6-1-1967

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Gerald M. Mayo

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interpretation, as parties would not be allowed to profit at public and private expense from their own intentional acts. A definitive determination of the uncertainties now existing in the statute would allow more effective administration of the statute, would give the dog owner more adequate notice of the degree of responsibility placed on him by the statute, and would enable the county, because the basis of the dog owner's liability is made clear, to defend and prosecute more effectively suits under the statute.

SUSAN H. EHRLINGHAUS

Torts—Rights of Servicemen under Federal Torts Claim Act

Of the enumerated exceptions to the Federal Tort Claims Act, none have created more litigation than the judicially imposed bar to members of the armed forces prohibiting their suits against the United States for injuries incurred incident to service. Since 1950 when the Supreme Court handed down the decision in Ferres v. United States, the courts have dogmatically rejected such suits by servicemen. With some degree of boldness, Judge Gray in the United States District Court for the Central District of California denied the government's motion to dismiss an action admittedly falling within the prohibition enunciated in Ferres, i.e., actions "for injuries to servicemen where the injuries arise out of or are in the course of activity incident to service." In this case, Lee v. United States, Judge Gray reasoned that by its decisions in a series of recent cases the Supreme Court has vitiated its grounds for precluding actions by servicemen for injuries incident to service wherein the

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58 There are procedural uncertainties in the statute as well as substantive ones. The statute is silent on what would happen should the dog tax fund be insufficient to discharge all the claims coming before the county, as well as on the point in time at which the dog tax fund, after payment of claims, is released to the schools.

3 E.g., United Airlines, Inc. v. Wiener, 335 F.2d 379 (9th Cir. 1964) cert. dismissed, 379 U.S. 951 (1964) (servicemen travelling in line of duty on airline which collided with Air Force jet fighter); Buer v. United States, 241 F.2d 3 (7th Cir. 1956) (serviceman injured by negligence of army surgeon while in "sick in hospital" status); Kilduff v. United States, 248 F. Supp. 310 (E.D. Va. 1960) (serviceman's injury based on government's negligent failure to disclose results of physical examination).
injuries do not stem from activities that involve an official military relationship between the negligent government employee and the claimant. In *Lee*, plaintiffs alleged negligence by the Federal Aviation Agency, not part of the military, for causing the aircraft crash, and the resulting injuries. The historical development behind the *Feres* exception to Tort Claims Act liability takes on interesting significance in light of Judge Gray's conclusion that *Feres* is no longer a correct statement of the law.

The Supreme Court accepted the common law doctrine of sovereign immunity from suits by citizens early in its history. The injustice of this doctrine was mitigated in a series of legislative acts granting relief. Of special importance, the Tucker Act of 1887 waived sovereign immunity for actions "not sounding in tort." But until the enactment of the Federal Tort Claims Act in 1946, private bills in Congress provided the only means of compensation for citizens wrongfully injured by federal employees. The Tort Claims Act waived the sovereign immunity of the United States from tort liability for injury or damages caused by negligence 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 occurred. The statute also grants authority for administrative settlement of claims of $2,500 dollars or less by the head of the federal agency affected.

The statute precludes recovery in thirteen enumerated exceptions. Among the excluded, were claims "arising in a foreign

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* Gibbons v. United States, 75 U.S. (8 Wall.) 269 (1868); Chisholm v. Georgia, 2 U.S. (2 Dall.) 419 (1792).
* See 28 U.S.C. § 2680 (1964). Of the enumerated exceptions, § 2680(h) which bars recovery against the United States for intentional torts of its employees, such as assault, battery, and slander, is of particular significance.
country,” and claims “arising out of combatant activities” of the armed forces. Otherwise, the serviceman was not specifically excluded from benefits of the Act. During the years preceding enactment of the Tort Claims Act, a number of bills were introduced in Congress to waive the immunity of the government from general tort liability. Most of these bills provided that cases covered by Federal Employees Compensation Act, or the World War Veterans Act of 1924, were excepted. The obvious intent was to exclude claims by federal employees or military personnel who were provided other statutory means of relief. Upon the enactment of the Tort Claims Act, this exception was omitted. It must be concluded that Congress was aware of this omission since the bill as originally introduced excluded any claim arising out of activities of the armed forces during time of war but was amended before passage to exclude only combatant activities. The omission must mean either that servicemen were intended to acquire benefits under the Act, or that Congress believed such specification unnecessary in light of the generally accepted common law barring such suits. Legislative history of the Act provides no explanation for the omission.

The first case to reach the Supreme Court concerning the rights of servicemen to sue the United States for injuries incurred during military service was decided in 1948. This case, United States v. Brooks, involved the death of one serviceman and injury to another in an automobile accident while on furlough. The injuries were caused by the negligence of a civilian employee of the Army driving a United States Army truck. The Court held that servicemen were permitted to bring suit against the government for injuries sustained while on authorized leave from duty and not incident to service. Justice Murphy, speaking for the Court, noted, “where the accident incident to the Brooks’ service, a wholly different case would be presented.”

The “wholly different case” was presented to the Supreme Court
one year later in *Feres v. United States.* In *Feres,* the Court considered three cases presenting a common issue of "whether the Tort Claims Act extends its remedy to one sustaining 'incident to the service' what under other circumstances would be an actionable wrong." In *Feres,* the decedent perished by fire in an Army barrack while on active military duty. Negligence was alleged in allowing him to be quartered in barracks known or that should have been known to be unsafe because of a defective heating plant and in failing to assure an adequate fire watch. In affirming dismissal of the action the Court recognized that the enumeration of specified exceptions "might also imply inclusion of claims such as we have here," but felt the necessity to construe the statute to fit "into the entire statutory system of remedies against the Government to make a workable, consistent and equitable whole," to be an overriding consideration. The primary purpose of the Act was to provide a remedy for the remediless. This did not include servicemen who were provided other relief. The Court noting the statutory language, "The United States shall be liable . . . as a private individual under like circumstances . . . ," found no analogous circumstances to meet the statutory requisite. The liability assumed by the government is created by all the circumstances, "not that which a few of the circumstances might create." Hence, the landlord-tenant circumstance in *Feres* could not be isolated from the broader sovereign-soldier relationship. Since the serviceman was not free to choose his location, the Court did not believe that Congress intended a cause of action for him which would fluctuate with the various state laws. The Court also noted the distinctly federal character of the relationship between a member of the armed service and his government. The legal incidents of such relationship can be derived only

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22 *Feres v. United States,* 177 F.2d 535 (2d Cir. 1949); *Jefferson v. United States,* 178 F.2d 518 (4th Cir. 1949) (injury caused by negligence of army surgeon); *United States v. Griggs,* 178 F.2d 1 (10th Cir. 1949) (death of army officer through negligent medical treatment by army surgeons).
25 *Id.* at 139.
28 The Court referred to its prior recognition of the relationship as "dis-
from federal sources and governed by federal authority. Further, the Court seemed strongly persuaded by the comprehensive benefits provided for the injured serviceman under prior statutes. In concluding, the Court held that: "The Government is not liable under the Federal Tort Claims Act for injuries to servicemen where the injuries arise out of or are in the course of activity incident to service." It was this statement of the law that Judge Gray in *Lee v. United States* felt was no longer authoritative.

In *Lee v. United States*, two marines on active duty were being transferred by air from a California station to Viet Nam. The aircraft, operated by the Military Air Transport Service, United States Air Force, crashed in departure for the overseas flight. The two marines, and others, were killed. The plaintiffs made no charge against the Marine Corps or the Air Force, but alleged negligence on the part of the Federal Aviation Agency in operating, maintaining and controlling the departure of the aircraft from the ground and in giving inadequate terrain clearance information. The government moved to dismiss on the ground that, as a matter of law, the facts preclude recovery under the Tort Claims Act. This motion was denied.

First commenting on the lack of any language in the Tort Claims Act which would indicate that servicemen are to be deprived of the benefits of the Act in the circumstances in point, Judge Gray quoted from the decision in *United States v. Brooks* by Justice Murphy:

> We are not persuaded that "any claim" means "any claim but that of servicemen." . . . It would be absurd to believe that Congress did not have the servicemen in mind in 1946, when this statute was passed. The overseas and combatant activities exceptions make this plain.

This argument appears less viable today. Accepting that the omission of any specified exception for servicemen may have indicated some Congressional intent to allow their suits, Congress has had ample time since the *Feres* decision in 1950, to correct a misinterpretation of the statute. Congress has remained silent since *Feres* con-
strued the Act disallowing servicemen’s suits. In fact, the Act was amended in 1959 to add the thirteenth exception to the list. No indication is evident that Congress is displeased with prior judicial construction of the Act. Judge Gray’s inference of legislative intent to allow servicemen’s suits does not seem to overcome the presumption of approval of the Feres prohibition of such suits found in seventeen years of Congressional silence.

Taking each of the three assigned grounds for the conclusion in Feres which would defeat the plaintiffs in Lee, Judge Gray rejected them in orderly succession as having been abandoned by later decisions. Following is a closer look at the respective arguments and a consideration of their validity.

1—To the argument that the serviceman already had a comprehensive system of relief and therefore was not intended to benefit from the Act, the court cited United States v. Brown. In this case, a veteran receiving compensation for a service-connected injury to his knee, was further negligently injured by an operation performed in a Veterans Administration hospital. The Brown Court held that disability compensation under the veterans acts was not an exclusive remedy and would not preclude recovery under the Tort Claims Act. The Court distinguished the Brown facts from Feres in that the injury for which recovery is sought occurred when the claimant was not a member of the armed service. Hence, the “distinctly federal character” of the relationship was lacking. Assuming that Congress might have intended to exclude recovery under the Act to servicemen injured while on active duty, the Court recognized that there was no blanket exclusion intended for claimants not members of the service at the time injured, who might be receiving some form of federal compensation. Brown was explained thusly, and specifically adhered to the Feres “incident to service” test. The Lee court also cited United States v. Muniz, in which two inmates of a federal penitentiary sued under the Tort Claims Act for injuries sustained due to the negligence of supervisory personnel. Relying on Brown, Chief Justice Warren in Muniz stated

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*See note 28 *supra* and accompanying text.


*374 U.S. 150 (1963).*
that "the presence of a compensation system, persuasive in Feres, does not of necessity preclude a suit for negligence" under the Tort Claims Act. Two aspects of Muniz distinguish it from the Lee and Feres fact situations, and, to a degree, detract from the significance of the Chief Justice's statement. 1) The "distinctly federal character" of the sovereign-soldier relationship relied upon in Feres is lacking. 2) There was no compensation system available to Muniz. Under the Muniz circumstances, recovery under the Tort Claims Act was the sole remedy available for the wrongful injury. Hence, the above quoted statement from Muniz was dictum.

Reconciling Brown and Muniz with Feres is made less difficult by the rationale of a case handed down by the Supreme Court on December 5th, 1966, only seven days before the Lee decision. This case, United States v. Demko, held that the claimant who was receiving compensation for injuries sustained while an inmate in a federal penitentiary was precluded from recovery under the Tort Claims Act. The Court adhered to the rule laid down in Johansen v. United States, that where "the government has created a comprehensive system to award payment for injuries, it should not be held to have made exceptions to that system without specific legislation to that effect." Demko distinguished Muniz in that the claimant there was not eligible for the compensation received by Demko. A dissent in Demko was based on the grounds that the benefits received by the claimant were too limited and that the statute providing compensation for prisoners was not sufficiently comprehensive.

2—Judge Gray effectively countered the Feres argument that

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38 Id. at 160.
39 Ibid. See note 43 infra.
41 343 U.S. 427 (1952). The Court in Johansen held that the existence of a remedy under the Federal Employees Compensation Act precluded a suit for damages under the public Vessels Act.
42 343 U.S. 427, 441 (1952).
43 Demko was awarded $180 per month to start upon discharge from prison and to continue so long as the disability continued, under the Act of June 23, 1934, 48 Stat. 1211, as amended, 18 U.S.C. § 4126. The Act provides compensation for "injuries suffered in any industry or in any work activity in connection with the maintenance or operation of the institution where confined." Demko fell within this provision; Muniz did not.
44 Mr. Justice White noted in the dissent that the compensation under the Act was permissive not mandatory, that compensation did not become a vested right, and that the amount rested within the discretion of the Attorney General. 385 U.S. 49, 155-6 (1966).
there were no analogous circumstances for a private individual's liability as a prerequisite to United States' liability by citing Indian Towing Co. v. United States.\textsuperscript{45} There, the Supreme Court allowed recovery for damages resulting from the grounding of a tug due to the negligence of the Coast Guard in the operation of a lighthouse. In a subsequent decision, Rayonier Inc. v. United States,\textsuperscript{46} the Court found that an injury caused by the negligence of firefighters employed by the government was actionable under the Tort Claims Act. In neither case did the activity, operating lighthouses for navigation and fighting forest fires, have "analogous circumstances" in the non-governmental area. The Court established that governmental liability under the Tort Claims Act does not require that the total circumstances under which the injury occurred be paralleled in private activity.\textsuperscript{47} If the activity might conceivably be privately performed, liability may be imposed.\textsuperscript{48}

3—As to the argument that the servicemen should not be left victim to the varying state laws where injuries occur inasmuch as he has no control over where his military duties might take him, Judge Gray again cited Munis. Commenting that prisoners likewise have little discretion as to the state in which they dwell and hence might be prejudiced, the judge quoted Chief Justice Warren in Munis, "... it nonetheless seems clear that no recovery would prejudice them even more."\textsuperscript{49} It is significant to note that, in Munis, recovery under the Tort Claims Act was the only alternative and the quoted statement was appropriate, but its validity is questionable when placed in the context of Lee wherein a comprehensive compensation system is available.

Judge Gray concludes from his survey of cases that the serviceman would not be precluded from recovery under the Tort Claims Act when the official activities of the negligent party and those of the injured parties are entirely unrelated. The decision implies agreement with the views of several Supreme Court opinions\textsuperscript{50} that

\textsuperscript{47} See 352 U.S. 315, 318 (1957); 350 U.S. 61, 66-7 (1955).
\textsuperscript{48} See 350 U.S. 61, 68 (1955).
\textsuperscript{49} 374 U.S. 150, 162 (1963).
the significance of the judicially imposed exception lies primarily in prohibiting suits involving "a battle commander's poor judgment, an army surgeon's slip of hand, a defective jeep which causes injury. . . ."51

The rule of recovery formulated by the Brooks and Feres decisions has left an uneasy sense of dissatisfaction and uncertainty. The case by case determination of whether the claimant's injury was incident to service has not proved to be an easy task. A naval reservist was allowed recovery under the Tort Claims Act for injury in a Navy aircraft accident enroute to the station where active duty was to begin.62 The court found the activity was not incident to service. Recovery was allowed where an enlisted seaman on shore-leave was drowned because of the negligent maintenance of a swimming pool on a naval station.53 The activity was found not incident to service. Injuries sustained through alleged negligence in a government hospital were found not incident to service, and recovery was allowed for a former member of the Women's Army Auxiliary.64 An Army nurse was denied recovery on a finding that the injury was incident to service where the injury occurred in a Veterans Administration hospital four years after her discharge.65 A sergeant injured while on a three day pass by an explosion demolishing his on-base quarters was denied recovery,66 whereas recovery has been allowed where the injuries were sustained in quarters off-base.57

It is submitted that the Lee "official relationship" test will be subject to the same difficulty of application. At what point would the relationship take on sufficient "officialdom" to bar recovery? The rule would essentially prevent recovery under the Tort Claims Act only where there exists an official relationship between the activities of the negligent party and those of the injured party. To accept this rule would lead to undesirable discrimination. A large portion of the present military force is stationed in foreign countries. These servicemen would be automatically barred from re-

covery by section 2680(k) of the Tort Claims Act if the injury occurred therein. Had the traffic controller's negligence in *Lee* caused the crash in Thailand instead of California, there would be no recovery. An increasing number of military personnel are engaged in combatant activities, and are thus precluded from recovery by section 2680(j) of the Act. Assuming wrongful injuries caused by federal employees without an official military relationship to the injured, it is difficult to infer Congressional intent to allow recovery for all servicemen except combatants or foreign-stationed personnel.

In light of the *Demko* decision barring recovery to a prisoner due to the comprehensive compensation system available to him otherwise, a brief examination of the compensation provided for the injured serviceman is helpful.

Title 38 of the United States Code is devoted entirely to the administration of veterans' benefits. The benefits include compensation for disability or death; hospitalization, medical treatment, and domiciliary care; burial allowance; loan guaranty for home, farm, business or trade; educational assistance and others. For the disabled veteran, the statute provides for compensation in accordance with the degree of disability. The monthly compensation payments may range from 17 dollars for peacetime disabilities rated at 10 per cent, to 600 dollars for total disability under certain circumstances. Additional compensation provided for dependents of the disabled veteran may range from 20 dollars per month for a wife, to 68 dollars per month for a wife and three children plus 13 dollars for each child in excess of three. Death benefits to a widow are determined by a formula based upon the serviceman's base pay. Provisions are also made for children and dependent parents upon the death of a serviceman. An immediate death gratuity equal to six months pay, not more than 3000 dollars nor less than 800 dollars, is payable to dependents.

A service-connected injury severing the right arm of an Army Captain, age 30, would be rated as an approximate 80 per cent dis-
ability by the Veterans Administration regulations. Assuming that this is a peacetime injury and that the Captain has a wife and one child, age 6, disability payments per month would amount to 213 dollars until the child reached age 21, and 202 dollars thereafter. Should the Captain live for his expected life span, he will receive in excess of 98,000 dollars for disability payments alone. The death of this same Captain, assuming the above stipulations plus eight years in service, from service-connected injuries, would entitle his widow to compensation of 176 dollars per month. Including an immediate death gratuity payment of 3000 dollars, she can expect during her normal life expectancy aggregate compensation in excess of 84,000 dollars. In both illustrations, hospitalization, medical treatment, and domiciliary care would be provided by the government.

Comparing recovery under the Tort Claims Act with the statutory benefits available to the veteran, the Court in Feres took note that in the companion cases, Jefferson would receive approximately 35,000 dollars, and Grigg’s widow in excess of 22,000 dollars, under the veterans compensation system at that time. The widow’s maximum recovery by wrongful death action was limited to 15,000 dollars by Illinois statute. Thirteen states by statute still limit the amount of recovery for wrongful death actions. The median maximum among these states is approximately 25,000 dollars. In the prior illustration of the Army Captain, a considerable amount in excess of this limitation would have been recovered under the veterans’ acts without the accompanying expense of litigation.

The serviceman will receive compensation under the veterans’ acts whenever the injury is determined to be service-connected, that

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65 38 C.F.R. § 471(a) (1966).
67 See N.C. GEN. STAT. § 8-46 (Supp. 1965), where by the mortuary table therein, the Captain would have an expected life span of 40.39 additional years at age 30.
70 See N.C. GEN. STAT. § 8-46 (Supp. 1965), where at age 30, the widow would expect to live 40.39 years longer.
73 Ibid.
is, an injury sustained in the line of duty.\textsuperscript{75} Any injury or disease incurred by military personnel while on active duty status is deemed to have been incurred in line of duty as long as it is not the result of his own wilful misconduct.\textsuperscript{76} Active duty status expressly includes periods of authorized leave.\textsuperscript{77}

The most compelling reason for not adopting the Lee extension of liability under the Tort Claims Act lies in the policy objective of arriving at a just, consistent, and rational rule to govern servicemen's suits. The only viable alternative to the present milieu of conflicting decisions and continuing litigation appears to be an acceptance of the availability of statutory compensation as an exclusive remedy for the serviceman. He is now provided with an adequate, fixed and certain scale of benefits for service-connected injury or death. In view of the special relationship between the sovereign and soldier, and the particular hazards of military life, the government has provided adequate protection against injury or death for military personnel. This protection is now provided without the expense and uncertainty of litigation under the Tort Claims Act. To hold that, where applicable, the statutory compensation system available to members of the armed services is their exclusive remedy would not prejudice their rights.

Congress has not spoken on the instant problem. Until it does, the courts are responsible for formulating a just and equitable rule of law. An appeal from the Lee decision will provide the 9th Circuit Court of Appeals an opportunity to apply the Demko rationale in the sovereign-soldier context. In light of the conflicts and problems resulting from the Brooks and Feres decisions and the approach recently applied in Demko, there is reason to believe that the Supreme Court may accept a rule formulated to exclude servicemen's Tort Claims Act suits where veterans' compensation is available to the claimant.

Gerald M. Mayo

\textsuperscript{76} 38 U.S.C. § 105 (1964).
\textsuperscript{77} Ibid.