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In Defense of Feres: An Unfairly Maligned Opinion

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Abstract
The Supreme Court's 1950 Feres v. United States decision held that when it enacted the Federal Tort Claims Act Congress did not intend to waive sovereign immunity for injuries to members of the military arising out of activity incident to their service. The Court's decision was influenced by the long history of efforts to enact a general tort claims bill that would free Congress from the burden of processing claims against the government, as well as the case law, statutes, and procedures pertaining to service-members' injuries prior to enactment of the Federal Tort Claims Act. This Article examines those influences and the early cases that analyzed the incident to service issue under the Act, including the Court's Brooks decision that allowed service-member suits for injuries that did not arise incident to service. The Article reviews the lower courts' decisions in the three cases that were consolidated in Feres and the parties' briefing in the Supreme Court. The Article addresses arguments that have been raised against Feres' reasoning, arguments that independently attack its holding, and various characterizations of the opinion. Because of the language of the Federal Tort Claims Act, the historical backdrop to the Court's decision, and the absence of any indication that Congress intended to waive sovereign immunity for injuries suffered incident to service, Feres correctly decided that the Federal Tort Claims Act did not encompass such injuries.

IN DEFENSE OF FERES: AN UNFAIRLY MALIGNED OPINION

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INTRODUCTION

In its 1950 *Feres v. United States*[1] opinion, the Supreme Court considered three companion Federal Tort Claims Act ("FTCA" or "the Act")[2] cases involving claims of military members arising from injuries that occurred while they were on active duty.[3] The Court concluded that Congress had not intended to include such claims in the Act's general

1. 340 U.S. 135 (1950).
2. Federal Tort Claims Act, Pub. L. No. 79-601, 60 Stat. 842 (1946) (codified in scattered sections of 28 U.S.C.) (establishing an administrative procedure for tort claims against federal agencies and granting United States district courts jurisdiction to hear such claims, subject to specific exceptions and jurisdictional exclusions).
3. Jefferson v. United States, 178 F.2d 518 (4th Cir. 1949); Griggs v. United States, 178 F.2d 1 (10th Cir. 1949); Feres v. United States, 177 F.2d 535 (2d Cir. 1949).

waiver of sovereign immunity.[4] Accordingly, it held that, "the Government is not liable under the . . . Act for injuries to servicemen where the injuries arise out of or are in the course of activity incident to service."[5] In practice, this means that members of the military cannot sue the government in tort for injuries related to their military service.

Judges, bar associations, attorneys, and academics have severely criticized the *Feres* decision. The Court is accused of willfully ignoring a straight-forward statute[6] by creating an exception to the FTCA that Congress deliberately rejected.[7] It is charged that *Feres* "and its progeny have wrought untold injustice."[8] In sum, according to this school of thought, "[g]iven the absence of historical or legal support, the *Feres* doctrine appears to be the product of little more than judicial lawmaking."[9]

The burden of this Article is to show that the Supreme Court correctly decided the *Feres* case in 1950. Part I reviews the historical and legal backdrop to *Feres*. It discusses the considerations and decades-long legislative efforts that led to the enactment of the FTCA. It then evaluates the four mechanisms through which service members sought financial relief for service-connected injuries prior to enactment of the FTCA. The uniform compensation system Congress established for service members and veterans provided substantial benefits. Tort litigation under pre-FTCA statutes that waived sovereign immunity, however, was unsuccessful because those statutes were held to exclude claims of service members who had a Congressionally-provided administrative remedy. The Military

4. The *Feres* opinion concludes, "We do not think that Congress, in drafting this Act, created a new cause of action dependent on local law for service-connected injuries or death due to negligence. We cannot impute to Congress such a radical departure from established law in the absence of express congressional command." 340 U.S. at 146.

5. *Id.*

6. *See, e.g.*, Costo v. United States, 248 F.3d 863, 875 (9th Cir. 2001) (Ferguson, J., dissenting) ("[T]he only conceivable reason for the Court to engage in re-writing of such a momentous statute was that it believed that Congress had not given enough protection to the government against the men and women in the armed forces.").

7. *See, e.g.*, ABA & BAR ASS'N OF D.C., REPORT TO THE HOUSE OF DELEGATES 12 (2008) ("The Court—almost 60 years ago—wrote into the FTCA an additional exception that Congress could have added but deliberately did not."). The American Bar Association approved Recommendation 10(b), which urged "Congress to examine the 'incident to service' exception to the [FTCA] created by the Supreme Court in *Feres* . . . [and] provide that only the exceptions specifically provided in the Act limit active duty military members' access to the courts." 2008 ANNUAL MEETING OF THE AMERICAN BAR ASSOCIATION AND MEETING OF THE HOUSE OF DELEGATES 11 (2008), http://www.abanet.org/leadership/2008/annual/docs/select_committee_report.doc.

8. Kevin J. Barry, *A Face Lift (and Much More) for an Aging Beauty: The Cox Commission Recommendations to Rejuvenate the Uniform Code of Military Justice*, 2002 MICH. ST. L. REV. 57, 119–20 (2002).

9. Jonathan Turley, Pax Militaris*: The* Feres *Doctrine and the Retention of Sovereign Immunity in the Military System of Governance*, 71 GEO. WASH. L. REV. 1, 7 (2003).

Claims Act and the Military Personnel Claims Act authorized and paid administrative settlements to service members for various tort claims, but not for "injury or death occur[ring] incident to their service."[10] Congressionally-enacted private laws for the benefit of individual injured service members did not produce compensation because few such bills were passed by Congress, and those that did were vetoed.

Part II analyzes the key, pre-*Feres* judicial opinions that addressed whether service members could sue under the FTCA. It examines two seminal opinions by U.S. District Judge William Chesnut, the first rejecting the government's argument that the FTCA did not apply to suits arising from military service and the second granting dismissal on that basis. It analyzes the district court and Fourth Circuit opinions in the *Brooks* litigation, and the parties' briefing of that case before the Supreme Court. It reviews the Court's 1949 *Brooks* decision which held that service members could sue under the FTCA for injuries not incurred incident-to-service.[11] Finally, it summarizes the three circuit court opinions[12] that raised the common issue the Court resolved in *Feres*: whether the FTCA provides a remedy for injuries arising incident to military service.[13]

Part III reviews the Supreme Court proceedings in *Feres*. It examines the government's Supreme Court briefs and those of the three plaintiffs. It summarizes the Court's *Feres* decision. To provide a background for considering the criticisms of the decision that ensued, it briefly reviews the Court's subsequent, related opinions.

Part IV considers the *Feres* opinion and the criticisms leveled against it. It evaluates the *Feres* opinion and the reasoning supporting the Court's conclusion that Congress did not intend for the FTCA to apply to injuries that arose incident to military service. It examines criticisms that directly challenge *Feres*' reasoning, including arguments that the FTCA does not require parallel private person liability, that state tort law can properly be used in service member suits despite the federal relationship between them and the government, and that the Court misjudged the importance of the military compensation system to the FTCA. It also examines two criticisms that independently attack *Feres*' holding. The first argues that earlier drafts of the FTCA included an exception for claims of service members that was not included in the Act; the second asserts that *Feres*

10. Military Personnel Claims Act of 1945, Pub. L. No. 79-67, 59 Stat. 225 (1946) (codified with some difference in language in 1946 at 31 U.S.C. § 223b, now codified at 10 U.S.C. §§ 2731–39 (2006)).

11. Brooks v. United States, 337 U.S. 49, 50–51 (1949).

12. Jefferson v. United States, 178 F.2d 518 (4th Cir 1949); Griggs v. United States, 178 F.2d 1 (10th Cir. 1949); Feres v. United States, 177 F.2d 535 (2d Cir. 1949).

13. Feres v. United States, 340 U.S. 135, 138 (1950).

undermines the deterrence aspect of tort law. Finally, Part IV considers labels that have been pinned onto the *Feres* opinion—that it judicially created an extra exception to the FTCA, that it usurped the role of Congress, and that it fostered injustice.

The Article concludes with an appraisal of the logical consequences of the *Feres* holding. These include the limited authority of the *Feres* decision outside its FTCA context, the importance of the rationales of the decision in deciding whether the FTCA or other areas of the law provide a financial remedy to service-members, and whether the *Feres* holding can be altered by the judiciary.

I. THE HISTORICAL BACKGROUND OF THE *FERES* DECISION

A. Sovereign Immunity and Enactment of the Federal Tort Claims Act

The doctrine of sovereign immunity, as it is understood in American jurisprudence, provides that a sovereign state can be sued only to the extent that it has consented to be sued and that only its legislative branch can give such consent.[14] Unless Congress has enacted an applicable waiver of the United States' sovereign immunity, the federal government cannot be sued for damages.[15] "A waiver of the Federal Government's sovereign immunity must be unequivocally expressed in statutory text, . . . and will not be implied . . . ."[16] Accordingly, no one could sue the United States in tort until Congress passed a statute waiving the government's sovereign immunity for such a suit.[17] The Federal Tort Claims Act provided such a general waiver for tort cases when it became law in 1946.[18]

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14. *See, e.g.*, United States v. Dalm, 494 U.S. 596, 610 (1990) (stating that the principle that power to consent is reserved to Congress is central to our understanding of sovereign immunity); *accord* United States v. U.S. Fid. & Guar. Co., 309 U.S. 506, 514 (1940) ("Consent alone gives jurisdiction to adjudge against a sovereign. Absent that consent, the attempted exercise of judicial power is void. . . . Public policy forbids the suit unless consent is given, as clearly as public policy makes jurisdiction exclusive by declaration of the legislative body.").

15. United States v. Testan, 424 U.S. 392, 399 (1976) ("Thus, except as Congress has consented to a cause of action against the United States, 'there is no jurisdiction . . . in any . . . court to entertain suits against the United States.'" (quoting United States v. Sherwood, 312 U.S. 584, 587–88 (1941))); United States v. McLemore, 45 U.S. 286, 288 (1846) ("[T]he government is not liable to be sued, except with its own consent, given by law."); *see also* Cohens v. Virginia, 19 U.S. 264, 411–12 (1821) ("The universally received opinion is, that no suit can be commenced or prosecuted against the United States; that the judiciary act does not authorize such suits.").

16. Lane v. Pena, 518 U.S. 187, 192 (1996) (citing United States v. Nordic Vill., Inc., 503 U.S. 30, 33–34, 37 (1992); Irwin v. Dep't of Veterans Affairs, 498 U.S. 89, 95 (1990)); U.S. Fid. & Guar. Co., 309 U.S. at 514.

17. *See Lane*, 518 U.S. at 192 (stating that the ability to sue the United States relies

American citizens have a First Amendment right to petition the government for redress of grievances.[19] From the beginning of the Republic, individuals have used that right to seek special private legislation granting them financial remedies for damages caused by the government, including tort damages.[20] Also from the beginning, members of Congress recognized that legislation was a poor way to resolve private claims against the government. On February 23, 1832, John Quincy Adams wrote:

> There is a great defect in our institutions by the want of a court of Exchequer or Chamber of Accounts. [Deciding claims] is judicial business, and legislative assemblies ought to have nothing to do with it. One-half of the time of Congress is consumed by it, and there is no common rule of justice for any two of the cases decided. A deliberative assembly is the worst of all tribunals for the administration of justice.[21]

By the twentieth century, the legislative process had proven particularly ill-suited to resolving tort claims.[22] The process was subject to inordinate delays and arbitrary actions.[23] Congressional procedures were inadequate to the task of promptly and effectively resolving tort claims on their merits.

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upon statutory authority).

18. Federal Tort Claims Act, Pub. L. No. 79-601, 60 Stat. 842 (1946) (codified in scattered sections of 28 U.S.C.).

19. U.S. CONST. amend. I; *see* Paul Frederic Kirgis, *Section 1500 and the Jurisdictional Pitfalls of Federal Government Litigation*, 47 AM. U. L. REV. 301, 302 (1997) (citing WILSON COWEN ET AL., THE UNITED STATES COURT OF CLAIMS, A HISTORY, PART II: ORIGIN-DEVELOPMENT-JURISDICTION, 1855–1978, at 9 (1978)).

20. *See Hearings on H.R. 5373 and H.R. 6463 Before the H. Comm. on the Judiciary*, 77th Cong. 49–55 (1942) [hereinafter *Hearings on H.R. 5373 and H.R. 6463*]; James E. Pfander & Jonathan L. Hunt, *Public Wrongs and Private Bills: Indemnification and Government Accountability in the Early Republic*, 85 N.Y.U. L. REV. 20, 23 (forthcoming 2010), http://www.law.harvard.edu/faculty/faculty-workshops/pfander.paper.pdf

21. *Hearings on H.R. 5373 and H.R. 6463*, *supra* note 20, at 49. On December 18, 1854, Senator Broadhead of Pennsylvania similarly stated:

> [O]ne third of the [Senate's] time, to say nothing of the time spent by committee—is set apart for the consideration of private bills . . . . Our time is too valuable to be occupied in discussing the merits or demerits of a private bill. Frequently, we dispute about the facts of a case presented in an ex parte way, the truth of which could be better ascertained by a tribunal differently constituted.

Id.

22. In 1926, the House of Representatives procedure for enacting such a private bill called for the claim to be referred to the Committee on Claims. H.R. REP. NO. 69-667, at 13 (1926) (Supplementary Report of Congressman Emanuel Celler), *cited in Hearings on H.R. 5373 and H.R. 6463*, *supra* note 20, at 50–51. If the committee took favorable action, the claim would be forwarded to the House where it would be placed on the Private Calendar. *Id.* Any member could strike it from that calendar for any reason. *Id.*

23. *See id.* (stating that the Committee on Claims could meet for a century and still not adjudicate all pending claims). In 1926, Congressman Charles Underhill of Massachusetts said, "The power vested in the chairman of the Committee on Claims is tremendous and absolutely wrong. I can either refuse arbitrarily to consider your claim or I can take up each and every one of your claims to suit my convenience." 67 CONG. REC. 7527 (1926), *cited in Hearings on H.R. 5373 and H.R. 6463*, *supra* note 20, at 52.

In 1926 Congressman Celler explained that the "Committee on Claims ha[d] no facilities nor ha[d] the members time or inclination to pass upon questions of negligence and contributory negligence, to sift evidence, and determine a host of matters."[24] Witnesses were not cross-examined.[25]

The process imposed substantial burdens on the time and attention of Congress.[26] Narrow waivers of sovereign immunity did become law, as then Assistant Attorney General Francis M. Shea explained in 1942 when he presented the Administration's detailed recommendation for what became the Federal Tort Claims Act:

> [T]he ban upon suits against the Government [was] lifted in certain cases sounding in tort. . . . During the [F]irst World War, when the Government took over operation of the railroads and other utilities, Congress made the United States subject to the same responsibility for property damage, personal injury, and death as the private owners themselves would have been. A few years later, in 1920 and 1925, the Government consented to suits in the district courts upon admiralty and maritime torts involving Government vessels, without limitation as to amount.[27]

These statutes did not significantly stanch the number of private bills. In 1926, the House Committee on Claims favorably reported a general tort claims bill, largely because of the burden private claims imposed on Congress.[28] The committee noted that in the previous Congress (the 68th), more than two thousand private bills were introduced, but only 250 were enacted.[29] It explained that "[m]embership on the Committee on Claims ha[d] become a nearly intolerable burden, not only because of the number of claims submitted but because of the realization that careful judicial consideration of the claims [wa]s for the most part impossible."[30]

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24. H.R. REP. NO. 69-667, at 14 (Supplementary Report of Congressman Emanuel Celler), *cited in Hearings on H.R. 5373 and H.R. 6463*, *supra* note 20, at 51. Congressman Ross Collins of Mississippi testified that, "I made up my mind that Congress was wasting its time in playing around with these comparatively minor private bills, and that the consideration given to them by the individual membership was trifling." *A General Tort Bill: Hearing Before a Subcomm. of the Comm. on Claims*, 72d Cong. 6 (1932), *cited in Hearings on H.R. 5373 and H.R. 6463*, *supra* note 20, at 53.

25. *Hearings on H.R. 5373 and H.R. 6463*, *supra* note 20, at 54 (statement of Congressman Robison).

26. *See, e.g.*, *Hearings on H.R. 5373 and H.R. 6463*, *supra* note 20, at 49–55 (collecting criticisms from various legislators that the private bill process is cumbersome, inefficient, and burdensome); S. REP. NO. 79-1400, at 30–31 (1946) (noting that thousands of private bills were introduced and hundreds were approved); H.R. REP. NO. 79-1287, at 2 (1945) (same).

27. *Hearings on H.R. 5373 and H.R. 6463*, *supra* note 20, at 24.

28. *See* H.R. REP. NO. 69-667, at 1–2 (stating that the purpose of the bill is to ease the burden on Congress), *cited in Hearings on H.R. 5373 and H.R. 6463*, *supra* note 20, at 50.

29. *Id.*

30. *Id.*

In 1931, the House Committee on Claims issued a similar report on another tort claims bill, noting the continued "burden on Congress and the injustice to claimants, because of the lack of facilities for proper and adequate investigation of these claims."[31] The situation was no better in 1940, when Congressman Celler explained that the committee could not know the details of each of the thousands of claims it considered in every Congress.[32] In both the 74th and 75th Congresses, over 2,300 private claim bills were introduced, seeking more than one hundred million dollars.[33] In the 77th Congress, there were 1,829 private claims bills, followed by 1,644 in the 78th Congress.[34]

Various legislative proposals for a broad tort claims act were debated for decades.[35] In 1929, both houses of Congress passed such a bill, but President Coolidge pocket vetoed it, apparently because it would have authorized the Comptroller General (an agent of Congress) to represent the United States in the Court of Claims.[36] In the 76th Congress, the House passed H.R. 7263, a bill similar in many respects to the FTCA, but in 1940, "the pressure of other urgent matters prevented its consideration in the Senate before the close of the session."[37] On January 14, 1942, President Roosevelt sent a formal message to Congress urging the enactment of a tort claim act so that Congress and the Executive Branch could deal with larger matters and noting that in the previous three Congresses, fewer than twenty percent of the 6,300 private claim bills became law, and that private claims bills accounted for a third of the bills he had vetoed.[38] In the 77th Congress, the Senate passed S. 2221, a bill similar to the prior Congress' H.R. 7263.[39]

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31. H.R. REP. NO. 71-2800, at 2 (1931), *quoted in Hearings on H.R. 5373 and H.R. 6463*, *supra* note 20, at 52.

32. *Debates on H.R. 7236*, 86 CONG. REC. 12018 (1940), *quoted in Hearings on H.R. 5373 and H.R. 6463*, *supra* note 20, at 54.

33. H.R. REP. NO. 79-1287, at 2 (1945).

34. *Id.*

35. *See generally Hearings on H.R. 5373 and H.R. 6463*, *supra* note 20, at 40–41 (discussing the introduction of various legislative remedies in previous decades); LESTER S. JAYSON & ROBERT C. LONGSTRETH, HANDLING FEDERAL TORT CLAIMS §§ 2.09–2.10 (2009).

36. H.R. REP. NO. 71-2800, at 1 (1931), *cited in Hearings on H.R. 5373 and H.R. 6463*, *supra* note 20, at 41 (statement of Assistant Att'y Gen. Francis M. Shea). "The Attorney General objected to the act because it placed the Comptroller General in charge of appeals to the Court of Claims from his own decisions, and the act received a pocket veto by President Coolidge." *Id.*; *see also* O.R. McGuire, *Tort Claims Against the United States*, 19 GEO. L.J. 133, 134–35 (1931) (discussing the history of President Coolidge's pocket veto).

37. H.R. REP. NO. 79-1287, at 2 (1945).

38. H.R. DOC. NO. 77-562, at 1 (1942). The Roosevelt Administration, through the Department of Justice, was actively involved in drafting proposals for a general tort claims act. *See, e.g.*, *Hearings on H.R. 5373 and H.R. 6463*, *supra* note 20, at 6–36 (statement of Assistant Att'y Gen. Francis M. Shea); *Hearings on H.R. 7236 Before Subcomm. No. 1 of*

The legislative and administration proposals for a general tort claims act waiving sovereign immunity for government tort claims shared a common limitation—almost all of them had a cap on damages. For example, the 1929 proposal passed by the 70th Congress had a limitation of $50,000 for property damages and $7,500 for personal injury or death claims.[40] The 1940 House bill had a cap of $7,500 for all claims,[41] as did President Roosevelt's 1942 proposal,[42] and the House bill of 1942.[43] The 1942 Senate-passed version capped damages at $10,000.[44] In the 79th Congress, when passage of a statute was at hand, the House bill capped damages at $10,000 for "property loss or damage or personal injury or death."[45] At the Senate's insistence, the proposed damages cap was deleted from the statute.[46]

Finally, the 79th Congress enacted the Federal Tort Claims Act as Title IV of the Legislative Reorganization Act of 1946.[47] On August 2, 1946, President Truman signed the Legislative Reorganization Act, making the FTCA law.[48] The President's signing statement commended Congress for

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the H. Comm. on the Judiciary, 76th Cong. 15–31 (1940) (statement of Alexander Holtzoff, Special Assistant to the Att'y Gen.); JAYSON & LONGSTRETH, *supra* note 35, § 2.10 (noting that Roosevelt's Department of Justice collaborated with other governmental agencies to draft a federal tort bill).

39. H. REP. NO. 79-1287, at 2 (1945); *see also* S. REP. NO. 77-1196, at 6 (1942) (waiving sovereign immunity in part as did H.R. 7236).

40. *Hearings on H.R. 5373 and H.R. 6463*, *supra* note 20, at 41.

41. H.R. REP. NO. 76-2428, at 4 (1940).

42. H.R. DOC. NO. 77-562, at 2 (1942).

43. *Hearings on H.R. 5373 and H.R. 6463*, *supra* note 20, at 2.

44. S. REP. NO. 77-1196, at 2, 6.

45. H. REP. NO. 79-1287, at 4 (1945).

46. S. REP. NO. 79-1400, at 30 (1946). The report stated:

> The essential difference is that the House bill puts a maximum limitation of $10,000 on claims for which suit may be brought, whereas this title as reported by your committee contains no such limitation. The committee is of the opinion that in view of the banning of private claim bills in the Congress no such limitation should be imposed . . . .

Id.

47. Legislative Reorganization Act of 1946, Pub. L. No. 79-601, 60 Stat. 812 (codified as amended in scattered sections of 28 U.S.C.). The Legislative Reorganization Act also established the organization of congressional committees, *id.* tits. I, II; regulated lobbying, *id.* tit. III; eliminated the need for congressional approval of each new bridge, *id.* tit. V; and altered congressional pay, *id.* tit. VI.

Pertinent to the FTCA, Title I prohibited private bills in circumstances where the FTCA might provide a remedy:

> No private bill . . . directing (1) the payment of money for property damages, for personal injuries or death for which suit may be instituted under the [FTCA] . . . shall be received or considered in either the Senate or the House of Representatives.

Id. § 131. The Legislative Reorganization Act also generally repealed pre-FTCA laws that authorized federal agencies to pay compensation for the torts of federal employees. *Id.* § 424(a).

48. 92 CONG. REC. 10,675 (1946) (statement by President Truman upon signing the

improving its efficiency, expanding the staff of Congressional committees and of agencies in the Legislative Branch, and raising Congressional salaries and expense allowances.[49] It did not mention the Federal Tort Claims Act.[50]

The FTCA grants United States district courts specific, limited subject matter jurisdiction.[51] This jurisdictional grant was intended to limit the waiver of sovereign immunity: "The bill therefore does not . . . lift the immunity of the United States from tort actions except as jurisdiction is specifically conferred upon the district courts by this bill."[52] Thus, claims that would not lie against a private person under state law are not cognizable under the Act.[53] The FTCA contained a number of explicit exceptions to its waiver of sovereign immunity,[54] including two that obviously would block some suits by injured service members. The combatant activity exception bars "[a]ny claim arising out of the combatant activities of the military or naval forces, or the Coast Guard, during time of war."[55] The foreign tort exception bars "[a]ny claim arising in a foreign country."[56]

B. Financial Remedies of Service Members Prior to the Federal Tort Claims Act

This Section addresses avenues that members of the military might have pursued to obtain financial relief for service-connected injuries incurred prior to the effective date of the FTCA. It briefly reviews the uniform compensation systems available to service members and veterans. It examines lawsuits brought by military personnel under limited waivers of sovereign immunity enacted by Congress. It discusses the administrative remedies available under the Military Claims

Legislative Reorganization Act). President Truman's statement is available through The American Presidency Project. Statement by the President Upon Signing the Legislative Reorganization Act, THE AM. PRESIDENCY PROJECT, http://www.presidency.ucsb.edu/ws/?pid=12480 (last visited Oct. 24, 2010).

49. *92 CONG. REC. 10,675.*

50. *Id.*

51. Federal Torts Claim Act, Pub. L. No. 79-601, § 410(a), 60 Stat. 812 (codified at 28 U.S.C. § 1346(b)(1) (2006)); The Act of June 25, 1948, 62 Stat. 862, (recodifying Title 28 of United States Code). Alterations in the language of the FTCA did not substantively alter the law. Feres v. United States, 340 U.S. 135, 140 n.9 (1950).

52. H. REP. NO. 79-1287, at 5 (1945).

53. *See* FDIC v. Meyer, 510 U.S. 471, 477–78 (1994) (recognizing the FTCA's jurisdictional requirement of comparable private person liability under state law); *infra* notes 460–462 and accompanying text.

54. *See* 28 U.S.C. § 2680 (2006) (listing exceptions).

55. *See id.* § 2680(j).

56. *See id.* § 2680(k).

Act and the Military Personnel Claims Act. Finally, it reviews private relief legislation designed to provide extra benefits to particular injured service members beyond those available under established compensation systems, and President Truman's and President Eisenhower's vetoes of those few private bills passed by Congress.

1. The Uniform Compensation Systems

Congress has provided pensions for military veterans since the Revolutionary War.[57] The World War Veterans' Act of 1924 consolidated laws that established benefits for World War I veterans and their dependents.[58] In 1933, Congress gave the President, acting through the Veterans Administration, the authority to administer by regulation the benefits programs for the veterans of World War I and their dependents.[59] From 1941 through 1946, Congress enacted a large number of statutes building on that system and considered many more.[60]

At the time the FTCA became law, a wide range of remedies were available to service members, veterans, and their families. Monthly pensions were provided for service members with partial or total disabilities.[61] Pensions were provided for the widows, children, and

57. *See, e.g.*, Act of March 3, 1865, ch. 84, 13 Stat. 499 (Civil War); Act of May 13, 1846, ch. 16, 9 Stat. 9, 10 (Mexican War); Act of April 24, 1816, ch. 68, 3 Stat. 296–97 (War of 1812); Act of March 23, 1792, ch. 11, 1 Stat. 243, 244 (Revolutionary War); Act of September 29, 1789, ch. 24, 1 Stat. 95 (Revolutionary War).

58. World War Veterans Act, 68 Pub. L. No. 242, 43 Stat. 607 (1924) ("An Act to consolidate, codify, revise, and reenact the laws affecting the establishment of the United States Veterans' Bureau and the administration of the War Risk Insurance Act, as amended, and the Vocational Rehabilitation Act, as amended.").

59. Act of March 20, 1933, Pub. L. No. 73-2, 48 Stat. 8. The act also encompassed veterans of the Spanish American War, the Boxer Rebellion, and the Philippines Insurrection. *Id.* § 1.

60. For example, from October 17, 1942 to June 30, 1943, Congress introduced 2,366 general bills whose main purpose was to alter veterans' benefits and enacted twenty-two into law. 1943 ADM'R OF VETERANS' AFFS. ANN. REP. 30–41. In the period from July 1, 1945 to August 2, 1946, it considered 1,677 such bills and enacted fifty-eight into law. 1946 ADM'R OF VETERANS' AFFS. ANN. REP. 49–61; *see also* Brief for the United States at 19, Brooks v. United States, 337 U.S. 49 (1949) (Nos. 388 and 389) [hereinafter U.S. *Brooks* Br.]. The United States argued:

> The most recent compilation of "Laws Relating to Veterans," [compiled by Superintendent, Document Room, House of Representatives, 1948] sets forth the text of over 490 federal statutes enacted during 1914 to 1948. Current congressional concern for providing an adequate and specialized system of compensation for serviceman's injury or death is also evidenced by the introduction during the fiscal year 1947, of approximately 2300 bills pertaining to veterans' benefits, and by the introduction of almost 100 such bills during the first 10 days of the first session of the 81st Congress.

Id. (footnotes omitted).

61. 38 U.S.C. § 701a (1946); Act of July 13, 1943, Pub. L. No. 78-144, 57 Stat. 554; Act of March 20, 1933, Pub. L. No. 73-2, § 1(a), 48 Stat. 8.

dependent parents of service members who were injured or killed.[62] Service members who were incapacitated drew full military pay for their period of incapacitation.[63] Service members injured while in service received free medical care.[64] If a service member died in service, six months pay was paid to his or her beneficiary.[65] Subsidized life insurance was available to service members under the National Service Life Insurance Act.[66] Unlike typical workers' compensation statutes, benefits provided to service members and veterans compensated any injury, disability, or death that arose at any time during their period of service, not just those incurred while the service member was acting within the scope of employment or on active duty.[67] Veterans were given hiring preferences in the civil service,[68] housing benefits,[69] and educational benefits.[70]

Huge numbers of service members, veterans, and their families benefited from these programs in the 1940s. On June 30, 1947, 1,728,516 World War II veterans were receiving disability benefits.[71] On that date, death benefits were being paid to dependents of 223,554 World War II veterans for service-connected deaths, and dependents of another 2,053 for non-service connected deaths.[72] In the fiscal year of 1947, similar payments were made to World War I veterans' dependents for 76,760 service-connected deaths and 154,717 non-service connected deaths.[73]

62. 38 U.S.C. § 701c (1946); § 1(c), 48 Stat. at 8.

63. *See* 10 U.S.C. § 847(a) (1946) (stating that incapacitation arising from alcohol or drug abuse, as opposed to injury, will not warrant payment); Act of June 16, 1942, Pub. L. No. 77-607, 56 Stat. 359, 364 (providing allowances for medically ill service members); Act of May 17, 1926, Pub. L. No. 69-230, 44 Stat. 557 (stating that service members who are absent from their duties because of venereal disease are permitted allowances).

64. 38 U.S.C. § 434 (1946); § 6, 48 Stat. 8, 9; World War Veterans' Act, Pub. L. No. 68-242, § 10, 43 Stat. 607, 610 (1924).

65. Act of December 17, 1919, Pub. L. No. 66-99, 41 Stat. 367, *amended by* Act of December 17, 1943, Pub. L. No. 78-198, 57 Stat. 599.

66. National Service Life Insurance Act, ch. 757, 54 Stat. 1008, 1009, 1012 (1940).

67. Act of September 27, 1944, Pub. L. No. 78-439, 58 Stat. 752. The statute deemed any injury or disease to "have been incurred in line of duty" if the service member was "on active duty or on authorized leave" when the injury or disease arose. *Id.* § 2. The only exceptions were injuries or disease that resulted from the service member's "own willful misconduct," or arose while the service member was deserting, absent without leave, or "confined under sentence of court martial or civil court." *Id.*

68. Act of June 27, 1944, Pub. L. No. 78-359, 58 Stat. 387, 388.

69. Servicemen's Readjustment Act, Pub. L. No. 78-346, § 501, 58 Stat. 284, 292 (1944) (codified at 38 U.S.C. § 694(a) (1946)).

70. *Id.* § 400, 58 Stat. 284, 287–91 (1994), (codified at 38 U.S.C. § 739, Part VIII (1946)).

71. 1947 ADM'R OF VETERANS' AFFS. ANN. REP. 19.

72. *Id.* at 24, 25.

73. *Id.* at 26, 27.

2. Tort litigation by military personnel under pre-FTCA waivers of sovereign immunity

Prior to the enactment of the FTCA, Congress passed other statutes that waived the government's sovereign immunity for specific categories of torts.[74] These included the Suits in Admiralty Act[75] and the Public Vessels Act,[76] which consented to suits involving admiralty and maritime torts of government vessels, and the Railroad Control Act of 1918,[77] which consented to tort suits against the government for its operation of railroads and utilities under wartime authority. Despite language in these statutes that made the United States liable to the same extent as a private entity, the statutes were consistently interpreted to exclude claims made by members of the military for whom Congress had provided an administrative remedy.[78]

Dobson v. United States,[79] the leading authority on the issue, arose from the collision of the Steamship City of Rome and United States Submarine S-51, a public vessel.[80] Suits were brought under the Public Vessels Act by the estates of three submarine officers who died as a result of the collision.[81] Following judgment for the United States in the district court, the Second Circuit confronted the issue whether the Public Vessels Act

74. *See supra* text accompanying note 27 (statement of Assistant Att'y Gen. Francis M. Shea) (explaining pre-FTCA waivers of sovereign immunity for suits in tort).

75. Act of March 9, 1920, Pub. L. No. 66-156, § 2, 41 Stat. 525 (codified at 46 U.S.C. § 30903 (2006)). The statute provided:

> That in cases where if such vessel were privately owned or operated, or if such cargo were privately owned and possessed, a proceeding in admiralty could be maintained at the time of the commencement of the action herein provided for, a libel in personam may be brought against the United States . . . provided that such vessel is employed as a merchant vessel or is a tug boat . . . .

Id. at 525–26.

76. Act of March 3, 1925, Pub. L. No. 68-546, 43 Stat. 1112 (current version at 46 U.S.C. § 31102 (2006)). The statute provided, "[t]hat a libel in personam in admiralty may be brought against the United States, or a petition impleading the United States, for damages caused by a public vessel of the United States." *Id.* at 1112.

77. Act of March 21, 1918, Pub. L. No. 65-107, § 10, 40 Stat. 451, 456. The statute provided:

> That carriers while under Federal control shall be subject to all laws and liabilities as common carriers, whether arising under State or Federal laws or at common law . . . . Actions at law or suits in equity may be brought by and against such carriers and judgments rendered as now provided by law; and in any action at law or suit in equity against the carrier, no defense shall be made thereto upon the ground that the carrier is an instrumentality or agency of the Federal Government.

Id.

78. *See infra* notes 79–105 and accompanying text (discussing how courts have interpreted the statutes to exclude claims of service members).

79. 27 F.2d 807 (2d Cir. 1928).

80. Haselden v. United States, 24 F.2d 529, 530 (E.D.N.Y. 1927), *aff'd sub nom.* Dobson v. United States, 27 F.2d 807 (2d Cir. 1928).

81. *Id.*

provided a remedy for the officers' deaths under these circumstances.[82] The court accepted that the language of the Public Vessels Act, read alone, might be broad enough to allow suit by officers and crew of a public vessel.[83] Nevertheless, it ruled that no recovery could be had on behalf of the submarine officers from the United States, reasoning that the statute did not specify who might sue and that allowing such suits would be "so radical a departure from the government's long-standing policy with respect to the personnel of its naval forces that we cannot believe the act should be given such a meaning."[84] The court recognized that the elaborate pension system provided to naval personnel was less generous than the recovery available under the Public Vessels Act. The court found, however, that the statute's general language was insufficiently specific to justify upsetting long-standing and well-known policy. The court explained that "[t]he more natural meaning of the act is to refer it to damage caused by the ship to third persons who are not of her company, and generally, if not universally, the damage will be the result of a collision."[85]

The Second Circuit again addressed the issue of service member suits against the federal government in *Bradey v. United States*,[86] a Public Vessels Act suit alleging that a Navy fireman was killed in 1944 when his destroyer was negligently struck by another vessel owned by the United States.[87] The circuit court affirmed the district court's dismissal.[88] Judge Learned Hand, writing for the court, explained:

> It is quite true that nothing in the text of the Public Vessels Act bars suit by a member of the armed forces, but in *Dobson* . . . we held that, because of the compensation elsewhere provided for such persons, they must be deemed excluded from its protection. That case directly rules here . . . .[89]

A similar line of authority holds that the government's waiver of sovereign immunity in the Railroad Control Act did not open the United

82. *Dobson*, 27 F.2d at 808.
83. *Id.*
84. *Id.* at 808–09; *see also* O'Neal v. United States, 11 F.2d 869, 871 (E.D.N.Y. 1925) ("Congress by this enactment [of the Public Vessels Act] clearly did not intend to overturn the government's established policy, and permit its employees to bring actions for damages received on government ships in the course of their employment . . . ."), *aff'd per curiam*, 11 F.2d 871 (2d Cir. 1926).
85. *Dobson*, 27 F.2d at 809. The court also addressed statutes that provided administrative compensation for lost property of officers and sailors. *Id.*
86. 151 F.2d 742 (2d Cir. 1945).
87. *Id.* at 742.
88. *Id.* at 743.
89. *Id.*

States to suit by service members.[90] In *Moon v. Hines*,[91] a Reserve Officers' Training Corps soldier was injured while traveling by rail under military orders on September 30, 1918, and brought a tort action against the Director General of Railroads.[92] The Supreme Court of Alabama concluded that the soldier's administrative compensation provided under the War Risk Insurance Act[93] was exclusive, barring his suit in tort.[94] The court reasoned that Congress had not authorized such a suit against the government arising from its transportation of a service member.[95] It explained that the soldier's enlistment was a contract that changed his relationship with the government, giving him a new status with different rights and duties.[96]

In *Seidel v. Director General of Railroads*,[97] a World War I sailor walking down the street to his ship lost an eye when a railroad guard's shotgun accidentally fired.[98] The Supreme Court of Louisiana held that the sailor's war risk insurance barred his suit in tort: "If plaintiff had this remedy by suit in damages he would have against the government two remedies: One in damages; and one under said act. The government has not so provided; but has provided only the one remedy under said act."[99]

In *Sandoval v. Davis*,[100] the district court dismissed three consolidated actions of enlisted men who were allegedly injured or killed while in the line of duty by negligent operations of railroads under federal control.[101] Each family had accepted compensation under the war risk insurance program.[102] The court concluded that a suit in tort was barred "because of the compensation provisions of the War Risk Insurance Act."[103] The *Sandoval* opinion spoke to its similarity to the *Moon* and *Seidel* decisions:

> The conclusion in these three cases is the same. The three different courts reached this conclusion by somewhat different argument. It seems to me that the reasoning of all three opinions is sound. Congress

90. *See* Moon v. Hines, 87 So. 603, 607 (Ala. 1921).
91. 87 So. 603 (Ala. 1921).
92. *Id.* at 603–04.
93. The 1917 amendments to the War Risk Insurance Act provided benefits for the death or disability of all enlisted personnel and officers in the United States military. *See* Act of October 6, 1917, Pub. L. No. 65-91, § 300, 40 Stat. 398, 405.
94. *Moon*, 87 So. at 607.
95. *Id.* at 607–08.
96. *Id.* at 608.
97. 89 So. 308 (La. 1921).
98. *Id.* at 308.
99. *Id.* at 309.
100. 278 F. 968 (N.D. Ohio 1922), *aff'd per curiam*, 288 F. 56 (6th Cir. 1923).
101. *Id.* at 969–70, 974–75.
102. *Id.* at 970.
103. *Id.* at 972.

> did not intend to confer upon an injured or killed soldier or sailor a right to a double recovery of compensation from the United States. . . . The general creation and preservation of rights of action by section 10, Federal Control Act, and section 206, Transportation Act of 1920, must yield to the specific provisions covering the injuries of a soldier or sailor on active service in the line of his duty. The rights and remedies of a soldier or sailor in that situation are specially provided for and limited by the provisions of the War Risk Insurance Act.[104]

The Sixth Circuit affirmed, per curiam.[105]

3. The Military Claims Act and the Military Personnel Claims Act

In 1943, Congress enacted the Military Claims Act to consolidate a number of statutes that previously authorized the War Department to settle tort claims administratively.[106] The procedures, scope, and limitations of those statutes varied greatly.[107] The Military Claims Act was intended to "make possible the investigation, settlement, and payment in a uniform manner of all small claims; i.e. those not in excess of $500, or in time of war not in excess of $1,000, within the War Department."[108] The act did not authorize lawsuits, but established an administrative remedy

> for damage to or loss or destruction of property, real or personal, or for personal injury or death, caused by military personnel or civilian employees of the War Department or of the Army while acting within the scope of their employment, or otherwise incident to noncombat activities of the War Department or of the Army . . . .[109]

104. *Id.* at 974–75.

105. *Sandoval*, 288 F. at 56–57 (citing Dahn v. Davis, 258 U.S. 421 (1922)) (holding that the Federal Employees' Compensation Act was an exclusive remedy, barring suit under the Railroad Control Act).

106. Act of July 3, 1943, Pub. L. No. 78-112, 57 Stat. 372 (codified with some difference in language at 31 U.S.C. § 223b (1946), now codified at 10 U.S.C. §§ 2731-39 (2006)). The consolidated statutes included: Act of August 24, 1912, Pub. L. No. 62-338, 37 Stat. 569, 586, that authorized settlements of claims of up to $1,000 "occasioned by heavy gun fire and target practice of troops, and for damages to vessels, wharves, and other private property, found to be due to maneuvers or other military operations for which the Government is responsible," *id.*; Act of March 3, 1885, ch. 335, 23 Stat. 350, as amended by Act of July 9, 1918, Pub. L. No. 65-193, 40 Stat. 845, 880, and by Act of March 4, 1921, Pub. L. No. 66-391, 41 Stat. 1436, allowing settlement of claims by military personnel for loss of personal property, *id.*; Act of December 28, 1922, Pub. L. No. 67-375, 42 Stat. 1066, that authorized "the head of each department . . . to . . . adjust . . . any claim . . . on account of damages to or loss of privately owned property where the amount of the claim does not exceed $1,000, caused by the negligence of any officer or employee of the Government acting within the scope of his employment." *Id.* § 2. *See generally* Martha L. Neese & Thomas J. Lyons, *The Military Claims Act: Remedy or Run Around?*, 14 AM. J. TRIAL ADVOC. 305, 307–09 (1990).

107. S. REP. NO. 78-243, at 3 (1943).

108. *Id.* at 2.

109. Act of July 3, 1943, Pub. L. No. 78-112, 57 Stat. 372, 372–73.

The Secretary of War or his designee could settle such claims outright or, if they exceeded $1,000, report them to Congress "for its consideration."[110] The statute did not require the claimant to make a showing of negligence or wrongful act.[111] The Military Claims Act remedy was not available if the damage or injury was "caused in whole or in part by any negligence or wrongful act on the part of the claimant, his agent, or employee," or if a written claim was not presented within one year.[112] Nor did it apply "to claims for damage to or loss or destruction of property . . . or for personal injury or death of [military personnel or civilian employees of the War Department or of the Army] if such . . . injury, or death occur[red] *incident to their service*."[113]

The Military Claims Act was deemed inadequate because it compensated some claims of military personnel but arbitrarily excluded similar claims that did not fall within the precise language of the statutes that had been consolidated in the Act.[114] The Secretary of War recommended clarifying legislation specifically directed to the claims of service members and civilian employees of the War Department.[115] Accordingly, Congress enacted the Military Personnel Claims Act of 1945.[116]

A key change made by the newer act allowed military members and civilian employees to recover on claims for loss or damage to property even if that loss or damage was incurred incident-to-service.[117] The incident-to-service bar however, was retained for claims alleging personal injury or death.[118] The Military Claims Act and the Military Personnel Claims Act were codified together in the 1946 edition of the United States Code.[119]

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110. *Id.*
111. *Id.*
112. *Id.*
113. *Id.* (emphasis added).
114. *See* H.R. REP. NO. 79–237, at 1–2 (1945) ("[T]he present statutes . . . do not grant equal justice in that the claim of one member of the Army may be approved while a similar claim by another member who lost property in the same incident is . . . barred by some technical limitation of the law.").
115. *Id.* at 2–4 (attaching Letter from Robert Patterson, Acting Sec'y of War (Feb. 2, 1945)).
116. Act of May 29, 1946, Pub. L. No. 79-67, 59 Stat. 225 (codified with some difference in language at 31 U.S.C. § 223b (1946), now codified at 10 U.S.C. §§ 2731–39 (2006)).
117. *See* 59 Stat. at 225–26.
118. *Id.* ("The provisions of this Act shall not be applicable to claims . . . for personal injury or death of military personnel or civilian employees of the War Department or of the Army if such injury or death occurs *incident to their service*." (emphasis added)).
119. 31 U.S.C. § 223b. In 1945 the Secretary of the Navy received comparable authority. Act of December 28, 1945, Pub. L. No. 79-277, 59 Stat. 662 (codified with some difference in language at 31 U.S.C. § 223(d) (1946), now codified at 10 U.S.C. §§ 2731-39 (2006)). The compensation provided for injury or death not "incident to service" was

4. Private relief bills for injured service members & the Uniform Compensation System

Like other citizens, members of the military can seek private legislation to compensate them for injuries caused by the government.[120] In the years before the FTCA was enacted, private bills were not viable avenues to increased compensation for injured military service members, perhaps because of the general awareness that systems were in place to provide appropriate relief[121] and out of concern for uniformity.[122] In fact, from 1942 through 1947, no private bills granting monetary benefits to World War II veterans or their dependents became law.[123]

The 79th Congress did act favorably on a private bill that would have awarded $500 in money damages to Ensign Joseph Lanser for injuries he incurred in a Navy bus accident on August 26, 1944, while serving in the military.[124] However, on August 2, 1946, the same day he signed the FTCA into law, President Truman vetoed the Lanser private bill to preserve the established uniform system for the compensation of those injured while in military service.[125] The President was typically succinct in explaining why he decided to veto the serviceman's remedy:

> Ensign Lanser was on active duty with the Navy at the time of the accident. He was hospitalized in a naval hospital and is entitled to the same rights and benefits extended to all other members of the armed forces who sustained personal injuries while in an active duty status. No reason is evident why special treatment should be accorded this officer.[126]

In 1948, President Truman again cited the importance of treating injured service members uniformly when he vetoed a $4,244 private bill for the relief of the estate of Lee Jones Cardy, a Navy chief pharmacist mate who was killed in a vehicle accident caused by government negligence near San

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limited to reasonable medical and burial expenses. 31 U.S.C. § 223b (1946).

120. *See supra* notes 17–21 and accompanying text.

121. *See* Feres v. United States, 340 U.S. 135, 140 (1950); Jefferson v. United States, 77 F. Supp. 706, 712 (D. Md. 1948) *aff'd*, 178 F.2d 518 (4th Cir. 1949), *aff'd sub nom.* Feres v. United States, 340 U.S. 135 (1950).

122. *See infra* text accompanying notes 124–33 (comments of Presidents Truman and Eisenhower).

123. 1947 ADM'R OF VETERANS' AFFS. ANN. REP. 146; 1946 ADM'R OF VETERANS' AFFS. ANN. REP. 108; 1945 ADM'R OF VETERANS' AFFS. ANN. REP. 69; 1944 ADM'R OF VETERANS' AFFS. ANN. REP. 68; 1943 ADM'R OF VETERANS' AFFS. ANN. REP. 66; 1942 ADM'R OF VETERANS' AFFS. ANN. REP. 67. Indeed, as of 1947 only two private bills granting financial relief to World War I veterans had become law. *See* 1947 ADM'R OF VETERANS' AFFS. ANN. REP. 146.

124. H.R. DOC. NO. 79–767, at 1–2 (1946)(returning H.R. 4660, a bill for the relief of Mrs. Georgia Lanser and Ensign Joseph Lanser, without his approval).

125. *Id.*

126. *Id.* at 1.

Diego on November 17, 1944.[127] The President explained that "[a]pproval of this measure . . . would be discriminatory in character in that it would grant to the estate a special benefit denied to the estates of other members of the armed forces where the facts are similar."[128] He noted in detail the benefits Chief Cardy's family would receive under laws administered by the Veterans' Administration and the military services,[129] and found that payment of those benefits distinguished this private bill from those of civilians who had no administrative remedy.[130]

President Eisenhower voiced similar concerns when he vetoed private relief legislation intended to override final Veterans' Administration decisions denying benefits.[131] In vetoing a bill that would have deemed a World War II veteran's eye injury to be service-connected, the President stated:

> I consider it unwise to set aside the principles and rules of administration prescribed in the general laws governing veterans' benefit programs. Uniformity and equality of treatment to all who are similarly situated must be the steadfast rule if the Federal programs for veterans and their dependents are to be operated successfully. [132]

127. Harry S Truman, S. DOC. NO. 80–179, at 1–3 (1948) (returning, without his approval, bill S. 252 for the relief of the estate of Lee Jones Cardy).

128. *Id.* at 2–3.

129. *Id.* at 2. These included: Navy-paid death gratuity payment equal to six months pay ($756); Army-paid burial expenses ($227.93); Veterans' Administration monthly payments for death compensation to Mr. Cardy's widow ($78/month); Veterans' Administration monthly payments for death compensation to Mr. Cardy's mother ($54/month); and Government life insurance monthly installments ($36.20) from Mr. Cardy's $10,000 policy. *Id.* The 1947 median income for a male U.S. Worker was $2,324. U.S. Census Bureau, Current Population Survey, 1988 to 2003 Annual Social and Economic Supplements,
http://www.census.gov/hhes/www/income/histinc/p53ar.html.

130. S. DOC. NO. 80-179, at 3. President Truman likewise vetoed a private bill that would have paid a lump sum of $10,000 to pilot Ernest Jenkins who was injured in a 1942 Georgia airplane crash while on active duty with the Civil Air Patrol. Harry S Truman, S. DOC. NO. 81-120, at 1–3 (1949)(returning bill S. 377, an Act for the Relief of Ernest J. Jenkins, without his approval). The President stated:

> [I]t is clear that to single [Jenkins] out for special treatment in this fashion would discriminate against and deny equal justice to others who may have suffered equally or worse.
>
> The records of the Civil Air Patrol indicate that over 50 of its members lost their lives and somewhat less than 100 were injured on its missions in World War II. Benefits are still being paid under the civilian war-benefits program to the dependents of 33 members who were killed and to 4 members who were injured.

Id. at 2.

131. H.R. DOC. NO. 83–426, at 1–3 (1954) (returning bill H.R. 3109, 83d Cong. (1954) an Act for the relief of Theodore W. Carlson, without his approval).

132. *Id.* at 2.

He used identical language when he vetoed a bill that decreed a soldier who committed suicide in 1943 while in a Mississippi guardhouse "shall be held and considered to have [died] in line of duty."[133]

II. JUDICIAL ANTECEDENTS TO *FERES* AFTER ENACTMENT OF THE FEDERAL TORT CLAIMS ACT

This part examines the key, pre-*Feres* judicial decisions that addressed whether, and to what extent, the FTCA provided a remedy to members of the military. It begins by examining the two seminal district court opinions in *Jefferson v. United States*[134] that influenced much of the subsequent jurisprudence.[135] It discusses the *Brooks v. United States*[136] litigation that culminated in the Supreme Court's decision, reached a year before *Feres*, which held that the FTCA authorized suits by service members for injuries that did not arise incident to military service.[137] It ends by describing the *Jefferson*, *Griggs*, and *Feres* circuit court decisions that were jointly heard by the Supreme Court in *Feres*.[138]

A. Judge Chesnut & Jefferson v. United States

In the *Jefferson* litigation, United States District Judge William Chesnut of the District of Maryland issued a pair of influential opinions that laid the groundwork for the *Feres* debate.[139] The *Jefferson* cases arose from an army surgeon's negligence in leaving a thirty-inch by eighteen-inch towel in the body cavity of his patient, Army flight chief Arthur Jefferson, an active duty soldier.[140] The United States moved to dismiss, arguing that Congress had not intended for the FTCA to authorize suits by service members for the negligence of other service members.[141] It reasoned that the veterans' benefits programs provided an exclusive remedy, citing Public Vessel Act cases which held that military members could not sue the government in tort although that statute waived sovereign immunity for

133. H.R. DOC. NO. 83-432, at 1–2 (1954) (returning bill H.R. 6242, 83d Cong. (1954) an Act for the relief of Mrs. Josette L. St. Marie, without his approval).
134. 77 F. Supp. 706 (D. Md. 1948), *aff'd*, 178 F.2d 518 (4th Cir. 1949), *aff'd sub nom.* Feres v. United States, 340 U.S. 135 (1950); *Jefferson v. United States*, 74 F. Supp. 209 (D. Md. 1947).
135. *Supra* note 135.
136. 337 U.S. 49 (1949).
137. *Id.* at 54.
138. Jefferson v. United States, 178 F.2d 518 (4th Cir. 1949), *aff'd sub nom.* Feres v. United States, 340 U.S. 135 (1950); Griggs v. United States, 178 F.2d 1 (10th Cir. 1949), *rev'd sub nom.* Feres v. United States, 340 U.S. 135 (1950); Feres v. United States, 177 F.2d 535 (2d Cir. 1949), *aff'd*, 340 U.S. 135 (1950).
139. *See Jefferson*, 77 F. Supp. at 708; *Jefferson*, 74 F. Supp. at 210.
140. *Jefferson*, 77 F. Supp. at 708.
141. *Id.* at 711.

injuries caused by a United States public vessel.[142] The government also argued that the relationship between it and its service members was of a special nature unlike typical master-servant or employer-employee relations. Therefore, it concluded, Congress did not intend the FTCA to apply to claims arising from the mutual duties and obligations running between military members and the government which are governed by federal law[143] when the FTCA applies the tort law applicable to private persons under the state law "of the place where the act or omission occurred."[144]

In a carefully written opinion of October 23, 1947, Judge Chesnut denied the United States' motion to dismiss without prejudice.[145] While acknowledging the "plausibility and force"[146] of the argument that Congress did not intend for the FTCA to authorize all suits by members of the military because it had created "an elaborate system of disability and pension allowances"[147] for them, he noted that the Act specifically included members of the military in its definitions of "'Employee of the Government' [and] '[a]cting within the scope of . . . employment,'"[148] thereby bringing their torts within the Act's general waiver of sovereign

142. *Jefferson*, 74 F. Supp. at 210–11 (citing Bradey v. United States, 151 F.2d 742 (2d Cir. 1945); Dobson v. United States, 27 F.2d 807 (2d Cir. 1928)).

143. *Jefferson*, 74 F. Supp. at 211 (citing United States v. Standard Oil Co., 332 U.S. 301 (1947)). In *Standard Oil*, the government sought to recover the amount of pay and medical expenses it had expended for a soldier injured by a negligently driven Standard Oil truck. 332 U.S. at 302. The Court declined to decide the case under state law, reasoning that:

> Perhaps no relation between the Government and a citizen is more distinctively federal in character than that between it and members of its armed forces. To whatever extent state law may apply to govern the relations between soldiers or others in the armed forces and persons outside them or nonfederal governmental agencies, the scope, nature, legal incidents and consequences of the relation between persons in service and the Government are fundamentally derived from federal sources and governed by federal authority.

Id. at 305–06. It explained that state law is inappropriate for deciding such issues. *Id.* at 309–10 ("Not only is the government-soldier relation distinctively and exclusively a creation of federal law, but we know of no good reason why the Government's right to be indemnified in these circumstances . . . should vary in accordance with the different rulings of the several states . . . ."). The Court held that the United States could not recover because it is for Congress to decide whether the United States can bring suit to recover losses it sustains for injury to its soldiers, and Congress had not created such a cause of action. *Id.* at 315–17.

144. *Jefferson*, 74 F. Supp. at 211 (quoting Federal Tort Claims Act, Pub. L. No. 79-601 § 402(b), 60 Stat. 842 (1946) (codified at 28 U.S.C. § 1346(b) (2006))). The government also argued that under general Military Law, a government is not liable to a soldier of the militia injured by the negligence of fellow soldiers. *Id.* at 214.

145. *Id.* at 209–10, 216.

146. *Id.* at 211.

147. *Id.* at 210.

148. *Id.* at 211 (citing Federal Tort Claims Act § 402(b)–(c) (codified at 28 U.S.C. § 2671 (2006))).

immunity.[149] He also noted that the Act included twelve enumerated exceptions to the general waiver, but not one explicitly for claims by service members although prior legislative proposals had included an exception for "claims for which compensation was provided by the . . . World War Veterans' Act of 1924."[150] He expressed concern that the Public Vessels Act cases were distinguishable because that act had very general language about who could bring suit[151] compared to the FTCA's explicit jurisdictional grant[152] and its clear intent to allow suits against the government for "the negligent acts of military personnel."[153] Recognizing that the military stands in a special, federal relationship to the government,[154] he acknowledged that there may be merit to the argument that allowing the *Jefferson* suit might create a "heretofore non-existent tort, . . . not within the intention of Congress" under circumstances where a private person would not be liable under state law as required by the FTCA's jurisdictional grant.[155] Nonetheless, he was not persuaded, concluding that the motion to dismiss should be denied without prejudice, but suggesting that, "[p]erhaps the proper application of the Act will become clearer on further argument and consideration and the possible narrowing of issues by the developed facts of the particular case."[156]

On May 7, 1948, following a trial on the merits, Judge Chesnut revisited the government's motion to dismiss and issued a second opinion.[157] The judge made findings of fact that during a cholecystostomy operation on July 3, 1945, while Mr. Jefferson was on active duty,[158] his military surgeon negligently left in his body cavity a towel thirty inches long and eighteen inches wide, marked "Medical Department U.S. Army."[159] The towel was removed when it was discovered during an operation on March 13, 1946.[160] Mr. Jefferson suffered a serious hernia which made it doubtful that he could return to his occupation as a mechanic.[161] After his discharge,

149. *Id.* at 211.
150. *Id.* at 211–12 (citing 86 CONG. REC. 12015–32 (1940)).
151. *Id.* at 212–13.
152. *Id.* at 213 (citing Federal Tort Claims Act § 410(a) (codified at 28 U.S.C. § 1346(b) (2006))).
153. *Id.* at 214.
154. *Id.* at 215 (citing United States v. Standard Oil Co., 332 U.S. 301, 310–11 (1947)).
155. *Id.* at 215.
156. *Id.* at 216.
157. *Jefferson*, 77 F. Supp. 706, 706, 711 (D. Md. 1948), *aff'd*, 178 F.2d 518 (4th Cir. 1949), *aff'd sub nom.* Feres v. United States, 340 U.S. 135 (1950).
158. *Id.* at 708. Mr. Jefferson had enlisted in the Army on October 22, 1942, when he was forty-five years old, and received his honorable discharge on January 9, 1946. *Id.*
159. *Id.* at 708–09.
160. *Id.*
161. *Id.* at 709.

Mr. Jefferson applied for service-connected disability payments and, at the time of trial, was receiving 100% disability from the Veterans' Administration of $138 per month, for a prospective lifetime award of $31,947.[162] The court found that had he been able to return to his prior employment, "[t]he commuted value of this earning capacity for [his] estimated life expectancy of 22 years would be about $45,000."[163] Judge Chesnut concluded that if Jefferson had a valid claim under the FTCA and his administrative awards were deducted from his damages, "a sum of $7,500 would be an appropriate verdict."[164]

After setting forth his findings of fact, Judge Chesnut revisited the question raised in the government's motion to dismiss.[165] He cogently stated the issue:

> The problem of statutory construction now presented is whether the comprehensive phrase "any claim against the United States, for money only" . . . without words of limitation as to classes of persons who may make the claim, should be narrowed by construction to exclude claims made by members of the Armed Forces of the United States for service-connected injuries sustained while in such service, in view of the special relationship long existing between the United States and members of its military forces, and the large body of federal legislation upon the subject. These include elaborate provisions for pay and allowances and retirement benefits . . . .[166]

He recognized that the problem was especially difficult because the FTCA contained a number of explicit exceptions but none that barred all service-connected claims by service members, although a prior draft of the Act had included an exception "for the same general purpose."[167] Nonetheless, he concluded that the FTCA did not encompass such claims.[168]

In explaining this decision, Judge Chestnut noted the principle of statutory construction that a statute should not be read literally when, "from the whole subject matter of the particular Act and its setting in the whole governmental scheme, the court can see that the literal import of the phrase used is contrary to established policy and would not accord with the real intention of Congress in passing the Act."[169] He recognized the "close

162. *Id.* at 710.
163. *Id.*
164. *Id.* at 710–11.
165. *Id.* at 711.
166. *Id.*
167. *Id.* at 712.
168. *Id.*
169. *Id.* at 712 (citing United States v. Arizona, 295 U.S. 174 (1935); Ozawa v. United States, 260 U.S. 178 (1922); United States v. Sweet, 245 U.S. 563 (1918)).

precedent" of the Second Circuit Public Vessels Act[170] cases that barred claims of service members despite statutory language that generally allowed suit "'against the United States . . . for damages caused by a public vessel of the United States.'"[171] He cited *Burkhardt v. United States*[172] for the proposition that the literal language of one phrase of the FTCA is "not applicable in view of other provisions of the Act."[173]

The judge explained that "the main purpose" of the FTCA was to waive sovereign immunity for "the ordinary run of tort claims arising in the United States,"[174] but that the FTCA was only one part (Title IV) of the more comprehensive Legislative Reorganization Act of 1946.[175] Title I of that Act prohibited private relief bills for claims that might be brought under the FTCA.[176] He noted that Congress enacted this provision because it was overburdened by the deluge of such private bills and "that an important if not the main motivation of Congress in enacting the Tort Act was to transfer such claims to the courts."[177] He further noted that private bills to benefit service members for service-connected injuries were uncommon because of the many administrative remedies Congress had provided to them.[178] Accordingly, he found it "probable" that damages claims of soldiers for service-connected injuries "were not within the contemplation of Congress" when it enacted the FTCA.[179]

Judge Chesnut concluded that claims of military members arising from their military duty did not fall within the FTCA's jurisdictional language that defined the government's tort liability by the standard of a private person under the law of the state where the tort took place, because "such injuries did not constitute common law or statutory torts under the laws of the several States," and no "State legislation could properly have affected the relations of the United States to members of its armed forces which, of

170. *Id.* (citing Public Vessels Act, 46 U.S.C.A. §§ 781–90 (1946) (now codified at 46 U.S.C. §§ 31101–13 (2006))).

171. *Id.* (citing Bradey v. United States, 151 F.2d 742 (2d Cir. 1945); Dobson v. United States, 27 F.2d 807 (2d Cir. 1928); O'Neal v. United States, 11 F.2d 869 (2d Cir. 1926)).

172. 165 F.2d 869 (4th Cir. 1947).

173. *Id.* at 712 (citing *Burkhardt*, 165 F.2d 869). *Burkhardt* held that despite language of the FTCA limiting liability to "*circumstances* where the United States, if a private person, would be liable [to the claimant] in accordance with the law of the place," state statutes of limitations defenses are inapplicable because the FTCA included statutes of limitations. 165 F.2d at 871, 874 (citing FTCA § 410(a)).

174. *Jefferson*, 77 F. Supp. at 712; *see also id.* at 713 (citing S. REP. NO. 79-1400 (1946)); H.R. REP. NO. 79-2614 (1946).

175. *Id.* at 712.

176. *Id.* (citing Legislative Reorganization Act, Pub. L. No. 79-601, § 131, 60 Stat. 812, 831 (1946)).

177. *Id.*

178. *Id.*

179. *Id.* at 712–13.

course, depended purely on federal law."[180] He found support for this conclusion in *United States v. Standard Oil Co.*,[181] which held that the government had no right to subrogation for injuries to its military members because Congress had not created one "in federal law, and . . . it would be incongruous to give such a right of action in view of the variable State laws which might apply to any particular soldier dependent upon where he happened to be at the time."[182] He quoted *Standard Oil*'s summary of the "distinctively federal" nature of the United States' relationship to its military members.[183] He concluded that the FTCA's private person under state law standard for assigning tort liability is "inapt" for the military plaintiff.[184]

B. Brooks v. United States

The *Feres* decision was foreshadowed by the *Brooks v. United States*[185] case, which the Supreme Court decided on May 16, 1949.[186] In *Brooks*, two brothers on furlough from the Army[187] were driving with their father in a private car on a public highway when a civilian federal employee driving an Army truck negligently struck them.[188] Following a trial on the merits, District Judge Cavanah entered a judgment of $4,000 for the personal injuries of Welker Brooks,[189] and one of $25,000 for the wrongful death of Arthur Brooks.[190] On January 7, 1948, Judge Cavanah denied the government's motion to dismiss; rejecting its argument that suit was barred because the Brooks brothers had received veterans' benefits.[191] He gave two reasons: First, unlike the North Carolina workers' compensation statute, no federal statute declared veterans' benefits to be an exclusive

180. *Id.* at 713.
181. 332 U.S. 301 (1947).
182. *Jefferson*, 77 F. Supp. at 713 ("[W]e know of no good reason why the Government's right to be indemnified in these circumstances, or the lack of such a right, should vary in accordance with the different rulings of the several states, simply because the soldier marches or today perhaps as often flies across state lines." (quoting *Standard Oil Co.*, 332 U.S. at 310)).
183. *Id.* (quoting *Standard Oil*, 332 U.S. at 305).
184. *Id.* at 714 ("It is hardly conceivable to analogize the liability of the United States to that of a private individual in respect to service-connected disabilities in view of the government-soldier particular relationship.").
185. 337 U.S. 49 (1949).
186. *Id.* at 49.
187. United States v. Brooks, 169 F.2d 840, 841 (4th Cir. 1948), *rev'd*, 337 U.S. 49 (1949). The Fourth Circuit issued its opinion on August 26, 1948. *Id.* at 840.
188. 337 U.S. at 50.
189. *Id.*; United States v. Brooks, 176 F.2d 482, 483 (4th Cir. 1949).
190. *Brooks*, 176 F.2d at 484. The father, James Brooks, received a judgment of $5,000 for his personal injuries. *Brooks*, 337 U.S. at 51 n.1; Transcript of Record at 27, *Brooks*, 337 U.S. 49 (Nos. 388 and 389).
191. Transcript of Record at 19, *supra* note 191.

remedy.[192] Second, because the FTCA made the government liable in the same manner as a private person and the then-recent Ninth Circuit *Standard Oil* decision allowed a service member to recover both administratively from the veterans' benefit program and in tort from a tortfeasor without subrogation by the government, "it would follow that the government may make veterans' payments to the plaintiff and at the same time be liable to him as a tortfeasor."[193]

On appeal, the Fourth Circuit reversed in a split decision.[194] Writing for the majority, Judge Dobie adopted much of Judge Chesnut's analysis in *Jefferson*, but went beyond it to conclude that all claims of military members were excluded from the FTCA, not just those that arose from their military service.[195] The court noted the comprehensive nature of the compensation system for service members and veterans,[196] the unique relationship between service members and the federal government,[197] and the incongruity of barring suit by service members injured in combat or foreign lands but allowing claims arising from non-combat domestic activities:

> Thus, under the [combatant activity] exception, a soldier killed or injured in the important and perilous combat activities of war would be denied a recovery; while there would be a perfect claim for the soldier killed or injured in non-combat activities. Under the [foreign tort] exception, for a soldier injured or killed while stationed in Canada, no recovery; for a soldier injured or killed at Plattsburg, New York, just a few miles from the Canadian border, again a recovery. It is difficult for us to think that Congress intended such results to flow from the Federal Tort Claims Act.[198]

Judge Dobie relied on the *Dobson* and *Bradey* Public Vessels Act decisions[199] and the *Sandoval* Railroad Control Act opinion, all of which

192. *Id.* at 26.

193. *Id.* (citing Standard Oil Co. v. United States, 153 F.2d 958 (9th Cir. 1946), *aff'd*, 332 U.S. 301 (1947)).

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

195. *Id.* at 842–45 (citing *Jefferson*, 77 F. Supp. 706, 711–14 (D. Md. 1948), *aff'd*, 178 F.2d 518 (4th Cir. 1949), *aff'd sub nom.* Feres v. United States, 340 U.S. 135 (1950)) ("We are quite unable to find in the Act anything which would justify us in holding that Congress intended to include death of, or injury to, a soldier, which was not service-caused (the instant case) and to exclude service-caused injury or death (the Jefferson case).")).

196. *Id.* at 842–43.

197. *Id.* at 842.

198. *Id.* at 844.

199. *Id.* at 843–44 (quoting Bradey v. United States, 151 F.2d 742, 743 (2d. Cir. 1945); Dobson v. United States, 27 F.2d 807, 808, 809 (2d. Cir. 1928)) ("If it had been the purpose to change that policy as respects officers and seamen of the navy injured . . . by the fault of one another, because that is what in the end it comes to, we cannot think it would have been left to such general language . . . .").

held that general waivers of sovereign immunity do not allow suits by service members when Congress has provided them with an administrative remedy.[200]

In dissent, Chief Judge Parker argued it was unreasonable to think that Congress would overlook the potential tort "claims of soldiers . . . at a time when soldiers and their rights were so prominently in the public mind."[201] He reasoned that the FTCA included twelve exceptions, but not one for claims of military members,[202] although a prior version of the Act had included an exception barring "[a]ny claim for which compensation is provided by the Federal Employees' Compensation Act, as amended, or by the World War Veterans' Act of 1924, as amended."[203] He rejected the argument that allowing suits for claims "not arising out of service" would disrupt military discipline.[204] He pointedly noted that the Brooks' claims did not involve injuries arising from their military service as had those in *Jefferson*, and "[e]ntirely different considerations might operate to deny recovery in such case, as [was] suggested in the opinion of Judge Chesnut."[205]

Facing this body of law, counsel for the Brooks crafted petitions for certiorari to avoid the key adverse authority by emphasizing that the brothers' activities at the time of the accident were entirely divorced from their military service. They framed the "Questions Involved" as:

> Did Congress intend that members of the armed services should have no rights of action under the Federal Tort Claims Act?
>
> More particularly, if a member of the armed services is injured under circumstances wholly unconnected with military affairs and not in any way growing out of any armed service status or relationship, and if the situation is one which may readily occur and does occur with respect to persons not in the armed service and is a situation in which other persons, in general, do clearly have rights of action under the Federal Tort Claims Act—did Congress nevertheless intend that in such situation the claimant, merely because of the circumstance that he belongs to the armed service, shall have no right of action?[206]

200. *Id.* at 844 (citing Sandoval v. Davis, 288 F. 56 (6th Cir. 1923)).
201. *Id.* at 847 (Parker, C.J., dissenting).
202. *Id.* at 848.
203. *Id.* at 849 (noting that the missing exception "was omitted, with apparent deliberation" (citing Federal Tort Claims Act, H.R. 181, 79th Cong. (1945)); S. REP. NO. 79-1400, at 30 (1946)).
204. *Id.* at 850.
205. *Id.*
206. Petition for Writs of Certiorari at 3, Brooks v. United States, 337 U.S. 49 (1949) (Nos. 388 and 389).

They argued that, "Welker B. Brooks and Arthur L. Brooks were soldiers. *But their being soldiers had nothing whatever to do* with their respective injury and death" or the brothers' presence "*on the highway*."[207] They distinguished *Dobson*, *Bradey*, and *Sandoval* because, unlike the Brooks' situation, "the injuries involved in [those] . . . cases were 'service-caused,' that is, occurred because the injured men were members of the armed forces and incurred their injuries during the course of activities necessitated by or incident to their military service."[208] They distinguished *Jefferson* on the same grounds, arguing Jefferson "was on the operating table . . . *only because of his being a soldier*. The army surgeon was operating on him *only because of the military and army relationship* between the two of them."[209] The Supreme Court granted the Brooks' petitions for certiorari on January 3, 1949.[210]

The United States began its argument with the cases that excluded claims of service members from general waivers of the government's tort sovereign immunity.[211] In response to the plaintiffs' argument that the brothers' injuries were not connected to their military service, the government maintained that the cases barring tort suits of service members turned on the existence of the comprehensive compensation system rather than the manner in which the injury was incurred.[212] The government went on to argue that Congress had provided an "adequate and comprehensive statutory system for handling death or injury claims of members of the armed forces,"[213] and that Congress did not intend for the FTCA to provide duplicate compensation.[214] It explained that while a primary purpose of the Legislative Reform Act of 1946 and the FTCA was to increase legislative efficiency by removing Congress' responsibility for deciding private bills involving torts by assigning that job to the courts,[215] the number of private

207. Brief in Support of Petition for Writs of Certiorari at 16, *Brooks*, 337 U.S. 49 (Nos. 388 and 389).
208. *Id.* at 21.
209. *Id.* at 22.
210. Brooks v. United States, 335 U.S. 901 (1949). The Brooks' petitions were filed on October 30, 1948, in both the personal injury case and the wrongful death case. Petition for Writs of Certiorari, *Brooks*, 337 U.S. 49 (Nos. 388 and 389). Accordingly, two orders were entered when the petitions were granted. *Brooks*, 335 U.S. 901.
211. U.S. *Brooks* Br., *supra* note 60 at 6, 10–18. Thus, the government cited *Dobson*, *id.* at 12–13; *Bradey*, *id.* at 13–14; cases construing the Railroad Control Act of 1918, *id.* at 14–16; and the New York Tort Claims Act, *id.* at 16.
212. *See id.* at 49 ("The rationale of those cases was not, as contended by petitioner, the fact that the injuries were service-caused, but rather that there was in existence a comprehensive statutory system for making payment on such claims.").
213. *See id.* at 6–7; *see also id.* at 17–30.
214. *See id.* at 8–10, 30–49.
215. *See id.* at 30–33.

bills seeking money for injured or killed service members was insignificant.[216] It reasoned that because the FTCA was enacted to allow the courts to decide claims that would previously have been submitted to Congress as private bills by those who had no administrative remedy, "it is reasonable to assume that Congress did not intend the Act [to] encompass an entirely new and distinct group of claims arising out of the death or injury to soldiers for which it had already adequately provided."[217] The government also argued that the plaintiffs' acceptance of statutory benefits barred any recovery under the FTCA.[218]

The Supreme Court framed the question before it as "whether members of the United States armed forces can recover under [the FTCA] for injuries not incident to their service."[219] To answer that question, the Court examined as best it could what Congress had intended when it enacted the FTCA.[220] The Court concluded that the FTCA did waive sovereign immunity for such claims.[221] Justices Frankfurter and Douglass dissented "substantially for the reasons set forth by Judge Dobie."[222]

In reaching its decision, the Court recognized that neither the veterans' laws nor the FTCA explicitly stated that the remedies they provided were exclusive of other remedies, and that Congress had not required an election of remedies.[223] It noted the FTCA's exceptions for combatant activities and foreign torts, and the absence of an exception for claims that might be compensated under the World War Veterans' Act of 1924 that had been included in prior legislative drafts.[224] Together, these suggested to the Court that Congress did have service members in mind when it enacted the FTCA.[225]

On the other hand, the Court acknowledged the potential legitimacy of the government's argument that Congress did not intend to waive immunity for claims by service members for "[a] battle commander's poor judgment, an army surgeon's slip of hand,

216. *See id.* at 33–35.
217. *Id.* at 36.
218. *See id.* at 50–52.
219. Brooks v. United States, 337 U.S. 49, 50 (1949).
220. *See id.* at 51 (arguing that the overseas and combatant activities exceptions made it plain that Congress had service members in mind when the statute was passed in 1946); *id.* at 52 (stating that consequences may provide insight for determining congressional purpose); *id.* at 53 (seeing no indication that Congress meant the United States to pay twice for the same injury).
221. *See id.* at 54.
222. *Id.* (Frankfurter & Douglas, JJ., dissenting) (citing United States v. Brooks, 169 F.2d 840 (2d. Cir. 1948), *rev'd*, 337 U.S. 49 (1949)).
223. *See id.* at 53.
224. *See id.* at 51–52.
225. *See id.* at 52.

[or] a defective jeep which causes injury."[226] While recognizing the substantial authority that might support the government's argument in suits involving military situations,[227] the Court concluded that the *Brooks* facts did not raise the issue because the brothers' injuries were not related to their military service:

> But we are dealing with an accident which had nothing to do with the Brooks' army careers, injuries not caused by their service except in the sense that all human events depend upon what has already transpired. Were the accident incident to the Brooks' service, a wholly different case would be presented. We express no opinion as to it, but we may note that only in its context do [*Dobson*, *Bradey*, and *Jefferson*] have any relevance. See the similar distinction in 31 U.S.C. § 223b [the Military Claims Act and the Military Personnel Claims Act]. . . . The Government's fears may have [a] point in reflecting congressional purpose to leave injuries incident-to-service where they were, despite literal language and other considerations to the contrary. The result may be so outlandish that even the factors we have mentioned would not permit recovery. But that is not the case before us.[228]

Accordingly, the Court left for another day the question whether the FTCA allows suit by service members for claims arising incident to military service.[229] Three cases squarely raising that question were in the judicial pipeline.

C. The Feres, Griggs, *&* Jefferson *Circuit Court Decisions*

In 1949, three circuit courts rendered decisions squarely dealing with the issue of whether the FTCA waived sovereign immunity for claims arising from injuries incurred incident to military service.[230] These cases were decided together in the Court's *Feres* opinion.[231]

226. *Id.*

227. *Id.* (citing Bradey v. United States, 151 F.2d 742 (2d Cir. 1945); Dobson v. United States, 27 F.2d 807 (2d Cir. 1928); Jefferson v. United States, 77 F. Supp. 706 (D. Md. 1948), *aff'd*, 178 F.2d 518 (4th Cir. 1949), *aff'd sub nom.* Feres v. United States, 340 U.S. 135 (1950)).

228. *Id.* at 52–53 (citation omitted).

229. *Id.* at 53. The Court remanded the case for determination whether the judgment should be reduced for previously paid administrative remedies, and whether that issue had been preserved for appeal. *Id.* at 54.

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

231. *Feres*, 340 U.S. at 136–37.

1. Feres v. United States

The *Feres* litigation alleged that a barracks fire and the death of U.S. Army Lieutenant Rudolph Feres were caused by government negligence in maintaining a defective heating plant and failing to guard against fire.[232] Lieutenant Feres was quartered under orders in the barracks in Pine Camp, New York, a federal military post.[233] The district court dismissed the case, relying on the Fourth Circuit's *Brooks* decision.[234] On November 4, 1949, in an opinion by Judge Augustus Hand, the Second Circuit unanimously affirmed.[235]

The Second Circuit concluded that its *Dobson* and *Bradey* precedents, as followed by Judge Chesnut in *Jefferson*, correctly stated the established rule that service members cannot sue the government in tort for incident-to-service injuries.[236] Accordingly, "[i]f more than the pension system had been contemplated to recompense soldiers engaged in military service we think that Congress would not have left such relief to be implied from the general terms of the Tort Claims Act, but would have specifically provided for it."[237] The court saw the Supreme Court's *Brooks* decision to have recognized an "exception to this interpretation [for] . . . situations where military personnel were not on active duty."[238]

The court directly addressed the FTCA's twelve exceptions, noting that, "they relate to the cause of injury rather than to the character of a claimant who may seek to recover damages for his injuries."[239] The court recognized that even though the exceptions "relieve the government in certain situations from liability to all persons including civilians, they do not mention soldiers specifically" and "[t]here would seem to have been no reason for mentioning soldiers when the latter had not been treated as having claims for injuries incident to their service."[240] The court gave short shrift to the argument that Congress intended to allow FTCA suits for incident-to-service injuries because it had omitted from the FTCA a proposed thirteenth exception for, "'[a]ny claim for which compensation is

232. 177 F.2d at 536.
233. *Id.*
234. *See id.* (citing United States v. Brooks, 169 F.2d 840 (4th Cir. 1948), *rev'd*, 337 U.S. 49 (1949)).
235. *Id.* at 535.
236. *Id.* at 537 (citing Bradey v. United States, 151 F.2d 742 (2d Cir. 1945); Dobson v. United States, 27 F.2d 807 (2d Cir. 1928); *Jefferson*, 77 F. Supp. 706 (D. Md. 1948), *aff'd*, 178 F.2d 518 (4th Cir. 1949), *aff'd sub nom.* Feres v. United States, 340 U.S. 135 (1950)).
237. *Id.* at 537.
238. *Id.*
239. *Id.*
240. *Id.* (citing 31 U.S.C.A. § 223b (1946)).

provided by [Federal Employees Compensation Act (FECA)], as amended, or by the World War Veterans Act of 1924, as amended.'"[241] Judge Augustus Hand reasoned that FECA, as amended, provided that an employee receiving benefits under that act, "'shall not receive from the United States any salary, pay, or remuneration whatsoever except in return for services actually performed, and except pensions for [military] service.'"[242] Likewise, "the World War Veterans' Act of 1924, as amended, provided that 'no other pension laws or laws providing for gratuities or payments in the event of death in the service' . . . shall be applicable to disabilities or deaths made compensable under the Act."[243] Accordingly, the proposed thirteenth exception was likely judged "unnecessary."[244] Consequently, the court affirmed dismissal of the suit.[245]

2. Griggs v. United States

Griggs v. United States[246] alleged that Lt. Colonel Dudley Griggs underwent surgery at an Army hospital at Scott Air Base, Illinois, and died as a result of medical malpractice by members of the Army Medical Corps.[247] Lt. Colonel Griggs was on active duty and was admitted to the hospital under orders.[248] The district court granted the government's motion to dismiss on grounds that the complaint failed to state a claim for relief under the FTCA.[249] On November 16, 1949, a divided Tenth Circuit panel reversed that holding.[250]

Judge Murrah, writing for the majority, acknowledged that in *Jefferson*, Judge Chesnut had concluded that the broad benefits Congress provided to veterans indicate that "the obvious purpose of Congress was to exclude" from FTCA coverage those claims that arise from the "unique Government-soldier relationship."[251] However, he then noted that the Supreme Court in *Brooks* "was not moved by such considerations."[252] The opinion reasoned that a claim for injury to a service member was valid under the FTCA "unless it [fell] within one of the twelve exceptions

241. *Id.* (citing H.R. 181, 79th Cong. (1945)).
242. *Id.* (quoting 5 U.S.C.A. § 757 (1946)).
243. *Id.* at 537–38 (quoting 38 U.S.C.A. § 422 (1946)).
244. *Id.* at 538.
245. *Id.*
246. 178 F.2d 1 (10th Cir. 1949) *rev'd sub nom.* Feres v. United States, 340 U.S. 135 (1950).
247. *Id.* at 2.
248. *Id.*
249. *Id.*
250. *Id.* at 3.
251. *Id.* at 2.
252. *Id.*

specifically provided therein; or, unless from the context of the Act it [was] manifestly plain that despite the literal import of the legislative words, Congress intended to exclude from coverage civil actions on claims arising out of a Government-soldier relationship."[253] Judge Murrah found nothing in the legislative history "justifying judicial limitation upon the claims of servicemen."[254] He observed that although Congress had included express exceptions for military claims in eighteen proposed tort claims bills, "it conspicuously omitted" from the FTCA an exception for "claims growing out of a government-soldier relationship."[255] He concluded that Congress had deliberately decided not to exclude such claims from the Act.[256] The opinion did not mention or address *Bradey* and *Dobson*.[257] In dissent, Judge Huxman "adopt[ed] the reasoning of [Judge Chesnut in] the Jefferson case."[258]

3. Jefferson v. United States

On December 19, 1949, a unanimous panel of the Fourth Circuit affirmed Judge Chesnut's decision that because Arthur Jefferson's injuries arose from his military service, the FTCA did not provide a tort remedy for the medical malpractice that left a towel in his body cavity.[259] The panel consisted of Judge Soper who authored the panel's opinion,[260] Judge Dobie who had written the Fourth Circuit majority opinion in *Brooks*,[261] and Chief Judge Parker who had dissented in *Brooks*.[262]

The opinion noted that while the *Jefferson* litigation was proceeding before Judge Chesnut, the Supreme Court had decided in *Brooks* that service members could sue under the FTCA "for injuries not incident to their service, but left open the question whether the statute also cover[ed] claims by service men for injuries incident to their service."[263] It remarked that the Second and Tenth Circuits had come to opposite conclusions on that question in *Feres* and *Griggs*.[264] The court characterized the choice as "between a literal interpretation of the Act and a construction which

253. *Id.* at 2, 3.
254. *Id.* at 3.
255. *Id.*
256. *Id.*
257. *See id.* at 1–3.
258. *See id.* at 3 (Huxman, J., dissenting).
259. Jefferson v. United States, 178 F.2d 518, 519–20 (4th Cir. 1949), *aff'd sub nom.* Feres v. United States, 340 U.S. 135 (1950).
260. *Id.* at 518.
261. *Id.*; United States v. Brooks, 169 F.2d 840, 841 (4th Cir. 1948), *rev'd*, 337 U.S. 49 (1949).
262. *Jefferson*, 178 F.2d at 518; *Brooks*, 169 F.2d at 846.
263. *Jefferson*, 178 F.2d at 519.
264. *Id.*

recognize[d] the peculiar relationship that exist[ed] between a member of the armed services and superior military authority."[265] It recognized that Congress enacted the FTCA to provide a remedy for "persons injured through the negligence of [government] employees" in the courts rather than through the inefficient private bill process "which burdened the legislative branch . . . and caused delay."[266] But the court saw limits on the scope of that remedy:

> It seems unreasonable, however, to conclude that Congress, while accomplishing these desirable purposes, intended at the same time to subject every injury sustained by a member of the armed forces in the execution of military orders to the examination of a court of justice . . . . If this were so, the civil courts would be required to pass upon the propriety of military decisions and actions and essential military discipline would be impaired by subjecting the command to the public criticism and rebuke of any member of the armed forces who chose to bring a suit against the United States.[267]

In concluding that the FTCA did not provide a remedy for in-service injuries, the court attached no importance to the fact that proposed exceptions for claims of military personnel were dropped before final passage of the Act.[268] It supported its conclusion by noting the "distinctively federal character of the government-soldier relationship,"[269] and the unreasonableness of supposing "in the absence of an express declaration on the point, that Congress intended to adopt so radical a departure from its historic policy as to subject internal relationships within the military establishment to the law of negligence as laid down by the courts of the several states."[270] It recognized that Mr. Jefferson and other service members had a wide range of allowances and retirement benefits, providing them with generous remedies outside the tort arena.[271] Finally, it cited the Second Circuit's *Dobson* and *Bradey* decisions, which held in analogous circumstances that the Public Vessels Act waiver of sovereign immunity allowing persons to sue "the United States in personam for damages caused by the negligent

265. *Id.* at 519–20.
266. *Id.* at 520.
267. *Id.*
268. *Id.* (citing Orders of Ry. Conductors v. Swan, 329 U.S. 520, 529 (1946); Jewell Ridge Coal Corp. v. Local 6167 United Mine Workers, 325 U.S. 161, 168 (1945) (stating that a court should not give too much weight to the language contained in discarded measures or to the statements of legislatures in the course of debate when interpreting a statute)).
269. *Id.* (citing United States v. Standard Oil Co. 332 U.S. 301, 305 (1947)).
270. *Id.*
271. *See id.* (citing *Jefferson*, 77 F. Supp. 706, 711 (D. Md. 1948), *aff'd*, 178 F.2d 518 (4th Cir. 1949), *aff'd sub nom.* Feres v. United States, 340 U.S. 135 (1950)).

handling of a public vessel refers to damages suffered by third persons but not by members of the ship's company."[272] It affirmed Judge Chesnut's dismissal of the action.[273]

III. THE SUPREME COURT & THE *FERES* DOCTRINE

This Part reviews the parties' arguments to the Supreme Court, summarizes the Court's *Feres* opinion, and briefly reviews the Court's other opinions related to the *Feres* doctrine.

A. The Parties' Arguments

1. The United States' Arguments

The United States presented its principal arguments to the Supreme Court in its *Griggs* petitioner's brief.[274] The government began by arguing that *Brooks* had impliedly recognized that injuries suffered incident-to-service fell outside the *Brooks* holding that service members could sue under the FTCA.[275] It reasoned that drawing a distinction between injuries incurred on furlough and those incurred while receiving medical care under orders was mandated by the need to avoid subjecting claims arising from military orders to varying state law rules or judicial review which would undermine military discipline.[276] It noted that this distinction explained why Judge Parker concluded that the Brooks brothers could sue under the FTCA, but Arthur Jefferson could not.[277] The government cited as direct precedent involving "the identical problem presented . . . here,"[278] the *Dobson* and *Bradey* Public Vessel Act decisions and the Railroad Control Act cases that barred suit for incident-to-service injuries under those waivers of sovereign immunity.[279] It noted that in *Brooks*, the Court had recognized that *Dobson* and *Bradey* "would have relevance if the accident had occurred incident to the soldier's military service."[280]

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272. *Id.* (citing Bradey v. United States, 151 F.2d 742 (2d Cir. 1945); Dobson v. United States, 27 F.2d 807 (2d Cir. 1928)).
273. *Id.*
274. *See* Brief for the United States, United States v. Griggs, 340 U.S. 135 (1950) (No. 31) [hereinafter U.S. *Griggs* Br.]; Brief for the United States at 3, Feres v. United States, 340 U.S. 135 (1950) (No. 9) [hereinafter U.S. *Feres* Br.]; Brief for the United States at 4, Jefferson v. United States, 340 U.S. 135 (1950) (No. 29) [hereinafter U.S. *Jefferson* Br.].
275. *See* U.S. *Griggs* Br., *supra* note 275, at 9–13.
276. *See id.* at 13.
277. *See id.* at 12–13.
278. *Id.* at 18.
279. *See id.* at 14–19.
280. *See id.* at 14 (citing United States v. Brooks, 337 U.S. 49, 52 (1949)).

The United States then argued that Congress had not intended for the FTCA to apply to incident-to-service claims of military members.[281] Starting from the Court's *Brooks* admonition that the consequences of an interpretation allowing such suits "may provide insight for determination of congressional purpose,"[282] it reasoned that the unique, completely federal relationship between government and soldier recognized by the Court in *Standard Oil Co.*[283] was incompatible with the FTCA's requirement that tort liability of the government be assessed under state law.[284] It noted the impropriety of subjecting that relationship to "dissimilar and frequently irreconcilable state statutes and decisions."[285] It argued that because the FTCA waived sovereign immunity only under circumstances where a private person would be liable under state law, and because state law did not allow one service member to sue another for negligence, the United States could not be liable on a *respondeat superior* basis for that negligence.[286] It reasoned that if military members could bring suit for service-connected injuries, "it is obvious that the military decisions, orders, and conduct which constituted the basis for the [claim] . . . would be thrown open to judicial examination,"[287] undermining military discipline.[288] It argued that the Legislative Reorganization Act's repeal[289] of portions of the Military Claims Act[290] did not authorize suit for incident-to-service injuries because only provisions allowing recovery were repealed and the "Military Claims Act . . . does not include claims by servicemen for injury or death sustained by them incident to their military service."[291] The government concluded by noting that the military and veterans' benefits laws provided ready compensation for injured service members and their families.[292]

281. *See id.* at 19–28.
282. *Id.* at 20 (quoting *Brooks*, 337 U.S. at 52).
283. United States v. Standard Oil Co., 332 U.S. 301, 305–06 (1947) (holding that the United States could not seek indemnity under state law for payments it made on behalf of an injured soldier because the relationship between the Government and service members was governed entirely by federal law).
284. U.S. *Griggs* Br., *supra* note 274, at 21–26.
285. *Id.* at 21.
286. *See id.* at 33–37.
287. *Id.* at 27; *see id.* at 26–28 (citing United States v. Brooks, 169 F.2d 840, 845 (4th Cir. 1948), *rev'd*, 337 U.S. 49 (1949)).
288. *See id.* at 35–36; *see also id.* at 24–28.
289. The Legislative Reorganization Act of 1946 repealed those statutes that allowed agencies to make compensatory payments to persons injured by government negligence. Pub. L. No. 79–601, § 424a, 60 Stat. 812, 846 (1946).
290. *See* U.S. *Griggs* Br., *supra* note 274, at 29. When the brief mentions the Military Claims Act, it cites 31 U.S.C. § 223b and apparently refers to both the Military Claims Act and the Military Personnel Claims Act. *Id.* at 29–30.
291. *See id.* at 30.
292. *See id.* at 37–39 (noting that Mrs. Griggs could expect to receive over $22,000 in

2. The Plaintiffs' Arguments

The *Griggs*, *Jefferson*, and *Feres* plaintiffs all argued that the *Brooks* holding authorized their suits because there was no basis for distinguishing soldiers on furlough from those asleep in barracks or receiving care in hospitals.[293] The plaintiffs argued that the FTCA's language was plain on its face and allowed their suits.[294] They argued that under canons of construction, the FTCA should be interpreted to allow incident-to-service claims, pointing to the FTCA's exceptions for discretionary functions,[295] combatant activities,[296] and foreign torts,[297] and the deletion from the FTCA of a comparable exception for service members' claims that had been in prior drafts: "[T]he deliberate rejection of this proposed exception demonstrate[s] that Congress did not intend to exclude members of the armed forces suffering injuries or death in the United States, and not in combat, regardless of any other rights . . . conferred under the World War Veterans' Act of 1924 as amended."[298] Their overarching argument was that "[n]either the act as written, its legislative history or avowed purpose permitted the [c]ourt below to read into the act an exception that was not there."[299]

Responding to the government's arguments, the plaintiffs urged that *Dobson*, *Bradey*, and similar cases arose under statutes that were narrower

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compensation from her various federal benefits, but that the Illinois wrongful death statute limited damages to $15,000); *see also* U.S. *Jefferson* Br., *supra* note 274, at 3–4 (noting that Jefferson could expect to receive approximately $35,500 in benefits, roughly $7,500 less than the judgment value of his case). The United States also incorporated by reference, arguments raised in its *Brooks* brief. *See* U.S. *Griggs* Br., *supra* note 274, at 30 n.9.

293. Brief for Respondent at 6–7, 10–11, United States v. Griggs, 340 U.S. 135 (1950) (No. 31) [hereinafter Resp't *Griggs* Br.]; Brief For Petitioner at 14–17, Feres v. United States, 340 U.S. 135 (1950) (No. 9) [hereinafter Pet'r *Feres* Br.]; Brief for Petitioner at 4–7, Jefferson v. United States, 340 U.S. 135 (1950) (No. 29) [hereinafter Pet'r *Jefferson* Br.] ("Whether injured on furlough or in an army hospital, each is on active duty and subject to military control though not engaged in the performance of their *normal* duties, each is entitled to the same special statutory benefits . . . .") (emphasis in original).

294. *See* Pet'r *Feres* Br., *supra* note 293, at 5–7; Resp't *Griggs* Br., *supra* note 293, at 7–8; Pet'r *Jefferson* Br., *supra* note 293, at 10; *see also id.*, at 7 (stating that the Act was just as clear as it was in the *Brooks* case).

295. *See* Pet'r *Jefferson* Br., *supra* note 293, at 13.

296. Pet'r *Feres* Br., *supra* note 293, at 6; Resp't *Griggs* Br., *supra* note 293, at 16; Pet'r *Jefferson* Br., *supra* note 293, at 15.

297. Pet'r *Feres* Br., *supra* note 293, at 6; Resp't *Griggs* Br., *supra* note 293, at 16.

298. Resp't *Griggs* Br., *supra* note 293, at 8–11 (citing United States v. Brooks, 337 U.S. 49, 51 (1949)) (noting that sixteen of the eighteen bills introduced between 1925 and 1935 for tort claims acts had proposed the exclusion of claims for service members); Pet'r *Feres* Br., *supra* note 293, at 7–8.

299. Pet'r *Feres* Br., *supra* note 293, at 5. Feres also argued that because the FTCA was complementary to the provision of the Legislative Reorganization Act banning private bills on tort claims, "it seem[ed] evident . . . that Congress wanted to rid itself of the great number of private bills for relief of military personnel and their families presented at every session." *Id.* at 12.

in scope and purpose than the FTCA,[300] and that when Congress deleted the proposed World War Veterans Act exception, it "repudiated and made inapplicable to the [FTCA] the doctrine of the *Dodson* [sic] . . . [and] *Bradey* case[s]."[301] They raised the same point in response to the defense's argument that applying state law to tort claims by service members was incompatible with the federal nature of that relationship and not something Congress had contemplated.[302] They further argued that Congress had appropriately chosen to "make the laws of the different states the test of liability" for service members, as it had for other federal matters such as tax law and bankruptcy law,[303] and that the FTCA's exceptions and various state law defenses adequately protected the government's interests.[304] Griggs argued that Congress' failure to include exclusionary "service caused claims" language in the FTCA as it had in the Military Claims Act, "indicate[d] that Congress did not choose to exclude such claims from [the FTCA]."[305] Jefferson and Feres argued that the Military Claims Act and the Military Personnel Claims Act had no bearing here because they provided compensation without regard to fault and the FTCA required a negligent or wrongful act.[306]

The plaintiffs argued that the military and veterans compensation statutes did not say they were exclusive,[307] their benefits were "not . . . all-inclusive [or] complete,"[308] and the Court's *Brooks* decision had held that those benefits did not cut off service members' rights under the FTCA.[309] The plaintiffs disputed that allowing FTCA suits would disrupt military discipline, reasoning that "military personnel likely would be better disciplined . . . [with] knowledge that the Government had accorded them

300. Pet'r *Feres* Br., *supra* note 293, at 18 ("The decisions in the *Dobson* and *Bradey* cases are founded upon acts whose legislative history and purpose are not parallel to the [FTCA]."); Pet'r *Jefferson* Br., *supra* note 293, at 10–11 (arguing that the Legislative Reorganization Act of 1946 and the FTCA had a "double purpose" of removing "the anachronistic doctrine of sovereign immunity to actions in tort . . . and . . . reliev[ing] Congress of the burden of . . . private bills" that demonstrate a different policy than the *maritime* statutes addressed by *Dobson* and *Bradey*).

301. Resp't *Griggs* Br., *supra* note 293, at 14.

302. *See id.* at 16.

303. *See id.* at 16–17.

304. *See* Pet'r *Jefferson* Br., *supra* note 293, at 16–17.

305. *See* Resp't *Griggs* Br., *supra* note 293, at 19.

306. Reply Brief for Petitioner at 4–5, Feres v. United States, 340 U.S. 135 (1950) (No. 9) [hereinafter Pet'r *Feres* Reply Br.]; Pet'r *Jefferson* Br., *supra* note 293, at 12.

307. *See* Pet'r *Jefferson* Br., *supra* note 293, at 11 ("Unlike Workmen's Compensation statutes, there is nothing in the veterans' or servicemen's benefit statutes providing for exclusiveness of remedy.").

308. Pet'r *Feres* Br., *supra* note 293, at 19.

309. *Id.* at 20–21; Pet'r *Jefferson* Br., *supra* note 293, at 11; Resp't *Griggs* Br., *supra* note 293, at 10–11.

the right to recover for injuries negligently inflicted upon them,"[310] that giving new rights and benefits to America's World War II military personnel resulted in "the best disciplined [forces] this country has ever produced,"[311] and that military discipline was adequately protected by the Articles of War and courts martial.[312] Jefferson contested that civilian judges would have to evaluate military decisions, reasoning that "no military decision was involved in the performance of surgery."[313]

Responding to the argument that no American law allowed one member of the armed forces to sue another, Griggs generally conceded the point, but attributed it to a soldier's immunity akin to intra-family immunity.[314] Griggs then reasoned that the government was liable on a *respondeat superior* basis under the Restatement of Agency for such torts because, "although a servant acting in the course of his employment might not be liable to his wife or child by reason of his immunity, the master may nevertheless be held liable."[315] Jefferson argued that military personnel were generally liable for torts at common law, noting a 1616 English case where one active duty soldier sued another.[316] Feres argued that "American Common Law did not refuse to recognize the right of a soldier to maintain an action against another soldier for acts arising while on duty,"[317] but he cited only encyclopedia passages that did not address suits by service members for negligence.[318]

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310. Pet'r *Jefferson* Br., *supra* note 293, at 16; *accord* Resp't *Griggs* Br., *supra* note 293, at 19. Feres' attorneys took a different tack, arguing that military discipline considerations are not relevant to a soldier's widow who should be able to sue just as a convict's family could sue even though the convict is barred. Pet'r *Feres* Br., *supra* note 293, at 18–19 (citations omitted).

311. Pet'r *Jefferson* Br., *supra* note 293, at 16.

312. *Id.*

313. *Id.* (citation omitted).

314. Resp't *Griggs* Br., *supra* note 293, at 21.

315. *Id.* at 21–22 ("A master or other principal is not liable for acts of a[n] . . . agent which the agent is privileged to do although the principal himself would not be so privileged, but he may be liable for an act as to which the agent has a personal immunity from suit." (quoting RESTATEMENT OF THE LAW OF AGENCY § 217(2) (1933)). The brief then quotes a comment to section 217: "Thus if a servant while acting within the scope of employment negligently injures his wife, the master is subject to liability." *Id.* at 22 (quoting RESTATEMENT OF THE LAW OF AGENCY § 217 cmt. b (1933).

316. *See* Pet'r *Jefferson* Br., *supra* note 293, at 12–13 (citing Weaver v. Ward, (1616) 80 Eng. Rep. 284 (K.B.); Hobart 134).

317. Pet'r *Feres* Reply Br., *supra* note 306, at 5.

318. *Id.* (citing and quoting 36 AM. JUR. Military § 119 (1941) ("An officer will, however, be liable to the soldiers under him for acting in an illegal and unauthorized manner toward them."); 6 C.J.S. Army & Navy § 36 (1937) ("An officer is not answerable for an injury done within the scope of his authority, unless influenced by malice, corruption, or cruelty . . . .")).

B. The Feres *Decision*

The common fact in *Feres*, *Griggs*, and *Jefferson* was that "each claimant, while on active duty and not on furlough, sustained injury due to negligence of others in the armed forces."[319] Justice Jackson, writing for the Court, squarely understood the issue to be one of "statutory construction"—"whether the Tort Claims Act extend[ed] its remedy to one sustaining 'incident to the service' what under other circumstances would be an actionable wrong."[320] No legislative history addressed this issue.[321] This made the task of statutory interpretation difficult, a point the Court readily acknowledged.[322]

The Court recognized arguments that favored liability, including: the FTCA granted district courts jurisdiction over negligence claims against the United States;[323] the FTCA contemplated liability for the torts of service members acting within the line of duty;[324] the FTCA did not include an exception barring suits by service members, although prior bills had;[325] and, finally, *Brooks* allowed FTCA suits by service members and "it is argued that much of its reasoning is as apt to impose liability in favor of a man on duty as in favor of one on leave."[326]

The Court determined that the FTCA "should be construed to fit, so far as will comport with its words, into the entire statutory system of remedies against the Government to make a workable, consistent and equitable whole."[327] It examined the history that led to passage of the FTCA, noting the expansion of the federal government and the corresponding increase in the number of "remediless wrongs" caused by government negligence, the growing number of private bills seeking compensation, the inadequacy and capriciousness of the Congressional claims process, and Congress' prior legislation allowing certain types of claims.[328] It stated:

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319. Feres v. United States, 340 U.S. 135, 138 (1950).
320. *Id.*
321. *See id.*
322. *See id.* (stating that because no committee reports or floor debates disclosed what effect the statute was designed to have on the problem or even that Congress had the problem in mind, no conclusion was above challenge).
323. *See id.* (citing 28 U.S.C. § 1346(b) (Supp. V 1946)).
324. *See id.* (citing 28 U.S.C. § 2671 (Supp. V 1946)).
325. *See id.* at 138–39 (citing Brooks v. United States, 337 U.S. 49, 51 (1949)) (stating that all but two of the eighteen tort claims bills introduced in Congress between 1925 and 1935 expressly denied recovery to members of the armed forces but that the present Tort Claims Act made no exception).
326. *Id.* at 139. The Court rejected this argument because "[t]he actual holding in the *Brooks* case [could] support liability here only by ignoring the vital distinction there stated. The injury to Brooks did not arise out of or in the course of military duty." *Id.* at 146.
327. *Id.* at 139.
328. *Id.* at 139–40.

> At last, in connection with the Reorganization Act, [Congress] waived immunity and transferred the burden of examining tort claims to the courts. The primary purpose of the Act was to extend a remedy to those who had been without; if it incidentally benefited those already well provided for, it appears to have been unintentional. Congress was suffering from no plague of private bills on the behalf of military and naval personnel, because a comprehensive system of relief had been authorized for them and their dependents by statute.[329]

The Court acknowledged that the FTCA granted jurisdiction to decide tort cases, but noted, "it remain[ed] for courts, in exercise of their jurisdiction, to determine whether any claim [was] recognizable in law."[330] It found that the FTCA's text provided "the test of allowable claims, which is, 'The United States shall be liable . . . in the same manner and to the same extent as a private individual under like circumstances . . . ,' with certain exceptions not material here."[331] It concluded that the plaintiffs' claims did not meet this test because the "plaintiffs [could] point to no liability of a 'private individual' even remotely analogous to that which they [were] asserting against the United States."[332] No American precedent had allowed service members to sue the government or their officers for negligence, and no private person had power comparable to the federal government's over its service members.[333] The Court recognized that "if we consider relevant only a part of the circumstances and ignore the status of both the wronged and the wrongdoer in these cases we find analogous private liability," but liability under the FTCA "is that created by 'all the circumstances,' not that which a few of the circumstances might create."[334] It concluded that no parallel private liability existed and "no new one has been created by . . . this Act."[335]

The opinion considered the "law of the place" requirement of § 1346(b), through which the FTCA adopts the substantive tort law of the state where the tortious act took place.[336] It noted that service members had no say over where they were posted, that workers' compensation laws in "most states ha[d] abolished the common-law action for damages between employer and employee and superseded it with workman's compensation statutes which provide[d], in most instances, the sole basis of liability," and

329. *Id.* at 140.
330. *Id.* at 140–41 ("Looking to the detail of the Act . . ."); *see also* FDIC v. Meyer, 510 U.S. 471, 477 (1994); *infra* note 462.
331. *Feres*, 340 U.S. at 141 (quoting 28 U.S.C. § 2674 (Supp. V 1946)).
332. *Id.*
333. *See id.* at 141–42.
334. *Id.* at 142.
335. *Id.*
336. *See id.* (citing 28 U.S.C. § 1346(b) (Supp. V 1946)).

that state tort law varied widely as to liability, defenses, and damages.[337] The Court concluded, "[i]t would hardly be a rational plan of providing for those disabled in service by others in service to leave them dependent upon geographic considerations over which they have no control and to laws which fluctuate in existence and value."[338]

The Court spoke to the "distinctively federal"[339] relationship between the government and its service members, citing its three-year-old *Standard Oil Co.*[340] decision that barred the government from recovering the damages it incurred providing care to an injured soldier:

> The considerations which [led] to [the *Standard Oil Co.*] decision apply with even greater force to this case: ". . . To whatever extent state law may apply to govern the relations between soldiers or others in the armed forces and persons outside them or nonfederal governmental agencies, the scope, nature, legal incidents and consequences of the relation between persons in service and the Government are fundamentally derived from federal sources and governed by federal authority."[341]

It observed that no federal law would allow a suit on these claims.[342] "The Military Personnel Claims Act . . . permitted recovery in some circumstances, but it specifically excluded claims of military personnel 'incident to their service.'"[343]

The Court turned to the "simple, certain, and uniform" compensation system Congress had created "for injuries or death of those in armed services."[344] After noting that the compensation system "requires no litigation," and its "recoveries compare extremely favorably with those provided by most workman's compensation statutes," it recounted the substantial benefits given to Arthur Jefferson and Lt. Col. Griggs' estate.[345] The Court found significance in Congress' failure to address the intersection of the uniform compensation system and the FTCA[346]:

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337. *See id.* at 142–43.
338. *Id.* at 143.
339. *Id.* (internal quotation marks omitted).
340. United States v. Standard Oil Co., 332 U.S. 301 (1947). *See generally supra* notes 165–67 and accompanying text.
341. *Feres*, 340 U.S. at 143–44 (quoting *Standard Oil Co.*, 332 U.S. at 305–06 (citing Tarble's Case, 80 U.S. (13 Wall.) 397 (1871); Kurtz v. Moffitt, 115 U.S. 487 (1885))).
342. *Id.* at 144 (citing 31 U.S.C. § 223b (1946).
343. *Id.*
344. *Id.*
345. *Id.* at 145. The Court noted that Jefferson had received $3,645.50 at the time of trial, and could expect to receive another $31,947, and that Mrs. Griggs could expect to receive over $22,000, which was $7,000 more than the maximum permitted for wrongful death in Illinois. *Id.*
346. *See id.* at 144. The Court set out four different possibilities: "We might say that the claimant may (a) enjoy both types of recovery, or (b) elect which to pursue, thereby waiving

> If Congress had contemplated that this Tort Act would be held to apply in cases of this kind, it is difficult to see why it should have omitted any provision to adjust these two types of remedy to each other. The absence of any such adjustment is persuasive that there was no awareness that the Act might be interpreted to permit recovery for injuries incident to military service.[347]

The Court held without dissent that the FTCA did not provide a remedy for "injuries to servicemen where the injuries [arose] out of or [were] in the course of activity incident to service."[348] It noted that federal law defined the relationship between service members and the government, concluding that Congress had not authorized a new cause of action under varying state law for injuries or death of service members.[349] The Court stated, "[w]e cannot impute to Congress such a radical departure from established law in the absence of express congressional command."[350]

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the other, or (c) pursue both, crediting the larger liability with the proceeds of the smaller, or (d) that the compensation and pension remedy excludes the tort remedy." *Id.*

347. *Id.*

348. *Id.* at 146 (Justice Douglas did not join the Court's opinion but did concur in the result). Courts consider a variety of factors in determining whether a claim arose incident to service, with no single factor being dispositive. *See, e.g.*, Costo v. United States, 248 F.3d 863, 867 (9th Cir. 2001); Richards v. United States, 176 F.3d 652, 655 (3d Cir. 1999). These factors include the following:

> (1) Whether the injury arose while a service member was on active duty. *See* Kohn v. United States, 680 F.2d 922, 923–25 (2d Cir. 1982) (soldier shot by fellow soldier); Chambers v. United States, 357 F.2d 224, 226–27 (8th Cir. 1966) (airman drowned in base swimming pool).
>
> (2) Whether the injury arose on a military situs. *See* Morey v. United States, 903 F.2d 880, 881–82 (1st Cir. 1990) (sailor fell off pier where his ship was docked); Millang v. United States, 817 F.2d 533, 534–35 (9th Cir. 1987) (per curiam) (off-duty marine run over by on-duty military police officer on military installation). *But see* Dreier v. United States, 106 F.3d 844, 852 (9th Cir. 1996) (ruling that the situs of the injury was not determinative).
>
> (3) Whether the injury arose during a military activity. *See Costo*, 248 F.3d at 864, 868 (sailors drowned while participating in Navy-led recreational rafting trip); Galligan v. City of Phila., 156 F. Supp. 2d 467, 473–74 (E.D. Pa. 2001) (West Point cadet injured while attending an Army-Navy football game).
>
> (4) Whether the service member was taking advantage of a privilege or enjoying a benefit conferred as a result of military service. *See* Rayner v. United States, 760 F.2d 1217, 1219 (11th Cir. 1985) (per curiam) (soldier injured during elective surgery at military hospital); Herreman v. United States, 476 F.2d 234, 235 (7th Cir. 1973) (National Guardsman passenger on military flight).
>
> (5) Whether the injury arose while the service member was subject to military discipline or control. *See* Pringle v. United States, 208 F.3d 1220, 1222, 1226–27 (10th Cir. 2000) (per curiam) (soldier injured when ejected from on-base social club under the operational control of base commander); Stewart v. United States, 90 F.3d 102, 104–05 (4th Cir. 1996) (soldier injured in on-post automobile accident while returning to quarters after mandatory physical training).

349. *Feres*, 340 U.S. at 146.

350. *Id.*

C. Subsequent Supreme Court Decisions related to the Feres *Doctrine*

This section briefly summarizes the Supreme Court's decisions that deal with the *Feres* doctrine and the related body of law declining to recognize constitutional torts arising from military relationships. This short review is provided to facilitate discussion of the criticisms that have been directed at the *Feres* decision.

1. United States v. Brown

In *United States v. Brown*,[351] the Supreme Court held that *Feres* does not bar claims of veterans that arise after they have left military service.[352] Noting that the veteran was injured in a Veterans' Administration hospital seven years after his discharge, the Court explained that "[t]he injury . . . was not incurred while [Brown] was on active duty or subject to military discipline. The injury occurred after his discharge, while he enjoyed a civilian status."[353] The Court concluded that this injury did not arise incident-to-service and was not barred by *Feres*.[354] In reaching such a conclusion, the Court explained its *Feres* decision, stating:

> 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 Court to read that Act as excluding claims of that character.[355]

Justices Reed and Minton joined in Justice Black's dissent.[356]

2. Stencel Aero Engineering Corp. v. United States

In *Stencel Aero Engineering Corp. v. United States*,[357] the Court considered a third-party indemnity action against the United States brought by the manufacturer of an aircraft ejection system that injured a National Guard pilot.[358] The issue was complicated by the holding in *United States v. Yellow Cab Co.*[359] that the FTCA allows third party actions against the

351. 348 U.S. 110 (1954).
352. *Id.* at 113.
353. *Id.* at 112.
354. *Id.* at 113.
355. *Id.* at 112.
356. *Id.* at 113 (Black, J., dissenting). Justice Black argued, "[w]e have previously held, I think correctly, that a soldier injured in a hospital cannot also sue for damages under the Tort Claims Act. . . . To permit a veteran to recover damages . . . seems like an unjustifiable discrimination which the Act does not require." *Id.* at 114.
357. 431 U.S. 666 (1977).
358. *Id.* at 667.
359. 340 U.S. 543 (1951).

United States for indemnity and contribution.[360] Because of the tension between *Yellow Cab* and *Feres*, the Court found it "necessary . . . to examine the rationale of *Feres* to determine . . . if . . . [*Stencel Aero Engineering Corp.*'s] claim would circumvent the purposes of the Act."[361] The Court recounted *Feres*' point that the government's relationship to its service members "is unlike any relationship between private individuals," creating "at least a surface anomaly in applying" the FTCA's private person liability requirement.[362] It identified three rationales or factors for *Feres*' conclusion that Congress had not intended to allow incident-to-service claims:

> First, the relationship between the Government and members of its Armed Forces is "'distinctively federal in character'" . . . . Second, the Veterans' Benefits Act establishes, as a substitute for tort liability, a statutory "no fault" compensation scheme which provides generous pensions to injured servicemen, without regard to any negligence attributable to the Government. . . . [T]hird[,] . . . 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 . . . .[363]

It then addressed each rationale.[364] It concluded that "[t]he factors considered by the *Feres* court are largely applicable in this type of case as well," and that suit was barred.[365]

Justice Marshall filed a dissent, in which Justice Brennan concurred, stating: "I cannot agree that that narrow, judicially created exception to the waiver of sovereign immunity contained in the Act should be extended to any category of litigation other than suits against the Government by active-duty servicemen based on injuries incurred while on duty."[366]

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360. *Stencel Aero Eng'g Corp.*, 431 U.S. at 669–70 (citing *Yellow Cab*, 340 U.S. 543, and explaining its holding).

361. *Id.* at 670.

362. *Id.* at 670–71 (citing 28 U.S.C. § 2674 (1976); Feres v. United States, 340 U.S. 135, 141–42 (1950)).

363. *Id.* at 671–72 (alteration in original) (citations omitted).

364. *Id.* at 672–73 (finding that the government-federal contractor relationship is federal, the military compensation system "provides an upper limit" to the government's potential liability, and trial of the contractor's suit would have the same effect on military discipline as a suit by the airman, involving second-guessing orders and testimony by service members about one another's decisions).

365. *Id.* at 674.

366. *Id.* at 674 (Marshall, J., dissenting).

3. Chappell v. Wallace

In *Chappell v. Wallace*,[367] the Supreme Court unanimously held that no cause of action existed under the Constitution for tort suits by service members against other service members.[368] Five sailors alleged that seven of their superior officers had discriminated against them because of their race.[369] The Court reasoned that a Constitutional cause of action will not be recognized when "'special factors counseling hesitation' are present,"[370] and that "[t]he 'special factors' that bear on the propriety of respondents' *Bivens* action also formed the basis of this Court's decision in *Feres*."[371] These factors or rationales included "the unique relationship between the Government and military personnel," the uniform compensation system, and the disruption such suits would have on military discipline.[372] The Court declined to recognize a Constitutional cause of action under these circumstances because "'special factors counseling hesitation' [were] present" in that Congress had appropriately regulated the military and the rights of service members,[373] and "'courts are ill-equipped to determine the impact upon discipline that any particular intrusion upon military authority might have.'"[374]

4. United States v. Shearer

In *United States v. Shearer*,[375] the Supreme Court expanded the *Feres* doctrine to encompass situations other than claims that met the traditional incident-to-service test,[376] holding that *Feres* barred an FTCA suit against the government for the off-base, off-duty murder of one service member by

367. 462 U.S. 296 (1983).
368. *Id.* at 305.
369. *Id.* at 297.
370. *Id.* at 298 (citing Bush v. Lucas, 462 U.S. 367, 378 (1983); Carlson v. Green, 446 U.S. 14, 18 (1980); Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 396 (1971)).
371. *Id.*
372. *Id.* at 299. The Court stated:

> As the Court has since recognized, "[i]n the last analysis, *Feres* seems best explained by the 'peculiar and special relationship of the soldier to his superiors, [and] the effects on the maintenance of such suits on discipline . . . .'" *United States v. Muniz*, 374 U.S. 150, 162 (1963), quoting *United States v. Brown*, 348 U.S. 110, 112 (1954). . . . Although this case concerns the limitations on the type of non-statutory damages remedy recognized in *Bivens*, rather than Congress' intent in enacting the [FTCA], the Court's analysis in *Feres* guides our analysis in this case.

Id. (alterations in original) (citations omitted).
373. *Id.* at 298, 302–04.
374. *Id.* at 305 (quoting Earl Warren, *The Bill of Rights and the Military*, 37 N.Y.U. L. REV. 181, 187 (1962)).
375. 473 U.S. 52 (1985).
376. *See supra* notes 365–369 (discussing incident-to-service test).

another, even though the government knew that the murderer had been convicted of a prior manslaughter overseas.[377] The plaintiff alleged government negligence because "although the Army knew that [the murderer] was dangerous, it 'negligently and carelessly failed to exert a reasonably sufficient control over' him and 'failed to warn other persons that he was at large.'"[378]

The Court reasoned that the crux of the *Feres* doctrine is 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 . . . were allowed for negligent orders given or negligent acts committed in the course of military duty."[379] It concluded that the plaintiff's allegation of negligent personnel practices relating to the murderer and the Army's failure to warn others about him "[struck] at the core of these concerns."[380] Any suit would "call[] into question basic choices about the discipline, supervision, and control of a serviceman," and require "commanding officers . . . to convince a civilian court of the wisdom of a wide range of ['complex, subtle, and professional'] military and disciplinary decisions."[381] The Court ruled that these claims, like those in *Feres* and *Stencel*, "were the *type* of claims that, if generally permitted, would involve the judiciary in sensitive military affairs at the expense of military discipline and effectiveness."[382] It held that such claims were outside what Congress had authorized when it enacted the FTCA.[383] The eight justices deciding the case concurred in the Court's analysis of the *Feres* issue.[384]

5. United States v. Johnson

In *United States v. Johnson*,[385] the Supreme Court held that the *Feres* doctrine barred a tort suit by members of the Coast Guard injured in a

377. *Shearer*, 473 U.S. at 53–54, 59. *Shearer* also addressed the FTCA's assault and battery exception. *Id.* at 54–57 (discussing 28 U.S.C. § 2680(h) (1982)). That discussion is not relevant to this paper.

378. *Id.* at 54.

379. *Id.* at 57 (internal quotation marks omitted) (citing United States v. Muniz, 374 U.S. 150, 162 (1963) (quoting United States v. Brown, 348 U.S. 110, 112 (1954))).

380. *Id.* at 58. The Court added in a footnote that, "[a]lthough no longer controlling, other factors mentioned in *Feres* are present here. It would be anomalous for the Government's duty to supervise servicemen to depend on the local law of the various states, and the record shows that Private Shearer's dependents are entitled to statutory veterans' benefits." *Id.* at 58 n.4 (citations omitted).

381. *Id.* at 58 (citations omitted).

382. *Id.* at 59.

383. *See id.*

384. *See id.* at 59–60 (Justices Brennan, Blackmun, and Stevens concurred in Part II-B regarding the *Feres* opinion, and Justice Marshall also concurred separately in Part II-B).

385. 481 U.S. 681 (1987).

helicopter crash during a rescue mission although the tortfeasor, an FAA air traffic controller, was not a member of the military.[386] Rejecting an Eleventh Circuit test that provided "when negligence is alleged on the part of a Federal Government employee who is not a member of the military, . . . the propriety of a suit should be determined by examining the rationales that underlie the *Feres* doctrine,"[387] the Court reaffirmed its *Feres* holding that the FTCA does not encompass claims "for injuries that [arose] out of or [were] in the course of activity incident to service."[388] It also rejected the argument that the civilian nature of the tortfeasor was relevant to that inquiry.[389] The Court found that the three broad rationales for the *Feres* doctrine applied to the *Johnson* facts[390]: the distinctively federal nature of the military relationship between service members and the government;[391] the congressionally-established system of "generous statutory disability and death benefits";[392] and the disruption of military discipline and "commitment essential to effective service" that would flow from allowing tort suits by service members.[393] It noted that Johnson had been on a rescue mission as part of his military service and in his military status, that his wife had received administrative compensation, and that any suit would likely raise military discipline issues.[394] Accordingly, the case came "within the heart of the *Feres* doctrine as it consistently ha[d] been articulated."[395]

Justices Brennan, Marshall, and Stevens joined in Justice Scalia's dissent.[396] Justice Scalia argued that, with the exception of the military discipline concern first noted in *Brown*, the Court had disavowed the rationales it had identified in support of the *Feres* decision, and that they did not justify the result.[397] He argued that the "parallel private liability" rationale failed because it would render superfluous some explicit exceptions to the FTCA that involve purely federal activities, such as postal matters and combatant activities, and because the Court had subsequently

386. *Id.* at 682–83, 692.
387. *Id.* at 684.
388. *Id.* at 686 (citation omitted) (internal quotation marks omitted) ("This Court has never deviated from this characterization of the *Feres* bar.").
389. *Id.* at 686–88.
390. *Id.* at 688.
391. *Id.* at 689 (citing Feres v. United States, 340 U.S. 135 (1950) (quoting United States v. Standard Oil Co., 332 U.S. 301, 305 (1947))).
392. *Id.* (citing UNIFORMED SERVICES ALMANAC (L. Sharff & S. Gordon eds., 1985)).
393. *Id.* at 690–91 (citing United States v. Shearer, 473 U.S. 52 (1985)).
394. *Id.* at 691–92.
395. *Id.* at 692.
396. *Id.* at 692 (Scalia, J., dissenting).
397. *Id.* at 693–95.

rejected the "parallel private liability" requirement.[398] He also criticized the second rationale, that claims arising within the distinctively federal military relationship should not be judged by state tort law.[399] Justice Scalia reasoned it was more unfair to deny service members any recovery than it was to subject them to varying state laws; the purported "need for uniformity" was belied by allowing civilians, prisoners,[400] and "servicemen . . . [injured] not incident to service" to sue; and "it [was] difficult to explain why uniformity . . . [was] indispensable for the military, but not for the many other federal departments and agencies."[401] He argued that the third rationale—the existence of a uniform compensation system—was undermined because the Court had allowed FTCA suits by veterans and service members for injuries that were not incurred incident to service even though both veterans and service members receive administrative compensation.[402] He further noted that the Court had recognized that neither the Veterans Benefit Act nor the FTCA provided that remedies under the veterans' statute were exclusive.[403] Finally, Justice Scalia argued that *Feres*' attempt "to make 'the entire statutory system of remedies against the Government . . . a workable, consistent and equitable whole,'" had failed,[404] and that "'[t]here [was] no justification for this Court to read exemptions into the Act beyond those provided by Congress.'"[405]

6. United States v. Stanley

In *United States v. Stanley*,[406] a former soldier alleged that his constitutional rights were violated when he unwittingly participated in an LSD drug testing program during his military service.[407] The Court reaffirmed its conclusion in *Chappell* that no constitutional tort remedy was available when a service member's injury arose out of or in the course of activity incident-to-service, and clarified that the holding applied even

398. *Id.* (citing Rayonier, Inc. v. United States, 352 U.S. 315, 319 (1957); Indian Towing Co. v. United States, 350 U.S. 61, 66–69 (1955)).
399. *Id.* at 695–96.
400. *Id.* at 695–96 ("We have abandoned this peculiar rule of solicitude in allowing federal prisoners (who have no more control over their geographical location than servicemen) to recover under the FTCA for injuries caused by the negligence of prison authorities." (citing United States v. Muniz, 374 U.S. 150, 162 (1963))).
401. *Id.* (quoting Stencel Aero Eng'g Corp. v. United States, 431 U.S. 666, 675 (1977) (Marshall, J., dissenting)).
402. *Id.* at 697–98 (citing Brooks v. United States, 337 U.S. 49, 53 (1949); United States v. Brown, 348 U.S. 110, 111 (1951)).
403. *Id.* at 697 (citing *Brooks*, 337 U.S. at 53).
404. *Id.* at 701 (quoting Feres v. United States, 340 U.S. 135, 139 (1950)).
405. *Id.* at 702 (quoting Rayonier, Inc. v. United States, 352 U.S. 315, 320 (1957)).
406. 483 U.S. 669 (1987).
407. *Id.* at 671–72.

though suit had been brought against government employees other than the plaintiff's superior officers.[408] The same "'special factors counseling hesitation [in *Chappell*]'—'the unique disciplinary structure of the Military Establishment and Congress' activity in the field,'" counseled hesitation in *Stanley*.[409] The Court found "no reason" to adopt a different test for service members' claims for constitutional torts than for FTCA suits.[410] The Court held that Stanley had no constitutional cause of action because his claim arose incident to his military service.[411] The majority opinion, written by Justice Scalia, did not address Stanley's FTCA claims against the United States, other than to reject them on procedural grounds as not within the interlocutory order that was appealed to the circuit court.[412]

Justice O'Connor concurred in part and dissented in part.[413] While agreeing that service members had no remedy for constitutional torts that arise incident to military service, she would have recognized a constitutional cause of action where "conduct of the type alleged in [*Stanley* was] so far beyond the bounds of human decency that as a matter of law it simply cannot be considered a part of the military mission."[414]

Justice Brennan wrote a separate dissent, joined by Justice Marshall and in part by Justice Stevens.[415] Justice Brennan argued that the majority had inappropriately granted absolute immunity to the civilian officials who had violated Stanley's rights,[416] and improperly expanded the holding of *Wallace v. Chappell*.[417] He urged, in the absence of a command relationship or clear showing that military discipline would be

408. *Id.* at 680–81 (citations omitted).
409. *Id.* at 683–84 (quoting Chappell v. Wallace, 462 U.S. 296, 304 (1983)).
410. *Id.* at 681–83. The Court stated:

> A test for liability that depends on the extent to which particular suits would call into question military discipline and decisionmaking would itself require judicial inquiry into, and hence intrusion upon, military matters. Whether a case implicates those concerns would often be problematic, raising the prospect of compelled depositions and trial testimony by military officers concerning the details of their military commands. Even putting aside the risk of erroneous judicial conclusions (which would becloud military decisionmaking), the mere process of arriving at correct conclusions would disrupt the military regime. The "incident to service" test, by contrast, provides a line that is relatively clear and that can be discerned with less extensive inquiry into military matters.

Id. at 682–83.
411. *Id.* at 680.
412. *Id.* at 676–78. Both dissents concurred in this result. *Id.* at 686 n.1 (Brennan, J., concurring in part and dissenting in part); *id.* at 708 (O'Connor, J., concurring in part and dissenting in part).
413. *Id.* at 708 (O'Connor, J., concurring in part and dissenting in part).
414. *Id.* at 708–10.
415. *Id.* at 686 (Brennan, J., concurring in part and dissenting in part).
416. *Id.* at 693–98.
417. *Id.* at 700–02.

undermined,[418] that no factor counseled hesitation to the recognition of a constitutional cause of action on these facts.[419]

IV. ANALYSIS OF THE SUPREME COURT'S *FERES* DECISION

This Part analyzes the *Feres* decision and the criticisms directed at it. It evaluates the Court's reasoning and the factors that support its conclusion. It then considers the criticisms of the opinion, including those that directly challenge the reasoning of *Feres*, and those that independently object to its analysis. Finally, it addresses characterizations of the *Feres* decision as judicially creating an exception to the FTCA, usurping the role of Congress, and fostering injustice.

A. Evaluating the Feres Conclusion

The historical circumstances and the state of the law when Congress enacted the Legislative Reform Act of 1946 provide substantial support for *Feres*' conclusion that Congress did not intend for the FTCA to cover claims arising from injuries to service-members incident-to-service. The single issue before the Court in *Feres* was "whether the Tort Claims Act extend[ed] its remedy to one sustaining 'incident to the service' what under other circumstances would be an actionable wrong."[420] The Court approached its task with the stated purpose of deciding that issue in accordance with what Congress intended.[421] The task was difficult because there was no definitive legislative history on the issue.[422]

The Court laid out a strong affirmative case for the proposition that when Congress enacted the FTCA it did not intend to allow suit for injuries that were incurred incident to military service. The opinion reviewed the "long effort" that led to the enactment of the FTCA.[423] It recognized that a key purpose of the Act was to relieve Congress of the burden of private bills, but noted that private bills on behalf of service members were not a significant part of that problem.[424] The Court explained that the courts are "to determine whether any claim is recognizable in law."[425] It noted that the text of the FTCA subjected the government to liability only "'to the same extent as a private individual under like circumstances,'" and that no

418. *Id.* at 703–06.
419. *Id.* at 706–08.
420. Feres v. United States, 340 U.S. 135, 138 (1950).
421. *Id.* at 138, 146.
422. *Id.* at 138.
423. *Id.* at 139.
424. *Id.* at 140.
425. *Id.* at 141–42.

American precedent supported liability under circumstances akin to those of the government-service member relationship.[426] The Court addressed the FTCA's jurisdictional requirement that liability be assessed under the substantive state tort law of the place of the wrongful act, noted that state tort law and workers' compensation law vary widely, and concluded that it would not have been rational to subject claims brought against the federal government by members of its military to such varied rules.[427] The Court spoke to the "distinctively federal" relationship between the government and service members that is "fundamentally derived from federal sources and governed by federal authority," and noted that federal law did not provide "a recovery such as plaintiffs seek" because the Military Personnel Claims Act "specifically excluded claims of military personnel 'incident to their service.'"[428] It addressed the "simple, certain, and uniform" compensation programs Congress had created for veterans and service members and reasoned that, had Congress intended for service members to recover under the FTCA, it would have directed how a tort recovery would or would not alter the administrative remedy.[429]

Although not mentioned in its opinion, the *Feres* Court was aware of a significant body of law that held that service members could not bring suit for in-service injuries under statutes that waived the United States' tort sovereign immunity in specific circumstances. Second Circuit decisions in 1928[430] and 1945[431] (the latter written by Judge Learned Hand) held that the Public Vessels Act did not authorize service members to sue for in-service injuries even though the language of the statute did not exclude such liability[432]:

> If it had been the purpose to change that policy as respects officers and seamen of the navy injured by the unseaworthiness of a public vessel, or by the fault of one another, because that is what in the end it comes to, we cannot think it would have been left to such general language . . . .[433]

A similar line of cases barred suits seeking compensation for in-service injuries to service members under the Railroad Control Act's waiver of federal sovereign immunity.[434] This body of law was presented to the

426. *Id.*
427. *Id.* at 142–43.
428. *Id.* at 143–44 (quoting United States v. Standard Oil Co., 332 U.S. 301, 305–06 (1947) (citing 28 U.S.C. § 2672 (Supp. IV 1946); Kurtz v. Moffitt, 115 U.S. 487 (1885); Tarble's Case, 80 U.S. (13 Wall.) 397 (1871)).
429. *Id.* at 144–45.
430. Dobson v. United States, 27 F.2d 807 (2d Cir. 1928).
431. Bradey v. United States, 151 F.2d 742 (2d Cir. 1945).
432. *Id.* at 743; *Dobson*, 27 F.2d at 809.
433. *Dobson*, 27 F.2d at 809.
434. *See* Sandoval v. Davis, 278 F. 968, 969–970 (N.D. Ohio 1922), *aff'd per curiam*,

Court in *Feres*[435] and *Brooks*.[436] The Court alluded to it in the *Brooks* opinion.[437]

One other factor strongly supports the Court's conclusion. Throughout the legislative build-up to the enactment of the FTCA, Congress had contemplated that any general tort claims bill would place caps or limits on the damages that could be recovered. Many of the bills proposed in the 1920s and 1930s included maximum amounts to be paid.[438] Up to the eve of the FTCA's enactment, the legislative proposals of the 1940s limited damages to $7,500 or $10,000.[439] President Roosevelt's 1942 proposal included a limit of $7,500.[440] Payments under the military compensation system were substantially higher than these limits.[441] Because it had already provided service members with an assured, no-fault administrative remedy that was larger than the tort remedy under consideration, it is unlikely that Congress intended to allow service members to also pursue a tort remedy under the FTCA.

On the face of its opinion and unanimous holding, the Court made a compelling explanation why "Congress, in drafting this Act, [had not]

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288 F. 56 (6th Cir. 1923); Seidel v. Dir. Gen. of R.Rs., 89 So. 308 (La. 1921); Moon v. Hines, 87 So. 603 (Ala. 1921).

435. U.S. *Griggs* Br., *supra* note 274, at 14–19.

436. U.S. *Brooks* Br., *supra* note 60, at 6, 10–18.

437. Brooks v. United States, 337 U.S. 49, 52 (1949).

438. *See* S. 1043, 74th Cong. §§ 1(a), 202(b) (1935) ($50,000 for property; $7500 for personal injury or death); S. 1833, 73d Cong. §§ 1(a)–(b), 201(a), 202(b) (1933) ($50,000 for property; $7,500 for personal injury or death); H.R. 129, 73d Cong. § 2(b)(1) (1933) ($50,000 for property; $10,000 for personal injury or death); S. 4567, 72d Cong. §§ 1(a)–(b), 201(a), 202(b) (1932) (same); S. 211, 72d Cong. §§ 1(a), (c), 201(a), 202(b) (1931) (same); H.R. 5065, 72d Cong. §§ 1(a), (c), 203(b)(3) (1931) ($50,000 for property; $10,000 for personal injury or death); H.R. 17168, 71st Cong. §§ 1, 201(a) (1931) ($50,000 for property; $7,500 for personal injury or death); H.R. 16429, 71st Cong. §§ 1, 21(a) (1931) (same); H.R. 15428, 71st Cong. §§ 1(a), 201(a), 202(a) (1930) (same); S. 4377, 71st Cong. §§ 1(a), (201)(a), 202(a) (1930) (same); H.R. 9285, 70th Cong. §§ 4, 201(a), 202(a) (1928) ($10,000 for property; $7,500 for personal injury or death); S. 1912, 69th Cong. §§ 2, 3 (1926) ($5,000 for property and personal injury or death); H.R. 6716, 69th Cong. §§ 4, 204(a)(5), 204(b)(3) (1926) ($10,000 for property; $5,000 for total disability or death); H.R. 12178, 68th Cong. § 5 (1925) ($5000 for personal injury or death). Four bills of that era did not cap damages. *See* H.R. 2028, 74th Cong. (1935); H.R. 8561, 73d Cong. (1934); H.R. 8914, 69th Cong. (1926); H.R. 12179, 68th Cong. (1925).

439. *See, e.g.*, *Hearings on H.R. 5373 and H.R. 6463*, *supra* note 20, at 2 ($7,500); H.R. REP. NO. 79-1287, at 4 (1945) ($10,000); S. REP. NO. 77-1196, at 2, 6 (1942) ($10,000); H.R. REP. NO. 76-2428, at 4 (1940) ($7,500).

440. *See* H.R. DOC. NO. 77-562, at 2 (1942) ($7,500).

441. *See, e.g.*, Feres v. United States, 340 U.S. 135, 145 (1950) (noting that Arthur Jefferson had received $3,645 in government benefits prior to trial and could expect to receive another $31,947, and that Mrs. Griggs could expect to receive over $22,000 in government benefits); S. DOC. NO. 80-179, at 1–3 (1948) (noting monthly payments of $168 made to Lee Jones Cardy's wife and mother following his 1944 death).

created a new cause of action dependent on local law for service-connected injuries or death due to negligence."[442] It could not "impute to Congress such a radical departure from established law in the absence of express congressional command."[443] The Court correctly found that Congress did not intend for the FTCA to allow service members to sue for injuries that arose incident to military service.[444]

B. Arguments Against the Feres *Decision*

Opponents of *Feres* raise a number of criticisms of the decision.[445] Some directly attack the Court's explanation. Others raise independent reasons why the Court must be considered mistaken. A third set characterizes the decision in pejorative terms.

1. Direct Challenges to Feres*' Line of Analysis*

a. The FTCA Requires Comparable Private Person Parallel Liability

In *Feres* the Court concluded, "plaintiffs can point to no liability of a 'private individual' even remotely analogous to that which they are asserting against the United States."[446] This conclusion has been challenged on the ground that the military does things that private individuals do, and "[a]pplying the Court's logic, because private entities can be held liable for negligent provision of medical, legal, retail, transportation, and recreational services, the United States could, similarly, be liable for the negligent provision of such services."[447] This argument falls into the logical trap of finding "analogous private liability" by considering only some circumstances and ignoring "the status of both the wronged and the wrongdoer."[448] The Court addressed and rejected this argument because liability under the FTCA "is that created by 'all the

442. *See Feres*, 340 U.S. at 146.
443. *See id.* Justice Douglas concurred in the result.
444. *See* JAYSON & LONGSTRETH, *supra* note 35, §§ 1-5A, 5A.05 ("There is little evidence that *Feres* incorrectly determined Congressional intent on the matter . . . ."); *see also* Gregory C. Sisk, *Teaching Litigation with the Federal Government*, 49 J. LEGAL EDUC. 275, 287 (1999) (arguing that "the *Feres* Court was probably correct [fifty years ago] in divining the mood of the times, confirming . . . that era's [deference] toward military demands and the military command structure, and recognizing that Congress very likely would have excepted military personnel from the [Act] . . . had it anticipated . . . such claims").
445. This article responds to those arguments that are most prominent or recent.
446. 340 U.S. at 141.
447. Dierdre G. Brou, *Alternatives to the Judicially Promulgated* Feres *Doctrine*, 192 MIL. L. REV. 1, 43–44 (2007).
448. *See Feres*, 340 U.S. at 142.

circumstances,' not that which a few of the circumstances might create."[449] Tort liability often turns on the particular relationship between the plaintiff and the defendant.[450]

In his *Johnson* dissent, Justice Scalia argued that *Feres* was mistaken to recognize an FTCA parallel private liability requirement.[451] First, he argued such a requirement would mean that some of the FTCA's exceptions were "superfluous, since private individuals typically do not, for example, transmit postal matter, 28 U.S.C. § 2680(b), collect taxes or customs duties, § 2680(c), impose quarantines, § 2680(f), or regulate the monetary system, § 2680(i)."[452] Second, he argued the Court had subsequently rejected any "'parallel private liability' requirement."[453]

The former argument fails because the FTCA does include redundant defenses. For example, 28 U.S.C. § 2680(h) bars claims arising from both "misrepresentation" and "deceit," and the discretionary function exception of § 2680(a) would bar any claim arising from either "the imposition . . . of a quarantine," protected by § 2680(f), or "the regulation of the monetary system," protected by § 2680(i).[454] Nor was it irrational for Congress to include overlapping defenses.[455]

The latter argument fails because the "private person" liability requirement is a textual part of 28 U.S.C. § 1346(b), the FTCA's jurisdictional grant.[456] As the Court recognized in *Feres*, one of its tasks was to determine whether a "claim is recognizable in law."[457] In *FDIC v. Meyer*,[458] the Court analyzed the language of the jurisdictional grant in very similar terms:

449. *Id.*

450. *See, e.g.*, Matheny v. United States, 469 F.3d 1093, 1094–95 (7th Cir. 2006) (finding that the Indiana Recreational Use Statute foreclosed recovery by a visitor injured while sled-riding in a national park); Leigh v. NASA, 860 F.2d 652, 652–53 (5th Cir. 1988) (holding that the Louisiana statutory employer doctrine barred suit by employee of a subcontractor injured while testing an external tank of the space shuttle).

451. United States v. Johnson, 481 U.S. 681, 694–95 (1987) (Scalia, J., dissenting) (citing 28 U.S.C. § 2680(b), (c), (f), (i) (1982)).

452. *See id.* at 694.

453. *Id.* at 694–95 (citing Rayonier, Inc. v. United States, 352 U.S. 315, 319 (1957); Indian Towing Co. v. United States, 350 U.S. 61, 66–69 (1955)).

454. 28 U.S.C. § 2680(a), (f), (h), (i) (2006).

455. Certainly the Postal Exception, 28 U.S.C. § 2680(b) (2006), is not superfluous when juxtaposed with the private person liability requirement. The government is still liable for negligently leaving mail in a hazardous spot. *See* Dolan v. U.S. Postal Serv., 546 U.S. 481, 489–92 (2006).

456. 28 U.S.C. § 1346(b) (2006).

457. Feres v. United States, 340 U.S. 135, 141 (1950).

458. 510 U.S. 471 (1994).

> Section 1346(b) grants the federal district courts jurisdiction over a certain category of claims for which the United States has waived its sovereign immunity and "render[ed]" itself liable. Richards v. United States, 369 U.S. 1, 6 . . . (1962). This category includes claims that are:
>
> "[1] against the United States, [2] for money damages, . . . [3] for injury or loss of property, or personal injury or death [4] caused by the negligent or wrongful act or omission of any employee of the Government [5] while acting within the scope of his office or employment, [6] under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred." 28 U.S.C. § 1346(b).
>
> A claim comes within this jurisdictional grant—and thus is "cognizable" under § 1346(b)—if it is actionable under § 1346(b). And a claim is actionable under § 1346(b) if it alleges the six elements outlined above.[459]

Thus, private person liability is an element of any FTCA claim.[460] Where a private person might perform the same task, that requirement can be met.[461] But where an activity is not something a private person could do, the requirement for private person liability cannot be met and the claim is not cognizable under the FTCA.[462]

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459. *Id.* at 477 (alterations in original).

460. *See id.* at 477–78 (holding that § 1346(b) does not waive sovereign immunity for constitutional tort claims because "federal law, not state law, provides the source of liability for a claim alleging the deprivation of a federal constitutional right"); H.R. REP. NO. 79-1287, at 5 (1945); *see also* United States v. Olson, 546 U.S. 43, 44 (2005) (recognizing that § 1346(b)(1) waives sovereign immunity under circumstances where the United States if a private person, rather than the United States if a state or municipal entity, would be liable and that the Court had consistently adhered to the private person standard). *See generally* Laird v. Nelms, 406 U.S. 797 (1972) (citing § 1346(b)) (holding that because the jurisdictional grant is for claims for a "negligent or wrongful act or omission," claims for strict or absolute liability cannot be brought under the FTCA)); Peak v. Small Bus. Admin., 660 F.2d 375, 378 (8th Cir. 1981) ("The holding in *Laird* did not indicate that such claims are not governed by the provisions of the FTCA, but simply that they are barred by the provisions of the FTCA. The practical effect . . . is the same as if Congress had included it as an exemption under section 2680.").

461. *See* Rayonier, Inc. v. United States, 352 U.S. 315, 315, 319 (1957) (negligence by people fighting forest fire); Indian Towing Co. v. United States, 350 U.S. 61, 61–62, 66–69 (1955) (failure to keep lighthouse repaired).

462. C.P. Chem. Co. v. United States, 810 F.2d 34, 35, 37 (2d Cir. 1987) (barring suit challenging ban on formaldehyde-emitting foam insulation and stating that the plain meaning of § 1346(b) is that the United States cannot be held liable if there is no comparable cause of action against a private citizen); Jayvee Brand, Inc. v. United States, 721 F.2d 385, 387, 390 (D.C. Cir. 1983) (affirming dismissal of suit by pajama manufacturers challenging ban on flame retardant because a quasi-legislative or quasi-adjudicative action by an agency of the federal government is not the type of action that private persons could engage in); Pate v. United States, 328 F. Supp. 2d 62, 63, 76 (D.D.C. 2004) (barring suit alleging U.S. Parole Commission failed to hold hearings in conformity with its regulations); *see also* Dorking Genetics v. United States, 76 F.3d 1261, 1264 (2d

Finally, some critics have asserted that the Court erred in discussing private person liability by "ignor[ing] other provisions of the FTCA . . . which opened to liability a number of areas where parallel private rights of action did not previously exist, including the 'transmi[ssion of] postal matter, 28 U.S.C. § 2680(b), collect[ion of] taxes or custom duties, § 2680(c), impos[ition of] quarantines, § 2680(f), [and regulation of] the monetary system, § 2680(i).'"[463] This assertion is apparently based on a misreading of Justice Scalia's argument that a private person liability requirement would render some of the FTCA's exceptions superfluous because they protected purely governmental activity.[464] The cited provisions, 28 U.S.C. §§ 2680(b), (c), (f), and (i) are exceptions to the FTCA's general waiver of sovereign immunity.[465] As such, they do the opposite of opening the United States to liability for transmitting postal matter, collecting taxes, imposing quarantines, or regulating the monetary system: they exclude such claims from the FTCA.

b. State Law and the Federal Relationship between Service Members and the United States

Feres supported its conclusion that Congress did not intend to include claims arising incident-to-service by noting that "[i]t would hardly be a rational plan" to have claims of service members decided under widely varying state law, as the FTCA would require, when the relationship between service members and the government was "distinctively federal."[466] In response it is argued that the FTCA itself burdens the military relationship with state tort law:

Cir. 1996) (barring suit alleging government failure to stop export of diseased cattle and holding that the breach of such a duty, assuming it existed, is not cognizable under the FTCA); Art Metal-U.S.A., Inc. v. United States, 753 F.2d 1151, 1152–55 (D.C. Cir. 1985) (barring suit alleging that the General Services Administration failed to follow government regulations when it debarred plaintiff from federal contracts).

463. Costo v. United States, 248 F.3d 863, 874 (9th Cir. 2001) (Ferguson, J., dissenting) (alterations in original) (quoting United States v. Johnson, 481 U.S. 681, 694 (1987) (Scalia, J., dissenting)); *see also* Turley, *supra* note 9, at 16 (noting the same examples and stating that "[w]hile the *Feres* Court relied on the fact that there was no parallel private right of action where service members could sue their employer, '[t]his ignores other provisions of the FTCA . . . which opened to liability a number of areas where parallel private rights of action did not previously exist'" (alterations in original) (quoting *Costo*, 248 F.3d at 874)).

464. Johnson v. United States, 481 U.S. 681, 694 (1987) (Scalia, J., dissenting) (citing 28 U.S.C. § 2680 (b), (c), (f), (i) (1982)).

465. Section 2680 begins, "Exceptions: The provisions of this chapter and section 1346(b) of this title shall not apply to— . . . ." 28 U.S.C. § 2680 (2006).

466. Feres v. United States, 340 U.S. 135, 143 (1950) (quoting United States v. Standard Oil Co., 332 U.S. 301, 305 (1947)). The Court reasoned:

> That the geography of an injury should select the law to be applied to his tort

> State law . . . intrudes upon the relationship between the Government and its armed forces [because] when civilians sue . . . for injuries inflicted by . . . service members[,] [s]tate law . . . provid[es] the substantive tort law to establish the United States' [FTCA] liability for its employees' actions. . . . Civilians sue under the [FTCA] and, as a result, . . . service members face tort liability. Because tort law varies from state to state, this can lead to varying tort standards for . . . service members.[467]

This argument fails for three reasons. First, service members would not face tort liability because the FTCA specifically grants immunity to all federal employees for any tort that is cognizable under the Act.[468] Second, leaving aside the service members' immunity, in an FTCA suit for service member negligence, the service member and the United States would both be on the defense side, with no strain on their relationship caused by varying state tort law. Third, the argument does not address the Court's point: absent some strong indication to the contrary, it is unlikely that Congress would have set up a system where similar members of the military exposed to the same danger and suffering similar injuries would receive widely varying remedies under state tort law.[469]

Justice Scalia argues:

> [I]t is difficult to explain why uniformity (assuming our rule were achieving it) is indispensable for the military, but not for the many other federal departments and agencies that can be sued under the FTCA for the negligent performance of their "unique, nationwide function[s]," . . . including, as we have noted, the federal prison system which may be sued under varying state laws by its inmates.[470]

> claims makes no sense. We cannot ignore the fact that most states have abolished the common-law action for damages between employer and employee and superseded it with workman's compensation statutes which provide, in most instances, the sole basis of liability.

Id.

467. Brou, *supra* note 447, at 40–41.

468. *See* 28 U.S.C. § 2679(d)(1) (2006).

469. *See Feres*, 340 U.S. at 142–44. In Molsbergen v. United States, 757 F.2d 1016 (9th Cir. 1985), the court held that state law determines whether the government owed a duty to inform a former soldier that he had been exposed to radiation with thousands of others during service, assuming that the government had no notice that radiation was hazardous prior to his discharge. *Id.* at 1019–20. Because the service member was domiciled in California after discharge, the court determined that California law would apply to claims regarding his injury. *Id.* at 1020.

470. *Johnson*, 481 U.S. at 696 (1987) (Scalia, J., dissenting) (quoting Stencel Aero Eng'g Corp. v. United States, 431 U.S. 666, 675 (1977) (Marshall, J., dissenting)); *see also* Brou, *supra* note 447, at 41–42. *But see* United States v. Demko, 385 U.S. 149 (1966) (holding federal prisoner could not sue under the FTCA for injuries incurred working for Prison Industries, Inc.).

The answer is that the military needs to be a cohesive organization to a much greater extent than other federal agencies and in a categorically different way than the Bureau of Prisons: "The military constitutes a specialized community governed by a separate discipline from that of the civilian."[471] Trust and goodwill among soldiers, sailors, and airmen are important to military success.[472]

A uniform system of remedies fosters trust and goodwill. The FTCA bars claims that arise in foreign countries[473] or in combatant activities.[474] If three service-member amputees share a military hospital ward—one having lost a leg when his helicopter was shot down by the Taliban, one suffering the same loss in a military transport accident in Germany, and one in a military training flight in Kansas—each of them will have the full panoply of service members' and veterans' benefits.[475] Those who suffered their loss in combat or overseas could not sue under the FTCA because the Act's exceptions bar those claims.[476] If the one injured in Kansas could bring a FTCA suit under Kansas tort law he would have a much larger potential remedy, the others would know it, and may well feel unfairly treated.[477] Concern about providing such disparate treatment for similarly situated members of the military led President Truman to veto the Cardy private relief bill on the day he signed the FTCA into law, stating that "it would grant to the estate a special benefit denied to the estates of other members of the armed forces where the facts are similar."[478] As President

471. Orloff v. Willoughby, 345 U.S. 83, 94 (1953); *see also* United States v. Stanley, 483 U.S. 669, 679 (1987) ("We found 'factors counseling hesitation' in '[t]he need for special regulations in relation to military discipline, and the consequent need and justification for a special and exclusive system of military justice . . . .'" (alterations in original) (quoting Chappell v. Wallace, 462 U.S. 296, 300 (1983))).

472. *See* Kathryn R. Burke, *The Privacy Penumbra and Adultery: Does Military Necessity Justify an Adultery Regulation and What Will It Take for the Court to Declare It Unconstitutional?*, 19 HAMLINE J. PUB. L. & POL'Y 301, 321 (1997); Sam Nunn, *The Fundamental Principles of the Supreme Court's Jurisprudence in Military Cases*, ARMY LAW. Jan. 1995, at 27, 28–30.

473. 28 U.S.C. § 2680(k) (2006).

474. 28 U.S.C. § 2680(j) (2006).

475. *See* discussion *supra* Part I.B(1).

476. *See* 28 U.S.C. § 2680(j), (k) ("The provisions of this chapter . . . shall not apply to . . . [a]ny claim arising out of the combatant activities of the military . . . or . . . [a]ny claim arising in a foreign country.").

477. *See* Edwin F. Hornbrook & Eugene J. Kirschbaum, *The* Feres *Doctrine: Here Today—Gone Tomorrow?*, 33 A.F. L. REV. 1, 11 (1990) ("[A]bolishing *Feres* would splinter military cohesion by creating a privileged class of claimants who could bring suit, and an underprivileged class who would still be barred by the combat, foreign country, and discretionary function exceptions."). *See generally* United States v. Brooks, 169 F.2d 840, 844 (4th Cir. 1948) (hypothesizing the disparate treatment that similarly-situated soldiers might nonetheless receive under the FTCA), *rev'd*, 337 U.S. 49 (1949).

478. S. DOC. NO. 80-179, at 2–3 (1948) (returning without approval the bill entitled "An Act for the Relief of the Estate of Lee Jones Cardy"); *see supra* notes

Eisenhower stated in a similar veto message, "[u]niformity and equality of treatment to all who are similarly situated must be the steadfast rule if the Federal programs for veterans and their dependents are to be operated successfully."[479] This is why the Court thought it unlikely Congress would *sub silentio* create a new, non-uniform remedy for those injured incident-to-service.[480]

c. The Military Compensation System & The Federal Tort Claims Act

The *Feres* Court found it significant that Congress, having "provide[d] systems of simple, certain, and uniform compensation for injuries or death of those in armed services," failed to state how money received administratively would be taken into account if a service member received an FTCA judgment.[481] The Court recognized four possible approaches Congress could have adopted.[482] It concluded that "[t]he absence of any such adjustment is persuasive that there was no [Congressional] awareness

125–29 (discussing vetoes of military private bills).

479. H.R. DOC. NO. 83-432, at 1–2 (1954) (returning without approval a bill for the relief of Mrs. Josette L. St. Marie); *see also* H.R. DOC. NO. 83-426, at 1–2 (1954) (returning without approval a bill for the relief of Theodor W. Carlson).

480. One of the lessons of the September 11th Victim Compensation Fund is that providing different, individualized awards to members of a group who have suffered similar loss can cause frustration and ill-will:

> [T]here are serious problems posed by a statutory approach mandating individualized awards for each eligible claimant. The statutory mandate of tailored awards fueled divisiveness among claimants and undercut the very cohesion and united national response reflected in the Act. The fireman's widow would complain: "Why am I receiving less money than the stockbroker's widow? My husband died a hero. Why are you demeaning the value of his life?" . . . The statutory requirement that each individual claimant's award reflect unique financial and family circumstances inevitably resulted in finger-pointing and a sense among many claimants that the life of their loved one had been demeaned and undervalued relative to others also receiving compensation from the Fund.

KENNETH R. FEINBERG ET AL., U.S. DEP'T OF JUSTICE, FINAL REPORT OF THE SPECIAL MASTER FOR THE SEPTEMBER 11TH VICTIM COMPENSATION FUND OF 2001 82 (2008) (noting that a better approach might have been to provide the same amount for all eligible claimants); *accord* KENNETH R. FEINBERG, WHAT IS LIFE WORTH? THE UNPRECEDENTED EFFORT TO COMPENSATE THE VICTIMS OF 9/11 71–73 (2005) (describing his encounters with the 9/11 families at town meetings and their reactions of resentment, anger, and disbelief when "faced with the raw truth that each claimant would receive a different award depending on the economic wherewithal of the victim" because "[w]idows of firefighters and military men . . . [were] receiv[ing] less from the fund than the stockbrokers' widows").

481. Feres v. United States, 340 U.S. 135, 144 (1950).

482. *Id.* The Court noted that a claimant might "(a) enjoy both types of recovery, or (b) elect which to pursue, thereby waiving the other, or (c) pursue both, crediting the larger liability with the proceeds of the smaller, or (d) that the compensation and pension remedy excludes the tort remedy." *Id.*

that the Act might be interpreted to permit recovery for injuries incident to military service."[483]

Critics have faulted this conclusion, arguing that the *Feres* bar of claims arising "incident-to-service" is much broader than the workers' compensation laws' bar to suits by "employees injured in accidents that arise out of and in the course of employment,"[484] and that "veterans benefits are not as generous as the Court believed them to be."[485] The first argument presumes that the rights of civilians and service members to sue their employers should be parallel even though their work connection requirements for receiving benefits are categorically different: one compensating injuries arising during "course of employment" and the other granting benefits for injuries arising during period of service.[486] The second argument presents one side of an interminable debate.[487] Neither argument addresses the Court's reasoning that if Congress had anticipated

483. *Id.* The Court then noted that the compensation system compared favorably to "most workman's compensation statutes" and stated the administrative payments made to Jefferson and Griggs. *Id.* at 145.

484. Brou, *supra* note 447, at 51; *see, e.g.*, United States v. Johnson, 481 U.S. 681, 698 (1987) (Scalia, J., dissenting) (arguing that "[r]ecovery is possible under workers' compensation statutes more often than under the [Veterans' Benefit Act]," and that "[Veterans' Benefit Act] benefits can be terminated more easily than can workers' compensation" benefits); Turley, *supra* note 9, at 85 (arguing that unlike the *Feres* doctrine which bars suit in non-work related areas, FECA's exclusive remedy is confined to work-related injuries or illnesses and does not bar suits for injuries caused by government negligence outside the employment context).

485. Brou, *supra* note 447, at 48.

486. *See* Brou, *supra* note 447, at 52–53 (touching upon the breadth of military medical coverage). Unlike typical workers' compensation statutes, benefits are provided to veterans and service members for any injury, disability, or death that arises at any time during their period of service, with few exceptions. *See supra* Part II.B.1 (identifying the origin and scope of the military's uniform compensation system). The liberal standard is reflected in the title to the Congressional Act of September 27, 1944, which expanded the scope of the benefits program: "To repeal [the statute], which provides for the forfeiture of pay of persons in the military and naval service . . . who are absent from duty on account of the direct effects of venereal disease due to misconduct . . . ." Act of September 27, 1944, Pub. L. No. 78-430, 58 Stat. 752.

487. Resolving the "generousness" argument would likely turn on the definition chosen. Certainly, however, there are two sides to be considered. *Compare* Brou, *supra* note 447, at 48–51 (arguing that the scope of veterans' benefits is limited when compared to the recoveries available in typical personal injury cases), *with* Hornbrook & Kirschbaum, supra note 477, at 11–14 (endorsing the overall equity associated with veterans' benefits), *and* Joanne M. Bernott, United States v. Johnson*: The Dissent's Flawed Attack on* Feres v. United States, 21 CREIGHTON L. REV. 109, 126 (1987) (arguing that criticisms of the exclusive nature of the administrative remedies "carelessly impugn[] the overall adequacy of the military's statutory compensation scheme"). Any weighing of the generousness of veterans' benefits would need to consider the broad range of benefits, preferences and perquisites available to veterans but not part of workers' compensation systems. *See supra* Part I.B.1 (identifying the origins and scope of the military's uniform compensation system). These include "educational benefits, extensive health benefits, home-buying loan benefits, and retirement benefits." *Johnson*, 481 U.S. 681, 690 n.10 (1987).

that service members could recover under the FTCA it would have given direction about how moneys received from the two remedies would be adjusted.[488]

Justice Scalia argues that "the [Veterans Benefits Act] is not, as *Feres* assumed, identical to federal and state workers' compensation statutes" because they almost invariably contain "exclusivity provisions" which the veterans statutes do not.[489] But the Court held in *United States v. Demko*[490] that the Prison Industries Fund was the exclusive remedy for federal prisoners injured while working for Federal Prison Industries, Inc., even though that statute does not contain exclusivity language.[491] The statute was enacted in 1934 and its legislative history does not address the exclusivity issue.[492] The Court recognized that "compensation laws are practically always thought of as substitutes for, not supplements to, common-law tort actions."[493] It distinguished its *Muniz* decision because unlike the prisoner plaintiffs there, plaintiff Demko was "injured . . . in the performance of an assigned prison task" and "is protected by the prison compensation law."[494] Accordingly, that law was his exclusive remedy, precluding his FTCA suit.[495]

Justice Scalia also argues that "both before and after *Feres* we permitted injured servicemen to bring FTCA suits, *even though they had been compensated under the* [*Veterans Benefit Act*]."[496] He pointedly observes that "the [Veterans Benefit Act] will in fact be exclusive for service-connected injuries, but not for others," and suggests that the tension cannot be resolved from the texts of the statutes.[497] This tension was recognized

488. *Feres*, 340 U.S. at 144. Jayson & Longstreth note:

> Since the turn of the century, most tort remedies against employers for work-related injuries have been eliminated, with an administrative compensation scheme substituted in their place. . . . It would certainly be strange to conclude that Congress intended that servicemen, virtually alone among American workers, be given free rein to sue their employer.

JAYSON & LONGSTRETH, *supra* note 35, § 5A.05.

489. *Johnson*, 481 U.S. at 698 (Scalia, J., dissenting).

490. 385 U.S. 149 (1966).

491. *Id.* at 151–52. Federal Prison Industries, Inc. is the federal corporation that provides training and rehabilitation programs for prisoners. 18 U.S.C. § 4126 (2006).

492. *Denko*, 385 U.S. at 152.

493. *Id.* at 151.

494. *Id.* at 149, 153.

495. *Id.* at 154.

496. United States v. Johnson, 481 U.S. 681, 697–98 (1987) (Scalia, J., dissenting) (citing United States v. Brown, 348 U.S. 110, 111 (1954); Brooks v. United States, 337 U.S. 49, 53 (1949)).

497. *Id.* at 698.

by the judges that dealt with the *Feres* litigation.[498] It hardly shows that *Feres* is wrong.

Nowhere in his dissent does Justice Scalia directly address or acknowledge the *Feres* Court's core analysis on the compensation issue. The absence from the FTCA of any "statutory authority" one way or another directing how tort judgments and money paid administratively are to be reconciled suggests that Congress was not "aware[] that the Act might be interpreted to permit recovery for injuries incident to military service."[499]

Some of the confusion surrounding the compensation issue is attributable to the Court. Over time, the Court has been imprecise in describing *Feres*' analysis of the compensation issue. The *Feres* reasoning about the "simple, certain, and uniform" military compensation system[500] is that, had Congress contemplated that the FTCA would apply to incident-to-service claims, "it is difficult to see why it should have omitted any provision to adjust these two types of remedy to each other."[501] In *Stencel Aero Engineering Corp.*, this "adjustment" point was lost; the Court stated only that "the Veterans' Benefits Act establishes, as a substitute for tort liability, a statutory 'no fault' compensation scheme which provides generous pensions to injured servicemen, without regard to any negligence attributable to the Government."[502] In *Shearer*, the point was reduced to a footnote: "Although no longer controlling, other factors mentioned in *Feres* are present here. . . . [T]he record shows that Private Shearer's dependents are entitled to statutory veterans' benefits."[503] In *Johnson* the point was accurately presented again:

> The Court in *Feres* found it difficult to believe that Congress would have provided such a comprehensive system of benefits while at the same time contemplating recovery for service-related injuries under the

498. *See infra* Part IV.B.3.c.

499. Feres v. United States, 340 U.S. 135, 144 (1950). Justice Scalia's *Johnson* dissent has received its own criticism:

> The dissent's case against *Feres* fails because it does not directly address the plain meaning of Sections 1346(b) and 2674; does not address Justice Jackson's syllogistic inquiry into the Congressional intent behind the FTCA; relies nearly exclusively on post-*Feres* case law to undermine a statutory interpretation premised on the statute's text and legislative history; turns on an ill-considered proclamation about the legal mores of 1946; and too casually repudiates almost forty years of Congressional tolerance and expansion of the *Feres* doctrine.

Bernott, *supra* note 487, at 135.

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

501. *Id.*

502. Stencel Aero Eng'g Corp. v. United States, 431 U.S. 666, 671 (1977).

503. United States v. Shearer, 473 U.S. 52, 58 n.4 (1985) (citing *Feres*, 340 U.S. at 144–45).

FTCA. Particularly persuasive was the fact that Congress "omitted any provision to adjust these two types of remedy to each other."[504]

2. *Other Challenges to the* Feres *Conclusion*

a. Language in Earlier Tort Claims Bills

When it laid out the "considerations persuasive of liability,"[505] the *Feres* Court noted that "eighteen tort claims bills were introduced in Congress between 1925 and 1935 and all but two expressly denied recovery to members of the armed forces; but the bill enacted as the present Tort Claims Act from its introduction made no exception."[506] Many critics have argued that this piece of information undermines *Feres*' holding: "The omission of such a bar, when one was considered and rejected in sixteen previous tort bills, clearly indicates that Congress did not intend to limit service members' ability to sue under the Federal Tort Claims Act."[507]

There are three problems with this argument. First, it ignores the substantial time gap between when the cited bills were considered—the last was in 1935—and passage of the FTCA more than a decade later.[508] The cited bills are not contemporaneous with the FTCA's enactment and, therefore, are suspect as a reflection of Congressional intent in 1946.[509]

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504. United States v. Johnson, 481 U.S. 681, 690 (1987) (quoting *Feres*, 340 U.S. at 144).

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

506. *Id.* at 139 (citing Brooks v. United States, 337 U.S. 49, 51 (1949)). The Court's comment that "the bill enacted . . . made no exception" refers to S. 2177, 79th Cong. tit. IV (1946).

507. Brou, *supra* note 447, at 37; *see, e.g.*, Costo v. United States, 248 F.3d 863, 870 n. 1(9th Cir. 2001) (Ferguson, J., dissenting) (citing *Feres*, 340 U.S. at 138–39, and asserting "that all but two of the eighteen drafts of the FTCA considered by Congress barred suits by members of the military"); Turley, *supra* note 9, at 16 n.105 (stating that "sixteen of the eighteen drafts of the FTCA contained a prohibition on suits by service members, a position rejected in the final legislation.").

508. Brou states that "[b]etween 1942 and the passage of the [FTCA] in 1946, Congress considered eighteen tort claims bills." Brou, *supra* note 447, at 37. But the eighteen bills cited in her supporting footnote are the same ones cited in *Brooks* and are dated from 1925 to 1935. *Compare id.* at 37 n.261, *with Brooks*, 337 U.S. at 51 n.2.

509. *See* CHRISTIAN E. MAMMEN, USING LEGISLATIVE HISTORY IN AMERICAN STATUTORY INTERPRETATION 27, 67 (2002) (acknowledging the usefulness of legislative history in clarifying ambiguous statutory issues, but qualifying this acknowledgment by stating that only contemporaneous legislative history should be used in the aid of statutory interpretation because pre-enactment legislative history is suspect); *see also id.* at 66–67, (citing Estate of Cowart v. Nicklos Drilling Co., 505 U.S. 469, 497 n.3 (1992) (Blackmun, J., dissenting)) (supporting a general proposition that pre-enactment legislative history is suspect). In *Cowart*, Justice Blackmun questioned the use of legislative history from predecessor bills considered three years prior to the enactment of the Longshore and Harbor Workers' Compensation Act Amendments of 1984. 505 U.S. at 497 n.3 (Blackmun, J., dissenting).

Second, the bills were very different from the FTCA as it was finally enacted. Six of them provided only administrative remedies for personal injury or wrongful death claims, with no recourse to the courts.[510] Eight called for administrative proceedings before the General Accounting Office or an Employees Compensation Commission, coupled with a right to review in the Court of Claims.[511] Fourteen of them had different procedures for property claims than for claims involving personal injury or death.[512] Fourteen placed caps on the amount of damages that might be recovered.[513]

Only three of the eighteen bills granted subject matter jurisdiction to United States district courts, and they bear very little resemblance to the FTCA as it was enacted.[514] They are much shorter than the FTCA, having lengths of 100 lines,[515] fifty lines,[516] and fifty-one lines,[517] compared to the FTCA's 307 lines.[518] None of the three contained a detailed jurisdictional grant comparable to 28 U.S.C. § 1346(b).[519] None contained any of the exceptions included in § 2680 of the FTCA,[520] although two included provisions that would bar claims by service members.[521] Because the

510. *See* H.R. 15428, 71st Cong. § 1(a) (1930); S. 4377, 71st Cong. §§ 201–209 (1930); H.R. 9285, 70th Cong. §§ 201–209 (1928); H.R. 6716, 69th Cong. §§ 201–213 (1926); S. 1912, 69th Cong. §§ 2, 3 (1926); H.R. 12178, 68th Cong. § 2 (1925).

511. *See* S. 1043, 74th Cong. § 304 (1935); H.R. 129, 73d Cong. §§ 11–12, 14–15 (1933); S. 1833, 73d Cong. § 304 (1933) (providing that any insurance available to claimant be deducted from the damages to be paid by government); S. 4567, 72d Cong. § 304 (1932) (same); S. 211, 72d Cong. § 303 (1931); H.R. 5065, 72d Cong. § 303 (1931); H.R. 17168, 71st Cong. §§ 303, 307 (1931) ("[T]he findings of the Comptroller General shall be prima facie evidence of the facts therein stated."); H.R. 16429, 71st Cong. §§ 33, 37 (1931) (same).

512. *See* S. 1043 (providing different procedures and limitations for property damage claims than those for personal injury claims)); S. 1833, 73d Cong. (1933) (same); S. 4567 (same); S. 211, 72d Cong., 1st Sess. (1931) (same); H.R. 5065, 72d Cong. (1931) (same); H.R. 17168 (1931) (same); H.R. 16429 (same); H.R. 15428 (conferring authority upon the Court of Claims to review on *certiorari* any settlements made under the provisions of the title, but limited the record on review to "a transcript of all the papers filed . . . prior to [the] settlement, together with . . . the decision of the Comptroller General"); S. 4377 (same) ; H.R. 9285 (same); H.R. 6716 (same); S. 1912 (providing no provision for personal injury or death); H.R. 12179, 68th Cong. (1925) (providing no provision for property damage); H.R. 12178 (providing no provision for property damage).

513. *See supra* notes 438–40 and accompanying text (discussing the use of damage caps in pre-FTCA bills).

514. *See* H.R. 8561, 73d Cong. § 2 (1934) (requiring pre-suit certificate of probable cause from the district judge); H.R. 8914, 69th Cong. (1926); H.R. 12179.

515. H.R. 8561.

516. H.R. 8914.

517. H.R. 12179.

518. S. 2177, 79th Cong. (1946) 62–71.

519. H.R. 8561; H.R. 8914; H.R. 12179.

520. *See id.*

521. H.R. 8914 § 6; H.R. 12179 § 6.

eighteen cited bills are so different from the FTCA, the absence of some of their provisions from its final version does not demonstrate Congressional intent.[522]

The third reason to reject the inference of Congressional intent from the absence of an explicit FTCA exception for service members is that such an exception was unnecessary in the first place. Judge Augustus Hand explained three key points in the Second Circuit's *Feres* opinion: (1) service members could not recover for injuries incurred incident-to-service under the Military Personnel Claims Act;[523] (2) law established by *Dobson* and *Bradey* before enactment of the FTCA barred suit for such injuries;[524] and (3) the World War Veterans' Act of 1924 had been amended to state that when it provided compensation, "'no other pension laws or laws providing for gratuities or payments in the event of death in the service' shall be applicable to disabilities or deaths made compensable under the Act."[525] Accordingly, "the explanation for the omission of the thirteenth exception to the Tort Claims Act is that it was considered unnecessary."[526]

Chief Judge Parker of the Fourth Circuit was apparently persuaded by Judge Hand's analysis. In his dissent from the Fourth Circuit's *Brooks* decision, Judge Parker noted that the proposed exception in H.R. 181 would have barred, "'[a]ny claim for which compensation is provided by the Federal Employees' Compensation Act, as amended, or by the World War Veterans' Act of 1924, as amended.'"[527] He argued that "[w]hat seems a conclusive reason for not reading into the act the exception suggested, however, is that this exception was originally contained in the tort claims act which was introduced into Congress . . . and was omitted, with apparent deliberation, when that bill was incorporated . . . [into] the Legislative Reorganization Act."[528] A year later, sitting on the Fourth Circuit's unanimous *Jefferson* panel, Judge Parker declined to make that argument.[529] Rather, the Fourth Circuit stated that it

522. *See* U.S. *Brooks* Br., *supra* note 60, at 35–36 (proposing alternative interpretations of the Congressional intent underlying the passage of the FTCA); MAMMEN, *supra* note 509, at 67 (qualifying the usefulness of pre-enactment legislative history when interpreting ambiguous statutory issues).

523. Feres v. United States, 177 F.2d 535, 537 (2d Cir. 1949) (citing 31 U.S.C. § 223b (1946)).

524. *Id.* (citing Bradey v. United States, 151 F.2d 742 (2d Cir. 1945); Dobson v. United States, 27 F.2d 807 (2d Cir. 1928)).

525. *Id.* at 537–38 (quoting 38 U.S.C. § 422 (1946)).

526. *Id.* at 538.

527. United States v. Brooks, 169 F.2d 840, 849 (4th Cir. 1948) (Parker, C.J., dissenting) (citing H.R. 181, 79th Cong. § 402(8) (1946)), *rev'd*, 337 U.S. 49 (1949).

528. *Id.*

529. Jefferson v. United States, 178 F.2d 518, 520 (4th Cir. 1949), *aff'd sub nom.* Feres v. United States, 340 U.S. 135 (1950) ("[T]oo much weight should not be given to the

was "in accord with the conclusions reached by the Second Circuit."[530] Its opinion concluded that Congress had not intended for the FTCA to allow every injury to a service member to become a potential negligence action because that would require the courts to review military decisions and would undermine military discipline.[531] The court reasoned that "this consideration [was] too weighty to be swept aside by" the argument that Congress must have intended to allow such suits when it had not included a proposed exception for military claims in the final version of the FTCA.[532] Judge Chesnut followed a similar path in the *Jefferson* district court litigation, acknowledging the potential strength of the missing exception argument in his first opinion,[533] but holding against it in the second.[534]

b. Feres *& the Deterrence Role of Tort Law*

Feres is attacked on the ground that its bar to suit by service members for government negligence has removed the deterrence role that tort law normally serves. Professor Turley argues largely from the perspective of financial deterrence[535] while Major Brou argues for the deterrence of disclosure.[536]

i. Financial Deterrence

Professor Turley argues that the *Feres* bar immunizes the military from the financial costs of our tort system that normally encourage safe practices. He states:

> *Feres* constitutes a major reduction in potential costs for military businesses and activities. For most businesses, liability costs (including insurance, risk abatement, and actual liability awards) represent a significant budget component. . . . Moreover, potential liability costs are a critical factor in businesses determining whether to enter a particular market or enterprise. For the military, such costs are present in a greatly reduced form.[537]

language contained in discarded measures . . . .").

530. *Id.* at 519.

531. *Id*. at 520.

532. *Id.*

533. *Jefferson*, 74 F. Supp. 209, 211 (D. Md. 1947).

534. *Jefferson*, 77 F. Supp. 706, 712 (D. Md. 1948), *aff'd*, 178 F.2d 518 (4th Cir. 1949), *aff'd sub nom.* Feres v. United States, 340 U.S. 135 (1950).

535. *See* Turley, *supra* note 9, at 46–47 (relying upon the paradigm of the rational, self-interested, value-maximizing actor).

536. *See* Brou, *supra* note 447, at 33 (noting the increased judicial and public attention that FTCA claims impose on government organizations).

537. Turley, *supra* note 9, at 49–50. Professor Turley develops his *Feres*-Deterrence-argument at length. *Id.* at 46–67. Accordingly, this summary of his argument is necessarily truncated.

> . . . .
>
> With commonly tight budgetary conditions in the military, asymmetrical increases in the cost of individual units or programs will also be generally tracked. Even if such costs are borne in part by the Justice Department as the designated defense counsel for such claims, these costs will become part of an appropriation request and therefore subject to an oversight review in Congress. . . . This could introduce personal costs for physicians in the form of increased insurance rates.[538]
>
> . . . .
>
> By introducing a liability system, the military will be forced to internalize more of the true costs of [its negligence].[539]

The argument that *Feres* undermines the financial deterrence role of tort law fails for two reasons. First, as a general matter there is reason to believe that governments are not responsive to financial deterrence in the same way as private entities. Second, federal agencies such as the Department of Defense are not responsive to financial deterrence because they have virtually no stake in the financial outcome of tort claims brought against the United States for their negligent acts.

Professor Turley reasons that "there is little question that increasing levels of liability will influence the conduct of a rational actor."[540] There is, however, substantial question about how governments will respond to increased tort liability because governments and their agencies are not motivated by the single interest of maximizing monetary value.[541] Because governments and agencies respond to political interests rather than financial ones, it is unlikely that requiring them to pay tort judgments will cause them to alter their practices or begin new loss prevention initiatives.[542] This is particularly so if agencies perceive that compensation payments will not affect their budgets, either because payments are made from a general fund or because they expect that money paid from budgets

538. *Id.* at 66.
539. *Id.* at 67.
540. *Id.* at 47.
541. *See* Daryl J. Levinson, *Making Government Pay: Markets, Politics, and the Allocation of Constitutional Costs*, 67 U. CHI. L. REV. 345, 355–56 (2000) (concluding that one cannot simply assume "that government will behave like a private, profit-maximizing firm").
542. *See* Turley, *supra* note 9, at 48 ("[P]ast cases indicate high rates of malpractice and injuries have occurred within this [military] system without meaningful risk-avoidance . . . ."); Daryl J. Levinson, *Empire-Building Government in Constitutional Law*, 118 HARV. L. REV. 915, 965 (2005) ("Government officials do not derive any intrinsic value from public funds . . . and therefore do not necessarily attach any disutility to losing it through compensation payments."); Lawrence Rosenthal, *A Theory of Governmental Damages Liability: Torts, Constitutional Torts, and Takings*, 9 U. PA. J. CONST. L. 797, 824–26 (2007) (summarizing the gradual erosion of the assumption that government tort liability works in the same manner as the common law liability of private tortfeasors).

will be restored in future appropriations.[543] Agencies will also weigh the political cost of choosing loss prevention programs and enhanced safety over core agency functions and more politically-valued programs.[544] Because agencies engage in such political balancing, "tort liability cannot be expected to promote efficient government investment in loss prevention."[545] When tort damages are paid out as a consequence of such choices, the agency can rationalize the payment as "a cost of public policy."[546] Accordingly, agencies are not responsive to financial deterrence.

Financial deterrence is even less effective with federal agencies such as the Department of Defense. Federal agencies in general are subject to the political issues discussed in the preceding paragraph. Because military officers will not expect to be in the same position three years hence, their political choices regarding the programs they direct may be even more skewed to favor core agency functions.[547]

Federal agencies have very little stake in the financial outcome of tort litigation that arises from their negligence.[548] Agencies do not pay FTCA settlements in excess of $2,500 or FTCA judgments.[549] Those settlements and judgments are paid from the Judgment Fund rather than agency

543. *Accord* Marc L. Miller & Ronald F. Wright, *Secret Police and the Mysterious Case of the Missing Tort Claims*, 52 BUFF. L. REV. 757, 758 (2004) (examining similar incentive structures within the context of police departments); *see* Levinson, *supra* note 542, at 966 (acknowledging that legislators who approve of an agency's activities may simply replace any losses imposed by liability in the following appropriations cycle).

544. *See* Rosenthal, *supra* note 542, at 826 ("When the political cost of diverting public resources to loss prevention is sufficiently high, government will not make the investment even when it is economically justified.").

545. *Id.* For example, a social welfare agency must choose between providing more benefits directly to clients and maintaining its physical facilities and staff credentials.

546. *See* Harold J. Krent, *Reconceptualizing Sovereign Immunity*, 45 VAND. L. REV. 1529, 1539 (1992).

547. *See generally* 10 U.S.C. § 664 (2008) (stipulating the length of duty assignments); DEP'T OF DEF., INSTRUCTION NUMBER 1300.19, DOD JOINT OFFICER MANAGEMENT PROGRAM 3 (2010) (evidencing DOD policy that tour lengths not exceed three years per tour).

548. *See* Hornbrook & Kirschbaum, *supra* note 477, at 15 ("[T]he FTCA message to correct negligent behavior is somewhat muted since the FTCA holds the Government, not the individual, liable"). *But see id.* (acknowledging that federal agencies do bear the cost of providing litigation support, witnesses, and in-house counsel to assist the Department of Justice attorneys that represent the government in court).

549. 28 U.S.C. § 2672 (2006); 3 U.S. GEN. ACCOUNTING OFFICE, OFFICE OF THE GEN. COUNSEL, GAO-08-078SP, PRINCIPLES OF FEDERAL APPROPRIATIONS LAW 14–30 to –44 (3d ed. 2008) [hereinafter PRINCIPLES, 3d. ed.], *available at* http://www.gao.gov/special.pubs/d08978sp.pdf. The rare exceptions include nonappropriated fund instrumentalities, *id.* at 15–266, and the U.S. Postal Service, 3 U.S. GEN. ACCOUNTING OFFICE, OFFICE OF THE GEN. COUNSEL, GAO/OGC-94-33, PRINCIPLES OF FEDERAL APPROPRIATIONS LAW 14–34 to –37 (2d ed. 1994) [hereinafter PRINCIPLES, 2d. ed.], *available at* http://www.gao.gov/special.pubs/og94033.pdf.

appropriations.[550] Because the Judgment Fund is a permanent, indefinite appropriation,[551] any FTCA judgment or settlement is paid automatically and without any Congressional oversight review.[552] Because the FTCA grants immunity to federal employees for any tort cognizable under the Act,[553] those employees do not suffer financial consequences for their negligence nor do they need liability insurance.[554] For all these reasons, if *Feres* did not exist, the Department of Defense would be no more responsive to financial deterrence than it is with *Feres*.

ii. Deterrence of Disclosure

Major Brou argues that the *Feres* Court, in focusing on the compensation aspect of the benefits provided to injured service members, ignored the preventative function provided by tort law. In arguing that FTCA claims have the potential to hone judicial and public attention on the shortcomings of governmental organizations, Major Brou maintains that the *Feres* doctrine undermines the government's incentive to improve efficiency and safety by allowing it to avoid liability for injuries inflicted upon service members by government negligence.[555]

This argument ignores the non-tort factors that already bring about disclosure, overestimates the likely effect of disclosures that might arise from tort litigation, and disregards the current exposure of military agencies to tort litigation arising from care provided to civilians. There are more effective ways to bring about broad public disclosure than tort litigation, including a vigorous political system and a free press.[556] Most tort cases (as opposed to their underlying events) do not lead to widespread media

550. *See* 31 U.S.C. §1304 (2006); PRINCIPLES, 3d. ed., *supra* note 549, at 14–19 to –49.

551. *See* H.R. REP NO. 84-2638, at 72 (1957) (noting that H.R. 12138, 84th Cong. § 1302 "establish[es] a permanent indefinite appropriation for the payment of judgments").

552. PRINCIPLES, 2d. ed., *supra* note 549, at 14-5 to -15; JAYSON & LONGSTRETH, *supra* note 35, § 3.03.

553. *See* 28 U.S.C. § 2679(d)(1) (2006).

554. Government health care professionals stand in a different posture because, although they are immune from paying damages, adverse judgments arising from their care are reported to the National Practitioner Data Bank. *See* 42 U.S.C. §§ 11131–37 (2006). *See generally* Hornbrook & Kirschbaum *supra* note 477, at 15 n.104.

555. Brou, *supra* note 449, at 33; *see also* Turley, *supra* note 9, at 47–49 (discussing non-liability mechanisms that can influence agency risk prevention).

556. *See* Rosenthal, *supra* note 542, at 828–29 (rejecting the suggestion that tort litigation will "unearth[] governmental misconduct"); Turley, *supra* note 9, at 47 (noting good faith military response to political pressure about medical malpractice). *But see* Myriam E. Gilles, *In Defense of Making Government Pay: The Deterrent Effect of Constitutional Tort Remedies*, 35 GA. L. REV. 845, 859–62 (2001) (exploring the informational and fault-fixing features of municipal liability suits).

coverage.[557] To the extent that tort litigation has a deterrence of disclosure, the military medical system is already fruitful ground for its work because a majority of its patients are not service members to whom *Feres* applies.[558] Therefore, doing away with *Feres* would bring about only an incremental increase in the deterrence of disclosure.

3. Characterizations of Feres

a. Feres *as "Judicially Created"*

In *Feres*, the Court explained: "We do not think that Congress, in drafting this Act, created a new cause of action dependent on local law for service-connected injuries or death due to negligence."[559] Thus, on its face, *Feres* is the Supreme Court's interpretation of Congressional intent, rather than a judicial promulgation of a new exception to the FTCA. Over the last three decades, this point has been clouded by a number of circuit court opinions that casually characterize the *Feres* doctrine as a "judicially created exception" to the FTCA.[560] The opinions support this characterization by reference to the statute,[561] to *Feres* itself,[562] or to nothing at all.[563]

The notion that *Feres* is a "judicially created FTCA exception" was mentioned in only one judicial opinion in the first twenty-three years after the decision.[564] From 1973 to 1977, just three opinions used the "judicially

557. *See* Rosenthal, *supra* note 542, at 828–29.

558. *See* U.S. DEP'T OF DEF., EVALUATION OF THE TRICARE PROGRAM: FISCAL YEAR 2010 REPORT TO CONGRESS 17 (2010) (reporting that Active Duty military personnel constituted fourteen percent of beneficiaries eligible for DoD health care benefits at the end of fiscal year 2009, and Guard and Reserve military personnel constituted four percent; the remaining eighty-two percent are active duty family members, guard and reserve family members, and retirees and family members).

559. Feres v. United States, 340 U.S. 135, 146 (1950).

560. *See, e.g.*, McMahon v. Presidential Airways, Inc., 502 F.3d 1331, 1341 (11th Cir. 2007); Brown v. United States, 462 F.3d 609, 611 (6th Cir. 2006) ("[The FTCA is] subject to a judicially-created exception carved out in *Feres v. United States* . . . ."); Pringle v. United States, 208 F.3d 1220, 1223 (10th Cir. 2000) (per curiam); Miller v. United States, 42 F.3d 297, 300 (5th Cir. 1995); Romero *ex rel.* Romero v. United States, 954 F.2d 223, 224 (4th Cir. 1992); Chatman v. Hernandez, 805 F.2d 453, 457 (1st Cir. 1986) (per curiam); Brown v. United States, 739 F.2d 362, 364–65 (8th Cir. 1984); *see also* Hata v. United States, 23 F.3d 230, 234 (9th Cir. 1994) (describing the *Feres* doctrine as a "judicially created 'incident to service' exception to the [FTCA]").

561. *Hata*, 23 F.3d at 234 (citing 28 U.S.C. § 1346(b) (1994)).

562. *McMahon*, 502 F.3d at 1341; *Brown*, 462 F.3d at 611; *Pringle*, 208 F.3d at 1223; *Romero*, 954 F.2d at 224; *Chatman*, 805 F.2d at 457; *cf. Brown*, 739 F.2d at 365 (citing United States v. Brown, 348 U.S. 110 (1954); *Feres*, 340 U.S. 135; Brooks v. United States, 337 U.S. 49 (1949)).

563. *Miller*, 42 F.3d at 300.

564. Mattos v. United States, 274 F. Supp. 38, 38 (E.D. Cal. 1967) (addressing the contention that "no recovery may be had as against the United States because of *judicially-created exception* to the [FTCA] . . . ." (emphasis added)).

created" characterization, but none provided authority or explanation for the term.[565] In a similar fashion, and with a similar lack of authority or explanation, Justice Marshall used the phrase in his 1977 *Stencel* dissent, stating, "I cannot agree that that narrow, *judicially created exception* to the waiver of sovereign immunity contained in the Act should be extended to any category of litigation other than suits against the Government by active-duty servicemen based on injuries incurred while on duty."[566]

Legal scholarship was similarly silent. Only one academic article published in the 1950s suggested that *Feres* judicially created a new exception to the FTCA.[567] In the 1960s, only one student article made such a characterization.[568] In the 1980s, it appeared in several student works[569] and a handful of works by scholars.[570] As in the judicial opinions, the characterization was either baldly stated or supported only by a reference to the FTCA or the *Feres* opinion.[571]

By the 1990s, the notion that the *Feres* decision had "judicially created" a new exception to the FTCA had become a shibboleth, widely repeated,

565. Hass *ex rel.* United States v. United States, 518 F.2d 1138, 1143 (4th Cir. 1975) (citing only *Feres*); Bankston v. United States, 480 F.2d 495, 496 (5th Cir. 1973) (same); Frazier v. United States, 372 F. Supp. 208, 208–09 (M.D. Fla. 1973) (same).

566. Stencel Aero Eng'g Corp. v. United States, 431 U.S. 666, 674 (1977) (Marshall, J., dissenting) (emphasis added).

567. *See* Robert A. Hitch, *The Federal Tort Claims Act and Military Personnel*, 8 RUTGERS L. REV. 316, 316 (1954) ("In *Feres* . . . [t]he Court in effect added an exception to the act which discriminated against certain servicemen.").

568. Recent Development, *Negligently Conducted Pre-Induction Physical Examination Not Actionable Under Federal Tort Claims Act when Injury Occurs During Service*, 62 COLUM. L. REV. 381, 381–82 (1962) (characterizing the *Feres* doctrine as an exception "created by judicial decision").

569. *See, e.g.*, John Astley, Note, United States v. Johnson*:* Feres *Doctrine Gets New Life and Continues to Grow*, 38 AM. U. L. REV. 185, 185 (1988) ("The source of the injustice is the *Feres* doctrine, the only judicially-created exception to the [FTCA]." (citing Federal Tort Claims Act, Pub. L. No. 79-601, §§ 401–22, 60 Stat. 842 (1946); Feres v. United States 340 U.S. 135 (1950))); Brian P. Cain, Note, *Military Medical Malpractice and the* Feres *Doctrine*, 20 GA. L. REV. 497, 498 (1986); J. Thomas Morina, Note, *Denial of Atomic Veterans' Tort Claims: The Enduring Fallout from* Feres v. United States, 24 WM. & MARY L. REV. 259, 260 (1983); Lora Tredway, Comment, *When a Veteran "Wants" Uncle Sam: Theories of Recovery for Servicemembers Exposed to Hazardous Substances*, 31 AM. U. L. REV. 1095, 1112 (1982).

570. *See* William N. Eskridge, Jr., *Public Values in Statutory Interpretation*, 137 U. PA. L. REV. 1007, 1086 n.337 (1989) (explaining that the Supreme Court used a broad application of a "judicially created exception to FTCA"); Courtney W. Howland, *The Hands-Off Policy and Intramilitary Torts*, 71 IOWA L. REV. 93, 102 (1985); Harold Hongju Koh, *Why the President (Almost) Always Wins in Foreign Affairs: Lessons of the Iran-Contra Affair*, 97 YALE L.J. 1255, 1336 n.377 (1988); Paul Wolfson, *Preemption and Federalism: The Missing Link*, 16 HASTINGS CONST. L.Q. 69, 105 n.198 (1988) (describing the "judicially created *Feres* doctrine" as peculiar); *see also* Jeffrey R. Simmons, *Military Medical Malpractice*, 23 ARIZ. B.J. 22, 24 (1988) (explaining that the Court "judicially created an exception in . . . *Feres*").

571. *See supra* notes 569–70.

generally accepted, and largely unexamined.[572] The falsity of that notion is suggested by the fact that it was barely murmured in the two decades immediately following the decision. The falsity is demonstrated by an examination of how the *Feres* Court came to its decision.[573]

b. Feres *as "Usurpation"*

Some of the most distinguished critics of the *Feres* opinion go further than repeating the vaguely judgmental, "judicially created" allegation. They accuse the Court of intentionally usurping the role of Congress. Professor Turley argues:

> [T]he actions of the Court in creating the *Feres* doctrine go far beyond other areas in *usurping* legislative prerogatives. The Court essentially created a civil liability system to its own liking, based on its own uninformed assumptions. The Court's unilateral action not only conflicts with the language of the FTCA but engages in a level of judicial legislation that may be unprecedented in its scope and impact. At a minimum, *Feres* represented a total departure from principles of judicial restraint and deference to the political branches.[574]

This is a very strong accusation.

The *Feres* opinion explicitly states that the Court's goal was to figure out, as best it could, what Congress had intended when it passed the FTCA.[575] The task was difficult because nothing in the FTCA's legislative

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572. *See, e.g.*, Erwin Chemerinsky, *The Constitution in Authoritarian Institutions*, 32 SUFFOLK U. L. REV. 441, 444 (1999) ("[T]he judiciary has created an additional, major exception . . . known as the Feres doctrine."); Hornbrook & Kirschbaum, *supra* note 477, at 18 (1990); *see also* Norman W. Black, *Recent Developments in Admiralty Law in the United States Supreme Court, the Fifth Circuit, and the Eleventh Circuit*, 19 HOUS. J. INT'L L. 327, 353 (1997) (citing Miller v. United States, 42 F.3d 297, 300 (5th Cir. 1995)); Koh, *supra* note 570, at 1336 n.377 (citing United States v. Johnson, 481 U.S. 681, 694 (1987) (Scalia, J., dissenting)); Peggy L. Miller, *An Ounce of Immunity Prevents a Pound of Lawsuits: Medical Malpractice and Military Mothers*, 70 U. DET. MERCY L. REV. 327, 332 (1993) (citing *Feres*, 340 U.S. 135); Sisk, *supra* note 444, at 287; Wolfson, *supra* note 570, at 105 n.198 (citing *Johnson*, 481 U.S. at 694–97 (Scalia, J., dissenting); *Feres*, 340 U.S. at 143–44).

573. *See* discussion *supra* Part IV.

574. Turley, *supra* note 9, at 68 (citing City of New Orleans v. Dukes, 427 U.S. 297, 303 (1976) (per curiam); Costo v. United States, 248 F.3d 863, 870 (9th Cir. 2001) (Ferguson, J., dissenting)) (emphasis added). Judge Ferguson stated:

> When considering the *Feres* doctrine, however, we are not dealing with a legislative action, but rather with a judicial re-writing of an unambiguous and constitutional statute. . . . *Feres* presented neither ambiguity nor constitutional violation nor legislative silence. . . . [T]he Court simply did not agree with Congress and searched in puzzling ways to declare that military personnel are not equal to civilians.

Costo, 248 F.3d at 871, 873.

575. *See Feres*, 340 U.S. at 138 ("The only issue of law raised is whether the Tort Claims Act extends its remedy to one sustaining 'incident to the service' what under other circumstances would be an actionable wrong."); *id.* ("Under these circumstances [the

history addressed the question whether the Act encompassed claims arising from military service.[576] The usurpation theory requires disbelief of the Court's statements that it was engaged in good faith legislative interpretation. But there is no basis for concluding that the Court was disingenuous.

The *Feres* decision does not conflict with the language of the FTCA. The argument that it does conflict is based on the assertion that the combatant activity exception of § 2680(j) is the only provision that limits service members' rights under the FTCA.[577] While the exceptions set out in § 2680 are important limitations on the FTCA's waiver of sovereign immunity, the jurisdictional limits of § 1346(b) are an equally important part of the law and must also be met.[578] Accordingly, the combatant activity exception of § 2680(j) is not the only FTCA provision that might bar claims of service members.[579]

The usurpation theory is baseless. There is simply no evidence that nine justices chose to "create[] a civil liability system to [their] own liking"[580]

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absence of any legislative history], no conclusion can be above challenge, but if we misinterpret the Act, at least Congress possesses a ready remedy."); *id.* at 146 ("We do not think that Congress, in drafting this Act, created a new cause of action dependent on local law for service-connected injuries or death due to negligence.").

576. *Id.* at 138 ("No committee reports or floor debates disclose what effect the statute was designed to have on the problem before us, or that it even was in mind.").

577. *See, e.g.*, Turley, *supra* note 9, at 8 (asserting that Congress only expressly exempted FTCA claims that arose out of "combatant activities of the military . . . [in a] time of war," noting that the "choice of wording by Congress is telling"); *see also Costo*, 248 F.3d at 871–73 (Ferguson, J., dissenting). Judge Ferguson argued:

> *Feres* took [the combatant activity exception, § 2680(j),] a fairly small, clearly defined, legislatively-created classification and broadened it considerably. . . . We can speculate forever upon reasons why *Feres* refused to apply a law written by Congress. It is clear that *Feres* recognized that the direct and unambiguous command of Congress created liability for claims caused by members of the military or naval forces of the United States, *Feres*, 340 U.S. at 138; 28 U.S.C. § 2671, and that the direct and unambiguous command of Congress exempted only claims arising out of combatant activities during time of war, *Feres*, 340 U.S. at 138; 28 U.S.C. § 2680(j).

Costo, 248 F.3d at 872–73 (Ferguson, J., dissenting). This is mistaken on both accounts. The Court did not derive *Feres* from the combatant activity exception. The *Feres* opinion mentions the exception only once, and only in the context of discussing several rejected "considerations persuasive of liability." 340 U.S. at 138. Nor did the Court recognize that the exception created a "direct and unambiguous command." To the contrary, the Court considered this argument and rejected it. *See id.* (identifying the argument that "from [the combatant activity exception] it is said we should infer allowance of claims arising from non-combat activities in peace").

578. *See* FDIC v. Meyer, 510 U.S. 471, 477 (1994) (explaining that Section 1346(b) grants jurisdiction for certain claims against the United States, and noting that each element of the jurisdictional grant must be met; *supra* notes 459–63 and accompanying text).

579. *See Meyer*, 510 U.S. at 477 (rejecting an FTCA claim on the grounds that it failed to present a cognizable claim to satisfy the jurisdictional requirement).

580. *See* Turley, *supra* note 9, at 68.

and disregarded a "direct and unambiguous command"[581] of Congress. The historical backdrop to *Feres* fully supports the Court's conclusion that Congress did not contemplate that the FTCA would allow incident-to-service suits by service members. This background includes the long legislative build-up to the enactment of the FTCA, the detailed, compensation system Congress created for service members, coupled with the lack of Congressional direction about how that compensation would be reconciled with FTCA judgments, the significant pre-FTCA body of law barring suits related to military service, and the absence of private laws enacted for service members.

The strongest reason to reject the usurpation theory is the evident good faith of the justices who dealt with the incident-to-service issue. *Feres* was decided without dissent.[582] Of those nine justices, five had voted in favor of the *Brooks* holding that service members could sue under the FTCA for injuries not incident-to-service.[583] The fact that a majority of the justices voted against the government in *Brooks* and for the government in *Feres* is strong confirmation that they were forthright in their approach to ascertaining what Congress had intended, as opposed to pushing some pro-military agenda.

Chief Judge Parker of the Fourth Circuit followed a similar path. Judge Parker had dissented from the Fourth Circuit opinion in *Brooks*, which held that the FTCA did not allow any suits by service members.[584] His dissent foreshadowed the Supreme Court's *Brooks* opinion, which reversed the Fourth Circuit and held that suits could be brought for injuries to service members that were not incident to military service.[585] Judge Parker was also on the unanimous Fourth Circuit panel in *Jefferson* that held the FTCA did not authorize claims for injuries that arose incident-to-service because "it [was] not reasonable to suppose, in the absence of an express declaration on the point, that Congress intended" to allow such claims.[586]

U.S. District Judge William Chesnut showed similar care and intellectual honesty. When first confronted with the incident-to-service issue in

581. *Costo*, 248 F.3d at 873 (Ferguson, J., dissenting).
582. *See Feres*, 340 U.S. at 135.
583. *See* Brooks v. United States, 337 U.S. 49, 53–54 (1949). Justices Frankfurter and Douglas dissented. *Id.* Justice Clark joined the Court on August 19, 1949. Justice Minton joined on October 12, 1949.
584. United States v. Brooks, 169 F.2d 840, 846 (4th Cir. 1948) (Parker, J., dissenting), *rev'd* 337 U.S. 49 (1949).
585. The Supreme Court stated in its *Brooks* opinion, "We agree with Judge Parker." *Brooks*, 337 U.S. at 51. It then adopted much of his analysis. *Compare Brooks*, 337 U.S. at 51–54, *with Brooks*, 169 F.2d at 846–50.
586. *See* Jefferson v. United States, 178 F.2d 518, 520 (4th Cir. 1949), *aff'd sub nom.* Feres v. United States, 340 U.S. 135 (1950).

Jefferson, he denied the government's motion to dismiss without prejudice.[587] Following a trial on the merits, he re-examined the motion and granted it, concluding that such claims "were not within the contemplation of Congress in enacting this particular legislation."[588]

The usurpation theory is refuted by the language of Justice Jackson's opinion, the lack of evidence that the Court was disingenuous in stating its legislative interpretation goal, and the justices' demonstrated willingness to reject the government's strong arguments and find liability in *Brooks*. It is also contradicted by the richness of thought and due care of the judges who dealt with the incident-to-service issue in the courts below. A careful reading of the decisions in *Brooks*, *Jefferson*, *Griggs*, and *Feres*, and the Supreme Court briefs in those cases, negates any suggestion that the Court sought to ignore Congress and impose its own will.

c. Feres *as "Unfair"*

The *Feres* opinion has repeatedly been characterized as unfair. Justice Scalia condemned "our clearly wrong decision in *Feres* and . . . the unfairness and irrationality that decision has bred."[589] It is said that "[t]he injustice of the doctrine is patently obvious and very well known,"[590] and that "[f]ailure to repeal the *Feres* Doctrine has allowed service members unfairly to be treated differently from other persons, and denied compensation for injuries suffered."[591]

The perception of unfairness seems to have two sources. The first is public perception itself. The "judicially created" shibboleth is not much questioned because it is so often repeated.[592] The same may be true for the "unfairness" label.[593] The second source begins from the premise that service members should be able to sue the government in the same way that others can, and concludes it is unfair that

587. *See Jefferson*, 74 F. Supp. 209, 216 (D. Md. 1947).

588. *See Jefferson*, 77 F. Supp. 706, 713 (D. Md. 1948), *aff'd*, 178 F.2d 518 (4th Cir. 1949), *aff'd sub nom.* Feres v. United States, 340 U.S. 135 (1950).

589. United States v. Johnson, 481 U.S. 681, 703 (1987) (Scalia, J., dissenting).

590. Barry, *supra* note 8, at 121; *accord Johnson*, 481 U.S. at 701 n.* (Scalia, J., dissenting) (listing cases and law review articles critical of *Feres*); *see also* Dana Michael Hollywood, *Creating a True Army of One: Four Proposals to Combat Sexual Harassment in Today's Army*, 30 HARV. J.L. & GENDER 151, 192 (2007) (describing the argument that *Feres* has engendered "unfairness and irrationality" as "most compelling"); Miller, *supra* note 572, at 336 (explaining the unfairness imposed by a service member's inability to choose a place of residence working in tandem with the *Feres* doctrine to prevent the choice of state tort law).

591. A.B.A. & B. ASS'N OF D.C., *supra* note 7, at 19.

592. *See supra* Part IV.B.3.a.

593. *See, e.g.*, Barry, *supra* note 8, at 121 (stating, without citation, that "[t]he injustice of the doctrine is patently obvious and very well known").

they cannot.[594] That premise ignores the distinctive relationship service members have with the government.[595] It also glosses over the workers' compensation-like trade of accepting assured, administrative, no-fault compensation in exchange for forgoing the opportunity to bring suit in tort and recover more damages.[596] The real consequence of *Feres* is that, for purposes of suing their employer in tort, the government's military employees are treated in roughly the same fashion as employees of other employers.[597] This is hardly unfair.[598]

CONCLUSION

To discuss the consequences of the *Feres* decision it may be helpful to return to first principles. A sovereign state can be sued only to the extent that it has consented to be sued and only its legislative branch can give such consent.[599] Absent an applicable waiver of sovereign immunity, the United States cannot be sued for damages.[600] Any such waiver "must be unequivocally expressed in statutory text . . . and will not be implied."[601] Congress created such a waiver when it passed the Federal Tort Claims Act.

The issue in *Feres* was direct and specific: "[W]hether the Tort Claims Act extends its remedy to one sustaining 'incident to the service' what under other circumstances would be an actionable wrong."[602] This is an all or nothing proposition—either Congress provided the necessary waiver for incident-to-service suits or it did not. The Court held that Congress had not

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594. *See, e.g.*, *supra* notes 590–91.

595. *See supra* Part IV.B.1.b.

596. *See* Michael L. Richmond, *Protecting the Power Brokers: Of* Feres*, Immunity, and Privilege*, 22 SUFFOLK U. L. REV. 623, 644–47 (1988) (exploring the notion that the compensation rationale of *Feres* is analogous to a workers' compensation scheme in justifying the disallowance of FTCA claims).

597. *See* JAYSON & LONGSTRETH, *supra* note 35, § 5A.05; *supra* Part IV.B.1.c.

598. *See* JAYSON & LONGSTRETH, *supra* note 37, § 5A.05 ("[T]here appears to be little validity to the view that it is a harsh and inequitable doctrine that Congress simply could not have intended to impose on servicemen."); Joan M. Bernott, *Fairness and* Feres*: A Critique of the Presumption of Injustice*, 44 WASH. & LEE L. REV. 51, 69–70 (1987) ("Servicemen already enjoy greater access to federal relief for most injury than do all other federal employees; equity does not compel exacerbating this disparity by revoking or limiting *Feres*."); *supra* Part IV.B.1.c.

599. *See, e.g.*, United States v. Dalm, 494 U.S. 596, 610 (1990) (observing that the power to consent to suits and waive sovereign immunity is "reserved to Congress"); United States v. U.S. Fid. & Guar. Co., 309 U.S. 506, 514 (1940) (explaining that without the consent of the sovereign, the "attempted exercise of judicial power is void").

600. *See, e.g.*, United States v. Testan, 424 U.S. 392, 399 (1976) (quoting United States v. Sherwood, 312 U.S. 584, 586 (1941)).

601. Lane v. Pena, 518 U.S. 187, 192 (1996) (citing United States v. Nordic Vill., Inc., 503 U.S. 30, 33–34, 37 (1992); Irwin v. Dep't of Veterans Affairs, 498 U.S. 89, 95 (1990)).

602. Feres v. United States, 340 U.S. 135, 138 (1950).

intended the FTCA to encompass claims arising out of activity incident to military service.[603] Accordingly, because the FTCA does not provide an applicable waiver, incident-to-service claims are barred by sovereign immunity.[604]

Three consequences logically follow from *Feres*' holding that Congressional enactment of the FTCA does not waive sovereign immunity for incident-to-service claims. First, the decision is directly applicable only to the FTCA. *Feres* is only persuasive authority for other statutes and areas of law. In explaining its holding, the *Feres* Court discussed a number of rationales or factors that supported its conclusion that Congress had not included incident-to-service claims in the FTCA. These rationales include the absence of any comparable private person liability,[605] the distinctively federal relationship between service members and the United States,[606] the inappropriateness of using varying state laws to govern that relationship,[607] and finally, the compensation system Congress established for military personnel and the absence of any direction from Congress as to how moneys from the two remedies would be adjusted.[608] Because they proved useful, these rationales were adopted as reasons counseling hesitation in recognizing constitutional tort remedies for injuries that arise out of or in the course of activity incident to military service.[609] They were also found useful in determining whether the Suits in Admiralty Act, the Death on the High Seas Act, or the Public Vessels Act waive sovereign immunity for incident-to-service injuries.[610] With regard to the Privacy Act, they correctly were not.[611]

The second consequence is that the rationales supporting the Court's analysis in *Feres* are not elements of a defense.[612] They are, taken together,

603. *See id.* at 146.
604. *See id.*; *supra* notes 599–603.
605. *See Feres*, 340 U.S. at 141–42.
606. *See id.* at 143–44.
607. *See id.* at 142–43 (noting that soldiers serve in a "number of places in quick succession," making the use of geography to determine the selection of law for their tort claims an imprudent choice).
608. *See id.* at 144.
609. *See* United States v. Stanley, 483 U.S. 669, 683–84 (1987) (quoting Chappell v. Wallace, 462 U.S. 296, 304 (1983)).
610. Death on the High Seas Act, 46 U.S.C. §§ 30301-30308 (2006); The Suits in Admiralty Act, 46 U.S.C. §§ 30901-30918 (2006); Public Vessels Act, 46 U.S.C. §§ 31101-31113 (2006); Blakey v. U.S.S. Iowa, 991 F.2d 148, 150–52 (4th Cir. 1993) (adopting the *Feres* analysis for these statutes); *see also* Miller v. United States, 42 F.3d 297, 300 (5th Cir. 1995); Charland v. United States, 615 F.2d 508, 509 (9th Cir. 1980); Beaucoudray v. United States, 490 F.2d 86 (5th Cir. 1974) (per curiam).
611. *See* Cummings v. Dep't of the Navy, 279 F.3d 1051, 1052 (D.C. Cir. 2002) (rejecting a *Feres*-based argument in a Privacy Act case).
612. *See generally* Maas v. United States, 94 F.3d 291, 295 (7th Cir. 1996) (explaining that the extent to which the *Feres* rationales are present in a case does not impact the

an explanation for the *Feres* conclusion that Congress did not contemplate that the FTCA would provide a tort remedy for incident-to-service claims. But debating whether a particular inquiry will disrupt military discipline or whether a government contractor is entitled to compensation does not change the core holding—Congress did not waive sovereign immunity for tort suits by service members related to military service.[613]

The third consequence of *Feres*' holding is simple. Because the Court held that the FTCA is not a waiver of sovereign immunity for incident-to-service claims, federal courts, including the Supreme Court, lack the authority to modify *Feres* because they do not have the authority to waive sovereign immunity.[614] The Court does have authority to decide that it had been mistaken in *Feres* about what Congress intended and to overturn the entire doctrine, but successfully and credibly revisiting and reversing such a legislative interpretation sixty years after the fact would be extremely difficult.

Certainly Congress can undo *Feres*, as the Court has repeatedly recognized.[615] Whether it should do so is a matter that might be debated. While that argument is beyond the scope of this article, a thorough understanding of the historical and legal backdrop to the FTCA and the *Feres* decision would elevate such a debate above the generalities and blind assumptions that have too frequently been lodged against *Feres* in the past.

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doctrine's application); Verma v. United States, 19 F.3d 646, 648 (D.C. Cir. 1994) (per curiam) ("[W]hether or not the circumstances of a case implicate the rationales for the *Feres* doctrine, the doctrine bars any damage suit against the United States for injuries incurred incident to military service.").

613. *See* United States v. Johnson, 481 U.S. 681, 690–92 (1987) (rejecting a test for liability that would require analyzing *Feres* rationales); United States v. Shearer, 473 U.S. 52, 58–59 (1985); Stencel Aero Eng'g Corp. v. United States, 431 U.S. 666, 672–73 (1977).

614. *See, e.g.*, United States v. Dalm, 494 U.S. 596, 610 (1990); United States v. U.S. Fid. & Guar. Co., 309 U.S. 506, 514 (1940).

615. *See, e.g.*, *Johnson*, 481 U.S. at 686; Feres v. United States, 340 U.S. 135, 138, 146 (1950).