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Torts - Government Immunity - The Intentional Torts Exception to the Federal Tort Claims Act Does Not Preclude an Action against the Federal Government for Negligent Failure to Discharge or Supervise Federal Employee Who Subsequently Commits Intentionally Tortious Conduct

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TORTS—GOVERNMENT IMMUNITY—THE INTENTIONAL TORTS EXCEPTION TO THE FEDERAL TORT CLAIMS ACT DOES NOT PRECLUDE AN ACTION AGAINST THE FEDERAL GOVERNMENT FOR NEGLIGENT FAILURE TO DISCHARGE OR SUPERVISE FEDERAL EMPLOYEE WHO SUBSEQUENTLY COMMITS INTENTIONALLY TORTIOUS CONDUCT

Shearer v. United States (1983)

On June 2, 1979, while off-base and on an authorized leave, Private Vernon Shearer of the United States Army was shot to death by Private Andrew Heard.[1] Heard had served three years for the brutal killing of a German woman when he was stationed abroad, and was released from prison four months before he shot Private Shearer.[2] Prior to Shearer's kidnapping and murder, several of Heard's superiors formally reported their judgments that Heard was unsuitable for military service and recommended his discharge.[3] Despite these admonitions, a psychiatric evaluation of Heard was never performed, and he remained in the Army after his release from prison.[4]

The administratrix of Shearer's estate brought suit against the federal government under the Federal Tort Claims Act (FTCA).[5] The complaint alleged that the government was negligent in failing to properly supervise or discharge Heard.[6] The United States District Court for the Eastern District of Pennsylvania granted the government's motion to dismiss the complaint, reasoning that the claim was barred under the *Feres* doctine.[7] On appeal,

1. Shearer v. United States, 723 F.2d 1102, 1104 (3d Cir. 1983), *reh'g en banc denied*, 729 F.2d 266 (3d Cir. 1984), *cert. granted*, 53 U.S.L.W. 3323 (U.S. Oct. 30, 1984) (No. 84-194). Shearer, who had joined the Army four months earlier, had been stationed at Fort Bliss, Texas. *Id.* Shearer was kidnapped at gunpoint by Heard and shot to death in New Mexico. *Id.* Heard was also off-duty. *Id.* Heard pleaded *nolo contendere* to the crime of second degree murder and firearm enhancement. *Id.* at 1104 n.2.

2. *Id.* at 1104. The victim of the earlier offense died from head injuries inflicted by Heard through the use of a wrench and lifting jack. *Id.* Heard served three years of a four year prison term for manslaughter. *Id.*

3. *Id.* Heard's battalion commander in Germany had recommended that Heard be discharged. *Id.* Two of the commander's superiors had adopted the recommendation. *Id.* One commented that Heard's discharge "would be in the best interest of Private Heard and the United States Army." *Id.* (quoting Indictment of Private Heard, App. at 15a).

4. *Id.* The Army failed to make a final determination regarding Heard's military status. *Id.*

5. *Id.* at 1105. *See* Federal Tort Claims Act (FTCA), 28 U.S.C. §§ 1346, 2671-2680 (1982). For a discussion of the FTCA, see notes 10-13 and accompanying text *infra*.

6. 723 F.2d at 1105. The complaint further alleged that the government was negligent in failing to warn other servicemen of Heard's violent propensities. *Id.*

7. Shearer v. United States, 576 F. Supp. 672, 673-74 (E.D. Pa. 1982) (citing

the Third Circuit[8] reversed, *holding* that neither the *Feres* doctrine nor the intentional torts exception to the FTCA barred a claim against the government for negligent supervision resulting in a serviceman's kidnapping and murder of another serviceman who was off the military base on authorized leave. *Shearer v. United States*, 723 F.2d 1102 (3d Cir. 1983), *reh'g en banc denied*, 729 F.2d 266 (3d Cir.), *cert. granted*, 53 U.S.L.W. 3323 (U.S. Oct. 30, 1984) (No. 84-194).

Under the doctrine of sovereign immunity, the United States government was immune from civil liability.[9] In 1946, Congress enacted the Federal Tort Claims Act.[10] The FTCA provides that the federal government is liable in tort "in the same manner and to the same extent as a private individual under like circumstances . . . ."[11] This broad waiver of immunity is

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Feres v. United States, 340 U.S. 135 (1950)). The district court concluded that the decisions alleged to be negligent were made by "military personnel . . . in the course of the performance of their military duty," and thus the claim was precluded under *Feres*. *Id.* at 674. For a discussion of the *Feres* doctrine, see notes 14-29 and accompanying text *infra*. Because the court found that the claim was barred by *Feres*, it did not decide the issue whether the claim would also be precluded under the "intentional torts exception" to the FTCA. 576 F. Supp. at 675-76 n.4. For a discussion of the intentional torts exception, see notes 30-33 and accompanying text *infra*.

8. The case was heard by Judges Gibbons, Garth, and Higginbotham. Judge Higginbotham wrote the opinion for the court in which Judge Gibbons joined. Judge Garth filed a dissenting opinion.

9. Boger, Gitenstein & Verkuil, *The Federal Tort Claims Act Intentional Torts Amendment: An Interpretive Analysis*, 54 N.C.L. REV. 497, 507-08 (1976) [hereinafter cited as Boger]. The doctrine of sovereign immunity is said to have evolved from the early common law maxim that "the king can do no wrong." *See* Note, *There is No Cause of Action Implied Under the Constitution Against Government Officials for Intentional Constitutional Torts Occurring Incident to Military Service*, 27 VILL. L. REV. 858, 860 n.11 (1982). Although this maxim was not accepted in the United States, the principle evolved that the federal government could not be held liable for its actions unless it had consented to liability. Feres v. United States, 340 U.S. 135, 139 (1950); Laswell v. Brown, 683 F.2d 261, 264 (8th Cir. 1982), *cert. denied*, 459 U.S. 1210 (1983). While the government itself was immune, the personal liability of its employees was governed by state statutes and the common law. Boger, *supra*, at 509.

10. Act of Aug. 2, 1946, Pub. L. No. 601, §§ 401-424, 60 Stat. 842 (codified as amended at 28 U.S.C. §§ 1346, 2671-2680 (1982)). Prior to 1946, the Congress had allowed exceptions to the federal government's immunity through the enactment of private bills. Feres v. United States, 340 U.S. 135, 140 (1950); Boger, *supra* note 9, at 508. This procedure proved cumbersome. *Feres*, 340 U.S. at 140; 1 L. JAYSON, HANDLING FEDERAL TORTS CLAIMS: ADMINISTRATIVE AND JUDICIAL REMEDIES § 58 (1983). Congress had previously waived federal government immunity for breach of contract actions. *See Feres*, 340 U.S. at 140. *See also* 28 U.S.C. § 1491 (1982).

11. 28 U.S.C. § 2674 (1982). Section 1346(b) of the Act confers jurisdiction on the federal courts to hear claims

> for money damages . . . injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

28 U.S.C. § 1346(b) (1982). Unless Congress has consented to the waiver of immu-

limited, however, both in the express language of the FTCA[12] and in its judicial construction.[13]

The most notable judicially created exception to the waiver of government immunity is the *Feres* doctrine.[14] In *Feres v. United States*,[15] three servicemen, injured while on active duty, alleged that their injuries were a result of government negligence.[16] The Supreme Court held "that the Government is not liable under the Federal Tort Claims Act for injuries to servicemen where the injuries arise out of or are in the course of activity incident to service."[17]

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nity for the alleged tort, the federal courts are without jurisdiction to hear the claim. Taylor v. United States, 513 F. Supp. 647, 649 (D.S.C. 1981).

The phrase "negligent or wrongful act" has been construed as covering more than merely negligent conduct. Panella v. United States, 216 F.2d 622 (2d Cir. 1954). The language "in accordance with the law of the place," requires that the alleged tort meet the elements of a tort cognizable under the appropriate state law to be a valid claim. Boger, *supra* note 9, at 521.

12. *See* 28 U.S.C. § 2680(a)(1982). One of the most litigated exceptions concerns discretionary functions on the part of government officials. *See id.* This section exempts from liability the exercise or failure to exercise a "discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused." *Id.* For a general discussion of the "discretionary function" exception, see Comment, *Federal Tort Claims Act: The Development and Application of the Discretionary Function Exemption*, 13 CUM. L. REV. 535 (1983).

13. *See* Scales v. United States, 685 F.2d 970, 972 (5th Cir. 1982), *cert. denied*, 103 S. Ct. 1772 (1983); 2 L. JAYSON, *supra* note 10, § 237; Schwartz & Means, *The Need for Federal Product Liability and Toxic Torts Legislation: A Current Assessment*, 28 VILL. L. REV. 1088, 1104-05 n.72 (1983). In construing the FTCA, courts have been guided by the principle that congressional waiver of sovereign immunity will not be extended beyond what has been directed by Congress. *See* United States v. King, 395 U.S. 1 (1969). The Supreme Court has interpreted the FTCA as waiving immunity only for claims existing at common law rather than the creation of new causes of action. *See* Feres v. United States, 340 U.S. 135, 142 (1950); 1 L. JAYSON, *supra* note 10, § 217.01. The Supreme Court has stated that Congress intended to impose liability on the federal government only when the government would otherwise be liable if it were a private citizen. *Feres*, 340 U.S. at 141.

14. *See* Feres v. United States, 340 U.S. 135 (1950). For a discussion of the *Feres* doctrine, see notes 14-29 and accompanying text *infra*.

15. 340 U.S. 135 (1950).

16. *See id.* at 136-38. *Feres* actually involved three consolidated cases. *Id.* at 138. In the first case, plaintiff's decedent died while he was on active duty during a fire in his barracks. *Id.* at 136. The complaint alleged that the government was negligent in housing the serviceman in a barracks with a defective heating system. *Id.* The second case involved a plaintiff who underwent surgery performed by military physicians during the plaintiff's term of active duty. *Id.* at 137. Subsequent to his discharge from the Army, another operation revealed a towel which had been left in his stomach after the first operation. *Id.* Similarly, the third action was predicated on negligent medical treatment by Army surgeons, received while plaintiff's decedent was on active duty. *Id.*

17. *Id.* at 146. Four reasons were set forth by the Court for the doctrine. *See* Note, *supra* note 9, at 866-67. The first was that since the FTCA was only intended to make the government liable under circumstances where a private person would be liable in tort, the Court did not believe that Congress intended to impose liability for military acts which would have no counterpart in the private sector. *Feres*, 340 U.S. at 141. The second reason advanced was that Congress had already established,

In *United States v. Brown*,[18] the Supreme Court explained that the *Feres* exclusion was based upon a recognition of the "special relationship of the soldier to his superiors, the effects of the maintenance of such suits on discipline, and the extreme results that might obtain if suits under the Tort Claims Act were allowed for negligent orders given or negligent acts committed in the course of military duty . . . ."[19] In *Brown*, the Court held that a

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under the Veteran Benefits Act, a comprehensive compensation program for those injured or killed in the armed services. *Id.* at 144. Third, one of the primary purposes of the FTCA was to remove Congress' heavy burden of granting relief in private bills, yet there had been few such bills from the armed forces. *Id.* Finally, while under the FTCA, the law of the state "where the act or omission occurred" was to be determinative in the inquiry of whether the plaintiff stated a cognizable claim in tort, the relationship between the soldier and the government was too "distinctively federal in character" to be subject to variations in state tort law. *Id.* at 142-44 (quoting United States v. Standard Oil, 332 U.S. 301, 305-06 (1947)).

The *Feres* doctrine has been the source of extensive commentary, much of it critical. For discussions criticizing *Feres*, see Comment, *Tort Remedies for Servicemen Injured by Military Equipment: A Case for Federal Common Law*, 55 N.Y.U. L. REV. 601, 629-35 (1980); Note, *From* Feres *to* Stencel: *Should Military Personnel Have Access to FTCA Recovery?*, 77 MICH. L. REV. 1099, 1102-21 (1979). For a general discussion of *Feres*, see Jacoby, *The Feres Doctrine*, 24 HASTINGS L.J. 1281 (1973); Rhodes, *The* Feres *Doctrine After Twenty-Five Years*, 18 A.F. L. REV. 24 (Spring 1976); Note, *The Supreme Court and the Tort Claims Act: End of an Enlightened Era?*, 27 CLEV. ST. L.J. 267 (1978). *Feres* has also provoked criticism by the federal courts. *See, e.g.*, Thomason v. Sanchez, 539 F.2d 955, 960 (3d Cir. 1976), *cert. denied*, 429 U.S. 1072 (1977); Peluso v. United States, 474 F.2d 605, 606 (3d Cir.) (per curiam) ("Only the Supreme Court can reverse [*Feres*]. While we would welcome that result we are not hopeful in view of the number of recent instances in which, having been afforded the opportunity, it declined to grant certiorari. Possibly the only route to relief is by an application to Congress."), *cert. denied*, 414 U.S. 879 (1973). *See also* Everett v. United States, 492 F. Supp. 318, 322 (S.D. Ohio 1980) ("To the extent *Feres* and its successors have decided to insulate military activity from judicial review, the Court has no warrant to intrude, despite inequities which may nevertheless remain.").

While the three cases consolidated in *Feres* all concerned negligence actions against the government, *Feres* has been held to be equally applicable to intentional torts. *See* Broudy v. United States, 661 F.2d 125, 127 n.4 (9th Cir. 1981); *Everett*, 492 F. Supp. at 321; Note, *supra* note 9, at 870-71. "Any other result would mean that the *Feres*-based immunity of [the] armed forces . . . could be abrogated through an exercise of pleading." Misko v. United States, 453 F. Supp. 513, 515 (D.D.C. 1978) (footnote omitted), *aff'd mem. on other grounds*, 593 F.2d 1371 (D.C. Cir. 1979).

If a claim falls within the prohibition of *Feres*, a federal court is without jurisdiction to hear the claim. *Broudy*, 661 F.2d at 127-28.

18. 348 U.S. 110 (1954).

19. *Brown*, 348 U.S. at 112. The Supreme Court has subsequently extended the *Feres* doctrine to bar third party indemnity suits against the government for damages paid by the third party to a member of the military who was injured in the course of military service. *See* Stencel Aero Eng'g Corp. v. United States, 431 U.S. 666 (1977). In *Stencel*, the plaintiff, a National Guard officer, had sued the manufacturer of his aircraft which malfunctioned during an emergency, causing him permanent injury. *Id.* at 667. The Court concluded that the reasoning of *Feres* and *Brown* applied equally to the issue of whether third party indemnity actions against the United States should be barred. *Id.* at 673.

The lower federal courts have extended the *Feres* doctrine to preclude even nonderivative claims by civilians based upon injuries of military personnel arising incident to military service. *See, e.g.*, Mondelli v. United States, 711 F.2d 567 (3d Cir.

veteran's claim for injuries caused by the negligence of the military subsequent to the plaintiff's discharge from the military was "not incident to the military service" and therefore not precluded by *Feres*.[20]

The federal courts of appeals have applied *Feres* to bar all FTCA claims by servicemen for injuries suffered while they were actually carrying out military orders.[21] Further, the courts of appeals agree that *Feres* bars claims by

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1983) (claim for genetically transmitted cancer caused by father's exposure to radiation while on active duty in United States Army), *cert. denied*, 104 S. Ct. 1272 (1984); Scales v. United States, 685 F.2d 970 (5th Cir. 1982) (plaintiff born with congenital rubella syndrome as a result of negligent medical treatment his mother received while in the Air Force), *cert. denied*, 103 S. Ct. 1772 (1983); DeFont v. United States, 453 F.2d 1239 (1st Cir.) (per curiam) (widow and children of deceased serviceman's claim for loss of financial support and companionship), *cert. denied*, 407 U.S. 910 (1972).

The reasoning for this extension is that third party claims would involve the same concerns involved in *Feres*: a civilian court would be "second-guessing" the military's judgment, and members of the Armed Services would have to testify as to each other's actions. *Mondelli*, 711 F.2d at 569 (citing Stencel Aero Eng'g Corp. v. United States, 431 U.S. 666, 673 (1977)); Seveney v. United States, 550 F. Supp. 653, 660 (D.R.I. 1982). Such suits threaten military discipline even though there be "no command relationship between the claimant and the individual tortfeasor." *Scales*, 685 F.2d at 973 (citing Monaco v. United States, 661 F.2d 129, 132 (9th Cir. 1981), *cert. denied*, 456 U.S. 989 (1982)).

More recently the Supreme Court reaffirmed the *Feres* doctrine in holding that enlisted personnel of the armed forces could not recover damages for the alleged constitutional violations of a superior officer. *See* Chappell v. Wallace, 103 S. Ct. 2362, 2368 (1983).

20. *Brown*, 348 U.S. at 113. Although plaintiff injured his knee while on active duty, the operation alleged to have been negligently performed, and which resulted in permanent damage to plaintiff's knee, occurred after the plaintiff's discharge from the Army. *Id.* at 110-11. This injury did not "arise out of" military service, despite the fact that plaintiff's treatment in the VA Hospital was linked to his prior term of service. *Id.* at 112.

In holding that the *Feres* doctrine did not preclude plaintiff's claim, the Court relied on a pre-*Feres* case. *Id.* at 112-13 (citing Brooks v. United States, 337 U.S. 49 (1949)). In *Brooks*, one serviceman was killed and another injured when their car was struck by a United States Army truck. *Brooks*, 337 U.S. at 50. At the time of the accident the servicemen were on leave and driving on a public highway. *Id.* The *Brooks* Court held that a claim on behalf of the servicemen against the government was actionable under the FTCA. *Id.* at 50, 54. The Court rejected the government's argument of the dire consequences that might result from holding the government liable under the facts of its case. *Id.* at 52. The *Brooks* Court had reasoned that the accident "had nothing to do with the [servicemen's] army careers," since the injuries were not caused by their service "except in the sense that all human events depend on what has already transpired." *Id.* The *Brown* Court stated that *Feres* had not overruled *Brooks*. *Brown*, 348 U.S. at 112. The *Brown* Court concluded that its facts were governed by *Brooks* rather than *Feres*, since the injury in *Brown* did not occur while the plaintiff "was on active duty or subject to military discipline." *Id.*

21. Laswell v. Brown, 683 F.2d 261 (8th Cir. 1982) (commanding officers negligently ordered deceased to attend three atomic bomb detonations; *Feres* precluded claim for cancer contracted from exposure), *cert. denied*, 459 U.S. 1210 (1983); Monaco v. United States, 661 F.2d 129 (9th Cir. 1981) (*Feres* precluded claim by serviceman who was negligently ordered to perform calisthentic exercises on field located near testing site of atomic bomb), *cert. denied*, 456 U.S. 989 (1982); Hale v. United States, 452 F.2d 668 (6th Cir. 1971) (serviceman, although on valid pass and off-base, was

servicemen for injuries which arose during their term of active duty while they are partaking of the services and benefits to which military status entitles them.[22] The plaintiff servicemen's on-duty/off-duty status, while significant, has been identified as only one factor in the determination of whether his claim "arose out of" or was incurred "in the course of activity incident to" military service.[23] Finally, whether the serviceman is on or off-base at the time of the relevant inquiry also has been recognized as a factor in the

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subject to orders and directions of Military Police after being picked up by M.P.'s while hitchhiking; therefore *Feres* barred his claim for damages for injuries suffered while following M.P.'s orders); Breunig v. United States, No. 83-290 (D. Minn. Oct. 7, 1983) (hut in which servicemen had been ordered to remain during typhoon caught on fire; *Feres* precluded claims for their injuries and deaths).

Even if a servicemen is not acting pursuant to military orders, *Feres* precludes an FTCA claim if he is subject to military discipline at the time of government negligence. Uptegrove v. United States, 600 F.2d 1248 (9th Cir. 1979) (although deceased was not ordered to fly in military aircraft, by riding in aircraft he was subject to military discipline), *cert. denied*, 444 U.S. 1044 (1980); Herreman v. United States, 476 F.2d 234 (7th Cir. 1973) (same).

22. *See* Hass v. United States, 518 F.2d 1138 (4th Cir. 1975) (riding horse rented from military-owned stable); Chambers v. United States, 357 F.2d 224 (8th Cir. 1966) (swimming in pool on military base); Degentesh v. United States, 230 F. Supp. 763 (N.D. Ill. 1964) (riding bus to military-sponsored beach party); Richardson v. United States, 226 F. Supp. 49 (E.D. Va. 1964) (drinking in non-commissioned officer's bar).

Another line of cases barring servicemen's claims under *Feres* involves injuries stemming from treatment in military hospitals and medical facilities. *See* Johnson v. United States, 631 F.2d 34 (5th Cir. 1980) (negligent release of serviceman from hospital), *cert. denied*, 451 U.S. 1018 (1981); Harten v. Coons, 502 F.2d 1363 (10th Cir. 1974) (negligently performed surgery), *cert. denied*, 420 U.S. 963 (1975); Peluso v. United States, 474 F.2d 605 (3d Cir.) (per curiam) (improper diagnosis failed to detect condition from which serviceman died), *cert. denied*, 414 U.S. 879 (1973); Shults v. United States, 421 F.2d 170 (5th Cir. 1969) (negligent emergency treatment).

Apparently, the use of benefits such as medical treatment must occur while the serviceman is on active duty in order for *Feres* to preclude a claim for injuries. *See* Brown v. United States, 348 U.S. 110 (1954) (claim by veteran for medical malpractice at Veteran's Administration Hospital subsequent to plaintiff's discharge from military not precluded by *Feres*). For a discussion of *Brown*, see notes 18-20 and accompanying text *supra*.

23. Woodside v. United States, 606 F.2d 134, 142 (6th Cir. 1979), *cert. denied*, 445 U.S. 904 (1980). When the servicemen is on furlough or off-duty when he is injured, *Feres* is less likely to be found to be a bar. Parker v. United States, 611 F.2d 1007 (5th Cir. 1980) (serviceman was on furlough when he was injured by government negligence while on military base; *Feres* did not preclude claim); Mills v. Tucker, 499 F.2d 866 (9th Cir. 1974) (per curiam) (same). The fact that a serviceman is off-duty does not necessarily preclude *Feres* from barring an FTCA claim when the serviceman is still subject to military discipline. Uptegrove v. United States, 600 F.2d 1248 (9th Cir. 1979) (deceased, although off-duty at time of airplane crash, was under discipline and control of military; therefore *Feres* precluded claim), *cert. denied*, 444 U.S. 1044 (1980); Herreman v. United States, 476 F.2d 234 (7th Cir. 1973) (same).

When the tortious act has occurred while the serviceman has been on-duty *Feres* has usually been found to bar his claim. See United States v. Lee, 400 F.2d 558 (9th Cir. 1968) (decedents on-duty at time of airplane crash), *cert. denied*, 393 U.S. 1053 (1969); Everett v. United States, 492 F. Supp. 318 (S.D. Ohio 1980) (decedent on-duty at time of exposure to nuclear radiation).

Feres analysis.[24]

In applying *Feres*, the Third Circuit has focused on the serviceman's status.[25] Under the Third Circuit's analysis, when the tortious government conduct took place while the serviceman was acting pursuant to orders, *Feres* has precluded an FTCA claim.[26] The Third Circuit has indicated that whether the serviceman is on or off-duty may be determinative of the outcome under *Feres*.[27]

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24. Parker v. United States, 611 F.2d 1007, 1014 (5th Cir. 1980). The fact that the injury occurred while the serviceman was on the military base appears to be a factor militating against plaintiff's recovery. Camassar v. United States, 531 F.2d 1149 (2d Cir. 1976) (per curiam) (deceased off-duty at time of fatal motor vehicle accident while on navy depot); Chambers v. United States, 357 F.2d 224 (8th Cir. 1966) (claim for serviceman who drowned in swimming pool located on military base even if serviceman was off-duty at the time was barred by *Feres*); Knight v. United States, 361 F. Supp. 708 (W.D. Tenn. 1972) (same), *aff'd mem.*, 480 F.2d 927 (6th Cir. 1973). Other cases have held that the fact that the serviceman was on the military base does not preclude an FTCA claim. Parker v. United States, 611 F.2d 1007 (5th Cir. 1980) (injuries occurring while off-duty even though on military base are not "incident to service"); *accord* Bryson v. United States, 463 F. Supp. 908 (E.D. Pa. 1978) (claim for death occurring on military base when serviceman was on a weekend pass was not precluded by *Feres*).

25. *See* Thomason v. Sanchez, 539 F.2d 955, 960 (3d Cir. 1976) (*Feres* doctrine turns on serviceman's status), *cert. denied*, 429 U.S. 1072 (1977); Henning v. United States, 446 F.2d 774, 777 (3d Cir. 1971) (*Feres* decision is predicated upon serviceman's military status), *cert. denied*, 404 U.S. 1016 (1972). The district courts within the Third Circuit have also adopted this approach. *See, e.g.*, Sheppard v. United States, 294 F. Supp. 7, 9 (E.D. Pa. 1969) (active duty status of serviceman precluded claim under *Feres*; whether negligent government employees were military or non-military personnel was immaterial).

Courts from other circuits which have addressed the issue also have focused on the status of the injured serviceman rather than the status of the tortfeasor. *See* Uptegrove v. United States, 600 F.2d 1248 (9th Cir. 1979) (civilian employees of federal government were negligent but serviceman was on active duty at time of incident; *Feres* precluded claim), *cert. denied*, 444 U.S. 1044 (1980); United States v. Lee, 400 F.2d 558 (9th Cir. 1968) (same), *cert. denied*, 393 U.S. 1053 (1969).

26. Mondelli v. United States, 711 F.2d 567 (3d Cir. 1983) (injuries arising from serviceman's exposure to atomic radiation when he was ordered to stand near site of nuclear explosion precluded by *Feres*), *cert. denied*, 104 S. Ct. 1272 (1984); Jaffee v. United States, 663 F.2d 1226 (3d Cir. 1981) (en banc) (same), *cert. denied*, 456 U.S. 972 (1982), noted in the *Third Circuit Review*, 27 VILL L. REV. 858, 861 (1982).

27. *See* Thomason v. Sanchez, 539 F.2d 955 (3d Cir. 1976), *cert. denied*, 429 U.S. 1072 (1977). In *Thomason*, the plaintiff, a member of the United States Army, was struck by an automobile driven by a serviceman while plaintiff was riding his motorcycle on the Army base. *Id.* at 956. In holding that *Feres* precluded a claim under the FTCA, the court stated that not only was the plaintiff in a " 'present for duty' status" at the time of the accident, he was also "not on any type of leave or pass." *Id.* at 957 (quoting Thomason v. Sanchez, 398 F. Supp. 500, 504 (D.N.J. 1975)).

A district court in the Third Circuit has held that *Feres* did not preclude a claim for a serviceman's death, using the same reasoning which the Third Circuit developed in *Thomason*. *See* Byson v. United States, 463 F. Supp. 908 (E.D. Pa. 1978). In *Bryson*, the court, in holding that *Feres* did not bar plaintiff's claim, noted that at the time of the injury, the deceased was on a weekend leave and therefore "was not acting under compulsion of orders . . . [nor] on a military mission." *Id.* at 914. Furthermore, the court emphasized, his injuries were not significantly related to his use

Another question which has arisen in *Feres* analysis is whether the court should focus upon the status of the plaintiff-serviceman at the time of the alleged tortious conduct or at the time of the serviceman's resulting injury.[28] The Third Circuit has joined an apparent majority among the courts of appeals in holding that the relevant inquiry is the status of the serviceman at the time the tortious act allegedly attributable to the government took place.[29]

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of benefits or services available to him because of his status as a member of the armed forces. *Id.* For a discussion of the facts of *Bryson*, see note 89 *infra.*

Thomason and *Bryson* indicate that whether a serviceman is on or off the military base at the time of the *Feres* inquiry is not controlling. *Thomason*, 539 F.2d at 957; *Bryson*, 463 F. Supp. at 913-14.

Some cases in the Third Circuit dealing with claims against the government for medical malpractice while the plaintiffs were in the military appear to look only at whether the serviceman was on active duty, and not whether the serviceman was off-duty at the time of the alleged negligence, in order for *Feres* to preclude the claim. *See* Peluso v. United States, 474 F.2d 605 (3d Cir.) (per curiam), *cert. denied*, 414 U.S. 879 (1973); Henning v. United States, 446 F.2d 774 (3d Cir. 1971), *cert. denied*, 404 U.S. 1016 (1972). It generally has been held, however, that a benefit of military status such as medical treatment is necessarily "incident to military service." Woodside v. United States, 606 F.2d 134, 142 (6th Cir. 1979), *cert. denied*, 445 U.S. 904 (1980).

28. *Compare* Breunig v. United States, No. 83-290 (D. Minn. Oct. 7, 1983) (claim precluded under *Feres* because injuries occurred incident to plaintiff's service; fact that part of tortious act occurred prior to plaintiff's enlistment in service irrelevant) *with* Bankston v. United States, 480 F.2d 495, 497 (5th Cir. 1973) (inquiry under *Feres* is whether the tortious government act took place incident to plaintiff's decedent's military service).

29. *See* Mondelli v. United States, 711 F.2d 567 (3d Cir. 1983), *cert. denied*, 104 S. Ct. 1272 (1984); Henning v. United States, 446 F.2d 774 (3d Cir. 1971), *cert. denied*, 404 U.S. 1016 (1972). At the district court level, the inquiry likewise has focused on the time of the negligent act. *See* Schwartz v. United States, 230 F. Supp. 536 (E.D. Pa. 1964). In *Mondelli*, plaintiff's father was exposed to nuclear radiation while he was on active duty. *Mondelli*, 711 F.2d at 568. The Court held that *Feres* precluded plaintiff's claims for congenital birth defects caused by her father's exposure. *Id.* at 569. In *Henning*, the court held that a plaintiff's claim for injuries suffered subsequent to his discharge from the military was precluded by *Feres* because the government's alleged medical malpractice occurred while the plaintiff was still on active duty. *Henning*, 446 F.2d at 776-77. The court stated that *Feres* focused "not upon when the injury occurs or when the claim becomes actionable, but rather the time of, and the circumstances surrounding the negligent act." *Id.* at 777. In *Schwartz*, a radioactive dye was inserted in plaintiff's sinus for an x-ray while plaintiff was on active duty. *Schwartz*, 230 F. Supp. at 537-38. The court stated that any injuries occurring subsequent to his discharge, predicated upon the negligent insertion of the dye while plaintiff was on active duty, would be precluded by *Feres*. *Id.* at 539.

This view finds support in the other circuits as well. *See, e.g.*, Laswell v. Brown, 683 F.2d 261 (8th Cir. 1982) (claims for injuries occurring subsequent to serviceman's discharge caused by serviceman's exposure to nuclear radiation while on active military duty precluded by *Feres*), *cert. denied*, 459 U.S. 1210 (1983); Monaco v. United States, 661 F.2d 129 (9th Cir. 1981) (same), *cert. denied*, 456 U.S. 989 (1982); Johnson v. United States, 631 F.2d 34, 37 (5th Cir. 1980) (negligent release of serviceman from hospital was incident to service regardless of the fact that the damage, caused by his shooting spree, did not manifest itself until a later time), *cert. denied*, 451 U.S. 1018 (1981); Bankston v. United States, 480 F.2d 495 (5th Cir. 1973) (deceased negligently given transfusion of contaminated blood on day he was to be discharged from Army; claim for subsequent contraction of hepatitis precluded by *Feres*); Seveney v. United

One of the most controversial exceptions to the waiver of government immunity contained in the FTCA is the section 2680(h) "intentional tort" exception.[30] This section excludes FTCA authorization for "[a]ny claim arising out of" intentional tortious conduct.[31] The torts excluded under the

States, 550 F. Supp. 653 (D.R.I. 1982) (claims for injuries occurring subsequent to serviceman's discharge caused by exposure to nuclear radiation while on active duty precluded by *Feres*); Fischer v. United States, 451 F. Supp. 918 (E.D.N.Y. 1978) (plaintiff was negligently prescribed drug by team physician while a cadet playing football for the United States Air Force Academy at which time he would not be considered on active military duty; drug caused injury which manifested itself after plaintiff had graduated and had become a member of the Air Force; *Feres* held *not* to preclude his claim).

30. *See* 28 U.S.C. § 2680(h) (1982).

31. *Id.* This section exempts from the government's waiver of immunity "[a]ny claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights . . . ." *Id.* The legislative history of § 2680(h) has been described as "meagre." Panella v. United States, 216 F.2d 622 (2d Cir. 1954). The first time there was an exclusionary section substantially identical with § 2680(h) was in S.211, 72d Cong., 1st Sess. § 206 (1931). 2 L. JAYSON, *supra* note 10, § 260.01[l] n.1.1. In 1940 a spokesman for the Department of Justice commented that the section excepted from liability certain torts which " 'would be difficult to make a defense against, and which are easily exaggerated.' " *Id.* (quoting *Tort Claims Against the United States: Hearings on S.2690 Before the Subcomm. on S.2690 of the Senate Comm. on the Judiciary*, 76th Cong., 3d Sess. 39 (1940) (statement of Alexander Holtzoff)). Because the torts excepted were the type that could inflame the trier of facts' passions, there was the strong probability that judgments would be in amounts far in excess to the amount of damages actually suffered if the government were liable for these intentional torts. Comment, *The Federal Tort Claims Act*, 56 YALE L.J. 534, 547 & n.84 (1947).

What little legislative history there is indicates concern for government liability for *deliberate* torts. *See* S. REP. NO. 1400, 79th Cong., 2d Sess. 33 (1946). At one point in the Senate hearings the following exchange took place between Senate Committee members and the Assistant Attorney General Francis M. Shea:

> Mr. Robinson: On that point of deliberate assault that is where some agent of the government gets in a fight with some fellow?
> Mr. Shea: Yes.
> Mr. Robinson: And socks him?
> Mr. Shea: That is right.
> Mr. Cravens: Assuming a C.C.C. automobile runs into a man and damages him then under the common law, where that still prevails, is not that considered an assault and is not the action based on assault and battery?
> Mr. Shea: I should think not. I would think under the common law rather that would be trespass on the case.
> Mr. Cravens: Trespass on the case?
> Mr. Shea: Yes.
> Mr. Cravens: I do not remember these things very well, but it seems to me there are some cases predicated on assault and battery even though they were personal injury cases.
> Mr. Shea: No; I think under the common law pleading you have the same writ, but it makes a distinction between an assault and negligence.
> Mr. Cravens: This refers to a deliberate assault?
> Mr. Shea: That is right.
> Mr. Cravens: If he hit someone deliberately?
> Mr. Shea: That is right.
> Mr. Cravens: *Is it not intended to exclude negligent assaults?*
> Mr. Shea: *No. An injury caused by negligence could be considered under the bill.*

"intentional tort exception"[32] are to be construed in their "usual, legalistic sense."[33]

Hearings on H.R. 5373 and H.R. 6463 Before the House Comm. on the Judiciary, 77th Cong., 2d Sess. 33-34 (1942) (emphasis added).

Several commentators have criticized the § 2680(h) exception to the waiver of government immunity. *See, e.g.*, K. DAVIS, ADMINISTRATIVE LAW TREATISE § 25.08 (1958); F. HARPER & F. JAMES, THE LAW OF TORTS § 29.13 (1956); Comment, *supra*, at 547; Note, *Federal Torts Claims Act—Exceptions—Intentional Torts*, 7 VAND. L. REV. 283, 285 (1954). One commentator has suggested that negligent claims are just as susceptible to exaggeration as are intentional torts. K. DAVIS, *supra*, § 25.08, at 470-71. Furthermore, the fact that claims under the FTCA are tried without a jury would appear to alleviate in part the government's concern over the exaggeration of intentional tort claims. Comment, *supra*, at 547 n.84. Professors Harper and James have argued that by excepting intentional torts from government liability such conduct is less likely to be deterred, since "the deterrent pressure of liability may well be put on the most effective spot if the master is made responsible." F. HARPER & F. JAMES, *supra*, § 29.13, at 1655 (footnotes omitted). As one commentator has noted, § 2680 "creates an anomalous situation in which the plaintiff tries to prove a slight breach of duty while the Government attempts to show that its employees, though acting within the scope of their employment, were guilty of an intentional harm." Note, *supra*, at 285. *See also* Comment, *Section 2680(h) of the Federal Tort Claims Act: Government Liability for the Negligent Failure to Prevent an Assault and Battery by a Federal Employee*, 69 GEO. L.J. 803, 818 n.95 (1981) [hereinafter cited as Comment, *Section 2680(h)*].

There has also been some dissatisfaction with the section on the part of the courts. *See, e.g.*, Lambertson v. United States, 528 F.2d 441 (2d Cir.), *cert. denied*, 426 U.S. 921 (1976); Gale v. United States, 525 F. Supp. 260 (D.S.C. 1981); Taylor v. United States, 513 F. Supp. 647 (D.S.C. 1981). In the words of one court, "[i]t would be much more pleasant to reach a decision based on what this Court wishes Congress had said, rather that what it did say." *Taylor*, 513 F. Supp. at 650.

In 1974 the section was amended to include the following:

> *Provided*, That, with regard to acts or omissions of investigative or law enforcement officers of the United States Government, the provisions of this chapter and section 1346(b) of this title [28 U.S.C. § 1346(b)] shall apply to any claim arising, on or after the date of the enactment of this proviso, out of assault, battery, false imprisonment, false arrest, abuse of process, or malicious prosecution. For the purpose of this subsection, "investigative or law enforcement officer" means any officer of the United States who is empowered by law to execute searches, to seize evidence, or to make arrests for violations of Federal law.

Act of March 16, 1974, Pub. L. 93-253, § 2, 88 Stat. 50, 50 (1974) (codified as amended at 28 U.S.C. § 2680(n) (1982)). This amendment was added in response to tortious conduct by federal law enforcement officials in conducting investigations. *See* S. REP. NO. 588, 93d Cong., 2d Sess. 2, *reprinted in* 1974 U.S. CODE CONG. & AD. NEWS 2789, 2790-91; Boger, *supra* note 9, at 500-07. At least one commentator has questioned the distinction for purposes of liability between law enforcement officials and other employees of the federal government. *See* Boger, *supra* note 9, at 540. "A deliberate battery is no less outrageous if inflicted by a mailman . . . than if inflicted by an FBI agent." *Id.*

32. *See* 28 U.S.C. § 2680(h) (1982). This section commonly has been referred to as the "intentional torts exception." Moffitt v. United States, 430 F. Supp. 34 (E.D. Tenn. 1976); Boger, *supra* note 9, at 518. The section, however, omits certain intentional torts, such as trespass and invasion of privacy. Boger, *supra* note 9, at 518. For the pertinent text of § 2680(h), see note 31 *supra*.

33. Moffitt v. United States, 430 F. Supp. 34, 37 (E.D. Tenn. 1976) (citing Lambertson v. United States, 528 F.2d 441, 445 (2d Cir.) (Oakes, J., concurring) (jumping

Where the sole cause of plaintiff's injury is a federal employee's intentional tort, section 2680(h) precludes an FTCA claim.[34] However, where

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on plaintiff's back, although done as a joke, was technically a battery), *cert. denied*, 426 U.S. 921 (1976)). Therefore, in order to fall within one of these exceptions it is necessary that the technical elements of the tort, as it is recognized at common law, be satisfied. *Lambertson*, 528 F.2d at 443-44. The Restatement defines an assault in the following language:

> (1) An actor is subject to liability to another for assault if
>
> (a) he acts intending to cause a harmful or offensive contact with the person of the other or a third person, or an imminent apprehension of such a contact, and
>
> (b) the other is thereby put in such imminent apprehension.

RESTATEMENT (SECOND) OF TORTS § 21 (1965). According to the Restatement, one is subject to liability for battery if

> (a) he acts intending to cause a harmful or offensive contact with the person of the other or a third person, or an imminent apprehension of such a contact, and
>
> (b) an offensive contact with the person of the other directly or indirectly results.

Id. § 18 (1965). *See also* W. KEETON, D. DOBBS, R. KEETON & D. OWENS, PROSSER AND KEETON ON TORTS § 9, at 39 (5th ed. 1984) [hereinafter cited as PROSSER]. It is necessary that the actor intended to cause the unconsented to contact, although it is not necessary that he intended or could have reasonably foreseen the harm to the plaintiff. *Lambertson*, 528 F.2d at 444; PROSSER, *supra*, § 8, at 36; F. HARPER & F. JAMES, *supra* note 31, § 3.3, at 216 (1956). In *Lambertson*, an employee of the United States Department of Agriculture jumped on the plaintiff's back, proceeding to ride the plaintiff "piggy back" as a practical joke. *Lambertson*, 528 F.2d at 442. This contact caused the plaintiff to fall on a meat hook, suffering severe facial injuries. *Id.* Since under the technical elements of battery, it was not necessary that the employee intended the injury, but merely that he intended the contact, plaintiff's claim against the government was barred under § 2680(h). *Id.* at 444-45.

Whether the elements of the common law tort are met will depend on the controlling state law. *Moffitt*, 430 F. Supp. at 37; Moos v. United States, 118 F. Supp. 275 (D. Minn. 1954), *aff'd*, 225 F.2d 705 (8th Cir. 1955). In *Moffitt*, the court denied a motion to dismiss plaintiff's complaint because the question of fact remained whether the tortfeasor, a United States postal employee, had the requisite intent to constitute a technical assault and battery under the controlling state law. *Moffitt*, 430 F. Supp. at 38. The complaint had alleged that at the time of plaintiff's attack, the employee "was in a state of mental derangement." *Id.* In *Moos*, a surgeon in a veteran's hospital negligently operated on the wrong leg of plaintiff. *Moos*, 118 F. Supp. at 276. The court held, however, that under the controlling state law, this was technically a battery and thus barred by § 2680(h). *Id. Cf.* Lane v. United States, 225 F. Supp. 850 (E.D. Va. 1964) (surgeon's operation on wrong knee, although technically an assault and battery, was actionable under FTCA).

34. *See* Comment, *Section 2680(h)*, *supra* note 31, at 804 & n.6. The exceptions from federal government liability may not be evaded "merely by the artistry of . . . pleading." Coffey v. United States, 387 F. Supp. 539, 540 (D. Conn. 1975). Therefore, courts have continually stated that it is not the fact that plaintiff alleges his claim to be in negligence that is controlling; rather it is whether the claim in substance falls within one of the exceptions to the waiver of government immunity. Gaudet v. United States, 517 F.2d 1034, 1035 (5th Cir. 1975) (per curiam); Moffitt v. United States, 430 F. Supp. 34 (E.D. Tenn. 1976). *See also* Fitch v. United States, 513 F.2d 1013 (6th Cir.) (allegation of government negligence more properly characterized as misrepresentation, thus excluded under § 2680(h)), *cert. denied*, 423 U.S. 866 (1975); Blitz v. Boog, 328 F.2d 596 (2d Cir.) (false imprisonment), *cert. denied*, 379 U.S. 855 (1964); Klein v. United States, 268 F.2d 63 (2d Cir. 1959) (false arrest);

government negligence is alleged as the cause of an intentional tort, the federal circuits disagree as to whether the intentional torts exception precludes a claim against the government.[35] In these cases the party sued is not the intentional tortfeasor, but rather the federal government, for negligence in allowing the intentional tort to occur.[36]

The Second Circuit was the first court of appeals to squarely address the question of whether government negligence for failure to prevent an assault and battery could be actionable under the FTCA.[37] In *Panella v. United States*,[38] a patient in a federally-operated mental hospital was assaulted by

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Stepp v. United States, 207 F.2d 909 (4th Cir. 1953) (assault and battery), *cert. denied*, 347 U.S. 933 (1954); Nichols v. United States, 236 F. Supp. 260 (N.D. Miss. 1964) (assault and battery). As stated by one court, to permit the plaintiff through his pleadings to " 'dress[ ] up the substance' of battery in the 'garments' of negligence would be to 'judicially admit at the back door that which has been legislatively turned away at the front door.' " Lambertson v. United States, 528 F.2d 441, 445 (2d Cir.) (citing Laird v. Nelms, 406 U.S. 797, 802 (1972)), *cert. denied*, 426 U.S. 921 (1976).

35. Comment, *Section 2680(h)*, *supra* note 31, at 804 (citations omitted). While one court has regarded § 2680(h) as a "seemingly simple exception," it has noted the variance in interpreting § 2680(h) when the plaintiff's claim is predicated on negligence rather than the intentional tort. *See* Taylor v. United States, 513 F. Supp. 647, 650 (D.S.C. 1981).

36. In these cases, the complaint alleges that the government's negligence constitutes a proximate cause of plaintiff's injury. *See, e.g.*, Hughes v. United States, 662 F.2d 219 (4th Cir. 1981) (negligent failure to control the conduct of the assailant); Taylor v. United States, 513 F. Supp. 647 (D.S.C. 1981) (failure to provide psychiatric treatment for the assailant); Davidson v. Kane, 337 F. Supp. 922 (E.D. Va. 1972) (negligence in hiring assailant as a government employee).

In determining whether the negligence of an actor can constitute a proximate cause for an injury which stems from the intervening tortious conduct of another party, courts have emphasized the foreseeability of the intervening act. Eldredge, *Culpable Intervention as Superseding Cause*, 86 U. PA. L. REV. 121, 125 (1937). Generally one is not expected to anticipate the intentional wrongdoings of another. *Id.* (citing F. BOHLEN, STUDIES IN THE LAW OF TORTS 505 (1926)). However, according to the Restatement, "[i]f the likelihood that a third person may act in a particular manner is the hazard . . . which makes the actor negligent, such an act whether . . . intentionally tortious, or criminal does not prevent the actor from being liable for harm caused thereby." RESTATEMENT (SECOND) OF TORTS § 449 (1965).

In order for there to be negligence on the part of the actor, there must be an existing duty to prevent the intervening assault. Harper & Kime, *The Duty to Control the Conduct of Another*, 43 YALE L.J. 886 (1934). Generally, this duty arises only if there exists a "special relationship" between the actor and either the party who committed the intervening intentional act, or the plaintiff. *Id.* at 904. Examples of relationships between the defendant and the assailant in which the affirmative duty to control the conduct of the assailant arises are the parent-child and employer-employee relationships. *Id.* at 893-96. Examples of relationships between the defendant and the plaintiff from which the affirmative duty to control the conduct of another arises are when the custody of the plaintiff has been entrusted to the defendant by law or when the plaintiff is a business invitee of the defendant. *Id.* at 899, 903. For a discussion of liability in negligence when there has been an intervening intentional act by another party, see generally, Feezer & Favour, *Intervening Crime and Liability for Negligence*, 24 MINN. L. REV. 635 (1940)).

37. *See* Panella v. United States, 216 F.2d 622 (2d Cir. 1954).

38. *Id.*

an inmate.[39] The *Panella* court held that the intentional torts exception did not preclude the patient's action under the FTCA for the government negligence.[40] The court noted that for purposes of section 2680(h), a distinction should be drawn between government-employee tortfeasors and third-party tortfeasors.[41] The court stated that although section 2680(h) bars suit against the government where the intentional tortfeasor is a government agent, that section is not a bar to suit against the government where the intentional tortfeasor is a third-party.[42] The court reasoned that since there can be no vicarious liability against the government for the intentional torts of a non-employee, any claim against the government must lie in negligence.[43] Thus, the court concluded, when the assailant is not a government employee, "a negligence action is not merely an alternative form of remedy to an action for assault but negligence is rather the essence of plaintiff's claim."[44]

The federal employee-third party distinction for determining government liability for negligence has been accepted by the majority of courts which have addressed the issue.[45] In *Naisbitt v. United States*,[46] the Tenth

39. *Id.* at 623. As part of a criminal sentence, plaintiff had been placed at the hospital to undergo treatment for drug addiction. *Id.* The plaintiff subsequently sued the government for negligence in failing to provide adequate security so as to guard against the assault. *Id.*

40. *Id.* at 625.

41. *Id.* at 624-26.

42. *Id.* at 625.

43. *Id.* The court hypothesized two examples, one in which the assailant was a government employee and the other a third party. *Id.* at 624. In the first case the court observed that the assault, in the absence of § 2680(h), would give rise to vicarious government liability regardless of proof of government negligence. *Id.* Therefore, the court stated, one could infer that § 2680(h) was intended to retain government immunity in the first situation, no matter what tort the complaint alleged. *Id.* The court explained that when the assailant is a third party, it was more difficult to draw such an inference, since absent negligence there could be no government liability (as the government would not be vicariously liable for the intentional tort of a third party). *Id.*

44. *Id.* at 624. The *Panella* court observed that its interpretation of § 2680(h) found support in the section's legislative history, which revealed that Congress' foremost concern was providing immunity for assaults by government agents. *Id.* at 626. For a discussion of the legislative history of § 2680(h), see note 31 *supra.*

45. *See, e.g.*, Wine v. United States, 705 F.2d 366 (10th Cir. 1983); Naisbitt v. United States, 611 F.2d 1350 (10th Cir.), *cert. denied*, 449 U.S. 885 (1980); Hughes v. Sullivan, 514 F. Supp. 667 (E.D. Va. 1980), *aff'd sub nom.* Hughes v. United States, 662 F.2d 219 (4th Cir. 1981) (per curiam); Muniz v. United States, 397 F.2d 285 (2d Cir. 1962) (en banc), *aff'd*, 374 U.S. 150 (1963); Taylor v. United States, 513 F. Supp. 647 (D.S.C. 1981); Gale v. United States, 491 F. Supp. 574 (D.S.C. 1980), *vacated*, 525 F. Supp. 260 (D.S.C. 1981); Pennington v. United States, 406 F. Supp. 850 (E.D.N.Y. 1976); Collins v. United States, 259 F. Supp. 363 (E.D. Pa. 1966). In *Pendarvis v. United States*, the court held that even where there is an antecedent intentional tort by a federal employee, a claim for subsequent government negligence is precluded under § 2680(h). *See Pendarvis*, 241 F. Supp. 8, 10-11 (D.S.C. 1965). In *Pendarvis*, the complaint alleged that the plaintiff was injured when he was seized by government officers. *Id.* at 9. Subsequently plaintiff was taken to a government hospital "where his injuries were negligently diagnosed . . . and . . . he was negligently treated . . . ."

Circuit explicated the distinction drawn by the Second Circuit in *Panella*.[47] The *Naisbitt* court stated that when the assailant is a government employee, the tort, regardless of whether it is termed negligence, is essentially "an intentional tort attributable to the government."[48] The court stated that this was explicable either on the theory of respondeat superior "or because the employee is closely related to the government."[49] The *Naisbitt* court's analysis was not altered by the plaintiffs' allegations that the federal employees were off-duty at the time they committed the assaults and batteries.[50]

The federal employee-third party distinction was adopted by the

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Id. The court held that any claim for malpractice against government physicians was precluded under § 2680(h). *Id.* at 10-11.

The court reasoned that the medical treatment was rendered only because of the assault. *Id.* at 11. The Supreme Court has never addressed the issue of whether government immunity for negligence should turn on the employment status of the intentional tortfeasor. Comment, *Section 2680(h)*, *supra* note 31, at 813 n.53.

46. 611 F.2d 1350 (10th Cir.), *cert. denied*, 449 U.S. 885 (1980).

47. *Id.* at 1355-56. In *Naisbitt*, two off-duty members of the United States Air Force entered a private store and committed "assaults, rapes, batteries and murders . . . ." *Id.* at 1351. In all five people were shot, three of them fatally. *Id.* The complaint alleged that the government had been negligent in retaining the assailants in the military or in failing to adequately supervise them. *Id.*

48. *Id.* at 1356.

49. *Id.* Since the government had retained immunity for its employee's intentional torts, the court concluded that "an attempt to establish liability on a negligence basis [was] indeed an effort to circumvent the retention of immunity provided in § 2680(h)." *Id.* Furthermore, the court explained, the assailants' acts were of such great magnitude that they rendered "insignificant" the government's negligence as a causal force. *Id.*

50. *See id.* at 1354-56. This aspect of *Naisbitt* has been criticized by one commentator. *See* Comment, *Section 2680(h)*, *supra* note 31, at 814-15 n.69. *Naisbitt* fails to explain how the government can be vicariously liable for an intentional tort when the employee is off-duty or acting outside the scope of his employment when the government concededly could not be liable under a respondeat superior theory. *Id.* While the *Naisbitt* court stated that it appears to be the close proximity of the employee to the government which imputes the intentional tort to the government, the commentator suggests that the *Naisbitt* court advanced no explanation for "this novel theory." *Id.*

Nevertheless, it appears to be generally accepted that the fact that the federal employee is off-duty or not acting within the scope of his employment does not change the view of courts, which recognize the employee-nonemployee distinction, that a claim for government negligence is barred by the intentional torts exception. *See* Wine v. United States, 705 F.2d 366 (10th Cir. 1983); Taylor v. United States, 513 F. Supp. 647 (D.S.C. 1981); Pennington v. United States, 406 F. Supp. 850 (E.D.N.Y. 1976). *See also* Gale v. United States, 525 F. Supp. 260 (D.S.C. 1981), *rev'g* 491 F. Supp. 574 (D.S.C. 1980).

In *Pennington*, the complaint alleged that the government was negligent in supervising a Deputy United States Marshall, who, after becoming intoxicated, shot the plaintiff's decedent. *Pennington*, 406 F. Supp. at 851. The court reasoned that when an action is predicated on the asserted negligence in hiring or failing to train an employee, whether the employee was on-duty or off-duty at the time of the assault loses significance. *Id.* at 852. The court recognized that a distinction between a nonemployee and an off-duty employee was "not [an] entirely . . . satisfactory one." *Id.* Less satisfactory in the court's view, however, was a distinction between an off-duty and an on-duty employee. *Id.*

Fourth Circuit in *Hughes v. United States*.[51] In *Hughes*, a postal employee had previously been arrested for taking indecent sexual liberties with a minor.[52] His supervisor allowed the employee to continue working the postal route, despite the contrary requests of the victim's parent.[53] Several years later, the employee lured two young girls into his postal truck where he took indecent sexual liberties with them.[54] Relying on the reasoning of the district court, which recognized the government employee-third party assailant distinction drawn by *Panella* and *Naisbitt*, the Fourth Circuit held that a claim based on the government's negligence in retaining the employee was precluded by the intentional torts exception.[55]

In accordance with the distinction first drawn in *Panella*, federal courts have generally held that section 2680(h) does not preclude an action under the FTCA against the government for negligent failure to prevent an assault by someone other than a federal employee.[56] In *Rogers v. United States*,[57] a case involving an intentional tort by a third party, the Fourth Circuit held that the intentional torts exception did not bar a valid claim for government negligence "even though assault or false imprisonment may be collaterally involved."[58] The *Rogers* court concluded that a valid negligence claim had been alleged where the government could be held liable in negligence for breach of a duty that it had either voluntarily assumed or which had been imposed by law.[59]

51. 662 F.2d 219 (4th Cir. 1981) (per curiam).

52. *Id.* at 220. The employee pleaded guilty to a lesser charge. *Id.*

53. *Id.*

54. *Id.*

55. *Id.* The court affirmed the district court for reasons "adequately stated" by the district court. *Id.* (citing Hughes v. Sullivan, 514 F. Supp. 667 (E.D. Va. 1980), *aff'd sub nom.* Hughes v. United States, 662 F.2d 219 (4th Cir. 1981)). The district court had stated that an earlier Fourth Circuit case (holding that § 2680(h) did not preclude a negligence claim against the government although one of the intentional torts listed in § 2680(h) caused the injury) was distinguishable in that the case involved an intentional tort by one who was not a federal employee. 514 F. Supp. at 670 (citing Rogers v. United States, 397 F.2d 12 (4th Cir. 1968)). For a discussion of *Rogers*, see notes 57-59 and accompanying text *infra*. The district court also rejected the negligence claim on the basis that the government's negligence was not a proximate cause of the injury. *Hughes*, 514 F. Supp. at 670. The court reasoned that there would have been no injury except for the independent assault and battery of the government employee. *Id.*

56. *See* Rogers v. United States, 397 F.2d 12 (4th Cir. 1968) (torture by known sadist); Muniz v. United States, 305 F.2d 285 (2d Cir. 1962) (assault by prison inmate), *aff'd*, 374 U.S. 150 (1963); Panella v. United States, 216 F.2d 622 (2d Cir. 1954) (assault by hospital inmate).

57. 397 F.2d 12 (4th Cir. 1968).

58. *Id.* at 15. In *Rogers*, plaintiff, a minor, had been arrested in connection with a stolen automobile. *Id.* at 13. The complaint alleged that while awaiting trial, a United States Marshall permitted plaintiff to leave in the company of a known sadist who had previously been arrested for chaining and physically beating another person. *Id.* The man took plaintiff to his home after picking him up from the jail and proceeded to torture the plaintiff. *Id.* at 14.

59. *Id.* at 14-15. By voluntarily assuming the duty of taking custody of the plaintiff, the government would have to use due care in exercising that duty. *Id.* at

Several federal courts have rejected the *Panella* distinction, adopting a minority position that negligence claims against the government are not precluded under the intentional torts exception even where the assailant was a government employee.[60] In *Underwood v. United States*,[61] the complaint alleged that supervising officers in the United States Air Force were negligent in placing an officer on active duty and allowing him access to a gun, in view of the fact that they knew he had a history of psychiatric problems.[62] After obtaining the gun, the airman went to his ex-wife's place of employment and shot her to death.[63] The Fifth Circuit held that because the complaint alleged facts which would support a finding that the government's negligence was a proximate cause of the ex-wife's death under Alabama law, the claim was not precluded under the intentional torts exception.[64]

One district court in the First Circuit has consistently held that claims for government negligence in allowing government employees to commit assaults and batteries is not precluded by the intentional torts exception.[65] In *Loritts v. United States*,[66] a member of a college choral group which had been invited to West Point was raped by a West Point cadet.[67] The *Loritts* court stated that the complaint alleged a valid negligence claim, since the attack was a foreseeable consequence of the government's breach of its duty to the plaintiff.[68] More recently, in *Schwer v. United States*,[69] the same court held

14. Furthermore, a court had ordered the U.S. Marshall to provide the plaintiff with transportation. *Id.* at 14 n.3.

60. *See, e.g.*, Underwood v. United States, 356 F.2d 92 (5th Cir. 1966) (murder by member of U.S. Air Force); Schwer v. United States, No. 83-1209 (D. Mass. Dec. 1, 1983) (beating death caused by U.S. Navy men); Loritts v. United States, 489 F. Supp. 1030 (D. Mass. 1980) (rape by West Point cadet).

61. 356 F.2d 92 (5th Cir. 1966).

62. *Id.* at 94.

63. *Id.*

64. *Id.* at 100. The court distinguished another Fifth Circuit case with analogous facts on the basis of the different state law controlling in that case. *Id.* at 99 (citing United States v. Shively, 345 F.2d 294 (5th Cir.) (under Georgia law, intervening criminal act severed precedent negligence as proximate cause of injury), *cert. denied*, 382 U.S. 883 (1965)). While *Underwood* did not specifically address the issue of whether the assailant was off-duty at the time of assault, its citation and apparent approval of *Panella's* employee-non-employee distinction has led some courts to interpret the result in *Underwood* as resting on the assailant's off-duty status. *See Naisbitt*, 611 F.2d at 1355 n.4; *Pennington*, 406 F. Supp. at 852. *But see* Comment, *Section 2680(h)*, *supra* note 31, at 819 n.100 ("the *Underwood* court relied solely on a duty/causation analysis to permit the plaintiff's claim and did not distinguish between on- and off-duty assailant") (citing *Underwood*, 356 F.2d at 98-100).

65. *See* Schwer v. United States, No. 83-1209 (D. Mass. Dec. 1, 1983); Loritts v. United States, 489 F. Supp. 1030 (D. Mass. 1980).

66. 489 F. Supp. 1030 (D. Mass. 1980).

67. *Id.* at 1031. West Point had voluntarily undertaken the task to provide escorts for plaintiff's choral group. *Id.* The assault occurred while plaintiff was walking unescorted at night on the Academy's campus. *Id.* The complaint alleged that the government was negligent in failing to provide escorts and in having allowed the assailant to remain at West Point "despite his demonstrated strange and suspicious behavior." *Id.* The court's discussion treated the cadet as a federal employee. *See id.*

68. *Id.* at 1032. The court emphasized that having voluntarily assumed the

that the intentional torts exception did not preclude a negligence claim against the government for the beating death of a civilian at the hands of four members of the United States Navy.[70] The *Schwer* court stated that the claim was "genuinely based on the antecedent negligence of the United States" either on a theory of common law liability for serving intoxicating liquors[71] or on a theory of the government's ability to control the actions of the sailors.[72]

In *Liuzzo v. United States*,[73] the district court for the Eastern District of Michigan criticized the government employee-third party distinction.[74] In *Liuzzo*, the court argued that the "essence" of plaintiff's claim did not change from negligence to assault and battery merely because the assault has been committed by a government employee as opposed to a third party.[75] The

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duty to provide escorts, the government was under the duty to act with due care. *Id.* at 1031. Since the risk to plaintiff was foreseeable, the government's negligence could be said to be a proximate cause of plaintiff's injury. *Id.* at 1031-32. Therefore, this was not a "situation where a plaintiff by virtue of artful pleading seeks to circumvent section 2680(h)." *Id.* at 1031.

In a footnote the court argued that the fact that the assailant was a government employee should not allow the government to escape liability. *Id.* at 1032 n.3. The court observed that "the fortuitous nature of the circumstances following its negligence" should not immunize the government since "[t]here [was] no question that had the plaintiff been attacked by a civilian or had she fallen into an unmarked excavation a negligence action would lie." *Id.*

69. No. 83-1209 (D. Mass. Dec. 1, 1983).

70. *Id.*, slip op. at 4. The complaint alleged that the assailants, who were stationed in Long Beach, California, were in a highly intoxicated state at the time of the assault. *Id.* at 2. It further alleged that the government was negligent in serving the sailors intoxicating liquor at the enlisted men's club and in allowing the men to enlist in the Navy and remain in it despite knowledge of their violent propensities. *Id.*

71. *Id.* at 4. The court observed that plaintiff's claim was a "classic common law dram shop claim." *Id.* The common law recognized that the seller of alcoholic beverages could be liable for the tortious acts of intoxicated persons to whom alcohol was served. *Id.* Although California had abrogated this common law doctrine in part by statute, a seller of alcohol remained liable when he served a minor and that minor injured another. *Id.* The court pointed out the complaint alleged that three of the four sailors who had been involved in the beating were minors at the time of the incident. *Id.*

72. *Id.* at 4-5. The court stated that because of their status as servicemen, the sailors were under the supervision and observation of the government. *Id.* at 5. Therefore, the government could be liable in negligence if, with knowledge of the sailors' intoxicated condition, it allowed them to leave the ship. *Id.* The court concluded that the plaintiff was not attempting to hold the government liable for their employees' intentional torts on a respondeat superior theory. *Id.*

73. 508 F. Supp. 923 (E.D. Mich. 1981).

74. *Id.* at 929-30. In *Liuzzo*, plaintiff's decedent was shot by one of the occupants of a car in which Ku Klux Klansmen were riding. *Id.* at 926. One of the occupants was an FBI informant. *Id.* The complaint alleged that the FBI was negligent in authorizing the informant to instigate violent activities, which proximately caused the deceased's murder. *Id.* Given the court's rejection of the government employee-third party distinction, it was unnecessary to determine whether the informant constituted a government employee, or which of the occupants of the car had actually fired the fatal shot. *Id.* at 928 n.3, 930.

75. *Id.* at 929-30.

Liuzzo court concluded that nothing in the legislative history of the FTCA indicated that § 2680(h) precluded an action against the government when its negligence caused the plaintiff to be assaulted by a government employee.[76]

Courts within the Third Circuit also have had occasion to decide whether the intentional torts exception precludes a negligence claim against the federal government when there has been an intervening intentional tort by a government employee. In *Collins v. United States*,[77] the district court for the Eastern District of Pennsylvania dismissed a complaint which alleged that the United States Postal Service was negligent in hiring and retaining the assailant, who "pushed, hit and struck" the plaintiff.[78] The *Collins* court held that the intentional torts exception precluded the claim, reasoning that if there had been no assault, no legal consequences could flow from the government's negligence.[79] The *Collins* court recognized the federal employee-third party distinction, noting that section 2680(h) barred a negligence action only when the assault was by a federal employee.[80]

In *Gibson v. United States*,[81] the Third Circuit, addressing the issue for the

76. *Id.* at 930. A reasonable inference could be drawn in viewing the legislative history that the intentional tort exception was established merely to prevent *vicarious* liability for government negligence. *Id.* A review of the legislative history of 2680(h) revealed that Congress was concerned with intentional torts which could be " 'difficult to make a defense against, and which are easily exaggerated.' " *Id.* (citing *Tort Claims Against the United States: Hearings on S. 2690 Before the Subcom. on S. 2690 of the Senate Comm. on the Judiciary*, 76th Cong., 3d Sess. 39 (1940)). The court stated that it did not see how the negligence claim in its case was any more difficult to defend against or more easily exaggerated than "any other negligence action." *Id.* For a discussion of the legislative history of § 2680(h), see note 31 *supra*.

But see Ballew v. United States, 389 F. Supp. 47 (D. Md. 1975), *aff'd mem.*, 539 F.2d 705 (4th Cir. 1976). In *Ballew*, the plaintiff alleged that federal agents were negligent in obtaining a search warrant for his apartment. *Id.* at 49. Federal agents and one county police officer executed the warrants. *Id.* at 48. Plaintiff, who met the agents and officer with a gun upon their entry into his house, was subsequently shot. *Id.* at 49. The court suggested that if one of the federal agents had been found to have fired the shot which wounded the plaintiff, the suit would be barred under § 2680(h), whereas if it was the county police officer who had shot the plaintiff, § 2680(h) would not preclude the claim. *Id.* at 49.

77. 259 F. Supp. 363 (E.D. Pa. 1966).

78. *Id.* at 364. The complaint averred that the government "knew or should have known" of the employee's propensity for violence. *Id.*

79. *Id.* at 364. The court observed that "Congress could easily have excepted claims *for* assault. It did not; it used the broader language excepting claims *arising out of* assault." *Id.* (emphasis supplied by the court). The court concluded that since the claim "arose" only because there was an assault and battery, the claim fell within the plain language of § 2680(h). *Id. But see* F. HARPER & F. JAMES, *supra* note 31, § 29.13. The authors suggest that the language "arising out of" may be more narrow than language excepting claims for assault. *Id.* The phrase may "be construed as referring only to actions where the very 'gist and essence' of plaintiff's theory of recovery is one of the excepted bases of liability . . . ." *Id.* at 1655-56.

80. *Collins*, 259 F. Supp. at 364 (citing Panella v. United States, 216 F.2d 622 (2d Cir. 1954)).

81. 457 F.2d 1391 (3d Cir. 1972).

first time, declined to hold that section 2680(h) was a bar to a negligence action involving intentional torts by federal employees.[82] In *Gibson*, the plaintiff, a Jobs Corps instructor, was assaulted by a Jobs Corps trainee.[83] The complaint alleged that under the Jobs Corps program the government had selected trainees who were known juvenile delinquents and drug addicts, with histories of mental illness and violence.[84] The Third Circuit reasoned that, given the circumstances, the assault was not a sufficient intervening cause to sever the causal connection between the government's negligence and the plaintiff's injury.[85] Rather, the court observed, the injury "had its roots in the Government's negligence."[86] The *Gibson* court distinguished *Collins* on the grounds that *Collins* involved conclusory allegations of negligence based upon the same assault for which the action was brought.[87] In *Bryson v. United States*,[88] the district court for the Eastern District of Pennslyvania relied on *Gibson* in holding that the alleged government negligence in enlisting the assailant in the Army, resulting in the beating

82. *See id.* at 1395.

83. *Id.* at 1392-93. The assailant, a juvenile delinquent who was known to be a narcotics addict, stabbed the plaintiff in the temple with a screwdriver. *Id.* at 1393. The court regarded the assailant as an employee of the government. *Id.* at 1393-94.

84. *Id.* at 1394. The complaint further alleged that there had been prior incidents of violence on the part of the trainees. *Id.* at 1393.

85. *Id.* at 1395. In the court's view, the attack was foreseeable since the assault was the very risk which made the defendant's failure to take precautions negligent. *Id.* (citing Harper & Kime, *supra* note 36, at 898). Therefore, under established tort principles there was liability for negligence. 457 F.2d at 1395. For a discussion of the duty to control the conduct of another, see note 36 *supra*.

86. 457 F.2d at 1395. As an alternative ground for holding the claim should not be dismissed under the intentional torts exception, the court observed that there was a question of fact whether the assailant even could have formed the requisite intent to constitute an assault and battery since he was alleged to be under the influence of narcotics at the time of the attack. *Id.* at 1396-97. For a discussion of the requirements for an assault and battery under the common law, see note 33 *supra*.

87. 457 F.2d at 1396 (citing *Collins*, 259 F. Supp. at 363). In contrast, the trainees in *Gibson* were known to be drug addicts with behavioral problems. *Id.* Furthermore, the government had affirmatively accepted the duty of supervising their behavior in a controlled environment. *Id.*

While the court recognized that some courts had drawn a distinction based on whether or not the assailant was a government employee, the court stated that "[n]one of these cases found it necessary to consider facts analogous to those presented in this proceeding." *Id.* at 1396-97. If a stronger showing of negligence makes it more likely the injury had "its roots in negligence," *Gibson* may be read as suggesting that when an assailant is an employee of the government, § 2680(h) is *less* likely to preclude a negligence claim, since there is a greater duty to control the conduct of the assailant when the assailant is an employee of the alleged negligent party. *Id. See also* Comment, *Section 2680(h)*, *supra* note 31, at 824. Despite the *Gibson* court's statement that the assailant was a government employee, some cases have attempted to distinguish *Gibson* on the basis that *Gibson* did not involve a government employee assailant. *See* Naisbitt v. United States, 611 F.2d 1350, 1355 n.4 (10th Cir.), *cert. denied*, 449 U.S. 885 (1980); Taylor v. United States, 513 F. Supp. 647, 651 (D.S.C. 1981).

88. 463 F. Supp. 908 (E.D. Pa. 1978).

death of plaintiff's decedent, stated an actionable claim under the FTCA.[89]

Against this background, the *Shearer* court first addressed the issue of whether the claim that the government negligently failed to supervise or to discharge Heard was barred by the *Feres* doctrine.[90] "The pivotal question under the *Feres* analysis," Judge Higginbotham explained, "is whether the servicemen sustained the injury either in the 'course of' or 'incident to' his military service."[91] The court observed that the application of these conclusory standards turns on the specific facts defining the injured serviceman's relationship with the military at the time and place the injury was sustained.[92] Judge Higginbotham identified several relevant factors in the *Feres* analysis and noted that the controlling factors often seem to be the status and activity of the injured serviceman.[93] The majority explained that the

89. *Id.* at 912. In *Bryson*, plaintiff's son, a private in the United States Army, was killed by another soldier, one Weidenhammer. *Id.* at 910. The decedent had gone to the aid of Weidenhammer, who was intoxicated in the Army barracks at the time. *Id.* Weidenhammer subsequently became violent, striking the decedent's head against the floor. *Id.* Plaintiff did not sue the government vicariously for Weidenhammer's intentional tort, but for the government's alleged negligence. *Id.* at 910-12. The complaint alleged that the government was negligent in accepting and retaining Weidenhammer in the Army, due to his " 'background of emotional problems, lack of maturity, (and) lack of average intelligence.' " *Id.* at 910. The court held that the death of the decedent could reasonably be said to have " 'had its roots in the Government's negligence.' " *Id.* at 912 (citing *Gibson*, 457 F.2d at 1395).

The court further held that the claim was not precluded by the *Feres* doctrine. *Id.* at 914. For a discussion of this aspect of *Bryson*, see note 27 *supra*.

90. 723 F.2d at 1105. Judge Higginbotham characterized the "thrust of the *Feres* doctrine [as the] prevent[ion of] an action against the government for 'injuries to servicemen where the injuries arise out of or are in the course of activity incident to service.' " *Id.* (citations omitted). Judge Higginbotham regarded the principle underlying the *Feres* doctrine as minimizing judicial interference with the " 'peculiar and special relationship of the soldier to his superiors . . . .' " *Id.* (citing Stencel Aero Eng'g Corp. v. United States, 431 U.S. 666, 671 (1977)) (additional citation omitted). For a discussion of the *Feres* doctrine, see notes 14-29 and accompanying text *supra*.

91. 723 F.2d at 1105 (citing United States v. Brown, 348 U.S. 110, 112 (1954); Feres v. United States, 340 U.S. 135, 146 (1950); Jaffee v. United States, 663 F.2d 1226, 1233 (3d Cir. 1981) (en banc), *cert. denied*, 456 U.S. 972 (1982)). Judge Higginbotham noted that the terms " 'in the course of' and 'incident to' " service are "not self-evident truths that leap out to illuminate any factual situation." *Id.*

92. *Id.* The court pointed out that under the Supreme Court's cases the military was immune from suits under the FTCA which arose out of " 'negligent orders given or negligent acts committed in the course of' an injured serviceman's military duty." *Id.* (quoting Stencel Aero Eng'g Corp. v. United States, 431 U.S. 666, 671 (1977); United States v. Brown, 348 U.S. 110, 112 (1954)).

93. 723 F.2d at 1105. Judge Higginbotham noted four factors which control the *Feres* analysis: 1) the status of the soldier at the time of injury; 2) the location where the injury occurred; 3) the nature of the serviceman's activity and 4) whether the injured serviceman was acting pursuant to orders at the time of injury. *Id.* (citations omitted). Judge Higginbotham summarized: "Generally, an off-duty serviceman not on the military base and not engaged in military activity at the time of injury, can recover under FTCA; an on-duty serviceman, however, is usually barred from recovery." *Id.* at 1106 (citing Feres v. United States, 340 U.S. 135 (1950) (barring recovery for an on-duty serviceman injured on base); Brooks v. United States, 337

district court, in holding that *Feres* barred the present claim, had improperly switched the focus away from the activity and status of the injured *serviceman* at the time and place of injury to a "*tortfeasor* status-activity analysis."[94] According to Judge Higginbotham, the two cases relied upon by the district court stood for the narrower proposition that medical treatment received by an active duty soldier at a military hospital is by its nature an activity or benefit which is "incident to military service."[95]

Judge Higginbotham explained that a proper application of the *Feres* analysis to the present case would focus upon the fact that the victim was on leave and out of state at the time of the kidnapping and murder.[96] Further, he observed, "*being kidnapped* off base at gun point" could never be considered a benefit of military status akin to medical treatment.[97] Therefore, the court concluded, there was no "legitimate basis" upon which *Feres* could be held to preclude plaintiff's claim.[98]

Turning to the issue of whether the FTCA claim was barred under the intentional torts exception, the *Shearer* court observed that section 2680(h) does not necessarily preclude a claim against the government for negligence just because the injury is brought about by the assault and battery of a government employee.[99] Rather, the court stated, the "FTCA simply requires that the intentional tort must 'have its roots in government negligence.' "[100] The court explained that a complaint alleged an intentional tort which had

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U.S. 49, 52 (1949) (permitting recovery for off-duty serviceman injured on personal business)). For a discussion of *Brooks*, see note 20 *supra*. For a discussion of *Feres*, see notes 15-17 and accompanying text *supra*.

94. *Id.* at 1106 (emphasis added). Judge Higginbotham noted that the undisputed evidence indicated that Shearer was off-base, on leave, and not acting incident to any military activity at the time of his murder. *Id.* He continued:

> The district court's error stems from its singular focus on the status and activity of the allegedly negligent parties (i.e. Heard's superior officers) without considering the status and activity of the injured party. Consequently the district court improperly concluded that appellant's "allegations relate directly to decisions of military personnel made in the course of the performance of their military duty and, therefore, are barred."

Id. (quoting App. at 25a).

95. *Id.* at 1106 (citing Johnson v. United States, 631 F.2d 34 (5th Cir. 1980), *cert. denied*, 451 U.S. 1018 (1981); Henning v. United States, 446 F.2d 774 (3d Cir. 1971), *cert. denied*, 404 U.S. 1016 (1972)) (further citation omitted). By relying on an improper interpretation of these cases, Judge Higginbotham stated, the district court never considered the status or activity of the injured serviceman. *Id.* For a discussion of *Henning*, see note 29 *supra*.

96. *Id.* (citing Feres v. United States, 340 U.S. 135, 136-38, 146 (1950); Brooks v. United States, 337 U.S. 49, 50-52 (1949)). For a discussion of *Brooks*, see note 20 *supra*. For a discussion of *Feres*, see notes 15-17 and accompanying text *supra*.

97. *Id.* (emphasis supplied by the court).

98. *Id.*

99. *Id.* For a discussion of § 2680(h), the intentional torts exception to the FTCA, see notes 30-89 and accompanying text *supra*.

100. 723 F.2d at 1106 (citing Gibson v. United States, 457 F.2d 1391, 1395-97 (3d Cir. 1972); Underwood v. United States, 356 F.2d 92, 99-100 (5th Cir. 1966)). For a discussion of *Underwood*, see notes 61-64 and accompanying text *supra*.

"its roots in [government] negligence" when it pleaded facts indicating that the government should have known of its employee's dangerous propensities and reasonably anticipated his injurious act.[101] Conversely, the court stated that when a complaint merely contains conclusory allegations of government negligence, the intentional torts exception properly precludes the claim.[102] The court found that the plaintiff had alleged sufficient facts which, if true, would reveal government knowledge of the assailant's violent propensities.[103] Therefore, the court concluded that the claim was not precluded by the intentional tort exception.[104]

Judge Garth, in dissent, first stated his conclusion that the claim was precluded by *Feres*.[105] However, Judge Garth chose to base his dissent upon

101. 723 F.2d at 1107 (citing *Gibson*, 457 F.2d at 1395-96; Underwood v. United States, 356 F.2d 92, 99-100 (5th Cir. 1966)). In such a situation the assault and battery could be regarded as the "natural result" of the failure of the government to exercise due care. *Id.* (citing *Gibson*, 457 F.2d at 1395-96; United States v. Shively, 345 F.2d 294 (5th Cir.), *cert. denied*, 382 U.S. 883 (1965)). As such, the assault and battery was not a sufficient intervening force to sever the causal relation between the government's negligence and the plaintiff's injury. *Id.* (citing *Gibson*, 457 F.2d at 1395; *Underwood*, 356 F.2d at 99-100).

102. 723 F.2d at 1107 (citations omitted). Nor could there by recovery if negligence was a "remote cause" of the injury, Judge Higginbotham continued. *Id.*

The court distinguished a Tenth Circuit decision, which held that § 2680(h) barred suit where the assailant was a government employee, on the grounds that the Tenth Circuit dealt with a claim based on mere conclusory allegations of negligence. *Id.* at 1107-08 (citing Naisbitt v. United States, 611 F.2d 1350 (10th Cir.), *cert. denied*, 449 U.S. 885 (1980)). For a discussion of *Naisbitt*, see notes 46-50 and accompanying text *supra*. The court stated that in *Naisbitt* the complaint failed to allege any facts that would establish that the government knew or should have known of either the assailant's past or future violent propensities. *Id.* at 1107-08. "In bringing a claim," Judge Higginbotham explained, "a plaintiff cannot merely point to an assault and battery and then claim, based simply on the occurrence of the intentional tort, that the government was negligent for not having anticipated the offensive action." *Id.* at 1107. (citations omitted).

103. 723 F.2d at 1107. Judge Higginbotham stated:

> The following facts are critical: Heard had been convicted and imprisoned for killing a civilian while in the Army. He was released from the prison less than four months prior to killing Shearer. Several months before Shearer was murdered, high-ranking military officers, aware of Heard's violent disposition, recommended his discharge. Nevertheless, Heard remained in the Army and was treated as a member in good standing. Despite Heard's previous murder and the Army's knowledge of his disposition, enlisted men, including Shearer, were not warned about his violent past or present disposition. We believe these alleged facts are sufficient to withstand a summary judgment motion based on the intentional tort exception to the FTCA.

Id. These facts, he felt, "would permit a court to find that the government's negligence proximately caused Shearer's injury, thus, this case fell closer to the rubric of *Gibson* facts, not to that of *Naisbitt*." *Id.* at 1108. *See* Gibson v. United States, 457 F.2d 1391, 1395 (3d Cir. 1972) (holding government liable for failure to take reasonable steps to protect plaintiff from a class of government employees known to be "dangerously sick"). For a discussion of *Gibson*, see notes 81-87 and accompanying text *supra*. For a discussion of *Naisbitt*, see notes 46-50 and accompanying text *supra*.

104. 723 F.2d at 1108.

105. *Id.* (Garth, J., dissenting). Judge Garth observed, however, that it was not necessary to address the *Feres* issue given his disposition of the issue of whether the

his belief that the claim was barred under the intentional torts exception.[106] Judge Garth explained that it was necessary to look beyond the plaintiff's allegations of negligence to determine " 'whether, *in substance and essence*, the claim arises out of an assault and battery.' "[107] The dissent stated that the majority of courts which had dealt with government negligence claims predicated on the intentional tort of a government employee had found the intentional torts exception an insurmountable hurdle.[108] Judge Garth approved of the approach which recognized that " '[i]n any case in which the employee has intentionally injured another, the tort asserted against the government, regardless of whether it is called negligence, is indeed an intentional tort attributable to the government.' "[109]

Judge Garth stated that the Third Circuit's decision in *Gibson* was not

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intentional torts exception barred the claim. *Id.* n.1 (Garth, J., dissenting). For a discussion of Judge Garth's analysis of the intentional torts exception issue, see notes 106-12 and accompanying text *infra*. Nevertheless, Judge Garth did point out that the Third Circuit had previously held that the proper inquiry under *Feres* is directed to the time and location where the alleged negligence occurred. 723 F.2d at 1108 n.1 (Garth, J., dissenting) (citing Henning v. United States, 446 F.2d 774 (3d Cir. 1971), *cert. denied*, 404 U.S. 1016 (1972)). The time and place of the alleged *negligence* in this case were some months prior to Shearer's induction into the Army, in Germany. *Id.* However, Judge Garth noted his concern that the majority addressed the time and location of the *injury* to the plaintiff. *Id.* (emphasis added). For a discussion of this aspect of the majority's analysis of the *Feres* issue, see text accompanying note 92 *supra*. For a discussion of how federal courts have addressed the issue of whether the time of the injury or negligent act should be controlling under *Feres*, see notes 28-29 and accompanying text *supra*.

106. 723 F.2d at 1108 (Garth, J., dissenting). Judge Garth explained: "[Mrs. Shearer's] complaint, although appearing on the surface to charge negligence is, in truth, no more than a complaint seeking monetary recovery for an assault and battery perpetrated by a fellow soldier upon her son. Congress, however, has refused to permit recovery against the Government for such intentional actions." *Id.*

107. 723 F.2d at 1110 (Garth, J., dissenting) (quoting Nichols. v. United States, 236 F. Supp. 260, 263 (N.D. Miss. 1964)) (further citation omitted) (emphasis supplied by Judge Garth). Judge Garth first noted that the federal courts were witnessing a pattern among plaintiffs, who were increasingly pleading intentional torts cases in the negligence formula, so as to avoid the restriction of the *Feres* doctrine and Congress' limitation under the intentional torts exception. *Id.* at 1108-09 (Garth, J., dissenting) (citations omitted). *Shearer*, Judge Garth observed, was the Third Circuit's first occasion to address the issue, although the court had approached it "tangentially" in *Gibson*. *Id.* at 1109 (Garth, J., dissenting) (citing Gibson v. United States, 457 F.2d 1391 (3d Cir. 1972)).

108. *Id.* at 1109-10 (Garth, J., dissenting) (citing Wine v. United States, 705 F.2d 366 (10th Cir. 1983); Naisbitt v. United States, 611 F.2d 1350 (10th Cir.), *cert. denied*, 449 U.S. 885 (1980); Hughes v. Sullivan, 514 F. Supp. 667 (E.D. Va. 1980), *aff'd sub nom.* Hughes v. United States, 662 F.2d 219 (4th Cir. 1981) (per curiam); Taylor v. United States, 513 F. Supp. 647 (D.S.C. 1981); Davidson v. Kane, 337 F. Supp. 922 (E.D. Va. 1972); Collins v. United States, 259 F. Supp. 363 (E.D. Pa. 1966)). Judge Garth was convinced that these courts pointed the way to the "proper analysis" of the issue. *Id.* at 1110 (Garth, J., dissenting).

109. *Id.* at 1110 (Garth, J., dissenting) (quoting *Naisbitt*, 611 F.2d at 1356). As such, the negligence claim was only an " 'alternative theory of liability.' " *Id.* (quoting Naisbitt v. United States, 469 F. Supp. 421, 423 (D. Utah 1979)). The *Naisbitt* court concluded that the intentional tort superseded any government negligence as a

inconsistent with his analysis, since the assailant's attack in *Gibson* was not an intervening act of such magnitude to break the causal chain between the government's negligence and the plaintiff's injury.[110] Judge Garth distinguished the present case from *Gibson* on the ground that in the present case, the government had not accepted any duty to care for or control the assailant, and thus was under no "special obligation" to prevent Heard from harming others.[111] While recognizing the "unfortunate result" that would occur under what would be his disposition of the case, Judge Garth believed it was necessary to respect congressional intent in enacting section 2680(h).[112]

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causal force on the facts of that case; hence the claim was barred under § 2680(h). *Id.* n.4 (Garth, J., dissenting) (citing *Naisbitt*, 611 F.2d at 1356).

Judge Garth approved of the Fourth Circuit's holding that the FTCA did not waive immunity from liability for a government employee's independent assault, even when the assault was allegedly traceable to government negligence in retaining that employee after it had knowledge of his prior misconduct. *Id.* at 1111 (Garth, J., dissenting) (citing Hughes v. Sullivan, 514 F. Supp. 667, 670 (E.D. Va. 1980), *aff'd sub nom.* Hughes v. United States, 662 F.2d 219 (4th Cir. 1981) (per curiam)). Judge Garth questioned the majority's reliance upon a case in which the Fifth Circuit concluded that because the intervening assault by the government employee was the sole proximate cause of the injury, the claim arose out of an assault and thus § 2680(h) barred a claim phrased in negligence. *Id.* at 1111-12 (Garth, J., dissenting) (citing United States v. Shively, 345 F.2d 294 (5th Cir.), *cert. denied*, 382 U.S. 883 (1965)). Judge Garth felt that *Shively* was consistent with *Hughes*, *Naisbitt*, and the view that § 2680(h) barred negligence claims arising out of assaults by government employees. *Id.* at 1112 (Garth, J., dissenting).

110. *Id.* at 1112 (Garth, J., dissenting). Judge Garth observed that in *Gibson* the government had accepted the duty of care of trainees who were known to be drug addicts and to have behavioral problems. *Id.* (citing *Gibson*, 457 F.2d at 1395). Therefore, Judge Garth stated that the government was under a duty to prevent the assailant from causing harm to others. *Id.*

Judge Garth did not find that *Loritts* or *Bryson*, cases allowing recovery on an analogous government negligence theory, warranted a different result. *Id.* at 1112-13 n.6 (Garth, J., dissenting) (citing Loritts v. United States, 489 F. Supp. 1030 (D. Mass. 1980); Bryson v. United States, 463 F. Supp. 908 (E.D. Pa. 1978)). In *Loritts*, the government had voluntarily undertaken to provide escorts for plaintiff's choral group. *Id.* Having assumed this affirmative responsibility, it was properly held liable for breach of duty. *Id.* *Bryson* was "not persuasive" because it had merely cited *Gibson* in a "non-analytical fashion" and "misread the critical distinction made in *Gibson* [between its circumstances and those in *Collins*]." *Id.* at 1113 n.6 (Garth, J., dissenting). For a discussion of *Gibson*, see notes 81-87 and accompanying text *supra*. For a discussion of *Loritts*, see notes 66-68 and accompanying text *supra*. For a discussion of *Bryson*, see notes 88-89 and accompanying text *supra*.

111. 723 F.2d at 1113 (Garth, J., dissenting). Judge Garth noted that Heard was not known to have medical or behavioral problems comparable to those of the assailant in *Gibson*, who had a known addiction to mind-controlling drugs. *Id.* All that the government knew about Heard was that he had committed a crime, albeit heinous, for which he had served his sentence. *Id.* Nor, Judge Garth observed, was Heard part of any government rehabilitation program in which the government had accepted the duty to take care of Heard in a controlled environment. *Id.*

112. *Id.* at 1109, 1113 (Garth, J., dissenting). Judge Garth noted that the merits of the exceptions to the Federal Tort Claims Act were not before the court. *Id.* at 1113 (Garth, J., dissenting). What was before the court was an attempted "subterfuge," an action cloaked in negligence to avoid dismissal under the intentional torts

On March 7, 1984, a petition for rehearing *en banc* of *Shearer* was denied.[113] Judge Adams believed that a rehearing was warranted because of the importance of both the intentional torts exception and *Feres* issues, and the tension existing among the circuits as to the application of each.[114] Judge Garth thought that the whole court should hear the case in order to fulfill the need of a uniform application of the congressional mandate of section 2680(h).[115] Judge Garth noted that every court of appeals which had decided the issue of whether § 2680(h) precludes claims of government negligence, on facts analogous to *Shearer*, had concluded that the claim was barred.[116]

In analyzing the *Shearer* opinion, it is submitted that the court's *Feres* analysis correctly focused upon the status of the injured serviceman, that is, his relation to the military, rather than upon the status of the tortfeasor.[117] It is further submitted that the court's reliance upon Shearer's authorized

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exception. *Id.* To say that such a claim did not arise out of an assault and battery " 'would be to blink at the exclusionary provisions of § 2680.' " *Id.* (quoting Lambertson v. United States, 528 F.2d 441, 444 (2d Cir.), *cert. denied*, 426 U.S. 921 (1976)).

113. 729 F.2d 266 (3d Cir. 1984). Judges Adams, Hunter, Weis, and Garth would have granted the petition. Judges Adams and Garth each filed a separate statement.

114. *Id.* (Adams, J., Statement Sur Denial of the Petition for Rehearing). Judge Adams noted that in holding that § 2680(h) did not preclude a claim against the government for a murder committed by an off-duty serviceman, the *Shearer* opinion was in direct conflict with several circuits. *Id.* (citing Wine v. United States, 705 F.2d 366 (10th Cir. 1983); Hughes v. United States, 662 F.2d 219 (4th Cir. 1981) (per curiam)). Furthermore, the *Shearer* majority's holding that the *Feres* doctrine did not preclude Shearer's claim "raise[d] serious policy concerns about judicial review of military decisions." *Id.* (citing Feres v. United States, 340 U.S. 135 (1950)).

115. *Id.* at 627 (Garth, J., Statement Sur Denial of the Petition for Rehearing).

116. *Id.* at 266 (Garth, J., Statement Sur Denial of the Petition for Rehearing). Judge Garth observed, as he did in his dissent in *Shearer*, that one of the cases relied upon by the majority, in holding that § 2680(h) did not preclude Shearer's claim, specifically held that a plaintiff could not recover for government negligence when plaintiff's claim arose out of an assault. *Id.* at 266-67 (Garth, J., Statement Sur Denial of the Petition for Rehearing) (citing United States v. Shively, 345 F.2d 294 (5th Cir.), *cert. denied*, 382 U.S. 883 (1965)). Judge Garth believed that a rehearing was appropriate "if for no other reason than to clear up a potentional jurisprudential murkiness" underlying the *Shearer* majority's opinion. *Id.* at 267 (Garth, J., Statement Sur Denial of the Petition for Rehearing).

117. *See* United States v. Lee, 400 F.2d 558, 562 (9th Cir. 1968) (status of serviceman, not that of tortfeasor controlling; thus serviceman on active duty could not recover although tortfeasor was a civilian federal employee), *cert. denied*, 393 U.S. 1053 (1969). The Third Circuit has also focused on the status of the serviceman. *See* Thomason v. Sanchez, 539 F.2d 955, 960 (3d Cir. 1976) (*Feres* doctrine turns on the serviceman's status), *cert. denied*, 429 U.S. 1072 (1977); Henning v. United States, 446 F.2d 774 (3d Cir. 1971), *cert. denied*, 404 U.S. 1016 (1972); Bryson v. United States, 463 F. Supp. 908 (E.D. Pa. 1978); Sheppard v. United States, 294 F. Supp. 7 (E.D. Pa. 1969). Neither *Henning* nor *Johnson v. United States*, both cited by the district court as support for a tortfeasor-status analysis, appear to change the *Feres* inquiry of the status of the serviceman. *See* Johnson v. United States, 631 F.2d 34 (5th Cir. 1980) (serviceman's activity and status are relevant factors), *cert. denied*, 451 U.S. 1018 (1981); *Henning*, 446 F.2d at 777 (*Feres* analysis predicated on plaintiff's military status at time of negligent act). These cases did appear, however, to adopt an inquiry

leave status as a factor militating against the application of the *Feres* doctrine was proper.[118] It is suggested, however, that the dissent was justified in expressing concern over the majority's inquiry into the status of the serviceman at the time of the *injury*, and apparently dispensing with the established focus upon the serviceman's status at the time of the *tortious act*.[119] Previously, the Third Circuit had regarded the serviceman's status at the time of the government's negligence, rather than at the time of his injury, as the proper inquiry under *Feres*.[120]

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which focused upon the time of the negligent act rather than upon the time of the serviceman's injury. For a discussion of *Johnson* and *Henning*, see note 29 *supra*.

118. *See* Thomason v. Sanchez, 539 F.2d 955 (3d Cir. 1976), *cert. denied*, 429 U.S. 1072 (1977); Bryson v. United States, 463 F. Supp. 908 (E.D. Pa. 1978). In holding that *Feres* precluded the claim before it, the *Thomason* court noted that not only was the plaintiff on active duty, he was also "not on any type of leave or pass." *Thomason*, 539 F.2d at 957 (quoting Thomason v. Sanchez, 398 F. Supp. 500, 504 (D.N.J. 1975)). In *Bryson*, the claim was not barred by *Feres* because the serviceman was on a weekend pass at the time of his death. *Bryson*, 463 F. Supp. at 914.

Both *Thomason* and *Bryson* indicate that the fact that Shearer was not on the military base at the time of his death is not itself controlling. *See Thomason*, 539 F.2d at 957; *Bryson*, 463 F. Supp. at 913-14. The serviceman's status as off-base and on authorized leave has not always prevented *Feres* from barring a claim for the serviceman's injury. *See* Uptegrove v. United States, 600 F.2d 1248 (9th Cir. 1979) (deceased subject to military discipline for using military craft although on authorized leave at time of airplane crash; therefore *Feres* precluded the claim). However, when the serviceman is not using any of the benefits available to him through his military status, and is both off duty and off the military base, an FTCA claim has been held to be actionable. *See* Brooks v. United States, 337 U.S. 49 (1949). In *Brooks*, one serviceman was killed and another injured while on authorized leave off the base and driving in a private automobile. *Id.* at 50. In holding that an FTCA claim could be maintained against the government, the *Brooks* Court reasoned that the circumstances of the accident were in no way related to the servicemen's Army careers. *Id.* at 52. Similarly, in *Shearer*, based on the factual record, the circumstances would indicate that Shearer's murder was not caused by his being in the service "except in the sense that all human events depend upon what has already transpired." *See id. Brooks* held that such a tenuous connection would not preclude a serviceman's claim. *Id.*

119. *See* 723 F.2d at 1108 n.1. (Garth, J., dissenting). The majority itself cited *Stencel Aero Engineering* as stating that *Feres* precluded claims against the military that arose "out of 'negligent orders given or negligent acts committed in the course of' an injured serviceman's military duty." *Id.* at 1105 (citing Stencel Aero Eng'g Corp. v. United States, 431 U.S. 666, 671 (1977)). This language seems to indicate that the proper inquiry under *Feres* is the serviceman's status at the time of the alleged tortious act rather than at the time of the injury.

120. *See* Mondelli v. United States, 711 F.2d 567 (3d Cir. 1983) (birth defect caused by father's exposure to nuclear radiation while on active military duty), *cert. denied*, 104 S. Ct. 1272 (1984); Henning v. United States, 446 F.2d 774, 777 (3d Cir. 1971) (injuries occurred subsequent to discharge; medical malpractice occurred while plaintiff was still in the military), *cert. denied*, 404 U.S. 1016 (1972). For a discussion of *Mondelli* and *Henning*, see note 29 *supra*.

The majority of other jurisdictions has likewise held the proper inquiry to be the time of the government's negligent act rather than the time of the injury. For a brief discussion of these cases, see note 29 *supra*.

The *Shearer* majority would probably have reached the same conclusion on the *Feres* issue whether it focused upon Shearer's status at the time of the government's negligence or at the time of Shearer's injury. *See Henning*, 446 F.2d at 778 (refusing to

It is submitted that the *Shearer* court correctly recognized that the intentional torts exception to the FTCA should not necessarily bar claims collaterally involving an assault and battery.[121] It is also suggested that the *Shearer* court's implicit rejection of the federal government employee-third party distinction is an appropriate step toward a "consistent and equitable" reading of the intentional torts exception.[122] In not adopting this distinction, the

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regard the government's negligence in failing to warn as an ongoing wrong, instead fixing the time of the claim at the initial negligent decision). By this reasoning, the government's failure to discharge Heard would not be regarded as ongoing negligence; hence it would have occurred *prior* to Shearer's induction into the Army. 723 F.2d at 1108 n.1 (Garth, J., dissenting). There appears to be even less of a connection between military service and decisions occurring *before* one is inducted into the Army than between service and occurrences after discharge. Courts have generally held that *Feres* is not a bar when the negligent act causing plaintiff's injury has occurred subsequent to plaintiff's discharge. *See* United States v. Brown, 348 U.S. 110 (1954) (negligently performed operation on veteran's knee); Schwartz v. United States, 230 F. Supp. 536 (E.D. Pa. 1964) (post discharge negligent medical treatment). *But see* Breunig v. United States, No. 83-290 (D. Minn. Oct. 7, 1983) (servicemen were performing tasks incident to their military service at time of their injuries, therefore, claim precluded under *Feres*; fact that some of the government's tortious acts took place prior to their enlistment in the service is irrelevant).

Given the fact that Judge Garth believed that the proper inquiry was the time of the government's negligence, and that occurred prior to Shearer's induction in the Army, it is unclear why Judge Garth opined that the claim was precluded under *Feres*. *See* 723 F.2d at 1108 & n.1 (Garth, J., dissenting).

121. *See* Rogers v. United States, 397 F.2d 12 (4th Cir. 1968); Loritts v. United States, 489 F. Supp. 1030 (D. Mass. 1980). The legislative history of § 2680(h) reveals that the Congressional concern was with liability for deliberate torts, claims which were thought to be more difficult to defend than are negligence actions. *See* Comment, *Section 2680(h)*, *supra* note 31, at 809-10. For a discussion of the legislative history of § 2680(h), see note 31 *supra*. It does not appear that defending against negligence which is alleged to be the proximate cause of an injury involving an intervening assault would be more difficult than defending against a simple claim where negligence is alleged as the direct and proximate cause of the injury. Liuzzo v. United States, 508 F. Supp. 923, 930 (E.D. Mich. 1981).

122. *See* Liuzzo v. United States, 508 F. Supp. 923 (E.D. Mich. 1981) (precluding claim for government negligence based upon the intentional tortfeasor's government employee status is neither consistent nor equitable); Comment, *Section 2680(h)*, *supra* note 31, at 821-22. While the *Shearer* majority did not expressly reject this distinction, its observation that the intentional torts exception does not necessarily bar a negligence claim against the government where the injury is caused by an assault and battery by a federal employee contradicts the employee-non-employee distinction. *See* Wine v. United States, 705 F.2d 366 (10th Cir. 1983); Hughes v. United States, 662 F.2d 219 (4th Cir. 1981) (per curiam); Taylor v. United States, 513 F. Supp. 647 (D.S.C. 1981).

Judge Garth's approval of these cases indicates his approval of the federal employee-third-party distinction. *See* 723 F.2d at 1109-12 (Garth, J., dissenting). Judge Garth specifically relied on the reasoning of the *Naisbitt* court which recognized this distinction. *See id.* at 1110 (Garth, J., dissenting) (citing *Naisbitt*, 611 F.2d at 1356). At the same time, Judge Garth cited *Gibson* with approval. 723 F.2d at 1112-13 (Garth, J., dissenting) (citing *Gibson*, 457 F.2d at 1395). Since *Gibson* held that a valid negligence claim could be alleged in at least some cases where the injury resulted from the assault and battery of a government employee, it is unclear whether Judge Garth would adopt the employee-non-employee distinction. For a discussion of *Gibson*, see notes 81-87 and accompanying text *supra*.

Third Circuit has correctly recognized that the "essence" of a negligence claim against the government under the FTCA should not depend upon the intentional tortfeasor's government employee status.[123] It is suggested that *Shearer*'s resolution of this issue is consistent with *Gibson*.[124]

It is further suggested that in lieu of the employee/non-employee distinction, the proper inquiry under section 2680(h) should be whether a valid claim of negligence is alleged.[125] A court should determine whether the government owed a duty to the plaintiff not to be negligent, and if it did, whether the breach of that duty was a proximate cause of the plaintiff's in-

123. Comment, *Section 2680(h)*, *supra* note 31, at 822. The employee-non-employee distinction fails to recognize that the plaintiff is alleging not one but two separate torts. *Id.* at 816. Besides the assault by the employee, the plaintiff is alleging government negligence in not preventing the foreseeable assault. *Id.* The courts which bar negligence claims involving assaults by government employees equate the assault with the negligence claim, and label each in essence "an intentional tort attributable to the government." *See Naisbitt*, 611 F.2d at 1356. The negligence claim, however, is not merely an alternate remedy, but a completely distinct tort. Comment, *Section 2680(h)*, *supra* note 31, at 816. Traditional tort law recognizes that an assault may give rise to liability not only for the intentional wrong but also for negligence in failure to discipline or to warn others. *See* PROSSER, *supra* note 33, § 56, at 383-85. Where there is an assault by someone other than a government employee, the courts have acknowledged the assault and the negligence as two separate torts. *See* Rogers v. United States, 397 F.2d 12, 15 (4th Cir. 1968); Panella v. United States, 216 F.2d 622, 624 (2d Cir. 1954). It appears illogical to hold that there are two distinct torts in the one case and only one tort in the other. *See Liuzzo*, 508 F. Supp. at 930.

It is submitted that an assailant's government employee status actually makes it *more* likely that a bona fide negligence claim can be stated based on the government's failure to prevent a foreseeable intentional tort. *See* Gibson v. United States, 457 F.2d 1391, 1394 (3d Cir. 1972) (one's duty to control conduct of another is greater when the other person is his employee). The trend of cases recognizing the employee-non-employee distinction contradict modern tort law principles since they would more readily hold the government liable for failure to control the actions of a non-employee than an employee. Comment, *Section 2680(h)*, *supra* note 31, at 821. As noted by one commentator, "the employee/non-employee approach creates troubling incongruities. Under th[is] approach, the government must scrutinize the behavior of individuals not in its employ, . . . but need not scrutinize the behavior of its own employees over whom it may exert a greater degree of control." *Id.* (footnote omitted).

124. *See* Gibson v. United States, 457 F.2d 1391 (3d Cir. 1972). In *Gibson*, the court determined that the government could be liable despite the fact that the assailant was a federal employee because its failure to control the assailant constituted a breach of the duty that it owed to the plaintiff. *Id.* at 1395-96. While the facts in *Shearer* did not indicate the same degree of control by the government over the assailant as in *Gibson*, the government's knowledge of Heard's violent propensities, unlike the allegations of negligence because of the government's knowledge in *Collins*, was not "based upon the very assault for which the action [was] brought." *See id.* at 1396. For a discussion of *Gibson*, see notes 81-87 and accompanying text *supra*. For a discussion of *Collins*, see notes 77-80 and accompanying text *supra*.

125. Comment, *Section 2680(h)*, *supra* note 31, at 829-31. It is submitted that this approach better serves the purpose of the FTCA of allocating responsibility for injuries due to the government's negligence than does an approach making artifical distinctions based on the intentional tortfeasor's employment status. *Id.* at 825, 831.

jury.[126] It is suggested that a court may dispose of spurious claims through application of these traditional tort principles.[127]

Although it appeared that *Shearer* had shifted the *Feres* analysis to the status of the serviceman at the time of his injury,[128] the Third Circuit has more recently indicated that it will continue to regard the serviceman's status at the time of the tortious act as the relevant inquiry.[129]

In terms of the intentional torts exception, *Shearer*'s abrogation of the federal employee-third party distinction signals greater liberality in constru-

126. *Id.* at 825-28. An analysis in terms of traditional tort principles is consistent with the FTCA's waiver of governmental immunity for torts recognized by state law. *See* 28 U.S.C. § 1346(b) (1982); Comment, *Section 2680(h)*, *supra* note 31, at 827. For the text and a discussion of § 1346(b), see note 11 *supra*. By focusing on the intentional tortfeasor's status as a government employee, courts may end up ignoring state law which recognizes the negligent party's liability for the assault of another. Comment, *Section 2680(h)*, *supra* note 31, at 829. In *Naisbitt*, for instance, the court held as an alternative ground for dismissing the claim that the government's negligence could not be a proximate cause of the injury as a matter of law. *Naisbitt*, 611 F.2d at 1356. In doing so the court ignored applicable state law which may have allowed recovery against the negligent party. Comment, *Section 2680(h)*, *supra* note 31, at 829 (citations omitted).

127. Comment, *Section 2680(h)*, *supra* note 31, at 830-31. Admittedly, construing § 2680(h) so as not to preclude negligence suits per se against the government when the assailant is a government employee creates some risk that the number of claims filed against the government will increase. *See* Shearer v. United States, 729 F.2d 266 (3d Cir. 1984) (Garth, J., Statement Sur Denial of the Petition for Rehearing). It should be emphasized, however, that § 2680(h) is only intended as a jurisdictional bar. Comment, *Section 2680(h)*, *supra* note 31, at 804 n.4, 830. After establishing that the claim is not precluded by § 2680(h), a plaintiff must still establish that there was a duty on the part of the government to protect against the assault because of a special relationship with either the assailant or the plaintiff and that the breach of that duty was a proximate cause of the injury. *See* Harper & Kime, *supra* note 36, at 904. For a discussion of liability in negligence for failure to control the conduct of another, see note 36 *supra*. *See also* Gibson v. United States, 457 F.2d 1391, 1395 (3d Cir. 1972) (although claim not precluded by § 2680(h), government could not be liable to the plaintiff for negligence when it did not have control over plaintiff's assailant).

Furthermore, as interpreted by the courts, § 2680(h) may not be circumvented merely through artful pleading. *See* Gibson v. United States, 457 F.2d 1391 (3d Cir. 1972) (plaintiff's conclusory allegation of government negligence properly barred by § 2680(h)). Cases such as *Naisbitt* and *Collins*, which include only conclusory allegations of government knowledge of its employees' violent propensities, may properly be dismissed. For a discussion of *Naisbitt*, see notes 46-50 and accompanying text *supra*. For a discussion of *Collins*, see notes 77-80 and accompanying text *supra*.

128. *See* 723 F.2d at 1105-06.

129. *See* Heilman v. United States, 731 F.2d 1104 (3d Cir. 1984). In *Heilman*, a servicemen was exposed to atomic radiation while on active duty with the United States Navy. *Id.* at 1105-06. Subsequent to his discharge he contracted cancer and died, allegedly due to this exposure. *Id.* at 1106. The court stated that the proper focus under *Feres* was " 'not upon when the injury occurred or when the claim became actionable, but rather the time of, and circumstances surrounding the negligent act.' " *Id.* at 1106-07 (quoting Henning v. United States, 446 F.2d 774, 777 (3d Cir. 1971), *cert. denied*, 404 U.S. 1016 (1972)). Therefore, any claim for injuries arising from the exposure while the deceased was on active duty was precluded by *Feres*. *Id.* at 1107.

ing the language of the intentional torts exception and will avoid the inequities resulting from an overly technical construction.[130] The inconsistent interpretations among the federal circuits demonstrate that what has been regarded as a "seemingly simple exception" to the waiver of government immunity has in fact been the source of much conflict.[131] It is suggested that this inconsistency may provide sufficient impetus for the Supreme Court to finally resolve this issue.[132] Perhaps a better alternative would be for Congress to clarify what is meant by the phrase "arising out of an assault [and] battery."[133] Until that time, *Shearer* can be viewed as an attempt to limit what have become perhaps the two exceptions to the waiver of government immunity most disturbing to the judicial conscience.[134]

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130. *See* Comment, *Section 2680(h)*, *supra* note 31, at 828.

131. *See* Taylor v. United States, 513 F. Supp. 647, 650 (D.S.C. 1981). For a discussion of the interpretation of § 2680(h) among the federal circuits, see notes 34-89 and accompanying text *supra.*

132. The Supreme Court has granted *certiorari* to hear the *Shearer* case. *See* 53 U.S.L.W. 3323 (U.S. Oct. 30, 1984) (No. 84-194).

133. 28 U.S.C. § 2680(h) (1982). It is unclear from the language of § 2680(h) whether Congress intended to bar or allow claims alleging government negligence when the plaintiff was directly injured by an assault and battery. *See* Comment, *Section 2680(h)*, *supra* note 31, at 808-09. The term "arising out of" may be construed as barring all claims where an assault is involved or, on the other hand, as barring only those claims where in "essence" the claim is predicated on an assault and battery. *See* F. HARPER & F. JAMES, *supra* note 31, § 29.13. Furthermore, the legislative history on the section does not provide a certain answer. Collins v. United States, 259 F. Supp. 363, 364 (E.D. Pa. 1966). For a discussion of the legislative history of § 2680(h), see note 31 *supra.*

134. *See* Heilman v. United States, 731 F.2d 1104, 1111-13 (3d Cir. 1984) (Adams, J., concurring). For a discussion of other judicial commentary on the *Feres* doctrine, see note 17 *supra.* For a discussion of judicial comments on the intentional tort exception, see note 31 *supra.*