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# Service Member Recovery for Military Medical Malpractice under the Federal Tort Claims Act: A Judicial Response Comment.

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## I. INTRODUCTION

The traditional sovereign immunity of the United States has been waived for most of the unintentional tortious acts of its agents by the Federal Tort Claims Act (FTCA).[1] Under the FTCA, the United States is liable for torts committed by its agents "in the same manner and to the same extent as a private individual under like circumstances."[2] Members of the armed forces are expressly included within the FTCA's scope of liability.[3] In passing the Act, however, Congress was careful to limit military liability in specific in-

1. *See* 28 U.S.C. §§ 2671-2680 (1982); Feres v. United States, 340 U.S. 135, 139 (1950) (Act marks culmination of efforts to mitigate effects of sovereign immunity). *See generally* STEADMAN, SCHWARTZ & JACOBY, LITIGATION WITH THE FEDERAL GOVERNMENT 245-48 (2d ed. 1983).

2. 28 U.S.C. § 2674 (1982).

3. *See id.* § 2671. The specific wording of the statute provides that " 'Employee of the government' includes . . . members of the military or naval forces of the United States . . . ." *Id.* The act also explains that an armed service member would be "acting within the scope of his employment" when acting in the line of duty. *Id.*

stances. As it pertains to military personnel, the FTCA limits governmental liability in times of war,[4] when the injury occurs in a foreign country,[5] and while service members are operating pursuant to statute or military orders within authorized discretionary functions.[6] The Supreme Court has interpreted "discretion" broadly so as to include decisions traditionally left to military judgement.[7] In *Feres v. Unites States*,[8] the Supreme Court created a further limitation on the available tort redress of military personnel by holding that a service member may not gain recovery from the government for negligence which is "incident to [military] service."[9]

The "*Feres* doctrine," as this judicially-created governmental immunity has been termed,[10] has come under constant attack by both scholars and courts.[11] This criticism is due primarily to the doctrine's often harsh result

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4. *See id.* § 2680j.

5. *See id.* § 2680k.

6. *See id.* § 2680a. The statute further limits the liability of the United States for intentional torts committed by its agents. *See id.* § 2680h; *see also* United States v. Shearer, 473 U.S. 52, 57 (1985)(barring recovery under FTCA for kidnapping and assault injuries); Note, *Intramilitary Immunity and Constitutional Torts*, 80 MICH. L. REV. 312, 312-13 (1981)(discussing extreme examples of alleged intentional tortious conduct without liability).

7. *See* Parker v. Levy, 417 U.S. 733, 758 (1974)(finding military discretion permits regulation of activities which may be unconstitutional if attempted outside the military). The Supreme Court has recognized that the power to control the military is granted to Congress and not the courts. *See* Gilligan v. Morgan, 413 U.S. 1, 6-7, 10 (1973)(relying on constitutional separation of powers to emphasize that Congress, not the courts, controls actions of military); *see also* U.S. CONST. art. I, § 8, cl. 14 (Congress regulates Army and Navy). *See generally* Note, *Intramilitary Immunity and Constitutional Torts*, 80 MICH. L. REV. 312, 333 (1981)(concluding court's grant of immunity for intentional torts and constitutional violations in the military over broad).

8. 340 U.S. 135 (1950); *see also* Atkinson v. United States, 804 F.2d 561, 562 (9th Cir. 1986)(military exclusion judicially created). *See generally* Zillman, *Intramilitary Tort Law: Incidence to Service Meets Constitutional Tort*, 60 N.C.L. REV. 489, 502-3 (1982). Professor Zillman suggests three conclusions that may be drawn after thirty-five years of governmental immunity from intramilitary torts: (1) the statutory language does not prohibit recovery; (2) judicial precedent and legislative history support immunity; and (3) lack of congressional action gives tacit approval to immunity. *See id.*

9. *See* Feres v. United States, 340 U.S. 135, 144 (1950); *see also* Hunt v. United States, 636 F.2d 580, 587 (D.C. Cir. 1980)(noting Supreme Court left lower courts task of deciding scope of "incident to service" doctrine). *See generally* Note, *The Effect of the Feres Doctrine on Tort Actions Against the United States by Family Members of Servicemen*, 50 FORDHAM L. REV. 1241, 1245, 1248-53 (1982)(discussing lack of guidance given to lower courts in determining "incident to service").

10. *See* Feres v. United States, 340 U.S. 135, 135-46 (1950); *see also* STEADMAN, SCHWARTZ & JACOBY, LITIGATION WITH THE FEDERAL GOVERNMENT 248 (2d ed. 1983).

11. *See, e.g.*, Monaco v. United States, 661 F.2d 129, 134 (9th Cir. 1981)(*Feres* justification confused; doctrine unsound); Zillman, *Intramilitary Tort Law: Incidence to Service Meets Constitutional Tort*, 60 N.C.L. REV. 489, 505 (1982)(*Feres* policy fictional and ill conceived); Note, *Intramilitary Immunity and Constitutional Torts*, 80 MICH. L. REV. 312, 326 (1981) (concluding that basing denial of recovery on fear of adverse disciplinary effect unfounded).

in preventing recovery to injured service members and families,[12] and to the lack of meaningful distinctions as to when the *Feres* doctrine should or should not bar a service member's claim.[13] One of the areas in which the results seem most difficult to accept is in the area of military medical malpractice. Examples where recovery under the FTCA has been attempted for alleged military medical malpractice include a soldier who had a thirty-by-eighteen inch towel left in his stomach after surgery in an Army hospital;[14] an Air Force serviceman who was given medicine, told to go home, and later died;[15] and a service member who suffered side effects from elective surgery performed in a military hospital.[16] These cases concern conduct where a private practicing physician could be liable[17] and, therefore, recovery should

12. *See, e.g.*, Feres v. United States, 340 U.S. 135, 136-37 (1950)(denying recovery when 30 x 18-inch towel left in soldier's stomach after surgery in military hospital); Lowe v. United States, 440 F.2d 452, 452-53 (5th Cir.)(refusing recovery when two months prior to end of enlistment plaintiff underwent elective surgery performed by military doctors and died), *cert. denied*, 404 U.S. 833 (1971); Shults v. United States, 421 F.2d 170, 171 (5th Cir. 1969)(denying recovery when sailor hit by auto, died at naval hospital due to alleged medical malpractice); Buckingham v. United States, 394 F.2d 483, 484 (4th Cir. 1968)(refusing recovery when Air Force master sergeant died as result of alleged negligent treatment). It should be noted, however, that despite lack of recovery under the FTCA, active duty service members are entitled to military disability and death compensation. *See* 10 U.S.C. §§ 1475-1489 (1982)(identifying entitlements due to death); 38 U.S.C. §§ 301-1008 (1982)(listing benefits authorized for various service connected disabilities or death); 38 C.F.R. §§ 3.1-3.1612 (1986). For a discussion of the military's disability benefit system see generally Novak, *The Army Physical Disability System*, 112 MIL. L. REV. 273 (1986).

13. *See* Hunt v. United States, 636 F.2d 580, 587 (D.C. Cir. 1980)(noting lack of guidance supplied by Supreme Court to determine *Feres* applicability). Courts have varied widely in their applications of the *Feres* doctrine. *Compare* Mason v. United States, 568 F.2d 1135, 1135-36 (5th Cir. 1978)(denying recovery for injury occurring on base where service member subject to military discipline) *and* Martinez v. Schrock, 537 F.2d 765, 766-67 (3d Cir. 1976) (stating *Feres* prevents personal liability to military doctor acting within scope of duties) *and* Shults v. United States, 421 F.2d 170, 171-72 (5th Cir. 1969)(denying recovery since medical treatment would not occur but for military status) *with* Johnson v. United States, 704 F.2d 1431, 1447 (9th Cir. 1983)(allowing recovery although injury occurred on base while service member subject to military discipline) *and* Henderson v. Bluemink, 511 F.2d 399, 403-04 (D.C. Cir. 1974)(finding FTCA not bar to personal action against negligent military doctor) *and* Adams v. United States, 728 F.2d 736, 740-41 (5th Cir. 1984)(stating use of facility based on valid military identification card would not bar claim under FTCA).

14. *See* Feres v. United States, 340 U.S. 135, 137 (1950).

15. *See* Buckingham v. United States, 394 F.2d 483, 484 (4th Cir. 1968).

16. *See* Lowe v. United States, 440 F.2d 452, 452 (5th Cir.), *cert. denied*, 404 U.S. 833 (1971).

17. *See, e.g.*, Tobias v. Winkler, 509 N.E.2d 1050, 1052 (Ill. App. Ct. 1987)(medical negligence may be found for failure to disclose possible side effects of treatment); Mercer v. Thornton, 646 S.W.2d 375, 378 (Mo. Ct. App. 1983)(finding evidence of doctor's failure to properly diagnose and treat patient sufficient to preclude summary judgement in favor of doctor); Ayers v. Morgan, 154 A.2d 788, 788-89 (Pa. Super. Ct. 1959)(case involving medical malpractice for leaving surgical sponge in patient).

not be barred under the terms of the FTCA.[18] Yet, as the law currently stands, a military service member who is injured through negligent medical treatment received at a military medical facility cannot recover under the FTCA.[19]

In *Feres v. United States*,[20] the United States Supreme Court refused to find the government liable for military medical malpractice.[21] The doctrine of *stare decisis* compels the conclusion that recovery for military medical malpractice is still barred by the *Feres* precedent.[22] Subsequent decisions by the Supreme Court, however, have modified the rationale in *Feres* so as to make a rigid application of the *Feres* holding inappropriate in military medical malpractice cases.[23] Additionally, the expanding scope of the military's

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18. *See* Atkinson v. United States, 804 F.2d 561, 564-65 (9th Cir. 1986)(suit for malpractice on pregnant soldier allowed); Adams v. United States, 728 F.2d 736, 740-41 (5th Cir. 1984)(medical malpractice suits should be barred only when claim would hinder military). *Cf.* Henderson v. Bluemink, 511 F.2d 399, 403-04 (D.C. Cir. 1974)(holding military doctor may be personally liable for negligently treating soldier). *See generally* Zillman, *Intramilitary Tort Law: Incidence to Service Meets Constitutional Tort*, 60 N.C.L. REV. 489, 508 (1982)(allowing recovery for military medical malpractice would not harm discipline); Note, *Intramilitary Immunity and Constitutional Torts*, 80 MICH. L. REV. 312, 331 (1981)(determining that jobs performed in military are directly analogous to those in civilian community providing for military liability where private individuals would be liable). Furthermore, it appears that parallel liability in civilian suits is not a requirement. *Compare* Feres v. United States, 340 U.S. 135, 141 (1950)(no private liability remotely similar to allowing service member recovery from government) *with* Rayonier Inc. v. United States, 352 U.S. 315, 319 (1957)(FTCA's effect was to waive traditional governmental immunity and allow novel and unprecedented liability) *and* Indian Towing Co. v. United States, 350 U.S. 61, 68 (1955)(difficult to contemplate governmental activity which has or could not be privately performed). *See generally* Zillman, *Intramilitary Tort Law: Incidence to Service Meets Constitutional Tort*, 60 N.C.L. REV. 489, 508 (1982)(requiring identical private liability to recover under FTCA rejected by Supreme Court).

19. *See* Feres v. United States, 340 U.S. 135, 136-37 (1950). In *Feres*, the Court actually combined three cases, two of which were medical malpractice suits. *See id.* One case involved a medical towel being left in the stomach of a soldier who underwent surgery at an Army hospital. *See* Jefferson v. United States, 178 F.2d 518, 519 (4th Cir. 1949), *rev'd sub nom.* Feres v. United States, 340 U.S. 135 (1950). The other involved an Army colonel who died due to the alleged negligence of a surgeon at the base hospital. *See* Griggs v. United States, 178 F.2d 1, 2 (10th Cir. 1949), *rev'd sub nom.* Feres v. United States, 340 U.S. 135 (1950).

20. 340 U.S. 135 (1950).

21. *See id.* at 136-37.

22. *See, e.g.*, Flowers v. United States, 764 F.2d 759, 761 (11th Cir. 1985)(*stare decisis* prevents review of military medical malpractice claims); Scales v. United States, 685 F.2d 970, 974 (5th Cir. 1982)(requiring acceptance of law stated in *Feres*); Lowe v. United States, 440 F.2d 452, 453 (5th Cir.)(denying recovery based solely on *Feres*), *cert. denied*, 404 U.S. 833 (1971); Dilworth v. United States, 387 F.2d 590, 591 (3d Cir. 1967)(per curiam)(rejecting military medical malpractice claim based on *Feres* precedent).

23. *See* Feres v. United States, 340 U.S. 135 (1950). In *Feres*, the Court barred recovery to service member plaintiffs because: the FTCA did not create new causes of action; there were no like circumstances in the private sector which would allow a soldier to sue the government; service members have no choice in where they are stationed, consequently, allowing recovery

medical mission[24] and the growing concern over medical malpractice[25] call for a review of the continuing viability of the *Feres* doctrine as applied to military medical malpractice claims.[26]

This comment will discuss how the holding of *Feres* and its rationale has been modified by subsequent case law. Focus will be placed on the current test utilized by the Supreme Court for determining recovery by service members under the FTCA. Finally, this test will be applied to various scenarios of military malpractice.

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based on law where the injured service member did not choose to be is irrational; and, the military already has a system of recovery. *See id.* at 141-43. However, in reaching its recent decision in *Shearer v. United States*, the Court discounted the above concerns. *See* United States v. Shearer, 473 U.S. 52, 57, 58 n.4 (1985)(emphasizing adverse effect on discipline and second-guessing of military decisions in applying *Feres* doctrine; other *Feres* factors not controlling). The Supreme Court has also withdrawn the need for like private liability to recover under the FTCA. *See, e.g.*, United States v. Muniz, 374 U.S. 150, 159 (1963)(stating that governmental liability under FTCA not restricted to circumstances where government has traditionally been held liable); Rayonier Inc. v. United States, 352 U.S. 315, 319 (1957)(FTCA waived traditional governmental immunity and created novel, unprecedented liability); Indian Towing Co. v. United States, 350 U.S. 61, 64, 68-69 (1955)(FTCA did not exclude all operational governmental activity but does exclude discretionary functions). Finally, recovery was allowed prior to the *Feres* decision for an injured service member in *Brooks v. United States* despite the plaintiff being an active duty service member and subject to the same conditions as the *Feres* plaintiffs. *See* Brooks v. United States, 337 U.S. 49, 50, 54 (1949)(allowing recovery for service member injured while on leave).

24. *See* 32 C.F.R. § 728.1 (1986)(naval medical mission to provide care for all members of uniform service); *see also* 10 U.S.C. § 1077 (1982)(expanding military medical care to dependents of service members). *See generally* Navy Times, Sept. 14, 1987, at 6 (Vice Admiral in charge of Naval Medicine finds "burgeoning' population of patients" requires expansion of Navy medical facilities and staff).

25. *See generally* Cook, *The Limitation on Medical Malpractice Awards*, 12 VA. B.A.J. 4, 4 (1986)(noting medical malpractice claims increased twelve per cent per year from 1966-1975); Note, *New York's Medical Malpractice Insurance Crises-A New Direction For Reform*, 14 FORDHAM URB. L.J. 773 (1986)(calling for insurance legislation to cope with increased medical malpractice premiums); RESPONSE TO QUESTIONNAIRE OF THE U.S. GENERAL ACCOUNTING OFFICE REGARDING MEDICAL MALPRACTICE, *reprinted in* 63 U. DET. L. REV. 219, 219-23 (1985)(discussing increased use of medical care as reason for seemed increase in medical malpractice litigation).

26. *See, e.g.*, H.R. Res. 3174, 99th Cong., 1st Sess., 131 CONG. REC. H8335 (1985)(resolution calling for amendment to FTCA to allow service member action for medical malpractice); H.R. 1054, 100th Cong., 1st Sess., 133 CONG. REC. H7291 (1987)(bill to amend FTCA to permit service member action for improper medical care referred to Committee of the Whole House on the State of the Union); Comment, *Military Medical Malpractice and the Feres Doctrine*, 20 GA. L. REV. 497, 525-31 (1986)(supporting congressional action to alter *Feres* doctrine).

## II. HISTORICAL RATIONALE FOR DENYING SERVICE MEMBERS' CLAIMS UNDER THE FTCA

### A. *Development of the* Feres *Doctrine*

In 1949, the United States Supreme Court decided the case of *Brooks v. United States*.[27] In *Brooks*, the Court found the United States liable for the death of an off-duty serviceman who was killed in an automobile accident due to the negligence of an on-duty serviceman acting within the scope of his duties.[28] Interpreting the FTCA broadly, the Court concluded that Brooks was entitled to recovery under the Act because the language of the statute includes service members.[29] The Court also found that the legislative history of the FTCA supports inclusion of service member claims.[30] Finally, the Court rejected suggestions that the existence of an alternative compensation scheme impliedly barred a service member's action.[31] Although allowing liability, the Court limited *Brooks* to its facts[32] and stated that if the deceased serviceman was acting within the scope of his duties the result would have been different.[33] Thus, the reasoning adopted in *Brooks*, which allowed recovery, did not apply to on-duty service members injured by other service members acting within the scope of their duties.[34]

*Feres v. United States*,[35] decided only a year after *Brooks*, dealt specifically with FTCA claims by active duty service members for negligent injury

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27. 337 U.S. 49 (1949).

28. *See id.* at 51.

29. *See id.* at 52-53 (Court not persuaded that "any claim" used in statute excludes military).

30. *See id.* at 51 (absurd to think that Congress did not intend inclusion of service member claims). The Court found support for allowing Brooks' recovery in the specific language of the FTCA and the legislative history of the statute. *See id.* at 51-52 & n.2 (sixteen of eighteen bills introduced in Congress excluded recovery for military members but final FTCA contained no such exceptions).

31. *See id.* at 53 (refusing to apply exclusiveness or election of remedies when not required by Congress). The Court did, however, suggest that the receipt of other benefits should be considered in the final settlement. *See id.*

32. *See id.* at 50 (restricting issue to whether a service member may recover under FTCA for injury caused by military but not "incident to service").

33. *See id.* at 52-53 ("outlandish results" possibly created by allowing recovery when injury is "incident to service" justifies preclusion of service member claims despite statute's language).

34. *See* Feres v. United States, 340 U.S. 135, 146 (1950)(rejecting *Brooks* application in case where service member is injured while performing duties under orders). In *Feres*, the Supreme Court found that the relationship of a service member to the government while on leave was not analogous to a soldier under orders. *See id.* The Court's reasoning in reaching their conclusion was that in *Brooks* the injured service member "was on furlough, driving along the highway, under compulsion of no orders or duty and on no military mission." *Id.*

35. 340 U.S. 135 (1950).

caused by another service member acting in the scope of his employment.[36] While *Feres* itself dealt with alleged negligence in assigning a soldier to an unsafe barracks,[37] the two companion cases in *Feres* were medical malpractice claims.[38] The plaintiffs in each case were on active duty, not on authorized absence from their commands, and sustained personal injury due to the negligence of another service member.[39] The Court denied recovery in all three cases because each injury was "incident to service."[40] The Court distinguished *Brooks* as being a case where the injury to the service member was not incident to service[41] and found the reasoning used in *Brooks* inapplicable when the injury is incident to service.[42] The Court in *Feres* conceded that the statutory language of the FTCA sanctioned liability.[43] Contrary to its findings in *Brooks*, however, the Court in *Feres* found that Congress did not intend to include service member claims under the FTCA.[44] The Court also considered the existence of the military's alternative compensation system as reason to bar the *Feres* plaintiffs' claims under the FTCA, despite a contrary finding in *Brooks*.[45] Further, the Supreme Court pointed to "the

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36. *See id.* at 138. The Court distinguished the facts in *Brooks* by observing that in *Brooks*, unlike *Feres*, the injury was not incident to service. *See id.*

37. *See id.* at 136-37. Feres was assigned to a barracks which later burned down while he slept inside. The deceased's family claimed the United States was negligent in maintaining the barracks and in assigning Feres to live in it. *See id.*

38. *See id.* at 137. The other two cases were *Jefferson v. United States*, 178 F.2d 518, 519 (4th Cir. 1949), *rev'd sub nom. Feres v. United States*, 340 U.S. 135 (1950)(towel left in abdomen after surgery in Army hospital), and *Griggs v. United States*, 178 F.2d 1, 2 (10th Cir. 1949), *rev'd sub nom. Feres v. United States*, 340 U.S. 135 (1950)(soldier died while under treatment in Army hospital).

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

40. *See id.* at 146 (holding government not liable under FTCA for injuries to service members occurring incident to service).

41. *See id.* at 138 (Brooks not under compulsion of orders or subject to military discipline).

42. *See id.*

43. *See id.* (statutory language and exceptions indicate liability should be established); *see also* Brooks v. United States, 337 U.S. 49, 51 (1949)(inclusion of military in FTCA exceptions indicates congressional intent to allow service member claims).

44. *See* Feres v. United States, 340 U.S. 135, 140 (1950)(finding recovery under the FTCA beyond benefits already provided was unintentional). In *Feres*, the Court found the lack of private filed bills within Congress, seeking redress for individual service member injury, indicated that no recovery was contemplated, rather than noting the specific inclusion of the military in the statute as in *Brooks*. *Compare id.* at 140 (lack of private bills on behalf of service members indicates relief already provided) *with* Brooks v. United States, 337 U.S. 49, 51 (1949)(adopted FTCA fails to contain military exceptions as earlier bills introduced).

45. *See* Feres v. United States, 340 U.S. 135, 144 (1950)(comprehensive system for relief already provided). The Court in *Feres* also considered Congress' failure to address how to credit disability and death compensation already provided under other statutes. The Court found the lack of instruction persuasive evidence that additional recovery under the FTCA was not intended. *See id.* This reasoning is in direct opposition to that given in *Brooks* where

distinctly federal relationship"[46] between a serviceman and the government and the presence of an alternative military compensation system as justifications for denying recovery, without showing how these concerns differed from those in *Brooks*.[47] Although the Court in *Brooks* feared the "outlandish results" that may occur if recovery is allowed when the injury is incident to service, in reaching its conclusion in *Feres* the Court failed to provide analysis or examples of potential adverse affects.[48] *Feres* remains the only opinion by the Supreme Court concerning medical malpractice claims by active duty military personnel. The Supreme Court's limited review of service member claims arising from the tortious acts of the government has provided lower federal courts little insight into how to determine when injuries are incident to military service.[49] In *Brown v. United States*,[50] however, the Court did provide some guidance.

In *Brown*, the Court rejected the government's contention of a "but for being in the military" analysis to resolve the issue of "incident to military

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the existing compensation system was considered only incidental. *Compare* Brooks v. United States, 337 U.S. 49, 53 (1949)(Court will not apply exclusiveness or election of remedies where Congress has not expressly done so) *with* Feres v. United States, 340 U.S. 135, 144 (1950) (absence of Congress' addressing how to credit compensation shows lack of congressional intent to include military in FTCA).

46. Feres v. United States, 340 U.S. 135, 143-44 (1950)(finding relationship between government and service member distinctly federal). The Court used this relationship to disallow using state law as basis for liability because, "no federal law recognizes a recovery such as claimants seek." *Id.* at 144. Further, the Court summarily rejected the argument that the service members in *Brooks* and *Feres* experienced the same relationship between themselves and the government. Instead, the Court found that the relationship between the federal government and a service member on leave is not analogous to that of a soldier injured while performing duties under orders. *See id.* at 146.

47. *See id.* at 144. The Court acknowledged that in both *Brooks* and *Feres* the plaintiffs were entitled to other compensation, but reached opposite conclusions in each case. *Compare id.* at 144 (failure to state how to credit compensation under FTCA persuasive evidence that Congress did not intend recovery) *with* Brooks v. United States, 337 U.S. 49, 53 (1949)(lack of congressional instruction on election of remedies fails to indicate intent to bar recovery under FTCA).

48. *See* Feres v. United States, 340 U.S. 135, 146 (1950); *see also* Brooks v. United States, 337 U.S. 49, 52 (1949)(allowing recovery where injury "incident to service" would cause extreme results). In *Feres*, the Court distinguished *Brooks* by stating that the *Feres* claims were incident to service. *See* Feres v. United States, 340 U.S. 135, 138 (1950); *see also* United States v. Muniz, 374 U.S. 150, 162 (1963)(denial of recovery under *Feres* based on adverse effects on discipline).

49. *See* Hunt v. United States, 636 F.2d 580, 587 (D.C. Cir. 1980)(task of determining "incident to service" left to lower courts). For an in-depth analysis of the effects on lower courts caused by the lack of Supreme Court guidance on determining "incident to service," see generally Rhodes, *The Feres Doctrine After Twenty-Five Years*, 18 A.F. L. REV. 24 (1976).

50. 348 U.S. 110 (1954).

service."[51] The Court in *Brown* allowed recovery under the FTCA to a veteran who was injured while undergoing treatment at a government medical facility.[52] The *Brown* majority refused to hold that Brown's presence in the government hospital, due to a benefit received by virtue of his military service, barred his claim under *Feres*.[53] Despite the rejection of a "but for" test, lower federal courts have recurrently ignored substantive analysis of the nature of the tortious action and the relationships described by the Supreme Court, and denied claims of active duty service members based solely on military status.[54] The Court later clarified the inconsistency between the reasoning of *Brooks*, *Feres*, and *Brown* in *United States v. Muniz*.[55]

In *Muniz*, the Supreme Court was asked to determine whether or not a federal prisoner could recover under the FTCA.[56] In resolving the contention that the *Feres* doctrine should control the case, the Court reviewed the rationale of *Feres*. After discussing the principal reasons for the *Feres* holding,[57] the Court concluded that *Feres* is best explained by the "peculiar and

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51. *See* United States v. Brown, 348 U.S. 110, 112 (1954)(discharged veteran allowed to recover despite admission into hospital being dependant on military service).

52. *See id.* Brown was injured while on active duty in the armed forces. After his discharge from the service, he sought treatment at a government veterans' hospital for the same injury. Brown attempted recovery under the FTCA for the allegedly negligent treatment received at the hospital. *See id.* at 110.

53. *See id.* at 114 (Black, J., dissenting)(arguing to reject recovery because "but for his military service" he could not have been injured). The majority in *Brown* clearly recognized that the plaintiff would not have been able to use the medical facility except for his military service. However, the majority considered the facts that Brown was not on active duty nor subject to military discipline as sufficient to place *Brown* under the holding of *Brooks*. *See id.* at 112. The *Brown* dissent rejected this argument and found the distinguishing feature of *Brooks* to be that the injury would have occurred despite the plaintiffs being in the military. *See id.* at 114 (Black, J., dissenting). The dissent also pointed out that the veteran was allowed the same disability benefits as an active duty service member and that, by allowing recovery, the Court had unjustifiably discriminated between active duty and discharged military personnel. *See id.*

54. *See, e.g.*, Jones v. United States, 729 F.2d 326, 328 (5th Cir. 1984)(military medical malpractice case where service member on active duty and recovery denied); Hass v. United States, 518 F.2d 1138, 1139, 1141 (4th Cir. 1975)(claim for injury incurred by service member at base riding stables barred); Shults v. United States, 421 F.2d 170, 171 (5th Cir. 1969)("except for" military status injured would not be at hospital); Chambers v. United States, 357 F.2d 224, 229 (8th Cir. 1966)(recovery barred for injury occurring at base recreational swimming facility because use was dependant upon military service). For a discussion of strict application of the "incident to service" test see Rhodes, *The Feres Doctrine After Twenty-Five Years*, 18 A.F. L. REV. 24, 30-32 (1976).

55. 374 U.S. 150 (1963).

56. *See* United States v. Muniz, 374 U.S. 150, 152-54 (1963). The discipline required to control federal prisoners was used as an analogy to that required to control military personnel. The Court found, however, that allowing suits by federal prisoners would not hinder prison discipline. *See id.* at 163.

57. *See id.* at 159. The Court gave five principal reasons for the *Feres* decision: (1) there

special relationship of the soldier to his superiors . . . the effects on discipline if [recovery is] allowed . . . and the extreme results that might result if liability is found."[58] This determination reflects a recognition that being a military service member is a complete lifestyle within itself,[59] and liability is limited to instances where the command relationship between a soldier and superiors might be disrupted.[60]

Although *Muniz* provided some insight, the lack of specific guidance from the Supreme Court as to how to resolve the incident to service issue has left lower federal courts to develop their own appropriate substantive law.[61] This has resulted, not surprisingly, in gross inconsistencies among the courts as to when a serviceman's FTCA claim should be barred, with some courts making distinctions wholly repudiated by others.[62] In the area of medical

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existed no parallel private liability comparable to a service member suing the government; (2) the existence of a comprehensive military compensation system; (3) the lack of private bills introduced into Congress in behalf of military personnel seeking compensation; (4) the distinctly federal relationship between soldiers and superiors and the government; and (5) variations in the state law to be applied without the choice of the injured. *See id.*

58. *Id.* at 162 (quoting United States v. Brown, 348 U.S. 110, 112 (1954)).

59. *See* Parker v. Levy, 417 U.S. 733, 743 (1974)(recognizing military as a "specialized society"); Feres v. United States, 340 U.S. 135, 141-42 (1950)(treating military as separate entity under FTCA); *see also* Zillman, *Intramilitary Tort Law: Incidence to Service Meets Constitutional Tort*, 60 N.C.L. REV. 489, 516 (1982)(military both job and way of life). *See generally* Hirschhorn, *The Separate Community: Military Uniqueness and Servicemen's Constitutional Rights*, 62 N.C.L. REV. 177, 251-54 (1984)(approving use of "separate community doctrine" in evaluating constitutional rights of military personnel); Note, *Intramilitary Immunity and Constitutional Torts*, 80 MICH. L. REV. 312, 331 (1981)(military is self-contained community with military members having many direct civilian counterparts).

60. *See* United States v. Muniz, 374 U.S. 150, 162 (1963)(limiting application of *Feres* due to extreme effect on discipline and relationships with superiors if recovery allowed). The Supreme Court gave explicit approval of this interpretation in *Shearer*. *See* United States v. Shearer, 473 U.S. 52, 57 (1985)(emphasizing that allowing recovery would require court to second-guess military decisions and would impair discipline); *see also* Atkinson v. United States, 804 F.2d 561, 563 (9th Cir. 1986)(*Shearer* decision makes possible damage to military discipline only controlling factor in determining to bar service member claim). In *Atkinson*, the United States Court of Appeals for the Ninth Circuit relied directly on *Shearer* to overrule past precedent within the circuit and allowed recovery for medical malpractice to an active duty service member. *See id.* at 563-64. For additional discussion of the federal courts' emphasis on discipline, see generally Rhodes, *The Feres Doctrine After Twenty-Five Years*, 18 A.F. L. REV. 24, 42 (1976); Zillman, *Intramilitary Tort Law: Incidence to Service Meets Constitutional Tort*, 60 N.C.L. REV. 489, 515-17 (1982).

61. *See* Hunt v. United States, 636 F.2d 580, 587 (D.C. Cir. 1980)(stating Supreme Court left to lower courts problem of interpreting incident to service); *see also* Note, *The Effect of the Feres Doctrine on Tort Actions Against the United States by Family Members of Servicemen*, 50 FORDHAM L. REV. 1241, 1248 (1982)(Supreme Court's lack of standards leaves lower courts to determine what is incident to service).

62. Some courts have relied on disciplinary effect to bar recovery while others have refused to consider this factor. *Compare* Hunt v. United States, 636 F.2d 580, 599 (D.C. Cir. 1980)(effect on discipline exclusive basis of *Feres* doctrine) *with* Hall v. United States, 451 F.2d

malpractice, however, the courts have, with few exceptions, consistently barred recovery to injured military personnel.[63]

One such exception is the case of *Henderson v. Bluemink*.[64] In *Henderson*, the United States Court of Appeals for the District of Columbia held that an Army medical officer could be personally liable for the negligent treatment of another active duty Army officer.[65] The court found that the defendant was acting within the scope of his duties by providing medical services to his military patient,[66] but that the injured serviceman's claim

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353, 354 (1st Cir. 1971)(per curiam)(no nexus required between discipline and injury to bar suit). Courts have also disagreed as to whether *Feres* concerns apply to actions against individual military members instead of the government. *Compare* Henderson v. Bluemink, 511 F.2d 399, 401 (D.C. Cir. 1974)(finding FTCA considerations not applicable while allowing personal liability for military surgeon's negligence) *with* Bailey v. DeQuevedo, 375 F.2d 72, 73-74 (3d Cir. 1967)(no personal liability for medical negligence by military surgeon). In some instances, it appears that courts will modify rigid incident to service rules to render a just result. *Compare* Shults v. United States, 421 F.2d 170, 171-72 (5th Cir. 1969)(injured would not have been admitted into military hospital except for military status; recovery is barred) *with* Adams v. United States, 728 F.2d 736, 740-41 (5th Cir. 1984)(access to and use of medical facility based solely on military identification card does not constitute "incident to service;" recovery allowed). Courts have admitted that the law varies in other jurisdictions without attempting to reconcile the differences. *See* Stanley v. United States, 786 F.2d 1490, 1499 (11th Cir. 1986). In *Stanley*, the court stated that "the interpretation of the *Feres* doctrine in the Eleventh Circuit is far different from the . . . Fifth Circuit," and resolved the issue independently. *Id.*

63. *See, e.g.*, Vallance v. United States, 574 F.2d 1282, 1282 (5th Cir. 1978)(denying recovery for misdiagnosis of brain tumor); Shults v. United States, 421 F.2d 170, 171-72 (5th Cir. 1969)(denying recovery to survivors of sailor who died in naval hospital due to alleged medical malpractice); Buckingham v. United States, 394 F.2d 483, 484 (4th Cir. 1968)(denying recovery for serviceman who died in hospital subsequent to negligent medical treatment); Dilworth v. United States, 387 F.2d 590, 591 (3d Cir. 1967)(per curiam)(denying recovery for death due to medical malpractice based on *Feres*). *See generally* Rhodes, *The Feres Doctrine After Twenty-Five Years*, 18 A.F. L. REV. 24, 37-38 (1976)(discussing ineffective results of suing under FTCA for medical malpractice). In addition to denying recovery for medical malpractice injuries suffered by the service member, courts have also barred recovery to service member families for service members who are physically injured due to malpractice. *See, e.g.*, Scales v. United States, 685 F.2d 970, 971-73 (5th Cir. 1982)(denying recovery for child born with birth defects resulting from service member's rubella inoculation while pregnant); Bolton v. United States, 604 F. Supp. 1219, 1222-23 (S.D. Miss. 1985)(granting motion to dismiss in case alleging negligent medical diagnosis of service member with mental disorders who later killed his children). *See generally* Note, *The Effect of the Feres Doctrine on Tort Actions Against the United States by Family Members of Servicemen*, 50 FORDHAM L. REV. 1241 (1982) (discussing tort actions under FTCA by service member families).

64. 511 F.2d 399 (D.C. Cir. 1974).

65. *See id.* at 404. In *Henderson*, the court focused on the fact that, traditionally, official immunity was only granted when necessary to protect military discretion. *See id.* at 401. The court found that the discretion exercised between a military medical officer and a service member is medical in nature and not governmental, so immunity was not justified. *See id.* at 402-03.

66. *See id.* at 400.

was not barred by the FTCA since the action was against the defendant personally, and not the government.[67] Further, because the injured service member urged liability on the individual medical officer rather than the government, the court found the FTCA provisions and the *Feres* reasoning inappropriate.[68] The court, focusing upon the operational aspect of the duty being performed,[69] also found that governmental immunity would not be afforded to a military medical officer if the discretion exercised by the officer was medical rather than governmental.[70] In seemingly direct conflict with the concerns of *Feres* and its progeny, the court in *Henderson* determined that allowing the suit would not affect the quality or efficiency of the armed service.[71] However, it is difficult, if not impossible, to determine why a suit against the government would adversely affect discipline, whereas a suit directly against an officer would not.[72]

In a more recent case, the United States Court of Appeals for the Fifth Circuit allowed recovery by a service member who, at the time of injury, was relieved of all military duties and awaiting discharge from the service.[73] In *Adams v. United States*,[74] the court identified three factors it would consider in determining when conduct is "incident to service": (1) the duty status of the injured individual, (2) where the incident occurred, and (3) the activity

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67. *See id.* at 404. *Contra* Bailey v. DeQuevedo, 375 F.2d 72, 73-74 (3d Cir. 1967)(*Feres* considerations bar personal liability to military surgeon for leaving sutures in patient's abdomen after operation in Army hospital).

68. *See* Henderson v. Bluemink, 571 F.2d 399, 404 (D.C. Cir. 1974).

69. *See id.* at 401-02 (government personnel immune when formulating policy but must carry out policy with reasonable care).

70. *See id.* at 402-03 (discretion involved in military medical care could be medical, not governmental). The court reasoned that the purpose for immunity of government officials is to protect the formulation of policy but not to immunize officials from failure to conduct activities in a reasonable manner. *See id.*; *see also* Jackson v. Kelly, 557 F.2d 735, 738 (10th Cir. 1977)(when military doctor cares for patient without engaging in agency "planning or policy-making" then discretion used not governmental).

71. *Compare* Henderson v. Bluemink, 511 F.2d 399, 402-03 (D.C. Cir. 1974)(military doctor may be liable to service member who was given negligent medical treatment) *with* Feres v. United States, 340 U.S. 135, 141 (1950)(government has never allowed soldier to sue superior officer). *See also* United States v. Muniz, 374 U.S. 150, 162 (1963)(*Feres* concerned with special relationship between soldier and superiors).

72. *See generally* Rhodes, *The Feres Doctrine After Twenty-Five Years*, 18 A.F. L. REV. 24 (1976). Captain Rhodes, U.S.A.F., emphasizes that suits against individual tortfeasors are routinely barred, preventing an intrusion into military performance. *See id.* at 40.

73. *See* Adams v. United States, 728 F.2d 736, 737 (5th Cir. 1984). Adams was admitted for treatment at a government health service hospital on the basis of an expired identification card. Although he had an invalid identification card and was awaiting discharge, the Army asserted that he was entitled to treatment due to his military status. While on the operating table following a circumcision, Adams died. *See id.* at 738.

74. 728 F.2d 736 (5th Cir. 1984).

of the serviceman at the time of injury.[75] None of the factors alone was determinative in the court's ruling that recovery should be granted; rather, the court determined that recovery for medical malpractice should be barred only where the status of the service member weighs against proceeding with the action.[76] The court found that the Supreme Court's decision in *Brown* allowed for recovery under the FTCA when a service member is on authorized absence from the service.[77] Recently, the Supreme Court clarified the application of the *Feres* doctrine in *United States v. Shearer*.[78]

B. *Recent Developments*

In *Shearer*, a soldier who had a record of violent attacks kidnapped and killed another soldier who was off-duty and off-base at the time of the incident.[79] The decedent's family filed for recovery under the FTCA, alleging that the military was negligent in failing to properly control a serviceman with known violent propensities, thereby causing the death of their son.[80] A majority of the Court agreed that the claim was barred under the *Feres* doctrine.[81] After restating the *Feres* considerations cited in *Brown*,[82] the Court gave further guidance as to how service member claims should be analyzed. The majority called for a case-by-case analysis of each claim and disdained the use of bright-line rules.[83] Also, the Court noted that the situs of the

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75. *See id.* at 739.

76. *See id.* at 740. The court stated that "claims of military medical malpractice . . . [are] barred only where the status of the service member at the time of seeking treatment would cut against allowing the action to proceed." *Id.*

77. *See id.*; *see also* Parker v. United States, 611 F.2d 1007, 1013 (5th Cir. 1980)(must measure duty status from one extreme of being on leave to the other extreme of being on-duty for the day).

78. 473 U.S. 52 (1985).

79. *See id.* at 53-54. Shearer was taken from his home and murdered by another soldier. The soldier who killed him had recently been released from a German prison for the brutal killing of a German citizen. Requests had been made by several of the soldier's superiors that he be immediately discharged from the service due to his uncontrollable conduct. *See id.*

80. *See id.* at 54.

81. *See id.* at 53. Although the case came before the Court sounding in negligence, four of the Justices found the action barred by the intentional tort exception of the FTCA. *See id.* at 53, 54-57 (applying 28 U.S.C. § 2680h (1982) excluding government from liability for "assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights"). The second portion of the opinion, in which six of the Justices joined, focused on the negligence aspect of the claim. *See id.* at 57-59. The Court redirected the emphasis of the *Feres* considerations by noting the possibility of second-guessing military decisions, and called for a case-by-case analysis of each claim. *See id.* at 57-59.

82. *See id.* at 57; *see also* United States v. Brown, 348 U.S. 110, 112 (1954)(basis of *Feres* lies in relationship between soldier and superiors, possible effect on discipline, and extreme results if claims for negligent military acts allowed).

83. *See id.* at 57.

tortious act was secondary in importance to whether or not the suit required interpretation of military decisions.[84] Finally, the Court reaffirmed the rationale utilized in *Muniz* and *Brown* by concentrating its analysis on whether the suit would impair "essential military discipline."[85]

Despite the gains achieved by the *Shearer* Court in clarifying the law of tort liability in the military, the United States Supreme Court failed to follow the reasoning of *Shearer* in *Johnson v. United States*.[86] In *Johnson*, the Court decided that the *Feres* doctrine barred service members' claims for injuries incurred while operating within the scope of their duties, despite the injury being caused by the negligence of civilian government employees.[87] Although the lower court relied on *Shearer*'s reasoning in determining that Johnson's claim under the FTCA was not barred,[88] the Supreme Court, in reversing the decision, only mentioned *Shearer* once in its analysis.[89] Instead, the Court used the traditional justifications behind *Feres*: the uniquely federal relationship involved, the alternate means of compensation, and the possible effects on discipline.[90] As noted by Justice Scalia's dissent, however, the only factor which withstands scrutiny continues to be the possible deleterious effect on military discipline if suits under the FTCA are allowed.[91]

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84. *See id.* (finding lower court's emphasis on where injury occurred misplaced).

85. *Id.* at 57-58 (allegations that military negligent in failing to exert sufficient control over service member directly implicates "basic choices about the discipline, supervision, and control of personnel").

86. __ U.S. __, 107 S. Ct. 2063, 95 L. Ed. 2d 648 (1987). In *Johnson*, the wife of a deceased United States Coast Guard helicopter pilot sued under the FTCA. *See id.* at __, 107 S. Ct. at 2064-65, 95 L. Ed. 2d at 653-54. Mrs. Johnson claimed that her husband's death was due to the negligent assistance given by Federal Aviation Administration controllers which resulted in her husband crashing into the side of a mountain. *See id.*

87. *See id.* at __, 107 S. Ct. at 2065, 95 L. Ed. 2d at 653.

88. *See id.* at __, 107 S. Ct. at 2066, 95 L. Ed. 2d at 655. The eleventh circuit in an *en banc* decision found that the Supreme Court's opinion in *Shearer* supported allowing the suit to go forward as the concerns of *Shearer* were not raised. *See* Johnson v. United States, 779 F.2d 1492, 1493-94 (11th Cir. 1986)(en banc), *rev'd*, __ U.S. __, 107 S. Ct. 2063, 95 L. Ed. 2d 648 (1987).

89. *See* United States v. Johnson, __ U.S. __, __, 107 S. Ct. 2063, 2066-69, 95 L. Ed. 2d 648, 655-659 (1987). In mentioning *Shearer* the Court noted only that if allowing claims for injuries incurred incident to service were "generally permitted," military discipline might be affected. *See id.* at __, 107 S. Ct. at 2069, 95 L. Ed. 2d at 658.

90. *See id.* at __, 107 S. Ct. at 2068-69, 95 L. Ed. 2d at 657-59 (explaining the three factors upon which *Feres* relies). However, although the Court listed the factors supporting the *Feres* doctrine, it failed to give any explanation as to how in this case these factors were raised, except that the deceased was killed while carrying out a service mission. *See id.* at __, 107 S. Ct. at 2069, 95 L. Ed. 2d at 659. Rather, the Court expanded the concept of effects on disciple by finding that if suits by service members against the government were allowed their loyalty to the government could be undermined. *See id.*

91. *See id.* at __, 107 S. Ct. at 2073, 95 L. Ed. 2d at 664 (Scalia, J., joined by Brennan,

## III. APPLICATION OF CURRENT "INCIDENT TO SERVICE" TEST TO MILITARY MEDICAL CARE

It is now clear that excluding military personnel from recovery under the FTCA rests primarily, if not solely, on the effects that allowing the suit would have on military discipline.[92] The mandate of *Shearer*, that each claim be determined on a case-by-case basis, forces courts to make an initial determination of the suit's impact on discipline.[93] Because it is likely that any investigation into the military's actions will have some effect on discipline,[94] the courts should weigh the present and possible effects on discipline against the claimant's right to recovery.[95] In instances where a service member is injured while performing assigned tasks or duties the effect on discipline would likely be severe.[96] However, in instances where the injured

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Marshall, and Stevens, J.J., dissenting)(effect on military discipline best explanation for *Feres*). Justice Scalia went further and noted that failure to allow recovery is likely to have an adverse effect on service personnel. *See id.* at __, 107 S. Ct. at 2074, 95 L. Ed. 2d at 665 (morale of service members not likely to be raised by realization that widows and children will receive fraction of comparable civilian recovery).

92. *See* United States v. Shearer, 473 U.S. 52, 57 (1985)(emphasizing concerns over whether allowing suit would impair "essential military discipline"). In its footnote the Court further indicated that the "other *Feres* concerns" are "no longer controlling." *Id.* at 58 n.4; *see also* Atkinson v. United States, 804 F.2d 561, 563 (9th Cir. 1986)(interpreting *Shearer* as subrogating other concerns to effect on discipline and second-guessing of military decisions). Even prior to *Shearer*, courts emphasized the primacy of disciplinary concerns in determining whether service member recovery should be barred. *See, e.g.*, Johnson v. United States, 704 F.2d 1431, 1436 (9th Cir. 1983)(protection of discipline most fundamental rationale for limiting recovery under FTCA); Monaco v. United States, 661 F.2d 129, 132 (9th Cir. 1981)(protection of military discipline primary, if not exclusive, reason for *Feres* doctrine); Hunt v. United States, 636 F.2d 580, 599 (D.C. Cir. 1980)(possible effect on discipline if recovery allowed is only consideration that has not wavered in explaining *Feres* bars to service member claims). *See generally* Note, *The Effect of the Feres Doctrine on Tort Actions Against the United States by Family Members of Servicemen*, 50 FORDHAM L. REV. 1241, 1261-65 (1982) (focusing on effects on discipline if suits allowed by service member families).

93. *See* United States v. Shearer, 473 U.S. 52, 57 (1985)(no bright-line rules for *Feres* doctrine, courts must analyze each case individually for effects on discipline); *see also* Atkinson v. United States, 804 F.2d 561, 563-64 (9th Cir. 1986)(denying "but for" analysis when considering effects of action on military discipline).

94. *See* Mindes v. Seaman, 453 F.2d 197, 201-02 (5th Cir. 1971)(judicial review of military unavoidably affects discipline). *See generally* Note, *The Effect of the Feres Doctrine on Tort Actions Against the United States by Family Members of Servicemen*, 50 FORDHAM L. REV. 1241, 1261-65 (1982)(concise discussion of FTCA claims on military discipline).

95. *See* United States v. Muniz, 374 U.S. 150, 162 (1963)(construing *Feres* analysis as focusing on effects to discipline and consequences if recovery allowed).

96. *Cf.* Note, *The Effect of the Feres Doctrine on Tort Actions Against the United States by Family Members of Servicemen*, 50 FORDHAM L. REV. 1241, 1262 (1982)(the more attenuated the degree of military control over the claimant at the time of injury the less effect on discipline); *see also* Rhodes, *The Feres Doctrine After Twenty-Five Years*, 18 A.F. L. REV. 24, 42 (1976)(destructive effect on discipline likely when suit allowed attacking actions of superior in

person is not a participant in the operational task by which he is injured, the effect on discipline is less clear. In such circumstances, the court should look to the nature of the task being performed,[97] and the relationship between those controlling the operation of the task and the injured party.[98] In applying these factors to the issue of military medical malpractice, it will be shown that under the standard set by the Supreme Court, recovery in many cases should be allowed.

### A. *Purpose of Medical Care*

The use of military medical facilities by service members serves a two-fold purpose. First, it ensures that the military is maintaining a healthy force, both in times of combat and in peace.[99] Second, military medical care is part of a service member's compensation.[100] Computations used by the military to determine the value of a service member's pay and benefits, as compared

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furtherance of military mission); Zillman, *Intramilitary Tort Law: Incidence to Service Meets Constitutional Tort*, 60 N.C.L. REV. 489, 505 (1982)(suit for commander's actions in battle barred under FTCA).

97. *See* Johnson v. United States, 704 F.2d 1431, 1436 (9th Cir. 1983)(nature of service member's activity at time of incident most important factor to be considered). *See generally* Rhodes, *The Feres Doctrine After Twenty-Five Years*, 18 A.F. L. REV. 24, 29-30 (1976)(distinguishing injuries incurred while on duty as incident to military service and other injuries which do not involve military relationship).

98. *See* Atkinson v. United States, 804 F.2d 561, 565 (9th Cir. 1986)(granting recovery based in part on absence of command relationship between service member and military doctor); *see also* United States v. Shearer, 473 U.S. 52, 58 (1985)(allowing recovery for failure to adequately control individual would require commanding officer to convince civilians of wisdom of military decisions); United States v. Brown, 348 U.S. 110, 112 (1954)(granting recovery because plaintiff was not subject to military orders from superiors); Brooks v. United States, 337 U.S. 49, 52 (1949)(granting recovery where accident had nothing to do with being in military). *See generally* Rhodes, *The Feres Doctrine After Twenty-Five Years*, 18 A.F. L. REV. 24, 42 (1976)(discipline affected when attacking direct superiors acting in furtherance of their mission); Zillman, *Intramilitary Tort Law: Incidence to Service Meets Constitutional Tort*, 60 N.C.L. REV. 489, 515 (1982)(discipline most affected by suing superiors, member of same command).

99. *See* AFR 168-4 (C1 1982) ¶ 12-74. In this regulation, the United States Air Force states that its medical mission is "to provide the medical support needed to maintain the highest possible degree of combat readiness and effectiveness of the Air Force." *Id.* Majors Bryant and Hemingway discuss a program set up by one army unit to ensure military effectiveness through medical care. They specifically note the effects on combat preparedness due to medical difficulties. *See* Bryant & Hemingway, *Preventative Medicine and Preventative Law: Fort Stewart's "Corporate Fitness" Program for Senior Officers*, 112 MIL. L. REV. 211, 212 (1986).

100. *See* 10 U.S.C. § 1074 (1982 & Supp. III 1985)(all active duty military personnel entitled to medical and dental care). The statute further states that the purpose of providing medical and dental care is to "create and maintain high morale in the uniformed services by providing improved . . . medical and dental care for members." *Id.* § 1071; *see also* Lapidula v. Government Emp. Ins. Co., 370 A.2d 50, 52 (N.J. Super. Ct. App. Div. 1977)(medical benefits to military personnel part of paid compensation); Smith v. United Services Auto. Ass'n, 190

to a civilian entitled to similar benefits, conspicuously list medical treatment as part of the service member's overall comparative worth.[101] In order to enjoy the medical benefits and incentives incident to being in the armed forces, service members must use military medical facilities or, in effect, forego a portion of their pay.[102]

Although the use of medical facilities may be considered part of a service member's pay, in some instances the use of the facilities may be wholly incident to maintaining a healthy fighting force. Mandatory periodic physical examinations and mass vaccinations of military personnel are examples of this type of medical treatment.[103] Service members are ordered to participate in these treatments, therefore, the nature of the medical treatment takes on the form of an operational task.[104] By inquiring into these types of decisions, civilian courts will necessarily be tampering with the decision-making process of the military.[105]

The same is not true, however, for military personnel who voluntarily report for personal treatment of ailments apart from mass medical procedures required by orders, regulations, or as part of the military's preventive medicine program. In these circumstances, the nature of the task of caring for such a member is not operational, but rather, purely medical.[106] While it is true that a service member seeking personal medical attention is subject to the regulations and discipline of the military in general, this is a hollow dis-

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N.W.2d 873, 875 (Wis. 1971)(military medical benefits are compensation for services rendered in armed forces).

101. *See* USMC PERSONAL STATEMENT OF MILITARY COMPENSATION at 2 (stating that since medical needs provided there is no need for medical insurance). The statement also provides a dollar value for the service provided. *See id.*

102. *See* 32 C.F.R. § 199.3(d) (1986)(primary intent of medical facilities to have all active duty military personnel receive medical care through Uniformed Services medical system). The Department of Defense further explains that active duty service members who are also dependents of another active duty service member, i.e. spouses, are not normally eligible for reimbursement for medical care received at civilian hospitals. *See id.*

103. *See, e.g.*, Hunt v. United States, 636 F.2d 580, 583, 593 (D.C. Cir. 1980)(allowing suit against private manufacturer of swine flu vaccine despite inoculation being mandatory); *see also* 32 C.F.R. § 55.3(a) (1986)(members of ready reserve required to get physical examination every four years); 122 CONG. REC. 26,636 (Aug. 10, 1976)(noting possibility of mandatory inoculations for swine flu within military).

104. *See* Scales v. United States, 685 F.2d 970, 973 (5th Cir. 1982)(refusing to second-guess military judgment of vaccination program).

105. *See id.*

106. *See* Atkinson v. United States, 804 F.2d 561, 565 (9th Cir. 1986)(stating no military discipline applies to care provided by conscientious physician); *see also* Jackson v. Kelly, 557 F.2d 735, 738 (10th Cir. 1977)(military physician's treatment of patient not use of governmental discretion so as to inure official immunity); Henderson v. Bluemink, 511 F.2d 399, 402 (D.C. Cir. 1974)(policy of immunity to ensure unrestrained discretion not applicable to military doctor making purely medical judgments).

tinction when viewed in light of the fact that at all times, even while absent from their military post or off-duty, service personnel are subject to the regulations and discipline of the military.[107]

### B. *Relationship Between Service Member Patient and Military Medical Personnel*

The structure of the armed forces recognizes military hospitals as commands separate from operational forces.[108] Personnel assigned to military hospitals operate within an internal command structure similar to any unit in the military.[109] Each hospital has a commanding officer who is responsible for the conduct of his staff, lower staff officers, and personnel.[110]

As members of a separate command, service personnel who voluntarily use military hospital facilities are usually not under the control of those who provide the medical care.[111] Rather, their control belongs to the unit where the service member is assigned.[112] In this circumstance, a service member is only under the control of medical personnel to the extent of both their respective military ranks and the doctor-patient relationship.[113] As statute limits the disciplinary function of service members to their respective commanding officers, the members of the hospital command have no direct authority to discipline a service member from an outside command for infractions of military rules or demeanor.[114] Likewise, the hospital staff may

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107. *See* Solorio v. United States, __ U.S. __, __, 107 S. Ct. 2994, 2925, 2933, 97 L. Ed. 2d 364, 377-78 (1987)(military has jurisdiction to try service personnel for violations of Uniform Code of Military Justice regardless of service connection of act); Adams v. United States, 728 F.2d 736, 739 (5th Cir. 1984)(recognizing that service member on leave still subject to recall even while awaiting discharge); Mason v. United States, 568 F.2d 1135, 1135-36 (5th Cir. 1978)(stating that off-duty service member still on active duty and subject to discipline and emergency service). *But see* Feres v. United States, 340 U.S. 135, 146 (1950)(relationship between service member and government while on leave not analogous to on-duty relationship).

108. *See* 32 C.F.R. § 571.1(8) (1986)(identifying U.S. Army Health Service Command as separate command); *see also id.* § 700.307 (listing Chief of Naval Dentistry and Chief of Bureau of Medicine and Surgery as separate commands).

109. *See generally* AFR 168-4 (C1 1982) ¶¶ 2-4, 3-1, 3-6 (regulation identifying basic command structure of Air Force medical system).

110. *See* AFR 168-4 (C1 1982) ¶ 3-1(a) (authorizing medical commanders to delegate authority but not responsibility).

111. *See* AFR 168-4 (C1 1982) ¶ 12-74 (identifying hospital command structure for administrative control over patients).

112. *See* AFR 168-4 (C1 1982) ¶ 12-74 (stating that hospital does not take responsibility of patients until attached or assigned to hospital command).

113. *See id.*

114. *See* Uniform Code of Military Justice, 10 U.S.C. § 815 (1982 & Supp. III 1985) (limits non-judicial punishment of commanding officers to persons within their command); *id.* § 822-824 (granting commanding officers authority to convene courts-martial); *see also* AFR

not order the outside command service member to undergo unwanted treatment whereas the service itself may.[115] Since the medical personnel are without direct control over those who report to the facility for personal medical care, it is difficult to see how discipline would be eroded by allowing recovery for negligent care.[116]

Although in most cases there is no direct command relationship between the patient and the military medical staff, there are occasions when the service member patient is administratively ordered to the hospital for treatment.[117] This order is an administrative transfer of the service member which is required for personnel who are admitted to the medical facility.[118] Since service members are subject to punishment from the command to which they are assigned, in these circumstances the hospital would have authority to reprimand military patients for breaches of discipline.[119] However, such an assignment is only an administrative requirement designed for accurate accounting rather than operational control.[120] It is unreasonable to transform an otherwise viable claim into a nonrecoverable claim based on an accounting measure.

### C. *Capacity of the Judiciary to Distinguish Military Decisions From Medical Decisions*

With the large number of civil cases involving litigation over the appropri-

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168-4 (C1 1982) ¶ 3-1(b) (stating that medical commanders have courts-martial authority over members in their command).

115. *See* Scales v. United States, 685 F.2d 970, 971 (5th Cir. 1982)(Air Force requiring all service members to receive rubella vaccine); Hunt v. United States, 636 F.2d 580, 583-84 (D.C. Cir. 1980)(service ordering all members to receive swine flu vaccine).

116. *See, e.g.*, Atkinson v. United States, 804 F.2d 561, 565 (9th Cir. 1986)(declaring military discipline not affected during medical treatment of pregnant service member); Scales v. United States, 685 F.2d 970, 974 (5th Cir. 1982)(law forces court to reluctantly find that suing for military medical malpractice would be disruptive); Hall v. United States, 451 F.2d 353, 354 (1st Cir. 1971)(per curiam)(admitting no effect on discipline when utilizing hospital facilities, but denying that nexus between discipline and injury required); *see also* Rhodes, *The Feres Doctrine After Twenty-Five Years*, 18 A.F. L. REV. 24, 42 (1976). Captain Rhodes recognizes that actions against direct superiors or for injuries incurred on the job will affect discipline, but finds no similar effect as to non-scope injuries. *See id.*

117. *See, e.g.*, AFR 39-11 ¶ 7-2 (1982)(requiring patients who are admitted into hospital to be assigned to hospital command by order); AFR 36-20 ¶ 7 (1982)(requiring personnel who will be admitted in excess of 90 days to be assigned to hospital); *see also* Feres v. United States, 340 U.S. 135, 137 (1950)(service member patient admitted to hospital under orders).

118. *See id.*

119. *See* AFR 168-4 (C1 1983) ¶ 3-11 (commander of patient affairs squadron has non-judicial punishment authority over attached or assigned enlisted personnel); *see also* 10 U.S.C. § 815 (1982 & Supp. III 1985)(describing extent of non-judicial punishment authority).

120. *See* AFR 168-4 (C1 1983) ¶ 3-11 (commander of patient affairs has responsibility over those attached or assigned to hospital for administrative purposes).

ate level of care used in medical treatment,[121] it can hardly be argued that any judicial interpretations involving military medical care are beyond the expertise of civilian courts.[122] The claims that have been filed for military medical malpractice have not varied in substance from those in the civilian sector.[123] What does vary is the fact that military medical malpractice, by definition, takes place on a military reservation and involves military personnel. The Supreme Court has established that the fact that an injury occurs on a military installation does not necessarily bar recovery.[124] Therefore, the only consistent factor that remains to bar a claim is that the act from which the injury arises is being performed by military personnel. It is this relationship between service members that is the key to barring recovery.[125]

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121. *See, e.g.*, Bush v. United States, 703 F.2d 491, 495-96 (11th Cir. 1983)(claiming medical malpractice for exploratory surgery while attempting to locate cancerous tumor); Karas v. Jackson, 582 F. Supp. 43, 44 (E.D. Pa. 1983)(attempting to make physician vicariously liable for negligent performance of amniocentesis); Johnson v. Methodist Hosp., 547 F. Supp. 780, 781 (N.D. Ind. 1982)(negligent treatment of tonsillitis); Kennedy v. Ziesmann, 522 F. Supp. 730, 730 (E.D. Ky. 1981)(negligence in failing to test for pregnancy before performing plastic surgery). *See Generally* Cook, *The Limitation on Medical Malpractice Awards*, 12 VA. B.A.J. 4, 4 (1986)(noting medical malpractice claim increase over ten year period); Note, *New York's Medical Malpractice Insurance Crises-A New Direction For Reform*, 14 FORDHAM URB. L.J. 773 (1986)(discussing proposed changes in insurance techniques due to rising malpractice suits and awards); RESPONSE TO QUESTIONNAIRE OF THE U.S. GENERAL ACCOUNTING OFFICE REGARDING MEDICAL MALPRACTICE, *reprinted in* 63 U. DET. L. REV. 219, 219-23 (1985)(offering explanation for increase in medical malpractice litigation).

122. *See* Feres v. United States, 340 U.S. 135, 142 (1950)(admitting patient-doctor relationship exists while in military medical facility); Atkinson v. United States, 804 F.2d 561, 564 (9th Cir. 1986)(denying any command relationship when service member voluntarily uses military medical facility); Henderson v. Bluemink, 511 F.2d 399, 402-03 (D.C. Cir. 1974)(distinguishing medical and governmental discretion involved in service member's use of medical facilities).

123. *Compare* Feres v. United States, 340 U.S. 135, 137 (1950)(leaving towel in stomach of serviceman) *and* Vallance v. United States, 574 F.2d 1282, 1282-83 (5th Cir. 1978)(misdiagnosis of cancer in service person) *and* Buckingham v. United States, 394 F.2d 483, 484 (4th Cir. 1968)(prescribing wrong medication to service member) *and* Bailey v. DeQuevedo, 375 F.2d 72, 73 (3d Cir. 1967)(leaving sutures in abdomen of soldier) *with* Lipscomb v. Memorial Hosp., 733 F.2d 332, 337 (4th Cir. 1984)(alleging sutures in lumen negligently placed) *and* Augustine v. United States, 704 F.2d 1074, 1076 (9th Cir. 1983)(failure to diagnose condition that led to metastatic cancer) *and* Conway v. Huff, 644 S.W.2d 333, 334 (Ky. 1983)(determining if statute of limitations runs when sponge left in patient or when discovered).

124. *See* United States v. Shearer, 473 U.S. 52, 57 (1985)(concluding situs of tortious act not as important as other factors); *see also* Atkinson v. United States, 804 F.2d 561, 564 (9th Cir. 1986)(fact that tortious act occurred on base does not alone bar suit); Johnson v. United States, 704 F.2d 1431, 1436-37 (9th Cir. 1983)(finding that location of negligent act an important indicator but not dispositive of FTCA action).

125. *See* Atkinson v. United States, 804 F.2d 561, 563 (9th Cir. 1986)(finding effects on discipline and second-guessing of military decisions only relevant concerns); Adams v. United States, 728 F.2d 736, 738-39 (5th Cir. 1984)(*Feres* policy is to prevent erosion of unique relationship between service member and the government); Scales v. United States, 685 F.2d 970,

Although courts have traditionally allowed the military a broad interpretation of what constitutes military decision making,[126] this does not mean that the judiciary has not reviewed military decisions to determine if such decisions are in fact distinctly military.[127] Under the Administrative Procedure Act (APA), federal courts have jurisdiction to review, with limited exceptions, all administrative actions in the military.[128] The APA also authorizes courts to "hold unlawful and set aside agency action."[129] While including the military within the reach of judicial review, the courts have continued to limit the scope of their review when the case involves military discretion.[130] The question however, still remains, both under the APA and the *Feres* doctrine: Would allowing recovery for military medical malpractice adversely affect discipline? At least two courts have answered this question in the negative.[131]

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973 (5th Cir. 1982)(effects on discipline most important factor); Shults v. United States, 421 F.2d 170, 171-72 (5th Cir. 1969)(sailor taken on-base for medical treatment after off-base auto accident; medical negligence incident to service).

126. *See* Parker v. Levy, 417 U.S. 733, 758 (1974)(finding what would be unconstitutional outside of military often allowed while in military). The Supreme Court has recognized that the judiciary is ill-equipped to deal with military decisions. *See* Gilligan v. Morgan, 413 U.S. 1, 6-7, 10 (1973)(constitutional separation of powers requires that Congress, not courts, control military). *See generally* Noone, *Rendering Unto Caesar: Legal Responses to Religious Nonconformity in the Armed Forces*, 18 ST. MARY'S L.J. 1233, 1246-61 (1987)(discussing judicial reluctance in interpreting military decision making).

127. *See, e.g.*, Parker v. Levy, 417 U.S. 733, 733-60 (1974)(reviewing military's action under articles of the Uniform Code of Military Justice); Gilligan v. Morgan, 413 U.S. 1, 7-10 (1973)(denying judicial review of military training, weaponry, and orders of national guard). *See generally* McDaniel, *The Availability and Scope of Judicial Review of Discretionary Military Administrative Decisions*, 108 MIL. L. REV. 89, 113-27 (1985)(discussing effects of Administrative Procedure Act on review of military discretion).

128. *See* 5 U.S.C. §§ 551-559 (1982 & Supp. III 1985); *see also id.* §§ 701-706 (Supp. III 1985).

129. 5 U.S.C. § 706(2) (Supp. III 1895).

130. *See, e.g.*, Builders Corp. of Am. v. United States, 320 F.2d 425, 429 (9th Cir. 1963) (denying United States could be liable for military housing policy since its formulation involved some discretion on part of commanders); Park v. Zatchuk, 605 F. Supp. 207, 210 (D.D.C. 1985)(finding defendant military doctor could not be liable for libel and slander in criticizing plaintiff's performance as military doctor as such involved discretion); Neal v. Secretary of Navy, 472 F. Supp. 763, 781 (E.D. Pa. 1979)(law only requires government agencies to have standards within which to act; so long as decisions made within this framework court cannot find abuse of discretion). *See generally* McDaniel, *The Availability and Scope of Judicial Review of Discretionary Military Administrative Decisions*, 108 MIL. L. REV. 89, 122 (1985) (discussing deference given by courts to military decision making).

131. *See* Atkinson v. United States, 804 F.2d 561, 565 (9th Cir. 1986)(declaring military discipline not affected by medical care of military physician); Henderson v. Bluemink, 511 F.2d 399, 404 (D.C. Cir. 1974)(*Feres* concerns irrelevant in personal liability suit for medical malpractice).

As previously discussed, in the case of *Henderson v. Bluemink*[132] the court of appeals concluded it is possible to find personal liability of an Army medical officer for negligent medical treatment.[133] In *Henderson*, the court focused its analysis on the degree of discretion inherent in the military physician's services and found that it was solely medical, not governmental.[134] Although in reaching its decision the court did not rely on the possible effect that allowing recovery would have on military discipline, the court denied that allowing recovery would "inhibit fearless, efficient and vigorous administration of policies."[135] The court further denied that finding liability would affect the judgment of medical personnel in the future, but noted that it was only holding the military doctor to the same standard of care as his civilian counterpart.[136] The court impliedly held, therefore, that there would be no adverse effect on the discipline and decision making ability of the military doctor.[137] It would appear, then, that the discipline of the injured serviceman using the facility would be equally unaffected since he has, in effect, no choice in utilizing the military medical service.[138]

More recently, the United States Court of Appeals for the Ninth Circuit, in *Atkinson v. United States*,[139] concluded that allowing recovery for military medical malpractice would not adversely affect military discipline.[140] Relying on the majority ruling in *Shearer*, the court in *Atkinson* overruled prior precedent and reversed the lower court's dismissal of a service member's claim for military medical malpractice.[141] The court specifically found that military discipline would not be affected by holding a military doctor to the same standard of care as a conscientious civilian physician.[142]

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132. 511 F.2d 399 (D.C. Cir. 1974).

133. *See id.* at 400 (reversing lower court's summary judgment as to military medical officers' immunity to suit).

134. *See id.* at 402.

135. *Id.* at 401-03.

136. *See id.* at 402-03 (suits against military doctors do not inhibit discretion as they must make same medical decisions regardless of military status).

137. *See id.*

138. *See* 32 C.F.R. § 199.3(d) (1986)(Department of Defense intends that all active duty military personnel receive medical care through Uniformed Services medical system).

139. 804 F.2d 561 (9th Cir. 1986).

140. *See id.* at 565 (allowing recovery for injured pregnant service member would not adversely effect military discipline).

141. *See id.* at 563-64 (overruling *per se* approach to military medical malpractice claims that existed within circuit); *see also* Bankston v. United States, 480 F.2d 495, 497 (5th Cir. 1973)(holding that although service member's status was tantamount to discharge, not barred from tort action under *Feres*).

142. *See* Atkinson v. United States, 804 F.2d 561, 565 (9th Cir. 1986)(medical actions of military physician do not affect military discipline).

### D. *Ancillary Effects of Allowing Recovery for Military Medical Malpractice*

When dealing with areas concerning the national defense, and thereby the military, courts have been reluctant to create impediments to the smooth functioning of the armed forces.[143] Certainly, the military is an area where maximum discretion should continue to be granted, subject to decisions by the executive and legislative branches of the government.[144] Because of this, it is necessary to examine the effects that allowing military medical malpractice recovery would have on the military.[145]

One drawback in allowing recovery is the administrative workload and economic loss that would result in defending medical malpractice suits.[146] It cannot be denied that summarily dismissing service member claims is administratively and economically efficient. Yet, the Supreme Court has noted that a drain on the government's coffers is no reason to deny recovery.[147] As for the administrative workload, there can be no distinction in the effects on administration for allowing recoveries such as in *Brooks* and military medical malpractice claims.[148] The real concern is that the opportunity for recovery will increase negligence claims, creating a need to expand the military's capability to defend against such suits.[149]

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143. *See, e.g.*, United States v. Shearer, 473 U.S. 52, 58 (1985)(refusing to allow claim which would require Court to question basic military choices about discipline, supervision, and control of servicemen). In *Gilligan v. Morgan*, 413 U.S. 1 (1973), the Supreme Court stated that it would not inquire into the "complex, subtle, and professional decisions as to composition, training, equipping and control of a military force." *Id.* at 10; *see also* Atkinson v. United States, 804 F.2d 561, 565 (9th Cir. 1986)(citing *Gilligan*).

144. *See* 28 U.S.C. § 2680a (1982)(stating FTCA claims do not apply to acts of discretion); *see also* 5 U.S.C. § 701a(2) (1982)(excluding discretionary action of military from judicial review). *But cf.* Florida Dept. of Bus. Regulation v. United States Dept. of Interior, 768 F.2d 1248, 1255 (11th Cir. 1985)(action committed to agency discretion is narrow and must be clearly demonstrated before review will be denied).

145. *See* United States v. Shearer, 473 U.S. 52, 57 (1985)(calling for case-by-case analysis of effects on discipline).

146. *See* Hall v. United States, 451 F.2d 353, 354 (1st Cir. 1971)(per curiam)(allowing recovery for military medical malpractice would require services to maintain claims department). *See generally* Zillman, *Intramilitary Tort Law: Incidence to Service Meets Constitutional Tort*, 60 N.C.L. REV. 489, 515, 516 (1982)(discussing overall effects on military efficiency if suits under FTCA allowed).

147. *See* Rayonier, Inc. v. United States, 352 U.S. 315, 319-20 (1957). In *Rayonier*, a case involving the negligence of the United States Forest Service, the Supreme Court stated that the possibility of imposition of a heavy burden on the public treasury by reason of government liability under the FTCA "is no justification to read exemptions into the acts beyond those provided by Congress." *Id.*

148. *See generally* Rhodes, *The Feres Doctrine After Twenty-Five Years*, 18 A.F. L. REV. 24, 42 (1976)(allowing other claims under FTCA must have same effect on governmental workload as allowing claims which are not incident to service, such as in *Brooks*).

149. *See* Hall v. United States, 451 F.2d 353, 354 (1st Cir. 1971)(allowing recovery for

In addition, allowing military medical malpractice recovery would surely have an effect on the medical personnel whose acts are in question.[150] Undoubtedly, the military would carefully reconsider retaining personnel whose negligent acts impose liability upon the government.[151] The exposure that would necessarily result from a negligence suit may act as a deterrent for future physician retention[152] despite the pay incentives provided to military physicians,[153] and the fact that Congress has made military medical personnel immune from personal liability for malpractice.[154] This, however, is unlikely as it presupposes that no actions are currently being brought against military medical personnel. This is not the case, as recovery is continually sought by both active duty service members and dependents alike.[155] The

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military medical malpractice would require services to maintain claims department). *See generally* Zillman, *Intramilitary Tort Law: Incidence to Service Meets Constitutional Tort*, 60 N.C.L. REV. 489, 515-17 (1982)(discussing adverse effects if tort claims expanded); Rhodes, *The Feres Doctrine After Twenty-Five Years*, 18 A.F. L. REV. 24, 37-38 (1976)(noting that many suits can be expected in area of medical malpractice).

150. *See* Martinez v. Schrock, 537 F.2d 765, 768 (3d Cir. 1976)(finding that allowing suits against medical personnel contravenes government interest in recruiting and retaining qualified medical personnel); *see also* Bailey v. DeQuevedo, 375 F.2d 72, 74 (3d Cir. 1967) (stating that *Feres* considerations barring recovery due to relationship between service member and government same as between service member and doctor). *But see* Henderson v. Bluemink, 511 F.2d 399, 402-03 (D.C. Cir. 1974)(allowing personal liability for military medical malpractice has no different effect on military doctor than if he performed outside of government).

151. *See* AFR 36-10 (1982) attachment 1. All medical officers are required to have personal evaluation reports submitted. In this evaluation, the doctor's performance in administering to his patients must be graded. *See id.* ¶ 3(a). It is most likely that this evaluation will contain information disclosing negligent practices, since it is required that examples of conduct be given to support the assigned grading. *See id.* ¶ 3(b); *see also* Park v. Zatchuk, 605 F. Supp. 207, 208 (D.D.C. 1985)(suit claiming damages for remarks made in Officer Evaluation Report critical of military doctor's professional competence and conduct).

152. *See* Martinez v. Schrock, 537 F.2d 765, 768 (3d Cir. 1976)(allowing suits against medical officers personally contradicts government interest in recruiting and retention).

153. *See* 37 U.S.C. § 302a (1982 & Supp. III 1985). Qualified military physicians are entitled to special pay, incentive pay, and additional special pay each year. Depending on the length of active service and the doctor's personal qualifications this pay could exceed twenty-one thousand dollars for a twelve-month period. *See id.* This pay is in addition to regular pay and allowances. *See id.* § 302b (Supp. III 1985). Military dentists receive similar entitlement. *See id.*

154. *See* 10 U.S.C. § 1089 (1982 & Supp. III 1985). For cases interpreting the provisions of this statute see, e.g., *Baker v. Barber*, 673 F.2d 147, 148-49 (6th Cir. 1982)(statute immunizes physicians); *Hall v. United States*, 528 F. Supp. 963, 965 (D.N.J. 1981)(section intended immunity to medical personnel for malpractice), and *Hernandez v. Koch*, 443 F. Supp. 347, 349 (D.D.C. 1978)(statute's purpose to protect military medical personnel from personal liability).

155. *See, e.g.*, Feres v. United States, 340 U.S. 135, 137 (1950)(suing under FTCA for negligent military medical care); Jones v. United States, 729 F.2d 326, 327-28 (5th Cir. 1984) (wrongful death action alleging negligent military medical practice); Vallance v. United States,

current status of the *Feres* doctrine has not prevented lawsuits but only determined their outcome.[156]

On the other hand, allowing recovery may cause the military to review its procedures in order to provide more competent service.[157] The occurrences of alleged negligent treatment throughout the medical field evinces the need to assure that proper caution is being taken within the military medical system to prevent mishaps.[158]

Finally, allowing recovery in one area of the military system may open the door for recovery in other areas involving professional services. Claims for

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574 F.2d 1282, 1282 (5th Cir. 1978)(claiming negligent misdiagnosis of cancer); Martinez v. Schrock, 537 F.2d 765, 766 (3d Cir. 1976)(suit to hold military doctor personally liable for medical malpractice); Henderson v. Bluemink, 511 F.2d 399, 400 (D.C. Cir. 1974)(finding military doctor personally liable for negligent diagnosis and treatment of service member); Bailey v. DeQuevedo, 375 F.2d 72, 72 (3d Cir. 1967)(suing military doctor for leaving sutures in abdomen after operation in military hospital). In addition to malpractice claims, service members have been litigious in other areas. *See, e.g.*, United States v. Shearer, 473 U.S. 52, 53-54 (1985)(suing for Army's failure to control person with known violent propensities); Stanley v. United States, 786 F.2d 1490, 1492 (11th Cir. 1986)(action under FTCA for wrongful administration of LSD while in service); Garcia v. United States, 776 F.2d 116, 117 (5th Cir. 1985)(suit for negligent supervision of recruiter resulting in sexual assault); United States v. Lee, 400 F.2d 558, 559 (9th Cir. 1968)(wrongful death action for marines killed in military aircraft crash). *See generally* Zillman, *Intramilitary Tort Law: Incidence to Service Meets Constitutional Tort*, 60 N.C.L. REV. 489, 511-12 (1982)(discussing persistent service member litigation under FTCA).

156. *See, e.g.*, Flowers v. United States, 764 F.2d 759, 760 (11th Cir. 1985)(denying recovery for damages caused when service member's private vehicle hit by military bus); Camassar v. United States, 531 F.2d 1149, 1150-51 (2d Cir. 1976)(denying recovery for off-duty sailor injured on defective pier); Hass v. United States, 518 F.2d 1138, 1139-41 (4th Cir. 1975) (marine injured at base stable denied recovery). *See generally* Rhodes, *The Feres Doctrine After Twenty-Five Years*, 18 A.F. L. REV. 24, 37-42 (1976)(discussing limited success of attempting suits under FTCA).

157. *See generally* Zillman, *Intramilitary Tort Law: Incidence to Service Meets Constitutional Tort*, 60 N.C.L. REV. 489, 491 (1982)(finding that allowing suits to proceed may uncover military wrongdoing); *see also* Note, *Intramilitary Immunity and Constitutional Torts*, 80 MICH. L. REV. 312, 314-15 (1981)(discussing deterrence benefits of civil damages).

158. *See, e.g.*, Feres v. United States, 340 U.S. 135, 137 (1950)(one service member had towel left in stomach after surgery, another died while in military hospital due to alleged negligence); Adams v. United States, 728 F.2d 736, 738 (5th Cir. 1984)(death on operating table following circumcision); Scales v. United States, 685 F.2d 970, 971-72 (5th Cir. 1982)(rubella vaccination while pregnant causing birth defects in child); Vallance v. United States, 574 F.2d 1282, 1282 (5th Cir. 1978)(misdiagnosis of brain tumor); Lowe v. United States, 440 F.2d 452, 452 (5th Cir.)(adverse effects following elective surgery), *cert. denied*, 404 U.S. 833 (1971); Buckingham v. United States, 394 F.2d 483, 484 (4th Cir. 1968)(Air Force man died two days after receiving medication and being sent home); Bailey v. DeQuevedo, 375 F.2d 72, 72 (3d Cir. 1967)(sutures left in abdomen after hospital operation). *See generally* Note, *New York's Medical Malpractice Insurance Crises-A New Direction For Reform*, 14 FORDHAM URB. L.J. 773, 773-76 (discussing current insurance crises caused by number and amount of awards for medical malpractice).

legal malpractice within the military have been attempted.[159] However, this "slippery slope" can be avoided and recovery still allowed if the Supreme Court gives adequate guidance as to when recovery will be allowed and, as always, the power of the legislative branch is present to clarify the Court's interpretation. The lack of action by Congress, however, is perhaps the most persuasive argument not to allow recovery; Congress has not, despite judicial invitation, altered the *Feres* doctrine.[160]

## III. CONCLUSION

The rationale behind the *Feres* doctrine has been unclear since its inception. Subsequent to its announcement, the Supreme Court has attempted to explain the various purposes for the ruling without much success. In its recent decisions on the subject of intramilitary tort recovery under the FTCA, the Court has given explicit guidance on how to resolve the issue of service member recovery under *Feres*. The recent ruling of the Supreme Court in *Shearer* makes it clear that potential adverse effects on discipline is the only valid reason for denying recovery by service members for military medical malpractice.

Denial of recovery for military medical malpractice cannot be justified in light of past and current precedent, nor does the feared adverse effect on discipline if recovery is allowed withstand critical analysis. The nature of the task being performed in a military medical scenario is not one that involves typical military decision making; rather, it is primarily a medical procedure not unlike medical procedures in the civilian sector. Also, the relationship between an ailing patient and a military physician is not one which impinges upon the basic command control over military personnel.

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159. *See* Matthews v. United States, 456 F.2d 395, 396 (5th Cir. 1972)(alleging legal malpractice for inaccurate advice concerning filing requirements for insurance claim).

160. *See* Feres v. United States, 340 U.S. 135, 138 (1950)(emphasizing that if Court misinterprets FTCA Congress has appropriate remedy); *see also* Zillman, *Intramilitary Tort Law: Incidence to Service Meets Constitutional Tort*, 60 N.C.L. REV. 489, 502-03 (1982)(noting Congress' tacit approval of *Feres* doctrine by inaction). Recently, the House of Representatives passed a resolution that would allow for service member recovery for military medical malpractice. *See* H.R. Res. 3174, 99th Cong., 1st. Sess., 131 CONG. REC. H8335 (1985). The resolution called for an addition to the current FTCA which would allow active duty service members to recover for injuries incurred while treated at fixed governmental medical facilities. *See* 131 CONG. REC. H8286 (1985)(listing proposed addition 28 U.S.C. § 2681). Although the resolution was introduced into the Senate, see 131 CONG. REC. S13008, it never made it out of committee. For a thorough discussion of H.R. Res. 3174 see generally Comment, *Military Medical Malpractice and the Feres Doctrine*, 20 GA. L. REV. 497, 525-30 (1986). Currently, the House of Representatives is conducting hearings to determine resubmission of a bill similar to H.R. Res. 3174. *See* H.R. 1054, 100th Cong., 1st Sess., 133 CONG. REC. H647 (1987) (introducing proposed changes to 28 U.S.C. § 2681 allowing for service member recovery for improper medical care).

Furthermore, by adjudicating military medical malpractice claims, courts will not be attempting to second-guess military decision making. The cases that have primarily confronted the courts involve individual claims for negligent treatment incurred while attempting to obtain proper medical care—care which is part of a service member's compensation for being in the military. Finally, the benefits of deterrence and just compensation outweigh the additional administrative workload that would likely result in processing medical malpractice claims. The mandate of the Supreme Court requires an analysis of disciplinary effects in allowing FTCA actions within the military. In the narrow field of medical malpractice the analysis favors recovery.