of England 1401 (4th ed. 1976).

13. Winfield & Jolowicz, supra note 12, at 602.

the distinction between suit against government and suit against an official was less than absolute.[14] Representatives of the Crown would defend the military tortfeasor and would settle meritorious cases or pay judgments rendered against Crown servants.[15]

Spanning a century and a half, three litigations highlight the British common-law cases. The cases raise issues still central to contemporary intra-military damage suits. The first major decision on the issue of intra-military immunity is *Sutton v. Johnstone*,[16] decided in 1786. Johnstone was the Squadron Commander of a British Naval expedition against the French and Dutch. Sutton commanded one of the ships in the expedition, which was damaged in combat. When Johnstone ordered prompt pursuit of the enemy fleet, Sutton refused to bring his damaged ship into the chase as promptly as Johnstone wished. Johnstone treated this disobedience of orders as grounds to remove Sutton from command, to place him under arrest, and considerably later, to court-martial him. The court-martial held for Sutton and acquitted him of all charges. Sutton then brought civil action against Johnstone for the arrest, suspension from duty, damage to reputation and malicious prosecution by court-martial. The case was twice tried to juries, both of which returned verdicts for Sutton. Johnstone appealed to the Court of Exchequer. He asserted that no civil action was permissible to redress a dispute involving court-martial prosecution for actions taken in the course of military discipline. In essence, this was the modern claim of absolute immunity. Alternatively, Johnstone argued that he had probable cause to suspend and court-martial Sutton. The existence of probable cause would protect Johnstone from suit for damages, regardless of Sutton's acquittal at court-martial. This, in essence, was the modern claim of qualified immunity.

Writing the opinion for the Court of Exchequer, Baron Eyre rejected both of Johnstone's contentions. He refused to extend to military commanders the absolute immunity from tort suits given to judges and jurors. While suggesting that some circumstances would allow the courts to give considerable deference to the action of the military superior, Baron Eyre stated that military conduct could be examined in civil court. He was not persuaded that military performance would suffer from the possibility of civil litigation: "Men of honour will do their duty and will abide the consequences."[17] Baron Eyre rejected Johnstone's second contention, holding that the acquittal on one of the court-martial charges reflected the finding that no probable cause existed to bring the charge.

Commander Johnstone brought a writ of error. He again urged that the military commander was a public officer similar to a judge. Both were duty-bound to act for the public good in ways that might injure individual citizens.

14. Jaffee, Suits Against Governments and Officers: Sovereign Immunity, 77 Harv. L. Rev. 1, 3, 18 (1963).

15. P. Hogg, supra note 12, at 62; Winfield & Jolowicz, supra note 12, at 602; see, e.g., Dawkins v. Lord Paulet, L.R. 5 Q.B. 94 (1869); Keighly v. Bell, 176 Eng. Rep. 781 (1866).

16. 99 Eng. Rep. 1215 (1786).

17. Id. at 1222.

If citizens could freely bring civil suits, the performance of public business might be damaged. The military context of the case also offered unique justifications for absolute immunity. Military discipline could be threatened by subordinates' suits. Further, the specialized nature of the military made it impossible for a civilian judge or juror to assess accurately a military dispute. Military proceedings should determine such issues and provide the forum for punishing a commander's excesses toward a subordinate. Johnstone also renewed his contention that he had probable cause for his actions. Sutton's argument on the absolute immunity issue began with the "general proposition that whenever any subject of England suffers any damages from any illegal or injurious act of another . . . the law gives him a remedy by civil action."[18] Sutton cited prior cases that had allowed recovery of civil damages in military or quasi-military situations.[19]

On appeal, the Lord Chancellor ruled for Johnstone, basing his judgment on the views expressed by Lords Mansfield and Loughborough. Their opinion focused on the "essential ground [for a recovery by Sutton] that a legal prosecution was carried on without a probable cause."[20] Their lordships found that probable cause did exist to bring court-martial charges against Sutton. After disposing of other matters, the justices then addressed the absolute immunity issue. They recognized the intramilitary civil suit as a matter of first impression. In dictum, Lord Mansfield supported absolute immunity. Discipline could be threatened if "every acquittal before a court-martial" could give rise to a civil suit. His opinion continued:

> The salvation of this country depends upon the discipline of the fleet; without discipline they would be rabble, dangerous only to their friends, and harmless to the enemy.
>
> Commanders, in a day of battle, must act upon delicate suspicions; upon the evidence of their own eye; they must give desperate commands; they must require instantaneous obedience . . . .
>
> [W]hat condition will a commander be in, if, upon the exercising of his authority, he is liable to be tried by common-law judicature?[21]

At this point, the outspoken defenders of discipline in the fleet returned to their role as cautious appellate justices. They found "no authority of any kind either way" on absolute intramilitary immunity. While the question required resolution "by the highest authority," in this case it was "not necessary to the judgment."[22] Later opinions suggest that the full House of Lords did not concur with the Mansfield dictum on absolute immunity.[23]

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18. Id. at 1237.

19. Swinton v. Molloy (1783), discussed in Johnstone v. Sutton, 99 Eng. Rep. 1225, 1239 (K.B. 1783) (false imprisonment action by ship's purser against captain); Wall v. M'Namara (1779), discussed in *Johnstone* (false imprisonment by captain in Africa Corps against Lieutenant-Governor of Senegambia).

20. 99 Eng. Rep. at 1243.

21. Id. at 1246.

22. Id.

23. Warden v. Bailey, 128 Eng. Rep. 253, 256 (1811) (comment of Lawrence, J.).

Victorian England was the setting for the contribution of the remarkably litigious Lt. Col. Dawkins to the second of the three English intramilitary cases. Dawkins was an officer in the Coldstream Guards. Depending upon whom one believes, Dawkins was either wrongly maligned by fellow officers or a chronic malcontent. Dawkins' significant problems began when he refused to shake hands with Lord Rokeby, one of his superior officers. Rokeby ordered him arrested for eleven days. For several years thereafter, Dawkins sought redress in the military for this and other wrongs. Finally, at Dawkins' request, a military court of enquiry was called to assess the merits of Dawkins' charges. In the course of the enquiry proceedings, both Lord Rokeby and Lord Paulet, another of Dawkins' superiors, expressed their opinions about Dawkins' unfitness for command. The court of enquiry findings were unfavorable to Dawkins. They noted that his conduct was "marked by a contentious and quarrelsome spirit, much at variance with proper subordination."[24] As a consequence, Dawkins was retired from service. His subsequent petitions to the Queen and Parliament to reopen his case failed. At this point Dawkins sought the aid of the civil courts.

Dawkins' first action, *Dawkins v. Lord Rokeby*,[25] was brought against Lord Rokeby for false imprisonment, malicious prosecution and conspiracy to remove Dawkins from the Army. Judge Willes, at the Court of Common Pleas, identified three issues in the case:

1. whether Lord Rokeby acted from bad motives without probable cause,
2. whether an absolute immunity protected Lord Rokeby's actions as a witness in the military enquiries, and
3. whether a purely military question could be raised in a civil tort suit.

Judge Willes focused on the absolute immunity issue. His views strongly endorsed the dictum of Justice Mansfield in *Sutton*. Judge Willes' support for the absolute immunity mixed a concern for the harm to military discipline with the necessity for leaving certain matters to military expertise.

> I cannot conceive . . . anything more fatal to . . . the discipline or the subordination of the army—if every officer who considers himself to have been slighted by his inferiors, or every officer aggrieved by his superiors . . . should seek to undo their judgment before a tribunal which must necessarily have but slight acquaintance with those matters upon which it is called to pronounce an opinion.[26]

Judge Willes further opined that no evidence supported a finding of malice or lack of probable cause on Lord Rokeby's part and that civilian principles of witness immunity would protect many of Rokeby's actions.[27] Dawkins was

24. Dawkins v. Lord Rokeby, 176 Eng. Rep. 800, 808 (1866).
25. 176 Eng. Rep. 800 (1866).
26. Id. at 815.
27. The judge also dismissed the false arrest charge as barred by the statute of limitations, as involving military matters, and as probably not justified on the merits. Id. at 813-15.

nonsuited.

Dawkins brought a further suit against Lord Rokeby for libel and slander.[28] This suit focused on Rokeby's comments at the court of enquiry regarding Dawkins' unsuitability for command. Rokeby claimed absolute immunity. Dawkins maintained he was entitled to recover upon a showing that the defamatory statements were made maliciously or lacked probable cause. Chief Baron Kelly of the Court of Queen's Bench ruled against Dawkins. The Chief Baron first held that Lord Rokeby was entitled to the absolute immunity accorded to a witness in a civil proceeding. The Chief Baron then offered "another and a higher ground" for its ruling for Lord Rokeby. The Chief Baron stated that *Sutton* created a precedent that "a case involving questions of military discipline and military duty alone are cognizable only by a military tribunal . . . ."[29] Nonetheless, the holding is less than clear-cut. The court distinguished other cases ruling for military plaintiffs in civil court challenges to the exercise of military authority.[30] Nor did the opinion detail any particular threat to military discipline. The House of Lords affirmed but addressed only the witness immunity issue.[31] Although Dawkins had failed again, the case was far less than a ringing adoption of absolute intramilitary immunity.

Dawkins also sued Lord Paulet. The suit was for defamation involving comments by Lord Paulet in the course of forwarding Dawkins' complaints to higher authorities.[32] Lord Paulet claimed an absolute immunity for the report of a superior military officer on the military capacity and qualifications of a subordinate. Dawkins contended that he could recover upon a showing of Lord Paulet's malice. The Court of Queen's Bench ruled for Lord Paulet by a divided vote.[33] Justice Mellor held that because Lord Paulet was performing a military duty in forwarding Dawkins' letters with his comments to superior officers, Paulet was absolutely immune. Alternatively, Justice Mellor relied on the *Sutton* dictum to support dismissal of the action. His opinion reflected the military expertise and the military discipline arguments.[34] In Mellor's view, a military proceeding under the Articles of War had exclusive jurisdiction over Dawkins' complaint.

Justice Lush concurred that Dawkins' complaint could only be heard by military tribunals. He viewed the case as involving complaints about Dawkins' "capacity as a military officer" and not involving his "character . . . as a citizen . . . [nor were they intended] for circulation amongst the

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28. Dawkins v. Lord Rokeby, L.R. 8 Q.B. 255 (1873).

29. Id. at 271.

30. Dickson v. Earl of Wilton, 175 Eng. Rep. 790 (1859); Warden v. Bailey, 128 Eng. Rep. 253, 262 (1811) (remanded for a new trial, with strong urging to drop case, for "they ought only to be the subject of arrangement among military men").

31. Dawkins v. Lord Rokeby, 45 L.J.Q.B (n.s.) 8 (1875).

32. Dawkins v. Lord Paulet, L.R. 5 Q.B. 94 (1869).

33. Justice Hayes died before judgment was rendered. Justice Mellor stated that Justice Hayes "entirely approved" Justice Mellor's opinion. Id. at 111.

34. "The promotion of an incompetent man may cause the greatest disaster . . . ." Id. at 115.

public."[35]

Chief Justice Cockburn dissented. He believed Lord Paulet was entitled to a qualified privilege but regarded it as "most disastrous" to deny recovery for the dissemination of a known falsehood, even if done under color of military duty. The Chief Justice reviewed the case law from *Sutton* to *Dawkins*. He found the precedents had not adopted absolute immunity. He further opposed absolute immunity as a matter of policy. The threat of tort suits did not deter fearless action by military officers. On the contrary, an absolute immunity for manifest wrongdoing would itself be harmful to military discipline.[36]

During World War I the English courts returned a third time to intramilitary litigation in the case of *Fraser v. Balfour*.[37] There, the House of Lords reviewed a civil suit for false imprisonment and malicious causation of plaintiff's retirement from the Navy. The House of Lords dismissed the false imprisonment charge because defendant had not participated in the imprisonment. However, it remanded the malicious exercise of authority charge for further fact-finding. The opinion of Lord Chancellor Finlay observed that the absolute immunity question was unresolved, noting that *Dawkins v. Lord Rokeby* had been affirmed in the House of Lords solely on witness privilege and not on the broader issue of absolute immunity from civil court review. The absolute immunity issue was "still open" and involved "constitutional questions of the utmost gravity."[38] The lack of adequate facts in Fraser's case to decide questions of such gravity compelled the remand.[39]

From a contemporary perspective, the English intramilitary tort cases are surprising because they did not adopt an absolute immunity from civil tort suit for actions taken in the performance of military duties. Typically, but not always, the military defendant won the litigation.[40] But cases did go to trial, military command decisions were examined in detail,[41] and narrow grounds for decision were relied upon.[42] Cases like *Sutton*, *Dawkins* and *Fraser* posed direct challenges to the exercise of military authority. The jury in *Sutton* was

35. Id. at 120.

36. Id. at 108.

37. 87 L.J.K.B. (n.s.) 1116 (1918).

38. Id. at 1118.

39. A subsequent case, Heddon v. Evans, 35 T.L.R. 642, 645 (K.B. 1919), quotes Lord Finlay in the *Fraser* case as distinguishing between actions "in excess of, or without, jurisdiction" and acts "within jurisdiction and in the course of military discipline." Acts in the former category which amount to "assault, false imprisonment, or other common law wrong, even though the injury purports to be done in the course of actual military discipline," would be actionable in civil court damage suits. Actions in the latter category would not be actionable in civil court even if malice and lack of probable cause were alleged.

40. Among the exceptions are Dickson v. Earl of Wilton, 175 Eng. Rep. 790 (1859); Hannaford v. Hunn, 172 Eng. Rep. 68 (1825); Swinton v. Molloy (1783), discussed in Johnstone v. Sutton, 99 Eng. Rep. 1225, 1239 (K.B. 1783); Wall v. M'Namara (1779), discussed in *Johnstone*.

41. See the lengthy discussions in Heddon v. Evans, 35 T.L.R. 642 (K.B. 1919) and Dawkins v. Lord Rokeby, 176 Eng. Rep. 800 (1866).

42. Fraser v. Balfour, 87 L.J.K.B. (n.s.) 1116 (1918) (no showing of personal culpability of defendant in false imprisonment charge); Dawkins v. Lord Rokeby, 45 L.J.Q.B. (n.s.) 8 (1875) (evidence given in military proceedings may not form basis of defamation action); Bailey v. Warden, 105 Eng. Rep. 882 (1815) (statute of limitations had run and other acts were permissible in connection with military criminal actions).

asked to decide the propriety of combat orders. They had to assess the degree of damage to Sutton's ship, the necessity for immediate pursuit of the enemy fleet, and the degree of delay in response to orders. Civilians evaluating *Dawkins* or *Fraser* would have to determine fitness for military command. The civilian reviewing the *Dawkins* affair would have to assess the degree of impropriety in the refusal to shake hands with the commander and other incidents during Dawkins' stormy military career. Justices urging an absolute immunity contended first that civilians should not second-guess military expertise and second that any civil court interference would disrupt military discipline.

The first argument in favor of deference to the military, that of military expertise, stresses that the civilian decision regarding the merits of an intra-military dispute is less likely to be correct than the military's determination. This is particularly true when the military provides an independent review process through court of enquiry or court martial. Permitting judgments in civilian courts to turn on issues of probable cause or malice allows the wronged party to urge jurors and judges to assess apparently harsh and summary military acts in civilian terms. Under these conditions, military officers may not only be subject to the inconvenience of trial but may in fact have verdicts rendered against them for acts necessary in a military context involving military expertise.[43]

Unlike the arguments regarding expertise, concerns over military discipline do not turn on the rightness or wrongness of military decisions. Civilian tribunals in some instances may be more accurate fact-finders or more sensitive arbiters of right and wrong than military tribunals. However, the gains from this accuracy may be overridden by the harm to the control of military forces arising from the possibility of civilian review. The ability of a subordinate to challenge a superior's military judgment in the civilian courts undercuts the system of prompt obedience to orders necessary to run a military unit. The English cases all involved disputes going to the heart of the command relationship. At issue in this discipline argument was the conscious exercise of the duties of military command, often in wartime or combat situations.

Other factors also would support an argument to grant absolute immunity in the early English military. For example, the English military during the age of empire could be classed far more accurately as a society separate from the civilian world than could the contemporary American military.[44] Further, the British military of that bygone era relied far more on force and harsh discipline to secure satisfactory military performance than the modern American military. Yet in spite of these factors, the English judiciary refused to adopt absolute immunity as an essential protection of discipline. Given this refusal,

43. See cases cited note 40 supra.

44. E. Longford, Wellington—The Years of the Sword 38 (1969), quotes Sir John Fortescue's comment on the English military recruits of the first half of the 19th century: "They were the off-scouring of the nation, who could be purchased at a cheap rate by the crimps—criminals, decrepit old men, raw boys, the half-witted, the feeble minded, even downright lunatics."

it is ironic to read contemporary United States cases asserting that military discipline will be harmed irreparably if a soldier can sue a military surgeon for medical negligence.[45]

The reasons for the reluctance of the British courts to adopt absolute immunity for intramilitary suits are not well articulated. Several factors are suggested. First, the harshness of military life may have prompted the courts to entertain claims of abuse of military power. Second, the number of officer removal cases suggests the importance accorded the officer's commission in a privilege-conscious society. Finally, as Justice Cockburn suggests in *Dawkins*, the absolute immunity may not have been thought needed to secure satisfactory performance of military command.[46] A qualified immunity protects the vigorous commander. A more extensive immunity only protects the tyrant.

When Parliament finally removed the immunity of the national government from suits in tort in 1947,[47] it is also provided a more substantial intramilitary immunity than the common law cases. Section 10 of the Crown Proceedings Act frees the service member and the Crown from liability in tort for "causing the death of another person or for causing personal injury to another person" when the harmed party is a member of the armed forces on duty at the time or occupying military premises or property, and when the injured party is entitled to military pension rights.[48] While some torts (*e.g.*, defamation) are not covered by the section, others (*e.g.*, battery, false imprisonment) are covered to immunize fully the Crown and its service members.[49]

B. The American Precedents

The original American decisions in intramilitary cases adopted a qualified immunity in intentional tort cases. *Wilson v. Mackenzie*,[50] decided in 1845, is the most significant state case. A naval officer was sued for beating and imprisoning an enlisted landsman. The defendant demurred to the complaint, claiming absolute immunity because of military status. The New York Supreme Court dismissed the demurrer, noting that the English courts had allowed suits for acts done in the exercise of military discipline.

The next precedent in American intramilitary tort law is the litigation involving Captain Wilkes and Private Dinsman. Wilkes was the commander of a naval vessel taking part in a government expedition to the South Seas. Dinsman was a marine on the ship. During the voyage a dispute arose over whether Dinsman's enlistment had expired and he was entitled to be shipped home. Dinsman refused to obey further orders and, at least in Captain

45. E.g., Bailey v. Van Buskirk, 345 F.2d 298 (9th Cir. 1965) ("The idea is that an undisciplined army is a mob and he who is in it would weaken discipline if he can civilly litigate with others in the army over the performance of another man's army duty.").

46. Dawkins v. Lord Paulet, L.R. 5 Q.B. 94, 108 (1869).

47. Crown Proceedings Act, 1947, 10 & 11 Geo. 6, c. 44.

48. Id. § 10.

49. Winfield & Jolowicz, supra note 12, at 604. Adams v. War Office, [1955] 1 W.L.R. 1116, illustrates the workings of the statutory immunity and the military pension system.

50. 7 Hill 95 (N.Y. Sup. Ct. 1844).

Wilkes' eyes, threatened to lead a mutiny among the crew. Wilkes arrested Dinsman, had him flogged and placed in irons and confined him for a few days in a Hawaiian jail that fell somewhat below contemporary eighth amendment standards. Upon return to the United States, Dinsman initiated court-martial charges against Captain Wilkes for "cruelty and oppression." Wilkes was found not guilty. Dinsman then brought civil court action for assault, battery and false imprisonment. A jury found for Dinsman and awarded him $500. In 1849 the case reached the United States Supreme Court.[51] Justice Woodbury agreed that the jury instructions had improperly placed the burden of proof on Captain Wilkes. In essence, the judge below had not recognized that Captain Wilkes was entitled to some privilege because of his position: "Now, in respect to those compulsory duties [of Captain Wilkes], . . . a public officer, invested with certain discretionary powers, never has been, and never should be, made answerable for any injury, when acting within the scope of his authority, and not influenced by malice, corruption, or cruelty."[52] Justice Woodbury emphasized that Captain Wilkes could not claim immunity "for acts beyond his jurisdiction, or attended by circumstances of excessive severity, arising from ill-will, a depraved disposition, or vindictive feeling."[53] While the Supreme Court opinion recognized disciplinary concerns, it fell short of barring any tort action against Captain Wilkes by Private Dinsman. The case was reversed and remanded for proper jury instructions.

The second jury ruled for Captain Wilkes. The case was returned to the Supreme Court.[54] Again the Court reversed the judgment, this time for evidentiary errors prejudicial to Dinsman. The opinion of the Court still did not provide an absolute immunity for Captain Wilkes.[55] Chief Justice Taney recognized the danger to discipline from civil damage suits but felt that harm to the nation would occur if a serviceman could "be oppressed and injured by his commanding officer, from malice or ill-will, or the wantonness of power."[56] These issues of intent were to be given to the jury. If they found the punishment "was in any manner or in any degree increased or aggravated by malice or a vindictive feeling . . . or by a disposition to oppress him," Dinsman should recover.[57] The Chief Justice added, in dictum, that had Captain Wilkes' acts been "forbidden by law, or beyond the power which the law confided to him," he would be liable for even good faith actions.[58]

Wilkes indicates that the American courts did not initially adopt Lord Mansfield's dictum in *Sutton*. The facts of *Wilkes* make an appealing case for absolute immunity. Wilkes' conduct was clearly related to military duty and

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51. Wilkes v. Dinsman, 48 U.S. (7 How.) 89 (1849).

52. Id. at 129.

53. Id. at 130 (citing Warden v. Bailey, 128 Eng. Rep. 253 (1811)). But see Hannaford v. Hunn, 172 Eng. Rep. 68 (1825); Bailey v. Warden, 105 Eng. Rep. 882 (1815).

54. Dinsman v. Wilkes, 53 U.S. (12 How.) 390 (1851).

55. Counsel for Captain Wilkes asserted only a qualified immunity. Id. at 400-01.

56. 53 U.S. (12 How.) at 403.

57. Id. at 405.

58. Id. at 404.

to the completion of a mission of high congressional importance. The facts suggest the need for severe measures to prevent a mutiny and to save the expedition. A military proceeding had assessed Captain Wilkes' behavior and deemed it not criminal. The civil proceedings must have taxed the patience of Captain Wilkes and deflected him from duty. Yet, the Supreme Court twice allowed the case to proceed to the jury on the basis of a qualified immunity.

The intramilitary suit for negligence did not appear until the twentieth century.[59] Several reasons may account for the lack of such suits against individual military defendants. First, the negligence action itself was defined only in the last half of the twentieth century. Motor vehicle accidents and medical malpractice, two staples of recent intramilitary litigation, developed in the twentieth century. Second, the negligent tortfeasors were probably fellow enlisted members or low-ranking officers and likely judgment-proof. Third, the negligent injuries in the course of military duty did entitle the injured party to a combination of medical care and disability pension that probably compared favorably with other disability compensation schemes available at the time.

As governments waived sovereign immunity for the tortious acts of their officers and employees, intramilitary negligence cases began to appear. The New York Court of Claims Act[60] and the federal Public Vessels Act[61] provided opportunities for military personnel to sue the government for the negligent acts of fellow military personnel. Subsequent case law created an intramilitary tort immunity for negligence actions in terms more absolute than the terms found in British and American intentional tort precedents.[62] *Dobson v. United States*[63] and *Goldstein v. State*[64] asserted the immunity doctrine most strongly. In *Dobson* the plaintiff's decedent was a submarine officer killed in a high seas collision allegedly caused by inadequate lighting of the submarine. An action was brought under the Public Vessels Act, which allowed suit "for damages caused by a public vessel." The Act was silent about a tort claim arising out of harm to a military member. The Court of Appeals for the Second Circuit read into the Act a prohibition against military plaintiffs. The court noted the existence of a compensation program for military personnel and dependents. The court also stated that a tort suit constituted a "radical . . . departure from the government's long-standing policy with respect to the

59. The earliest reported intramilitary tort litigation is Weaver v. Ward, 80 Eng. Rep. 284 (1616). One soldier shot a fellow member of his command during a training skirmish. The action was brought in trespass for assault and battery. Plaintiff was given the judgment when defendant's contention of accident was rejected by the court. The court held that in trespass defendant's lack of wrongful intent was irrelevant except that the accident "be judged utterly without his fault." The subsequent paragraph states defendant would have been excused if the harm "had been inevitable, and that the defendant had committed no negligence to give occasion to the hurt." In modern terms the case would be a negligence action for careless use of firearms. *Weaver* makes no mention of any immunity because of the intramilitary nature of the injury.

60. 1920 N.Y. Laws, ch. 922.

61. Ch. 423, 43 Stat. 1112 (1925) (codified at 46 U.S.C. §§ 781-90 (1976)).

62. Sandoval v. Davis, 288 F. 56 (6th Cir. 1923); Moon v. Hines, 205 Ala. 355, 87 So. 603 (1921); Seidel v. Director General, 149 La. 414, 89 So. 308 (1921); Kennedy v. State, 16 N.Y.S.2d 288 (Ct. Cl. 1939); McAuliffe v. State, 107 Misc. 553, 176 N.Y.S. 679 (1919).

63. 27 F.2d 807 (2d Cir. 1928).

64. 281 N.Y. 396, 24 N.E.2d 97 (1939).

personnel of its naval forces."[65]

Goldstein involved a suit by a New York National Guardsman against the state for injury arising from the negligence of a fellow guardsman. The New York Court of Appeals referred to the prospect of state liability for intramilitary negligence as "rather startling."[66] A narrow reading of the case indicates that the court only held that militiamen were not "officers and employees" of the state for purposes of making the state liable for their torts. More broadly, the court appeared to endorse *Dobson*, noting that a pension system existed to provide recompense for military injuries. The court then observed that allowance of tort suits would "be contrary to the history of military organization and control."[67]

Additional intramilitary negligence cases, prior to the passage of the Federal Tort Claims Act, followed the patterns of *Dobson* and *Goldstein*: they consistently rejected tort recovery for negligence, emphasized the existence of a separate compensation system[68] and expressed a belief that the suits would disrupt military organization and discipline.[69] Cases citing threats to military organization and discipline were more conclusory than analytical and did not address British and American intramilitary intentional tort cases with their allowance of some prospect of tort recovery in matters implicating military discipline.

III. THE FEDERAL TORT CLAIMS ACT AND INTRAMILITARY CLAIMS

A. *The Supreme Court Creates the Incident-to-Service Rule*

In 1946 Congress passed the Federal Tort Claims Act (FTCA),[70] making the United States generally liable for negligent or wrongful acts of its employees committed in the scope of their employment.[71] The Act provided an opportunity for Congress to clarify the intramilitary tort action immunity question. Unfortunately, no provision of the Act provides the clarity of section 10 of the English Crown Proceedings Act. The legislative history does not resolve the issue either.[72] Now, thirty-five years later, three conclusions can safely be drawn: (1) the language of the FTCA does not prohibit military

65. 27 F.2d at 808-09.

66. 281 N.Y. at 403, 24 N.E.2d at 100.

67. Id. at 400, 24 N.E.2d at 101.

68. Bradley v. United States, 151 F.2d 742 (2d Cir. 1945); O'Neal v. United States, 11 F.2d 869 (E.D.N.Y. 1925); Moon v. Hines, 205 Ala. 355, 87 So. 603 (1921); Seidel v. Director General, 149 La. 414, 89 So. 308 (1921); McAuliffe v. State, 107 Misc. 553, 176 N.Y.S. 679 (1919).

69. Moon v. Hines, 205 Ala. 355, 87 So. 603 (1921); McAuliffe v. State, 107 Misc. 553, 176 N.Y.S. 679 (1919). See also Wright v. White, 110 P.2d 948, 951-53 (Or. 1941) (action for malicious prosecution adopts disciplinary harms dictum from *Sutton*).

70. Ch. 753, 60 Stat. 842 (1946) (codified in scattered sections of 28 U.S.C.).

71. See, e.g., 28 U.S.C. § 2672 (1976) (administrative adjustment of claims); id. § 1346(b) (1976) (grant of jurisdiction to federal courts).

72. Among the better studies of the legislative history of the Act and the legislative intent regarding military plaintiffs are L. Jayson, Handling Federal Tort Claims, ch. 2 (1964); Hitch, The Federal Tort Claims Act and Military Personnel, 8 Rut. L. Rev. 316, 318-19 (1954); Note, 43 St. John's L. Rev. 455, 456-58 (1969). See also Jefferson v. United States, 77 F. Supp. 706, 711-13 (D. Md. 1948).

plaintiffs from bringing suit; (2) plausible arguments can be made from judicial precedent and legislative history to support an implied prohibition of military plaintiffs; and (3) in view of frequent discussion of the issue of intramilitary immunity, congressional inaction since 1950 constitutes tacit approval of judicial creation of an intramilitary immunity.

Three Supreme Court decisions defined the incident-to-service rule that bars most suits by military plaintiffs under the FTCA.[73] Is is valuable to trace the progress of these cases through the appellate courts in order to divine the justifications for a substantial prohibition of intramilitary negligence suits under the FTCA. The first reported decision was a Maryland federal district court ruling on a government motion to dismiss an FTCA suit in *Jefferson v. United States*.[74] Plaintiff was on active duty when injured through the negligence of military doctors. The Government asserted that the military compensation system and the "special relationship" between the United States and its military personnel prohibited an FTCA suit by a member while on active duty "due to injuries sustained by the negligence of another member of the Forces."[75] Judge Chesnut was not persuaded by the Government's argument, denied the motion to dismiss and remanded the case for further argument. The judge illustrated his concern about the government position by posing the hypothethical case of the serviceman on furlough injured by government negligence.[76]

Ten months later Judge Chesnut dismissed plaintiff's case in *Jefferson*.[77] His opinion focused on the existence of a military compensation system and the peculiar federal relationship of the soldier to the United States.

Three months after the *Jefferson* dismissal, the United States Court of Appeals for the Fourth Circuit ruled on a case involving the facts that had troubled Judge Chesnut in his hypothetical. The Brooks brothers, military enlisted men, were hit on a public highway by a truck carrying the Fort Bragg band. One brother died and one was injured. The brothers had been on furlough at the time of the accident, were driving their own car and were not engaged in any military business. Both were awarded military administrative benefits after the accident. Plaintiffs then sought additional compensation from the United States in an FTCA suit. By a two-to-one vote, the court of appeals held the Brooks brothers were barred from suit under the FTCA.[78] The majority read the legislative history of the FTCA as indicating that Congress had legislated with knowledge of the *Dobson* line of cases, which prohibited military members from pursuing statutory tort remedies.[79] Since these

73. United States v. Brown, 348 U.S. 110 (1954); Feres v. United States, 340 U.S. 135 (1950); Brooks v. United States, 337 U.S. 49 (1949); see Note, 1 Syracuse L. Rev. 87 (1949).

74. 74 F. Supp. 209 (D. Md. 1947).

75. Id. at 210.

76. Id. at 216.

77. Jefferson v. United States, 77 F. Supp. 706 (D. Md. 1948), aff'd, 178 F.2d 518 (4th Cir. 1949), aff'd, 340 U.S. 135 (1950).

78. United States v. Brooks, 169 F.2d 840 (4th Cir. 1948), rev'd, 337 U.S. 49 (1949).

79. Id. at 845.

existing precedents disqualified the military plaintiff, the court believed that congressional imprecision as to service members argued against permitting the Brooks' case. The majority noted the brothers had received statutory benefits and suggested that tort suits might cause a "subversion of military discipline."[80] The majority denied FTCA recovery even though the injuries were not "service-caused." Judge Parker, in dissent, read the statute and legislative history as allowing a suit arising out of "injuries [not] connected with the military service of plaintiffs."[81]

The Brooks plaintiffs took their case to the Supreme Court.[82] They argued broadly that the FTCA did not disqualify military plaintiffs and narrowly that an "injury wholly unconnected with military affairs and not arising out of any armed service status or relationship" should be compensable in tort.[83] Government argument focused on the comprehensive compensation system, which implied that military injuries were to be redressed outside of the tort process.[84]

The Court ruled for the plaintiffs. Justice Murphy for the majority adopted plaintiffs' view of the statutory language, holding that the FTCA allowance of "any claim"[85] provided no exclusion for military plaintiffs. He found that the legislative history of the FTCA also reflected a congressional judgment not to exclude soldiers. Further, the existing military compensation system was not made an exclusive remedy nor had Congress dictated an election of remedies. However, the opinion suggested the Government could not be required to pay twice—once through administrative compensation and once in the FTCA action—for the same injury. The Government should receive credit for any military compensation payments in determining an FTCA award.[86]

This portion of the Court's opinion was a reasonable exercise in statutory construction. However, the opinion also chose to address the consequences of tort liability on the functioning of the military. The Court rejected the Government's fear of "dire consequences" should a "battle commander's poor judgment, an army surgeon's slip of hand, [or] a defective jeep" make the United States liable in tort. The Brooks' accident "had nothing to do with [their] army careers."[87] Had the accident been "incident to the Brooks' service, a wholly different case would be presented."[88]

Brooks is unpersuasive in its explanation of a legislative intent to prohibit

80. Id.

81. Id. at 850 (Parker, J., dissenting).

82. Brooks v. United States, 337 U.S. 49 (1949).

83. Brief in Support of Petition for Writs of Certiorari at 16, Brooks v. United States, 337 U.S. 49 (1949).

84. Brief for Defendant at 18-30, 337 U.S. 49 (1949).

85. 28 U.S.C. §§ 2672, 1346(b) (1976) ("civil actions on claims").

86. 337 U.S. at 53-54.

87. Id. at 52.

88. Id.

soldier FTCA suits in some circumstances and allow them in others.[89] The Court tried to make policy when Congress had not done so. Unfortunately, the policy it made was poorly considered. The *Brooks* Court did not suggest why suits against the United States by military plaintiffs are undesirable. Also, the discussion of types of military lawsuits did not distinguish the dangers of these suits brought against the military by civilian plaintiffs and the dangers of those brought by military plaintiffs. Yet negligence cases for medical malpractice and improper maintenance of a government vehicle were familiar to courts in 1946. Surely the Court did not imply that the FTCA would bar a civilian from suing the military for these injuries. By contrast, suit for a battle commander's poor judgment does raise novel issues whether brought by a civilian or a military member. This action would certainly involve fundamental military decisions. It would also be prohibited by statutory exceptions to tort liability contained in the FTCA.[90]

The second failing of the *Brooks* opinion is its treatment of the military compensation system. The system had been authorized by various statutes and carried out by administrative rules long before passage of the FTCA.[91] Compensation eligibility is based on military status and lack of serious misconduct at the time of injury or death. The system is one of government paid protection for the serviceperson and his or her dependents that applies if the serviceperson was on active duty and the injury is not incurred or contracted during a period of unauthorized absence and is not due to the "intentional misconduct or willful neglect of the member."[92] Further, the serviceman benefits from a presumption that he was in the line of duty and the injury was not due to his misconduct.[93] The Government must supply substantial evidence to rebut the presumption. The compensation program combines elements of workers' compensation protection, health and disability protection, and life insurance to protect the serviceman on or off the job. Thus, the Brooks brothers were eligible for benefits even though they were on vacation and engaged in no work-related duties. They would have been compensated even if they

89. Id. at 53.

90. See 28 U.S.C. §§ 2680(a), (h), (j), (k) (1976) ("discretionary function" exception; claims arising out of assault, battery, misrepresentations; combatant activity claim; claim arising in a foreign country). The notable illustration of the difficulties in such a suit is Rotko v. Abrams, 338 F. Supp. 46 (D. Conn. 1971) (FTCA suit for Vietnam combat death).

91. Various provisions of statutes provide for the serviceman harmed in the line of duty. See 31 U.S.C. § 241 (1976 & Supp. III 1979) (Military Personnel and Civilian Employees Claims Act of 1964 authorizing payment for loss or damage of personal property); 10 id. § 1074 (1976) (entitlement to medical and dental care); id. §§ 1076-1079 (1976 & Supp. III 1979) (dependents' entitlement to medical care); id. §§ 1201-1204 (retirement because of physical disability); id. § 1212 (1976) (disability severance pay); id. § 1447 (1976 & Supp. III 1979) (survivor benefits plan); id. §§ 1475-1478 (1976) (death gratuity); id. §§ 1481-1484 (burial provisions); 38 id. §§ 310-314 (veterans' disability benefits in wartime); id. §§ 331-335 (veterans' disability benefits in peacetime); id. §§ 410-411 (dependents' compensation for service-connected deaths); id. § 610 (VA hospital and nursing home care); id. §§ 765-767 (Servicemen's Group Life Insurance program). The military disability benefits system is summarized in Dep't of the Army, Pam. No. 27-21, Military Administrative Law Handbook §§ 29-30 (1973); Hitch, supra note 72, at 326-28; Note, 29 Hastings L.J. 1217, 1226-30 (1978); Note, 45 N.C.L. Rev. 1129, 1138-39 (1967).

92. Dep't of the Army, supra note 91, § 3.26a.

93. Id.

had been negligent and caused the accident. Justice Murphy's "incident-to-service" test for FTCA purposes creates a different eligibility test. The result of *Brooks* was the creation of a system that allows unpredictable payments from the United States to negligently injured servicemen.

The "wholly different case" envisioned in *Brooks* was not long in reaching the Supreme Court. In fact, three cases were decided by federal courts of appeal shortly after *Brooks*. In *Feres v. United States*[94] the Court of Appeals for the Second Circuit affirmed dismissal of a suit alleging government negligence in a barracks fire that killed plaintiff's decedent. The opinion stressed the existence of the military compensation system and endorsed *Dobson*. *Brooks* was distinguished as a case "where military personnel were not on active duty."[95] In *Griggs v. United States*[96] a divided Court of Appeals for the Tenth Circuit reversed a dismissal of a medical malpractice complaint. The court expanded *Brooks* to make eligible under the FTCA a plaintiff "on active, but not combat, duty."[97] The third and last decision was the Fourth Circuit Court of Appeals' review of *Jefferson v. United States*.[98] By the time of decision, the court had the benefit of not just the Supreme Court opinion in *Brooks*, but also the previous month's decisions in *Feres* and *Griggs*. A unanimous court (including Judge Parker, the dissenter in *Brooks*) affirmed Judge Chesnut's rejection of the serviceman's medical malpractice suit. The court based its opinion on "the peculiar relationship that exists between a member of the armed services and superior military authority."[99] Congress did not intend to subject conduct causing injuries to servicemen "in the execution of military orders" to review in a civil negligence suit. "If this were so, the civil courts would be required to pass upon the propriety of military decisions and actions and essential military discipline would be impaired by subjecting the command to the public criticism and rebuke . . . ."[100] The court "fortified" its conclusion by reference to the distinctly federal relationship between soldier and government and the existing compensation system.[101] The opinion provides the first adoption of fear of disruption of military discipline as a rationale for rejecting servicemen's tort suits.[102]

The three cases were consolidated for decision in the Supreme Court. A unanimous Court ruled against all three plaintiffs.[103] It held that the United States was 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."[104]

Justice Jackson began the Court's opinion by conceding that the legisla-

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94. 177 F.2d 535 (2d Cir. 1949).
95. Id. at 537.
96. 178 F.2d 1 (10th Cir. 1949).
97. Id. at 2.
98. 178 F.2d 518 (4th Cir. 1949).
99. Id. at 519-20.
100. Id. at 520.
101. Id. (citing United States v. Standard Oil Co., 332 U.S. 301, 305-06 (1947)).
102. Id.
103. Feres v. United States, 340 U.S. 135 (1950) (Douglas, J., concurred in the result).
104. Id. at 146.

tive purpose was not clear. He then sought to construe the FTCA "to fit, so far as will comport with its words, into the entire statutory system of remedies against the Government."[105] Several reasons were suggested why the FTCA was not meant to apply to the claims of military plaintiffs injured incident to their service. First, a major congressional objective in passing the FTCA had been to free Congress of the burden of considering private bills for tortious injuries by government employees. Very few of these bills were for military members. Second, the Act makes the United States "liable . . . in the same manner and to the same extent as a private individual."[106] No private individual's liability is "remotely analogous" to that asserted against the United States. In particular, no American decision had allowed a serviceman to sue his superiors or the government for negligence.[107] Third, since recovery under the FTCA is determined under "the law of the place where the act or omission occurred,"[108] it would "hardly be a rational plan of providing for those disabled in service by others in service"[109] to require a soldier to rely on the tort rules of the state into which he was ordered. Further, the soldier is at a disadvantage in litigation because of his duty status. Fourth, the soldier-government relation is distinctly federal. A highly ordered compensation system exists not requiring litigation and providing remedies that "compare extremely favorably" with state workers' compensation formulas. All of these factors supported the rejection of the military plaintiff.

It remained for the Court to deal with *Brooks*. Rather summarily the Court pointed to the "vital distinction" that the Brooks' injuries did not "arise out of . . . military duty." Their "relationship while on leave was not analogous to that of a soldier injured while performing duties under orders."[110]

The *Feres* opinion is a more careful study of the legislative history of the FTCA and the policy choices in the intramilitary cases than that provided in *Brooks*. Nonetheless, it fails as an attempt to assess the status of the military plaintiff under the FTCA. First, the opinion adopts the imprecise incident-to-service terminology without providing further explanation of its meaning. The term evidently meant something more than the workers' compensation "performance of duty" standard[111] and something less than the traditional

105. Id. at 139.

106. 28 U.S.C. § 2674 (1976).

107. 340 U.S. at 141. Justice Jackson cites no case, statute or other authority for this proposition. His footnote reads "*Cf. Dinsman v. Wilkes*, 12 How. 390 and *Weaver v. Ward*, Hobart 135, Eng. Rep. 284 (1616) as to intentional torts." 340 U.S. at 141 n.10. Given *Weaver*'s essential posture as a negligence case (see note 59 supra) and *Dinsman*'s endorsement of a tort suit under circumstances far more injurious to military command and the special soldier-government relationship than the *Feres* case, the conclusion seems lightly supported at best.

108. 28 U.S.C. §§ 1346(b), 2672 (1976).

109. 340 U.S. at 143.

110. Id. at 146.

111. The Federal Employees' Compensation Act, 5 U.S.C. §§ 8101-8151, 8171-8173, 8191-8193 (1976 & Supp. III 1979), is the federal compensation program for most civilian civil servants. Section 8116(c) makes its recovery the exclusive remedy against the government. See Johansen v. United States, 343 U.S. 427 (1952) and Patterson v. United States, 359 U.S. 495 (1959) on the exclusivity issue. The FECA compensates for death or injury "in the performance of . . . duty."

military "line of duty" determination.[112] Second, several of the *Feres* premises were doubtful. The necessity of finding an identical private liability has been rejected by later Court decisions.[113] The concern over the irrationality of allowing fifty state laws to govern military plaintiffs' recoveries applies to a *Brooks* situation as well as a *Feres* situation. Further, when the alternative is denying an FTCA remedy altogether, worries about the burden of tort suits on soldiers seems hypocritical. Third, the distinction between *Feres* and *Brooks* is unpersuasive. As just noted, servicemen in either situation face the same problems in struggling with different jurisdictions. Both are in a federal status as soldiers on active duty. Both are entitled to the compensation system benefits. Both could be asserting novel theories of liability. Fourth, the discussion in the opinion of intramilitary suits at common law is limited to a sentence and a footnote that briefly suggest long-established precedents barring intramilitary tort suits. Finally, the opinion does not address the disruption of discipline issue raised by the Fourth Circuit Court of Appeals in *Jefferson* and earlier alluded to in *Brooks*. Surely this is a concern in the intramilitary tort case. Do these concerns present themselves in the facts of medical malpractice or barracks maintenance negligence? How should this element be assessed in measuring subsequent incident-to-service questions? The Court gave no answer.

The last case in the incident-to-service trilogy was *United States v. Brown*,[114] decided in 1954. Plaintiff was a military veteran originally injured on active duty. Seven years after receiving his honorable discharge, he was at a Veterans Administration hospital and suffered from the doctor's malpractice. The only negligence alleged in his FTCA suit occurred during the post-discharge VA hospital treatment. The Government argued *Feres* controlled since the original injury arose out of Brown's military service and because the Veterans Administration compensation system provided federal relief to veterans injured at a VA facility. Brown argued that *Brooks* controlled. *Brooks* made clear that a military compensation scheme was not the exclusive remedy. Brown maintained that other *Feres* factors did not apply to a person with no active duty relationship to the military at the time of the injury. In particular, Brown's counsel asserted that one justification for *Feres* was the fear of disruption of military discipline from intramilitary suits.

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5 U.S.C. § 8102(a) (1976). Joyce v. United States, 474 F.2d 215 (3d Cir. 1973), considers when the performance of duty begins.

112. See Dep't of the Army, supra note 91, § 3.26. The Federal Tort Claims Act unfortunately defines scope of employment for military members in line-of-duty terms. Scope of employment determines whether the United States will be liable for its employees' torts. Military line-of-duty determinations assess whether military members who have been harmed are entitled to various benefits. As the *Brooks* litigation suggests, the two standards are not the same. The vacationing Brooks brothers were eligible for benefits. Had they been negligent, the United States would not have treated them as within the "scope of employment" for purposes of subjecting the United States to FTCA liability. The cases have limited "scope of employment" for military tortfeasors to the standards of master and servant cases. See L. Jayson, supra note 72, § 204.

113. Rayonier, Inc. v. United States, 352 U.S. 315 (1957); Indian Towing Co. v. United States, 350 U.S. 61 (1955).

114. 348 U.S. 110 (1954).

The Supreme Court sided with Brown by a divided vote, holding that Brown's injury was not incident to military service. Brown, like the plaintiffs in *Brooks*, could bring suit under the FTCA, although any recovery would have to reflect benefits already given by the administrative compensation scheme.[115]

Justice Douglas' interpretation of *Feres* for the *Brown* majority is significant; pointing at the "peculiar and special relationship of the soldier to his superiors, the effects of the maintenance of such suits on discipline, and the extreme results that might obtain of suits . . . were allowed for negligent orders given or negligent acts committed in the course of military duty,"[116] Justice Douglas read a great deal into the *Feres* holding. The *Feres* opinion mentioned the special relationship of soldier to government, but did so in the context of the military compensation system rather than any disciplinary threat. The other disciplinary horribles were not mentioned in *Feres* by the Supreme Court even though that Court was aware of similar language in the court of appeals' decision in *Jefferson*. Further, Douglas' opinion ignored the precedents of the *Wilkes* litigation, a case far more relevant on its facts to disciplinary harm from intramilitary tort suits than either *Feres* or *Brown*.

Since 1954, the Court has shown considerable reluctance to re-enter the incident-to-service quagmire. In its only two re-examinations of *Feres*, the Court has readopted the Douglas explanation of *Feres* and has not changed the holdings of the *Brooks-Feres-Brown* trilogy.

The first of these re-examinations, *United States v. Muniz*,[117] authorized FTCA suits by certain federal prisoners. The Court's unanimous opinion assessed *Feres* as a relevant but not controlling precedent. The opinion provided a more accurate summary of the original *Feres* rationale than did *Brown* but then undercut many of the original *Feres* justifications. The Court found *Feres* best justified by the disciplinary language of *Brown*.[118]

Despite the statement that the *Muniz* Court had "no occasion to question *Feres*,"[119] both the analysis of *Feres* and the holding in *Muniz* encouraged a belief that the Court intended to back away from the incident-to-service rule and allow more military plaintiffs access to the FTCA. Numerous cases in the lower federal courts were argued on the theory that the incident-to-service rule had been changed to the benefit of military plaintiffs.[120] Unfortunately for plaintiffs, the lower courts were unresponsive.

By the time the Supreme Court next considered the incident-to-service rule, most of the *Muniz* justices had left the Court. In 1977 the Court strongly reaffirmed *Feres* in *Stencel Aero Engineering Corp. v. United States*.[121] Cap-

115. Id. at 115.
116. Id. at 112.
117. 374 U.S. 150 (1963).
118. Id. at 162.
119. Id. at 159.
120. See, e.g., Buckingham v. United States, 394 F.2d 483 (4th Cir. 1968); Sheppard v. United States, 369 F.2d 272 (3d Cir. 1966).
121. 431 U.S. 666 (1977).

tain Donham, an Air National Guard pilot, had been injured severely when the exit system of his plane malfunctioned. Donham had been given military medical and pension benefits.[122] He sued the United States and Stencel, the manufacturer of the allegedly defective part. Stencel, claiming the primary negligence had been that of the United States, cross-claimed for indemnity. The United States, relying on the incident-to-service rule, secured dismissals of both Donham's and Stencel's complaints.[123] The case reached the Supreme Court on the issue of Stencel's right to indemnity from the United States. While the Supreme Court decision in *United States v. Yellow Cab Co.*[124] had validated indemnity actions against the United States under the FTCA, that case had not involved an injury to an ineligible plaintiff. The *Stencel* Court, in a seven-to-two decision, reaffirmed *Feres*. The opinion recognized that the disciplinary harm language had been incorporated in *Brown*.[125] Nonetheless, it found that reason persuasive in barring an indemnity action when the party was originally injured incident to service. Allowance of the Stencel suit against the United States could involve "second-guessing military orders, and would often require members of the Armed Services to testify in court as to each other's decisions and actions."[126] Also persuasive to the Court was the fact that allowance of the Stencel action would undercut the military compensation scheme.

Stencel reaffirmed the Court's support for the incident-to-service rule in ringing tones. This was significant in view of the general improvement in the position of tort claimants against government and government officials between 1954 and 1977. It was also significant in view of the wealth of incident-to-service litigation in the lower federal courts since the *Brown* decision. If the Supreme Court was dissatisfied with particular aspects of that litigation it did not suggest that fact in *Stencel*.

B. Defining the Contours of Incidence to Service

The Supreme Court's lack of clarity in defining incidence to service created ample business for lower federal courts and government administrative claim officers.[127] Other writings have detailed the perceived shifts of meaning as district and circuit courts decided individual "incident-to-service" cases.[128] A reading of all reported lower court incident-to-service decisions over the last

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122. Donham received a lifetime pension of approximately $1500 per month. Id. at 668.

123. The district court dismissed Donham's action against the United States on the authority of *Feres*. Donham did not pursue the issue to the court of appeals. Donham v. United States, 536 F.2d 765, 767 n.1 (8th Cir. 1976).

124. 340 U.S. 543 (1951).

125. 431 U.S. at 671-72.

126. Id. at 673. The Court's reasoning is criticized in Note, 29 Hastings L.J. 1217 (1978); Note, 77 Mich. L. Rev. 1099 (1979).

127. 28 U.S.C. § 2675(a) (1976) requires presentation of a tort claim to the responsible federal agency prior to bringing suit on the claim in federal district court. The administrative process settles the great majority of all FTCA claims against the government.

128. Jacoby, The *Feres* Doctrine, 24 Hastings L.J. 1281 (1973); Rhodes, The *Feres* Doctrine After Twenty-Five Years, 18 A.F. JAG L. Rev. 24 (1976); Note, 45 N.C.L. Rev. 1129 (1967); Note, 43 St. John's L. Rev. 455 (1969).

quarter century reveals several facts.[129] First, the incidence-to-service issue has continued to be litigated. Research discovered 147 reported cases involving the doctrine in the intramilitary context. A significant number of these cases were decided post-*Stencel*. Second, plaintiffs have been remarkably unsuccessful. Of the 147 cases, excluding cases clearly within the *Brooks* or *Brown* fact patterns, plaintiffs won only eight cases.[130] Several of these eight decisions are district court opinions that may be reversed on appeal. In these and other cases, plaintiffs still must win their cases on the merits. The lower courts have been virtually unanimous in rejecting any serviceman's claim under the FTCA that is not squarely controlled by *Brooks*[131] or *Brown*.[132] Plaintiffs have tried and have failed to distinguish *Feres* on the grounds that a nonmilitary tortfeasor was involved,[133] that the plaintiff was a Reserve or National Guard member,[134] that an intentional[135] or constitutionally based tort[136] was involved, that only personal property damage was involved,[137] that

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129. All decisions were examined from January 1, 1955, until Vol. 654 of the Federal Reporter and Vol. 517 of the Federal Supplement, in cases keynoted (in the West Digest system) United States, § 78(16), Armed Services Personnel, injuries to. Decisions containing a factual pattern indicating suit on behalf of a military plaintiff against the United States or another government employee were included. Also included were several cases assessing the *Feres* doctrine in related contexts. Lastly, several other incident-to-service cases not included in the keynumber system were included. The result should provide a comprehensive study of the federal trial and appellate court assessment of incident-to-service cases after the Supreme Court decisions in *Brooks*, *Feres* and *Brown* had clarified the contours of the rule. A summary of all cases studied appears at Appendix infra.

130. Hunt v. United States, 636 F.2d 580 (D.C. Cir. 1981) (incident-to-service rule does not bar military plaintiff's action under Swine Flu statute, which made United States liable for claims against flu vaccine manufacturers); Parker v. United States, 611 F.2d 1007 (5th Cir. 1980) (injury on military road); Mills v. Tucker, 499 F.2d 866 (9th Cir. 1974) (injury on road abutting military installation); Stephen v. United States, 490 F. Supp. 323 (W.D. Mich. 1980) (injury at voluntary military recreational activity away from normal duty station); Bryson v. United States, 463 F. Supp. 908 (E.D. Pa. 1978) (off-duty fatality in trying to control drunk on military installation); Hand v. United States, 260 F. Supp. 38 (M.D. Ga. 1966) (injury on highway included in military base); Downes v. United States, 249 F. Supp. 626 (E.D.N.C. 1965) (accident on military installation while plaintiff on pass but in uniform); Rich v. United States, 144 F. Supp. 791 (E.D. Pa. 1956) (on leave but driving to post). See also Troglia v. United States, 602 F.2d 1334 (9th Cir. 1979) (remand); Henderson v. Bluemink, 511 F.2d 399 (D.C. Cir. 1974) (remand); Bankston v. United States, 480 F.2d 495 (5th Cir. 1973) (remand); Nowotny v. Turner, 203 F. Supp. 802 (M.D.N.C. 1962); Armiger Estates v. United States, 339 F.2d 625 (Ct. Cl. 1964) (equitable claim allowed despite *Feres* bar).

131. The following cases were controlled by *Brooks*: Knecht v. United States, 242 F.2d 929 (3d Cir. 1957); In re United States, 303 F. Supp. 1282 (E.D.N.C. 1969); Sapp v. United States, 153 F. Supp. 496 (W.D. La. 1957).

132. *Brown* controlled in the following cases: Milliken v. United States, 439 F. Supp. 290 (D. Kan. 1976) (Army prisoner after discharge); Watt v. United States, 246 F. Supp. 386 (E.D.N.Y. 1965) (retired military man); Hungerford v. United States, 192 F. Supp. 581 (N.D. Cal. 1961) (dishonorably discharged veteran).

133. Hass v. United States, 518 F.2d 1138 (4th Cir. 1975); Layne v. United States, 295 F.2d 433 (7th Cir. 1961).

134. Stencel Aero Eng'g Corp. v. United States, 431 U.S. 666 (1977); United States v. Carroll, 369 F.2d 618 (8th Cir. 1966); Knoch v. United States, 316 F.2d 532 (9th Cir. 1963); Herremen v. United States, 332 F. Supp. 763 (E.D. Wis. 1971), aff'd, 476 F.2d 234 (7th Cir. 1973).

135. Citizens Nat'l Bank v. United States, 594 F.2d 1154 (7th Cir. 1979); Schnurman v. United States, 490 F. Supp. 429 (E.D. Va. 1980); Sigler v. LeVan, 485 F. Supp. 185 (D. Md. 1980); Schmid v. Rumsfeld, 481 F. Supp. 19 (N.D. Cal. 1979); Thornwell v. United States, 471 F. Supp. 344 (D.D.C. 1979).

136. Everett v. United States, 492 F. Supp. 318 (S.D. Ohio 1980); Schnurman v. United States, 490 F. Supp. 429 (E.D. Va. 1980); Sigler v. LeVan, 485 F. Supp. 185 (D. Md. 1980); Schmid v.

plaintiff had never been validly admitted to the military,[138] and that the claimant had an independent claim for the harm.[139] The courts have felt free to pick and choose among the rationales of the *Feres* decision, almost always choosing a rationale for denying recovery.[140] The message for plaintiff's counsel is blunt: unless your military plaintiff was not performing military duties, not on a military installation, not subject to any immediate military command relationship, and not taking advantage of any special military privileges at the time of the negligent or wrongful government act, don't take the case!

The incident-to-service doctrine has been criticized by the legal commentators[141] and some courts.[142] Much of the criticism is justified. The Congress left a significant issue unclear in the 1946 Act. The Supreme Court then created an ill-explained rule that the lower courts have struggled to rationalize. The Supreme Court itself has shifted its justification for the rule. Increased use of the disciplinary harm justification has been particularly unfortunate. The facts of the decided cases rarely support a contention that an FTCA suit would harm military discipline in any immediate way. The Supreme Court's dicta picture a constant stream of injured subordinates suing their commanders for the exercise of military authority. The perceived result is loss of command authority and the promotion of discord in the ranks. The 147 reported incident-to-service cases hardly bear this out.[143] Forty-seven of the cases are medical negligence cases; forty-one involve vehicle or plane accidents; eleven involve government property maintenance failures; eight arise out of injuries at military recreational areas; eight challenge a wrongful entry into the military or a failure to discharge once admitted (most are further species of medical negligence); and ten involve military police or correction officer torts. Only eleven cases arise out of what appear to be injuries incurred in the performance of the serviceperson's work duties. Only in the last in-

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Rumsfeld, 481 F. Supp. 19 (N.D. Cal. 1979); Nagy v. United States, 471 F. Supp. 383 (D.D.C. 1979); Thornwell v. United States, 471 F. Supp. 344 (D.D.C. 1979); Misko v. United States, 453 F. Supp. 513 (D.D.C. 1978), aff'd, 593 F.2d 1371 (D.C. Cir. 1979).

137. United States v. United Servs. Auto. Ass'n, 238 F.2d 364 (8th Cir. 1956); Preferred Ins. Co. v. United States, 222 F.2d 942 (9th Cir. 1955); Rivera-Grau v. United States, 324 F. Supp. 394 (D.N.M. 1971).

138. Yolken v. United States, 590 F.2d 1303 (4th Cir. 1979); Joseph v. United States, 505 F.2d 525 (7th Cir. 1974); Gerardi v. United States, 408 F.2d 492 (9th Cir. 1969); Thompson v. United States, 493 F. Supp. 28 (W.D. Okla. 1980); Becton v. United States, 489 F. Supp. 134 (D. Mass. 1980); Calhoun v. United States, 475 F. Supp. 1 (S.D. Cal. 1977), aff'd, 604 F.2d 647 (9th Cir. 1979); Jackson v. United States, 451 F.2d 282 (Ct. Cl. 1977).

139. DeFont v. United States, 453 F.2d 1239 (1st Cir. 1972); Harrison v. United States, 479 F. Supp. 529 (D. Conn. 1979); Van Sickel v. United States, 179 F. Supp. 791 (S.D. Cal. 1959), aff'd, 285 F.2d 87 (9th Cir. 1960).

140. Among the notable cases finding incidence to service, and ineligibility for plaintiff status under the FTCA, are Charland v. United States, 615 F.2d 508 (9th Cir. 1980); Veillette v. United States, 615 F.2d 505 (9th Cir. 1980); Woodside v. United States, 606 F.2d 134 (6th Cir. 1979); Stansberry v. Middendorf, 567 F.2d 617 (4th Cir. 1978); Camassar v. United States, 531 F.2d 1149 (2d Cir. 1976).

141. E.g., Jacoby, supra note 128; Rhodes, supra note 128; Note, 12 Conn. L. Rev. 492 (1980); Note, 77 Mich. L. Rev. 1099 (1979); Note, 43 St. John's L. Rev. 455 (1969).

142. Peluso v. United States, 474 F.2d 605 (3d Cir. 1973); Henninger v. United States, 473 F.2d 814 (9th Cir. 1973); James v. United States, 358 F. Supp. 1381 (D.R.I. 1973).

143. See cases cited at Appendix infra.

stances are normal command relationships likely to be involved and command decisions challenged. Quite probably, the incident-to-service cases, as unclear as they may be, emphasize that these performance-of-duties cases are hopeless for plaintiffs. However, it is unfortunate to justify all incident-to-service cases on disciplinary grounds. It is unfair to the military plaintiff to offer specious reasons to deny his suit. The sailor subjected to malpractice at an outprocessing physical[144] or the soldier harmed at a poorly maintained military recreation area[145] cannot help but feel contempt for the military and the law when his suit is denied because of a "threat to discipline." The cases are also unfair to the military in suggesting that "harm to military discipline" is really a makeweight argument when the government can find no better reason for denying an FTCA claim. The federal courts have had to face serious legal issues involving military discipline in the past decade in nontort contexts.[146] The incident-to-service precedents have proven of little analytical help in resolving these cases.

Most critics' solutions to the absurdities of the incident-to-service doctrine have been to liberalize servicemen's eligibility under the FTCA.[147] Better analysis of the area, however, suggests that it was not *Feres* that was wrongly decided, but *Brooks*. Aside from trying to interpret what the limited legislative history implies in Congress' original failure to discuss military plaintiffs in the FTCA, sound policy would suggest adoption of an absolute bar to FTCA suits for death or injuries received by an active duty serviceperson who was eligible for military benefits at the time of suit.[148] The change could be made by Congress in language similar to section 10 of the British Crown Proceedings Act. It could also be made by the Supreme Court by an overruling of *Brooks*.

C. A Justification of a Bar to Military Plaintiffs

Analysis of the incident-to-service cases suggests the courts are reaching satisfactory results for unsatisfactory reasons. A prohibition on military claimants under the FTCA is not the illogical rule seen by critics of the incident-to-service cases. Rather, a broad prohibition on military plaintiffs is supported by the existing military administrative compensation program and the unique needs of government in defining the relationship between soldiers and

144. E.g., Henninger v. United States, 473 F.2d 814 (9th Cir. 1973).

145. E.g., Hass v. United States, 518 F.2d 1138 (4th Cir. 1975).

146. See Brown v. Glines, 444 U.S. 348 (1980); Parker v. Levy, 417 U.S. 733 (1974); Relford v. Commandant, 401 U.S. 355 (1971) (extent of court-martial jurisdiction); Carlson v. Schlesinger, 511 F.2d 1327 (D.C. Cir. 1975); Dash v. Commanding General, 307 F. Supp. 849 (D.S.C. 1969), aff'd, 429 F.2d 427 (4th Cir. 1970).

147. Hitch, supra note 72; Rhodes, supra note 128, at 43 (allow FTCA action for harm outside normal duty assignment); Note, 77 Mich. L. Rev. 1099, 1121-26 (1979) (limit *Feres* to cases involving a government exercise of discretion); Note, 43 St. John's L. Rev. 455, 475-76 (1969) (*Feres* should bar recovery only for "peculiarly military aspects"); Note, 14 Val. L. Rev. 527 (1980) (limit *Feres* to performance of military duty injuries).

148. See Note, 45 N.C.L. Rev. 1129 (1967), suggesting this resolution to *Feres*.

government. The court decisions have hinted at aspects of these values but have not carefully defined them.

The presence of the first main value, the existing compensation system, is essential. The *Feres* decision and the subsequent lower court decisions about the meaning of "incidence to service" would be shocking if the only compensation for the service person killed or injured by government negligence was under the FTCA. The military administrative benefits system[149] must be weighed from the serviceperson's viewpoint and from the government's. While the system is not perfect, it is certainly a constitutionally rational response by Congress to the broad problem of harm to a special kind of federal employee, the uniformed military member. Even if the government has "taken away" a serviceperson's "rights" under the FTCA,[150] the military compensation scheme provides a "reasonably just substitute" for the tort remedy it displaces.[151] Constitutional questions aside, the prohibition of FTCA remedies in addition to compensation remedies is a matter of sound policy. Objections to the inadequacy of the military compensation must be measured in terms of the protection given the serviceperson from injury or disease under any circumstances while on active duty, not just in situations in which the serviceman would have an FTCA action against the United States if he or she were a civilian.[152] Judged by this measure, the military compensation system provides a very broad insurance against the risks of day-to-day living, not just the hazards of the military workplace. The system reflects the view of the military person serving twenty-four hours per day, 365 days per year. The compensation system must also be evaluated with the military retirement system that allows pension payments to begin with as little as twenty years of service. Two points should be made. First, the compensation system gives significant benefits to the serviceman not available to civilians or other government employees. Second, the compensation system is part of the entire congressionally fine-tuned military pay-and-benefits system. It should also be remembered that the FTCA is statutorily limited to discourage large verdicts. The Act's prohibition of jury trials,[153] punitive damages,[154] prejudgment interest[155] and excessive attorney's fees[156] and its requirement of attempts at

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149. See note 91 supra.

150. The Federal Tort Claims Act, 28 U.S.C. §§ 2671-2680 (1976), created the right of action in tort against the United States. No common-law right to sue the United States was changed by the Act.

151. See the discussion of constitutional requirements for a statutory scheme abrogating common law rights in Duke Power Co. v. Carolina Envt'l Study Group, 438 U.S. 59, 87-88 (1978). The Court indicated that there the statutory scheme would provide a "reasonably just substitute for the common-law or state tort law remedies it replaces." Id. at 88. The Court did not decide whether even that standard of protection was constitutionally mandated.

152. Several of the critical commentators take this approach. They assume the military benefits system as a given and then criticize its inadequacy when a serviceman could also be eligible for FTCA recovery. See Rhodes, supra note 128, at 41; Note, 77 Mich. L. Rev. 1099, 1107-09 (1979).

153. 28 U.S.C. § 2402 (1976).

154. Id. § 2674.

155. Id.

156. Id. § 2678.

administrative settlement[157] do not make the FTCA the happy hunting ground of the plaintiff's personal injury lawyer. Million-dollar judgments have been awarded under the Act,[158] but they are the decided exception. From the serviceman's point of view the administrative compensation system provides a considerable degree of individual redress. It is hardly a poor second choice to the FTCA remedy.

The prohibition of intramilitary negligence suits under the FTCA also serves important military interests. Several military efficiency objectives can be identified. The objectives of economy, discipline, restoration to duty, federal relationship and nondiscrimination will be discussed. First, the prohibition of FTCA suits saves government funds.[159] Having provided administrative compensation, the government will be further burdened if it has to pay servicemen under the FTCA. The added FTCA payments do not appear to serve any congressional goals in the compensation of servicemen. In fact, the current workings of the incident-to-service rule are likely to reward least the serviceman injured while performing military duties and most likely to reward the serviceman injured while making no immediate contribution to the national defense. Congress may choose to correct the discrepancy by eliminating added compensation to the *Brooks* plaintiff.

Second, in some instances intramilitary suits can pose legitimate threats to discipline. The most obvious cases involve the suit by the subordinate against the superior. The opportunity to second-guess the commander through discovery proceedings and trial can undermine the attitude of prompt and willing obedience to lawful orders that should govern the subordinate-superior military relationship. Suits by members of the same unit may also undermine unit morale. The Supreme Court and lower courts have recognized the intangible nature of military morale and discipline in other contexts and have been willing to grant considerable discretion to the military in defining when they are threatened.[160] Since these cases overrode constitutional values, surely the prospect of a "more adequate verdict" for an injured serviceman here also is of lesser counterweight.[161]

Third, the existence of an FTCA remedy can impede the crucial military objective of prompt restoration of the injured serviceman to duty status. The

157. Id. § 2675.

158. E.g., Frankel v. United States, 321 F. Supp. 1331, 1349 (E.D. Pa. 1970), aff'd, 466 F.2d 1226 (3d Cir. 1972); Griffin v. United States, 500 F.2d 1059 (3d Cir. 1974).

159. The Supreme Court has recognized this factor in Stencel Aero Eng'g Corp. v. United States, 431 U.S. 666, 673 (1977) (compensation system "provides an upper limit of liability").

160. E.g., Brown v. Glines, 444 U.S. 348 (1980); Secretary of the Navy v. Avrech, 418 U.S. 676 (1974); Parker v. Levy, 417 U.S. 733 (1974); Carlson v. Schlesinger, 511 F.2d 1327 (D.C. Cir. 1975).

161. Provisions of the FTCA give some protection of the command relationship. The "combatant activities" exception, 28 U.S.C. § 2680(j) (1976), and the "discretionary function" exception, id. § 2680(a), are the most notable. However, the "combat activities" exception does not protect most peacetime exercises of command control. See Johnson v. United States, 170 F.2d 767 (9th Cir. 1948). The "discretionary function" exception has been difficult to interpret. In recent years courts have been less generous in according its protection to government activities. See Zillman, The Changing Meanings of Discretion: Evolution in the Federal Tort Claims Act, 76 Mil. L. Rev. 1 (1977); Downs v. United States, 522 F.2d 990 (6th Cir. 1975).

prospect of a tort action (whether administrative or judicial) can cause the soldier to spend time and concern on the litigation. The soldier preoccupied with counsel interviews, depositions, trials and appeals can be expected to be a less effective soldier. Further, the tort suit with its lump sum damage award at the time of settlement or judgment may be a subtle disincentive to prompt and full recovery. Litigation negotiations may encourage the overstatement of a disability or of pain and suffering. These factors can slow return to duty or lessen performance once the restoration to partial duty has occurred.

Fourth, beyond immediate disciplinary threats, the existence of the tort remedy undercuts the relationship between soldier and government that Congress and the Executive may desire to promote. A substantial body of sociological literature has examined the nature of membership in the military.[162] While the military has become more like the civilian world over the past century,[163] the military remains distinct from the average government employment relationship.[164] The military relationship is far more pervasive than the average employment situation.[165] The military is both a job and a way of life. The sense of mission, the distinctive military community, the obligatory aspects of the tour of duty, the forced companionship and the physical dangers do make the military the "separate society" recognized by the Supreme Court,[166] Congress, military leaders and scholarly commentators. An adversary tort relationship with the United States or a fellow serviceman, regardless of the command relationship, undercuts this concept. Soldiers can do wrong,

162. Three of the best studies are S. Huntington, The Soldier and the State (1957); M. Janowitz, The Professional Soldier (1960); C. Moskos, The American Enlisted Man (1970).

163. M. Janowitz, supra note 162, at 8, 21, 40-46.

164. C. Moskos, supra note 162, at 38, 170. The separateness of the military is further addressed in Moskos, From Institution to Occupation, Trends in Military Organization, 4 Armed Forces & Soc'y 51 (1977); Stahl, McNichols & Manley, An Empirical Examination of the Moskos Institution-Occupation Model, 6 Armed Forces & Soc'y 257 (1980).

165. Moskos, supra note 164 (details many distinctive features of military life).

166. Modern Supreme Court discussion of the role of the military has endorsed the theory of the military as a "specialized society separate from civilian society" that has "developed laws and traditions of its own." Parker v. Levy, 417 U.S. 733, 743 (1974). The distinctive nature of the military allows regulation of "a much larger segment of the activities of the more tightly knit military community" than is ever done in the civilian community. Id. at 749. The *Levy* case further distinguishes the military relationship to government, finding the government is "employer, landlord, provisioner, and lawgiver rolled into one." Id. at 751. The necessity for military obedience justifies the distinction. While the Constitution does apply to members of the military, it must be applied with a recognition of the differences between military and civilian society. The fifth amendment expressly excepts the armed forces from the requirement of grand jury presentment. Military regulation of speech and petition activities is also permissible in circumstances that would violate the first amendment in a non-military context. Id. at 456-58 (Articles 133 and 134 of the Uniform Code of Military Justice (U.C.M.J.) not overbroad or void for vagueness); Brown v. Glines, 444 U.S. 348 (1980) (military may impose prior review requirement on serviceman's right to petition Congress because of potential threat to military discipline); Secretary of the Navy v. Avrech, 418 U.S. 676 (1974) (Article 134 of U.C.M.J. not unconstitutionally vague). See also Secretary of the Navy v. Huff, 444 U.S. 453 (1980). The Court also sustained restraints on civilian first amendment activity on military installations in Greer v. Spock, 424 U.S. 828 (1976). The Court recognized the military installation could not be treated as a public forum for purposes of literature distribution or political campaign appearances. Other decisions have recognized the distinctive nature of the military criminal processes. Middendorf v. Henry, 425 U.S. 25 (1976) (fifth and sixth amendments do not require presence of counsel at summary court-martial); Schlesinger v. Councilman, 420 U.S. 738 (1975) (in most cases servicemen must exhaust all military remedies before seeking civilian court review).

but their misdeeds should be corrected within the military system. The military should likewise provide for its own casualties. If mistakes causing injury have occurred, it is essential to correct them to prevent further harm to military performance. Worry over possible civil liability should not impede accurate fact-finding. The combination of criminal and administrative sanctions for the military wrongdoer adequately serves the necessary deterrent function.

Finally, the present or any expanded system of allowing some military personnel access to both FTCA and military administrative remedies discriminates in ways undesirable for military morale. Commentators have decried giving the civilian access to the FTCA while denying it to the soldier.[167] The critics forget that a more harmful discrimination exists between the recovery given different soldiers under the present system. The soldier accepts many distinctions between civilian and soldier. They exist in a variety of forms, from dress to movement around the world, to early retirement, to a different set of criminal laws, to restrictions on political activities. Surely no massive discrimination occurs in limiting all active duty military personnel to the administrative compensation program.

The more serious discrimination lies in the varied recoveries for military injuries or death. Should a family be entitled to less compensation when their son is a combat fatality than when he is killed on leave through government negligence? Do supporters of limiting the incident-to-service rule feel that an aviator, wounded and permanently disabled in combat due to government negligence, should receive less compensation from the United States than an airman injured by government negligence at a military recreation area? If the complaint is a general inadequacy of military disability benefits, that issue should be addressed by Congress. The present system provides occasional irrational windfalls that serve no purpose in military planning.

On balance, it would be appropriate to handle intra-military tort claims against the United States exclusively under the administrative compensation programs. The *Feres* precedents could be modified to bar any FTCA suit by a military plaintiff who is entitled to recover military benefits. The benefits system provides a satisfactory basis for individual redress. The litigated cases indicate that the injured soldier is unlikely to carry any other grievance against the military beyond the desire to be compensated for injury. By contrast, substantial reasons of military efficiency encourage the use of the no-fault administrative program. Finally, no citizen-control objectives counsel against the elimination of intramilitary FTCA remedies. Military negligent wrongdoing is still reviewed by the courts when civilian plaintiffs are involved.

IV. Suits Against Individual Military Defendants

Section II observed that British and American intramilitary tort precedents arose out of suits by servicemen against individual military defendants. The passage of the Federal Tort Claims Act in the United States focused at-

167. See note 152 and accompanying text supra.

tention on the government as defendant. The Supreme Court's incident-to-service cases forbade most suits against the government by the military for tortious injury. However, neither the FTCA nor the *Brooks-Feres-Brown* trilogy addressed the tort suit against the individual military defendant. The limited prospects for recovery against the United States under the FTCA have encouraged military plaintiffs to sue individual military tortfeasors.

We examine suits against individual military defendants by military plaintiffs in three, not always exclusive, categories. The first category involves suits for ordinary negligence. The second involves suits based on certain common law torts—assault, battery, false imprisonment, defamation—originally excluded from FTCA coverage.[168] The third involves suits based on the constitutional tort theory first enunciated in *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*[169] for federal military personnel and authorized by 42 U.S.C. § 1983 for state military personnel.

A. The Negligence Suit

The few cases that considered the issue prior to passage of the FTCA rejected the intramilitary negligence suit because of concerns about harm to military discipline and the existence of the administrative compensation systems.[170] Although the FTCA did not forbid suits against the individual government tortfeasor, the great majority of military tort victims sued only the United States.[171] The *Feres* precedent soon emphasized that the military plaintiff injured incident to service could not sue the United States. A few dissatisfied servicemen plaintiffs then tried to sue the individual military tortfeasors. The courts and Congress combined to thwart these plaintiffs. Congress enacted a series of statutes immunizing certain government employees from tort suit for acts within their scope of employment. The favored categories of employees have been vehicle drivers,[172] Veterans Administration medical personnel,[173] Public Health Service medical personnel[174] and, most recently, military medical personnel.[175] Typically the statutory action is the result of a few lawsuits filed against individual government employees and worries over burdens of liability on these employees.[176] The immunity statutes forbid suit by any plaintiff—civilian or military—against the government

168. 28 U.S.C. § 2680(h) (1976) originally forbade any claims against the United States "arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights." The exception was phrased as the "intentional tort" exception. Despite its inaptness to some excluded items, the term will be used here. A 1974 amendment to section 2680(h) (Pub. L. No. 93-253, § 2, 88 Stat. 50) allowed United States liability for certain torts of law enforcement officers.

169. 403 U.S. 388 (1971).

170. See notes 59-69 and accompanying text supra.

171. A judgment in an FTCA action is a "complete bar to any action" against the government employee tortfeasor. 28 U.S.C. § 2676 (1976).

172. Id. § 2679.

173. 38 U.S.C. § 4116 (1976).

174. 42 U.S.C. § 233 (1976).

175. 10 U.S.C. § 1089 (1976).

176. S. Rep. No. 1264, 94th Cong., 2d Sess. 4, reprinted in 1976 U.S. Code Cong. & Ad. News

employee. For the civilian plaintiff this compels action against the United States under the FTCA. The military plaintiff is left with no tort remedy. *Feres* bars the incident to service suit against the United States. The immunity statute bars any action against the fellow serviceman covered by the immunity statute.

Courts also have endorsed an intramilitary immunity in cases against individual military defendants. The judicial decisions have mixed *Feres* precepts and a perceived pre-*Feres* common law bar on intra-military negligence actions. *Bailey v. Van Buskirk*,[177] a Ninth Circuit Court of Appeals case decided in 1965, has served as the most cited precedent. There, an enlisted man injured through medical malpractice while on active duty sued the Army doctors as individuals. The court observed that the plaintiff had benefitted from the "reasonably adequate" military compensation system. However, it focused its justification of an intramilitary bar on negligence suits on the potential harm to discipline. "The idea is that an undisciplined army is a mob, and he who is in it would weaken discipline if he can civilly litigate with others over the performance of another man's army duty."[178] Subsequent cases have endorsed the *Bailey* logic with very limited analysis of the issues.[179] Courts, while recognizing that *Feres* does not control the issue, have relied on *Feres* to prohibit the action against the serviceman defendant.

The notable exception to the judicial precedents is *Henderson v. Bluemink*.[180] The case involved suit by a civilian plaintiff against a military doctor for malpractice.[181] The Court of Appeals for the District of Columbia refused to prohibit absolutely tort suits against military doctors. Rather, the court distinguished between policy decisions and purely medical decisions. The court suggested immunity might be proper for policy decisions, but no immunity should be given medical decisions. The case was remanded to determine whether a grant of immunity was appropriate.[182] The *Henderson* litigation proved a major stimulant to passage of the military medical personnel immunity statute.[183] While individual immunity has now been mandated in military medical cases, it remains to be seen how the *Henderson* case would

4443, 4445-47; S. Rep. No. 736, 87th Cong., 1st Sess., reprinted in 1961 U.S. Code Cong. & Ad. News 2784, 2789-90, 2795-96 (Driver's Act).

177. 345 F.2d 298 (9th Cir. 1965).

178. Id. at 298.

179. Martinez v. Schrock, 537 F.2d 765 (3d Cir. 1976); Tirrill v. McNamara, 451 F.2d 579 (9th Cir. 1971); Bailey v. DeQuevedo, 375 F.2d 72 (3d Cir. 1967); Howell v. United States, 489 F. Supp. 147 (W.D. Tenn. 1980); Adams v. Banks, 407 F. Supp. 139 (E.D. Va. 1976); Kennedy v. Maginnis, 393 F. Supp. 310 (D. Mass. 1975); Roach v. Shields, 371 F. Supp. 1392 (E.D. Pa. 1974). The application of *Feres* to individual defendant cases is criticized in Jacoby, supra note 128, at 1296-98.

180. 511 F.2d 399 (D.C. Cir. 1974).

181. The court did not express an opinion whether the United States would have been liable under the FTCA. Id. at 403 n.26.

182. Id. at 404.

183. S. Rep. No. 1264, 94th Cong., 2d Sess. 4, reprinted in 1976 U.S. Code Cong. & Ad. News 4443, 4445.

apply to a *suit by a serviceman* against another serviceman for a negligent act not covered by an immunity statute.

The negligence suits brought by military plaintiffs against military defendants have almost without exception involved garden variety tort actions in which there has been little threat to the superior-subordinate disciplinary relationship.[184] Most of the cases have involved medical malpractice. The suit is brought against the individual defendant primarily because *Feres* bars the suit against the United States. Courts' assertions that intramilitary negligence suits are unthinkable ignore the *Wilkes* cases allowing suit for intentional tort in a situation in which the disciplinary harm was far more serious.

While the threat of disciplinary harm is rather doubtful in the medical malpractice case, the other factors supporting an intramilitary tort prohibition in negligence actions against the United States also apply to negligence actions against individual military defendants.[185] The statutory compensation system does provide payment to the victim of government negligence. Congress should define this as the limit on government payment. While an added tort judgment against the individual could be paid by the individual doctor or his malpractice insurer, the government also has a financial interest in judgment. First, the government provides legal defense for the government employee sued for activities within the scope of employment.[186] The cost of supplying government or private counsel can be considerable. Further, the government may feel obligated to recompense the uninsured military defendant who is found liable. Aside from direct expense, the individual immunity is a valuable part of the indirect compensation given military personnel. Particularly for certain professionals the freedom from the worries of malpractice liability is part of the attraction of service life. This helps recruit and retain personnel at a lower cost to the government.[187]

The immunities also protect the military plaintiff and defendant from work disruption. Some time is needed to investigate allegations of negligence, but this is far short of the time needed to engage in litigation. The intramilitary suit against the individual defendant also intrudes on the relations between servicemen and the government in the ways discussed earlier.

A major argument against individual immunities focuses on the possible encouragement of careless performance of duties. Both the military and the citizenry will lose if freedom from tort liability encourages negligent injuries.

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184. See, e.g., Hass v. United States, 518 F.2d 1138 (4th Cir. 1975) (negligent operation of recreational stable); Mattos v. United States, 412 F.2d 793 (9th Cir. 1969) (vehicular negligence); Bailey v. Van Buskirk, 345 F.2d 298 (9th Cir. 1965) (negligent surgery); Thomason v. Sanchez, 398 F. Supp. 500 (D.N.J. 1975) (vehicular negligence), aff'd, 539 F.2d 955 (3d Cir. 1976), cert. denied, 429 U.S. 1072 (1977); Garner v. Rathburn, 232 F. Supp. 598 (D. Colo. 1964) (work accident with civilian foreman as defendant).

185. See section III.*C*. supra.

186. See Bell, Proposed Amendments to the Federal Tort Claims Act, 16 Harv. J. Legis. 1, 7-9 (1979), in which the former Attorney General gives his perspective on the burden of defending government employees.

187. See S. Rep. No. 1264, 94th Cong., 2d Sess. 5, reprinted in 1976 U.S. Code Cong. & Ad. News 4443, 4447.

Are military personnel less careful because they know they cannot be sued in their individual capacity by some or all of their victims? When the military plaintiff is involved, the issue is particularly significant. If immunity encourages carelessness, the armed services are harmed because more personnel are disabled for duty and the perception of co-workers' incompetence or carelessness may hamper the performance of duties. This perception may also encourage personnel to leave military service or never to enter in the first place.

The assessment of the effects of immunity will vary among categories of military defendants. Consider, for example, two of the presently immunized groups—vehicle drivers and medical doctors. The average driver is a low or mid-level enlisted person who may be unaware of the existence of the immunity and hardly threatened by the prospect of a large tort judgment against him. Further, reckless driving threatens the drivers with physical harm, criminal sanction and possibly higher insurance rates on his personal vehicle. Bad driving exists in the military, but it is doubtful that the immunity statute increases it. The medical doctor may be in a different posture. The doctor is almost certainly aware of the immunity statute and its implications, is free from significant worry over criminal sanction and is not physically threatened by his negligent conduct. The careless surgery, unlike the speeding jeep, only harms the victim. The fear of malpractice suits and judgments is a meaningful incentive to the military physician who may plan to move to more lucrative civilian practice. On the other hand, the doctor's professional standards and peer review provide a significant check on carelessness. The immunity statutes and judicial holdings and their effect on performance deserve further evaluation. If the individual immunity can be shown to reduce performance, some immunities can be withdrawn. At present, however, the factors that support limiting military claims against the United States would also support limiting claims against other military members.

B. The Intentional Tort Cases

Intramilitary tort law originated from intentional tort actions brought by subordinates against their superiors. Both British and American precedents rejected the absolute immunity for the military defendant. In America the *Wilkes* cases remain, a century after their decision, as precedent for the proposition that in intentional tort suits by a subordinate, a military superior is entitled to a qualified, but not an absolute, immunity.[188]

Current military intentional tort cases are different from the negligence cases. The differences stem from legal developments outside the intramilitary litigation area and the nature of the complaints. Unfortunately, these developments have not been well analyzed in the few intramilitary suits against individuals for intentional torts.

The first legal development occurred when Congress initially distin-

188. Dinsman v. Wilkes, 53 U.S. (12 How.) 390 (1851); Wilkes v. Dinsman, 48 U.S. (7 How.) 89 (1849). See section II.*B*. supra.

guished between negligent and intentional torts for purposes of FTCA recovery. The FTCA exempted most of the intentional torts from the government's promise of recompense for negligent or wrongful actions of government employees. Section 2680(h) of the FTCA excludes claims "arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights."[189] Until 1974 the statutory exemption forced all plaintiffs, civilian and military, to sue the individual government employee if they wanted any recovery for these torts. In 1974 Congress recognized United States liability for the physical torts of government law enforcement officers.[190] The United States remains immune from liability for such torts as libel, slander and interference with contract relations and for physical torts committed by government employees other than law enforcement officers. The statutory amendment does not address the eligibility of military plaintiffs. However, the *Feres* precedents suggest that the soldier abused by military police may be in a different position from the civilian.

The second development significant for the resolution of intramilitary intentional tort suits against individuals is the court-created immunity. Protection of persons involved in judicial proceedings and persons responsible for preparing certain government information from suits in torts was well recognized by the time the English intramilitary cases were decided. These protections were used to provide immunity to the officer involved in court-martial proceedings or the officer preparing reports on the performance of subordinates. American courts have adopted absolute immunity from civil damage suits for participants in the judicial process[191] and legislators.[192] Immunity for executive officials has been less certain. The *Wilkes* litigation suggests only qualified immunity.[193] *Spalding v. Vilas*[194] gave absolute immunity from a damage suit to a Cabinet officer sued "on account of official communications made by him pursuant to an act of Congress, and in respect of matters within his authority."[195]

Contemporary examination of immunity for executive officers began in the wake of World War II with Judge Learned Hand's opinion for the Second

189. 28 U.S.C. § 2680(h) (1976). Professor Jayson regards this justification for the intentional tort exception as "unconvincing." L. Jayson, supra note 72, at § 260.01(1). The "scope of employment" requirement of 28 U.S.C. §§ 1346(b) and 2675(a) prevents widespread government liability for uncontrolled actions of soldiers or other government employees. The discretionary function exception, 28 U.S.C. § 2680(a) (1970), would prevent liability for major policy decisions that would intrude on individual rights.

190. Pub. L. No. 93-253, § 2, 88 Stat. 50 (1974), amending 28 U.S.C. § 2680(h). See Boger, Gitenstein & Verkuil, Federal Tort Claims Act Intentional Torts Amendment: An Interpretative Analysis, 54 N.C.L. Rev. 497 (1976).

191. Stump v. Sparkman, 435 U.S. 349 (1978) (judge); Imbler v. Pachtman, 424 U.S. 408 (1976) (prosecutor); Pierson v. Ray, 386 U.S. 547 (1967) (judge); Bradley v. Fisher, 80 U.S. (13 Wall.) 335 (1871) (judge).

192. Tenney v. Brandhove, 341 U.S. 367 (1951); see also U.S. Const. art. I, § 6.

193. See text accompanying notes 50-58 supra; Note, Qualified Immunity for Executive Officials for Constitutional Violations: *Butz v. Economou*, 20 B.C.L. Rev. 575 (1979).

194. 161 U.S. 483 (1896).

195. Id. at 498. The opinion does not mention the *Wilkes* cases.

Circuit Court of Appeals in *Gregoire v. Biddle*.[196] Plaintiff sought damages for four and one-half years wrongful detention as an enemy alien in World War II. A prior court decision had supported plaintiff's habeas corpus action for wrongful detention.[197] In a second action, plaintiff claimed a violation of both common-law and constitutional rights.[198] He sought damages from two Attorneys General and other high government officials responsible for his detention. Judge Hand held that prior Supreme Court precedents[199] mandated immunity from the common-law charge regardless of allegations of malice and lack of probable cause. He justified the absolute immunity by the impossibility of distinguishing meritorious from spurious claims. The "burden of a trial and . . . the inevitable danger of its outcome" would discourage "the unflinching discharge" of official duties.[200] Judge Hand further reflected that "the public interest calls for action which may turn out to be founded on a mistake."[201] In choosing between evils it was better to protect the government official. Plaintiff's constitutional claim, brought under the civil rights statutes, failed because all actions were taken under color of federal, not state, law.

A decade later the Supreme Court re-endorsed absolute executive immunity in the companion cases of *Barr v. Matteo*[202] and *Howard v. Lyons*.[203] Both cases involved allegedly defamatory remarks made by government officials. Both statements were related to the officials' duties, although both partook of political infighting against critics of their positions. A plurality of the Court in *Barr* found that a government official was entitled to an absolute privilege even though the defamatory statement was not compelled by his duties. It was enough that the action be an appropriate exercise of discretion "within the outer perimeter of defendant's line of duty."[204] *Howard v. Lyons* affirmed dismissal of a defamation action against a Navy captain for communicating to Congress criticism of civilian union representatives at his shipyard. A majority of the Court found that the *Barr* plurality opinion governed the case. The circulation of the defamatory statement was in the discharge of duty and thus absolutely privileged.[205]

The *Gregoire* opinion, with its endorsement by *Barr* and *Howard*, has remained the most influential justification of an absolute immunity for executive officials in common-law intentional tort cases. Learned Hand's standard, despite its popularity, is analytically unhelpful, a problem that is not solved by

196. 177 F.2d 579 (2d Cir. 1949), cert. denied, 339 U.S. 949 (1950).

197. United States ex rel. Gregoire v. Watkins, 69 F. Supp. 889 (S.D.N.Y. 1946), aff'd, 164 F.2d 137 (2d Cir. 1947).

198. Gregoire v. Biddle, 177 F.2d 579 (2d Cir. 1949), cert. denied, 339 U.S. 949 (1950).

199. Yaselli v. Goff, 275 U.S. 503 (1927), aff'g 12 F.2d 396 (2d Cir. 1926); Spalding v. Vilas, 161 U.S. 483 (1896).

200. Gregoire v. Biddle, 177 F.2d at 581.

201. Id.

202. 360 U.S. 564 (1959).

203. 360 U.S. 593 (1959).

204. Barr v. Matteo, 360 U.S. at 574-75.

205. Howard v. Lyons, 360 U.S. 593 (1959). Justice Stewart joined the *Howard* opinion to make a majority. In *Barr* he did not believe the defendant was acting in the line of duty. 360 U.S. at 592 (Stewart, J., dissenting).

the subsequent *Barr* and *Howard* decisions. The objectives of absolute immunity are not well defined. The types of governmental harm are not distinguished. *Gregoire* may be a case of a real injustice causing some of the most serious harms government can inflict.[206] The *Barr* and *Howard* injuries are of a lesser magnitude. Neither *Gregoire*, with its wartime national security aspects, nor *Howard*, with its naval officer defendant, attempt to define any special military privilege. The results are, of course, favorable to the government official—absolute immunity. Nonetheless, neither the Second Circuit nor the Supreme Court took the opportunity to qualify their broad assertions of absolute immunity by reference to the national defense aspects of the litigation.[207] The courts do not even mention the *Wilkes* cases in which a military officer operating well within the outer perimeter of duties in a matter of discretion did not receive an absolute immunity.

That the intramilitary intentional tort cases brought against individual defendants consistently have failed is due in part to the nature of the claims.[208] The cases involve claims for defamation, harm to military career, false imprisonment and battery. In most cases the plaintiff is a subordinate of the defendant or has been ordered for evaluation by the defendant. The controversy involves a major disagreement over the performance of military duties. Disputes have involved the preparation of military personnel efficiency reports,[209] the reference of plaintiff for psychiatric evaluation,[210] the designation of particular shipboard duties[211] and the assignment of soldiers to combat.[212] Military defendants have relied on two theories of defense. The first relies on *Feres*. The second relies on *Gregoire*, *Barr* and *Howard*. On occasion, both doctrines are cited to support a decision dismissing plaintiff's case. The opinions have been rather summary. None of the *Gregoire-Barr* opinions spend much time distinguishing "discretionary" from "non-discretionary" duties or

206. Portions of Judge Hand's opinion reflect on the unfairness of an absolute immunity to plaintiffs with legitimate grievances. 177 F.2d at 581.

207. See Hirabayashi v. United States, 320 U.S. 81 (1943) and Korematsu v. United States, 323 U.S. 214 (1944), in which the Court found that national security considerations may justify otherwise unconstitutional acts of government.

208. Tigue v. Swaim, 585 F.2d 909 (8th Cir. 1978) (libel and false imprisonment); Pagano v. Martin, 397 F.2d 620 (4th Cir. 1968) (defamation); Sigler v. LeVan, 485 F. Supp. 185 (D. Md. 1980) (false imprisonment, intentional infliction of emotional distress, conversion, assault and battery); Schmid v. Rumsfeld, 481 F. Supp. 19 (N.D. Cal. 1979) (violation of fifth amendment rights); Thornwell v. United States, 471 F. Supp. 344 (D.D.C. 1979) (portion of injuries occurred while on active duty); Miller v. United States, 472 F. Supp. 116 (E.D. Mo. 1978) (death incident to military service); Misko v. United States, 453 F. Supp. 513 (D.D.C. 1978), aff'd, 593 F.2d 1371 (D.C. Cir. 1979) (malpractice); Calhoun v. United States, 475 F. Supp. 1 (S.D. Cal. 1977) (death incident to military service), aff'd, 604 F.2d 647 (9th Cir. 1979), cert. denied, 444 U.S. 1078 (1980); Leighton v. Peters, 356 F. Supp. 900 (D. Hawaii 1973) (discretionary acts performed within outer limit of official duties); Rotko v. Abrams, 338 F. Supp. 46 (D. Conn. 1971) (death occurred during combat activity), aff'd, 455 F.2d 992 (2d Cir. 1972); Gamage v. United States, 217 F. Supp. 381 (N.D. Cal. 1962) (defamation, assault, battery, false imprisonment, misrepresentation, deceit, injuries incident to service).

209. Pagano v. Martin, 397 F.2d 620 (4th Cir. 1968).

210. Tigue v. Swaim, 585 F.2d 909 (8th Cir. 1978); Gamage v. United States, 217 F. Supp. 381 (N.D. Cal. 1962).

211. Leighton v. Peters, 356 F. Supp. 900 (D. Hawaii 1973).

212. Rotko v. Abrams, 338 F. Supp. 46 (D. Conn. 1971), aff'd, 455 F.2d 992 (2d Cir. 1972).

delineating the "outer perimeter" of military duties. None of the *Feres*-based opinions suggest the difference between negligent and intentional torts. None mention *Wilkes*.

The intentional tort cases raise different issues from the negligence actions. The military compensation system is not designed to redress many of the intentional tort injuries. A seriously injured battery victim may benefit to the extent of receiving free medical care and recompense for disability. However, a military determination that the injury was due to plaintiff's willful misconduct (for example, resisting arrest) would bar any eligibility under the compensation system. Victims of false imprisonment or defamation seek damages not compensable under the administrative benefits scheme. Individual redress in the military intentional tort cases includes more than monetary compensation. In these cases, unlike the negligence cases, the serviceman plaintiff feels put upon by military authority. Dollar damages can help but typically the plaintiff wants a declaration that he is in the right. The plaintiff can look to remedies under the Uniform Code of Military Justice[213] and in the civilian courts[214] that offer the opportunity for vindication of reputation. Military administrative procedures, such as the review of military discharges and records, also can correct failings addressed in the intentional tort cases.[215] These remedies in some circumstances provide a more satisfactory remedy than the tort damage action against the individual wrongdoer. In other circumstances, the lack of a tort suit against the military wrongdoer leaves the individual victim without redress.

The harm to military efficiency from intramilitary intentional tort suits is more serious than that involved in negligence litigation. All of the factors that support a ban on intramilitary suits for negligence apply to the intentional tort actions. In the intentional tort cases, serious disciplinary disruption is present in virtually every litigated case. The actions have tended to be subordinates' attempts to redress wrongs by superiors. Most involve the kinds of personality differences first seen in *Sutton*, and then in the *Dawkins* and *Wilkes* litigations. Civilian factfinders must consider the possibility of upsetting the command structure and discouraging fearless pursuit of duty by military superiors. They must also assess whether they are better able to reach the truth of a disciplinary dispute than are members of the military. Many jurors and a growing percentage of judges have no first-hand knowledge of the military society. Asking a jury or a judge to assess the special needs of military discipline may be impossible. Nor is a qualified immunity—protecting good faith action taken with probable cause—always sufficient. The military plaintiff in a tort

213. 10 U.S.C. § 938 (1976) (complaint against commander).

214. The expanded powers of the Court of Claims, 28 U.S.C. § 1491 (1976), give a forum to contest cases for interference with military career advantage. The statute gives jurisdiction over claims against the United States founded on the Constitution, federal statutes, executive regulations, contract with the United States, or "for liquidated or unliquidated damages in cases not sounding 'in tort.'" Id. Since 1972 the Court may "complete the relief afforded by the judgment" by ordering restoration to office, placement in appropriate duty or retirement status and correction of records. Id.

215. See, e.g., 10 U.S.C. §§ 1552-53 (1976).

suit will feel a real resentment against the commander and others in the military hierarchy. Plaintiff will firmly believe the allegations of malice in his complaint. In many cases there will be elements of blame in defendant's conduct. The military commander, faced with heavy pressures to please his superiors and run a problem-free organization, may overreact to the dissenter, the malcontent or the substandard performer in the unit. In such a situation the judge may be reluctant to dismiss on the pleadings and let the case go for full and time-consuming fact finding.[216]

The civilian control objective also takes on different aspects in the intentional tort cases. The harms are of the sort that may suggest systemwide deficiencies in the forces—excessive brutality, insufficient attention to individual liberties, racial discrimination, and so on. A grant of immunity might tend to encourage this undesirable conduct.

On balance, the disciplinary concerns suggest that the absolute immunity approach is sound in intramilitary intentional tort situations, at least as they involve the command relationship and incidents arising out of military duty. Present remedies provide some individual redress. The harm to military efficiency if immunity is not allowed is considerable. A partial resolution of the conflicting interests might occur by granting military officials power to give corrective damage awards for tortious wrongs not corrected by other parts of the military compensation system.

C. The Constitutional Tort

The suit for damages for violations of constitutional rights has been one of the major tort developments of the last two decades. The initial vehicle for such suits was section 1983 of the federal Civil Rights Act, which authorized suits to redress deprivations of constitutional rights taken under color of state law.[217] The "section 1983" suit has been a large factor in the development of government tort law. The impact of section 1983 on military litigation has been limited because of the requirement that the government action be taken under color of state law. The federal portions of the military have thus remained outside section 1983, as the abbreviated discussion in *Gregoire* of a statutory civil rights claim against federal officials indicates.[218]

The state national guard does remain subject to section 1983, but cases involving guardsmen have been rare. The notable exception is *Scheuer v. Rhodes*,[219] in which Ohio National Guardsmen, from enlisted men to the State Adjutant General, were sued for depriving victims of the 1970 Kent State shootings of their civil rights. The United States Supreme Court ruled against the defense claims of the military personnel and other state officials, including the Governor, that they were entitled to *Barr*-like absolute immunity. The Court provided a qualified immunity of "varying scope . . . depen-

216. See, e.g., Alvarez v. Wilson, 431 F. Supp. 136 (N.D. Ill. 1977).
217. 42 U.S.C. § 1983 (1976).
218. Gregoire v. Biddle, 177 F.2d 579, 581 (2d Cir. 1949).
219. 416 U.S. 232 (1974).

dent upon the scope of discretion and responsibilities of the office and all the circumstances as they reasonably appeared at the time of the action on which liability is sought to be based." Defendant's good faith and a reasonable belief under all the circumstances that the actions taken were proper would provide immunity.[220] The "all the circumstances" test was not given further definition. In particular, the Court made no effort to grant any unique immunity to the military participants. The Court recognized the crisis aspects of the Kent State situation but reflected that "the decision to invoke military power has traditionally been viewed with suspicion and skepticism since it often involves the temporary suspension of some of our most cherished rights."[221]

Scheuer is one of a series of holdings that grant only qualified immunity to most executive branch officials when they are acting in violation of constitutional rights.[222] At present the judicial, legislative and prosecutorial processes receive the benefit of absolute immunity.[223] Other executive branch activities do not.

Action against federal officials for constitutional violations were doubly stymied until the 1970s. First, until 1974 the Federal Tort Claims Act forbade suits for many of the intentional torts. Many of these torts—false imprisonment, battery, false arrest—could have been converted to constitutional violations when officials of government were the tortfeasors. Second, there existed no equivalent of section 1983 that allowed suit against federal officials, including the federal military, for constitutional deprivations.

Within three years both barriers collapsed. The initial actor was the United States Supreme Court. In *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*,[224] the Court held that the fourth amendment itself authorized suit for damages against federal police officers involved in an unlawful search and seizure. The subsequent opinion of the Second Circuit brought the further statement that the officers were entitled to only a qualified immunity based on good faith and reasonable belief in the rightness of their actions.[225] Cases since *Bivens* have extended the right of action for constitutional torts to other constitutional amendments. *Davis v. Passman*[226] recognized a right of action for a violation of fifth amendment due process for sexual discrimination. *Carlson v. Green*[227] recognized fifth and eighth amendment causes of action for intentionally bad medical treatment given prison inmates. It is reasonable to assume that the Supreme Court will eventually

220. Id. at 247-48.

221. Id. at 246.

222. Procunier v. Navarette, 434 U.S. 555 (1978) (prison administrators); O'Connor v. Donaldson, 422 U.S. 563 (1975) (state hospital administrator); Wood v. Strickland, 420 U.S. 308 (1975) (school administrator).

223. See cases cited in notes 191 & 192 supra.

224. 403 U.S. 388 (1971).

225. Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 456 F.2d 1339, 1347 (2d Cir. 1972).

226. 442 U.S. 228 (1979).

227. 446 U.S. 14 (1980).

find other provisions of the Bill of Rights to be the source of constitutional damage claims.

Three years after *Bivens*, Congress amended the Tort Claims Act to allow individuals to sue the United States for certain intentional torts committed by federal law enforcement officers.[228] The amendment was stimulated by several particularly outrageous examples of federal narcotics officer misconduct.[229] Had it been on the books, the amendment would probably have authorized Bivens to recover by administrative or judicial means from the United States. Nonetheless, by 1974 two avenues of relief had been recognized for certain intentional actions by officials of government. In the first, *Bivens* allowed actions against the individual officers, but with the expectation of government-paid defense and possible compensation. Unlike section 1983 and the Tort Claims Act, the remedy was created by the Constitution and the courts. In the second, the FTCA amendment covered common-law torts committed by federal law enforcement officers.

The *Bivens* opinion reflected on the injustice of denying any remedy to persons wronged by unconstitutional conduct of federal officials. The later amendment to the Tort Claims Act raised the question of the relation between the two theories of action. The most recent Supreme Court constitutional tort cases provide some guidance for accommodating the judicial and legislative remedies. *Davis v. Passman* allowed a damage remedy for sexual employment discrimination by a member of Congress. The Court observed that Congress had not forbidden damage recovery by persons harmed by employment discrimination. The Court observed that if Congress were "to create equally effective alternative remedies, the need for damages relief might be obviated."[230]

Davis did not involve a remedy under the FTCA. In *Carlson v. Green* the Court faced the interrelationship of the FTCA and the *Bivens* suit. Plaintiffs sued federal prison officials for the death of their incarcerated son. The crux of their complaint was intentionally inadequate medical care which allowed the son's asthma attack to kill him. The Court stated that "*Bivens* established that the victims of a constitutional violation by a federal agent have a right to recover damages against the official in federal court despite the absence of any statute conferring such a right."[231] The Court noted two exceptions to the rule drawn from *Bivens* and *Passman*. The first is when defendants demonstrate "special factors counselling hesitation in the absence of affirmative action by Congress."[232] The second is the presence of a congressional remedy "which [Congress] explicitly declared to be a *substitute* for recovery directly under the Constitution and viewed as equally effective."[233] Neither factor was present

228. 28 U.S.C. § 2680(h) (1976).

229. See S. Rep. No. 588, 93d Cong., 2d Sess. 3 (1973), reprinted in 1974 U.S. Code Cong. & Ad. News 2789, 2790.

230. 442 U.S. 228, 248 (1979).

231. 446 U.S. 14, 18 (1980).

232. Id.

233. Id. at 18-19.

in *Carlson*. The federal jailers did not enjoy such independent status in the constitutional scheme to make judicial remedies inappropriate. They would be entitled to qualified immunity, but no more. Second, nothing in the FTCA as originally enacted, or as amended in 1974, preempted a *Bivens* remedy. Comments from the 1974 legislative history reflect a desire to offer victims both the FTCA and the *Bivens* remedies.[234] The Court then observed that the FTCA remedy would be less effective than a *Bivens* remedy because (1) the suit against the individual had a greater deterrent effect than the suit against the government; (2) the *Bivens* suit would authorize the recovery of punitive damages; (3) the *Bivens* suit would allow trial by jury; and (4) the *Bivens* action would rely on uniform rules of federal law rather than "the law of the place where the act or omission occurred" used in the FTCA.[235] The Court concluded: "Plainly FTCA is not a sufficient protector of the citizens' constitutional rights, and without a clear congressional mandate we cannot hold that Congress relegated respondent exclusively to the FTCA remedy."[236]

Further uncertainty as to remedies and immunities was created by the 1978 Supreme Court decision in *Butz v. Economou*.[237] Economou had been subjected to administrative disciplinary action by the Department of Agriculture. He retorted with suits against the officials. The suits alleged both common-law and constitutional claims. The Court focused on the constitutional claims and defendant's contention that *Barr* provided absolute immunity so long as the "discretionary" and "outer perimeter of duties" tests could be met. The Supreme Court disagreed and found that *Barr* did not protect federal officials who "violated those fundamental principles of fairness embodied in the Constitution."[238] Rather, the *Bivens-Scheuer* qualified immunity precedents controlled. "We therefore hold that, in a suit for damages arising from unconstitutional action, federal executive officials exercising discretion are entitled only to the qualified immunity specified in *Scheuer*, subject to those exceptional situations where it is demonstrated that absolute immunity is essential for the conduct of the public business."[239]

The five-four decision emphasized the Supreme Court's distrust of absolute immunity for executive branch officials. The case also suggested the Court's belief that a meaningful distinction could be drawn between common-law torts and the newer, constitutionally based actions. *Barr* was not overruled, and the Court rejected the premise that artful pleading could turn any intentional wrong by a federal official into a constitutional tort.[240]

234. Id. at 24 (citing S. Rep. No. 588, 93d Cong., 2d Sess. 3 (1973), reprinted in 1974 U.S. Code Cong. & Ad. News 2789, 2790).

235. Id. at 21-23.

236. Id. at 23.

237. 438 U.S. 478 (1978). See Burgess, Official Immunity and Civil Liability for Constitutional Torts Committed by Military Commanders after *Butz v. Economou*, 89 Mil. L. Rev. 25 (1980).

238. 438 U.S. at 495.

239. Id. at 507.

240. Id. at 507-08.

Recent intramilitary tort suits reflect constitutional tort precepts.[241] The courts have been divided on their resolution and their analyses are less than clear. Lawsuits often combine constitutional claims with more familiar intentional tort claims. Suits are brought against the United States under the FTCA and against individual military defendants under common law and constitutional theories. The military defendant has several responses to the constitutional tort suit. The first is to deny that the provision of the constitution authorizes a suit for damages. *Davis* and *Green* suggest that an attempt to interpret *Bivens* narrowly is unlikely to succeed. The second response is to recognize a constitutional cause of action, but to assert that special circumstances authorize an absolute immunity as defined in *Butz* or other immunity cases. The third response is to assert that the *Feres* rationale prohibits suits sounding in tort between service members even when the complaint is constitutionally based. The fourth, and least satisfactory alternative, is to defend the action, relying on whatever form of qualified immunity has been found appropriate. Four intramilitary cases reflect the different responses to the constitutional allegations. *Misko v. United States*,[242] allowing absolute immunity, illustrates reliance on *Feres*. Plaintiff servicemen sued for an illegal medical confinement alleging a cause of action under the fifth amendment. The District Court for the District of Columbia did not decide whether a constitutional cause of action was proper under that amendment because it felt *Feres* and the separate intramilitary tradition forbade recovery. *Barr* and other immunity decisions were not controlling because of the "special intramilitary immunity questions" involved. The court rejected any exception to *Feres* for constitutional torts because the *Feres* justification applied equally to those suits. Any other result would allow an abrogation of *Feres* through an "exercise in pleading."[243] Judge Sirica's decision in *Misko* was affirmed by the Court of Appeals for the District of Columbia after the *Butz* decision.

Tigue v. Swaim[244] involved an Air Force captain's complaint against a

241. Jaffee v. United States (*Jaffee I*), 592 F.2d 712 (3d Cir.) (United States and individual defendants; constitutional tort), cert. denied, 441 U.S. 961 (1979); Tigue v. Swaim, 585 F.2d 909 (8th Cir. 1978) (individual defendant; intentional and constitutional tort); Everett v. United States, 492 F. Supp. 318 (S.D. Ohio 1980) (United States defendant; negligent, intentional and constitutional torts); Schnurman v. United States, 490 F. Supp. 429 (E.D. Va. 1980) (United States defendant; negligence and constitutional torts); Sigler v. LeVan, 485 F. Supp. 185 (D. Md. 1980) (individual defendants; intentional and constitutional torts); Schmid v. Rumsfeld, 481 F. Supp. 19 (N.D. Cal. 1979) (individual defendants; constitutional torts); Nagy v. United States, 471 F. Supp. 383 (D.D.C. 1979) (United States and individual defendants; negligent and constitutional torts); Thornwell v. United States, 471 F. Supp. 344 (D.D.C. 1979) (United States and individual defendants; negligent, intentional and constitutional torts); Misko v. United States, 453 F. Supp. 513 (D.D.C. 1978) (United States and individual defendants; negligent and constitutional torts), aff'd, 593 F.2d 1371 (D.C. Cir. 1979); Calhoun v. United States, 475 F. Supp. 1 (S.D. Cal. 1977) (United States and individual defendants; wrongful death and constitutional torts), aff'd, 604 F.2d 647 (9th Cir. 1979); Alvarez v. Wilson, 431 F. Supp. 136 (N.D. Ill. 1977) (individual defendants; constitutional torts); Milliken v. United States, 439 F. Supp. 290 (D. Kan. 1976) (United States defendant; intentional and constitutional torts); Birdwell v. Schlesinger, 403 F. Supp. 710 (D. Colo. 1975) (individual defendants; constitutional torts).

242. 453 F. Supp. 513 (D.D.C. 1978), aff'd, 593 F.2d 1371 (D.C. Cir. 1979).

243. Id. at 515.

244. 585 F.2d 909 (8th Cir. 1978).

base hospital commander for libel and false imprisonment. The action arose out of a forced psychiatric evaluation of the plaintiff. The court of appeals construed Tigue's complaint to state a constitutional cause of action for deprivation of liberty without due process of law. The court then examined the protection provided defendant by *Butz v. Economou*. The court rejected defendant's contentions that *Butz* authorized an absolute immunity for suits that interfere with a military command relationship. Rather, *Butz* compelled "a particularized inquiry into the functions an official performs and the circumstances under which they are performed."[245] However, since defendant Swaim was in charge of a medical evaluation program to assess the emotional capability of personnel with access to nuclear weapons, and "national security interests are involved," he was entitled to an absolute immunity in making his assessment of Tigue's mental state. The *Feres* issue was raised but not decided by the court.[246]

Alvarez v. Wilson[247] involved a military officer's suit for deprivation of liberty and racial discrimination in a dispute over the conduct of a military race relations program. The plaintiff sued only individual military officers. The district court denied defendants' motion to dismiss. The court recognized an action to recover damages for fifth amendment violations. It then rejected defendants' claim of absolute immunity. While recognizing unique military disciplinary needs, the court found that defendants' actions were far short of "the brink of combat." Nor were defendants involved in recruit training. Balanced against this was the severity of the alleged deprivation of rights suffered by plaintiff.[248] On the existing facts, defendants' good faith was not shown, and the case was continued for further fact finding. The court made no mention of *Feres* or any other intramilitary immunity.

The most thorough study of constitutional tort in the intramilitary context is the February 1980 opinion of the Court of Appeals for the Third Circuit in *Jaffee v. United States* (*Jaffee II*).[249] Plaintiff alleged that while a serviceman in the early 1950's he had been ordered to observe nuclear weapons tests in the Nevada desert. Massive radiation exposure occurred as a consequence. Plaintiff alleged this wrongful conduct on the part of the Government had caused him to develop cancer two decades later. Jaffee filed suit against the United States under the FTCA and against the individual military and civilian officials allegedly responsible for deprivation of his rights under the first, fourth, fifth, eighth and ninth amendments. A prior Third Circuit Court of Appeals decision dismissed the FTCA action against the United States on sovereign immunity grounds.[250] The district court dismissed the remaining suit against

245. Id. at 914.
246. Id. at 914 n.10.
247. 431 F. Supp. 136 (N.D. Ill. 1977).
248. Id. at 145-46.
249. Jaffee v. United States (*Jaffee II*), No. 79-1543 (3d Cir., filed Feb. 20, 1980), vacated, 663 F.2d 1226 (3d Cir. 1981). See Postscript infra.
250. Jaffee v. United States (*Jaffee I*), 592 F.2d 712 (3d Cir.), cert. denied, 441 U.S. 961 (1979). The case is discussed at notes 5-10 and accompanying text supra, and in Note, 12 Conn. L. Rev. 492, 496-98, 509, 520 (1980).

the individual defendants on *Feres* grounds. The court of appeals held that *Feres* did not control actions for willful violations of constitutional rights. The court of appeals traced the divergent threads of the *Feres* and *Gregoire* precedents. *Gregoire's* absolute immunity was "a politically attractive idea" in the years immediately following World War II.[251] That belief gave way in cases like *Bivens*, *Scheuer* and *Butz* to the greater concern that public officials could do serious harm to the citizenry if freed from any worries over their responsibility. The court viewed plaintiff's complaint as alleging "infringements of liberty . . . in subjecting soldiers to radiation without legal authority."[252]

The court then rejected the application of the *Feres* case. Initially, the court found that a uniform federal law standard could apply to assess government liability for constitutional wrongs. This undercut any fear that military liability might be decided by inconsistent rules of state law. The court then resurrected the *Wilkes* decisions to validate a distinction between intramilitary negligence suits and intramilitary intentional tort suits. The court observed the Supreme Court had not overruled *Wilkes* and the Congress had not provided an absolute immunity for all military personnel. The controlling principles in *Jaffee* therefore were those of the qualified immunity cases. In closing, the court found that plaintiffs had at least stated a constitutional cause of action under the fifth amendment. It also rejected defendant's claim that veterans-benefit legislation was an exclusive remedy. The court found nothing in the legislation that preempted private remedies against individuals or nothing that eliminated "the deterrence which potential personal liability for intentional wrongdoing provides."[253] The order dismissing the individual liability counts of plaintiff's complaint was reversed.[254]

Misko, *Tigue*, *Alvarez* and *Jaffee* illustrate the difficult issues raised by the new generation of intramilitary tort cases. Their facts suggest that an automatic application of the *Feres* doctrine ignores significant differences between negligence suits against the United States under the FTCA and constitutional tort actions against individual military defendants. The decisions also suggest that more weighty issues may be involved in constitutional tort than common-law intentional tort cases.[255] Allegations of racial discrimination or denial of rights of free speech do not fit comfortably into old intentional tort theories. Allegations of intentional medical experimentation on soldiers do appear of greater magnitude than random cases of military police brutality or discontent over a harsh efficiency report. In this regard *Jaffee* is the most complete of the four opinions. It analyzes both the *Feres* strain and the qualified immunity

251. Jaffee v. United States (*Jaffee II*), No. 79-1543, slip op. at 8 (3d Cir., filed Feb. 20, 1980).

252. Id. at 14.

253. Id. at 25.

254. Id. Judge Higginbotham's concurrence expressed his preference for absolute immunity in the case. He states that *Dinsman v. Wilkes*, while questionable, still compelled the court to recognize less than an absolute immunity. Id. at 28. (Higginbotham, J., concurring).

255. Freed, Executive Official Immunity for Constitutional Violations: An Analysis and a Critique, 72 Nw. U.L. Rev. 526, 549-50 (1977), argues for such a distinction.

precedents. *Misko* too easily assumes that *Feres* controls all. *Alvarez* and *Tigue* by contrast ignore the intramilitary precedents.

The factors for analysis of intramilitary tort claims suggest that the constitutional tort suits pose difficult policy choices. Many of the issues are similar to the intentional tort cases. Other issues in these constitutional tort cases raise new concerns.

The individual redress objective is not well treated under present law. The existing military compensation system was not designed to remedy claims for unlawful imprisonment, deprivation of speech rights, removal from advantageous duty assignments on racial grounds or illegal medical experimentation from which no adverse consequences have developed. The military compensation system can give no damage award. Even the Court of Claims may have difficulty fashioning a proper award, as the newness of constitutional tort theory makes it difficult to value awards.[256] Even when monetary awards are possible under the military compensation system (for example, the availability of veterans benefits for a service-induced radiation cancer), the seriousness of the wrongdoing leaves one with the feeling that justice has not been done.

The constitutional claims also involve redress beyond dollar damage. Like many of the intentional tort cases, the bitterness against the defendant may demand a more thorough vindication. Plaintiff may desire to expose widespread wrongs done by the service.

The intramilitary cases in constitutional tort also affect military efficiency far more than the negligence cases. *Misko*, *Alvarez* and *Tigue* address sensitive issues of fitness for duty. The civilian courts again must assess whether they can better perform the fact-finding role than can the military commanders involved or the independent military review process. Even if they can, what is the effect of their decision on the disciplinary posture of the immediate unit and the military in general?

Jaffee in particular illustrates the potential for interference with military efficiency. Plaintiff alleged he performed duties under military orders. The prospect of soldiers challenging hazardous duty orders in court certainly poses a major challenge to military discipline. Here, however, the misconduct is a quarter century in the past. All of the defendants are long removed from positions of command. The plaintiff presents the case as one of shocking disregard for human life, violating not just constitutional precepts but international rules of humanity as well.[257] Fact-finding is needed to determine how much defendants knew in 1952 of the harms from radiation and why they exposed the

256. See generally Note, 64 Cornell L. Rev. 667, 693-97 (1979) (the few successful *Bivens*-type plaintiffs have received small or nominal damage awards).

257. Plaintiff's Supplementary Brief, Issue II, at 12-20, Jaffee v. United States, No. 79-1543 (3d Cir., filed Feb. 20, 1980) is entitled "The International Covenant on Civil and Political Rights, The Nuremburg Code, The Geneva Convention, and the Entirety of the Law of Nations All Provide A Basis For A Federal Damage Action By A Former Serviceman Against Government Officials Who Willfully, and Without Legitimate Purpose, Subjected Him To A Dangerous Experiment Without First Obtaining His Informed Consent."

plaintiff and others to the risks they did.[258] It is fair to assume that the exercise did seek to discover whether troops would be disabled by close exposure to atomic attack. The military's curiosity was more than a matter of academic theory or demented sadism. Nuclear weapons were, and are, a major part of the United States capability. Under certain circumstances it is essential that troops work in conjunction with the weapons. The military certainly has an interest in determining before actual combat whether and how well troops can respond to the explosion, the radiation and the psychological impact of these new weapons.

Plaintiff's complaint that this was an improper use of troops or that only troops giving informed consent to the exercise should have been used has some inherent difficulties. From the point of view of the military, an informed consent may have vitiated the purpose of the exercise. The goal may have been to test the response of the average soldier, not the most adventuresome or fool-hardy. Further speculation before the fact about the consequences of exposure may have changed the response of even the willing participants. Finally, and most importantly, the informed consent could only rely on what was known to the nuclear radiation experts at the time. Probably different experts would have differed in their assessments of the risks involved, from hazardous to trivial. The precedent could also suggest opening innumerable other military activities to an assessment of risk. What distinguishes Jaffee from victims of live-fire training courses, paratroop practice exercises and ill-considered search and destroy missions in Vietnam?

The *Jaffee* complaint emphasizes the civilian review objective that looms large in the constitutional tort cases. Allegations of medical experimentation or racial discrimination in the military raise questions about the type of armed force the citizens of the United States desire to maintain. We as citizens fear for harm to the members of the armed forces. We fear the implications for its use in combat against other nations. We fear having the armed forces turned against United States civilians. Legitimate claims of constitutional wrongdoing in the armed forces deserve ventilation. If tort immunities prevent their exposure, the immunities may ill serve national objectives.

A difficult first task is defining unconstitutional conduct in the military. The Constitution itself recognizes that the military society is not identical to the civilian society.[259] The Supreme Court[260] and the Congress have validated other distinctions between military and civilian society. A court assessing the military constitutional tort thus has an additional element for decision—should the Constitution apply to the military community in the same way it applies to the civilian? Again *Jaffee* is illustrative. Involuntary subjection to medical experimentation sounds heinous in the civilian context. In the military, with its statutorily mandated duty to obey orders and be pres-

258. See Favish, Radiation Injury and the Atomic Veteran: Shifting the Burden of Proof on Factual Causation, 32 Hastings L.J. 933, 934-36 (1981).

259. U.S. Const. amend. V.

260. See note 166 supra.

ent for duty,[261] involuntariness has different shades of meaning.

These factors suggest that Congress rather than the courts may be best able to assess major tortious allegations of wrongdoing by the military. Congress or the Executive will be better able to assess any disciplinary consequences of an award for plaintiffs and the consequences of such an award on the overall budget for military compensation. Congressional attention is quite likely to secure the public exposure necessary to stimulate correction of military failings.[262]

The question remains whether executive or congressional action can resolve the intramilitary suit for constitutional deprivation. *Carlson v. Green* suggests that the Supreme Court would probably respect a clear congressional resolution of the treatment of intramilitary suits for deprivations of constitutional rights. The military cases may present "special factors counselling hesitation in the absence of affirmative action by Congress."[263] While the military is not an equivalent branch of government as Congress was in *Passman*, the Court itself has recognized the military as a distinctive part of government.[264] More directly, Congress could create the remedy "explicitly declared to be a substitute for recovery under the Constitution and viewed as equally effective."[265] Congress could legislate an absolute immunity for all military defendants from any type of tort suit, basing this judgment on the threats to military control, the adequacy of existing military and veterans compensation schemes, and the presence of alternative means of complaint through the military and civilian court systems. In some constitutional tort cases this would provide a remedy. Jaffee could have been compensated by the receipt of service-connected disability benefits. However, victims of unlawful confinement or denial of first amendment rights might be left with only a declaration of military wrongdoing, but no monetary award. The *Carlson* Court's discomfort with FTCA limitations suggests that monetary recovery is a valuable element of the "equally effective" remedy to the constitutional tort.

A more sensible congressional remedy would recognize that some wrongs to military personnel are not presently accounted for in the military claims procedures. These include both intentional and constitutional wrongs. Congress could authorize the military claims services to entertain and pay administrative claims for proven acts of wrongdoing committed by military personnel acting under color of military authority.[266] The statute would also bar suit against the individual defendant so long as he was acting under color

261. 10 U.S.C. §§ 885-86, 890-92 (1976).

262. The *Thornwell* litigation recently was settled by Congress for $625,000. Thornwell's suit against the United States for the Army's prolonged interrogation, abuse and involuntary administration of LSD was dismissed on immunity grounds. Thornwell v. United States, 471 F. Supp. 344 (D.D.C. 1979). The Army recommended a $1.7 million settlement. N.Y. Times, Jan. 4, 1981, § 1, at 31, col. 1.

263. Carlson v. Green, 446 U.S. 14, 18-20 (1980).

264. See note 166 supra. See also U.S. Const. art. I, § 8, cls. 12-16.

265. 446 U.S. at 18-19 (1980).

266. Attorney General Bell has advocated United States liability for constitutional torts with provisions for liquidated damages. See Bell, supra note 186, at 10-11.

of authority. A limit would be set on the amount payable to a claimant. While awards above that amount could be investigated by military claims officials, their payment would require congressional appropriation. A limit of $10,000 to $25,000 would allow a significant monetary award to the injured military claimant to correct harms not compensated by the existing claims system. It would also provide for military assessment of claims of serious intentional wrongdoing with final review in Congress. Judicial review of the decisions should be prohibited.

V. CONCLUSION

The complexity of the tort and immunity doctrines affecting the military suggests the need for legislative clarification. Waste and confusion characterize the present posture of intramilitary tort law. Congress should reassess all elements of intramilitary litigation.

This Article suggests that the proper resolution is to provide a generalized immunity for suits against individual military members except when the suits are for acts wholly unrelated to duty. Suits against the United States under the FTCA by military plaintiffs should be forbidden in any instance in which the injured plaintiff would be entitled to benefits under the military compensation system. Other wrongdoing, whether phrased as intentional or constitutional wrongdoing, should be compensable within the military or by Congress under new statutory authorization allowing payment for these harms.

POSTSCRIPT

Since this Article was set in page proofs, eight new federal decisions have addressed intramilitary immunity questions. The most notable decision occurred on November 2, 1981, when the Third Circuit Court of Appeals vacated its earlier decision in *Jaffee II*.[267] The majority of a badly splintered en banc court agreed that the justifications for intramilitary immunity applied to causes of action brought under state law or constitutional theories against individual defendants. Other court of appeals and district court opinions have applied the intramilitary immunity to bar FTCA, constitutional and other actions.[268]

Two decisions have rejected defendants' requests for absolute intramilitary immunity. In *Wallace v. Chappell*[269] the Court of Appeals for the Ninth Circuit reviewed a constitutional tort action for racial discrimination brought

267. Jaffee v. United States (*Jaffee II*), 663 F.2d 1226 (3d Cir. 1981), vacating No. 79-1543 (3d Cir., filed Feb. 20, 1980).

268. Lewis v. United States, 663 F.2d 889 (9th Cir. 1981) (intentional-tort claim under FTCA is barred); Monaco v. United States, 661 F.2d 129 (9th Cir. 1981) (radiation-exposure claim barred by *Feres*); Broudy v. United States, 661 F.2d 125 (9th Cir. 1981) (radiation-exposure claim barred under FTCA; post-discharge failure to warn might allow recovery); Laswell v. Brown, 524 F. Supp. 847 (W.D. Mo. 1981) (radiation-exposure suit brought under several theories of action; all barred); Coffey v. Department of Defense, 518 F. Supp. 726 (D.D.C. 1981) (fifth amendment claim for exposure to Agent Orange barred by intramilitary immunity).

269. 661 F.2d 729 (9th Cir. 1981).

by Navy enlisted men against their superior officers. The court of appeals reversed the district court's dismissal of the action. The court of appeals specified the standard that the district court should use in determining whether such a complaint could be reviewed. If the decision were reviewable, the military defendants would generally be entitled only to a qualified immunity. In *Hinkie v. United States*[270] a Pennsylvania district court held that the *Feres* rule did not bar an FTCA action by the wife, son and estate of a serviceman subjected to nuclear test exposure. The subsequent *Jaffee II* en banc decision calls this holding into question.

The growing confusion in the cases reinforces the need for clarification of the intramilitary immunity doctrine. We may hope that Congress and the Supreme Court will provide that clarity.

270. 524 F. Supp. 277 (E.D. Pa. 1981).

Appendix

Incident-to-Service Cases 1955-81

I. Medical Wrongdoing

Collins v. United States, 642 F.2d 217 (7th Cir.), cert. denied, 101 S. Ct. 3115 (1981); Johnson v. United States, 631 F.2d 34 (5th Cir. 1980), cert. denied, 101 S. Ct. 3007 (1981); Veillette v. United States, 615 F.2d 505 (9th Cir. 1980); Vallance v. United States, 574 F.2d 1282 (5th Cir.) (per curiam), cert. denied, 439 U.S. 965 (1978); Stansberry v. Middendorf, 567 F.2d 617 (4th Cir. 1978) (per curiam); Jackson v. Kelly, 557 F.2d 735 (10th Cir. 1977); Martinez v. Schrock, 537 F.2d 765 (3d Cir. 1976), cert. denied, 430 U.S. 920 (1977); Henderson v. Bluemink, 511 F.2d 399 (D.C. Cir. 1974); Joseph v. United States, 505 F.2d 525 (7th Cir. 1974); Harten v. Coons, 502 F.2d 1363 (10th Cir. 1974), cert. denied, 420 U.S. 963 (1975); Bankston v. United States, 480 F.2d 495 (5th Cir. 1973); Peluso v. United States, 474 F.2d 605 (3d Cir.) (per curiam), cert. denied, 414 U.S. 879 (1973); 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.) (per curiam), cert. denied, 407 U.S. 910 (1972); Tirrill v. McNamara, 451 F.2d 579 (9th Cir. 1971) (per curiam); Hall v. United States, 451 F.2d 353 (1st Cir. 1971) (per curiam); Henning v. United States, 446 F.2d 774 (3d Cir. 1971), cert. denied, 404 U.S. 1016 (1972); Lowe v. United States, 440 F.2d 452 (5th Cir.) (per curiam), cert. denied, 404 U.S. 833 (1971); Shults v. United States, 421 F.2d 170 (5th Cir. 1969) (per curiam); Coyne v. United States, 411 F.2d 987 (5th Cir. 1969) (per curiam); Buckingham v. United States, 394 F.2d 483 (4th Cir. 1968) (per curiam); Dilworth v. United States, 387 F.2d 590 (3d Cir. 1967) (per curiam); Bailey v. DeQuevedo, 375 F.2d 72 (3d Cir.), cert. denied, 389 U.S. 923 (1967); Bailey v. Van Buskirk, 345 F.2d 298 (9th Cir.), cert. denied, 383 U.S. 948 (1965); Knoch v. United States, 316 F.2d 532 (9th Cir. 1963); Van Sickel v. United States, 285 F.2d 87 (9th Cir. 1960); Buer v. United States, 241 F.2d 3 (7th Cir. 1956), cert. denied, 353 U.S. 974 (1957); Thompson v. United States, 493 F. Supp. 28 (W.D. Okla. 1980); Howell v. United States, 489 F. Supp. 147 (W.D. Tenn. 1980); Fischer v. United States, 451 F. Supp. 918 (E.D.N.Y. 1978); Pisciotta v. Ferrando, 428 F. Supp. 685 (S.D.N.Y. 1977); Wisniewski v. United States, 416 F. Supp. 599 (E.D. Wis. 1976); Franz v. United States, 414 F. Supp. 57 (D. Ariz. 1976); Adams v. Banks, 407 F. Supp. 139 (E.D. Va. 1976); Martin v. United States, 404 F. Supp. 1240 (E.D. Pa. 1975); Southard v. United States, 397 F. Supp. 409 (E.D. Pa. 1975), aff'd, 535 F.2d 1247 (3d Cir. 1976); Kennedy v. Maginnis, 393 F. Supp. 310 (D. Mass. 1975); Roach v. Shields, 371 F. Supp. 1392 (E.D. Pa. 1974); Redmond v. United States, 331 F. Supp. 1222 (N.D. Ill. 1971); Glorioso v. United States, 331 F. Supp. 1 (N.D. Miss. 1971); Schwager v. United States, 326 F. Supp. 1081 (E.D. Pa. 1971); Watt v. United States, 246 F. Supp. 386 (E.D.N.Y. 1965); Schwartz v. United States, 230 F. Supp. 536 (E.D. Pa. 1964), aff'd, 381 F.2d 627 (3d Cir. 1967); Weiserbs v. United States, 199 F. Supp. 329

(E.D.N.Y. 1961); Healy v. United States, 192 F. Supp. 325 (S.D.N.Y.), aff'd per curiam, 295 F.2d 958 (2d Cir. 1961); Hungerford v. United States, 192 F. Supp. 581 (N.D. Cal. 1961), rev'd, 307 F.2d 99 (9th Cir. 1962); Kilduff v. United States, 248 F. Supp. 310 (E.D. Va. 1960); Norris v. United States, 137 F. Supp. 11 (E.D.N.Y. 1955), aff'd, 229 F.2d 439 (2d Cir. 1956).

II. Vehicle and Plane Operation

Parker v. United States, 611 F.2d 1007 (5th Cir. 1980); Woodside v. United States, 606 F.2d 134 (6th Cir. 1979), cert. denied, 445 U.S. 904 (1980); Troglia v. United States, 602 F.2d 1334 (9th Cir. 1979); Uptegrove v. United States, 600 F.2d 1248 (9th Cir. 1979), cert. denied, 444 U.S. 1044 (1980); Daberkow v. United States, 581 F.2d 785 (9th Cir. 1978); Henry v. Textron, Inc., 577 F.2d 1163 (4th Cir.), cert. denied, 439 U.S. 1047 (1978); Mason v. United States, 568 F.2d 1135 (5th Cir. 1978) (per curiam); Herreman v. United States, 476 F.2d 234 (7th Cir. 1973); Hale v. United States, 452 F.2d 668 (6th Cir. 1971); Mattos v. United States, 412 F.2d 793 (9th Cir. 1969) (per curiam); United States v. Lee, 400 F.2d 558 (9th Cir. 1968), cert. denied, 399 U.S. 1053 (1969); Ulmer v. Hartford Accident & Indem., Co., 380 F.2d 549 (5th Cir. 1967); United States v. Carroll, 369 F.2d 618 (8th Cir. 1966); Sheppard v. United States, 369 F.2d 272 (3d Cir. 1966) (per curiam); United Airlines, Inc. v. Wiener, 335 F.2d 379 (9th Cir.), cert. denied, 379 U.S. 951 (1964); Layne v. United States, 295 F.2d 433 (7th Cir. 1961), cert. denied, 368 U.S. 990 (1962); Callaway v. Garber, 289 F.2d 171 (9th Cir.), cert. denied, 368 U.S. 874 (1961); Knecht v. United States, 242 F.2d 929 (3d Cir. 1957); Orken v. United States, 239 F.2d 850 (6th Cir. 1956) (per curiam); Kessler v. United States, 514 F. Supp. 1320 (D.S.C. 1981); Harrison v. United States, 479 F. Supp. 529 (D. Conn. 1979), aff'd mem., 622 F.2d 573 (2d Cir.), cert. denied, 449 U.S. 828 (1980); Eckles v. United States, 471 F. Supp. 108 (M.D. Pa. 1979); Spain v. United States, 452 F. Supp. 585 (D. Mont. 1978); Watkins v. United States, 462 F. Supp. 980 (S.D. Ga. 1977), aff'd, 587 F.2d 279 (5th Cir. 1979); Parker v. United States, 437 F. Supp. 1039 (N.D. Tex. 1977), rev'd, 611 F.2d 1007 (5th Cir. 1980); Thomason v. Sanchez, 398 F. Supp. 500 (D.N.J. 1975), aff'd, 539 F.2d 955 (3d Cir. 1976), cert. denied, 429 U.S. 1072 (1977); Frazier v. United States, 372 F. Supp. 208 (M.D. Fla. 1973); Morgan v. United States, 366 F. Supp. 938 (N.D. Fla. 1973); Coffey v. United States, 324 F. Supp. 1087 (S.D. Cal. 1971); Sheppard v. United States, 294 F. Supp. 7 (E.D. Pa. 1969); United Servs. Auto. Ass'n v. United States, 285 F. Supp. 854 (S.D.N.Y. 1968); Nikiforow v. Rittenhouse, 277 F. Supp. 608 (E.D. Pa. 1967); Hand v. United States, 260 F. Supp. 38 (M.D. Ga. 1966); Cox v. Maddox, 255 F. Supp. 517 (E.D. Ark. 1966), rev'd, 382 F.2d 119 (8th Cir. 1967); Downes v. United States, 249 F. Supp. 626 (E.D.N.C. 1965); Degentesh v. United States, 230 F. Supp. 763 (N.D. Ill. 1964); Nowotny v. Turner, 203 F. Supp. 802 (M.D.N.C. 1962); Homlitas v. United States, 202 F. Supp. 520 (D. Or. 1962); Fass v. United States, 191 F. Supp. 367 (E.D.N.Y. 1961); Sapp v. United States, 153 F. Supp.

496 (W.D. La. 1957); Rich v. United States, 144 F. Supp. 791 (E.D. Pa. 1956). Armiger Estates v. United States, 339 F.2d 625 (Ct. Cl. 1964).

III. Wrongful Entry into or Discharge from Military

Garrett v. United States, 625 F.2d 712 (5th Cir. 1980), cert. denied, 101 S. Ct. 1363 (1981); Torres v. United States, 621 F.2d 30 (1st Cir. 1980); Yolken v. United States, 590 F.2d 1303 (4th Cir. 1979); Gerardi v. United States, 408 F.2d 492 (9th Cir. 1969), cert. denied, 397 U.S. 857 (1970); Small v. United States, 333 F.2d 702 (3d Cir. 1964); Calhoun v. United States, 475 F. Supp. 1 (S.D. Cal. 1977), aff'd, 604 F.2d 647 (9th Cir. 1978); Becton v. United States, 489 F. Supp. 134 (D. Mass. 1980); Jackson v. United States, 551 F.2d 282 (Ct. Cl.), vacated, 434 U.S. 947 (1977), dismissed, 573 F.2d 1189 (1978).

IV. Military Police, Military Corrections and Military Hospital Use of Force

Dexheimer v. United States, 608 F.2d 765 (9th Cir. 1979); Citizens Nat'l Bank v. United States, 594 F.2d 1154 (7th Cir. 1979); Tigue v. Swaim, 585 F.2d 909 (8th Cir. 1978); Sigler v. LeVan, 485 F. Supp. 185 (D. Md. 1980); Thornwell v. United States, 471 F. Supp. 344 (D.D.C. 1979); Miller v. United States, 472 F. Supp. 116 (E.D. Mo. 1978); Misko v. United States, 453 F. Supp. 513 (D.D.C. 1978), aff'd mem., 593 F.2d 1371 (D.C. Cir. 1979); Milliken v. United States, 439 F. Supp. 290 (D. Kan. 1976); James v. United States, 358 F. Supp. 1381 (D.R.I. 1973), aff'd mem., 530 F.2d 962 (2d Cir. 1976); Gamage v. United States, 217 F. Supp. 381 (N.D. Cal. 1962).

V. Property Maintenance

Miller v. United States, 643 F.2d 481 (8th Cir. 1980); Camassar v. United States, 531 F.2d 1149 (2d Cir. 1976) (per curiam); Mills v. Tucker, 499 F.2d 866 (9th Cir. 1974) (per curiam); Barr v. Brezina Constr. Co., 464 F.2d 1141 (10th Cir. 1972), cert. denied, 409 U.S. 1125 (1973); United States v. United Servs. Auto. Ass'n, 238 F.2d 364 (8th Cir. 1956); Preferred Ins. Co. v. United States, 222 F.2d 942 (9th Cir.), cert. denied, 350 U.S. 837 (1955); Rivera-Grau v. United States, 324 F. Supp. 394 (D.N.M. 1971); Gursley v. United States, 232 F. Supp. 614 (D. Colo. 1964); Pratt v. United States, 207 F. Supp. 132 (D. Mass. 1962).

VI. Recreational Areas Injuries

Charland v. United States, 615 F.2d 508 (9th Cir. 1980); Mariano v. United States, 605 F.2d 721 (4th Cir. 1979); Hass v. United States, 518 F.2d 1138 (4th Cir. 1975); Chambers v. United States, 357 F.2d 224 (8th Cir. 1966); Stephan v. United States, 490 F. Supp. 323 (W.D. Mich. 1980); Knight v. United States, 361 F. Supp. 708 (W.D. Tenn. 1972), aff'd mem., 480 F.2d 927 (6th Cir. 1973); Keisel v. Buckeye Donkey Ball, Inc., 311 F. Supp. 371 (E.D. Va. 1970); Richardson v. United States, 226 F. Supp. 49 (E.D. Va. 1964).

VII. Performance-of-Duty Injuries

Stanley v. CIA, 639 F.2d 1146 (5th Cir. 1981); Jaffee v. United States (*Jaffee I*), 592 F.2d 712 (3d Cir.), cert. denied, 441 U.S. 961 (1979); Donham v. United States, 536 F.2d 765 (8th Cir. 1976); Beaucoudray v. United States, 490 F.2d 86 (5th Cir. 1974); Shaw v. United States, 448 F.2d 1240 (4th Cir. 1971); In re Agent Orange Litigation, 506 F. Supp. 762 (E.D.N.Y. 1980); Everett v. United States, 492 F. Supp. 318 (S.D. Ohio 1980); McCord v. United States, 377 F. Supp. 953 (M.D. Tenn. 1972), aff'd, 477 F.2d 599 (6th Cir. 1973); Rotko v. Abrams, 338 F. Supp. 46 (D. Conn. 1971), aff'd, 455 F.2d 992 (2d Cir. 1972); Coletta v. United States, 300 F. Supp. 19 (D.R.I. 1969); Drumgoole v. Virginia Elec. & Power Co., 170 F. Supp. 824 (E.D. Va. 1959).

VIII. Other Claims

Hunt v. United States, 636 F.2d 580 (D.C. Cir. 1980) (swine flu vaccine reaction); Foster v. Day & Zimmermann, Inc., 502 F.2d 867 (8th Cir. 1974) (products liability action against manufacturer of military products); Whitaker v. Harvell-Kilgore Corp., 418 F.2d 1010 (5th Cir. 1969) (same as *Foster*); Schnurman v. United States, 490 F. Supp. 429 (E.D. Va. 1980) (mustard gas experiment); Schmid v. Rumsfeld, 481 F. Supp. 19 (N.D. Cal. 1979) (failure to protect informant); Nagy v. United States, 471 F. Supp. 383 (D.D.C. 1979) (LSD experiment); Bryson v. United States, 463 F. Supp. 908 (E.D. Pa. 1978) (attempt to subdue drunken soldier); Garvas v. Clark Equip. Co., 410 F. Supp. 1383 (W.D. Pa. 1976) (products liability action against manufacturer of military product), aff'd, 568 F.2d 768 (3d Cir. 1973); Birdwell v. Schlesinger, 403 F. Supp. 710 (D. Colo. 1974) (expulsion from Air Force Academy); Adams v. General Dynamics Corp., 385 F. Supp. 890 (N.D. Cal. 1974) (facts not disclosed), aff'd, 535 F.2d 489 (9th Cir. 1976), cert. denied, 432 U.S. 905 (1977); In re United States, 303 F. Supp. 1282 (E.D.N.C. 1969) (U.S. vessel explosion), aff'd, 432 F.2d 1357 (4th Cir. 1970).