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Intramilitary Tort Immunity: A Comparison of the United States and Great Britain

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Member of the Class of 1991

I. INTRODUCTION

The United States and Great Britain both adhere to the doctrine of sovereign immunity, under which the state can be sued only when it consents to the suit.¹ This doctrine developed in Great Britain from the medieval belief that the king could do no wrong, and has been followed in the United States since the formation of the Union.²

In 1946 and 1947, respectively, the United States and Great Britain passed tort claims acts, both of which partially waived the national government's sovereign immunity by allowing individuals to sue the government in tort.³

Great Britain's tort claims act, the Crown Proceedings Act of 1947, (the 1947 Act) contained a military exception.⁴ That exception, embodied in section 10 of the 1947 Act, prohibited military personnel from suing the Crown or fellow servicemembers for torts committed while on


duty or on Crown land. The U.S. tort claims act, the Federal Tort Claims Act (the FTCA), contains no military exception. The Supreme Court created such an exception when it decided Feres v. United States in 1950. This exception, which has come to be known as the "Feres doctrine," bars military personnel from suing under the FTCA "where the injuries arise out of or are [sustained] in the course of activity incident to service."

Recently, Great Britain enacted the Crown Proceedings (Armed Forces) Act of 1987 (the 1987 Act), which repealed section 10 of the 1947 Act. Now, except in time of war, imminent national danger, or great emergency, military personnel may sue the Crown under the same circumstances as civilians. The United States, on the other hand, continues to deny its military personnel the right to sue the government under the FTCA.

In this Note, I will examine the policies underlying the Feres doctrine. I will then discuss the passage of section 10 of the 1947 Act and the reasons for its repeal. I will examine the equities of intramilitary tort immunity, and discuss legislative efforts to narrow the Feres doctrine. I will conclude with a discussion of the advisability of abrogating the Feres doctrine in light of the British experience.

II. INTRAMILITARY TORT IMMUNITY IN THE UNITED STATES

A. The Development of the Feres Doctrine

Congress defines the terms and conditions for bringing suit against

5. Id.
6. FTCA, supra note 3.
8. Id. at 146.
10. Id.
11. See Note, Supreme Court Extends the Feres Doctrine Bar, supra note 1, at 200-01.
the United States. Until 1946, when Congress passed the FTCA, one could bring a tort action against the United States government only through a private bill. In passing the FTCA, Congress waived federal governmental immunity in tort actions arising out of the acts or omissions of federal employees acting within the scope of their employment. The scope of the government’s liability is limited to situations in which a private person would be liable under the law of the jurisdiction in which the claim arose.

The FTCA contains a number of exceptions. For example, it excludes claims arising out of the combatant activities of the armed forces during time of war, and suits arising in foreign countries. However, no provision of the FTCA prevents military personnel from suing the government for injury or death arising out of noncombatant activities.

The first case in which the Supreme Court applied the FTCA to military personnel was Brooks v. United States. Brooks arose from the injury of one off-duty serviceman and the death of another serviceman in an off-base collision with an army vehicle. In reaching its decision that the claims were cognizable under the FTCA, the Court first referred to the language of the FTCA. The Court noted that in providing jurisdiction to the district courts, Congress did not exclude claims brought under the FTCA by servicemen. Rather, it provided for jurisdiction over “any claim founded on negligence brought against the United States.” Next, the Court suggested that in drafting the FTCA, Congress did not simply overlook the military. The Court reasoned that the FTCA’s combatant activities and foreign country exceptions clearly demonstrated

14. 1 L. JAYSON, supra note 2, § 65.02 (1989). A private bill is a method of obtaining relief from Congress through private legislation. Id. § 52.
17. 28 U.S.C.A. § 2680(f), (k) (West 1965).
18. See FTCA, supra note 3.
21. Id. at 51.
22. Id.
23. Id. (emphasis in original).
24. Id.
that Congress had servicemembers in mind when framing the Act.\textsuperscript{25} The Court further noted that although sixteen of the eighteen tort claims bills introduced in Congress between 1925 and 1935 contained military exceptions, the final version contained no such exception.\textsuperscript{26} This indicated to the Court that the FTCA drafters consciously chose not to create a military exception to the FTCA.\textsuperscript{27} The availability of other statutory disability benefits to servicemembers did not preclude suit for damages under the FTCA. The Court suggested that FTCA awards could be reduced by other compensation received by the servicemembers.\textsuperscript{28}

The Supreme Court's decision in \textit{Brooks} did not address whether the FTCA would apply to military personnel injured incident to service. The Court explicitly stated that its decision applied only to non-service-related injuries.\textsuperscript{29} The application of the FTCA to injuries that are incident to service would be a "wholly different case" for the Court to decide.\textsuperscript{30}

That case came before the Court a year later in \textit{Feres v. United States}.\textsuperscript{31} The Supreme Court decided \textit{Feres} with two companion cases: \textit{Jefferson v. United States} and \textit{United States v. Griggs}.\textsuperscript{32} Each case arose out of the injury or death of an active duty serviceman caused by the alleged negligence of members of the armed forces.\textsuperscript{33}

In \textit{Feres}, a serviceman died in a barracks fire.\textsuperscript{34} His survivors alleged negligence on the part of the United States Army in quartering him in barracks known to be unsafe due to a defective heating plant, and in failing to maintain an adequate fire watch.\textsuperscript{35} \textit{Jefferson} and \textit{Griggs} both arose from alleged military medical malpractice.\textsuperscript{36} Jefferson claimed that an army surgeon had negligently left a towel thirty inches long by eighteen inches wide in his abdomen.\textsuperscript{37} Griggs' executrix alleged that Griggs died because of negligent treatment by army surgeons.\textsuperscript{38}

\begin{itemize}
\item \textsuperscript{25} Id.
\item \textsuperscript{26} Id.
\item \textsuperscript{27} Id. at 51-52.
\item \textsuperscript{28} Id. at 53.
\item \textsuperscript{29} Id. at 52.
\item \textsuperscript{30} Id.
\item \textsuperscript{31} For discussion of the \textit{Feres} decision, see Note, \textit{Feres Doctrine Gets New Life}, supra note 12, at 198-204; Note, \textit{Expansion of the Feres Doctrine}, supra note 12, at 239-44.
\item \textsuperscript{32} \textit{Feres}, 340 U.S. at 135.
\item \textsuperscript{33} Id. at 138.
\item \textsuperscript{34} Id. at 137.
\item \textsuperscript{35} Id.
\item \textsuperscript{36} Id.
\item \textsuperscript{37} Id.
\item \textsuperscript{38} Id.
\end{itemize}
In attempting to apply the FTCA to these cases, the Court in *Feres* found no clear guidance in the language of the FTCA.\(^{39}\) It initially rearticulated a number of the textual and historical arguments for allowing recovery, as set forth in *Brooks*, but ultimately held that the provisions of the FTCA did not encompass the claims before it.\(^{40}\)

The Court in *Feres* gave three reasons for its ruling. First, the Court interpreted section 2674 of the FTCA. Under that section "[t]he United States shall be liable... in the same manner and to the same extent as a private individual under like circumstances."\(^{41}\) The Court maintained that since there was no private circumstance analogous to the relationship between servicemembers and superiors, and since there had never been an American law that allowed recovery for one servicemember's negligent or wrongful acts toward another, there could be no cause of action under the FTCA.\(^{42}\)

Second, the Court discussed section 1346 of the FTCA, which requires that the substantive laws of the state in which the act or omission occurred govern actions arising under the FTCA.\(^{43}\) The Court held that the "distinctively federal" character of the relationship between the government and members of the armed forces should not be governed by the laws of the several states.\(^{44}\) In addition, the Court reasoned that a member of the armed forces should not involuntarily be subjected to the laws of the state in which he happened to be stationed.\(^{45}\)

The third reason the Court gave for its decision was the availability of statutory disability and death benefits for servicemembers.\(^{46}\) The

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39. *Id.* at 138.
40. *Id.* at 146.
41. *Id.* at 141 (quoting 28 U.S.C.A. § 2674 (West 1965 & Supp. 1989)).
42. *Id.* at 141-42.
43. *Id.* at 142.
44. *Id.* at 143. The author interprets the Supreme Court's statements concerning its reluctance to apply divergent state laws to the military, and the distinctively federal character of the military as comprising one rationale underlying the *Feres* decision. At least one other commentator believes that these constitute two separate rationales. See Note, *Feres Doctrine* Gets New Life, *supra* note 12, at 201-02.

First, members of the uniformed services serving on active duty receive free medical care when injured or ill. See, e.g., 10 U.S.C. §§ 3721, 6201, and 8721. They also receive unlimited sick leave with full pay and allowances until well or released from active duty. Survivors of service members are entitled to death gratuity benefits
Court maintained that if Congress had intended to allow servicemembers to recover damages under the FTCA, then it would have made provisions within the Act to take these benefits into account. The Court further reasoned that the statutory compensation schemes were in some ways superior to the remedies available through an FTCA action. For example, the statutory compensation systems did not require servicemembers to litigate the issue of liability. Further, the amount recoverable under these compensation schemes compared favorably to awards under state workers' compensation statutes.

In the years following *Feres*, the Supreme Court undermined the three rationales supporting the decision while maintaining the doctrine itself. The Supreme Court undermined all three *Feres* rationales in *United States v. Brown*. The Court in *Brown* upheld a veteran's award of damages for negligence in the treatment of his injured knee in a Veterans Administration (VA) hospital. The injury occurred while the plaintiff was on active duty in the armed services, but the operation took place after his discharge. Although Brown had been treated in a VA hospital, the Court held that *Feres* did not apply because medical care in a VA hospital was analogous to treatment in a civilian hospital. Interest-

which include six months of base pay (10 U.S.C. §§ 1475-1482), as well as unique, subsidized insurance or insurance-type plans. 10 U.S.C. §§ 1447, et seq.; 38 U.S.C. §§ 765, et seq.

Second, Congress has established a comprehensive disability retirement system for service members permanently injured in the line of duty. See 10 U.S.C. §§ 1201, 1401. Moreover, should a service member leave the service without seeking disability retirement, he may later request it . . .


*Medical Malpractice Suits for Armed Services Personnel: Hearing on S. 2490 and H.R. 1054 Before the Senate Subcomm. on Courts and Administrative Practice of the Comm. on the Judiciary, 100th Cong., 2d Sess. 71-72, 72 n.1 (1988) [hereinafter *Medical Malpractice*] (statement of Brent O. Hatch, Deputy Assistant Attorney General, Civil Division, Dep't of Justice).*
ingly, the Supreme Court did not employ the private sector analogy developed in the Feres trio of cases, despite the fact that two of the three arose out of medical malpractice claims.55 The Court in Brown also undermined the Feres alternative compensation scheme rationale by ruling that Brown could recover under the FTCA even though he was entitled to VA benefits. The Court reasoned that Congress could have made the compensation system an exclusive remedy, but chose not to provide for such exclusivity.56 However, the Court had argued in Feres that because there were alternative compensation schemes, the cases could not be brought under the FTCA.57 Thus, the Court in Brown explicitly undermined two of the rationales for Feres: the lack of private analogy to military operations and the availability of alternative compensation schemes to servicemembers.58 Further, the Court implicitly frustrated the state law rationale: Brown's case would be tried under the applicable state law.59

Nonmilitary cases in which the Supreme Court undermined the Feres rationales include Indian Towing Co. v. United States,60 in which the Court allowed recovery against the Coast Guard for negligently operating a lighthouse, even though the operation of lighthouses is a "uniquely governmental function[,]"61 and United States v. Muniz,62 in which the Court ruled that a federal prisoner could sue under the FTCA for negligent acts by prison officials, even though statutory compensation was available to him.63

With the erosion of the original principles behind Feres, the main rationale for a military exception to the FTCA ultimately became the fear of a breakdown in military discipline if courts allowed military personnel to sue for injuries sustained incident to service. The Court in Feres mentioned this concern only in passing.64 However, in the Brown decision, the Supreme Court elevated the need to maintain military discipline to a major underpinning of the military exception to the FTCA.65 The Court reasoned that it had allowed recovery in Brooks because the

55. See supra text accompanying notes 36-38.
57. See supra text accompanying notes 46-50.
58. Id.
59. See supra text accompanying notes 43-45; see also 28 U.S.C.A. § 1346(b) (West 1976).
61. Id. at 64.
63. Id. at 160.
plaintiff was injured while not on active duty or subject to military discipline. Therefore, it should permit recovery in Brown on the same grounds. The Court in Brown maintained that in Feres it was the "peculiar and special relationship of the soldier to his superiors, [and] the effects of the maintenance of . . . [FTCA] suits on discipline" that led the Court in Feres to exclude the claims before it. Brown's suit, however, did not implicate military discipline.

In recent decisions, the Supreme Court has relied on the military discipline argument to expand the Feres doctrine. In Stencel Aero Engineering Corp. v. United States, the Court held that the Feres doctrine prevented a third party indemnity suit against the United States. Stencel arose from the infliction of permanent injuries to a serviceman when the ejection system of his fighter aircraft malfunctioned. The United States had given Stencel the specifications for the system and supplied certain components used in the manufacture of the aircraft. The serviceman sued the United States and Stencel, alleging that the emergency ejection system had malfunctioned as a result of the individual and joint negligence of the defendants. Stencel cross-claimed against the United States for indemnity, claiming that any malfunction in the ejection system was due to faulty specifications, requirements, and components provided by the United States. In addition, Stencel claimed that since the system had been in the exclusive custody and control of the United States since the time of its manufacture, Stencel's negligence was passive, while the negligence of the United States was active. Therefore, Stencel asked for indemnity for any damages that it would be required to pay to the serviceman.

66. Id.
67. Id.
68. Id.
69. Id.
71. 431 U.S. 666 (1977). For discussion of Stencel, see Whalen, Feres and Stencel Revisited: Liability of the United States for Contribution and Indemnity in Cases Involving Servicemen, 18 FORUM 107 (1982-83). Whalen believed that "the exclusivity of the military compensation system [would] be the ultimate rationale for the Feres doctrine." Id. at 112. Subsequent cases have proved otherwise, and the most important rationale for Feres is the military discipline rationale. See supra text accompanying notes 64-67; see also infra text accompanying notes 83-98, 107-108, 116.
72. Stencel, 431 U.S. at 667.
73. Id.
74. Id. at 668.
75. Id.
76. Id.
77. Id. at 668.
The Supreme Court rejected Stencel's arguments and applied the *Feres* doctrine to bar Stencel's indemnity action against the United States. The Court first held that the relationship between the Government and its suppliers was as federal in character as the relationship between the Government and its soldiers. Second, even though statutory compensation was not available to Stencel, the existence of such compensation influenced its decision. The Court contended that these schemes served a dual purpose: to provide a remedy to servicemembers and to limit the liability of the United States for service-related injuries. To allow recovery by Stencel would thus frustrate the purposes of the compensation schemes.

Most important, the Court held that although Stencel's indemnification action was not being brought by a member of the military, the effect upon military discipline would be as great as if a servicemember had brought suit. The Court noted its distaste for civilian courts "second-guessing military orders" and for members of the armed forces testifying about each other's decisions and actions.

The Court again used the military discipline rationale to expand the *Feres* doctrine in *United States v. Shearer*. In *Shearer*, the Court disallowed recovery even though the victim of the military's alleged negligence was off-base and off-duty at the time the incident occurred. Army Private Vernon Shearer was kidnapped and murdered by another serviceman. His estate alleged that the Army, knowing that the attacker was dangerous, "negligently and carelessly failed to exert a reasonably sufficient control over" him, and "failed to warn other persons that he was at large."

The Court disallowed the claim because it believed that the claim went "directly to the 'management' of the military," and called into question "basic choices about the discipline, supervision, and control of a

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78. Id. at 667-74.
79. Id. at 672.
80. Id. at 673.
81. Id.
82. Id.
83. Id.
84. Id.
86. Id. at 53, 59.
87. Id. at 53.
88. Id. at 54. First, the Supreme Court noted that the claim was barred under the assault and battery exception to the FTCA, 28 U.S.C. § 2680(h), since, although the claim was for negligence, the incident arose out of an act of assault and battery. Id.
serviceman.” This result was surprising since the Court in Brooks allowed recovery by servicemembers who were off-base and off-duty. The Court ruled that it was irrelevant that the serviceman was off-base and off-duty when the attack occurred because the claim would require a civilian court to “second-guess military decisions,” thus “impair[ing] essential military discipline.”

The Court further expanded the Feres doctrine in United States v. Johnson to bar an FTCA action by a servicemember against civilian employees of the federal government. Lieutenant Commander Horton Winfield Johnson, a United States Coast Guard helicopter pilot, died in a crash after requesting radar assistance from the Federal Aviation Administration (FAA), a civilian organization. His widow sued the government under the FTCA, alleging that the FAA flight controllers negligently caused her husband’s death. Because the widow’s suit arose from injuries sustained during a Coast Guard rescue mission, the Court found that it potentially would implicate military discipline, and, therefore, fell “within the heart of the Feres doctrine.” In denying relief, the Court reasoned that military discipline was involved even though the alleged tortfeasors were civilians: “[A] suit based upon service-related activity necessarily implicates the military judgments and decisions that are inextricably intertwined with the conduct of the military mission.” The Court argued that “military discipline involves not only obedience to orders, but more generally duty and loyalty to one’s service and to one’s

89. Id. at 58.
90. See supra text accompanying note 20. One can distinguish Shearer from Brooks because in Shearer, the army’s negligence in allowing Shearer’s killer to remain in the military was at issue, whereas in Brooks, the liability of the individual negligent servicemembers was in question.
91. Shearer, 473 U.S. at 57.
92. 481 U.S. 681 (1987). For criticism of Johnson, see Note, Expansion of the Feres Doctrine, supra note 12, at 260 (arguing that the Supreme Court “created the [Feres] doctrine and then manipulated it to the point that it virtually can be molded to fit any result that the Court desires.”); Note, The Feres Doctrine, supra note 12, at 579 (arguing that the Court relied wrongly on the military discipline rationale to decide this case, because this rationale is based on “‘the peculiar and special relationships [sic] of the soldier to his superiors,’ and this relationship is not implicated when the suit is against civilian federal employees”) (footnote omitted); Note, Feres Doctrine Gets New Life, supra note 12, at 216-223 (arguing that the suit filed on Johnson’s behalf did not affect military discipline or decisions); Note, Supreme Court Extends the Feres Doctrine Bar, supra note 1 (criticizing the extension of the Feres doctrine in Johnson to bar recovery under the FTCA when military personnel are injured by civilian government employees).
93. Johnson, 481 U.S. at 682.
94. Id. at 682-83.
95. Id. at 691-92.
96. Id. at 690-91.
country."\(^9\) Even if a suit is not brought against the military itself, it "could undermine the commitment essential to effective service and thus have the potential to disrupt military discipline in the broadest sense of the word."\(^9\)

In *Chappell v. Wallace*,\(^9\) the Court extended the *Feres* doctrine beyond the FTCA context to disallow *Bivens* claims\(^10\) against superior officers.\(^10\) The plaintiff servicemen in *Chappell*, five enlisted Navy men, alleged that "because of their minority race, petitioners [their superior officers] failed to assign them desirable duties, threatened them, gave them low performance evaluations, and imposed penalties of unusual severity."\(^10\) The servicemen claimed that the officers deprived them of their constitutional right not to be discriminated against because of race or color,\(^10\) and alleged that the officers violated 42 U.S.C. section 1985 by conspiring to deprive them of their constitutional rights.\(^10\) Although constitutional violations are not actionable under the FTCA, the Court applied the *Feres* doctrine to preclude the suit.\(^10\)

The Court in *Chappell* reasoned that Congress had enacted statutes regulating military life and had established a comprehensive internal military system of justice by taking into account the special patterns that define the military structure.\(^10\) In addition, the Court stressed the need for discipline within the armed services, stating that "no military organization can function without strict discipline and regulation that would be unacceptable in a civilian setting."\(^10\) The Court reasoned that because of the "special relationships that define military life," and the intrusion on that relationship that a civilian trial would create, the military should handle the servicemen's alleged violations of constitutional rights.\(^10\)

The Court also relied on *Feres* in *United States v. Stanley* to prohibit

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97. *Id.* at 691.
98. *Id.*
102. *Id.* at 297.
103. *Id.*
104. *Id.*
105. *Id.* at 299-305.
106. *Id.* at 302.
107. *Id.* at 300.
108. *Id.* at 305.
In 1958, James B. Stanley, a master sergeant in the army, had volunteered to participate in a scientific study conducted at the Army's Chemical Warfare Laboratories at the Aberdeen Proving Grounds in Maryland. As part of the study, he was secretly administered LSD pursuant to an Army plan to study the effects of the drug on human subjects. Stanley suffered from hallucinations and violent outbursts as a result of ingesting the LSD, but did not learn that he had been administered the hallucinogen until 1975 when he received a letter from the Army "soliciting his cooperation in a study of the long-term effects of LSD on 'volunteers who participated' in the 1958 tests."

In reaching its decision, the Court in Stanley first maintained that the activity giving rise to the suit was "incident to service," even though civilians conducted the tests, thus bringing the case within the Feres doctrine. Then, despite a vigorous dissenting opinion by Justice Brennan that the defendants violated the Nuremburg principles with regard to human experimentation by administering LSD to servicemembers without their consent, the majority barred the suit. The Court in Stanley argued that if a civilian court were to decide Stanley's case, it would intrude on military affairs and call into question the chain of military command and military discipline.

These decisions demonstrate that the Supreme Court has steadfastly adhered to the Feres doctrine and has expanded it into areas outside of the FTCA, principally by relying on the military discipline argument developed in Brown. The Court in Feres acted in the absence of clear con-
gressional guidance for deciding military claims under the FTCA. Since the Feres decision, Congress has failed to give the Supreme Court such guidance. Except in the area of medical malpractice, where there have been efforts to eliminate the doctrine, there has been no recent opposition in Congress.

III. INTRAMILITARY TORT IMMUNITY
IN GREAT BRITAIN

A. Section 10 of the Crown Proceedings Act of 1947

The Crown Proceedings Act of 1947 (the 1947 Act) waived sovereign immunity and exposed the British Crown "to all those liabilities in tort to which, if it were a private person . . . it would be subject." Section 10 of the 1947 Act, however, explicitly barred military personnel from bringing suit against the Crown for personal injury or death where the injured servicemember was entitled to receive a military pension or compensation for the injury. This exception applied to servicemembers who were on duty or on any Crown premises used by the armed forces when their injuries occurred.

Three principles underlay Great Britain's military exclusion. First, as was true in the United States when the Supreme Court decided Feres, alternative compensation schemes were available to British military personnel and many members of Parliament believed they were comparable if not superior to those awarded by civilian courts. Great Britain's Attorney General, Sir Hartley Shawcross, assumed that in most cases pensions would "be as valuable to the soldier . . . as any lump sum for damages which he might recover." While in the service, British servicemembers received free medical treatment. When servicemembers became disabled and left the service, or if they died, they or their depen-

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117. See supra text accompanying note 39.
118. See infra text accompanying notes 209-14.
123. 439 PARL. DEB., H.C., supra note 121, at 2634.
124. Id. at 1683.
dents were entitled to pension rights.\textsuperscript{125} Since only servicemembers entitled to military pensions would be excluded from suing under the proposed Act,\textsuperscript{126} no one would be left uncompensated for service-related injuries.\textsuperscript{127}

The second principle that Parliament relied on for the exclusion was also given in the \textit{Feres} decision: the lack of an analogy between the military and a private citizen.\textsuperscript{128} Shawcross argued that since in military matters "the functions of the Crown . . . involve duties and responsibilities which no subject is required to undertake," the distinctions between the Crown and civilians had to be taken into account in framing any tort claims act.\textsuperscript{129} Shawcross further argued that it would be "impossible to apply the ordinary law of tort" to military training exercises held under battle conditions,\textsuperscript{130} since these conditions were "highly dangerous and, if done by private citizens, would . . . be extremely blameworthy."\textsuperscript{131}

The third principle behind the exclusion was similar to another \textit{Feres} rationale: a fear of a dangerous effect that allowing members of the armed forces to sue under a tort claims act would have on military discipline.\textsuperscript{132} Section 10 supporters believed that military personnel should not be threatened with liability for mistakes made in the line of duty that result in the injury or death of other soldiers.\textsuperscript{133}

Despite these principles supporting a military exclusion to the 1947 Act, not every Member of Parliament favored section 10.\textsuperscript{134} Parliamentary debates surrounding the proposed 1947 Act reflect dissatisfaction with a military exclusion on the part of many Members of Parliament. Mr. M. Turner-Samuels, Member of Parliament from Gloucester, believed that a military exclusion would result in inequality for servicemembers as compared to civilians,\textsuperscript{135} since "whatever an officer may do, whatever the degree of his negligence may be and however unfortunate an injury results to the soldier or Serviceman," that servicemember would have no claim.\textsuperscript{136} Mr. C.H. Gage of Belfast, South, argued that intramilitary tort immunity was justified only in training situations pecu-

\textsuperscript{125} \textit{Id.}
\textsuperscript{126} \textit{Id.} at 2633-34.
\textsuperscript{127} \textit{See id.} at 2634.
\textsuperscript{128} \textit{Id.} at 1679.
\textsuperscript{129} \textit{Id.}
\textsuperscript{130} \textit{Id.} at 1682.
\textsuperscript{131} \textit{Id.}
\textsuperscript{132} \textit{Id.} at 1682.
\textsuperscript{133} \textit{Id.}
\textsuperscript{134} \textit{See id.} at 1690.
\textsuperscript{135} \textit{Id.} at 1701.
\textsuperscript{136} \textit{Id.}
liar to the military. 137 Where injuries arose from non-training situations, conditions were much the same as in civilian life, Gage argued, and thus, there would be no reason to prevent Parliament from extending the rights of a tort claims act to servicemembers. 138

Critics of section 10 also noted that, although the purported purpose of the proposed act was to enhance individual rights, 139 section 10 would not only exclude servicemembers from the benefits of the act, it would actually deprive them of a right that they had prior to its passage. 140 British servicemembers traditionally could sue other individual servicemembers in tort. 141 A military exception would rescind this right. 142

Parliament may not have passed the Crown Proceedings Bill, however, had it not contained the military exception. 143 The armed services strongly opposed allowing servicemembers to enjoy the provisions of a tort claims act. 144 Viscount Jowitt, the Lord Chancellor at the time that Parliament considered the 1947 Act, declared that he had been "compelled by the Service Departments" to insert section 10. 145 Later, he remarked that he was forced either to include the exception or withdraw the entire bill. 146 Ultimately, Parliament passed the bill containing the exception.

B. The Repeal of Section 10 147

In the early 1980s British organizations of veterans and their families and survivors began to advocate the repeal of section 10. 148 These organizations included the Section Ten Abolition Group (STAG), 149 the British Nuclear Test Veterans Association, 150 and the British Atomic Veterans Association. 151 In 1983 an interdepartmental group of officials from the Ministry of Defence and other concerned Government depart-

137. Id. at 1714.
138. See id.
139. 1 CURRENT LAW CONSOLIDATION § 7640 (J. Burke & C. Walsh eds. 1952).
140. See 439 PARL. DEB., H.C., supra note 121, at 1722-23.
141. Id. at 1723.
142. Id.
143. Dickinson, supra note 121, at 1025.
144. Id.
145. Id. at 1025 (quoting 439 PARL. DEB., H.C., supra note 121, at 1741 (1947)).
147. For other commentary on the repeal of section 10, see Dickinson, An Injustice Finally Remedied?, 137 NEW L.J. 435 (1987); Boyd, supra note 122.
149. 94 PARL. DEB., H.C. (6th ser.) 849 (1986).
151. 110 PARL. DEB., H.C., supra note 146, at 576.
ments was established to review the operation and effects of section 10.¹⁵²

The Right Honorable Jack Ashley of Stoke-on-Trent was the main force in Parliament behind the repeal.¹⁵³ Ashley argued that section 10 resulted in the “deprivation of basic human rights,” robbing servicemembers of a privilege granted to civilians under the Crown Proceedings Act.¹⁵⁴ Ashley further argued that the armed services would exercise greater care in training servicemembers if Parliament repealed section 10, since the courts would hold the services more accountable for the actions of their officers and soldiers.¹⁵⁵ In addition, Ashley argued that the pensions given to military personnel were inadequate and that Parliament should allow servicemembers to recover awards of the size given in civil suits.¹⁵⁶

Early in the repeal debates, the Right Honorable John Stanley, the Minister of State for Defence, raised a number of objections to the repeal of section 10, each of which Ashley countered. Stanley argued that a repeal would endanger military discipline.¹⁵⁷ Ashley summarily replied that military “discipline is irrelevant to legal redress.”¹⁵⁸ The Minister argued that allowing servicemembers’ claims would create anomalies, since those injured in wartime would not be able to recover, whereas those injured in other situations would be entitled to recovery.¹⁵⁹ Ashley countered that the “basic anomaly is that comparable public servants, such as policemen and firemen, can sue for negligence [even though] they receive the same . . . pension as soldiers, sailors and airmen.”¹⁶⁰ Stanley argued that attempting to define the dividing line between military action and other activities would create uncertainty as to which activities would be subject to suit.¹⁶¹ Ashley replied that any servicemember knows the difference between military actions and nonmilitary actions.¹⁶² The Minister further argued that members of the armed forces may not be able to

¹⁵⁴. Id. at 237.
¹⁵⁵. Id.
¹⁵⁶. Id. at 236-37.
¹⁵⁷. Id. at 237.
¹⁵⁸. Id.
¹⁵⁹. Id.; see also 93 PARL. DEB., H.C. (6th Ser.) 173 (1986) (John Lee, the Parliamentary Under Secretary of State for Defence Procurement, stated that “attempts over the years to distinguish between activities with a military character and those which are essentially civil in nature have always foundered because of the discrimination it would create between different categories of service men and because it would create more anomalies than it would remove”).
¹⁶⁰. 76 PARL. DEB., H.C., supra note 153, at 237.
¹⁶¹. Id.
¹⁶². Id.
prove negligence,\textsuperscript{163} to which Ashley responded that the decision ought to be left to the courts.\textsuperscript{164}

Eventually Stanley notified Parliament that the Government would agree to the repeal of section 10 if the repeal bill contained provisions that would reactivate section 10 in case of war or national emergency.\textsuperscript{165} Parliament included reactivation provisions and the Crown Proceedings (Armed Forces) Bill of 1987 passed without amendment.\textsuperscript{166}

Section 1 of the 1987 Act provides for the repeal of section 10 of the Crown Proceedings Act of 1947 except in relation to injuries suffered due to an act or omission committed before the date on which the 1987 Act was passed.\textsuperscript{167} Section 2 of the 1987 Act provides that the Secretary of State may reactivate section 10 in cases of imminent national danger or great emergency.\textsuperscript{168} The 1987 Act does not contain offset provisions, but the Secretary of State may reduce a pension entitlement by the amount of an award of damages pursuant to the 1987 Act.\textsuperscript{169}

There are a number of explanations for the passage of the repeal. Perhaps most importantly, between 1947 and the mid-1980s, Parliament changed its beliefs concerning the servicemembers' right to sue the government.\textsuperscript{170} In 1987 Winston Churchill, a Member of Parliament from Davyhulme, remarked that "[t]he general climate of public opinion in civil and human rights has changed considerably since [the 1947 Act] was enacted."\textsuperscript{171} By the 1980s Parliament was less willing to accept the idea that the special circumstances of military life justify depriving servicemembers of the rights enjoyed by their fellow citizens.\textsuperscript{172} The similarities between military and civilian life were particularly evident in peacetime, and in circumstances similar to those experienced by other disciplined forces that were engaged in hazardous duties, such as the police and the fire forces.\textsuperscript{173} Indeed, John Powley, the Member of Parlia-

\begin{footnotes}
\item[163.] Id.
\item[164.] Id.
\item[165.] Dickinson, supra note 147, at 435.
\item[166.] 114 PARL. DEB., H.C. (6th ser.) 925 (1987).
\item[167.] Crown Proceedings (Armed Forces) Act, supra note 9, § 1.
\item[168.] Id. § 2(2).
\item[169.] Boyd, supra note 122, at 247 (citing Article 55, Naval, Military and Air Force, etc., (Disablement and Death) Service Pensions Order 1983, S.I. 1983 No. 883). Boyd suggests that "more could have been done to ensure that damages and war pension awards are in fact offset, since the possibility of overlap detracts from the efficacy of the pension scheme by enhancing the potential additional benefits available at common law." Id.
\item[170.] See 110 PARL. DEB., H.C., supra note 146, at 568.
\item[171.] Id.
\item[172.] Id.
\item[173.] Id.
\end{footnotes}
ment from Norwich, South, remarked that the operations that he had observed on an army base were much like those in any civilian workplace. Because of this similarity, Powley found little reason to deny servicemembers the rights conferred by the 1947 Act. A belief in the inadequacy of compensation available to servicemembers also contributed to the repeal. In 1947 many Members of Parliament believed that the military compensation schemes would be comparable to those recoverable by civilians suing under the 1947 Act. However, by the 1980s civilian court negligence awards outstripped, sometimes by a factor of ten or more, compensation available to servicemembers. This was partially because the military failed to compensate for certain types of damages for which civilian courts compensated, such as loss of future earnings.

An additional problem that Parliament felt compelled to remedy was the inability of injured servicemembers or their survivors to examine the records regarding the injury or death of a servicemember. In moving for a second reading of the proposed Crown Proceedings (Armed Forces) Bill of 1987, Churchill drew attention to the pain servicemembers and their families suffer as a result of not being informed of the circumstances surrounding injury or death. Moreover, Churchill expressed a suspicion that military officials were engaging in coverups, using section 10 to prevent disclosure. Churchill hoped that the adversarial system, with its discovery and testimonial processes, would help cure these defects.

To allay the fears of those who believed that the repeal would lead to the breakdown of military discipline, proponents of the repeal set forth two arguments. First, they noted that the Defence Ministry would pay

174. Id. at 592.
175. Id.
176. 107 Parl. Deb., H.C., supra note 150, at 85.
177. Id.
178. Id.; 110 Parl. Deb., H.C., supra note 146, at 568-69. Churchill stated:
   It is evident that it was not the intention of the Labour Government or of Parliament to place the service man at a disadvantage compared with his civilian counterpart, but rather to provide what might today be called a 'no fault' system of compensation that effectively cut out the lawyers and the courts, and with them much expense and delay. Regrettably, that is not how things have worked out.
Id. at 569.
179. 110 Parl. Deb., H.C., supra note 146, at 569-70.
180. Id. at 570.
181. Id.
182. Id.
183. Id.
the damages if a court found that a servicemember was negligent.\textsuperscript{184} Thus, a court could not compel, an officer to pay damages for injuries caused by negligent orders.\textsuperscript{185} Second, and more importantly, proponents of the repeal noted that the repeal would apply only in peacetime. Section 10 can be reactivated in the event of hostility or grave national emergency.\textsuperscript{186} Thus, there would be no fear of a breakdown of military discipline during combat caused by the repeal.\textsuperscript{187}

In addition, the Ministry of Defence would continue to provide alternate compensation for injured servicemembers who wish to avoid litigation.\textsuperscript{188} The debates reflected the hope that most servicemembers would use these compensation schemes, thus minimizing the Crown's litigation costs.\textsuperscript{189}

The repeal of section 10, embodied in the Crown Proceedings (Armed Forces) Bill of 1987, which became the Crown Proceedings (Armed Forces) Act of 1987, passed easily through Parliament.\textsuperscript{190} Aside from the initial objections from the Ministry of Defence, the parliamentary debates showed no general opposition to the repeal.\textsuperscript{191} However, Parliament vehemently debated one issue: whether the repeal should be made retroactive to cover injuries incurred prior to the effective date of the repeal.\textsuperscript{192}

The 1987 Act made section 10's repeal prospective only.\textsuperscript{193} Without retroactivity, servicemembers and veterans who sustained their injuries prior to the effective date of the 1987 Act do not benefit from the repeal.\textsuperscript{194} This includes members of the organizations that worked to eliminate section 10.

\begin{itemize}
  \item \textsuperscript{184} 107 PARL. DEB., H.C., \textit{supra} note 150, at 86.
  \item \textsuperscript{185} \textit{Id.} at 85-86.
  \item \textsuperscript{186} \textit{Id.} at 86; \textit{see supra} text accompanying note 168. Ms. Fiona Boyd noted, however, the uncertainty of when the reactivation provision would be used. Boyd remarked: "\textit{W}hilst the provision does not expressly exclude the possibility of judicial review, the sensitivity of the issue in question would probably make the courts unwilling to intervene; in any case, the vagueness of the wording involved leaves a great deal of discretion to the Secretary of State." Boyd, \textit{supra} note 122, at 248.
  \item \textsuperscript{187} 107 PARL. DEB., H.C., \textit{supra} note 150, at 86.
  \item \textsuperscript{188} 110 PARL. DEB., H.C., \textit{supra} note 146, at 573.
  \item \textsuperscript{189} \textit{See id.} at 573-74.
  \item \textsuperscript{190} \textit{See generally id.} at 567-609.
  \item \textsuperscript{191} \textit{See generally} 110 PARL. DEB., H.C., \textit{supra} note 146, at 573.
  \item \textsuperscript{192} \textit{See, e.g., id.} at 576-78.
  \item \textsuperscript{193} Crown Proceedings (Armed Forces) Act, \textit{supra} note 9.
  \item \textsuperscript{194} 110 PARL. DEB., H.C., \textit{supra} note 146, at 576.
\end{itemize}
John Cartwright of Woolwich, accused the Government of opposing retroactivity solely to avoid litigating the so-called "atomic veterans" issue. A government report stated that the armed forces had used soldiers as guinea pigs to discover the effects of nuclear explosions on humans without protection. Cartwright's claim was bolstered by the fact that, despite a finding by the National Radiological Protection Board for the United Kingdom that servicemembers had sustained injuries in the nuclear weapons tests, the Minister of State for Defence Procurement claimed that no one had been harmed as a result of the atomic tests.

Cartwright further argued that retroactive legislation should be introduced when it is in the national interest. Ashley noted that making the repeal retroactive would not make negligent servicemembers retroactively liable, since the Minister of Defence would pay costs and damages awarded under the 1947 Act.

Despite these arguments, Parliament did not make the repeal retroactive. Those who remain without a remedy under the 1987 Act include approximately 20,000 veterans who took part in atomic tests in Australia and the South Pacific in the 1950s and 1960s. To provide a remedy for atomic veteran cases that arose prior to the repeal of section 10, a number of Members of Parliament suggested the establishment of an alternative compensation fund for cases arising out of atomic weapons testing. This fund has yet to be developed, mainly because the Ministry of Defence asserts that there is no causal connection between the atomic weapons tests and the diseases from which former ser-

195. Id. at 576, 582. Those opposed to making the repeal retroactive claimed that they did so on the principle that retroactive liability should never be imposed. They argued that retroactivity has been resisted "as a basic concept" by successive British Governments. Id. at 572. They argued that where there had been retroactive laws, they endowed a retroactive benefit, rather than imposed a retroactive liability, and that making the repeal retroactive would be unfair to the defendant-servicemember. Even though the Crown would stand behind the servicemember, he or she would be embroiled in litigation, perhaps decades after the incident which gave rise to the action occurred. Id.

196. Id. at 577.

197. Id.

198. Id. at 581. Mr. McNamara of Kingston on Hull, North found precedential retroactive legislation, for example, in the Pneumoconiosis Acts of 1979 and 1985, which provided for retroactive relief on a case-by-case basis. Id. at 588.

199. 114 PARL. DEB., H.C., supra note 166, at 939. But see, Boyd, supra note 122, at 246 (noting that although the allegedly negligent servicemember would not be financially liable for any tort the servicemember may have committed, there would be "an element of personal culpability." Boyd further noted that "in the case of personnel still serving, a finding of negligence could jeopardise promotion prospects and raise the possibility of disciplinary action.")


201. 114 PARL. DEB., H.C., supra note 166, at 927.

202. See, e.g., id. at 926-27.
vicemembers who participated in the atomic weapons tests suffer.\textsuperscript{203}

IV. PROPOSAL: THE UNITED STATES SHOULD AMEND THE FEDERAL TORT CLAIMS ACT TO ALLOW SERVICEMEMBERS TO SUE FOR INJURIES THAT ARE INCIDENT TO SERVICE

In the United States, a servicemember who, because of improper treatment of an infection by military physicians, lost the frontal portion of his skull, has no judicial remedy.\textsuperscript{204} During an operation, a physician left sponges in a servicewoman’s body, rendering her sterile.\textsuperscript{205} She has no judicial recourse.\textsuperscript{206} The courts denied a remedy to the widow of an astronaut killed in the space shuttle Challenger explosion.\textsuperscript{207} Despite the negligent design of the shuttle, the Eleventh Circuit Court of Appeals did not permit the widow to maintain a wrongful death action.\textsuperscript{208}

Despite overwhelming criticism of the \textit{Feres} doctrine,\textsuperscript{209} the United States has not amended the Federal Tort Claims Act to allow servicemembers to sue for injuries that are incident to service.
States Congress has not eliminated the military exception to its tort claims act. Recently, however, there have been unsuccessful congressional efforts to eliminate the Feres doctrine in military medical malpractice cases. The most recent proposals to allow military medical

military medical malpractice, and suggesting a resolution that would eliminate Feres altogether); Note, The Feres Doctrine, supra note 12, at 576-83 (not arguing for the abrogation of the Feres doctrine, but instead criticizing United States v. Johnson and United States v. Stanley on the grounds that they are inconsistent with earlier cases that applied the Feres doctrine); Note, They Fight to Protect Our Rights, supra note 114, at 160-62 (criticizing United States v. Stanley as allowing human experimentation in violation of the Nuremberg principles). Cf. Note, Method to This Madness: Acknowledging the Legitimate Rationale Behind the Feres Doctrine, 68 B.U.L. Rev. 981, 1017-1018 (1988) [hereinafter Note, Method to This Madness] (suggesting limiting Feres to a “military necessity” rationale, under which civilian courts would have their jurisdiction over cases involving the military, limited only when the claim would require “a civilian court to interfere with either the legitimate exercise of professional military judgment or the disciplinary structure of the military.”); Comment, Service Member Recovery for Military Medical Malpractice Under the Federal Tort Claims Act: A Judicial Response, 19 St. Mary’s L.J. 203, 217-29 (1987) (suggesting that in cases involving military medical malpractice, courts should distinguish between military decisions, such as mandatory physical examinations and vaccinations, which, according to the author, if included in the FTCA would require civilian courts to “tamper[] with the decision-making process of the military” and medical decisions that arise from situations where military personnel “voluntarily report for personal treatment of ailments apart from mass medical procedures required by orders, regulations, or as part of the military’s preventive medicine program.” The former should, according to the author, fall within the parameters of Feres, and the latter without).

210. Past proposed bills to eliminate the Feres doctrine include H.R. 2659, 96th Cong., 1st Sess. § 4 (1979) and S. 695, 96th Cong., 1st Sess. (1979). These amendments would have allowed suits against the United States “not only for the common law torts committed by federal employees ‘within the scope of their employment’ but also for the constitutional wrongs committed either ‘within the scope of’ or ‘under color of office.’” Note, Intramilitary Tort Immunity, supra note 1, at 627 n.31 (quoting Comment, Constitutional Tort Remedies: A Proposed Amendment to The Federal Tort Claims Act, 12 Conn. L. Rev. 492, 531 (1980)).

Senator Jim Sasser of Tennessee, one of the strongest supporters of eliminating the Feres doctrine in the area of medical malpractice, is opposed to eliminating the doctrine in its entirety. See infra text accompanying notes 278-82.


The Department of Defense has suggested that, rather than amending the FTCA to eliminate the Feres doctrine, Congress should instead amend the Military Claims Act (MCA), 10 U.S.C. § 2733 (1988), to allow active-duty military personnel to file claims for military medical malpractice. Medical Malpractice, supra note 46, at 51 (responses of Kathleen Buck to Written Questions Submitted by Senator Heflin). The MCA is an “administrative remedy for the payment of claims for property damage, personal injury, or death caused by either civilian or military personnel of the Armed Forces acting within the scope of their employment.” Id. at 26.

According to Ms. Kathleen Buck, General Counsel of the Department of Defense, the advantages of an amended MCA to the elimination of the Feres doctrine are: (1) that the MCA would provide recovery for military personnel no matter where the injury occurred, whereas the FTCA does not cover personnel stationed overseas; (2) that under the MCA,
malpractice suits under the FTCA were introduced in the House and the Senate in 1989. The House has passed its resolution and sent it to the Senate Judiciary Committee, where it has been since July 11, 1989. The House bill would amend the FTCA explicitly to allow claims for personal injury or death of members of the armed forces serving on active duty or on full-time National Guard duty. The injury or death must be the result of negligent medical or dental care furnished in a non-combatant situation by a member of the Armed Forces in a medical facility operated by the United States. The resolution would reduce any FTCA award by the amount of other Government benefits awarded to the servicemember, such as those provided by the Veterans Administration.

Congress should enact legislation with provisions similar to this recent bill to eliminate Feres as it applies to all suits arising from non-combatant activities. The Supreme Court in Feres refused to provide a judicial remedy to the plaintiffs unless explicitly authorized by Congress. Congress should, therefore, unambiguously confer on servicemembers the rights granted by the FTCA. Congress should eliminate Feres both because its rationale is flawed, and because, as Parliament has correctly concluded, it is fundamentally unfair and discriminatory to exclude members of the armed forces from the rights and protections afforded the rest of the population under a nation’s tort claims act.

There are numerous reasons supporting the elimination of the Feres doctrine. Nothing in the language of the FTCA itself indicates that civilian courts do not second-guess military decisions, and the MCA would not “disrupt military operations by making servicemembers subject to the orders, dockets, and schedules of civilian judges and lawyers;” (3) that the MCA is an efficient administrative system; (4) that the FTCA permits lawyers to take fees of 20% of an award if the claim is settled administratively and 25% if a case goes to court, whereas the amended MCA would limit attorneys' fees to 10%; (5) that “[t]he MCA provides an unbiased review of claims”; and (6) that for over 30 years the MCA has provided recovery for claimants overseas who are not barred by Feres to recover for malpractice, and that it has a “proven record for handling malpractice claims.”

215. Id.
216. Id. at 6.
217. Id. at 2-3.
218. See supra text accompanying notes 171-75.
gess intended to create a military exception. Moreover, the three policies underlying the Feres decision—the uniquely governmental nature of the military, the undesirability of the armed services being governed by the various state laws, and the availability of alternative compensation schemes—are without merit. The Supreme Court demonstrated the illegitimacy of these rationales in its decisions in United States v. Brown, United States v. Muniz, and Indian Towing Co. v. United States. There is nothing uniquely governmental about many military activities. As noted in the parliamentary debates surrounding the 1987 Act, many military functions have private sector analogies.

The Supreme Court itself acknowledged this in United States v. Brown, when it made the analogy between private and military hospitals. In his testimony before the Subcommittee on Administrative Practice and Procedure of the Senate Committee on the Judiciary, Mr. Mark A. Dumbroff, a former attorney with the Civil Division of the United States Department of Justice specializing in tort litigation, remarked that he had a "hard time categorizing medical malpractice as military or nonmilitary." He continued: "Negligence is negligence and the federal government, in areas where there are not uniquely governmental . . . [activities involved in noncombat situations] should be held to the same standards of accountability as the rest of society." In addition, the Supreme Court held the Coast Guard liable for negligently operating a lighthouse, and allowed prisoners to sue federal prison officials, even though there is no private analogy to the Coast Guard or federal prisons. The governmental nature of military activi-

220. See supra text accompanying notes 41-50.
221. See supra text accompanying notes 173-75.
223. Malpractice, supra note 13, at 89 (statement of Mark A. Dumbroff).
224. Id. at 94.
227. See P. HOGG, LIABILITY OF THE CROWN IN AUSTRALIA, NEW ZEALAND AND THE UNITED KINGDOM 79 (1971); Note, Supreme Court Extends the Feres Doctrine Bar, supra note 1, at 210 (discussing Muniz: "Incredibly, the Court thus affords convicted federal criminals a right to tort recovery that it denies to men who devote their lives to the defense of this country"). See also Note, Feres Doctrine Gets New Life, supra note 12, at 220 (arguing that strict application of the distinctively federal relationship rationale, as well as the alternative compensation rationale, to Feres "automatically bars every servicemember's claim . . . [and that] . . . [s]uch an approach conflicts with prior Court decisions") (citing Shearer, 473
ties should be irrelevant in FTCA actions. As Professor Peter W. Hogg has suggested, the FTCA should be interpreted as requiring the court "to disregard the status of the parties and examine the remaining circumstances to see if they are analogous to those which would give rise to private tort liability." Courts should examine the actual activities engaged in by the alleged tortfeasor and the victim.

The second Feres rationale—the undesirability of applying state law to the military—is unfounded for two reasons. First, the United States military is often subject to the laws of the several states. When a dependent or spouse of a servicemember sues the military for medical malpractice, the court deciding the case applies the law of the state in which the action is brought. Second, the Court in Feres maintained that the courts should not subject the individual servicemember to the tort laws of a state in which he happens to be stationed, but in United States v. Muniz, the Supreme Court allowed federal prisoners to sue the United States under the FTCA, even though they could not choose which state's law would govern the action. The Muniz Court concluded that com-

U.S. at 57; Brown, 348 U.S. at 112; Brooks, 337 U.S. at 52-53); Note, They Fight To Protect Our Rights, supra note 114, at 153 n.180 (claiming that the "parallel personal liability provision is no longer utilized") (citing Stencel, 431 U.S. at 671-72 (stating that the "Court only elaborated on three underlying rationales"); Rayonier, Inc. v. United States, 352 U.S. 315, 319 (1957); Indian Towing Co., 350 U.S. at 64-65).

228. P. Hogg, supra note 227, at 79.

[In the usual civilian doctor and patient relationship, there is of course a liability for malpractice. And a landlord would undoubtedly be held liable if an injury occurred to a tenant as the result of a negligently maintained heating plant. But the liability assumed by the Government here is that created 'by all the circumstances,' not that which a few of the circumstances might create.

Id. (quoting Feres, 340 U.S. at 142). Seidelson argues that this statement is "demonstrably overbroad." Id. He maintains that:

[No one would contend that a motorist injured when his vehicle is struck by a negligently operated mail delivery truck could not recover under the FTCA. The Act's applicability is apparent and remains so even if the truck were carrying first-class mail, an activity prohibited to any private entity. Consequently, the applicability of the FTCA simply cannot be determined by 'all the circumstances' as Feres would require. To do so would be to render the Act inapplicable to virtually every set of circumstances imaginable simply by enlarging the facts to the point where no private entity would be engaging in precisely the same activity as the government employee.

Id. (footnotes omitted).

232. See supra text accompanying notes 44-45.
pletely denying the prisoners recovery under the FTCA would be more harmful to them than subjecting them to the laws of the various states.\textsuperscript{234} In addition, as Professor David L. Seidelson aptly points out, by filing suit under the FTCA, the servicemember has chosen that his suit be subject to the substantive laws of the state in which the injury occurred, rather than have no suit at all.\textsuperscript{235}

The third \textit{Feres} rationale—that alternate compensation schemes are adequate—is also without merit. First, if Congress eliminates the \textit{Feres} doctrine, it could provide for a reduction in FTCA by the amount of compensation received from other sources. This would prevent double recovery by a servicemember of both statutory compensation and an FTCA award.\textsuperscript{236} The Court in \textit{Brooks} provided this very type of reduction.\textsuperscript{237}

Second, these schemes are inadequate, despite arguments such as those of Mr. Brent O. Hatch, Deputy Assistant Attorney General, Civil Division. Hatch argued that the alternative compensation schemes available to servicemembers are adequate.\textsuperscript{238} Hatch noted that members of the U.S. Armed Forces receive free medical care when injured or ill, and are granted unlimited sick leave with full pay and allowances until the servicemember is well or released from active duty.\textsuperscript{239} In addition, as Hatch pointed out, survivors of servicemembers are eligible for death

\textsuperscript{234} Comment, \textit{The Feres Doctrine: Should It Continue to Bar FTCA Actions By Service-men Who Are Injured While Involved In Activities Incident To Their Service?}, supra note 2, at 201.

\textsuperscript{235} Seidelson, \textit{supra} note 229, at 634.

\textsuperscript{236} H.R. 536 would provide:

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

H.R. 536, \textit{supra} note 211, at 2. \textit{See also} Note, \textit{Forgotten Rights of Military Personnel}, \textit{supra} note 12, at 182 (proposing an amendment to the FTCA to eliminate \textit{Feres} that would include similar offset provisions).

\textsuperscript{237} \textit{See supra} text accompanying note 28. As one commentator has noted, "the Supreme Court moved from the position it took in \textit{Brooks} that the Military Compensation System was not the exclusive remedy to the position it took in \textit{Stencel} that it is exclusive." Whalen, \textit{supra} note 71, at 111.

\textsuperscript{238} H.R. REP. No. 87, \textit{supra} note 214, at 12-13.

\textsuperscript{239} \textit{Id.} at 12 (citing 10 U.S.C. §§ 3721, 6201, 8721).
Intramilitary Tort Immunity

Intramilitary Tort Immunity

gratuity benefits, which include six months of base pay as well as subsidized insurance or insurance-type plans.\textsuperscript{240} Permanently disabled servicemembers participate in a comprehensive disability retirement system.\textsuperscript{241} Further, veterans also can take advantage of the Veteran Benefits Act (VBA).\textsuperscript{242} The payments provided by the VBA are, according to supporters of \textit{Feres}, “more precisely compensatory for lost income than are lump-sum awards of tort damages.”\textsuperscript{243} They “rise or fall in response to actual changes in levels of disability and continue throughout . . . [the veteran’s] lifetime[ ] while disability persists.”\textsuperscript{244} In addition, as when the Supreme Court decided \textit{Feres}, statutory schemes still provide greater compensation than state workers’ compensation awards.\textsuperscript{245}

However, the statutory compensation schemes are inadequate.\textsuperscript{246} For example, these schemes do not compensate for pain and suffering or for the loss of future income.\textsuperscript{247} If Congress amended the FTCA explicitly to include claims by members of the military, servicemembers would be able to receive awards comparable to those of civilians. At the same time, the awards would not be extravagant. Suits brought under the FTCA are tried before judges, not juries. This eliminates the threat of huge jury awards.\textsuperscript{248} The threat of large damage awards is further diminished by FTCA prohibition of the imposition of punitive damage awards against the United States.\textsuperscript{249}

The United States also could minimize the threat of large civil trial awards and litigation costs by leaving the alternative compensation schemes in place as an option for those servicemembers who wish to forego filing suit, as Parliament provided in the 1987 Act.\textsuperscript{250} If these schemes are as superior to FTCA actions as \textit{Feres} supporters claim,\textsuperscript{251} then most servicemembers will bypass filing claims under the FTCA and opt for statutory compensation.

\textsuperscript{240} Id. (citing 10 U.S.C. §§ 1475-1482; 10 U.S.C. §§ 1447 et seq.; 38 U.S.C. §§ 765 et seq.).
\textsuperscript{241} Id. (citing 10 U.S.C. §§ 1201, 1401 (1983)).
\textsuperscript{242} Id. at 13.
\textsuperscript{243} Id. at 16.
\textsuperscript{244} Id.
\textsuperscript{245} Id. at 13 (citing Stencel Aero Engineering Corp. v. United States, 431 U.S. 666, 673 (1977)).
\textsuperscript{246} Compensation, supra note 219, at 14 (statement of Rep. Barney Frank).
\textsuperscript{247} Id.; see also Malpractice, supra note 13, at 10 (statement of Sen. Edward M. Kennedy).
\textsuperscript{248} Compensation, supra note 219, at 13 (statement of Rep. Barney Frank).
\textsuperscript{249} Id.; see also 28 U.S.C.A. § 2674 (West 1965 & Supp. 1989) (recovery of pretrial interest denied under FTCA).
\textsuperscript{250} See supra text accompanying notes 188-89.
\textsuperscript{251} See supra text accompanying notes 238-45.
The three rationales articulated in the *Feres* decision are no longer the only policies underlying the *Feres* doctrine. The principle policy for maintaining the *Feres* doctrine is a fear that military discipline will break down if the government allows servicemembers to sue their superiors.\footnote{252} Yet there is no evidence that such a disciplinary breakdown would occur. The House Judiciary Committee, when considering one of the military medical malpractice bills, concluded that if a servicemember could sue on behalf of a dependent without a breakdown in military discipline, then there is no reason why suing on his or her own behalf would precipitate a disciplinary collapse.\footnote{253} This same analysis would also hold true in non-medical negligence cases.\footnote{254} In addition, the Supreme Court has not overruled the *Brooks* decision which allows servicemembers who are injured by the negligence of other servicemembers while off-base and off-duty to bring suit under the FTCA. Therefore, servicemembers already can bring their superiors to court.

Eliminating *Feres* could even improve the functioning of the services by making members of the military more accountable for their actions.\footnote{255} In fact, *Feres* may have a harmful effect on the services by preventing

\footnote{252. See supra text accompanying notes 64-68, 83-91, 95-98, 106-08, 114-16; see also Medical Malpractice, supra note 46, at 11 (statement of Sen. Strom Thurmond) (expressing concern that Senate and House resolutions to eliminate the *Feres* doctrine in the area of medical malpractice “could endanger morale and discipline” among members of the armed forces).

For criticism of this rationale, see Note, The *Feres* Doctrine, supra note 12, at 579 (condemning the use of the military discipline rationale in *Johnson* and *Stanley* since the suits were against civilian military employees).

Another reason for retaining the *Feres* doctrine is the “fiscal uncertainty” that would be caused by its elimination. Comment, Why Congress Should Not Legislatively Repeal the *Feres* Doctrine — A Struggle in Equity, 18 TEx. TECH. L. REV. 819, 839 (1987) [hereinafter Struggle in Equity].

253. H.R. REP. No. 87, supra note 214, at 4. See also Medical Malpractice, supra note 46, at 8 (statement of Sen. Jim Sasser). Senator Sasser posed the question:

[I]f the wife can sue or if the active duty military personnel can bring suit on behalf of a minor child who has been injured as a result of malpractice in the military medical system, how does it possibly damage discipline if the military person, him or herself, brings the suit?

Id. at 9.


255. See id.; Malpractice, supra note 13, at 11 (statement of Sen. Edward M. Kennedy). But see Medical Malpractice, supra note 46, at 11-13 (statement of Sen. Strom Thurmond) (suggesting that eliminating the *Feres* doctrine in the area of military medical malpractice “will in all likelihood do little to improve medical service provided to members of our Armed Forces” and that “it might be better to recruit more qualified medical personnel and mandate better continuing medical training”); id. at 21 (statement of Ms. Kathleen Buck, General Counsel, Dep’t of Defense) (arguing that:

providing the opportunity to sue in tort will, in no way, improve medical care for military personnel. Already, 70 percent of the patients served by military medical facilities may sue for malpractice. It defies common sense to assert that allowing the
investigations concomitant with civil litigation. Just as Churchill had argued in Parliament, Senator Jim Sasser of Tennessee, the author of the most recent Senate military medical malpractice bill, argued that some military medical personnel use the Feres doctrine as a shield to prevent investigations. If Congress eliminated the Feres doctrine, civilian courts would allow discovery with regard to alleged military negligence. This not only would make the armed services more accountable, but also would allow military negligence victims and their families to be comforted by knowing the circumstances surrounding the servicemember's injury or death.

Allowing servicemembers' claims under the FTCA also would help raise morale. As Churchill argued, the ability of servicemembers to obtain legal redress would raise their confidence in the military system. Senator Sasser found it "hard to imagine what could be worse for a soldier's morale than the feeling that he or she did not get a fair shake from the Government that they [sic] volunteered to defend."

remaining 30 percent to litigate under the Federal Tort Claims Act, would achieve any beneficial effect upon the quality of health care.

257. See supra text accompanying note 182.
258. S. 274, supra note 212.
260. See Compensation, supra note 219, at 141-42 (statement of Mrs. Truc-Nuong Brown). Mrs. Truc-Nuong Brown, for the Maryland and Washington D.C. Chapter, Concerned Americans for Military Improvements (CAMI), testified at a House Armed Services Committee hearing. Brown testified that her husband entered a military hospital for elective surgery and had emerged 100% physically and mentally disabled. Mrs. Brown has been unable to discover the truth about what happened to her husband in the military hospital. Id. at 141.

262. See supra text accompanying notes 181-83.
263. Medical Malpractice, supra note 46, at 9 (statement of Sen. Jim Sasser). As in Great Britain in the debates surrounding the 1987 Act, it has been argued in the hearings with regard to the passage of an exception to the Feres doctrine for military medical malpractice that the passage of such a bill would hurt morale because service people would be treated differently depending on whether they were in combat or noncombat activities. Medical Malpractice, supra note 46, at 14 (statement of Sen. Strom Thurmond). In answer to Senator Thurmond's comment, Senator Sasser remarked:

We have to realize that in time of combat, we can't hold our physicians to the same standard of care that we would in time of peace. For example, if you've got a surgeon operating in a field hospital, a quarter of a mile behind the front lines, he's been up for 48 hours with mortar shells bursting all around him, you're not going to hold him to the same standard of care as you would a surgeon operating . . . at Bethesda Hospital with the finest medical appliances that money can buy around him and surrounded with nurses and anesthesiologists and all of the things that are necessary for first-class medical care.

I think we would excuse, in time of combat, what we would say in peace time conditions might be malpractice or even, on occasion, negligence.
If Congress abolished the *Feres* doctrine, the courts could not hold personally liable military personnel whose negligence gives rise to FTCA suits. Under one of the proposed military medical malpractice bills, the government would be liable, and not the individual alleged tortfeasor servicemembers.264 This provision has probably been rendered superfluous by the recently passed Federal Employees Liability Reform and Tort Compensation Act.265 Under this Act, upon certification by the Attorney General that the defendant employee was acting in the scope of his employment when the act or omission that gave rise to an FTCA cause of action occurred, the United States shall be substituted as the party defendant.266 This provision would ensure less disruption in military units, because the defendant servicemember would not be a party to the FTCA suit.267

In addition, any tort law that would allow suit against a member of the military would take into account the special circumstances of military life. If servicemembers were allowed to bring suit under the FTCA, the standard of conduct which the courts would apply would be the standard applied in all negligence cases: that of a reasonable person of ordinary prudence under the circumstances.268 These circumstances would take into account special dangers peculiar to military training. Therefore, training officers would not be liable in tort for every injury that occurs; they would be liable only for those injuries resulting from unreasonable acts in training situations giving rise to injury.

Of the numerous reasons to abrogate the *Feres* doctrine, the most compelling is one of equity.269 Every person in the United States, except active duty members of the armed services, can bring suit under the

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266. *Id.*
267. In addition, military physicians are already immunized from suit under 10 U.S.C.A. § 1089 (West 1983 & 1990 Supp.).
Intramilitary Tort Immunity

FTCA.270 Active duty military personnel constitute only one-third of the total number of people treated in military medical facilities, yet they are the only individuals barred from suing for malpractice under the FTCA.271 To prevent servicemembers from bringing FTCA suits on their own behalf, when they are able to bring such suits on behalf of relatives,272 is not only nonsensical, but also unjust.

Finally, if Congress eliminates the Feres doctrine, it should include a provision similar to the reactivation provision included in Great Britain's Crown Proceeding (Armed Forces) Act of 1987.273 Such a provision would disallow FTCA suits by servicemembers during times of war or national emergency.274 The inclusion of a reactivation provision should allay any fears of a breakdown of military discipline in war or war-like situations.275

The quantity of bills introduced in Congress to allow military medical malpractice claims276 gives one hope that Congress will eliminate the Feres doctrine in the area of medical malpractice. However, Congress has not recently introduced any bills to completely abrogate the Feres doctrine,277 and the debates surrounding the medical malpractice bill do not indicate that Congress will in the near future.

The House Judiciary Committee, which supported the most recent military medical malpractice amendment to the FTCA, fully supported the policy that military personnel should not be allowed to sue the Government for negligence relating to the performance of military duties.278 Senator Sasser also believed that medical malpractice was distinguishable from other types of negligence.279 He believed that physicians should be held to a higher standard than other members of the military.280 In addition, Sasser was more protective of servicemembers receiving medical

271. Id.; see also Malpractice, supra note 13, at 13 (statement of Sen. Jim Sasser) (currently 70-80% of those treated in military hospitals can sue for malpractice).
272. See supra text accompanying note 253.
273. See supra text accompanying note 186.
274. However, Congress should delineate more clearly than the British Parliament precisely when the reactivation provision should be used. See supra note 186.
275. But see Comment, Struggle in Equity, supra note 252, at 844 (arguing that distinguishing between peacetime and wartime situations is "appealing but unsupportable. Military discipline is not something that miraculously appears in combat, and then fades away in the aftermath of the fight. It is a constant. Discipline is learned in peacetime and relied upon heavily in wartime)."
276. See supra note 211 and accompanying text.
277. See supra text accompanying note 212.
280. Id.
He believed that servicemembers could look out for themselves on routine active duty, but not in an operating room or in a physician's office.

Senator Sasser's reasoning is erroneous. Congress should not distinguish between medical malpractice and other forms of negligence in the military. It is foolish to suggest that servicemembers are able to look out for themselves when, for example, a fire starts in the barracks in which they are sleeping, or when the life support system in an airplane fails. These victims are entitled to judicial redress to the same extent as victims of military medical malpractice.

In the United States, as was true in Great Britain, opposition to making any legislation retroactive is likely because of a general reluctance to impose retroactive liability and the cost of retroactivity to the government. In addition, even though a servicemember who allegedly was negligent before the repeal of the Feres doctrine would not be held personally liable for damages, a lawsuit years after the alleged negligence could disrupt that individual's life. Therefore, an elimination of the Feres doctrine should not be made retroactive. Instead, Congress should adopt the solution proposed in Parliament: the establishment of alternative compensation schemes. Such a compensation scheme for Vietnam-era veterans who were exposed to dioxin and those who were exposed to ionizing radiation already exists.

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281. *Id.*

282. *Id.*

283. An illustration given by Ms. Kathleen Buck, General Counsel, Dep't of Defense, in her statement against a military medical malpractice bill actually provides the following argument for why any bill to eliminate the Feres doctrine should cover all negligence in the military:

A surgeon in a military stateside hospital makes an error. As a result, servicemember A suffers paralysis. Under the proposed legislation, he could sue the United States. Servicemember B is walking on the sidewalk outside the hospital and is hit by a government vehicle driven negligently by a motor pool driver. Servicemember B is paralyzed as a result of his injuries. He may not sue, although he has virtually the same disability.

*Medical Malpractice, supra* note 46, at 39 (statement of Ms. Kathleen Buck, General Counsel, Dep't of Defense). Rather than permitting neither to recover under the FTCA, as Buck would suggest, Congress should permit both suits under the FTCA.


286. *See supra* notes 192-200 and accompanying text.

287. *See supra* note 195.

288. *See supra* notes 195, 199.


vice-related injuries become known, Congress should establish additional compensation schemes.

V. CONCLUSION

The need to eliminate the *Feres* doctrine is urgent, given the Supreme Court’s ever-expansive interpretation of this FTCA exception. The Court has applied the doctrine, which originally covered only cases of negligence between servicemembers, to cases involving product liability on the part of military suppliers that result in the injury of servicemembers and negligence toward servicemembers on the part of civilian employees. Moreover, the Court has used what was originally a bar to FTCA actions by servicemembers to deny them the right to bring non-FTCA constitutional claims against the military forces.

The Supreme Court’s strengthening of the *Feres* doctrine should not be a barrier to its elimination. The Court created the *Feres* doctrine because, it maintained, Congress had given it no guidance for applying the FTCA to the military. Congress should now direct the Court. It should follow Great Britain’s lead and eliminate the military exception to its tort claims act. Congress should look to Great Britain as a model for how the military exception can be eliminated. As in Great Britain, all military personnel should have the right to sue under the tort claims act; the legislature should disallow such suits in times of war or national emergency and servicemembers should have the option of using alter-

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294. Chappell v. Wallace, 462 U.S. 296 (1983). One commentator has said that servicemembers should not be able to bring constitutional claims against the United States because such claims involve political questions that courts should not resolve. This is because of a textual commitment of military affairs to the legislature, the substantial activity of Congress on the field of military matters, and the judiciary's lack of expertise in military affairs. *See Note, Intramilitary Tort Immunity, supra* note 12, at 634-40.


296. American servicemembers presently cannot sue for claims arising out of combatant activities. 28 U.S.C.A. § 2680(j) (West 1965). *See also Note, Forgotten Rights of Military Personnel, supra* note 12, at 181 (arguing that such a provision would not be necessary, since the FTCA already has an exception for combatant activities). To allay the fears of those Representatives and Senators who may believe that the elimination of *Feres* would lead to suits against superiors for orders given in the heat of battle, it should be made explicit in the bill itself that the law will not apply to such claims.
native compensation schemes. In addition, FTCA awards should be reduced by any compensation received through the compensation schemes already established for military personnel and veterans.

The United States should follow Great Britain's lead and abrogate its military exception not only because the reasoning behind the *Feres* doctrine is flawed, but because, as Members of Parliament have pointed out, it is more humane and equitable to allow members of the military to benefit by a nation's tort claims act.

297. See *supra* text accompanying notes 188-89.
298. *Cf. supra* note 236 and accompanying text.