

Forgotten Rights of Military Personnel: An End To Congressional Acquiescence?

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Introduction

Donna Bass entered basic training for the United States Army in 1980. While performing required physical training exercises she dislocated her right hip. Having difficulty walking and standing, Donna was taken to Noble Army Hospital where she was examined by two military doctors. The doctors diagnosed Donna's injury as a muscle strain and released her to return to the physical training program. Complaining of increased pain in her right hip, difficulty in walking, and a "grating" feeling in her right hip joint, Donna returned to the hospital. The doctors again told Donna that her injury was only a muscle strain and that they believed she was concocting a story to avoid basic training exercises. Forced to continue basic training exercises, her requests to consult a private doctor denied, soon Donna could no longer walk. The doctors finally performed diagnostic tests and discovered a dislocated hip. Permanently disabled, Donna was medically discharged from the Army. Despite the negligent actions of the Army doctors, Donna cannot sue either the government or the doctors in their individual capacity.¹

In July 1945, Arthur Jefferson, an Army enlistee, had a gall bladder operation² at the Army hospital in Indiantown Gap, Pennsylvania. Suffering from vomiting spells and nausea, Arthur underwent a second operation in a private hospital eight months later. Surgeons found a 1 1/2 by 2 1/2 foot towel bearing the legend "Medical Department U.S. Army" in Arthur's abdominal cavity. As a post-operative result of the towel's removal, Arthur sustained a serious hernia, requiring him to wear a corset. He could not lean forward either standing or sitting in a chair, and

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1. *Bass v. Parsons*, 577 F. Supp. 944 (S.D. Va. 1984). Since the government's motion to dismiss was at issue, all the facts in the complaint were accepted as true.

2. *Petition for Writ of Certiorari to the United States Supreme Court at 4, Feres v. United States*, 340 U.S. 135 (1950) (No. 50-9).

had to lie down after three or four hours of any activity. Arthur was no longer employable industrially, and at less than 50 years of age it was doubtful that he could ever engage in any gainful employment. Nevertheless, Arthur lacked recourse against the government or the surgeon.³

Henry Winston contracted a brain tumor in April 1959. Worried about Henry's "dizziness, instability, and difficulty with his vision," Henry's attorney scheduled an examination with prison doctors. The diagnosis was "borderline hypertension" and the doctors recommended weight loss as a solution. Experiencing an increasing number of attacks, severe headaches, periodic loss of vision and an inability to walk, Henry again complained to prison authorities. He was given Dramamine⁴ without further examination. Henry's attorney visited him in January 1960. Alarmed by Henry's condition, the attorney scheduled an examination by a consulting physician. The following month, an operation in New York City revealed a benign tumor of the cerebellum. Henry is permanently blind due to the delay in treatment. Henry is a federal prisoner and may sue both the federal government and the doctors responsible for his condition.⁵

In each of these cases, the individual's status accounts for the disparity of treatment. The plaintiffs in the first two actions were military personnel while the plaintiff in the third case was a federal prisoner. Military personnel have no judicial remedy for injuries or death deemed "incident to the service."⁶ This denial of remedy is due to a court created principle known as the *Feres* doctrine. Yet the remainder of the United States population, including federal prisoners and aliens,⁷ may sue the government or its

3. *Jefferson v. United States*, 178 F.2d 518 (4th Cir. 1949). This case was one of three decided by the Supreme Court in *Feres v. United States*, 340 U.S. 135 (1950).

4. Dramamine is usually taken for motion sickness. *Physicians' Desk Reference For Nonprescription Drugs* 1868 (1987).

5. *Winston v. United States*, 305 F.2d 253 (2d Cir. 1962), *aff'd sub nom. United States v. Muniz*, 374 U.S. 150 (1963). In *Muniz*, the Supreme Court decided two separate suits in a single case. The first involved Henry Winston as a plaintiff. The second involved Carlos Muniz, a federal prisoner who was struck by a fellow inmate while outside a prison dormitory. Twelve inmates chased Muniz into another dormitory. One of the guards, instead of calling for help or assisting Muniz, locked the dormitory door. Muniz was thus trapped in the midst of his tormentors. The prisoners attacked Muniz, beating him with chairs, sticks, and other objects until he lost consciousness.

Muniz was hospitalized and underwent a series of operations. As a result of the beating, Muniz suffered a fractured skull and the loss of vision in his right eye. The Court held that Muniz was entitled to sue under the Federal Tort Claims Act (FTCA). 374 U.S. at 152.

6. *Feres*, 340 U.S. at 138.

7. See, e.g., Robert Johnson, *The Federal Tort Claims Act — A Substantive*

agents for injuries or death resulting from negligence.⁸ Military personnel⁹ are thus singled out and afforded fewer rights than other members of society.

This inequity results from the *Feres* doctrine's application and expansion by the judiciary.¹⁰ While *Feres v. United States*¹¹ did not address the propriety of suit against individual military tortfeasors, judicial interpretation of the doctrine blocks this road to recovery as well.¹² The Supreme Court held that the *Feres* rationale prevents suits between servicepersons for constitutional torts. Race discrimination within the military is thus not subject to judicial redress.¹³ The *Feres* doctrine encompasses intentional torts.¹⁴ Soldiers dying of cancer from the intentional exposure to radiation by their superiors are thereby barred from suit. Finally, this judicially created exception to the Federal Tort Claims Act (FTCA)¹⁵ extends to family members of military personnel if the family member's injury is traceable to a service-connected injury.¹⁶

Survey, 6 U. Rich. L. Rev. 65, 70 (1971). ("[R]ecoverry has been permitted under the FTCA to aliens, infants, corporations, Indians, and veterans.").

8. 28 U.S.C. §§ 1346(b), 2401(b), 2402, 2671-80 (1976).

9. In 1986, the number of military personnel totaled 2.15 million. 1987 Defense Dept. Ann. Rep. 44 (1986).

10. See, e.g., *Thornwell v. United States*, 471 F. Supp. 344, 347 (D.D.C. 1979) ("[W]here plaintiffs have sought recovery for injuries sustained in the course of military service, lower courts have consistently construed the *Feres* doctrine of immunity broadly.")

11. 340 U.S. 135 (1950).

12. See, e.g., Howard Donaldson, *Constitutional Torts and Military Effectiveness: A Proposed Alternative to the Feres Doctrine*, 23 A.F.L. Rev. 171, 172 (1982-83); Robert Rhodes, *The Feres Doctrine After Twenty-Five Years*, 18 A.F. L. Rev. 24, 40 (1976).

13. See, e.g., *Chappell v. Wallace*, 462 U.S. 296 (1983). The plaintiffs alleged that their superior officers discriminated against them because of race in violation of their constitutional rights. The plaintiffs cited unfair duty assignments, unfair performance evaluations, and excessive penalties as examples of discriminatory behavior. *Id.* at 297.

14. *Jaffee v. United States*, 468 F. Supp. 632, 635 (D.N.J. 1979), *aff'd*, 663 F.2d 1226 (3d Cir. 1981), *cert. denied*, 456 U.S. 972 (1982). In *Jaffee*, Stanley Jaffee claimed his constitutional rights were violated when Army and civilian Defense Department employees compelled him and other soldiers to participate in radiation testing of a nuclear device. As a result of this exposure to radiation, Jaffee suffers from inoperable lymphatic cancer. *Id.* at 1248. Jaffee was denied recovery under the FTCA.

15. 28 U.S.C. §§ 1346(b), 2401(b), 2402, 2671-80 (1976).

16. See, e.g., *Scales v. United States*, 685 F.2d 970 (5th Cir. 1982). As a result of the negligent medical treatment his mother received during basic training for the Air Force, Charles Lewis Scales was born with congenital rubella syndrome. The infant suffered from a heart murmur, cataracts, growth deficiency, and respiratory problems as a result of the condition. Furthermore, neurological damage and mental and physical retardation were possible. The court denied recovery notwithstanding that the infant had an independent cause of action under state law. The court held that the military discipline policy underlying *Feres* barred recovery even

An oral argument before Judge Stern of the Federal District Court for the District of Columbia in *Thornwell v. United States*¹⁷ illustrates the impact of judicial expansion of the *Feres* doctrine:

The Court: [A]s I read the law it doesn't matter if they stood up there and, 'one, two, three, left, right, left,' and marched them over a cliff . . . You'd be protected under *Feres* . . .

The Govt: Yes, your Honor.¹⁸

The striking inequities apparent in our legal system's treatment of military personnel through the application of the *Feres* doctrine is the subject of this article. Part I examines and criticizes the doctrine and its underlying rationale. Part II analyzes a recent Congressional response to the doctrine's shortcomings.¹⁹ Finally, Part III presents a proposal for reform of the current treatment of injured military personnel.

I. Background

The evolution of the *Feres* doctrine has not been smooth. Courts have continually struggled to define "incident to service," the phrase that triggers government nonliability. The cause of difficulty is the fact that neither the original rationale for *Feres* nor its numerous transformations support this judicially created exception to the Federal Tort Claims Act.

A. The Federal Tort Claims Act

In 1946 Congress passed the Federal Tort Claims Act,²⁰ lifting the historical blanket of sovereign immunity from the federal government.²¹ The FTCA governs the negligence of federal entities, and was designed to "extend a remedy to those who had been

though there was no command relationship between the infant and the individual tortfeasor. *Id.*

The *Feres* doctrine does not apply to bar suit by military dependents or other individuals if their injuries are not traceable to a service-connected injury. The courts, however, generously construe what is traceable to a service-related injury and thereby preserve the scope of the *Feres* doctrine.

17. 471 F. Supp. 344 (D.D.C. 1979). For further discussion of the facts of this case, see *infra* notes 98 and 147.

18. *Id.* at 348 n.1 (quoting *Jaffee*, 468 F. Supp. at 635).

19. The House of Representatives passed H.R. 1054 by a vote of 312-61 on February 17, 1988. 134 Cong. Rec. S929-02 (daily ed. Feb. 18, 1988). It was received in the Senate the next day. At the time this article went to press, H.R. 1054 was pending before the Subcommittee on Courts and Administrative Practices.

20. 28 U.S.C. §§ 1346(b), 2401(b), 2402, 2671-80 (1976).

21. For a thorough discussion of the history of the sovereign immunity doctrine and its relationship to the *Barr* rule of immunity for lower government officials, see Michael Graham, *Malpractice Protection for Military Medical Personnel and the Feres Doctrine: Constitutional Tension for the Military Plaintiff?*, 12 U.S.F. L. Rev. 525, 526-31 (1978).

without."²² The FTCA mandates that "[t]he United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances. . . ."²³ Subject to thirteen exceptions,²⁴ the FTCA allows any negligence claim against the federal government for money damages. The applicable law is that of the place where the tort occurred.²⁵

B. *An Early Decision Interpreting the FTCA: Brooks v. United States*

Three years after the FTCA went into effect, the Supreme Court addressed the rights of military personnel under the FTCA for injuries not "incident to service."²⁶ In *Brooks v. United*

22. *Feres*, 340 U.S. 135, 140 (1950).

23. 28 U.S.C. § 2674 (1976).

24. The list of exceptions in full is as follows: (a) Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused. (b) Any claim arising out of the loss, miscarriage, or negligent transmission of letters or postal matter. (c) Any claim arising in respect of the assessment or collection of any tax or customs duty, or the detention of any goods or merchandise by any officer of customs or excise or any other law-enforcement officer. (d) Any claim for which a remedy is provided by sections 741-752, 781-790 of Title 46 relating to claims or suits in admiralty against the United States. (e) Any claim arising out of an act or omission of any employee of the Government in administering the provisions of sections 1-31 of Title 50, Appendix. (f) Any claim for damages caused by the imposition or establishment of quarantine by the United States. (g) [Repealed] (h) Any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights: Provided, That, with regard to acts or omissions of investigative or law enforcement officers of the United States Government, the provisions of this chapter and section 1346(b) of this title shall apply to any claim arising, on or after the date of the enactment of this provision, out of assault, battery, false imprisonment, false arrest, abuse of process, or malicious prosecution. For the purpose of this subsection, "investigative or law enforcement officer" means any officer of the United States who is empowered by law to execute searches, to seize evidence, or to make arrests for violation of Federal law. (i) Any claim for damages caused by the fiscal operations of the Treasury or by the regulation of the monetary system. (j) Any claim arising out of the combatant activities of the military or naval forces, or the Coast Guard, during time of war. (k) Any claim arising in a foreign country. (l) Any claim arising from the activities of the Tennessee Valley Authority. (m) Any claim arising from the activities of the Panama Canal Company. (n) Any claim arising from the activities of a Federal land bank, a Federal intermediate credit bank, or a bank for co-operatives. *Id.* at § 2680. For a more complete discussion of the exceptions pertinent to military members, see *infra* text accompanying notes 154-60.

25. *Id.* at § 1346(b).

26. *Brooks v. United States*, 337 U.S. 49, 50 (1949). In *Brooks* the Court first held that whether injuries of servicepersons caused by another serviceperson's neg-

States,²⁷ two enlistees were on leave from the United States Army. Their car was struck by a truck negligently driven by a civilian employee of the Army. One of the men was killed instantly and the other was seriously injured as a result of the accident.²⁸

The government moved to dismiss the complaint on the ground that the plaintiffs were members of the military at the time of the accident and were thus barred from recovery.²⁹ Emphasizing that terms of the FTCA were "clear," the Supreme Court concluded that the language, framework, and legislative history of the FTCA dictated recovery by the plaintiffs.³⁰

The Court reasoned that the FTCA's language specifically allowed recovery for "any claim."³¹ Moreover, the FTCA disallowed recovery for claims arising in a foreign country and claims arising out of combatant activities of the military during time of war.³² The disallowance of these two specific military claims demonstrated that Congress intended recovery for other military claims. The Court stressed that the provision allowing recovery for "any claim" was unambiguous, and none of the specifically delineated exceptions barred recovery.³³

In reaching its conclusion, the Court examined the legislative history of the FTCA. Although eighteen tort claims bills were brought before Congress between 1925 and 1935, only two denied recovery to military personnel.³⁴ The Court quickly rejected an argument against recovery based on the injured claimant having received veterans benefits.³⁵ Statutes providing disability payments to servicepersons and gratuitous payments to their survivors did not prohibit recovery under the FTCA.³⁶ While typical work-

ligence were "incident to service" or "not incident to service" dictated recovery. *Id.* at 49 (emphasis added). The *Brooks* court specifically did not decide whether judicial recovery was allowed for the "wholly different case" of injuries incurred incident to service. *Id.* at 52.

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

28. *Id.* at 50.

29. *Id.* at 51.

30. *Id.*

31. *Id.*

32. *Id.* (citing 28 U.S.C. § 2680(k),(j)).

33. *Id.*

34. *Id.*

35. The *Brooks* court implied that government benefits received would be subtracted from any recovery under the FTCA, finding "no indication that Congress meant the United States to pay twice for the same injury." *Id.* at 53. Upon remand the Fourth Circuit reduced the FTCA judgment by the amount of disability benefits the plaintiff had received or would receive in the future. *United States v. Brooks*, 176 F.2d 482, 484 (4th Cir. 1949).

36. *Brooks*, 337 U.S. at 53.

ers compensation statutes provided for exclusivity of remedy,³⁷ such a provision was absent in both the FTCA and the veterans laws. The Court concluded that the specific provisions in other statutes and the language of the FTCA itself made it highly unlikely that the absence of an exclusivity provision for military members was a result of Congressional oversight. Therefore, military members injured in circumstances *not* incident to their service were afforded redress by the FTCA. Although *Brooks* has never been overruled, later court decisions have narrowed its application by generously construing the term "incident to service."³⁸

*C. A Judicially Created Exception to the FTCA for
Military Plaintiffs: Feres v. United States*

One year after the *Brooks* case was decided, the Supreme Court faced the issue reserved in *Brooks*: whether the United States government was liable under the FTCA for injuries "incident to service" sustained by servicepersons resulting from the negligence of other servicepersons. The Court was determining if an individual's status as an active duty enlisted person barred redress for an otherwise actionable wrong.³⁹

In *Feres v. United States*,⁴⁰ a lieutenant died in a barracks fire. The executrix of his estate instituted a negligence suit based on the military's having quartered him in barracks known to be unsafe. A defective heating plant existed in the barracks and consequently caused the fire. The Army also failed to maintain an adequate fire watch.⁴¹

The *Brooks* court explicitly left open the issue later presented to the *Feres* court. While *Brooks* interpreted the FTCA to cover claims *not* incident to service, much of the reasoning in *Brooks* "is as apt to impose liability in favor of a man on duty as in favor of one on leave."⁴² A unanimous court in *Feres*, worried

37. See, e.g., Minn. Stat. Ann. § 176.031 (West 1966) ("The liability of an employer prescribed by this chapter is exclusive and in the place of any other liability to such employe, his personal representative, surviving spouse, parent, any child, dependent, next of kin, or other person entitled to recover damages on account of such injury or death.").

38. See *infra* note 72.

39. The defendant's military status is not dispositive, as civilians may sue the military under the FTCA. Courtney Howland, *The Hands-Off Policy and Intramilitary Torts*, 71 Iowa L. Rev. 93, 102 (1985).

40. 340 U.S. 135 (1950). Along with *Feres*, the Court considered two cases involving medical malpractice of Army doctors. *Jefferson v. United States*, 178 F.2d 518 (4th Cir. 1949); *United States v. Griggs*, 178 F.2d 1 (10th Cir. 1950) (army surgeons negligently caused death of an army officer).

41. *Feres*, 340 U.S. at 137.

42. *Id.* at 139.

about depleting the public treasury,⁴³ chose instead to distinguish *Brooks* and deny recovery for the service-connected injuries of active duty servicepersons.

Noting that the FTCA must fit as much as possible into the entire statutory system of remedies against the government,⁴⁴ the Court cited three⁴⁵ reasons for its newly created exception to the FTCA. First, the relationship between the government and military personnel was "distinctively federal in character."⁴⁶ Since the federal government and not the soldier chose his location, it would be unfair to allow the location of a soldier's injury to determine recovery. Second, the Veterans Benefits Act (VBA)⁴⁷ established a system of "simple, certain, and uniform"⁴⁸ redress for the injuries or death of servicepersons. The Court reasoned that the existence of at least one statutory scheme, albeit a limited one, was sufficient relief. Third, the FTCA only rendered the government liable "in the same manner and to the same extent as a private individual under like circumstances,"⁴⁹ and there was no parallel private liability when the relationship of the wronged to the wrongdoer was considered. In other words, because private persons lacked the authority to command armies, private liability in this situation could never arise.

The Court's reasons were unpersuasive in 1950 and are less persuasive now.⁵⁰ Every reason posited by *Feres* is subject to challenge.⁵¹ With respect to the problem of the injury's geography dictating recovery, soldiers would likely prefer to chance state law than be denied recovery at the outset. It is less equitable to deny all soldiers recovery, under the guise of government benevolence,

43. *See id.*

44. *Id.*

45. Courts and commentators vary in their tabulation of the number of reasons given by the Supreme Court in support of *Feres*. *See, e.g.,* Stencel Aero Eng'g Corp. v. United States, 431 U.S. 666 (1977) (two reasons); Note, *From Feres to Stencel: Should Military Personnel Have Access to FTCA Recovery?*, 77 Mich. L. Rev. 1099 (1979) (four reasons); Sidney Jacoby, *The Feres Doctrine*, 24 Hastings L. J. 1281 (1973) (five reasons).

46. *Feres*, 340 U.S. at 143 (quoting *United States v. Standard Oil Co.*, 332 U.S. 301, 305 (1947)).

47. 38 U.S.C. §§ 310-62 (1982) (compensation); *id.* at § 610 (eligibility for hospital, nursing home and domiciliary care); *id.* at § 612 (eligibility for medical treatment).

48. *Feres*, 340 U.S. at 144.

49. *Id.* at 141 (quoting 28 U.S.C. § 2674).

50. *See infra* text accompanying notes 86-91.

51. *See, e.g.,* Camassar v. United States, 400 F. Supp. 894, 897 (D. Conn. 1975) (quoting *Henninger v. United States*, 473 F.2d 814, 815 (9th Cir.) (precise rationale for *Feres* rule and continuing validity have been source of confusion), *cert. denied*, 414 U.S. 819 (1973)).

than to permit recovery if the tort laws of a given state are favorable.

Furthermore, many other government agencies, such as the Bureau of the Census and the Immigration and Naturalization Service, perform a "unique, nationwide function,"⁵² with personnel and equipment scattered across the country.⁵³ The government is liable for negligent acts of these agencies despite the fact that resulting suits are governed by laws of the various states.⁵⁴ Additionally, when off-duty soldiers are permitted to recover under *Brooks*, and the service-connected injuries of discharged soldiers are aggravated by the negligence of other soldiers,⁵⁵ government liability is dictated by the law of the place of injury. It thus remains unexplained why it "makes no sense"⁵⁶ for state law to govern recovery for service-connected injuries of servicepersons, when the application of state law in similar situations is commonplace.

The Court's second reason for denying recovery—that the existence of the VBA obviates the need for tort recovery—is also unconvincing.⁵⁷ In stark contrast to the Court's logic one year earlier in *Brooks*, the existence of veterans benefits in *Feres* was suddenly held to preclude FTCA recovery. Yet the reasons given in *Brooks* for not allowing veterans benefits to bar an FTCA recovery remain convincing.

Veterans benefits are an inadequate replacement for tort re-

52. *Stencel*, 431 U.S. 666, 675 (1977) (Marshall, J., dissenting).

53. *Id.* (Marshall, J., dissenting).

54. *See, e.g., Hunt v. United States*, 636 F.2d 580 (D.C. Cir. 1980), where the court candidly stated:

[T]he notion that the soldier-sovereign relationship is distinctly federal in character evades easy application. The Supreme Court has never made clear why this relationship makes impossible the determination of an analogous private liability, given that such a determination has been made in cases involving other relationships that are seemingly just as 'distinctly federal in character.' *See, e.g., United States v. Muniz*, 374 U.S. 150, 83 S.Ct. 1850, 10 L.Ed.2d 805 (1963) (relationship between federal prison officials and prisoners); *Indian Towing Co. v. United States*, 350 U.S. 61, 76 S.Ct. 122, 100 L.Ed. 48 (1955) (relationship between Coast Guard and vessels it protects).

Hunt, 636 F.2d at 597.

55. *See infra* text accompanying notes 72-75.

56. *Feres*, 340 U.S. 135, 143 (1950).

57. In *Hunt* the court stated:

The second factor discussed in *Feres*, the presence of an alternative military compensation system, is no less nebulous than the first. The Supreme Court has relied on this factor in cases in which it has applied the *Feres* doctrine, but it has also rejected the factor's importance in other cases in which its use would seem equally appropriate.

636 F.2d at 598 (citations omitted).

covery for two reasons.⁵⁸ First, veterans benefits are meager when compared to tort recovery.⁵⁹ Second, an injured soldier is not guaranteed veterans benefits; rather, their availability depends on the serviceperson's discharge status.⁶⁰ For example, a military member discharged for "homosexual acts,"⁶¹ conscientious objection⁶² or any "offense involving moral turpitude"⁶³ will be denied benefits.⁶⁴ Even if a serviceperson's death or injury is sufficiently

58. Howland, *supra* note 39, at 135. For a more extensive comparison of tort recovery to veterans benefits, see *id.* at 133-37.

59. See *id.* at 136 ("Veterans benefits pale in comparison to potential tort recoveries."). See also Graham, *supra* note 21, at 553 (determination of veterans benefits disregards standard of pain and suffering); Douglas Bradshaw, *Veterans Administration Benefits and Tort Claims Against the Military*, Army Law., Sept. 1986, at 6. Bradshaw explains:

The primary periodic monetary benefits payable to veterans, their dependents, or survivors for disability or death are compensation and pension. . . . Payments are based upon the degree of severity of disability. The amount of compensation ranges from \$68 per month for a 10% disability to \$1,335 per month when the veteran is 100% disabled. . . .

Death compensation, known as Disability and Indemnity Compensation (DIC), is paid to eligible survivors (spouse, children, dependent parents) of a veteran who dies of a service-connected disability or while on active duty. . . . The monthly amount of DIC paid to a surviving spouse is based upon the veteran's highest military grade while in service. Current rates range from \$491 for the spouse of an E-1, to \$1,345 payable to the spouse of a veteran who served as Chairman of the Joint Chiefs of Staff, Chief of Staff of the Army or Air Force, Chief of Naval Operations, or Commandant of the Marine Corps or Coast Guard.

Id. at 6-7.

60. Howland, *supra* note 39, at 136.

61. 38 C.F.R. § 3.12(d)(5) (1978).

62. 38 C.F.R. § 3.12(c)(1) (1978). The constitutionality of this provision was re-enforced in *Bowers v. Hardwick*, 478 U.S. 186 (1986). In *Watkins v. United States Army*, however, the Ninth Circuit Court of Appeals distinguished homosexual acts from homosexual tendencies. 837 F.2d 1428 (9th Cir. 1988). The court then held that persons of homosexual tendencies were a suspect class and that the army regulations at issue in that case were not necessary to promote a legitimate compelling governmental interest and were thus unconstitutional. *Id.* at 1451. Even under the liberal *Watkins* decision, however, this statutory provision is constitutional, as it focuses on homosexual acts rather than protected homosexual tendencies.

63. 38 C.F.R. § 3.12(d)(3) (1978).

64. Note, *supra* note 45, at 1107-08. The regulations in full regarding the types of discharge that bar payment of veterans benefits are as follows:

(c) Benefits are not payable where the veteran was discharged or released under one of the following conditions:

(1) As a conscientious objector who refused to perform military duty, wear the uniform, or comply with lawful order of competent military authorities.

(2) By reason of the sentence of a general court-martial.

(3) Resignation by an officer for the good of the service.

(4) As a deserter.

(5) As an alien during a period of hostilities, where it is affirmatively shown that the veteran requested his or her release.

(d) A discharge of release because of one of the offenses specified in

service-connected for *Feres* purposes, it may not meet VBA requirements, thereby leaving the soldier with no redress.⁶⁵ As stated in *Hunt v. United States*,⁶⁶ "it cannot be said that the presence of an alternative compensation system either explains or justifies the *Feres* doctrine; it only makes the effect of the doctrine more palatable."⁶⁷

The third rationale for *Feres* was that the required parallel private liability was absent when the relationship of the parties was considered. This rationale was based on an unduly strict interpretation of the FTCA's language requiring parallel private liability.⁶⁸ Indeed, a "plain meaning" of the statute indicates that it was intended to create liability as far-reaching as that of private individuals. It is illogical to focus on the relationship of the parties, because the purpose of the FTCA was to reject sovereign immunity where the governmental relationship previously barred recovery.⁶⁹

this paragraph is considered to have been issued under dishonorable conditions.

(1) Acceptance of an undesirable discharge to escape trial by general court-martial.

(2) Mutiny or spying.

(3) An offense involving moral turpitude. This includes, generally, conviction of a felony.

(4) Willful and persistent misconduct. This includes a discharge under other than honorable conditions, if it is determined that it was issued because of willful and persistent misconduct. A discharge because of a minor offense will not, however, be considered willful and persistent misconduct if service was otherwise honest, faithful and meritorious.

(5) Generally, homosexual acts.

Id. at 1108 n. 57 (quoting 38 C.F.R. § 3.12(c), (d) (1978)).

65. See, e.g., *Healy v. United States*, 192 F. Supp. 325 (S.D. N.Y. 1961); *Glorioso v. United States*, 332 F. Supp. 1 (N.D. Miss. 1971) (military plaintiffs denied cause of action under FTCA for their service-connected injuries, even though ineligible for veterans benefits.).

66. 636 F.2d 580 (D.C. Cir. 1980).

67. *Id.* at 598. For a dispassionate pronouncement of the same principle, see *Bailey v. Von Buskird*, 345 F.2d 298, 298 (9th Cir. 1965) ("All we deny plaintiff-appellant is a remedy he likes better.").

68. Professor David E. Seidelson offers the following analogy:

No one would contend that a motorist injured when his vehicle is struck by a negligently operated mail delivery truck could not recover under the FTCA. The Act's applicability is apparent and remains so even if the truck were carrying first-class mail, an activity prohibited to any private entity.

David Seidelson, *The Feres Exception to the Federal Tort Claims Act: New Insight Into an Old Problem*, 11 Hofstra L. Rev. 629, 633 (1983).

69. The Court's rationale was explicitly rejected seven years later in *Rayonier Inc. v. United States*: "[T]he very purpose of the Tort Claims Act was to waive the Government's traditional all-encompassing immunity from tort actions and to establish novel and unprecedented governmental liability." 352 U.S. 315, 319 (1957). See also *United States v. Muniz*, 374 U.S. 150, 159 (1962) (government liability no

Despite its technical language concerns, the Court ignored the conspicuous absence of a blanket prohibition on claims of military personnel, instead "rush[ing] in where legislators feared to tread."⁷⁰ Thus, the reasoning of *Feres* is not persuasive, as the Court implicitly recognized four years later in *United States v. Brown*.⁷¹

*D. The Modern Justification for the Feres Doctrine:
United States v. Brown and its Progeny*

In *Brown*, the Supreme Court once again grappled with the definition of "incident to service."⁷² The *Brown* plaintiff, a discharged veteran,⁷³ sought treatment of a service-connected disability at a Veterans Administration Hospital. The plaintiff alleged that the negligently-performed operation resulted in permanent nerve damage to his leg.⁷⁴ The majority held the action maintain-

longer restricted to circumstances in which government bodies have traditionally been responsible for misconduct of their employees, but rather extends to novel and unprecedented forms of liability as well).

70. *Parker v. United States*, 611 F.2d 1007, 1009 (5th Cir. 1980).

71. 348 U.S. 110 (1954).

72. The issue of whether an injury is "incident to service"—dispositive of whether *Brooks* or *Feres* applies—continues to trouble the courts. It is clear that a military member on active duty (i.e., not on leave) is barred from recovery under the *Feres* doctrine. Less clear, however, is whether an injury incurred while on leave is incident to service. In *Camassar v. United States*, the court stated that "[t]he decided cases seem to indicate that if the injury occurred on a base, the claim is barred, whereas an injury off the base might or might not be barred depending on what the claimant was doing." 400 F. Supp. at 895. Compare *United States v. Shearer*, 473 U.S. 52 (1985) (administratrix not entitled to recovery where army's negligent personnel decision resulted in her enlisted son being kidnapped and murdered by another serviceman while off duty and away from base) and *Buer v. United States*, 241 F.2d 3 (7th Cir. 1956) (soldier injured while on leave but treated in military hospital denied recovery under *Feres* for part of surgical drill left in his eye), cert. denied, 353 U.S. 974 (1957) and *James v. United States*, 358 F. Supp. 1381 (1973) (recovery denied to estate of serviceman where, while on leave but in the custody of military security personnel at a military installation, racial slurs resulted in fatal beating of enlistee by security guard) and *Redmond v. United States*, 331 F. Supp. 1222, 1224 (N.D. Ill. 1971) (service member's death "inseparably intertwined" with army service, even though failure to diagnose occurred before induction and death from cancer occurred after discharge) with *Mills v. Tucker*, 499 F.2d 866 (9th Cir. 1974) (recovery allowed for death of naval petty officer on furlough who was killed in traffic accident caused in part by Navy's negligent road maintenance where highway was publicly used base access road and officer was returning from civilian "moonlighting" job).

73. The United States has 27.7 million veterans. Veterans Administration, Federal Benefits for Veterans and Dependents at i (1987).

74. Peter Brown was honorably discharged from the Armed Services in 1944 following a knee injury incurred while on active duty. In 1950, the Veterans Administration operated on the knee. The knee continued to dislocate frequently, and another operation was performed in 1951. *Brown*, 348 U.S. at 110.

During the 1951 operation, Army doctors applied a tourniquet to Brown's left

able against the United States even though the plaintiff's veterans benefits had been increased due to the aggravated injury.⁷⁵

The Court's decision necessitated modifying the *Feres* rationale.⁷⁶ This time there was no mention of the problems and unfairness in allowing recovery to depend on the fortuity of the injury's location.⁷⁷ Moreover, the *Brown* plaintiff not only received veterans benefits for the initial knee injury but also obtained an increase in benefits following the aggravating operation. The Court therefore had to abandon issues of the unfairness of disparate state recovery and the existence of alternative compensation as motivating factors behind the *Feres* doctrine.

The *Brown* Court modified the reasoning behind *Feres* even further. Rather than considering the relationship of the parties in determining whether parallel private liability existed, the Court now required only parallelism in the substance of the claim. Noting that a medical malpractice claim was cognizable under state law if the defendant were a private party, the Court held the injury not incident to service and thus allowed recovery under the FTCA.⁷⁸ Consequently, the final rationale of *Feres* was abandoned.

Perhaps realizing that it had demolished the foundation of *Feres*, the *Brown* court formulated a new one: military discipline.⁷⁹ The Court stated:

leg in a grossly negligent manner. Instead of promptly removing the tourniquet, the doctors increased its pressure. Brown consequently was hospitalized for 16 weeks and had to return to the hospital daily for treatment following his release. Brown has no feeling in his leg below the knee, has lost control of some of the muscles in his lower leg, and requires the aid of an orthopedic brace to walk. Transcript of Record at 2, *United States v. Brown*, 348 U.S. 110 (1954) (No. 54-38).

75. Brown's monthly veterans benefits increased from \$15.00 to \$119.70. Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit at 4, *Brown* (No. 54-38).

76. See, e.g., Donaldson, *supra* note 12, at 183 (footnote omitted) ("*United States v. Brown* narrowed considerably the focus of the overall rationale underlying *Feres*.").

77. *Feres* held that it made "no sense" to let the geography of an injury dictate government liability in light of the "distinctively federal" relationship between the government and military personnel. *Brown* made no mention of this logic, perhaps predicting its demise. See *supra* notes 52 through 56 and accompanying text.

78. The *Brown* Court did not point out that two of the three cases decided in *Feres* concerned medical malpractice claims. See *supra* note 40. Instead of focusing on the relationship of the parties, the *Brown* Court found parallel private liability in the cognizance of medical malpractice suits under local law.

79. See, e.g., Johnson v. United States, 749 F.2d 1530 (11th Cir. 1985) (most significant aspect of *Brown* is what has come to be regarded as single most important and defensible rationale for the *Feres* doctrine—military discipline); Stencel Aero Eng'g Corp. v. United States, 431 U.S. 666, 671-72 (*United States v. Brown* explained the military discipline factor considered in *Feres*).

The peculiar and special relationship of the soldier to his superiors, the effects of the maintenance of such suits on discipline, and the extreme results that might obtain if suits under the Tort Claims Act were allowed for negligent orders given or negligent acts committed in the course of military duty, led the [*Feres*] Court to read that Act as excluding claims of that character.⁸⁰

The plaintiff in *Brown* was not subject to military discipline when the injury occurred and hence was allowed recovery under the FTCA.⁸¹ Thus, the modern justification for the *Feres* doctrine was born.⁸²

Subsequent cases fine-tuned the "military discipline" rationale. In *Chappell v. Wallace*,⁸³ the Court found that "[t]he inescapable demands of military discipline and obedience to orders cannot be taught on battlefields; the habit of immediate compliance with military procedures and orders must be virtually reflex with no time for debate or reflection."⁸⁴ In *Hunt*, the Court articulated that it was "unseemly to have military personnel injured incident to their service, asserting claims that question the propriety of decisions or conduct by fellow members of the military."⁸⁵ It appears that the Court in *Hunt* found it more appropriate to single out military members and deny them access to the courts. Both *Hunt* and *Chappell* defend the military discipline rationale based on the allegedly detrimental effect it would have on a soldier's decision whether to obey orders during battle.

With the advent of modern warfare and professionally trained combat teams, however, blind adherence to rules and orders is no longer the ideal.⁸⁶ Rather, the ability to modify plans in the face of changed conditions marks the model soldier.⁸⁷ The

80. *Brown*, 348 U.S. at 112. Note that while *Brown* cites *Feres* as authority for this military discipline rationale, it is nowhere to be found in *Feres*.

81. 348 U.S. 110. The *Brown* court did not, however, address the fact that a suit by *Brown* would still involve the questioning of military conduct, even if *Brown* himself was no longer subject to military command.

82. See, e.g., *Hunt*, 636 F.2d 580, 599 (D.C. Cir. 1980) (protection of military discipline serves largely if not exclusively as predicate for *Feres* doctrine).

83. 462 U.S. 296 (1983).

84. *Id.* at 300.

85. 636 F.2d at 599.

86. Judge Gibbons, dissenting in *Jaffee v. United States*, called this purported need for rigid adherence to orders the "serviceman as automaton principle." 663 F.2d 1226, 1250 (3d Cir. 1981) (Gibbons, J., dissenting), *cert. denied*, 456 U.S. 972 (1982). Unconvinced by the majority's reasons for denying recovery, Judge Gibbons stated: "The real but unarticulated reason for the result is that the availability of a private remedy for intentional torts will encourage public accountability of the military, while foreclosing such a remedy will encourage concealment (the coverup principle)." *Id.* at 1250.

87. Morris Janowitz asserts that during World War II emphasis shifted to the

"obey without question" military discipline rationale of *Feres* does not foster innovation. The soldier cannot be expected to be creative for the first time in battle.

The judicial confusion over the *Feres* doctrine is further reflected in the transient rationales for *Feres*. The varying logic suggests a lack of substance. Similarly, the military discipline rationale exhibits a lack of substance. Allowing government liability in similar situations has not brought about the dire consequences predicted by the courts. For example, servicepersons can bring actions on behalf of dependents if the injury does not stem from the service-connected injury of a serviceperson. Thus, the parent soldier is allowed to question the reasonableness of another soldier's actions. Yet military discipline has not suffered from the judicial examination of the actions or inactions of military tortfeasors.

Similarly, prison structures have not collapsed with the advent of government liability for negligence, as the government argued in *United States v. Muniz*.⁸⁸ The Court's dismissal of the government's "prison discipline fears"⁸⁹ can be seen as further erosion of the modern military discipline logic behind *Feres*.⁹⁰

The *Brown* minority considered *Feres* controlling. Their characterization of the preference for veterans over active duty members as "an unjustifiable discrimination which the Act does not require"⁹¹ unwittingly sheds light on the *Feres* doctrine as a whole. Surely the preference for all others in the United States over military members is also "unjustifiable discrimination," especially in light of *Feres*' questionable rationale.

E. An Expansion to Bar Third Party Indemnity Claims: Stencel Aero Engineering Corp. v. United States

Despite the inroads on the theoretical predicates of the *Feres* doctrine, its scope was broadened in *Stencel Aero Engineering*

individual's "own judgment about the best response to make when confronted with given types of danger. The very designation 'combat team' . . . emphasizes the positive contribution of each person regardless of rank. . . . The morale and coordination of a complex group of specialists cannot rest simply on authoritarian discipline." Morris Janowitz, *Sociology and the Military Establishment* 43 (1965), quoted in Howland, *supra* note 39, at 113.

88. 374 U.S. 150 (1963).

89. *Id.* at 163. The *Muniz* court concluded that while it was possible that litigating prisoner claims would damage prison discipline, the spectre raised by the Government was more a matter of possibilities than of actualities. *Id.*

90. See, e.g., *Johnson v. United States* 749 F.2d 1530, 1533 (11th Cir. 1985) (continued viability of *Feres* doctrine again questioned, albeit implicitly, in *Muniz*).

91. *Brown*, 348 U.S. at 114 (Black, J., dissenting).

Corp. v. United States.⁹² The *Stencel* court held that the right of a third party to recover in an indemnity action against the United States is limited by *Feres* if the injured party is a serviceperson.⁹³ Thus, if the plaintiff's injury is service-connected, the original defendant must pay the entire judgment, even if the United States was primarily responsible for the injury. To achieve this result, the Court relied on the original *Feres* rationale.⁹⁴ As a consequence, the Court ignored the intervening *Brown* decision which had stripped the logic of *Feres*.

The entire Court, however, was not convinced. Justice Marshall, joined by Justice Brennan, delivered a powerful dissent, illustrating the technical maze in which the Court had trapped itself. Justice Marshall noted that if the same defective pilot eject system that caused the serviceman's injuries in *Stencel* had caused a crash which injured a civilian, there would be the same "second guessing of military orders" as in the case at bar.⁹⁵

The implications of Justice Marshall's analogy are far-reaching. After *Brown*, the only remaining rationale for the continued discrimination against servicepersons was the maintenance of military discipline. While *Feres* prohibits the internal questioning of military orders on the theory that the rigors of military discipline require it, outsiders are routinely allowed to drag military tortfeasors into court and question them about their motive, training, and chain of command if the plaintiff is a private citizen. Because accountability to outsiders is more intrusive than internal

92. 431 U.S. 666 (1977). See, e.g., *Thornwell v. United States*, 471 F. Supp. 344, 347 (D.D.C. 1979) ("In *Stencel Aero Engineering Corp. v. United States* the Supreme Court had an opportunity to reconsider *Feres*, and it again elected a broad application of the decision.") (citation omitted).

93. 431 U.S. at 673.

94. The *Stencel* court enumerated three reasons for its decision. First, as in *Feres*, it made no sense to have the location of the negligent act determine government liability for injuries incurred incident to service. *Id.* at 672. While the *Feres* court held this contingency unfair to the serviceperson, *Stencel* focused on the unfairness of the place of injury controlling the government's liability.

Second, the Veterans Benefits Act served as a cap on government liability for service-connected injuries. Permitting federal indemnity of government contractors would circumvent this cap. *Id.* at 673. The *Stencel* Court convoluted this rationale as well. In *Feres* veterans benefits were hailed as "no-fault" and "simple, certain, and uniform" recovery for the soldier, whereas *Stencel* recharacterized them as an "upper limit of liability" for the government.

Finally, even if brought by a third party, cases of this type would still adversely affect military discipline and involve the second-guessing of military orders. The Court reached this result by reasoning that the question litigated would be the degree of fault of servicepersons. Military personnel would still be required to testify about each other's decisions and actions. Such testimony would therefore impinge on military discipline. *Id.*

95. *Stencel*, 431 U.S. at 676 (Marshall, J., dissenting).

accountability,⁹⁶ Justice Marshall's dissent weakens the foundation of *Feres*' last supporting rationale.

In short, for 38 years the *Feres* doctrine has barred claims by on-duty servicepersons injured due to the negligence of other servicepersons. Indeed, the scope of the *Feres* doctrine has been expanded to apply to virtually all facets of active duty, including recreation, off-duty secondary employment on a military base, and the activities of reservists.⁹⁷ Thus, it is not likely that any relief will come from the judiciary.⁹⁸

The judiciary has commented that it is Congress' prerogative to change the law. The Supreme Court reflected on this in *Feres*, when it stated "if we misinterpret the Act, at least Congress possesses a ready remedy."⁹⁹

II. Congressional Action

Congress is currently considering a bill that would allow soldiers to sue for service-connected medical or dental malpractice. Although the Justice and Defense Departments strongly object to

96. See Howland, *supra* note 39, at 105 ("To the [Supreme] Court, separateness [is required by the military and] connotes the isolation of the military and its personnel from civilians and civilian institutions.").

97. *Hearings on H.R. 1054 and H.R. 1341 Before the Subcomm. on Administrative Law and Governmental Relations of the House Comm. of the Judiciary*, 100th Cong., 1st Sess. 10 (1987) [hereinafter *Hearings*] (statement of Richard K. Willard, Assistant Attorney General, Civil Division, Department of Justice).

98. Not all judges, however, have glibly applied *Feres*. Judge Gibbons delivered a chillingly eloquent dissent in *Jaffee*:

That any judicial tribunal in the world, in the last fifth of this dismal century, would choose to place a class of persons outside the protection against human rights violations provided by the admonitory law of intentional torts is surprising. That it should be an American court will dismay persons the world over concerned with human rights and will embarrass our Government. That this court, which once had a deserved reputation for sensitivity to human rights issues, should undertake to do so is a saddening demonstration of the extent to which it has lost the spirit which once animated our deliberations.

663 F.2d 1226, 1250 (3d Cir. 1981), *cert. denied*, 456 U.S. 972 (1982).

See also *Thornwell v. United States*, 471 F. Supp. 344 (D.D.C. 1979). In *Thornwell*, Judge Richey dismissed counts I-IV of James Thornwell's complaint, which alleged the surreptitious administration of LSD followed by interrogations under conditions of severe distress. Judge Richey, however, found it necessary to add a footnote:

In holding that counts I-IV must be dismissed, the Court acknowledges the precedent of *Feres*, but does not offer any approval for the scope of that decision. Indeed, to this Court, *Feres* appears to grant an immunity which is broader than necessary and, as a result, the application of that immunity may at times lead to unconscionable results.

Id. at 348 n.1.

99. 340 U.S. 135, 138.

the bill, their objections do not outweigh the benefits of H.R. 1054's enactment.

A. Allowance of Malpractice Claims: H.R. 1054

During nearly four decades of judicial expansion of the *Feres* doctrine, Congress acquiesced through inaction.¹⁰⁰ But now, partial legislative relief appears on the horizon. H.R. 1054¹⁰¹ would allow military or full-time National Guard members to sue the federal government for personal injuries or death *arising out of medical or dental care* furnished by a member of the Armed

100. Jacoby, *supra* note 45, at 1283.

101. 100th Cong., 1st Sess. (1987). H.R. 1054 in full reads as follows:

AN ACT

To amend chapter 171 of title 28, United States Code, to allow claims against the United States under that chapter for damages arising from certain negligent medical care provided members of the Armed Forces.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. CLAIMS FOR IMPROPER MEDICAL CARE.

(a) COGNIZABLE CLAIMS.—Chapter 171 of title 28, United States Code, is amended by adding at the end the following new section:

§ 2681. Certain claims arising out of medical care provided members of the Armed Forces

(a) CLAIMS AUTHORIZED.—Subject to the provisions of this chapter, claims may be brought under this chapter for damages against the United States for personal injury or death of a member of the Armed Forces serving on active duty or on full-time National Guard duty (as defined in section 101(42) of title 10), under the conditions prescribed in this section.

(b) LIMITATION TO MEDICAL CARE IN FIXED FACILITIES.—The personal injury or death referred to in subsection (a) must have arisen out of medical or dental care furnished the member of the Armed Forces in a fixed medical facility operated by the Secretary of a military department or any other fixed medical facility operated by the United States.

(c) REDUCTION OF AWARDS OR JUDGMENTS BY OTHER GOVERNMENT BENEFITS.—The amount of an award or judgment on a claim under this section for personal injury or death of a member of the Armed Forces shall be reduced by the agency making the award, or the court entering the judgment, as the case may be, by an amount equal to the total amount of other monetary benefits received or to be received by the member and the member's estate, survivors, and beneficiaries, under title 10, title 37, or title 38 that are attributable to the personal injury or death from which the claim arose. If the amount of future benefits cannot be determined because the benefits are provided under an annuity or other program of periodic payments, the amount of the reduction with respect to such future benefits shall be the actuarial present value of such future benefits.

(d) LIMITATION ON NONECONOMIC DAMAGES.—Any liability on a claim brought under this section shall be limited to not more than \$300,000 for losses other than economic losses.

(e) DEFINITIONS.—For purposes of this section—

(1) the term "fixed medical facility" means a medical center,

hospital, or clinic that is located in a building, structure, or other improvement to real property; and

(2) the term 'personal injury' does not include mental or emotional disability unless it is the direct result of a physical injury.

(b) CLERICAL AMENDMENT.—The table of sections for chapter 171 of title 28, United States Code, is amended by adding at the end the following new item:

2681. Certain claims arising out of medical care provided members of the Armed Forces.

SEC. 2. EFFECTIVE DATE.

Section 2681 of title 28, United States Code, as added by section 1, shall apply only with respect to personal injuries or deaths occurring on or after the date of the enactment of this Act.

The history of the bill, introduced in January 1987 by Representative Barney Frank, is as follows:

During the 98th Congress, the Subcommittee on Administrative Law and Governmental Relations held hearings on a similar bill, H.R. 1942. During the 99th Congress, the Subcommittee held hearings on H.R. 1161, Military Medical Malpractice, on July 8, and 9, 1985. The Subcommittee amended H.R. 1161 to include a section on "Reduction of Claims by Other Benefits" and to define "fixed medical facility", and favorably recommended a clean bill containing these modifications to the full Committee. This clean bill, H.R. 3175, passed the House by 317 to 90, with a floor amendment defining "personal injury". H.R. 1054 as introduced in the 100th Congress is identical to this House-passed bill.

H.R. Rep. No. 279, 100th Cong., 1st Sess., at 5-6 (1987).

The House of Representatives passed H.R. 1054 by a vote of 312-61 on February 17, 1988. 134 Cong. Rec. S929-02 (daily ed. Feb. 18, 1988). It was received in the Senate the next day. WESTLAW, Billcast library, Status file. At the time this article went to press, H.R. 1054 was pending before the Subcommittee on Courts and Administrative Practices.

Another bill, S. 347, would also allow military persons to sue the United States for certain injuries caused by improper medical care. S. 347 provides:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That (a) chapter 171 of title 28, United States Code, is amended by adding at the end thereof the following new section: S 2681. Certain claims by members of the Armed Forces of the United States

(a) Claims may be brought under this chapter for damages against the United States for the personal injury or death of a member of the Armed Forces of the United States arising out of the noncombatant activities of the Armed Forces while such member is serving on active duty if the claim arises out of the negligence of any physician, dentist, nurse, pharmacist, or paramedical or other supporting personnel (including medical and dental technicians, nursing assistants, and therapists) of the Armed Forces acting within the scope of their office or employment in a hospital or other medical facility of the Armed Forces.

(b) Actions brought pursuant to this section shall be brought in the appropriate court of the United States.

(c) The remedy against the United States provided by this section shall be exclusive of any other civil action or proceeding by reason of the same subject matter against the employee or the estate of the employee whose act or omission gave rise to the claim."

(d) The table of sections for chapter 171 of title 28, United States Code, is amended by adding at the end thereof the following new item:

Forces if the care was provided in a "fixed medical facility."¹⁰² This is defined as a "medical center, hospital, or clinic that is located in a building, structure, or other improvement to real property."¹⁰³ Mental or emotional disability is not compensable unless it is the direct result of a physical injury. Any other benefits received by the injured member or his/her estate attributable to the injury or death from which the claim arose reduce the recovery provided by the bill.¹⁰⁴ H.R. 1054, as currently proposed, thus allows tort recovery for servicepersons injured by medical malpractice, yet establishes limits that should assuage historical judicial concerns.

B. Justice Department Objections

The Justice Department asserts that passage of the bill would overrule the long-standing and viable *Feres* doctrine preventing military hospital medical malpractice claims.¹⁰⁵ The Department finds the reasons supporting the *Feres* doctrine controlling: the existence of veterans benefits, the effect of lawsuits upon military discipline,¹⁰⁶ and the distinctly federal relationship between the government and military members making the application of state

2681. *Certain claims by members of the Armed Forces of the United States.*

Sec. 2. Section 2681 of title 28, United States Code, as added by the first section of this Act, shall apply only with respect to claims arising on or after the date of enactment of this Act.

100th Cong., 1st Sess. (1987).

There are some differences between H.R. 1054 and S. 347. The latter provides that redress under the bill bars a civil action against the individual military tortfeasor. This is unnecessary, however, as the Gonzales Bill precludes suits against individual military medical personnel. 10 U.S.C. § 1089 (Supp. 4 1976); 32 U.S.C. § 334 (Supp. 4 1976). For further discussion of the Gonzales Bill, see *supra* note 139.

S. 347 fails to mention the interaction with veterans benefits. Given current judicial treatment of these claims, the courts may interpret this new remedy as exclusive. S. 347 explains which tortfeasors are covered by the bill, which may needlessly involve courts in battles over whether a given tortfeasor is properly defined as "supporting personnel." *Id.*

H.R. 1054, unlike S. 347, specifically excludes mental illness which is not the direct result of a physical injury. H.R. 1054 also limits recovery to injuries occurring in a "fixed medical facility."

H.R. 1054 is discussed in this article as it is the bill being most seriously considered by Congress.

102. H.R. 1054, 100th Cong., 1st Sess., § 1 (1987).

103. *Id.*

104. *Id.*

105. *Hearings, supra* note 97, at 1 (statement of Richard K. Willard, Assistant Attorney General, Civil Division, Department of Justice).

106. The military discipline rationale was first enunciated in *Brown*, not *Feres*. See *supra* notes 76 through 82 and accompanying text. It is, however, one of three grounds used to support the *Feres* doctrine.

law unfair.¹⁰⁷

The Justice Department advocates a significant addition¹⁰⁸ to the military discipline rationale of *Feres*: the impropriety of judicial intervention in military affairs.¹⁰⁹ This hands-off approach is said to "derive from society's most elemental instinct: self preservation through a strong military."¹¹⁰ Apparently the preservation of individual soldiers is less compelling. What the Justice Department really seeks to preserve is an unaccountable military government of men, not laws.¹¹¹

The Department, concerned that passage of H.R. 1054 would blur *Feres*' "clear line" of government liability, warns Congress that enactment of H.R. 1054 may invite judicial assault on *Feres* which would complicate its application.¹¹² This "clear line" is evidently more lucid to the Justice Department than to courts and military plaintiffs. The large number of suits brought by military plaintiffs despite the existence of *Feres*¹¹³ suggests that the line is anything but clear. The *Feres* doctrine as currently enforced is less clear than H.R. 1054. Furthermore, after nearly four decades in which the *Feres* doctrine has not only survived but prospered by judicial expansion, these fears are unfounded.

The Department contends that "from the perspective of *all* servicemen who suffer adverse consequences from medical care, the existing system of compensation is in many ways superior to

107. *Hearings, supra* note 97, at 2 (statement of Richard K. Willard, Assistant Attorney General, Civil Division, Department of Justice).

108. While judicial non-interference is often a concern in suits involving the military and foreign affairs, it has never been articulated as supporting the *Feres* doctrine. For a more complete discussion of cases in which judicial meddling was a concern, see Donaldson, *supra* note 12, at 185-87.

109. From *Orloff v. Willoughby* the Justice Department quotes: "Orderly government requires that the judiciary be as scrupulous not to interfere with legitimate Army matters as the Army must be scrupulous not to intervene in judicial matters. *Hearings, supra* note 97, at 8 (statement of Richard K. Willard, Assistant Attorney General, Civil Division, Department of Justice) (quoting 345 U.S. 83, 93-94 (1953)).

Yet an unaccountable military was one reason why the American Colonists asserted their independence from Great Britain. The Declaration of Independence lists this as one of the King's offenses: "He has affected to render the Military independent of and superior to the Civil power." The Declaration of Independence para. 1 (U.S. 1776).

110. *Hearings, supra* note 97, at 9 (statement of Richard K. Willard, Assistant Attorney General, Civil Division, Department of Justice).

111. People understood long ago that good governance required laws: "where there is no law, there is no transgression." *Romans* 4:15 (New Testament), quoted in David Shrager & Elizabeth Frost, *The Quotable Lawyer* 165 (1986).

112. *Hearings, supra* note 97, at 10-11 (statement of Richard K. Willard, Assistant Attorney General, Civil Division, Department of Justice).

113. See, e.g., Note, *supra* note 45, at 1119.

what they would receive if they were private citizens."¹¹⁴ This "concern" for the problems of proving negligence is baseless, because remedy under H.R. 1054 is not exclusive. The bill preserves veterans benefits for soldiers unable to prove negligence. By requiring other compensation to be subtracted from an FTCA award, the government is protected from a double payment.

Finally, according to the Justice Department, passage of H.R. 1054 would violate "sound fiscal policy."¹¹⁵ The Congressional Budget Office estimates that the passage of H.R. 1054 would cost the United States \$25 million per year.¹¹⁶ In an age when the annual budget is \$1.24 trillion,¹¹⁷ and the annual outlay for national defense is \$297.6 billion,¹¹⁸ \$25 million seems a small price to pay to ensure equality for military personnel. Moreover, a tight budget is hardly a compelling reasons to continue *Feres'* reign of injustice.¹¹⁹

C. Defense Department Objections

The Defense Department asserts that allowing military personnel to sue for medical malpractice but not for other forms of negligence would create a class of privileged claimants.¹²⁰ Doing so, they reason, demeans other injuries suffered by military per-

114. *Hearings, supra* note 97, at 13 (statement of Richard K. Willard, Assistant Attorney General, Civil Division, Department of Justice). The Justice Department notes:

While it sometimes is argued that the *Feres* doctrine is unfair to servicemen who are the victims of medical malpractice, the *Feres* doctrine in fact is but one element of a compensation package available to servicemen which, on the whole, is far more generous, even-handed, and fair than compensation available to private citizens.

Id. at 12.

115. *Hearings, supra* note 97, at 21 (statement of Richard K. Willard, Assistant Attorney General, Civil Division, Department of Justice).

116. H.R. Rep. No. 279, 100th Cong., 1st Sess., at 8 (1987).

117. Office of Management and Budget, *Budget of the United States Government* 5-27 (1988). This figure shows the estimated outlay for 1988.

118. *Id.* at 5-12. This figure shows the estimated outlay for 1988.

119. In *Bounds v. Smith*, the Court stated that there was a "fundamental constitutional right of access to the courts." 430 U.S. 817, 828 (1977). This access must be "adequate, effective, and meaningful." *Id.* at 822. The Court then held that despite the expense, states "must protect the rights of prisoners to access to the courts by providing them with law libraries or alternative sources of legal knowledge." *Id.* at 817. Taxpayers thus bear the cost of prisoners' right to access the courts. Soldiers, who incur their injuries while serving their country should not be denied their right to access the courts because of financial considerations.

120. *Hearings on H.R. 1054 Before the Subcomm. on Administrative Law and Governmental Relations of the House Comm. of the Judiciary*, 100th Cong., 1st Sess. 4 (1987) [hereinafter *Defense Hearings*] (statement of H. Lawrence Garrett, III, General Counsel, Department of Defense).

sonnel since they would be denied a tort remedy.¹²¹ After denying active duty soldiers tort recovery for service-connected injuries for decades, while allowing FTCA recovery to veterans, soldiers with injuries *not* service-connected,¹²² and federal prisoners, the sudden concern over "privileged" injuries is surprising.

The Department claims that consistency of treatment with respect to veterans benefits boosts morale. While it is true that there is a certain uniformity in denying redress for race discrimination¹²³ and also denying redress for one rendered a social and emotional vegetable after being a guinea pig for LSD experimentation,¹²⁴ uniformity of inequality will not boost morale. Furthermore, the holding of *Muniz*—that a non-uniform right to recover for prisoners was no excuse for denying recovery altogether¹²⁵—applies equally well to military personnel.

The Defense Department contends that H.R. 1054 would not improve medical care in the Armed Forces for four reasons.¹²⁶ First, the *Feres* doctrine bars judicial recovery for only thirty percent of the patient population served by military medical facilities; "[a]ny argument that military physicians provide better care to those who may sue for malpractice is a gratuitous insult to this dedicated group of officers who are bound by the same ethical requirements in treating all of their patients."¹²⁷ Second, if the incidence of medical malpractice is represented by the number of malpractice actions, then the threat of litigation does not improve medical care. Third, H.R. 1054's deterrence theory—that malpractice liability will deter negligent conduct—is misplaced because military physicians are immune from suit and the purpose of tort law is not to punish but to compensate. Finally, military health care can best be improved through quality assurance, not

121. *Id.*

122. It is ironic that military personnel are given broader relief for injuries when on leave than when defending our country.

123. See, e.g., *Chappell v. Wallace*, 462 U.S. 296 (1983).

124. *Thornwell v. United States*, 471 F. Supp. 344, (D.D.C. 1979). For further discussion of the facts of this case, see *supra* note 98 and *infra* note 147.

125. 374 U.S. 150 (1963). The Court stated it this way: "[t]hrough the Government expresses some concern that the non-uniform right to recover will prejudice prisoners, it nonetheless seems clear that no recovery would prejudice them even more. *Id.* at 162.

126. *Defense Hearings*, *supra* note 120, at 5-7 (statement of H. Lawrence Garrett, III, General Counsel, Department of Defense).

127. *Id.* at 5. Historically, however, the United States has not relied on ethics at the expense of law. In 1779, John Adams, in the original draft of the Massachusetts Constitution, termed this principle "a government of laws, and not of men." John Bartlett, *Familiar Quotations* 463 (1968).

litigation.¹²⁸

In its first argument against the bill, the Defense Department notes that because seventy percent of the population served by military hospitals already have the right to sue,¹²⁹ extending this right to the remaining thirty percent comprised of active duty servicepersons will have no impact on the quality of military health care. While it may be correct that improved medical care does not precisely correlate with the extension of liability, it seems that increased liability would have some effect. Indeed, one of the fundamental principles behind tort liability is deterrence.¹³⁰

The Department's point does, however, highlight the superficiality of the "military discipline" predicate of *Feres*. Seventy percent of the military population are allowed to question the actions of military personnel. Yet the military has not been rendered ineffective. Active-duty servicepersons may sue on behalf of dependents, including claims for incidental or consequential damages, medical expenses and loss of consortium.¹³¹ Thus, active-duty military members are allowed to "assert" claims that question the propriety of decisions or conduct by fellow members of the military¹³²—the exact horror ostensibly avoided by the application of *Feres*. Indeed, over time a judicial pattern in support of *Feres* has emerged: rationale after rationale is discarded and then revitalized as the courts struggle in vain to find convincing support for the unjust effect of *Feres*.

In support of its second reason why H.R. 1054 would not improve military medical care, the Defense Department, noting the rising incidence of malpractice claims in the civil sector, asserts that "if the number of malpractice actions reflects the incidence of malpractice, then the threat of suit does nothing to improve medical care."¹³³ The premise of this statement, however, is questionable. It seems just as likely that the growing number of lawsuits is a reflection of increased consumer knowledge and aggressive mar-

128. *Defense Hearings*, *supra* note 120, at 7 (statement of H. Lawrence Garrett, III, General Counsel, Department of Defense).

129. The *Feres* doctrine does not bar military retirees and dependents of active duty and retired personnel from suing under the FTCA, unless the injury is traceable to a service-connected injury. *Defense Hearings*, *supra* note 120, at 5 (statement of H. Lawrence Garrett, III, General Counsel, Department of Defense).

130. George Christie, *Cases and Materials on the Law of Torts* 5 (1983) (Deterrence of wrongdoers is one of the four goals of tort law); William Prosser, *Prosser on Torts* 27 (1941) ("The 'prophylactic' factor of preventing future harm has been quite important in the field of torts.").

131. Rhodes, *supra* note 12, at 35.

132. *Hunt v. United States*, 636 F.2d 580, 599 (D.C.Cir. 1980).

133. *Defense Hearings*, *supra* note 120, at 5 (statement of H. Lawrence Garrett, III, General Counsel, Department of Defense).

keting of attorneys, rather than the increasing incidence of malpractice.¹³⁴ Moreover, the Department's collection of malpractice statistics for military and civilian hospitals gives no insight into the corresponding number of *successful* claims, though this would better gauge the actual incidence of malpractice.

The Department claims that there are fewer allegations of malpractice against military practitioners than against their civilian counterparts.¹³⁵ If everything else were equal, these figures would be relevant. However, everything else is not equal: in no private situation does the "owner" of the hospital wield such power over all aspects of the potential claimant's life. While a civilian can sue a doctor or hospital and simply go elsewhere for future medical care, the ultimate health care provider for the military population—the government—controls employment, housing, leave and other decisions affecting military members.¹³⁶ Additionally, servicepersons have little incentive to waste time and money litigating claims when the *Feres* doctrine will bar recovery in the end. Thus, it seems likely that the incidence of military medical malpractice is understated.

Third, the Defense Department disputes the goal of some of H.R. 1054's supporters: that the threat of litigation will improve medical care.¹³⁷ It argues that this deterrence theory is misplaced because the purpose of tort law and the FTCA is compensatory, not punitive¹³⁸ and individual military physicians are immune from suit.¹³⁹

134. At the very least, the cause of the rising number of medical malpractice claims is unclear. Most doctors and professional organizations believe that excessive recovery in meritorious cases gives substantial incentive to pursue marginal or frivolous cases. U.S. General Accounting Office, *Medical Malpractice* 27 (Feb. 1986). Conversely, most legal organizations believe the fundamental cause of medical malpractice claims is medical carelessness or negligence. *Id.*

135. *Defense Hearings*, *supra* note 120, at 5-6 (statement of H. Lawrence Garrett, III, General Counsel, Department of Defense).

136. *See generally* Uniform Code of Military Justice, 10 U.S.C.A. §§ 801-950 (West 1983 & Supp. 1987).

137. *Defense Hearings*, *supra* note 120, at 6-7 (statement of H. Lawrence Garrett, III, General Counsel, Department of Defense).

138. *Id.* at 6.

139. *Id.* (citing 10 U.S.C. § 1089 (Supp. 1976)). The courts have read *Feres* to bar suit against individual military tortfeasors as well as the government. *See, e.g., Jaffee v. United States*, 663 F.2d 1226, 1228 (3d Cir. 1981) ("We have also interpreted the doctrine to immunize government officials sued in their individual capacity from liability to military personnel for negligent torts."), *cert. denied*, 456 U.S. 972 (1982); *Rhodes*, *supra* note 12, at 40.

In *Henderson v. Bluemink*, however, the District of Columbia Circuit held that military doctors were no longer protected by *Barr v. Mateo's* rule of immunity for government officials. 360 U.S. 564 (1959). Congress reacted in 1976 by passing the Gonzales bill, which made the FTCA the exclusive remedy for military malpractice

Neither of these reasons detracts from the deterrence theory. Although one goal of the FTCA is compensation for injured plaintiffs, few things work in isolation. If FTCA compensation incidentally serves to improve medical care, this is achieved with neither party suffering adverse consequences. The military plaintiff is simply not injured, thus avoiding a need for government remuneration.

Even if deterrence were a legitimate goal, reasons the Defense Department, H.R. 1054 would be ineffective because individual military physicians are immune from suit.¹⁴⁰ Yet deterrence is not accomplished solely by personal liability. Military hospitals, faced with financial liability, could use military discipline to take personnel actions assuring better medical care. Private hospitals, for instance, institute extensive review programs and other checks on doctors to avoid liability under a "control" theory.¹⁴¹ Likewise, military hospitals faced with liability can implement review programs to avoid liability. Adverse personnel action would thus serve as a deterrent to individual military doctors. Therefore, H.R. 1054 may effectively deter malpractice despite the immunity of individual doctors.

The Defense Department finally argues that quality assurance, not litigation, is the best way of improving health care.¹⁴² An emphasis on quality control is commendable. In fact, vigorous quality assurance will address one of the problems foreseen by both Departments—a mass of devastating litigation. But the real problem, not addressed by either Department, is the underlying inequality in singling out servicepersons in denying judicial redress for injuries. Thus, while it is likely that H.R. 1054 would improve medical care it would, more importantly, restore the forgotten rights of active-duty servicepersons.

Both Departments strenuously argue that H.R. 1054 would have the ironic effect of massively increasing the government's exposure to medical malpractice claims at a time when the existing

claims. See 10 U.S.C. § 1089 (Supp. 4 1976); 32 U.S.C. § 334 (Supp. 4 1976). For military members this remedy was illusive due to the judicially created *Feres* exception to the FTCA. For a detailed discussion of the Gonzales bill, its interaction with the FTCA, and possible constitutional violations, see Graham, *supra* note 21.

140. *Defense Hearings*, *supra* note 120, at 6 (statement of H. Lawrence Garrett, III, General Counsel, Department of Defense).

141. See, e.g., *Ezekial v. Winkley*, 20 Cal.2d 267, 572 P.2d 32, 142 Cal.Rptr. 418 (1977).

142. *Defense Hearings*, *supra* note 120, at 7 (statement of H. Lawrence Garrett, III, General Counsel, Department of Defense).

tort system is in a state of crisis.¹⁴³ Regardless of whether the tort system and medical malpractice claims are "out of control,"¹⁴⁴ the burden of reducing the number of lawsuits and the instances of recovery should not be borne exclusively by injured military personnel.

Opponents of H.R. 1054 raise many of the tired arguments that have been discarded by courts and commentators over the years. While the Justice and Defense Departments contemplate some new horrors,¹⁴⁵ none outweigh the benefits of the bill's enactment.

III. Proposal

Although H.R. 1054 is a good first step towards equality of treatment, our nation's servicepersons deserve a more comprehensive remedy than that offered by H.R. 1054. Congress should adopt a bill that would allow court access to all military plaintiffs. Even if H.R. 1054 was enacted, Rudolph Feres would still be denied recovery because he happened to die by fire rather than the slip of a surgeon's knife. James Thornwell¹⁴⁶ would also be denied recovery. Instead of being injured by a negligent medical diagnosis, Thornwell was permanently injured when he was the subject of an experiment on the truth-inducing effects of LSD.¹⁴⁷ These illus-

143. See *id.* at 5; *Hearings, supra* note 97, at 17-18 (statement of Richard K. Willard, Assistant Attorney General, Civil Division, Department of Justice).

Willard devotes four pages to statistics and examples showing the problems of the current tort system and the excessiveness of medical malpractice awards. Highlights include:

[T]he annual cost of liability insurance for certain medical specialties now exceeds \$97,000—effectively foreclosing those specialties to many younger physicians who have not yet developed a large enough practice to afford such premiums. . . . [T]hree times as many malpractice claims are filed today as were filed a decade ago, and claimants are receiving record awards. . . .

Willard then concludes that [t]here thus is something profoundly disturbing about the existing state tort law system for resolving medical malpractice claims. *Id.* at 18-21 (footnote omitted).

144. *Hearings, supra* note 97, at 20 (statement of Richard K. Willard, Assistant Attorney General, Civil Division, Department of Justice).

145. See, e.g., *Defense Hearings, supra* note 120, at 17 (statement of H. Lawrence Garrett, III, General Counsel, Department of Defense) ("The pendency of suit would also provide a colorable basis for personnel who do not want to accept new assignments to seek delay of any change in their status either from their military superior or the federal judge before whom their case is pending.").

146. *Thornwell v. United States*, 471 F. Supp. 344 (D.D.C. 1979).

147. See *id.*:

The official report prepared by the Operation Third Chance special purpose team explained that the experiment on Mr. Thornwell demonstrated the 'usefulness' of employing as a duress factor the device of inviting the subjects' attention to his [LSD]-influenced state

trations demonstrate the shortcomings of a bill which only allows redress for medical and dental malpractice.

In the words of former Chief Justice Earl Warren, "our citizens in uniform may not be stripped of basic rights simply because they have doffed their civilian clothes."¹⁴⁸ Military personnel should be allowed to sue under the FTCA for injuries incurred incident to service without H.R. 1054's restrictions. An important fact underlies *all* claims against the government by servicepersons on active duty. Each claimant sustained an injury due to the negligent action or inaction of others in the Armed Forces.¹⁴⁹ This fact supports a less restrictive bill. The negligent manner in which an action was performed, not the means of injury, should control.¹⁵⁰ Limiting judicial redress stops short of recognizing that servicepersons have rights which deserve protection. All injury and death, not only that caused by medical and dental malpractice, should have judicial redress.

Additionally, H.R. 1054, by redressing only a narrow band of claims, condones the current judicial treatment of all other types of service-connected injuries. In *Feres* the Supreme Court invited congressional action if Congress did not intend the results achieved under the *Feres* doctrine.¹⁵¹ H.R. 1054 implicitly stamps congressional approval on the application of *Feres* to all service-connected injuries not caused by medical or dental malpractice. Given judicial zealotry in applying the *Feres* doctrine, any congressional approval would further entrench this doctrine of inequality.

The very label that triggers government non-liability, "incident to service," suggests the solution. The purpose of the Armed Forces is to benefit and protect society as a whole.¹⁵² On that the-

and threatening to extend this state indefinitely, even to a permanent condition of insanity or to bring it to an end at the discretion of the interrogators. . . . The report also concluded that in Mr. Thornwell's case, the drug produced an 'extreme paranoid reaction' which was 'highly sustained and almost incapacitating.'

Id. at 346 (citations omitted).

148. Earl Warren, *The Bill of Rights and the Military*, 37 N.Y.U. L. Rev. 181, 188 (1962).

149. *Defense Hearings*, *supra* note 120, at 3, (statement of H. Lawrence Garrett, III, General Counsel, Department of Defense).

150. While arriving at a different solution, the Defense Department recognizes this disparity as well: "H.R. 1054 provides a remedy only for malpractice, but not for other forms of negligence. If a soldier loses a leg on field maneuvers, on the base in a driving accident, or in the hospital at the hands of a surgeon, he or she has the same injury." *Id.* at 4.

151. 340 U.S. at 138.

152. See U.S. Const. preamble; U.S. Const. art. I, § 8, cl. 1 ("provide for the common Defense") (emphasis added).

ory, expenses of tanks and bombers are rightfully shared by all United States citizens. Products liability law operates on the premise that consumer injuries are part of the cost of doing business.¹⁵³ Similarly, service-connected injuries should be viewed as part of the nation's cost of defense. It is difficult to see why the injuries of those working for the whole should be borne exclusively by the individual.

Although special problems exist due to the status of military plaintiffs, the FTCA contains three exceptions that would deny government liability in those situations where military discipline is a valid concern. First, no claims arising in a foreign country are allowed.¹⁵⁴ Thus, even without *Feres*, military members could not recover for injuries caused by a military exercise in France or any other foreign country.

Second, claims arising out of combatant activities are not compensable under the FTCA.¹⁵⁵ This exception alone obviates most of the military discipline concerns. The allowance of suit is most problematic on the battlefield.¹⁵⁶ During peacetime the military operates like any other bureaucracy.¹⁵⁷ For example, the government is liable under the FTCA if an FBI agent is injured by government negligence. Yet employee discipline and efficiency are not markedly impaired. In battle, where the analogy to other bureaucracies ends, the FTCA would immunize the government from suit.

Third, no coverage exists where an injury arises out of the exercise of discretion by the government or its employees.¹⁵⁸ Dis-

153. See, e.g., *Hawkeye-Security Ins. Co. v. Ford Motor Co.*, 174 N.W.2d 672 (Iowa 1970), where the court stated, "[t]he purpose of such liability is to insure that the costs of injuries resulting from defective products are borne by the manufacturers that put such products on the market rather than by the injured persons who are powerless to protect themselves." *Id.* at 683.

154. 28 U.S.C. § 2680(k).

155. *Id.* at § 2680(j).

156. See, e.g., *Chappell v. Wallace*, 462 U.S. 296, 300 (1983).

157. See Howland, *supra* note 39, at 107 ("The military transformed into a huge civilian-like bureaucracy.").

158. 28 U.S.C. § 2680(a) (1970). This "discretionary function" exception to the FTCA reads:

(a) Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government whether or not the discretion involved be abused.

Id. For thorough coverage of the discretionary function exception, and an argument that this exception alone renders the *Feres* doctrine unnecessary, see Note, *supra* note 45.

cretionary functions include certain planning, policy, regulatory and disciplinary decisions, thereby protecting unique military interests.¹⁵⁹ Only operational functions would expose the government to liability under the FTCA.¹⁶⁰ These exceptions allow military discipline to preside over the rights of servicepersons only when it is truly necessary.

The following bill would accomplish these results.

A BILL

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That chapter 171 of title 28, United States Code, is amended by adding at the end thereof the following new section:

S 2681. Claims by members of the Armed Forces

(a) CLAIMS OF MEMBERS OF ARMED FORCES.—Subject to all the provisions of this chapter, claims may be brought under this chapter for damages against the United States for personal injury or death of a member of the Armed Services serving on active duty or on full-time National Guard duty (as defined in section 101 (42) of title 10).

(b) REDUCTION OF AWARDS BY OTHER GOVERNMENT BENEFITS.—The amount of an award or judgment on a claim under this section for personal injury or death of a member of the Armed Forces or National Guard shall be reduced by the agency making the award, or the court entering the judgment, by an amount equal to the total amount of other monetary benefits received or to be received by the member or the member's estate, survivors, and beneficiaries, under title 10, title 37, or title 38 that are attributable to the personal injury or death from which the claim arose. If the amount of future benefits cannot be determined because the benefits are provided under an annuity or other program of periodic payments, the amount of the reduction with respect to such future benefits shall be the actuarial present value of such benefits.

(c) DATE OF APPLICABILITY.—Section 2681 of Title 28, United States Code, as added by this Act, shall apply only with respect to claims arising on or after the date of enactment of this Act.

159. Note, *supra* note 45, at 1121.

160. *Id.* at 1122.

Conclusion

For too long American soldiers have suffered from the contorted *Feres* doctrine, and have been effectively denied access to the courts. The *Feres* doctrine exacts too high a price from the nation's military members. The proposed bill would allow claims for the service-connected injuries or death of active duty military personnel subject to the FTCA's existing exceptions. Three exceptions in particular—that for claims arising in a foreign country, claims arising out of combatant activity and claims arising out of a discretionary function—would obviate any problems due to the military plaintiff's status. This solution remedies the injustice in denying military personnel access to the courts while at the same time protecting legitimate government interests.

