From *Feres* to *Stencel*: Should Military Personnel Have Access to FTCA Recovery

Michigan Law Review

Follow this and additional works at: https://repository.law.umich.edu/mlr

Part of the Legislation Commons, Military, War, and Peace Commons, and the Torts Commons

**Recommended Citation**


Available at: https://repository.law.umich.edu/mlr/vol77/iss4/4

This Note is brought to you for free and open access by the Michigan Law Review at University of Michigan Law School Scholarship Repository. It has been accepted for inclusion in Michigan Law Review by an authorized editor of University of Michigan Law School Scholarship Repository. For more information, please contact mlaw.repository@umich.edu.
From Feres to Stencel: Should Military Personnel Have Access to FTCA Recovery?

Only four years after the Federal Tort Claims Act of 1946 stripped away the obsolete and inequitable sovereign immunity of the United States government, the Supreme Court held that the United States could not be sued on tort claims growing out of military service. This decision in Feres v. United States created a major exception to the FTCA and plunged a large class of potential claimants back into the era of sovereign infallibility. Feres, however, has failed to prevent FTCA claims based on the injury or death of military personnel. The Feres rule has aroused conflicting lines of interpretation; courts have sought to limit the

1. 28 U.S.C. §§ 1291, 1346(b), (c), 1402(b), 1504, 2110, 2401(b), 2402, 2411(b), 2412(c), 2671-2680 (1976).
2. The growth of the concept of sovereign immunity from Anglo-Saxon law to the FTCA is traced in Pound, The Tort Claims Act: Reason or History?, 30 NACCA L.J. 404, 406-09 (1963). A history of acts preceding the FTCA and earlier congressional attempts to enact a general waiver of immunity may be found in Wright, Growth of the FTCA, 24 JAG J. 151, 151-52 (1970).

One major aim of the Act was to relieve persons injured by government negligence of an inequitable burden:
Congress was aware that when losses caused by [governmental] negligence are charged against the public treasury they are in effect spread among all those who contribute financially to the support of the Government and the resulting burden on each taxpayer is relatively slight. But when the entire burden falls on the injured party it may leave him destitute or grievously harmed. Congress could, and apparently did, decide that this would be unfair when the public as a whole benefits from the services performed by Government employees.

3. 340 U.S. 135 (1950). In Feres, suit was brought under the FTCA for the wrongful death of a serviceman who was killed when the barrack in which he was sleeping was destroyed by fire. Government negligence was alleged in the maintenance of the heating system. Two cases consolidated with Feres, Jefferson v. United States and United States v. Griggs, alleged injury or death of servicemen due to negligent medical treatment by United States Army physicians. In each of these cases, the Court refused to "impute to Congress such a radical departure from established law" in enacting the FTCA as the creation of a cause of action against the Government for service-connected injury or death of a member of the armed forces. 340 U.S. at 146.

4. The concept of sovereign immunity evolved from the common law doctrine that the king could do no wrong. Pound, supra note 2, at 406.

5. See note 119 infra.

6. Some courts have applied an absolutist rule, whereby a claim is barred where the serviceman would not have been injured but for the fact that he was on active duty, see, e.g., Hass v. United States, 518 F.2d 1138 (4th Cir. 1975); Henninger v. United States, 473 F.2d 814 (8th Cir.), cert. denied, 414 U.S. 519 (1973), while others have defined
rule to avoid its inequity;\(^7\) and commentators have criticized it harshly.\(^8\) Nevertheless, two years ago the Supreme Court reaffirmed *Feres* in *Stencel Aero Engineering Corp. v. United States*.\(^9\)

*Stencel* offered the Court an opportunity to view the issues with an informed eye, after thirty years of experience with the FTCA, a quarter century of litigation over the *Feres* rule, and a period of significant growth and change in judicial policy regarding the power of the armed services over their personnel.\(^10\) Never-

---

\(^7\) A few lower courts have attempted to redefine and narrow the “incident to service” test by employing certain aspects of the government-soldier relationship to formulate new tests for the allowability of an FTCA claim. For example, in *Downes v. United States*, 249 F. Supp. 628 (E.D.N.C. 1965), it was suggested that the real question in applying *Feres* is “[w]as plaintiff performing duties of such a character as to undermine traditional concepts of military discipline if he were permitted to maintain a civil suit for injuries therefrom?” 249 F. Supp. at 628-29. Under this test the claim was not barred because plaintiff, a serviceman, was struck and injured by a military vehicle while leaving his base on a pass, “at his liberty to pursue his personal affairs as he saw fit at the moment of collision.” 249 F. Supp. at 628-29.

Another formulation was attempted in *Lee v. United States*, 261 F. Supp. 252 (C.D. Cal. 1966), a wrongful death action brought on behalf of two active duty servicemen who were passengers on an Air Force transport plane which crashed due to alleged negligence of the Federal Aviation Agency. The court reasoned that the proper test is not whether the claimant was on or off duty, but whether the injury “stemmed from activities that involved an official military relationship between the negligent person and the claimant.” 261 F. Supp. at 258. Thus, although the deaths were actually “incident to service,” the policies underlying *Feres* did not require dismissal of the claims. Such a test would permit a broad range of claims excluded under the strict “incident to service” rule, while protecting the authority of those in command or those responsible for military decisions.

In *Hale v. United States*, 416 F.2d 355 (6th Cir. 1969), the court criticized the vagueness of the *Feres* standard and held the proper test to be whether the injury “arose out of or in the course of military duty.” 416 F.2d at 360. In *Schwager v. United States*, 279 F. Supp. 269 (E.D. Pa. 1968), the court suggested “an analysis of the relevant links between the ‘activity’ and the service.” 279 F. Supp. at 263.

---


10. The case involved injuries suffered by Captain John Donham of the Missouri Air National Guard when he was forced to eject in flight from his jet and the egress life-support system malfunctioned. Permanently disabled, Donham sued both Stencel, manufacturer of the system, and the United States. Stencel cross-claimed against the United States for indemnity. The district court dismissed both claims against the United States on the basis of the *Feres* rule. Donham v. United States, 395 F. Supp. 52 (E.D. Mo. 1976). Although Donham did not appeal his case, the Eighth Circuit reviewed Stencel’s appeal and upheld it. Donham v. United States, 598 F.2d 765 (8th Cir. 1979). The Supreme Court
theless, the Court decided against Stencel’s claim for indemnity from the federal government, upholding Feres and even extending it to bar third-party claims for indemnity for damages paid to cover service-connected injuries.

This Note reevaluates the Feres doctrine in light of legal developments of the past three decades. It concludes that the FTCA should be extended to military claims. It discusses the arguments that military claims will burden vital government functions and shows that the exception to liability under the present FTCA, particularly the exception for “discretionary actions” by government employees, would adequately protect all legitimate military interests.

The Feres Court raised four pillars to support its decision, and later cases have elaborated upon that same structure. The first pillar is the Court’s construction of the statutory language concerning a “parallel private liability.” Although this theory held sway for several years, it has since been discarded. The second pillar is the argument that Congress would not have intended to include military personnel within the FTCA’s coverage, given the preexisting statutory compensation system for members of the armed services. This Note shows first that the progressively liberal construction of legislative intent behind the FTCA is inconsistent with the judicially created exception and second that the statutory compensation system relied upon by the Feres Court is neither sufficiently reliable nor sufficiently exclusive to justify denying recovery under the FTCA. The third pillar is the tradition of judicial deference to military autonomy in the treatment of personnel. But the past three decades have seen that deference diminish steadily. Moreover, the FTCA exception of discretionary actions from liability, as construed and applied by the courts, would adequately protect the military need for autonomy and for discipline over personnel. The fourth pillar of Feres is judicial concern that application of local tort law under the


12. The full language of the exception is as follows:

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

FTCA\textsuperscript{13} would interfere with the uniform conduct of military activities by imposing standards of care that varied from state to state. This Note contends that the "discretionary function" exception of the Act would sufficiently protect uniformity in military activities.

The \textit{Feres} exemption to the FTCA is unnecessary. It deprives military personnel of redress for harms in the name of policies that are more than adequately fulfilled by the FTCA's "discretionary function" exception. This Note concludes by proposing a set of standards to guide the application of the discretionary function exception and to ensure that it provides immunity where waiver of sovereign immunity would endanger legitimate military interests. Legislative or judicial abandonment of \textit{Feres} in favor of principled application of the "discretionary function" exception and the other express exceptions to the FTCA would bring justice to our servicemen without jeopardizing national security.

I. THE FTCA: JUDICIAL CONSTRUCTION OF THE "PRIVATE PERSON" LANGUAGE

\textit{Feres} was one of a wave of cases in which the Supreme Court sought to divine the purposes of the Federal Tort Claims Act of 1946\textsuperscript{14} and to delineate the scope of the waiver of immunity. Although in other cases the Court urged liberal construction of the Act,\textsuperscript{15} in \textit{Feres} it took a cautious approach, establishing what is in fact the only judicially created exception to the Act.\textsuperscript{16} In so doing, it relied on what may be termed "a parallel private liability" theory—a theory arguing that the FTCA applies only where a parallel private liability for the tortious conduct exists in state law.

The Court found its parallel private liability rule in the language of the FTCA, which makes the government liable for claims

\textsuperscript{13} Under the Act, liability is to be determined "in accordance with the law of the place where the act or omission occurred." 28 U.S.C. § 1346(b) (1976). \textit{See also} text at notes 112-21 \textit{infra}.
\textsuperscript{14} The Act grants the federal courts jurisdiction over claims for injury, loss, or death, caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred. 28 U.S.C. § 1346(b) (1976).
\textsuperscript{16} \textit{See} note 11 \textit{supra} for the legislatively created exceptions.
arising "under circumstances where the United States, if a private person, would be liable to the claimant." The Court construed that language to exclude military claims. Justice Jackson declared that "one obvious shortcoming" of Feres was that the plaintiff could show no liability of a private individual analogous to her claims. Even if the type of tortious act were one for which a private individual might be liable, the Court felt it must consider "all the circumstances" of the claim, including the relationship between the plaintiff and defendant. The Court found no analogous liability under the law of landlord and tenant, medical malpractice, or other types of tort, because of the unique status of the parties: no private individual had the power to raise an army and no member of a state militia had ever been permitted to sue a state. According to Justice Jackson, that unique relationship was determinative, for "[T]he act created no new causes of action," and its effect "was not to visit the government with novel and unprecedented liabilities."

That rule against "novel and unprecedented liabilities" significantly limited the effect of the FTCA by preserving federal immunity for any government activity that lacked a parallel or analogy in the private sector. But later decisions by the Court undermined the parallel liability test and finally eliminated it altogether. In 1955, the Court held in Indian Towing Co. v. United States that the United States could be held liable for the Coast Guard's negligent failure to repair a lighthouse. The Court, urging liberal construction of the Act, concluded that no parallel private liability need be shown for an FTCA claim to stand.

Indian Towing was soon followed by Rayonier, Inc. v. United States, in which government firefighters negligently allowed the

---

18. 340 U.S. at 141-42.
19. 340 U.S. at 141.
20. 340 U.S. at 142.
21. That reasoning played a significant part in the Court's decision against federal liability in the controversial case of Dalehite v. United States, 346 U.S. 15 (1953). The case involved claims for death caused by the explosion of a government shipment of fertilizer. The alleged failure of the Coast Guard in fighting the fire which resulted from the explosion was held to fall outside the FTCA because of the lack of analogous private liability in tort law. 346 U.S. at 43-44. Justice Reed, writing for the majority, explained, "To impose liability for the alleged nonfeasance of the Coast Guard would be like holding the United States liable in tort for failure to impose a quarantine for, let us say, an outbreak of foot-and-mouth disease." 346 U.S. at 44.
23. 350 U.S. at 64-65.
plaintiff’s building to burn down. In Rayonier the Court specifically refuted the “private liability” defense raised by the Government as a misinterpretation of the purpose of the FTCA.  

Since Rayonier, courts have generally accepted that the FTCA does extend to “novel and unprecedented forms of liability,” and that the Feres rule barring claims where no analogous private liability can be shown is no longer good law. Many uniquely governmental activities have given rise to liability under the FTCA. The growth away from the “analogous private liability” limitation on the scope of the FTCA is consistent with both the purposes of the Act and the general trend toward expanding governmental liability.

Thus, whatever the stability of this first pillar in 1950, it does not have the strength in 1979 to support the broad Feres exception. An explanation for the exception’s continuing vitality must stand on one of the other three columns.

II. LEGISLATIVE INTENT AND THE VETERANS’ COMPENSATION SYSTEM

The second pillar of Feres was the Court’s contention that Congress could not have intended the FTCA to apply to military personnel because it had already created the veterans’ compensation program — “[providing] systems of simple, certain, and uniform compensation for injuries or death of those in armed services.” The Court described this conclusion as the product of an attempt “to fit [the FTCA] into the entire statutory system to make a workable, consistent, and equitable whole.”

25. 352 U.S. at 319.
27. See Note, supra note 6, at 468 n.64.
28. E.g., the FTCA has been held to allow government liability for the negligence of an FBI agent in trying to capture the hijacker of a private airplane, Downs v. United States, 522 F.2d 990 (6th Cir. 1975), for damage to livestock resulting from failure to warn owners of land adjacent to nuclear testing grounds of nuclear tests, Bulloch v. United States, 133 F. Supp. 885 (D. Utah 1955), for negligent operation of airport control towers at municipal airports, Ingham v. Eastern Airlines, 373 F.2d 227 (2d Cir. 1967); United Air Lines Inc. v. Wiener, 335 F.2d 379 (9th Cir.), cert. dismissed, 379 U.S. 951 (1964), for negligent treatment of federal prisoners, United States v. Demko, 368 U.S. 149 (1996); United States v. Muniz, 374 U.S. 150 (1963), and for negligence of the Coast Guard in rescuing a privately owned ship, United States v. Sandra & Dennis Fishing Corp., 372 F.2d 189 (1st Cir.), cert. denied, 389 U.S. 836 (1967).
29. 340 U.S. at 144.
30. 340 U.S. at 139.
Chief Justice Burger explicitly reaffirmed it in Stencel. The conclusion flows from the interplay of two intermediate assumptions—that Congress truly wanted to deny this remedy to members of the military and that the veterans’ compensation program is indeed adequate. Yet these assumptions are not entirely sound: congressional intent is at best ambiguous, and the compensation system is often inadequate. Moreover, they conflict with the Court’s interpretation in other cases of veterans’ benefits as nonexclusive.

The Court began its discussion in Feres with a search for evidence of legislative intent relating to the rights of military personnel under the FTCA. Unfortunately, the congressional debates contain no language on which to base a general rule for military claims, and the Court was thus left to make inferences from the broader statutory structure. The Act specifically excludes claims arising from combat and claims arising in a foreign country, but it has no general provision relating to its effect on members of the armed forces. The Feres claimants had argued from this structure that Congress intended no general exclusion of military personnel—why bother to make specific exclusions if there exists a general exclusion that subsumes them? Moreover, the FTCA includes "military personnel" in its definition of government employee. The Court, however, found more persuasive the argument that congressional silence grew out of an understanding that the existing veterans’ compensation system was the exclusive remedy: "Congress was suffering from no plague of private bills on the behalf of military and naval personnel, because a comprehensive system of relief had been authorized for them and their dependents by statute."

31. 431 U.S. at 672-73.
32. 340 U.S. at 138.
33. 340 U.S. at 138.
35. 340 U.S. at 144.
37. 340 U.S. at 140. Before the enactment of the FTCA, the only recourse for a citizen injured by the negligence of a government employee was to petition Congress to pass a private bill providing a special grant of relief. This system of relief proved unwieldy and inadequate as the range of government activities expanded, bringing a correspondingly steady increase in the number of private bills brought before Congress. The legislative history indicates that the primary aims of the FTCA were to provide those injured by government activities with a fair and accessible forum in the federal court system, and to relieve Congress of the burden of considering the thousands of private relief bills brought before it yearly. H.R. Rep. No. 1287, 79th Cong., 1st Sess. 2 (1946). See also 340 U.S. at 139-40.
Both logic and history reveal significant weaknesses in that argument. In his *Stencel* dissent, Justice Marshall showed that congressional silence supports the inference of nonexclusivity at least as well as that of exclusivity.\(^{38}\) Before enacting the FTCA, the federal government had adopted a compensation plan for civilian employees, the Federal Employees Compensation Act (FECA),\(^{39}\) that contained an express exclusion of other government liability.\(^{40}\) Nonetheless, the Supreme Court interpreted congressional silence in the FTCA to override that express exclusion and to offer further compensation to "unrelated third parties."\(^{41}\) The present Veterans' Benefits Act\(^ {42}\) and its predecessors\(^ {43}\) contain no such express exclusion, and yet the *Feres* Court found one for veterans and the *Stencel* Court found one for unrelated third parties. It is somewhat anomalous to think that Congress wanted to use the FTCA to override express exclusions but not to override implied ones. Furthermore, this view is inconsistent with the progressively liberal posture that the Court has taken in interpreting the FTCA in other contexts. In 1957 the Court declared, "There is no justification for this Court to read exceptions into the Act beyond those provided for by Congress."\(^ {44}\)

The second assumption underlying the *Feres* conclusion that Congress did not have military personnel in mind when it passed the FTCA is that the veterans' compensation system offers a "simple, certain, and uniform"\(^ {45}\) substitute for FTCA recovery. The *Feres* Court compared the veterans' compensation program to workers' compensation plans, which generally replace the common law tort remedy with a certain statutory award.\(^ {46}\) That comparison, however, is misleading. The certainty of workers compensation justifies the exclusion of the tort remedy.\(^ {47}\) But veter-

---

\(^{38}\) 431 U.S. at 675-76.


\(^{40}\) 5 U.S.C. § 8116(c) (1976).


\(^{43}\) At the time of *Feres*, the laws relating to compensation and pensions for the veterans of the various wars constituted Title 38 of the United States Code. In 1958, Congress enacted the Veterans' Benefit Act, Pub. L. No. 85-857, § 1, 72 Stat. 1105, a complete revision and consolidation of those laws.


\(^{47}\) E.g., New York Cent. R.R. v. White, 243 U.S. 188, 201-02 (1916); Jensen v.
ans’ compensation is not certain enough—and was not certain enough at the time of Feres—to justify depriving a serviceperson of the option of a tort claim.

Veterans’ compensation is uncertain because it is conditional—subordinate to the disciplinary needs of the armed forces. Unlike a workers’ compensation award, which is a vested right and revocable only when the beneficiary’s earning power has changed, a veterans’ award is merely a conditional gift. Justice Sutherland described veterans’ compensation as “a mere gratuity for which no suit can be maintained.” This is because the system is one of governmental largesse: “The underlying principle of pension and compensation is based upon the desire of a grateful Government to supplement the earning capacity of the veteran in civilian life proportionate to the degree of his disability which has directly diminished that capacity.”

Because it is “gratuitous,” a valid award of veterans’ compensation may be forfeited temporarily or permanently for a number of reasons unrelated to earning ability. For example, a veteran forfeits his compensation temporarily during imprisonment for a felony or misdemeanor and forfeits it permanently upon conviction for treason, sabotage, or “subversive activities.” Moreover, a veteran or his dependent will not receive a pension or compensation unless the period of service on which the claim is based was terminated by “discharge or release under conditions other than dishonorable.” This provision bars benefits if the member of the military is discharged as a conscientious


49. Silberschein v. United States, 266 U.S. 221, 225 (1924).

50. H.R. REP. No. 2301, 79th Cong., 2d Sess. 4 (1946). The concept of compensation as a mere gratuity is obsolete, especially with the introduction of the volunteer army. Instead, whatever the scope of compensation, awards should be restructured on the workers’ compensation model and made independent of military disciplinary policies.


Thus, as it stands now, the Veterans’ Benefits Act does not provide certain recovery for service-connected injuries. In asserting that the veterans’ compensation system provides protection to veterans and their families analogous to the protection of workers’ compensation statutes, the Court has skimmed over crucial differences in the nature and realities of the two systems. The veterans’ program may be appropriate where the rationale for compensation is merely governmental largesse, but it is no substitute for congressionally mandated tort recovery.

In Stencel, the Court noted that one purpose of the veterans’ compensation scheme was to place an “upper limit” on government liability. The Feres rule, however, admits an area where both the statutory and the tort remedies are available, and thus there is no statutory “upper limit.” For example, in Brooks v. United States, a serviceman on leave, off base, and in a private car was killed in a collision with an army truck. Since the accident was not incident to military service, tort recovery was avail-

57. 38 C.F.R. § 3.12(d)(5) (1978). The regulations in full regarding the types of discharge that bar payment of benefits are as follows:

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

(1) As a conscientious objector who refused to perform military duty, wear the uniform, or comply with lawful order of competent military authorities.
(2) By reason of the sentence of a general court-martial.
(3) Resignation by an officer for the good of the service.
(4) As a deserter.
(5) As an alien during a period of hostilities, where it is affirmatively shown that the veteran requested his or her release.
(d) A discharge or release because of one of the offenses specified in this paragraph is considered to have been issued under dishonorable conditions.

(1) Acceptance of an undesirable discharge to escape trial by general court-martial.
(2) Mutiny or spying.
(3) An offense involving moral turpitude. This includes, generally, conviction of a felony.
(4) Willful and persistent misconduct. This includes a discharge under other than honorable conditions, if it is determined that it was issued because of willful and persistent misconduct. A discharge because of a minor offense will not, however, be considered willful and persistent misconduct if service was otherwise honest, faithful and meritorious.
(5) Generally, homosexual acts.

58. 38 C.F.R. § 3.12(c),(d) (1978).
59. 337 U.S. 49 (1949).
able, but veterans benefits were also recoverable because Brooks was in active duty status at the time. The Court declared: "We will not call either remedy in the present case exclusive, nor pronounce a doctrine of election of remedies, when Congress has not done so." It is hard to imagine that Congress intended the Veterans' Benefits Act to be exclusive in some cases but not in others. If the purpose of veterans' benefits is, in fact, to provide an "upper limit" of government liability, as the court has interpreted it, then not only should it include an exclusivity provision, but the benefits afforded and the range of exclusivity should reasonably be coterminous.

Because the first two Feres pillars are not so sturdy as the Court's rhetoric might suggest, a modern Justice or Congressman eager to see that the intent of an earlier Congress is justly and accurately implemented would look closely at the remaining two pillars to see whether their worthwhile goals can be served by less extreme means than the Feres exception. In the next two Sections, this Note suggests that they can be served beautifully by the "discretionary function" exception that was written into the FTCA.

III. MILITARY AUTONOMY

The most substantial pillar supporting Feres, one that was reasserted in Stencel, was the Court's deference to military autonomy. The Court was reluctant to infringe upon the "distinctively federal" relationship between the government and the soldier by applying state tort law under the FTCA. As later cases have made clear, the "federal relationship" rationale really stood for the military's interest in carrying out its own discipline free from judicial interference. Since World War II, however, courts have taken an increasingly active role in supervising the military, restricting the scope of military autonomy. They have been particularly active in limiting the scope of court-martial jurisdiction and in reviewing military administrative decisions.

60. In contrast, in the context of workers' compensation or FECA, where compensation is limited to injuries having a causal or circumstantial connection with employment, Brooks' injury would not have been compensable. E.g., CAL. LAB. CODE § 3600 (Deering 1976); MICH. COMP. LAWS ANN. § 418.301 (West Supp. 1979); N.Y. WORK. COMP. LAW § 10 (McKinney 1965); 5 U.S.C. § 102 (1976). And where statutory compensation is available under either system, the tort remedy is consistently barred, thus maintaining consistent exclusivity. See note 46 supra; 5 U.S.C. § 116(e) (1976).

61. 337 U.S. at 53.
Given that changing judicial attitude toward judicial autonomy, one must wonder why the Court still finds it persuasive in the context of tort claims.

A. The "Federal Relationship" Rationale

Justice Jackson stressed in Feres that the application of state tort law to a service-connected claim under the FTCA would violate the "distinctively federal" relationship between the soldier and the government, a relationship defined and governed by federal law alone. The cases following Feres have clarified and narrowed the concept so that "federal relationship" now connotes exclusive disciplinary authority over military personnel.

Four years after Feres the Supreme Court again considered a serviceman's FTCA claim, in United States v. Brown. The plaintiff was a discharged veteran who had been injured in service and had received medical treatment and disability compensation from the government. Seven years after his discharge, he underwent a further operation for his in-service injury at a Veterans' Administration facility and suffered a new injury. The Court held that this new injury was not incurred incidental to service within the meaning of Feres, since it "did not arise out of or in the course

62. 340 U.S. at 143-44. Local law governs tort claims under the FTCA. See note 13 supra. In characterizing the relationship as a "distinctively federal" one, Jackson relied on the earlier decision in United States v. Standard Oil, 332 U.S. 301 (1947), a case which involved a soldier who had been struck by a privately owned truck while off base. The soldier signed a release, but the United States sued the owner and driver of the truck to recover for medical costs and wages expended during the soldier's disability. There was no statutory authorization for such a claim. The circuit court had considered the case to be governed by local tort law, in accord with the doctrine of Erie R.R. v. Tompkins, 304 U.S. 64 (1938). 332 U.S. at 303-04 n.4. The Court refused to recognize the claim because, Perhaps no relation between the Government and a citizen is more distinctly federal in character than that between it and members of its armed forces. To whatever extent state law may apply to govern the relations between soldiers or others in the armed forces and persons outside them or nonfederal governmental agencies, the scope, nature, legal incidents and consequences of the relation between persons in service and the Government are fundamentally derived from federal sources and governed by federal authority.

332 U.S. at 305-06.

Jackson suggested that the considerations present in Standard Oil "apply with even greater force" to Feres. 340 U.S. at 143. The two cases are, however, distinguishable because in Feres the FTCA provided a statutory authorization for applicability of state law, which was lacking in Standard Oil. The Standard Oil rule was overturned by Act of Sept. 25, 1962, Pub. L. No. 87-693, 76 Stat. 893 (codified at 42 U.S.C. § 2651(a) (1976)), which took effect in 1962, allowing the United States to recover for costs of medical care against a negligent private party.

The causal relationship was strong enough to justify an award of additional veteran's compensation, but not strong enough to fall within the Feres exemption from government liability. The Court identified the reasons for the Feres rule as disciplinary:

[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 committed in the course of military duty.

The Court felt that since this claim was brought by a discharged veteran it implied no threat to military discipline, and therefore the Court allowed it.

Shortly afterward, the Court considered the Feres doctrine's relevance to federal prisoners in United States v. Muniz. The plaintiffs claimed to have been injured due to the negligence of federal prison employees. The district court dismissed the case as analogous to Feres, but the Supreme Court distinguished it, asserting that Feres "seems best explained" by the disciplinary concerns outlined in Brown. The Court foresaw no significant discipline problem arising from application of the FTCA in federal prisons, noting that no such problems had arisen in states which allowed such suits.

Some hailed Muniz as a significant limitation of Feres and Stencel affirmed its redefinition of the "federal relationship" in terms of disciplinary authority and control of personnel. Chief Justice Burger emphasized in Stencel that "where the case concerns an injury sustained by a soldier while on duty, the effect of the action upon military discipline" justifies barring an FTCA claim. Because the litigation would involve "second-guessing military orders" and testimony by members of the armed services

64. 348 U.S. at 113.
65. "[T]he causal relation of the injury to the service was sufficient to bring the claim under the Veterans Act. But, unlike the claims in the Feres case, this one is not foreign to the broad patterns of liability which the United States undertook by the Tort Claims Act." 348 U.S. at 112.
66. 348 U.S. at 112.
67. 348 U.S. at 112.
69. 374 U.S. at 162. See text at note 66 supra.
70. 374 U.S. at 162-63.
71. See, e.g., Jacoby, supra note 6, at 1286-87; Rhodes, supra note 6, at 29. Note, supra note 6, at 467. But see Mayo, Torts—Rights of Servicemen Under the FTCA, 45 N.C. L. Rev. 1129, 1134-35 (1967).
“as to each other's decisions and actions,” he dismissed it. In view of recent developments in the legal relationship between government and soldiers the “federal relationship” analysis is even weaker today than in 1950. The Stencel Court, however, failed to recognize the significance of these developments. The next two Parts show how the courts in recent years have reduced military autonomy in the treatment of personnel, allowing today only as much as is commensurate with military needs. Therefore, in upholding the Feres rule, the Stencel Court relied on an obsolete view of the powers of the military services and the rights of their personnel.

B. Historical Evolution of Military Autonomy and Judicial Policy

The Constitution says little about the legal status of the soldier. Traditionally, the military services were viewed as an autonomous federal branch, a separate jurisdiction having its own rule of law, its own courts, and its own enforcement system.

72. 431 U.S. at 673.

73. Congress is empowered to declare war, to raise and support armies, to maintain a navy, to make rules for the government of the armed forces, and to organize, equip, and train a militia. U.S. Const. art. I, § 8. A separation of powers is achieved by making the President Commander-In-Chief. U.S. Const. art. II, § 2, cl. 1. The Executive has the authority to make regulations for the armed forces. United States v. Eliason, 41 U.S. (16 Pet.) 291 (1842). Military personnel are subject to the authority of both Congress and the President.

The fifth amendment excludes soldiers from the right to indictment by a grand jury in cases arising in actual service during war or public danger. U.S. Const. amend. V. The application of this exclusion to the serviceman on duty at other times is not inherent. (See text at notes 94-98 infra.) It appears that the framers of the Constitution did not contemplate that the federal government would maintain a standing federal army in peacetime, but rather that the states would maintain militia which Congress could call up for the purposes of U.S. Const. art. I, § 8, cl. 15. Sherman, Legal Inadequacies and Doctrinal Restraints in Controlling the Military, 49 Ind. L.J. 539, 545 n.18 (1974).

74. The military is probably unique among our government bureaucracies in the degree of autonomy accorded it by the three constitutional branches of government. Occupying a special place because the protection and very survival of the nation is ultimately in its hands, it has generally been treated with considerable deference by Congress in its appropriating and regulating role and by the executive in its general supervisory role. Viewed as a society necessarily set apart because of its combat mission and its peculiar needs for discipline and obedience, it has been exempted from ordinary standards of judicial review by the courts. .

Sherman, supra note 73, at 540-41 (footnotes omitted). The Supreme Court emphasized the separateness of the military justice system in Burns v. Wilson, 346 U.S. 137, 140 (1953): “Military law, like state law, is a jurisprudence which exists separate and apart from the law which governs in our federal judicial establishment. This Court has played no role in its development.” 346 U.S. at 140 (footnotes omitted). See also Barker, Military Law—A Separate System of Jurisprudence, 36 U. Conn. L. Rev. 223 (1967).
Each of the services developed and enforced an independent system of military law.  

Until recently, courts regularly deferred to the military in administrative and criminal matters. According to one federal circuit court, the leading considerations inhibiting review of military decisions were an unwillingness to second-guess judgments requiring military expertise, a reluctance to interfere with military discretion, a fear of the flood of litigation that might ensue if judicial review were made available, and a concern that review might hamper vital military functions.

Cracks appeared in the jurisprudential and administrative superstructure of the armed services during World War II. Congress met demands for reform by enacting the Uniform Code of Military Justice (UCMJ), which took effect in 1951. The UCMJ codified a unified body of criminal and disciplinary law for all the armed services. It was a vital step forward in defining the rights and duties of military personnel, but during the three decades since its enactment, pressures for reform have persisted.

The courts responded to pressures for protection of soldiers’ legal rights with a series of decisions making significant inroads on military autonomy. They have evolved new standards of military autonomy in relation to personnel primarily in cases involving the scope of court martial jurisdiction and the authority of military administrative decisions. The policies evolved in these cases are incompatible with the Feres rationale.

75. For a capsule history of the military justice systems of the several military services, see H. Moyer, Justice and the Military §§ 1-111 to -116 (1972).

76. Mindes v. Seaman, 453 F.2d 197, 199 (5th Cir. 1971). The Stencel majority was strongly influenced by what it imagined to be the probable “effects of the maintenance of such suits on discipline, and the extreme results that might obtain if suits under the Tort Claims Act were allowed for negligent orders given or negligent acts committed in the course of military duty.” United States v. Brown, 348 U.S. 110, 112 (1954), quoted in Stencel Aero Engr. Corp. v. United States, 431 U.S. 666, 671-72 (1977). A trial, it was feared, “would ... involve second-guessing military orders, and would often require members of the armed services to testify in court as to each other’s decisions and actions. This factor, too, weighs against permitting any recovery by petitioner against the United States.” 431 U.S. at 673.

77. See Holtzoff, Administration of Justice in the United States Army, 22 N.Y.U. L.Q. Rev. 1 (1947), for a summary of inadequacies and injustices revealed by studies of military justice which were conducted following World War II in response to widespread criticism.


1. Court-Martial Jurisdiction

In its original wording, the UCMJ asserted jurisdiction according to the status of the accused.\(^1\) Jurisdiction reached not only all military personnel on active duty\(^2\) but also some civilian groups such as dependents overseas,\(^3\) discharged personnel,\(^4\) and prisoners in the custody of the armed forces.\(^5\)

In two landmark decisions, the United States Supreme Court sharply curtailed UCMJ jurisdiction over civilians. In \textit{Reid v. Covert},\(^6\) it overturned court-martial jurisdiction of civilian dependents overseas as an unconstitutional deprivation of Bill of Rights protections.\(^7\) The Court said that military law is essentially disciplinary,\(^8\) so different from the law administered in article III courts that "the jurisdiction of military tribunals is a very limited and extraordinary jurisdiction."\(^9\)

\(^1\) Persons subject to the Code are identified in 10 U.S.C. § 802 (1976).
\(^4\) 10 U.S.C. § 803(a) (1976) (jurisdiction over ex-servicemen who are accused of serious offenses committed while on duty and not triable in a civilian court).
\(^6\) 354 U.S. 1 (1956).
\(^7\) The Court stated:
Every extension of military jurisdiction is an encroachment on the jurisdiction of the civil courts, and, more important, acts as a deprivation of the right to jury trial and of other treasured constitutional protections. Having run up against the steadfast bulwark of the Bill of Rights, the Necessary and Proper clause cannot extend the scope of Clause 14 [of U.S. Const. art. I, § 8].
354 U.S. at 21.
\(^8\) The Court described military law as a harsh law which emphasizes discipline more than justice, and "the security and order of the group rather than . . . the value and integrity of the individual." 354 U.S. at 39-40. Military authorities readily acknowledge the fusion of justice and discipline in military law: "The ultimate purpose of military justice is to maintain military discipline and thereby strengthen national security." U.S.A.F. RES. OFFICERS' TRAINING CORPS, THE MILITARY JUSTICE SYSTEM 2 (1962) (italics omitted), quoted in H. MOYER, supra note 75, § 1-150. Similarly, naval personnel are informed that "[n]aval justice is the disciplinary and court-martial system of the Navy. Its purpose is the maintenance of naval discipline, without which the Navy cannot function as an efficient fighting organization." Nav. Pers. 16199 (Oct., 1945) (published and distributed by Standards and Curriculum Division, Training, Bureau of Naval Personnel), quoted in H. MOYER, supra note 75, § 1-150.

Recently, General William Westmoreland identified the primary purpose of the military justice system as follows: "First and foremost, the military justice system should deter conduct which is prejudicial to good order and discipline. . . . Discipline markedly differentiates the soldier from his counterpart in civilian society. Unlike the order that is sought in civilian society, military discipline is absolutely essential in the Armed Forces." Westmoreland, \textit{Military Justice—A Commander's Viewpoint}, 10 AM. CRIM. L. REV. 5, 5 (1971).
\(^9\) 354 U.S. at 21.
In Toth v. Quarles, which soon followed, the Supreme Court struck down court-martial jurisdiction over discharged personnel accused of serious crimes committed while on duty. The Court held court martial jurisdiction legitimate only where it is "the least possible power adequate to the end proposed." Where the defendant has been discharged from service, the military's need to impose discipline is insufficient to justify the encroachment on article III jurisdiction and the abridgment of individual rights that military jurisdiction entails.

The Court similarly cut back UCMJ jurisdiction over all active duty personnel in O'Callahan v. Parker. There, the Court held that if the alleged crime of an active duty member of the armed forces is not "service-connected," no military necessity exists to justify military jurisdiction. Again, the Court restricted military necessity to "the exigencies of military discipline." Thus, military law in peacetime is now only constitutionally applicable to those subject to military discipline, and then only if a crime is service-connected. Article III jurisdiction does not yield to military jurisdiction except where the alleged crime has a clear impact on the discipline and morale of the armed forces. Military jurisdiction is appropriate only to meet "military necessity"; the essence of military necessity is discipline.

---

91. The petitioner, Toth, had been arrested by military authorities five months after his honorable discharge from the Army, and was tried by a military tribunal on charges of murder committed while he was on active duty abroad. Toth's petition for a writ of habeas corpus was granted by the Supreme Court on certiorari. 350 U.S. at 23.
92. 350 U.S. at 23 (footnote and italics omitted).
93. "[C]onsiderations of discipline provide no excuse for new expansion of court-martial jurisdiction at the expense of the normal and constitutionally preferable system of trial by jury." 350 U.S. at 22-23.
96. 395 U.S. at 272.
97. 395 U.S. at 261.
98. The O'Callahan rule was further developed in Relford v. Commandant, 401 U.S. 355 (1971), where it was decided that a soldier's crime against a person or property on base is "service-connected." The Court listed the factors stressed in O'Callahan as making that crime non-service-connected, including the lack of military control of the situs of the crime and lack of connection between the crime and the serviceman's duties, the fact that the crime took place within the United States in peacetime, the fact that the crime was one traditionally prosecuted in civilian courts and that a civilian court was available for prosecution of the case, and the absence of any flouting of military authority. 401 U.S. at 365.
99. A recent student comment finds a "doctrine of military necessity" employed by both military and civil courts to determine the reach of the Bill of Rights into the military context:
2. Military Administrative Decisions

The Court has also reduced the autonomy of military administrative bodies. But in this area the emphasis has been on military "discretion" rather than on discipline. In the leading case of Harmon v. Brucker, two soldiers challenged their less-than-honorable discharges, which were issued for their conduct prior to induction. Unlike cases challenging UCMJ jurisdiction, Harmon held that a soldier need not assert the constitutional right to due process in order to obtain review of a military administrative decision. Instead, he may prevail by showing that the decision maker has exceeded his statutory powers, for then "his actions would not constitute exercises of his administrative discretion, and . . . judicial relief from this illegality would be available." A flood of federal circuit court decisions after Harmon granted relief from a wide range of military administrative decisions.

In Mindes v. Seaman the Fifth Circuit reviewed the development of the military necessity doctrine as a means of assessing the degree to which a particular constitutional guarantee applies to service personnel.

Historically, military personnel have not been accorded constitutional protections to the same degree as their civilian counterparts. Their rights in disciplinary matters are protected by the Uniform Code of Military Justice (UCMJ), and by judicial review in the Court of Military Appeals (COMA), and in the federal courts. COMA and the lower federal courts have developed the military necessity doctrine as a means of assessing the degree to which a particular constitutional guarantee applies to service personnel.

101. 355 U.S. at 581.
102. 355 U.S. at 582. Despite legislation providing internal Army mechanisms for final and conclusive disposition of contested discharges, it was held that the district court did have jurisdiction to determine that the Secretary of the Army had exceeded his statutory powers in issuing the discharges or to overturn his action.
103. In Clark v. Brown, 414 F.2d 1159 (D.C. Cir. 1969), the court struck down an Air Force refusal to reassign reservists to standby reserve status when according to regulations they had completed the requisite period of military service. The Second Circuit court in Feliciano v. Laird, 426 F.2d 424 (2d Cir. 1970), issued a writ of mandamus to compel proper consideration of a draftee's application for hardship discharge as prescribed by regulation, distinguishing the judicial power to review a discretionary military decision, which is "extraordinarily limited," from the power to review a decision taken where the military fails to follow its own regulations, an error which "we do not hesitate to rectify." 426 F.2d at 427. Two other circuit courts issued writs of mandamus requiring military departments to permit reservists called up for active duty to use the internal review procedures of which they had been deprived in violation of military regulations. Schatten v. United States, 419 F.2d 187 (6th Cir. 1969); Smith v. Resor, 406 F.2d 141 (2d Cir. 1969); There also have been a number of successful challenges to administrative discharges on a similar basis, e.g., Kennedy v. Secretary of the Navy, 401 F.2d 590 (D.C. Cir. 1968); Bland v. Connolly, 293 F.2d 552 (D.C. Cir. 1961); Davis v. Stahr, 293 F.2d 830 (D.C. Cir. 1961); Stapp v. Resor, 314 F. Supp. 476 (S.D.N.Y. 1970).
104. 453 F.2d 197 (5th Cir. 1971). Mindes, an Air Force Captain, sought to void a
opments of the 1960s in this area and formulated some basic rules for judicial review of internal military affairs. First, the complainant must allege either a violation of applicable statutes or regulations or a deprivation of a constitutional right and he must have exhausted his military administrative remedies. Second, a court must evaluate the nature and strength of the complainant’s challenge, the potential injury to complainant if review is denied, the potential interference with the military function if review is granted, and the extent to which the challenged action involves military expertise or discretion.

Mindes demonstrated that even where a constitutional violation is not alleged, the courts now actively define the boundaries of military autonomy. That definition included not only interpretation of applicable statutes and regulations but also evaluation of the need for military expertise of judgment in a given situation, as well as the potential effects of judicial review on the “military function.” Thus, just as the courts reduced military disciplinary power to the bounds of military necessity, they have similarly redefined the limits of military discretion. In light of those developments, the reliance of Ferens on deference to “military autonomy” must be reconsidered.

C. The New Judicial Stance and Ferens

The new judicial attitude toward military autonomy is inconsistent with the “federal relationship” between soldier and government envisioned in Ferens. The issues of military autonomy that tort recovery raises are the same issues that the Court faced in the court martial jurisdiction and administrative review cases.

factually erroneous and adverse Officer Effectiveness Report that led to his removal from active duty. After exhausting administrative options, he filed a complaint seeking injunctive relief in a district court. The district court dismissed for want of jurisdiction; the Fifth Circuit remanded for review of the case on its merits.

105. 453 F.2d at 201. The court elaborated, “Constitutional claims, normally more important than those having only a statutory or regulatory base, are themselves unequal in the whole scale of values—compare haircut regulation questions to those arising in court-martial situations which raise issues of personal liberty.”

106. 453 F.2d at 201.

107. 453 F.2d at 201. According to the court, this is a question of degree: “Interference per se is insufficient since there will always be some interference when review is granted, but if the interference would be such as to seriously impede the military in the performance of vital duties, it militates strongly against relief.”

108. 453 F.2d at 201-02. “Courts should defer to the superior knowledge and experience of professionals in matters such as promotions or orders directly related to specific military functions.”
There is a need for protecting military discipline, particularly where a command or order may be challenged. There is a need for unhampered exercise of military expertise and discretion in carrying out the military function. And there is a military need for freedom to employ uniform standards of care throughout far-flung military operations. 109 Yet we have seen that these issues no longer completely bar judicial review. Moreover, the FTCA itself permits the courts to evaluate the military interests and to defer to military autonomy where necessary. Section 2680(a) of the Act 110 clearly orders the courts to determine whether the alleged tortious act was a discretionary action. If so, it would not be susceptible to challenge and judicial evaluation. Using the standards proposed in Section V of this Note, courts may use this “discretionary function” exception together with other specific exceptions in the Act, 111 to protect military autonomy in tort claims every bit as securely as it is protected by the rules of court martial jurisdiction and review of administrative decisions.

IV. THE UNIFORMITY PROBLEM

Closely related to the problem of military autonomy is the need for nationwide uniformity in the conduct of military activities, the fourth pillar of the Feres doctrine. The Court envisioned the armed forces as a nationwide enterprise in which each activity must be conducted under a single set of regulations and a single standard of care. 112 Under the FTCA, however, liability depends upon the laws of the place where the act or omission occurred. 113 The Court has been concerned that the application of varying standards of care would hinder the vital function of national security. 114 But that vital function, like the more general policies behind “military autonomy,” is protected by the “discretionary function” exception of the FTCA.

Feres stressed the unfairness of exposing military personnel to varying conditions of danger that reflect local standards of danger.

109. On the significance of the need for uniformity see text at notes 112-27 infra.
114. It is only in domestic operations that the FTCA would entail such difficulties, due to its express exclusion of overseas claims. See note 111 supra.
care.\textsuperscript{115} Later cases, however, have tended not to support this part of the \textit{Feres} rationale. In \textit{Feres}, Justice Jackson noted that while the FTCA requirement of “the law of the place” might be fair to a civilian, who is free in his choice of habitat, it makes no sense to apply it to a soldier, who has no such choice.\textsuperscript{116} Yet, as \textit{United States v. Muniz}\textsuperscript{117} pointed out in a similar context, denial of any tort recovery is far more prejudicial to a plaintiff than mere application of nonuniform state laws.\textsuperscript{118} Moreover, the sheer number of FTCA suits brought by military personnel since \textit{Feres}, despite the small likelihood of success, demonstrates the willingness of military plaintiffs to have their claims adjudicated according to diverse state laws.\textsuperscript{119} The \textit{Feres} Court’s solicitude for the military plaintiff seems ill-placed. The \textit{Stencel} Court apparently appreciated the weakness of the uniformity pillar and shifted perspective. While purporting to rely on the concern of the \textit{Feres} Court for military uniformity it in fact looked at the issue from the perspective of the government defendant. The Court said that since the military performs a “unique, nationwide function,”

\begin{footnotesize}
\begin{itemize}
    \item \textsuperscript{115} 340 U.S. 135, 143 (1950).
    \item \textsuperscript{116} 340 U.S. at 143.
    \item \textsuperscript{117} 374 U.S. 150 (1963).
    \item \textsuperscript{118} 374 U.S. at 162.
    \item \textsuperscript{119} For example, of the cases reported during the years 1976-1978 where tort damages were sought against the United States for injuries to servicemen, two distinguished \textit{Feres}, Fischer v. United States, 451 F. Supp. 918 (E.D.N.Y. 1978) (claim by former Air Force cadet for injuries caused by malpractice of Air Force football team physician not barred by \textit{Feres} because the injury was not incident to military service); Milliken v. United States, 439 F. Supp. 290 (D. Kan. 1976) (serviceman not barred from action under FTCA for alleged beatings by military law enforcement officers while confined by military service); whereas in nine such cases (including \textit{Stencel}) \textit{Feres} was followed, Daberkow v. United States, 581 F.2d 785 (9th Cir. 1978) (dependents of West German serviceman killed in United States during joint German-American military activity barred from recovery against the United States by \textit{Feres}); Mason v. United States, 568 F.2d 1136 (5th Cir. 1978) (serviceman injured in traffic collision on naval base while relieved from routine duties and engaged in personal business barred from recovery); Camassar v. United States, 531 F.2d 1149 (2d Cir. 1976) (serviceman on leave, delivering personal possessions to his ship, killed when private vehicle he was riding drove off pier; estate barred from recovery for wrongful death); Misko v. United States, 453 F. Supp. 513 (D.D.C. 1976) (claim by National Guard officer barred where he alleged malpractice by army medical officers treating him while on duty); Welch v. United States, 446 F. Supp. 76 (D. Conn. 1978) (\textit{Feres} rationale bars claim under Military Claims Act, 10 U.S.C. §§ 2701-2707 (1976) where serviceman was struck by military vehicle on naval base abroad); Parker v. United States, 457 F. Supp. 1039 (N.D. Tex. 1977) (serviceman on weekend pass killed in traffic collision on base; claim barred); Wniewaski v. United States, 416 F. Supp. 599 (E.D. Wis. 1976) (claims based on medical malpractice occurring in serviceman’s discharge examinations barred); Garvas v. Clark Equip. Co., 410 F. Supp. 1383 (W.D. Pa. 1976) (third-party action against United States by manufacturer of tractor driven by reservist during annual training, alleging failure to maintain and to instruct plaintiffs in its use, barred under \textit{Feres}).
\end{itemize}
\end{footnotesize}
which requires that it “frequently move large numbers of men, and large quantities of equipment, from one end of the continent to the other, and beyond,” it therefore “makes no sense to permit the fortuity of the situs of the alleged negligence to affect the liability of the Government to a serviceman who sustains service-connected injuries.” 120

But that version of the uniformity argument has its own weaknesses. As Justice Marshall, dissenting in Stencel, pointed out, it is illogical to immunize only the military from local law and not other government agencies or departments that perform a “unique, nationwide function” of similar scope and complexity.121 The FTCA should have appeared to be a threat to the operation of all government agencies that carry on complex nationwide activities.

Moreover, it is important to recognize the extent to which local tort law already governs the armed services in spite of the Feres rule. The armed forces are subject to diverse standards of care and liability wherever they are in contact with civilians who are not government employees, including dependents living on base within the United States, and civilians visiting bases or using military facilities. Indeed, wherever a domestic public carrier transports military personnel, whenever private land surrounds a military testing site, and whenever civilians feel the effects of domestic military operations in any way, the government faces potential FTCA liability. In fact, few domestic military activities are not subject to local standards of care.

For example, the courts have held military physicians and other military hospital employees to local professional standards of care where the patient was a civilian dependent.122 And a civilian plaintiff was able to hold a military hospital to a local standard of responsibility for a military patient.123 Therefore, to bar suits by service personnel does not actually protect the military hospitals from diverse state laws of medical malpractice nor en-

120. 431 U.S. at 672.
121. 431 U.S. at 657.
122. E.g., in Costley v. United States, 181 F.2d 723 (5th Cir. 1950), and Denny v. United States, 171 F.2d 385 (6th Cir. 1948), the decision to admit a civilian dependent to a military medical facility for treatment was held to be “discretionary,” but once the patient was admitted, the hospital was subject to liability under the ITCA.
123. E.g., in Underwood v. United States, 356 F.2d 92 (5th Cir. 1966), and Fair v. United States, 234 F.2d 288 (5th Cir. 1956), it was held that when the negligent release of a member of the armed forces from a military hospital causes injury to a civilian, the civilian may sue the government under the FTCA for malpractice by the hospital employees.
sure nationwide uniformity of liability standards for military medical facilities. Similarly, local standards have been applied to such military concerns as specifications for the manufacture of aircraft,\textsuperscript{124} procedures for an Air Force flight training program,\textsuperscript{125} specifications for reactivation of an Air Force base,\textsuperscript{126} and the traffic control system on a military base.\textsuperscript{127}

Uniformity, therefore, is not as solid a pillar as \textit{Feres} and \textit{Stencel} suggest. Military plaintiffs are willing to have their claims tried under local law and, in practice, local law already applies to military activities. Since the military must already cope with varying state standards of care, extending the FTCA to serviceman’s claims will not create a novel burden on the armed forces. Where uniformity is necessary for military reasons—where it really is necessary to “the nationwide function of protecting national security”—the FTCA’s exception for discretionary activities will, applied with the standards developed in the next section, protect that value.

V. THE DISCRETIONARY FUNCTION EXCEPTION

The FTCA excludes government liability for claims growing out of “discretionary” activities by the government and its employees. This exception could be the key to justly and equitably applying the FTCA to military claims, for it would bar claims growing out of certain policy, planning, regulatory, or disciplinary decisions of the armed forces and preserve the unique military interests that are thought to underlie the \textit{Feres} rule. In particular, the exception encompasses the special concern of military autonomy and uniformity. But the exception would allow claims for activities that are merely operational and that do not jeopardize vital military interests. The exclusion extends to:

\begin{quote}
[a]ny claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.\textsuperscript{128}
\end{quote}

\textsuperscript{124} Moyer v. Martin Marietta Corp., 481 F.2d 585 (5th Cir. 1973); Swanson v. United States, 229 F. Supp. 217 (N.D. Cal. 1964).

\textsuperscript{125} United Air Lines Inc. v. Wiener, 335 F.2d 379 (9th Cir.), cert. dismissed, 379 U.S. 951 (1964).

\textsuperscript{126} United States v. Hunsucker, 314 F.2d 98 (9th Cir. 1962).

\textsuperscript{127} Driscoll v. United States, 525 F.2d 136 (9th Cir. 1975).

\textsuperscript{128} 28 U.S.C. § 2680(a) (1976).
According to congressional reports, this was a highly important exception, intended to preclude any possibility that the bill might be construed to authorize suit for damages against the Government growing out of an authorized activity, such as a flood-control or irrigation project, where no negligence on the part of any Government agent is shown and the only ground for suit is the contention that the same conduct by a private individual would be tortious, or that the statute or regulation authorizing the project was invalid. It is also designed to preclude application of the bill to a claim against a regulatory agency, such as the Federal Trade Commission or the Securities and Exchange Commission, based upon an alleged abuse of discretionary authority by an officer or employee, whether or not negligence is alleged to have been involved. . . . Nor is it desirable or intended that the constitutionality of legislation, or the legality of a rule or regulation should be tested through the medium of a damage suit for tort. 120

The courts have construed the discretionary exception to protect governmental "planning" activities, in contradistinction to those that are merely "operational." 130 The planning or discretionary function has further been construed to include any decision that contains a significant element of policy making—evaluation of factors such as financial feasibility, need, safety, and time restrictions on a project or plan. 132 Thus, the exception

---

130. Construction of the FTCA's discretionary exception in terms of a distinction between "planning" and "operational" functions originated in Dalehite v. United States, 346 U.S. 15 (1953). In Dalehite the Court held that the discretionary exception was applicable to bar claims for damages arising from the explosion of a shipload of fertilizer manufactured pursuant to a War Department project for export of fertilizer to devastated countries following World War II, because the alleged negligence took place "at a planning rather than operational level." 346 U.S. at 32.

Although the Dalehite case has since been significantly limited, see Indian Towing Co. v. United States, 350 U.S. 61, 62-65 (1955), subsequent cases have followed the planning-operational rationale. E.g., United Air Lines Inc. v. Wiener, 335 F.2d 379 (9th Cir.), cert. dismissed, 379 U.S. 951 (1964) (the Air Force had discretion to set up a training program, but not to disregard commercial flight patterns in routing the training flights); United States v. Hunsucker, 314 F.2d 98 (9th Cir. 1962) (plans for reactivating an Air Force base were discretionary, but negligent design of the drainage and sewage facilities for the base was not); Dahlstrom v. United States, 228 F.2d 819 (8th Cir. 1956) (the decision to fly low-level survey flights was discretionary, but the failure to use due care in the flight was not); Swanson v. United States, 229 F. Supp. 217 (N.D. Cal. 1964) (the decision to design an elevator mechanism for military aircraft was discretionary, but the failure to properly supervise an inexperienced engineer assigned to the project was not).

131. In Dalehite, the Court reasoned that the "discretionary function or duty" includes more than the initiation of programs and activities. It also includes determinations made by executives or administrators in establishing plans, specifications or schedules of operations. Where there is room for policy judgment and decision there is discretion." 346 U.S. at 35-36. (footnote omitted).
132. Policy considerations mentioned by the courts as making a decision
would not permit military claimants to question central decisions that set general standards for local operations or for projects to be carried out on the local level according to a central plan. "Planning activities" would also include all regulations and directives issued by the various armed services within their discretionary powers, as well as congressional statutes affecting military activities. Vulnerability to tort suit under the FTCA would only arise at the "operational" level.

The courts will have to define which military activities are "operational." They can, of course, turn to the large body of law already developed under the exception. Some special standards, however, will be necessary to test the discretionary nature of military actions and decisions to protect legitimate areas of military autonomy. For each claim, courts will have to study the relation between the cause of the injury or loss and special areas of military power and needs, rather than relying on the military/civilian status of the plaintiff. The following four tests are suggested to achieve this goal.

1. **Did the injury arise due to a decision or action requiring professional military expertise or judgment?**

In summarizing the judicial policy regarding military administrative decisions, the court in *Mindes v. Seaman* conceded that "Courts should defer to the superior knowledge and experience of professionals in matters such as . . . orders directly related to specific military functions." That policy is consistent with the discretionary function exception to the FTCA. "Discretionary" is best understood as including such considerations as professional judgment, tactical necessity, or military necessity; the doctrine is not limited to acts that are truly discretionary in the sense of being executive decisions made without any immediate or present legal requirement. The following cases illustrate the application of the doctrine.

133. E.g., where an Air Force training plane crashed with a commercial airliner, negligence by the air base command in establishing the training procedure was alleged. The court held that the discretionary function exception did not apply because the command had failed to follow the Air Force regulations covering such procedures. If the regulations had been followed, the court implied, the discretionary function exception would apply. United Air Lines, Inc. v. Wiener, 335 F.2d 379, 384 (9th Cir.), cert. dismissed, 379 U.S. 951 (1964). *See also* Denny v. United States, 171 F.2d 365 (5th Cir. 1948); Costley v. United States, 181 F.2d 723 (6th Cir. 1950).

134. Mindes v. Seaman, 453 F.2d 197 (5th Cir. 1971).

135. *See* text at notes 104-09 *supra.*

136. 453 F.2d at 201-02.
with the judicial interpretation of the FTCA whenever civilians sue the government for actions by civilian or military personnel. Government employees are immune to tort liability to civilians if their actions require professional expertise or judgment. The test is thus a simple extension of an existing rule to a new class of plaintiffs. It may, for example, be within the discretion of an officer to employ potentially dangerous training methods. In contrast, the maintenance of the heating system of the barrack where Feres died was not a matter of professional military judgment and would fall within the category of "operational" acts.

2. Are there significant disciplinary reasons to bar the claim?

The enforcement of military discipline is an essential aspect of military discretion, as the Feres doctrine recognizes. Thus, where a tort claim would bring into question matters of military discipline, the "discretionary action" exception should bar the claim. The inquiry should be: Did the tortfeasor have authority over the claimant, and if so, was the tortfeasor acting within his authority? Was the claimant carrying out a military decision or command from which the injury arose? Discipline should be considered an element of military discretion only to the extent

137. In the development of the "planning" versus "operational" test for the discretionary exception, see note 130 supra, courts have included under the "planning" rubric decisions requiring professional "evaluations of factors such as the financial, political, economic, and social effects of a given plan or policy." Swanson v. United States, 229 F. Supp. 217 (N.D. Cal. 1964). See also Dalehite v. United States, 346 U.S. 15 (1953); Coates v. United States, 181 F.2d 816 (8th Cir. 1950); United States v. Ure, 347 F. Supp. 1088 (D. Me. 1972), vacated on other grounds, 476 F.2d 606 (1st Cir. 1973). In contrast, where the action that gave rise to injury was merely the carrying out of a decision made at a higher or professional level, the exception does not apply. E.g., American Exch. Bank v. United States, 257 F.2d 938 (7th Cir. 1958); Jemison v. The Duplex, 163 F. Supp. 947 (S.D. Ala. 1958).

138. See text at notes 66 & 69 supra.

139. In applying the "discretionary function or duty" exception of the FTCA, 28 U.S.C. § 2680(a) (1976), the courts have emphasized the importance of a government agency's or employee's mandate for the exercise of discretion. E.g., agencies mandated to approve state-planned and state-constructed highways under the Federal-Aid Highway Act of 1956, ch. 462, 70 Stat. 374, were required to follow a set of federal guidelines but empowered to exercise discretion in their application of the guidelines. Daniel v. United States, 426 F.2d 381 (5th Cir. 1970); Mahler v. United States, 306 F.2d 713 (3d Cir.), cert. denied, 371 U.S. 923 (1962). Similarly, statutory authorization for weathermen in Mid-Central Fish Co. v. United States, 112 F. Supp. 792 (W.D. Mo. 1953), affd. sub. nom. National Mfg. Co. v. United States, 210 F.2d 263 (8th Cir.), cert. denied, 371 U.S. 923 (1964), to use discretion in issuing reports, and for the military hospital in Denny v. United States, 171 F.2d 385 (5th Cir. 1948), to admit patients if treatment was "practicable," was determinative in applying the § 2680(a) exception.
that it affects the circumstances in which the injury arose. The Stencel Court's fear that tort suits will cause disciplinary problems is not a sufficient basis to bar a claim. Due to recent narrowing of military autonomy, courts already hear challenges to military actions by service personnel. Barring suits challenging military commands and decisions requiring military expertise or judgment would eliminate the most potentially disruptive suits. Courts would not be "second-guessing military orders."

3. **Is there a statute or military regulation that prescribes a standard of conduct?**

Both the propagation and the enforcement of regulations and directives are parts of military discretion, and lack of power to set uniform standards would indeed hinder military operations. Thus in an FTCA suit by a military claimant, military regulations and federal statutes should preempt local law. An action so authorized should be deemed "discretionary."

4. **Did the injury arise due to an emergency that would justify a lower standard of care?**

When the armed forces respond to national emergencies not involving combat, time and resources may be inadequate to prepare or equip personnel fully. In applying the FTCA, courts should consider this aspect of military necessity in determining whether the discretionary action exception should apply.

VI. **CONCLUSION**

Under the Feres rule, courts determine availability of the tort

---

140. In Lee v. United States, 261 F. Supp. 252, 256 (C.D. Cal. 1966), it was suggested that the test for exclusion of military personnel from recourse to the FTCA should be "whether or not the injuries stemmed from activities that involved an official military relationship between the negligent person and the claimant." However, the appellate court did not accept this reasoning: it reversed on the basis of Feres. United States v. Lee, 400 F.2d 558 (9th Cir. 1968).

141. Regulations, directives, and instructions governing military conduct, issued by the Department of Defense, carry the presidential authority as well as the congressional mandate, 10 U.S.C. § 133 (1976). The regulating authority is also delegated, subject to superior authority, to the head of each military department, who may issue departmental regulations, and to commanding officers. 5 U.S.C. § 301 (1976); 10 U.S.C. § 280 (1976).

142. See H.R. Rep. No. 1287, 79th Cong., 1st Sess. 2 (1946), quoted in text at note 129 supra. The role of regulations outlined here is the same as that applied in FTCA suits by civilian claimants. See note 133 supra.

143. Claims arising from combat in time of war by the armed forces are excluded from the FTCA waiver of immunity, under 28 U.S.C. § 2680(j) (1976).
remedy on the basis of the status and circumstances of the plain­
tiff at the time of the injury. No regard is given to the soldier's
relation to the tortfeasor, to the nexus between the soldier's spe­
cific military function and the injury, or to any military reasons
for the tort. The soldier is deprived of the civilian's recourse to
the FTCA in practically any contact he may have with a govern­
ment agent or instrumentality while on duty, on base, or on his
way to or from his place of duty.144 Feres represents the only
judicially created exception to the FTCA. It finds support neither
in the language of the Act nor in its legislative history. In justify­
ing this exception, the Court has relied on the statutory compensa­
tion already provided to members of the armed forces. But that
argument fails to recognize the uncertainty of statutory compensa­
tion. It also fails to provide a rational basis for the courts to
declare compensation exclusive in one case and not in another.

The Feres rule attempts to prevent tort claims that might
threaten either the general autonomy of the armed services or the
uniformity of military standards of conduct. But Feres rests on
an obsolete view of the role and powers of the military services.
Since it was decided, the judiciary has evaluated military issues
with growing confidence and without the predicted disruption of
military order. Courts have been increasingly active in protecting
members of the military services from abuses of power by their
superiors. Special military needs still exist but proper application
of the discretionary function exception of the FTCA to claims by
military personnel will protect those interests.

Feres has placed an undesirable and inequitable disability
upon members of the armed services. That burden is inconsistent
with modern law and policy regarding the legal status of military
personnel. A soldier is ready to risk life and limb where national
survival is at stake, but there is no justification for requiring him
to bear the risk of operational negligence in domestic, non­
combat circumstances, where the potential loss to him is great
and the risk to military interests minimal. The time has come for
the Court or Congress to abolish the Feres rule.

144. E.g., Hale v. United States, 452 F.2d 688 (6th Cir. 1971) (hitch-hiking service­
man on way to base, injured while boarding a military vehicle, barred from FTCA suit);
Callaway v. Garber, 289 F.2d 171 (9th Cir. 1961) (action for wrongful death barred for
Air Force sergeants en route to special service school, struck by car of United States Navy
recruiting officer); Adams v. United States, Civil Action No. 1032 (M.D. Ga., June 2,
1965), cited in Downes v. United States, 249 F. Supp. 626, 628 (E.D.N.C. 1965) (service­
man injured while on pass, on base, barred from FTCA recovery).