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The Feres Doctrine

By Sidney B. Jacoby*

The concept of sovereign immunity from suit is an important doctrine of American law. It was of special significance in the area of torts where the old English maxim was that “the king could do no wrong.” Following earlier piecemeal legislation, the Federal Tort Claims Act in 1946 constituted the culmination of efforts to subject the executive branch of our government to tort suits. Difficulties in the judicial construction of the consent statutes, especially in the tort field, have plagued the courts for years. Hornbook law has it that such statutes must be “strictly” construed, but sometimes the interpretation has been “liberal” and sometimes just “reasonable.”

An inordinate number of Supreme Court opinions have been rendered in the Tort Claims field, but of the various pronouncements of the Supreme Court the opinion in Feres v United States occupies a unique place. In its simplest form, Feres is a judge made exception for plaintiffs who are injured “incident to service” while on active duty; that is, by judicial interpretation of the Act, servicemen on active duty cannot recover from the government under the Tort Claims Act for injuries sustained “incident to service.” The article is written to update and delineate the present scope of the Feres doctrine. This article will consider how the Feres doctrine has been applied in relation to (a) impleader actions, (b) suits against fellow servicemen individually and (c) suits against private manufacturers of objects used by the armed forces.

* Professor of Law, Case Western Reserve University. The author gratefully acknowledges the research assistance of Randall A. Cole, J.D., 1973, Case Western Reserve University, and Susan Stevens, J.D. 1973, Case Western Reserve University.


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Feres and Related Fields

Before discussing the three significant developments in the law mentioned above, it is instructive to see how *Feres* is a unique decision in the interpretation of the Tort Claims Act over the years. To this end, the following pages show how *Feres* is to be distinguished from statutory exceptions to the Act, how it differs from a line of cases allowing recovery to servicemen sustaining injuries *not* “incident to service” and what the Supreme Court has done to the various rationales of the *Feres* doctrine.

Initially, *Feres* must be distinguished from a series of cases interpreting exceptions built into the Act. For example, by its own provisions the Act exempts claims based on discretionary acts of government officials, misrepresentation by government agents or acts occurring in a foreign situs.

The judge created exception of *Feres* must also be distinguished from general statutory exceptions of other claimants. For instance, Congress has explicitly excluded from the Act federal employees covered by the Federal Employees Compensation Act (FECA), employees of post exchanges and officers’ messes and most employees of the District of Columbia which are similarly covered by the FECA. Members of the Reserve Officers Training Corps also are not entitled to sue under the Act when injured in the line of duty, while engaged in authorized travel or while attending training activities. Members of the National Guard involved in military functions required by law are entitled to the same compensation benefits as the members of the armed forces are, and on that basis have been denied recovery under the Act. This is true despite the fact that a military member of the

8. Id. § 8173. For a discussion of the relationship between *Feres* and the statutory exemptions, see the recent case of *Moyer v. Marietta Corp.*, 481 F.2d 585, 598 (5th Cir. 1973).
state National Guard is not considered a government employee for whom the government may be liable.\textsuperscript{13}

As can be seen, in recent times Congress has been quite active in this area. One point that deserves mentioning is that throughout this period, though invited by the Supreme Court to do so,\textsuperscript{14} Congress took no action to change the \textit{Feres} result; that is, no legislation has been enacted that would give servicemen a claim under the Act for injuries sustained “incident to service.” This indicates, impliedly at least, legislative acquiescence in the \textit{Feres} doctrine.

\textit{Feres} was decided along with two companion cases, \textit{Jefferson v. United States}\textsuperscript{15} and \textit{United States v. Griggs}.\textsuperscript{16} The common fact underlying each of these cases was that each claimant, a serviceman on active duty, sustained injury due to negligence of others in the armed forces.\textsuperscript{17} In \textit{Feres} the executrix of Feres sued to recover for death caused by negligence. The decedent had perished by fire in a barracks while on active duty. Negligence was alleged in quartering him in a barracks known, or which should have been known, to be unsafe because of a defective heating plant, and in failing to maintain an adequate fire watch. The district court dismissed the action and the court of appeals affirmed, holding that if more than the pension system had been contemplated to recompense soldiers engaged in military service, Congress would have specifically provided for it.\textsuperscript{18}

\begin{itemize}
\item \textsuperscript{13} National Guard technicians, employees not engaged in military functions, were specifically given the status of civilian federal employees under 32 U.S.C. § 709 (1970), so that pursuant to 5 U.S.C. § 8116(c) (1970) such individuals may not recover as plaintiffs under the Tort Claims Act, but under 28 U.S.C. §§ 1346(b), 2671 (1970) the government may be liable for their negligent or wrongful acts or omissions.
\item \textsuperscript{14} 340 U.S. 135, at 138 (1950).
\item \textsuperscript{15} 178 F.2d 518 (4th Cir. 1949).
\item \textsuperscript{16} 178 F.2d 1 (10th Cir. 1949).
\item \textsuperscript{17} \textit{Feres v. United States}, 340 U.S. 135, 138 (1950). In \textit{Jefferson}, the plaintiff, while in the army, was required to undergo an abdominal operation. Eight months later, in the course of another operation after plaintiff was discharged, a towel 30 inches long by 18 inches wide, marked “Medical Department, U.S. Army,” was discovered and removed from his stomach. The complaint alleged it was negligently left there by the army surgeon. The district court concluded that the Tort Claims Act does not charge the United States with liability in this type of case, and the Court of Appeals affirmed.
\item \textsuperscript{18} In \textit{Griggs}, the district court dismissed the complaint of Griggs’ executrix, which alleged that while on active duty he met death because of negligent and unskillful medical treatment by army surgeons. The Court of Appeals reversed and, one judge dissenting, held that the complaint stated a cause of action under the Tort Claims Act. 177 F.2d 535, 537 (2d Cir. 1949). The court also recognized that the only exception to this interpretation of the Tort Claims Act applied to situations where
\end{itemize}
The Supreme Court granted certiorari. Justice Jackson, speaking for a unanimous court, denied recovery, holding that the Federal Tort Claims Act does not extend its remedy to members of the United States armed forces who sustain incident to their service what otherwise would be an actionable wrong.\textsuperscript{19} With a veritable dearth of legislative history on the issue, the court based its opinion on the rationales (a) that with respect to military claimants, Congress had not been suffering from a plague of private relief bills when enacting the Federal Tort Claims Act; (b) that no new claim was created by the Act, rather the government merely became subject to existing private remedies; (c) that no analogous private liability exists for the reason that private individuals do not engage in the business of conscription; (d) that the statutory rule making state law governing shows the inapplicability of the Act to these cases since the relationship of the government to its servicemen is distinctively federal in nature; and (e) that the fact of a simple and uniform system of compensation for those in the armed forces militates against application of the Tort Claims Act.\textsuperscript{20}

Thus, under the \textit{Feres} doctrine, a member of the armed forces who sustains an injury incident to his service due to negligence of another is without a judicial remedy, and he may look only to the statutory provisions regulating compensation of servicemen for duty-related injuries.\textsuperscript{21}

The \textit{Feres} decision is put in proper perspective when it is contrasted with \textit{Brooks v. United States},\textsuperscript{22} which the Supreme Court decided one year before \textit{Feres}. The \textit{Brooks} decision granted recovery under the Act to soldiers on furlough for injuries “not incident to their service,”\textsuperscript{23} and specifically reserved, and subsequently decided in \textit{Feres}, the issue whether injuries “incident to service” were cognizable under the Act. The courts have experienced great difficulty in the \textit{Feres-Brooks} distinction and have used a variety of devices to make the “incident to service” distinction, sometimes reaching peculiar results. One series of cases has denied recovery to servicemen while “on-base,”\textsuperscript{24} while another line of authority has denied recovery reasoning military personnel were not on active duty. \textit{Id.} See \textit{Brooks v. United States}, 337 U.S. 49 (1949).

\textsuperscript{19} Feres v. United States, 340 U.S. 135, 146 (1950).
\textsuperscript{20} \textit{Id.} at 140-44.
\textsuperscript{22} 337 U.S. 49 (1949).
\textsuperscript{23} \textit{Id.} at 52.
\textsuperscript{24} See, e.g., Orken v. United States, 239 F.2d 850 (6th Cir. 1956) (\textit{Feres} applied to officer occupying on-base quarters with his family to defeat recovery); Coffey
that but for the fact that the plaintiff was on active duty, he would not have been exposed to the allegedly wrongful acts.\textsuperscript{26} While the difficult question whether \textit{Brooks} or \textit{Feres} should be applied is significant, this article focuses on the subsequent development of the \textit{Feres} case.

**Post Feres Decisions**

Since \textit{Feres} the Supreme Court has questioned the continued effectiveness of the various rationales of the \textit{Feres} decision, although its

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When, although on leave, the soldier was a passenger on a military plane on a space available basis, recovery has been denied. Fass \textit{v. United States}, 191 F. Supp. 367 (E.D.N.Y. 1961). Recovery was permitted in the same accident, however, to a retired officer who had obtained a ride for personal reasons. See Homlitas \textit{v. United States}, 202 F. Supp. 520 (D. Ore. 1962). Of course, no recovery is permitted if the deceased soldier was on active military duty. United States \textit{v. Lee}, 400 F.2d 558 (9th Cir.), \textit{cert. denied}, 393 U.S. 1053 (1969); Sheppard \textit{v. United States}, 369 F.2d 272 (3rd Cir. 1966), \textit{cert. denied}, 386 U.S. 982 (1967).

Also, when a soldier on leave was hit by a government vehicle while talking to military policemen it was held that there was liability if at the time of the accident the soldier was simply invited to go back to base but not if at that time he was put under military orders to return. Hale \textit{v. United States}, 416 F.2d 355 (6th Cir. 1969).

One of the many additional problems encountered was whether the \textit{Feres} "military discipline" concept applied only if the tortfeasor-employee for whom the government allegedly was liable was of a higher rank than the injured serviceman. Mattos \textit{v. United States}, 412 F.2d 793 (9th Cir. 1969), held that the \textit{Feres} doctrine was applicable even though both individuals were of equal rank.

25. See, e.g., Schwager \textit{v. United States}, 326 F. Supp. 1081 (E.D. Pa. 1971). The \textit{Schwager} court fully discussed earlier decisions to demonstrate the "non-erosion of \textit{Feres}." It left undecided whether the "but for" test should be applied; that is, but for his service status Schwager could not have been a patient in the naval hospital. In Shults \textit{v. United States}, 421 F.2d 170 (5th Cir. 1969), \textit{Feres} was applied to a sailor who had been struck by an automobile while on liberty and subsequently died in a military hospital due to an alleged act of malpractice. Though the leave was never formally cancelled before the sailor's death recovery was denied because he "could not have been admitted, and would not have been admitted, to the Naval Hospital except for his military status." \textit{Id.} at 171. See also Lowe \textit{v. United States}, 440 F.2d 452 (5th Cir.), \textit{cert. denied}, 404 U.S. 833 (1971); Buer \textit{v. United States},
general validity has never been doubted. For example, the rationale of
Feres that "no new cause of action was created by the Act" seems to
have been negatived by the language in a more recent opinion in
which it was stated that the very purpose of the Tort Claims Act was to
establish novel and unprecedented governmental liability.26 Similarly,
the reasoning in Feres that the existence of a simple and uniform com-
penstation system militates against the application of the Tort Claims
Act was apparently abandoned in United States v. Brown27 where an
allegedly negligent operation was performed on a veteran which led to
an increase in the amount of his annuity for a prior service-connected
disability. Recovery under the Tort Claims Act was allowed, with the
court distinguishing the Feres situation by reasoning that in Feres

[t]he 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 com-
mitted in the course of military duty, led the court to read the Act
as excluding claims of that character.28

The Brown case, then, modifies the "incident to service" rationale of
Feres to mean only that which involves "general military discipline."

Furthermore, the more recent Supreme Court case of United States
v. Muinz,29 while not questioning the validity of Feres for military plain-
tiffs, dissected the various reasons of Feres and found them inappli-
cable to prisoner plaintiffs. Since the various rationales of Feres were
of a general character—quite independent from the factual situations
of military plaintiffs—the limiting effect of the Muinz decision should

United States, 402 F.2d 950 (4th Cir. 1968) (recovery for injury to wife of service-
man due to malpractice at army hospital); Hall v. United States, 314 F. Supp. 1135,
1136 n.2 (N.D. Cal. 1970).

his dissenting opinion in Rayonier Mr. Justice Reed referred to the Feres decision.
Id. at 321.


28. Id. at 112. In his dissent in Brown Mr. Justice Black, who would have de-

be interpreted to weaken the continued effectiveness of the rationales of Feres. The rationale of Feres that governmental liability does not cover new causes of action was specifically repudiated by Muinz.\(^{30}\) Also, the presence of a compensation system, though found persuasive in Feres, was held by the court in Muinz, citing Brown, not to preclude a negligence suit.\(^{31}\) Moreover, the other reasons of Feres (for example, the problem of applying diverse state law and possible damage to prison discipline) were brushed aside in Muinz.\(^{32}\) By its broad language the Court weakened those rationales of Feres.\(^{33}\) Accordingly, the ideas of "novelty of relief," of a "uniform system" of compensation, of "difficulty of applying state law," and to some extent, of "discipline" no longer are clearly valid rationales. Rather, the later Supreme Court opinions such as Muinz should be read as simply continuing to exclude from coverage military plaintiffs, broadly subject to military discipline, who seek recovery for wrongs sustained "incident to service."\(^{34}\)

The preceding discussion illustrates some of the problems which arose when an attempt was made to apply the Feres doctrine to various fact situations. It is now generally recognized that Feres is a well established but limited doctrine excluding from coverage under the Tort Claims Act military plaintiffs, broadly subject to military discipline, who seek recovery for wrongs sustained "incident to service."

**Applications of the Feres Doctrine**

The remainder of this article discusses the difficulties which seem

\(^{30}\) Id. at 159.

\(^{31}\) Id. at 160.

\(^{32}\) Id. at 161-63.

\(^{33}\) Thus, in answer to the argument that the government would be judged under too many standards the Court stated: "This seems more a matter of conjecture than of reality, . . . Even a matter such as improper medical treatment can be judged under the varying state laws of malpractice without violent dislocation of prison routine," (Id. at 161-62). Such statements can be made to the same effect regarding servicemen.

\(^{34}\) No discussion of Feres is found in United States v. Demko, 385 U.S. 149 (1966) where, distinguishing Muniz, it was held that the Tort Claims Act cannot be invoked by a prisoner injured while performing an assigned prison task, the injury being covered by compensation benefits under 18 U.S.C. § 4126 (1970). The Court held that 18 U.S.C. § 4126 (1970) was the exclusive remedy, in line with the historical doctrine that workmen's compensation statutes are "substitutes for, not supplements to, common-law tort actions." Id. at 151. The Feres opinion was mentioned only in the dissenting opinion of Mr. Justice White which suggested that the compensation system of federal prisoners under 18 U.S.C. § 4126 (1970) was not like the "simple, certain, and uniform" compensation system described in Feres. Id. at 155; see also Logue v. United States, — U.S. —, 93 S. Ct. 2215 (1973).
to exist with respect to certain applications of the *Feres* rule. Those situations basically fall into three categories: (a) whether *Feres* should prevent an impleader against the government by a private party-defendant who is being sued by a plaintiff disqualified under *Feres* to sue the government directly; (b) whether a person disqualified under *Feres* should in every case be precluded from suing an individual government employee personally for negligence; and (c) whether a person disqualified under *Feres* should be precluded from suing the manufacturer in a products liability situation even though the government may have to bear the ultimate burden of the recovery.

**Impléader**

Suits under the Tort Claims Act may be brought not only in the form of regular suits by the injured party against the government but also by means of a third party complaint. The defendant in the private litigation may implead the government under Rule 14(a), Federal Rules of Civil Procedure, on the theory that under the Tort Claims Act the government “is or may be liable to him for all or part of the plaintiff’s claim against him.” In its original form the Tort Claims Act did not specify whether claims could be so brought, but in *United States v. Yellow Cab Co.* the Supreme Court ruled that the government may be so impleaded. The 1966 amendment of the Tort Claims Act codified and modified that practice by requiring generally that an administrative claim be filed before instituting court action. The statute expressly provides, however, that no such prior administrative claim shall be required when the claim against the government is asserted by way of a third party complaint.

Some general observations on impleader involving the government are appropriate. Whether under Federal Rule 14 the government can be impleaded is dependent upon the applicable state law for contribution or indemnity. Even though the rule is not universal, apparently most state jurisdictions recognize indemnity and contribu-

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36. *Id.* at 556-57.
38. It should be recognized that in this general discussion we are concerned with impleader against the government, separate and distinct from Tort Claims Act actions.
tion causes of action, and no general provision of the Tort Claims Act prevents or limits such impleader. On the other hand, specifically with respect to the government's right to implead, occasionally federal, not state law, governs; thus despite contrary state law, impleader by the United States has sometimes been permitted.

Regardless of these general impleader provisions the question arises whether a private party defendant may implead the government in a suit by a Feres-disqualified plaintiff. In other words, can a Feres-disqualified plaintiff do indirectly what he could not do directly?

An analogous situation is found for employees covered by the Federal Employees Compensation Act (FECA). By statute FECA covered employees are precluded from filing tort claims against the government. Apparently the policy behind this statute is the idea of a "uniform system of compensation," that the employees should not derive additional benefits for the same act. The purpose of this statute is accomplished by providing that an FECA-covered employee who recovers for the same injury from a private tortfeasor is required to refund the amount of his benefits to the government. Disallowing impleader against the government in such a situation, however, would

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40. E.g., CAL. CODE CIV. PROC. § 875(c) (West Supp. 1972) specifies that the right of contribution "may be enforced only after one tortfeasor has, by payment, discharged the joint judgment or has paid more than his pro rata share thereof." See Gottlieb, The Tort Claims Act Revisited, 49 Geo. L.J. 539, 547-48 (1961); Gottlieb, Some Aspects of Contribution and Indemnity in Tort Actions against the United States, 9 Fed. B.J. 391, 397 (1948).

41. But cf. United States v. Gilman, 347 U.S. 507 (1954). Gilman presented an unusual instance of "judicial law-making in the negative." The case involved impleader by, not against, the government and the person to be impleaded was the individual government employee-tortfeasor for whom the government was liable. While generally permitting impleader by the government, the Supreme Court in Gilman refused to follow general private law principles of the master-servant relationship because it saw policy considerations and deferred to Congress the power to decide whether a right of indemnity should be recognized.

42. In Crocker-Citizens National Bank v. United States, 320 F. Supp. 673 (E.D. Cal. 1970), where in a contractual suit against the United States for the death of an employee of a government contractor the United States was permitted to bring a third party indemnity action against the contractor, although the contract did not contain an express indemnification provision, as was required by California state law. CAL. LABOR CODE § 3864 (West 1971). Federal law was held to apply because the contract was formed under the authority of federal law, the relationship of the parties was federal in character and the uniform treatment of federal contracts was deemed necessary. Id. at 675. Under federal law an express agreement by the manufacturer to conduct its work in a safe manner was held sufficient despite the absence of an express hold harmless clause. See id. at 675-76.


44. Id. at § 8132.
not result in implementing the policy that the government employees not reap improper advantages; rather, the result would be that the private tortfeasor would suffer undue losses. Thus, if an FECA-covered employee were to obtain $15,000 as benefits under the statute, and were to recover $20,000 for the tort of a private tortfeasor, the employee would have to repay $15,000 to the government. The private tortfeasor thus would bear the entire loss even though under state law he might be entitled to indemnity from the government. Consequently, to prevent an unfair burden on private defendants, impleader should be permitted in FECA situations.

There is some authority for not permitting such impleader or a separate suit, but a number of cases have permitted recovery. For instance, in *Weyerhaeuser Steamship Co. v. United States,* an admiralty case under the Public Vessels Act, it was held in a suit by the private shipowner who paid an injured government employee that the protective provision of the FECA did not affect the divided damage rule of admiralty in mutual fault collisions and, therefore, did not free the government of liability. A subsequent case, *Treadwell Construction Co. v. United States,* was an action against the United States by a government contractor who had been liable to a federal employee who, in his relationship to the government, was restricted to FECA benefits. The Third Circuit Court of Appeals dismissed the suit against the United States, and the Supreme Court vacated that decision for further consideration in light of *Weyerhaeuser.* Cases not permitting liability of the United States in the case of an FECA-

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49. 372 US. at 600.


covered employee distinguished the \textit{Weyerhaeuser} case on the ground that it was an admiralty case and emphasized that the \textit{Treadwell} case did not actually allow recovery but merely vacated the court of appeals decision for further consideration.\textsuperscript{5}

Cases reaching the opposite conclusion found a more general approach in the Supreme Court pronouncements and emphasized that in speaking of the exclusionary provisions of the FECA the Supreme Court in \textit{Weyerhaeuser} noted there is no evidence whatever that Congress was concerned with the rights of unrelated third parties.\textsuperscript{54} Also, upon remand by the Supreme Court in \textit{Treadwell}, the district court permitted the impleader; an appeal was taken, but later was dismissed because the Solicitor General recommended against appealing the decision unfavorable to the government.\textsuperscript{65}

Such policy considerations also seem to be particularly applicable to the \textit{Feres} situation. The \textit{Feres} exception is clearly a "judge-made" rule, and the only rationale of that doctrine still maintainable in light of the gradual development of that doctrine is the "general military discipline" concept.\textsuperscript{56} Neither that rationale, nor any of the previously advanced rationales, seem to support a conclusion excluding a private tortfeasor from recovering indemnity to which he would normally be entitled from the government. In a way the result would seem to be even more cogent in the \textit{Feres} situation than in that of an FECA-covered employee.\textsuperscript{57} In the latter situation we have to consider the statutory provision excluding tort claims by FECA-covered employees\textsuperscript{68} and to that extent conclusions, although possibly unjustified, may be drawn from the statutory language. In the \textit{Feres} situation we are concerned only with a judge made principle and it should be easier to adjust judicially that principle to the peculiar factual situation. However, until recently impleader against the government in suits by a \textit{Feres}-disqualified plaintiff has been denied.

\textsuperscript{56} See text accompanying notes 19-34 supra.
\textsuperscript{57} But cf. United Air Lines, Inc. v. Wiener, 335 F.2d 379, 402, 404 (9th Cir. 1964), where apparently impleader was disapproved with respect to both FECA-covered employees and \textit{Feres}-covered soldiers, though in the case of the FECA-covered employees not on the basis of the statute.
\textsuperscript{58} 5 U.S.C. § 8116(c) (1970).
In *United States Lines, Inc. v. Wiener*, involving a collision between a commercial airplane and a United States Air Force jet, actions against the commercial airline were brought under the Nevada wrongful death statute by the decedents of two servicemen who had been passengers on the commercial plane. To that extent the impleader of the government was dismissed for the reason that the government is not liable under the Tort Claims Act for injuries to servicemen whose injuries arise out of or are in the course of activity incident to service. *Drumgoole v. Virginia Electric & Power Co.* involved suits by reserve members of the armed forces on active training duty instituted against a power company. The latter sought to implead the United States for contribution and indemnity. Relying on Virginia law and the *Feres* doctrine the court granted the motion to dismiss the third party claim, for the reasons that under Virginia law contribution from a co-tortfeasor is withheld if he cannot be held liable to the original plaintiff, and that the act of the government toward the *Feres*-covered soldier was a negligence which was not actionable.

A later case in the State of Virginia based its holding disallowing impleader of the government more exclusively on the *Feres* doctrine, even though it cited the *Drumgoole* opinion. In *Keisel v. Buckeye Donkey Ball, Inc.*, a third party complaint of defendant against the United States was dismissed on the ground that the third party plaintiff stands in no different posture with regard to any claim against the United States than would the plaintiff had he instituted a direct action against the government. However, a more recent decision adopted the analogous reason-

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60. *Id.* at 384, 404.
62. *Id.* at 826. The Virginia statute provides: “Contribution among wrongdoers may be enforced when the wrong is a mere act of negligence and involves no moral turpitude.” Va. CODE ANN. § 8-627 (1957). Additionally the court based its holding on the broad ground that under the Tort Claims Act the government is liable only for certain tort claims, so that, even if the contribution claim was regarded independently of the original wrong, there could be no liability of the government here. 170 F. Supp. at 826.
64. *Id.* at 370-71. In *Nikiforow v. Rittenhouse*, 277 F. Supp. 608 (E.D. Pa. 1967), the court disallowed impleader for contribution, relying on the *Feres* doctrine and also citing the *Drumgoole* and the *Wiener* cases. On the other hand, the court in *Nikiforow v. Rittenhouse*, 319 F. Supp. 697 (E.D. Pa. 1970) allowed an indemnity claim against the government, which had intervened as party plaintiff, after judgment, under the Medical Care Recovery Act, pursuant to a stipulation agreed to by all parties and approved by the court. 42 U.S.C. § 2651 (1970).
ing of the FECA situation in Treadwell\textsuperscript{85} and Weyerhaeuser\textsuperscript{86} and recognized that impleader is not barred in the Feres situation. In Barr v. Brezina Construction Co.\textsuperscript{67} the court squarely held:

\begin{quote}
[I]t does not follow that a defendant-third-party plaintiff who has been subjected to liability by a serviceman inherits, so to speak, the limitations which apply to the serviceman, since his is an independent remedy based on different considerations.\textsuperscript{68}
\end{quote}

The Barr case involved a Feres-covered serviceman who had recovered $45,000 in settlement of a claim for personal injuries allegedly caused by the negligence of Brezina Construction Company and its subcontractor, the Nielsen Scott Company. The plaintiff had fallen down an access stairway installed by Nielsen in a building on an air force base in Utah. The case initially involved the issue of whether a Feres-covered serviceman may recover from the manufacturer of an object used by the military.\textsuperscript{69} The Barr court of appeals decision ruled that impleader is \textit{not} barred in the Feres situation. The Barr court referred to the Supreme Court cases of Weyerhaeuser and Treadwell\textsuperscript{70} and added thereto Ryan Co. v. Pan-Atlantic Corp.,\textsuperscript{71} an admiralty case. The Barr court recognized that the Supreme Court has not spoken on impleader under the Feres principle, but wisely permitted impleader, stating, “The reasoning of the Ryan body of law appears applicable so that a party seeking indemnity is not barred at the threshold.”\textsuperscript{72}

Clearly the conclusion reached in Barr that impleader of the government is possible in a suit by a Feres-disqualified plaintiff is a result that should be adopted for the benefit of the military plaintiff and the third party tortfeasor.

Feres and Suits Against Fellow Servicemen

The broad brush of the Feres doctrine encompasses all suits “incident to service”; apparently, the best rationale for excluding such suits under the Federal Tort Claims Act is the maintenance of general military discipline. However, this broad language covers a multitude of sins. Many situations in the military merely duplicate their counterpart in civilian life for which the rationale of maintaining discipline

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\textsuperscript{65} See note 50 supra.
\textsuperscript{66} See note 47 supra.
\textsuperscript{67} 464 F.2d 1141 (10th Cir. 1972), \textit{cert. denied}, 409 U.S. 1125 (1973).
\textsuperscript{68} \textit{Id.} at 1143 (emphasis added).
\textsuperscript{69} See text accompanying notes 94-99 infra.
\textsuperscript{70} See notes 47-55 supra.
\textsuperscript{71} 350 U.S. 124 (1956).
\textsuperscript{72} 464 F.2d 1141, 1143-44 (10th Cir. 1972).
is of dubious significance. A striking illustration is the medical services that are rendered to servicemen while on active duty.

This section will discuss the *Feres* doctrine as it applies to medical malpractice suits by members of the armed forces against military doctors.

While the courts may be divided on the impless situation as it applies to *Feres*, there does not seem to be any conflict with respect to the problem of whether a *Feres*-covered soldier can bring a negligence action against another soldier individually who may be his superior. In the *Feres* opinion, Justice Jackson, when discussing the requirement of the Tort Claims Act that the United States' liability be like that of a "private individual", stated specifically that he knew of no American law permitting a soldier to recover for negligence, against either his superior officer or the government.73

It is primarily on the basis of this dictum that recovery was denied in two cases involving one plaintiff, an enlisted man who sued army medical surgeons for malpractice in an operation performed in an army hospital. In the first of these cases, brought in the Ninth Circuit, the plaintiff, Bailey, sued two army surgeons for alleged medical malpractice. The suit against one of the doctors was dismissed for lack of personal jurisdiction and the other was dismissed on the ground that a soldier has no claim against an army surgeon because "[i]t is not yet within the American legal concept that one soldier may sue another for negligent acts performed in the line of duty."74 In the second case, brought in the Third Circuit, the reasoning of the Ninth Circuit was followed and the suit was dismissed for failure to state a claim for relief.75

No other decisions relating to this issue are available. It should be noted, however, that (1) Mr. Justice Jackson's dictum in *Feres* did not say that American law has disallowed such claims but merely that he knew of no American law which permitted such suits; (2) intentional tort suits against fellow soldiers have been allowed in American practice;76 (3) Mr. Justice Jackson's dictum was set forth in connec-
tion with a portion of the Feres opinion refuting the contention that no new claim was created under the Act (which, incidentally, was largely repudiated by the later development of the Feres doctrine in the Supreme Court); and (4) the remaining rationale of the Feres doctrine, that of military discipline, can hardly be deemed to justify precluding medical malpractice suits against army doctors individually.

It should also be noted that other causes of action are now permitted that have a far greater effect on the maintenance of general military discipline and the special relation of the soldier to his superiors. For example, military discipline is much more clearly endangered by false imprisonment actions against commanding officers than by suits for medical malpractice. Whether any interference with discipline may be created by suits for medical malpractice, such interference probably cannot to any significant extent be discerned in malpractice suits against army surgeons who, more likely than not, are insured by medical liability insurance. Basically, the question should be answered not from the possible absence of precedents, but rather from a consideration of the general law concerning the liability of individual government officers. In this respect, at least, medical malpractice suits against army surgeons individually should be permitted.

It is a postulate of American law that government agents are liable for their torts and that the immunity from suit possessed by the government is not shared by its agents. Of course, there are exceptions to this general principle. Perhaps the broadest exception to this general rule is the defense of privilege. The nature of this defense was most eloquently described by Judge Learned Hand in his frequently quoted statement in Gregoire v. Biddle, a suit brought against two trespass suit for false imprisonment by a private in the army against another soldier; compare McCull v. McDowell, 15 F. Cas. 1235 (D. Cal. 1867) (civilian's suit against commanding officer for illegal arrest and false imprisonment), with Jecker v. Montgomery, 59 U.S. 110 (1855) (private citizens, in an admiralty action, suing the commander of a U.S. ship individually because of confiscation). With respect to suits against manufacturers see text accompanying notes 94-99 infra.

77. See text accompanying notes 26-34 supra.
78. See note 76 supra.
81. Id. § 16.116, at 289-91.
82. 177 F.2d 579 (2d Cir.), cert. denied, 339 U.S. 949 (1950).
attorneys general personally for malicious conspiracy to imprison the plaintiff under the alien enemy control laws:

There must indeed be means of punishing public officers who have been truant to their duties; but that is quite another matter from exposing such as have been honestly mistaken to suit by anyone who has suffered from their errors. . . . In this instance it has been thought in the end better to leave unredressed the wrongs done by dishonest officers than to subject those who try to do their duty to the constant dread of retaliation.  

This judge-made doctrine owes its origin to the theory of privilege of judicial officers. It has been applied by the courts mainly in willful tort cases, not in negligence suits for medical malpractice. In a malpractice suit there is no question whether the commission of the wrong was done by a dishonest officer or whether there was an honest mistake. Medical malpractice is not an act of government administration as such; rather, the cause of action is based on professional standards independent of either the military or the government.

Instead of being a claim justifying the defense of privilege, a medical malpractice suit by a soldier against an army medical officer remains a normal negligence suit to which the general rules should apply. Tort suits against government officers generally are not affected by the presence or absence of relief against the United States. Express statutory language is necessary in order to preclude suits against individual government officers.

The Federal Tort Claims Act has precluded such suits in certain instances. For instance, the statute provides that the recovery of a judgment under the Act bars a suit against the government employee for whose negligence the United States was held liable. But it is the judgment under the Act which is a bar, not the institution of the ac-

83. Id. at 581 (emphasis added).
84. See, e.g., Dombrowski v. Eastland, 387 U.S. 82 (1967) (conspiracy to seize property); Barr v. Matteo, 360 U.S. 564 (1959) (libel); Romeo v. United States, 462 F.2d 1036 (5th Cir. 1972) (damage suit against Administrator of Small Business Administration personally for having rescinded a disaster loan); Skolnick v. Campbell, 454 F.2d 531 (7th Cir. 1971) (suit against a judge, alleging that he prevented plaintiffs from appearing as grand jury witnesses); Bethea v. Reid, 445 F.2d 1163 (3rd Cir. 1971), cert. denied, 404 U.S. 1061 (1972) (suit against U.S. Attorney for conspiracy to violate civil and constitutional rights); Carter v. Carlson, 447 F.2d 358 (D.C. Cir. 1971), reversed on other grounds sub nom. District of Columbia v. Carter, 409 U.S. 418 (1973) (suit against police officers personally for assault and battery); Frommhhagen v. Glazer, 442 F.2d 338 (9th Cir. 1971), cert. denied, 404 U.S. 1038 (1972) (libel action against a NASA employee for circulating a memorandum to persons within the agency).
tion. In other words, the creation of the statutory remedy against the United States is no bar to an action against the individual government employee. Nor is such a bar brought about by merely suing the United States. Accordingly, actions may be instituted jointly against the United States and the individual government employee. In fact, it has been specifically stated that while a Tort Claims Act judgment against the United States constitutes a bar to an action against the individual officer, the reverse is not true. In other words, a judgment first against the employee is no bar to an action against the United States though, of course, no double recovery is allowed.\footnote{Moon v. Price, 213 F.2d 794 (5th Cir. 1954); Adams v. Jackel, 220 F. Supp. 764, 766 (E.D.N.Y. 1963).}

Only when Congress specifically so legislates are tort suits against the individual government employee excluded.\footnote{See, e.g., 28 U.S.C. §§ 2676, 2679 (1970); Schwartz & Jacoby, supra note 80, § 16.115, at 288-89.} For instance, since 1962 the Tort Claims Act remedy against the United States has been made exclusive in cases involving "the operation by any employee of the Government of any motor vehicle."\footnote{28 U.S.C. § 2679(b); Schwartz & Jacoby, supra note 80, § 13.112, at 210. By virtue of 28 U.S.C. § 2402 (1970) a non-jury trial under the Act is substituted for the previously existing right to jury trial in the claim against the individual.} Thereafter, in 1965, the question of abolishing medical malpractice suits against government medical personnel was before Congress. It is significant that the resulting legislation excluded only the right to sue medical personnel of the Veterans Administration.\footnote{See 38 U.S.C. § 4116(a) (1970).} The legislative history of the 1965 amendment of this provision makes it clear that its purpose was to establish an exclusion similar to that of motor vehicle operators.\footnote{1965 U.S. CODE CONG. & AD. NEWS 3927-28.}

In view of all these considerations the law should recognize the permissibility of medical malpractice suits against army surgeons by Feres-covered soldiers. The most cogent consideration in support of this result is that by very detailed legislation Congress has abolished suits only against medical personnel of the Veterans Administration. Nothing comparable was done by Congress with respect to the medical personnel of the Defense Department. Under established principles of statutory construction\footnote{Inclusio unius est exclusio alterius (The inclusion of one is the exclusion of another). J. Sutherland, 3 Statutes and Statutory Construction § 5822, at 117 (1943).} it would seem that the medical personnel of the Defense Department should not receive the statutory exclusion from suit.

\footnotetext[86]{Moon v. Price, 213 F.2d 794 (5th Cir. 1954); Adams v. Jackel, 220 F. Supp. 764, 766 (E.D.N.Y. 1963).}
\footnotetext[87]{See, e.g., 28 U.S.C. §§ 2676, 2679 (1970); Schwartz & Jacoby, supra note 80, § 16.115, at 288-89.}
\footnotetext[88]{28 U.S.C. § 2679(b); Schwartz & Jacoby, supra note 80, § 13.112, at 210. By virtue of 28 U.S.C. § 2402 (1970) a non-jury trial under the Act is substituted for the previously existing right to jury trial in the claim against the individual.}
\footnotetext[89]{See 38 U.S.C. § 4116(a) (1970).}
\footnotetext[90]{1965 U.S. CODE CONG. & AD. NEWS 3927-28.}
\footnotetext[91]{Inclusio unius est exclusio alterius (The inclusion of one is the exclusion of another). J. Sutherland, 3 Statutes and Statutory Construction § 5822, at 117 (1943).}
This is particularly true in view of the fact that the opposite result produces strange results. Both veterans and soldiers, when they are the victims of medical malpractice, would in a proper case receive statutory disability benefits. The veteran, however, would not have a claim against the doctor individually; rather he would have a claim under the Federal Tort Claims Act. On the other hand, depriving the Feres-covered soldier of a claim against the doctor personally would mean that he would have neither claim. Hence, it seems proper to grant him the right to sue the army doctor personally.

The question will be raised as to how far individual suits against army personnel should be permitted. Allowing medical malpractice suits against army doctors need not imply a general inroad upon a rule of non-liability for negligent acts. The 1965 Congressional history is the only insight available for making inferences regarding legislative intent. That intent appears to leave malpractice suits against Defense Department medical personnel subject to general tort law. Furthermore, medical malpractice suits will have little or no effect on general military discipline or the relation of the soldier to his superior, whereas such a result might obtain from suits against non-medical superior officers.

As a matter of public policy, suits should be allowed against active duty medical personnel. As mentioned earlier, medical malpractice seems different from other negligent acts of a military character in that the medical duty of the army surgeon is primarily a professional duty, that of the medical profession. In a significant way the standards of malpractice are determined not by army regulations but generally by pre-existing requirements of the medical profession. It should follow, then, that the liability of a medical officer for malpractice be analogous to that of his civilian counterpart, and not affected by the concept of general military discipline.

Suits Against Manufacturers of Objects Used by the Military

The Feres doctrine has also found application outside the realm of the serviceman-government relationship. The Feres concept of governmental immunity from suits by servicemen injured incident to their service has been invoked by nongovernmental entities as well.

93. It should also be noted that the cases permitting a Feres-covered soldier to sue the manufacturers of objects used by the military under state law demonstrate that personal liability to a Feres-covered soldier is not unknown. See Note, 22 Hastings L.J. 400 (1971).
The Feres doctrine occupies a special place among the various interpretations of the Tort Claims Act. Different from other cases, Feres was not concerned with the interpretation of a specific clause of the

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94. E.g., O'Keefe v. Boeing Company, 335 F. Supp. 1104, 1111 n.15 (S.D.N.Y. 1971). In Paris v. General Electric Co., 54 Misc. 2d 310, 282 N.Y.S.2d 348 (Sup. Ct. 1967), aff'd mem., 29 App. Div. 939, 290 N.Y.S.2d 1015 (1968), the administrator of U.S. Air Force pilot who had died while on active duty brought wrongful death action both on the basis of negligence and of breach of implied warranty against aircraft engine manufacturer. On the basis of applicable state law a motion to dismiss was denied as to both causes of action, the court not even mentioning the Feres principle.

95. E.g., Whitaker v. Howell-Kilgore Corporation, 418 F.2d 1010 (5th Cir. 1969), petition for rehearing denied, 424 F.2d 549 (5th Cir. 1970); Boeing Airplane Co. v. Brown, 291 F.2d 310 (9th Cir. 1961); Montgomery v. Goodyear Tire & Rubber Co., 231 F. Supp. 447 (S.D.N.Y. 1964), aff'd sub nom. Montgomery v. Goodyear Aircraft Corp., 392 F.2d 777 (2d Cir. 1968), cert. denied, 393 U.S. 841; Note, 22 Hastings L.J. 400, 409 (1971). The material discussed in the Hastings note should be placed into proper context with our discussion of the development of the various Feres rationales and recent more doubtful applications of the Feres doctrine. See text accompanying notes 26-34 supra. Perhaps nonapplication of the Feres doctrine can be justified without the necessity of radically re-evaluating the doctrine, as the note suggests. See, also, Barr v. Brezina Construction Co., 464 F.2d 1141 (10th Cir. 1972), cert. denied, 409 U.S. 1125 (1973).


97. E.g., Boeing Airplane Co. v. Brown, 291 F.2d 310 (9th Cir. 1961).

98. E.g., Ulmer v. Hartford Accident & Indem. Co., 380 F.2d 549 (5th Cir. 1967).

99. See text accompanying notes 26-34 supra.
Act; rather, it was decided by a process of judicial lawmaking, seeking to fit the Act into the entire statutory system of remedies against the government to make a workable, consistent and equitable whole.\footnote{100}{See B. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 142-80 (1921), in which Cardozo explains the development of a judge-made “principle, henceforth isolated,” and of its transformation into “a new entity, which in turn develops of itself . . . to give it an independent life.” \textit{Id.} at 145.}

A comparison between the “whittling away” process of some of the other cases interpreting the Act and the judicial development of the judge made \textit{Feres} rule demonstrates how the latter rule assumed an “independent life” as an exclusionary rule.\footnote{101}{It is interesting to note that in his discussion of the life of judge-made law Cardozo compares the French code system with American common law but, surprisingly, in the field of governmental responsibility in tort the tables just happen to be reversed: the American system is the code system while the French law is a complete system of judge-made case law of the character of common law. \textit{See} Jacoby, \textit{Federal Tort Claims Act and French Law of Governmental Liability: A Comparative Study}, 7 \textit{VAND. L. REV.} 246, 250 (1954). \textit{See id.} at 256, 257 concerning the development of a \textit{Feres}-like principle in the French judge-made law, excluding from tort recovery soldiers who are covered by special laws providing for pensions and disability benefits.}

On the basis of that independent life the \textit{Feres} exemption was sought to be applied to other, completely non-military situations.\footnote{102}{As we have seen, the attempt to rely on \textit{Feres} in order to preclude prisoners from recovery under the Tort Claims Act failed. The Supreme Court specifically stated that “we find no occasion to question \textit{Feres}, as far as military claims are concerned, the reasons for that decision are not compelling here.” \textit{United States v. Muniz}, 374 U.S. 150, 159 (1963). Similarly, despite attempts to make the \textit{Feres} doctrine applicable, the claims of veterans were held not to be excluded from the Federal Tort Claims Act in \textit{United States v. Brown}, 348 U.S. 110 (1954).} However, not by judicial lawmaking but rather by specific legislation outside the Tort Claims Act, Congress has excluded certain persons from recovery under the
Act. With respect to soldiers on active duty, the congressional silence of over twenty years has sanctioned the judge-made rule of law in Feres. It appears that by judicial lawmaking the Supreme Court has read another exception into the statutory catalogue of "exceptions" from the Tort Claims Act by exempting any claim of a soldier for damages sustained incident to military service.

Thus, considering the Feres principle as a judge-made rule and an additional exception under the Tort Claims Act, certain valuable guidelines are supplied for the more doubtful situations previously discussed. For example, recognition of the independent life of the judge made Feres rule as an exclusionary rule excluding only the victims of governmental torts or plaintiffs under the Tort Claims Act justifies an impleader of the United States by a subsidiary tortfeasor. Similarly, it should be more fully realized that Feres is applicable only to suits under the Federal Tort Claims Act against the United States. Feres should find no application in suits against fellow servicemen for medical malpractice, nor should it bar recovery in suits against the private manufacturer of objects involved in an accident.

Despite its limited effect the Feres opinion remains to be a most interesting instance of judicial lawmaking. It evidences great imagination and is an outstanding example of an exalted judicial process.

103. See text accompanying notes 7-13 supra.
105. For some of the difficulties encountered by the lower courts in applying the judge-made Feres rule see text accompanying notes 22-25 supra.
106. See text accompanying notes 35-72 supra, for discussion of whether to permit certain impleader suits against the United States. See text accompanying notes 73-93 supra, for discussion of whether to permit medical malpractice suits against fellow medical officers. See text accompanying notes 94-99 supra, for discussion of whether to permit suits by soldiers against the private manufacturers of objects used by the military.
107. On the other hand, the "independent life" of the Feres doctrine likewise justifies the opposite result in a somewhat similar situation, namely that of subrogated insurance companies, which have insured property of a Feres-covered soldier, being excluded from suit under the Tort Claims Act, for the insurance companies are mere successors-at-law of the Feres-barred claimant. See, e.g., United States v. United Services Auto. Ass'n, 238 F.2d 364 (8th Cir. 1956); Preferred Insurance Co. v. United States, 222 F.2d 942 (9th Cir.), cert. denied, 350 U.S. 837 (1955), rehearing denied, 351 U.S. 990 (1956); Rivera-Grau v. United States, 324 F. Supp. 394 (D.N.M. 1971).
108. See text accompanying notes 73-93 supra.
109. See text accompanying notes 94-99 supra.